Neutral Citation Number: **[2021] EWHC 119 (Comm)**

Case No: **CL-2020-000576**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **22 January 2021**

Before :

Mr Justice Jacobs

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Between :

(1) QUADRA COMMODITIES S.A. **(2) IFCHOR (SWITZERLAND) SA** **(3) AMAGGI S.A.**	**Claimant**
- and -	
International Bank of St-Petersburg (Joint Stock Company) (In liquidation)	**Defendant**

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Jawdat Khurshid QC (instructed by **7KBW**) for the **Claimant**
David Allen QC and Jason Robinson (instructed by **7KBW**) for the **Defendant**

Hearing dates: **22nd January 2021**

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JUDGMENT

Mr Justice Jacobs **Friday, 22 January 2021**

(1:30 pm)

Judgment by **MR JUSTICE JACOBS**

1. This is an application by the claimants for a peremptory order against the defendant. The effect of the order sought would be to preclude the defendant, which is a Russian bank in liquidation, from participating and making submissions at a hearing due to take place for half a day in March. I will describe the nature of that hearing in due course. The preclusion would only arise, however, if the defendant were to persist in its failure or, as the claimants would describe it, refusal to pay an order for costs which was made by His Honour Judge Pelling QC on 30 September 2020.
2. The order was made by HHJ Pelling QC in the context of the grant of an anti-suit injunction. That injunction had the effect of preventing the defendant from pursuing certain proceedings in Russia, and from advancing claims otherwise than in London arbitration proceedings before the LCIA. The defendant was ordered to pay the costs of the hearing which took place for final relief on 30 September 2020, as well as the costs of an earlier interim anti-suit injunction which had been granted on 9 September 2020. The judge summarily assessed the costs at £100,000, and that figure has not been paid in whole or in part.
3. The effect and purpose of the present application is to encourage and compel the defendant to pay. The sanction for non-payment, namely debarring the defendant from participating in the half-day application which is fixed for March, could be serious; since potentially important issues arise for determination in March, and the defendant wishes to participate in that hearing. The claimants wish to encourage compliance, and consider that the present order is the best and most effective way of doing that.
4. A separate hearing of the application for a debarring order was ordered. I have accordingly been presented with a considerable amount of material and argument, which has taken place over half a day, as to whether or not the defendant should be represented at a further half-day application when, as Mr Allen QC for the defendant said, they might make submissions for something like an hour.

5. The nature and volume of evidence reflect the fact that, on any view, this is not an ordinary case of a solvent defendant who refuses to pay. The defendant is a company which is in liquidation and, it is common ground, is subject to Russian bankruptcy procedures. One of the issues which has been debated is whether or not under Russian law it is possible or permissible for the defendant simply to pay the £100,000 without further steps being taken by the claimants in Russia. I will come back to that in due course.

6. I will now describe briefly the nature of the application, to be heard in March, which is the object of the claimants' proposed debarring order. That application itself arises in somewhat unusual circumstances.

7. The hearing before HHJ Pelling QC dealt with the substance of the arbitration claim which the claimants had brought, namely the claim for an anti-suit injunction. It is true that, as Mr. Khurshid QC submitted, it did not dispose entirely of the arbitration claim – essentially because there was an additional claim for costs. It is not clear to me why the costs of proceedings in Russia, which may have been incurred by the claimants, would not be claimable in the arbitration proceedings rather than as a part of the arbitration claim in this court. But I leave that point aside. For most practical purposes, however, the decision of the HHJ Pelling QC to grant the anti-suit injunction effectively disposed of the most important part of the arbitration claim.

