Neutral Citation Number: [2024] EWCA Civ 139

Case No: CA-2023-001273

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD) FINANCIAL LIST
MR JUSTICE PICKEN
[2023] EWHC 711 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2024

Before:
LORD JUSTICE PHILLIPS

- -

Between:

(1) PALLADIAN PARTNERS L.P. **(2) HBK MASTER FUND L.P.** **(3) HIRSH GROUP LLC** **(4) VIRTUAL EMERALD INTERNATIONAL LIMITED**	**Respondents/ Claimants**
- and -	
(1)THE REPUBLIC OF ARGENTINA	**Appellant/ First Defendant**
(2) THE BANK OF NEW YORK MELLON (as Trustee)	**Second Defendant**

- -

Tamara Oppenheimer KC and **Samuel Ritchie** (Instructed by **Sullivan & Cromwell LLP**) appeared on behalf of the **Appellant/Defendant**
Alex Barden and **James Shaerf** (Instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP)** appeared on behalf of the **Respondent/Defendant**

Hearing date: 31 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

Lord Justice Phillips:

1. On 9 June 2023 Picken J ("the Judge") granted declarations sought by the Respondents as to the proper construction of an "Adjustment Provision" contained in the terms governing EUR-denominated GDP-linked securities ("the Securities") issued by the Appellant ("the Republic") in 2005 and 2010. The Judge further ordered the Republic to pay EUR1,329,760,063.39 to the Second Defendant (in its capacity as Trustee of the Securities) in respect of Reference Year 2013, together with pre-judgment interest of EUR233,220,560.34, and further ordered specific performance of the Republic's obligations under the Securities in relation to subsequent reference years.

2. The monetary judgment, together with post-judgment interest, was to be paid within 45 days of the lifting of a stay of execution granted by the Judge pending appeal.

3. On 18 January 2024, on the Republic's application in writing for permission to appeal to the Court of Appeal, I made an order on the papers granting permission, but subject to the condition (sought by the Respondents and apparently not opposed by the Republic) that the Republic pay EUR309,876,449.80 to the Trustee (approximately 20% of the sum ordered to be paid by the Judge) to be held in escrow pending determination of the appeal. In granting permission I observed that, although the Republic's proposed construction of the Securities was sufficiently arguable to justify granting permission, I had significant doubts about its merits as it appeared to require a significant degree of re-writing of the terms of publicly-traded securities.

4. The Republic sought reconsideration of the imposition of that condition, pointing out that it had filed evidence and advanced arguments in opposition which, by administrative error, had not been put before me before I made the order of 18 January 2024. I gave directions for an oral hearing of the issue and for the service of further evidence and skeleton arguments. It was common ground that the imposition of a condition fell to be considered afresh.

The test for the imposition of a condition

5. CPR 52.6(2)(b) provides that an order giving permission to appeal may be made subject to conditions. Whilst that rule does not identify the test to be applied, CPR 52.18(1)(c) provides that the appeal court may impose or vary conditions upon which an appeal may be brought, CPR 52.18(2) stating that the court will only exercise that power where there is "compelling reason" to do so. In *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWCA 993 and *Sunico A/S v Commissioners for HMRC* [2014] EWCA Civ 1108 this Court proceeded on the basis that the compelling reason requirement also applies to the imposition of a condition under CPR 52.6(2)(b). Neither party in the present case suggested departing from that approach.

6. As explained by Briggs LJ in *Sunico* at [22], the "compelling reason" test reflects the fact that a condition such as to pay or secure payment of the judgment debt is not routinely applied. Indeed, in *Dumford Trading AG v. OAO Atlantrybflot* [2004] EWCA Civ 1265 at [9] the imposition of a condition was described as "unusual, perhaps rare", an approach recently adopted by Sir Geoffrey Vos MR in *Infrastructure Services Luxembourg SARL & Anr v Kingdom of Spain* [2024] EWCA Civ 52 at [10].

7. In *Sunico*, Briggs LJ (with whom Patten and Underhill LJJ agreed) emphasised at [23] that the existence of a compelling reason was only a necessary rather than a sufficient factor. The imposition of a condition remained a matter for exercise of the court's discretion.

8. At [25] Briggs LJ identified certain factors which, depending on the overall circumstances, may point to the imposition of a condition:

> "i) Difficulties of enforcement of the court's judgment in a foreign jurisdiction;
>
> i) An apparent sufficiency of resources to enable the judgment debtor to continue to fund litigation;
>
> ii) The absence of convincing evidence that the appellant lacks the resources, or access to the resources, which would enable it to pay the judgment debt;
>
> iii) Inadequate disclosure by the appellant of its financial affairs, or a lack of confidence on the part of the court that it has been shown the truth;
>
> iv) The combination of
>
> a) A deliberate breach of an order to pay the judgment debt
>
> b) The refusal of a stay, and
>
> c) Ability to pay, but a failure to do so cynically based upon the difficulties for the respondent in enforcing the judgment in a foreign jurisdiction."

9. Briggs LJ further identified, at [26], that the main factor which is likely to tell against the imposition of a condition, if sufficiently demonstrated, is where to do so would stifle the appeal.

10. Ms Oppenheimer KC, leading counsel for the Republic, emphasised that there is no suggestion in the authorities that the perceived weakness of an appeal (notwithstanding that it has a real prospect of success) can amount to a compelling reason, but she recognised that it could be a factor in the exercise of discretion as to whether or not to impose a condition once a compelling reason has been identified. I accept that the merits (or lack of them) of the appeal would often be relevant only to the exercise of discretion, but I would not exclude the possibility that they might constitute or form part of a compelling reason, such as where the Court forms the view that an appeal (whilst just about arguable) was being pursued primarily to frustrate or delay enforcement.

The background facts

(a) Previous defaults and enforcement difficulties

11. In 2001 the Republic defaulted on US$80 billion of debt, at the time the largest sovereign debt default in history. As part of a re-structuring in January 2005 and again

in 2010, creditors were offered GDP-linked securities (including the Securities) in exchange for their existing non-performing bonds at a rate of between 25% to 30% of the face-value of the securities they held. Approximately 91% of the aggregate value of non-performing securities participated in the exchange ("the Exchange Creditors").

12. Certain creditors who did not accept the offer of an exchange (described as "Holdout Creditors") took proceedings to enforce the underlying debt. In May 2006 the US District Court for the Southern District of New York ("the SDNY") issued summary judgment against the Republic in favour of one such Holdout Creditor (NML) in the sum of about US$300m. The Republic strenuously resisted enforcement of that judgment over the next 10 years, including taking arguments as to sovereign immunity to both the UK Supreme Court and the US Supreme Court, without success.

13. In February 2012 the Republic was injuncted in the SDNY from paying Exchange Creditors whilst withholding payments to Holdout Creditors. That injunction was upheld by the US Court of Appeals for the Second Circuit, which described the Republic in its judgment as a "uniquely recalcitrant debtor": *NML Capital Ltd v Republic of Argentina* 727 F.3d 230 (2nd Cir, 2013). The Court of Appeals also commented on the repeated public comments of the Republic's officials announcing their intention to defy the relevant rulings. Such comments escalated after the Court of Appeals judgment and included televised statements from the then President of the Republic that the orders of the US courts amounted to extortion. The Republic enacted legislation to enable payment of the exchange creditors without paying the Holdout Creditors, describing the SDNY Court's orders as "illegitimate and illegal obstruction".

14. In 2016 the Republic reached agreement with most remaining Holdout Creditors, paying out in the region of US$9.6bn, funded by a further US$16bn international bond issue.