8. It is therefore perhaps unusual to see the matter coming back to court for a further half-day hearing. The issue which has arisen is because there was an undertaking which was given by the claimants in order to obtain the anti-suit relief. That undertaking may not be not the simplest undertaking to understand. It is perhaps regrettable that His Honour Judge Pelling did not have the benefit of the participation of the defendant in the hearing before him, when the terms of the undertaking were debated. It is also perhaps regrettable that the undertaking is much more complex than the undertaking which had been given in proceedings, also involving the defendant, which went to a judgment before Mr Justice Foxton in a case which was decided in September 2020: *Riverrock*

Securities v International Bank of St. Petersburg (Joint Stock Company) [2020] EWHC 2483 (Comm). The undertaking in that case was more simply worded: the Claimant there undertook not to "object to the substantive jurisdiction of any validly constituted arbitral tribunal to determine any claim brought by or in the name of the Defendant under Article 61.2 of the Bankruptcy Law in respect of any of the Contracts". It is, however, appropriate to leave all these points aside for present purposes, because the important point is that disputes have arisen as to how the undertaking is to be interpreted.

9. I have read the arguments, which have been advanced in the witness evidence served hitherto, concerning the interpretation of the more complex undertaking that was given in the present case. The issues which have arisen may not be the most straightforward. The claimants' application which has arisen because the defendant has said that the claimants have taken a position in correspondence which is contrary to the undertaking which was given to the court. The claimants dispute that proposition, and wish to clarify the position by obtaining declaratory relief. It is not necessary or appropriate for me to address the argument in detail, because that is for the March hearing. But I put to Mr Khurshid that a genuine point had been advanced by the defendant, and I did not understand him to submit to the contrary. It certainly seems to me, having read the correspondence and the skeleton argument, that it is by no means self-evident that the approach which the claimants have taken to the undertaking is correct. The defendant certainly has a legitimate argument, as it seems to me at the moment, that the approach which the claimants are taking is too restrictive.
10. I have explained this background, because the nature of that hearing, and the respective arguments to be advanced by the parties, are relevant to the case management decision which I must make as to the appropriateness of the debarring order which the claimants seek.
11. It is also relevant, in my view, that the only basis on which it is said that the defendant should be debarred from participating in that hearing is that the costs of £100,000 have not been paid. This is not a case where it is alleged that, at least subsequent to the orders made by HHJ Pelling QC, there

has been other contumacious conduct on the part of the defendant. The anti-suit injunction was designed to bring an end to the Russian proceedings, and it seems that the Russian proceedings are indeed not currently being pursued by the defendant. The anti-suit injunction was also designed to ensure that the parties' disputes were resolved in London arbitration, and that is indeed what is happening. Both parties have served, as I understand it, submissions in the context of the London arbitration, where there has been a considerable amount of interlocutory activity which it is not necessary to describe at the present stage. So the present application was based solely on the non-payment of costs, and that is one feature of the case which distinguishes it, at least on the facts, from the principal decision relied upon by Mr Khurshid, namely the *Days Healthcare* case to which I will return in a moment.

12. The other unusual feature of the present application is that it takes place against the background of a defendant who is not currently trading and where there is no suggestion that the defendant is a solvent party, well able to instantly pay whatever debts it may have. On the contrary, the defendant is in liquidation, subject to Russian bankruptcy proceedings.

13. The defendant has been able to put forward expert evidence in this case in order to explain the non-payment of the £ 100,000. That evidence came, originally, from its own lawyer, Mr Melnikov, who is a lawyer employed or engaged by Linklaters in Russia. More recently, and indeed belatedly, the explanation has been supported by an independent expert, Mr Simonov, in expert evidence which was served only very shortly before the hearing. I have looked at this evidence on a “de bene esse” basis. The substance of that evidence is captured in paragraphs 9 and 10 of Mr Simonov’s report, where he says, in reference to evidence put in by Dr Gerbutov for the claimants:

> "9. Consequently, I do not agree with Dr Gerbutov's key conclusion in his report that the costs award can be paid voluntarily by the defendant without it being recognised by a Russian court (and without regard to various other provisions of Russian bankruptcy law).

> 10. If the defendant were to pay the costs award without it being recognised in Russia first, the DIA (or its employees) would be exposed to civil, administrative and possible criminal liability."

14. The DIA, referred to in paragraph 10 is the State Corporation Deposit Insurance Agency, which has been described as the "official receiver" of the defendant bank.