15. The Republic points to the fact that in *Bison Bee LLC v the Republic of Argentina* 778 F.App'x 72 (2nd Cir, 2019) and *Bugliotti v Republic of Argentina* 952 F.3d 410 (2nd Cir, 2020) the Court of Appeals recognised that "times have changed, and Argentina is "uniquely recalcitrant" no more".

16. However, on 11 January 2024 the SDNY Court granted the plaintiffs in *Petersen Energia Inversora S.A.U v Argentine Republic and YPFS S.A.* leave to enforce a judgment against the Republic in the amount of US$16.1bn, entered in September 2023. The court noted that the Republic had not complied with the conditions of a stay which had been granted in November 2023 pending appeal (namely, the pledge of certain "minimal assets" to the plaintiffs and making a request to expedite the appeal) but rather:

> "At each turn, the Republic has demonstrated an apparent intention to leverage motion practice and the transition of administrations to dodge its obligations on the final judgment, and there is no evidence of any attempt to pay the final judgment".

17. The Republic's explanation for the failure to fulfil the financial condition imposed by the SDNY Court is that the required pledge of the "minimal assets" (which the Republic says are worth about US$4bn) would have required an act of Congress, which was not

possible in the "short period" allotted. No explanation is proffered for the failure to fulfil the condition requiring that the Republic request expedition of its appeal.

(b) The state of the Republic's finances and its ability to pay

18. In evidence accepted by the Judge in June 2023 (despite his concerns as to its form), the Republic demonstrated that it was undergoing severe economic problems, exacerbated by a severe drought that had afflicted the country.

19. In updated evidence for the purposes of the hearing before me, the Republic explained that the economic situation in Argentina had deteriorated rapidly through December 2023 when a new administration came into office, headed by President Milei. The country's net foreign currency reserves are now negative, it faces annual inflation of more than 200% and more than 40% of its population are living in poverty. There is no 2024 budget, the country operating on an extension of the 2023 budget. The IMF has stated that the new administration has inherited "an exceptionally challenging economic and social situation" with Argentina facing its "worst crisis in decades".

20. The Republic's annual national budget totals in the region of US$93bn, but no provision was made in the 2023 budget (including as extended) for payment of any adverse judgment in respect of the Securities (nor in respect of any payment required as a condition of appeal). In that regard, the Republic emphasises that Article 170 of the Permanent Supplementary Budget Law prohibits budgeting for the payment of judgments until the appeal process has been exhausted. The Republic further explains that in order to change the budget to provide for payment of the judgment sum, it would be necessary (i) to identify a source of funding, and (ii) enact a Law of Congress or issue an "Urgency and Necessity Decree", the latter not being justifiable in the circumstances. Ms Oppenheimer accepted in oral argument, however, that Article 170 did not apply to a sum ordered to be paid by way of condition of permission to appeal. That sum would have to be raised by diverting scarce resources from other items within the existing budget.

21. The Republic further maintains (although this is disputed by the Respondents) that it is unable to access international capital markets under current economic circumstances. It has not issued public debt in this market since 2018 and the local debt market could not absorb a payment of the size of the judgment sum, although the Central Bank of the Republic of Argentina has issued a bond series denominated in US dollars (with a 5% coupon) to certain local importers to assist in raising necessary foreign currency. The Republic has paid in the region of US$1bn by way of servicing debts due on other bonds, but the Republic contends that these were budgeted.

22. Notwithstanding the above difficulties, the Republic states (through its legal representatives in these proceedings) that if the judgment is ultimately upheld, it will "have to find" the funds to pay and will do so, although it does not explain in which year the payment would be made or how it would be funded. The Republic also accepts that it would find the funds to comply with a condition on permission to appeal from within the existing budget, painful though that would be for the Argentine population. There is accordingly no suggestion that the imposition of a condition would stifle the Republic's appeal.

(c) Events following the judgment in the present case

23. Shortly after the Judge handed down judgment on 8 April 2023 Mr Pablo Lopez, then the Minister of Treasury and Finance of the Province of Buenos Aires and formerly the Secretary of Finance of the Nation (and a witness at the trial before the Judge), published tweets describing the judgment as making "no sense", "indefensible technicality" and "scandalous". These were re-tweeted by the former Minister of the Economy and apparently endorsed by the then Vice-President (and former President) of the Republic.

24. On 9 June 2023 the Judge granted the Republic a stay of execution of the monetary judgment, accepting in his judgment delivered the day before that a risk of irremediable harm to the population of Argentina had been established if the judgment were to be enforced but then overturned on appeal. The Judge expressly recognised, however, that it was open to the Respondents to seek the imposition of a condition on the grant of permission to appeal and that nothing he said in his judgment was intended to "stray into that territory".

25. The Republic did not seek a stay of the interim payment of US$12,500,000 which the Judge ordered be paid on account of the Respondents' costs. The Republic duly paid that sum within the period stipulated by the Judge.

Is there a compelling reason to impose a condition?

26. The Respondents rely on the fact that, absent voluntary payment, it will be necessary to enforce the judgment against a foreign state which is in dire financial straits. The history of previous serious defaults on bonds issued by the Republic and the difficulties the Holdout Creditors had in obtaining payment demonstrates both the high risk of non-payment and the extreme difficulty and delays which are likely to be encountered in enforcement. The emphasis placed by the Republic on the immense harm payment of the Judgment Sums would cause the Argentine population only serves to increase the likelihood that the Republic will not pay voluntarily and will obstruct and delay enforcement. Mr Barden, counsel for the Respondents, submitted that, accordingly, several of the factors identified in *Sunico* are present in this case. He submitted, in summary, that the Republic should not have a "one way bet", being permitted to fund an appeal of the judgment and thereby delay enforcement, but without any assurance that any part of the judgment would be paid if the appeal failed. The condition proposed by the Respondents was a proportionate order, he argued, ensuring that the Republic be required to put up 20% of the 2013 Payment Amount and Pre-Judgment interest thereon to demonstrate its good faith and that the appeal was not merely part of a delaying process.

27. Ms Oppenheimer contended that there was no question of a compelling reason for the imposition of a condition in the present case. Such a reason must usually be found, she submitted, in the conduct of the appellant in the case in hand. In this case the Republic had complied with all court orders, including the prompt payment of US$12,500,000 by way of the interim payment of costs. The Republic had the means to pay and had stated unequivocally through its lawyers in these proceedings that it would pay if its appeal (and any further appeal) was unsuccessful. She submitted that the Respondents' reference to the Republic's conduct in relation to historic bonds and other proceedings was both exaggerated and irrelevant. The Republic had in fact reached accommodation

with most of the holders of the non-performing bonds, and ultimately settled with them all. Any recalcitrance identified in proceedings in another jurisdiction (and in the comments following the judgment in this case) was of no relevance to the current situation, where a new administration had been elected.

28. I do not accept, however, to the extent that it is suggested, that a compelling reason must arise from conduct in the case in question and that it is impermissible to consider wider issues and previous related conduct of the appellant. The previous default and restructuring (at a significant discount) is the context in which the Securities were issued, and the fact that it has again taken the holders of the Securities many years to obtain judgment in relation to Reference Year 2013 (and declarations in relation to subsequent years) demonstrates that the pattern of default and delay has not been broken. As for the points Ms Oppenheimer made:

    i) Whilst it is true that the Republic settled with most bondholders following the 2002 default, the fact that 91% of holders felt they had no choice but to accept a restructuring at a very substantial discount increases rather than minimises the perceived difficulties in enforcement against the Republic. The reality of those difficulties is apparent from the extreme lengths the Holdout Creditors had to go to for over a decade in order to enforce the bonds, during which time the Republic repudiated the judgments of courts of competent jurisdiction and continued to pay Exchange Creditors in preference.