15. I consider it is appropriate to pay regard to Mr Simonov's evidence, notwithstanding its late service, because it is advances, in substance, the same point as was put forward by Mr Melnikov when he first responded to the application on 30 November 2021. I refer to paragraph 71 of Mr. Melnikov's first statement, where Mr. Melnikov said

> "Unless and until the Claimants follow the procedures outlined above, the Defendant is not permitted to pay the Costs Award, as a matter of Russian law governing its insolvency proceedings. If the Defendant were to pay the Costs Award in defiance of the requirements of Russian law, the DIA would be exposed to potential civil claims from other creditors of the Defendant and possibly even criminal liability".

16. It also seems to me that it is appropriate to do so because, ultimately, the question of whether I should make an order which has the potential effect of debarring the defendant from appearing involves case management considerations. In reaching a case management decision, I do not consider it sensible to disregard evidence, albeit served late, which makes the same essential point that was made some time ago by Mr. Melnikov.

17. I should say, however, that a very coherent counterargument, responsive to the point advanced by Mr. Melnikov and then adopted by Mr. Simonov, has been advanced by Dr Gerbutov. He is the claimant's expert, and Mr Khurshid in the course of his submissions this morning has built upon Dr Gerbutov's report and responded to the points as developed by Mr Simonov in the report served very recently. There is therefore a strong counterargument, which would, if accepted, support the claimants' case that Russian law does not provide an impediment to payment, and therefore an excuse for non-payment.

18. Mr Khurshid invites me to resolve the dispute which has been debated between the two experts on the balance of probabilities, and to come to the view that Dr Gerbutov is more likely to be right. He says that the views of the defendant's two experts' views should, in practical terms, be rejected. He submits that there is a heavy onus on a party to establish that, on the balance of probabilities, it would be impossible for him to comply with the order if it were made. The defendant's evidence in that context should be scrutinised with a critical eye. In the present case, the evidence is insufficient to discharge its burden of proof. He invites me, therefore, to put aside the views of the defendant's experts, and to do so on the basis of the arguments which have been advanced in their reports and without having heard from any of them.
19. I do not consider that this is the correct approach. Clearly if the argument put forward by the defendant's experts was fanciful and could be rejected very clearly and easily by the court, then it should indeed be disregarded. But I do not consider I can come to that conclusion on the present material.
20. I accept, as I have indicated, that Mr Khurshid's submissions and Dr Gerbutov's report are cogent and coherent, but I do not consider that I am in a position safely to disregard the evidence of two experts on Russian law who take a contrary view.
21. I therefore consider it right to proceed on the basis that the current evidence goes so far as to establish that the legal position under Russian law may possibly be that these costs cannot be paid voluntarily by the defendant without the relevant order having been recognised by the Russian courts, and also that if the defendant were to pay the costs, it may possibly be exposed to civil, administrative and possible criminal liability. A clear finding as to the effect of Russian law is, however, not possible in the context of the present interlocutory application.
22. Although the defendant's evidence does not go so far as to positively say that they believe what their lawyers are saying in their witness statements, and that this is the reason why they have not paid the

£ 100,000, it does seem to me that where lawyers have put in evidence to this effect, a client is obviously entitled to pay regard to it.

23. So I approach the exercise of my case management discretion in that light. But I should say that I would come to exactly the same view, that I will express in a moment, even if I had been persuaded that Russian law did not even arguably provide a reason for the defendant's failure to pay the costs.

24. The relevant applicable principles are to be found in the decision of Mr Justice Langley in *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd & Ors* [2006] EWHC 1444 (QB), to which I was referred. I have also considered the earlier decision of the Court of Appeal in *Motorola Credit Corporation v Uzan* [2003] EWCA Civ 752, which was referred to in *Days Healthcare*.

25. Those cases indicate that it is possible to make an order against a party, such as the defendant in the present case, which would in practice and in effect debar him from participating in further proceedings if costs are not paid in accordance with the prior court order. But the *Motorola* case indicates that the court should exercise a degree of care before debarring someone from making submissions, even where that person is in contempt. That is particularly so where the order is sought against a defendant who is taking essentially a defensive position in litigation. Accordingly, a debarring sanction is by no means automatic where costs are unpaid.