    ii) The post-judgment utterances of officials following the judgment in this case mirror the defiant approach adopted to judgments given in favour of the Holdout Creditors. Whilst it is true that there is now a new administration in place, it has not yet demonstrated that a new approach will be taken to honouring of foreign judgments: in particular, the new administration has not publicly distanced itself from the comments made by former officials. It is also noteworthy that the Republic has not paid any of the judgment of the SDNY court, nor complied with the conditions on a stay of execution pending appeal.

    iii) Whilst the Republic says that it will pay the judgment if it loses its appeal(s), it has not identified how or when that payment would be made. Judgment was delivered in April 2023 and payment ordered in June 2023, but the Republic has not yet made any plans for how the judgment would be paid or identified the source of the funds.

    iv) It is true that the Republic has complied with court orders in this case, but it has done so where compliance was necessary to continue to defend the claim or to pursue its appeal. It seems likely that the Republic will comply with any condition for the same reason. Such conduct does not support the contention that the Republic will voluntarily pay the judgment if its appeal is unsuccessful.

    v) In my judgment there is a very high risk that the Republic will find the funds to appeal both to this Court and, if permitted, to the Supreme Court, but will not pay the judgment if unsuccessful, but will require Respondents to engage in another lengthy and difficult enforcement process.

29. For the above reasons I am satisfied that there is a compelling reason to impose the condition sought by the Respondents.

Discretion

30. The Republic contended that, even if there was a compelling reason to impose a condition, there are strong factors which indicate that none should be imposed as a matter of the exercise of my discretion.

31. The essence of the argument is that compliance with the condition would require diversion of funds from other budgeted expenditure, causing irremediable harm to the people of Argentina, harm which would have been inflicted unnecessarily and inappropriately if the appeal is ultimately successful. By way of example, the Republic points out that the Condition Sum represents 58% of the national budget for drinking water and sewage, 20.52% of the "transfers to universities" and 1118.14% of university grants. Ms Oppenheimer stressed that the Judge had accepted that the above argument justified the grant of an unconditional stay pending appeal and that that would be undermined (for no good reason) by the imposition of the condition.

32. Whilst I understand and am sympathetic to the impact any additional financial burden will have on a distressed economy, I am unpersuaded by the evidence and argument as to irremediable harm on the population. The Republic has not identified what expenditure it would actually divert to paying the Condition Sum. Instead, the Republic has simply identified certain undoubtedly worthy items of expenditure by way of comparison, being a tiny fraction of the overall national budget, but has not stated that those items would be cut to fund the Condition Sum, so their relevance is difficult to understand. In contrast, no reference has been made to other large items of expenditure, the reduction of which might have less impact (or less immediate impact) on the population.

33. I also do not accept that I am in any way constrained by the unconditional stay of execution granted by the Judge. As the Judge recognised, he had refused permission to appeal and was not considering the very different question of whether a condition should be imposed if permission was granted. But in any event, I am entitled to and bound to consider the question afresh.

34. It follows that I do not consider that I should decline to impose a condition, for which there is a compelling reason, as an exercise of my discretion. I should add that I have reached that conclusion without taking account of the view I formed in granting permission as to the relative lack of merit of the appeal. Whilst that might have been relevant to the exercise of my discretion had I been more impressed by the Republic's contentions in that regard, in the event it is neither necessary nor appropriate for me to express any view on the merits of the appeal.

Conclusion

35. For the above reasons, the condition I imposed on the grant of permission to appeal on 18 January 2024 will remain in place, save that the date for compliance will be extended. I accept Ms Oppenheimer's submission that, on the assumption the appeal is listed for early next term, the Republic should have until 5 April 2024 to comply with the condition.

36. The Trustee did not take part in this hearing, but did write to say that it would invite the parties to agree to certain terms upon which it would hold the Condition Sum in escrow. I would invite the parties to draw up an order which addresses those matters (to the Trustee's satisfaction) as well as any other consequential matters, to the extent they can be agreed.