26. In *Days Healthcare* itself, where the judge was persuaded to make an order, the facts were extreme. The defaulting defendant was a clearly solvent party who was in a position to pay, and was taking every possible step to frustrate various orders which the court had made. The proposed hearing, which was a detailed assessment of costs, in which he wished to participate, was anticipated to last many days, and every single point was being taken within that assessment in order to frustrate orders of the court. There was no, or very little, prospect of voluntary payment by the defaulting defendant at the end of that process of detailed assessment.

27. There is nothing, in my view, which is comparable, at least on the present evidence, in the present case. As I have indicated, the Russian proceedings are not continuing. There are claims which have been pleaded by both sides in the LCIA arbitration, and no case is advanced that the defendant is seeking to disrupt that hearing. The March hearing in respect of which the debarment is sought, which is the only hearing which is in immediate prospect before the court, is a relatively short half-day hearing which is due to take place in a few weeks' time. The nature of that hearing, as I have indicated, is to resolve a disagreement as to the scope of the claimants' undertaking. The points raised by the defendant in that context cannot, as it seems to me at the moment at least, be dismissed as obstructionist or fanciful or anything of that kind. Indeed, that has not been part of Mr. Khurshid's argument today.
28. In my judgment, it is not appropriate, on the facts of the present case, to make an order which has the potential effect of debarring the defendant from appearing. My reasons are as follows:
29. First, there is, as I have said, a genuine issue as to the effect of an undertaking which was given to the court. In circumstances where an undertaking given to the court is in issue, and where a genuine issue arises, it is in my view appropriate here for the court to have argument on both sides where there are any doubts as to its meaning and effect. It is legitimate, no doubt, for a party in the claimants' position to come back to court in order to ensure that they do not do something which they have promised the court not to do. However, it does not follow that the defendant should be debarred from responding to the application, even where costs of the prior application are unpaid. Indeed, this would appear to be undesirable in circumstances where the hearing is to address the possible lack of clarity in an undertaking which was drafted by the claimants themselves, and where legitimate questions have arisen as to what it actually means.
30. I also consider in that context that the present application is undesirable satellite litigation. I have had a hearing before me for half a day in order to decide whether the defendant should be permitted to make submissions at a half-day hearing in March. Its submissions in March are likely to be not

much longer than its 40 minutes of submissions today. The unsatisfactory nature of the present application is to my mind further demonstrated by the fact that the defendant's arguments, to be advanced in March, have already been significantly ventilated in witness statement evidence which has already been served. Those arguments were put forward, principally in Mr. Melnikov's first statement, in response to the substance of the application. The claimants will therefore have to deal with all the points raised in any event, in order to satisfy the court that it is appropriate to grant the declaratory relief which is sought.

31. It also seems to me in this context that the court will be assisted by the focused submissions of the defendant. The alternative, which is to hear one side only, with Mr Khurshid having to explain and deal with all the points which have been taken by the defendant in correspondence and witness statements, seems to me to be a highly undesirable way of proceeding and contrary to the interests of justice and the overriding objective. Any judge who is asked to make declaratory relief in relation to the clarity of this undertaking will inevitably be assisted by submissions from both parties as to the nature of the undertaking, what it means, and how, if at all, it should be interpreted or possibly changed.

32. Secondly, the argument that will take place in March may, to some degree, shade into questions of whether or not the undertaking should be recast in some particular way. Mr Allen's submission is that the substance of the claimants' application is one to recast the undertaking. It may be that that is an inaccurate way of characterising the nature of the application. But it is not difficult to envisage that the judge, on the hearing of that application in March, will be asking himself or herself: is this really a change to the undertaking which the claimant originally gave, and if it is a change, is it appropriate for that change to be made?

33. Thirdly, I consider it important to note that ordinarily, and in practical terms, the order of HHJ Pelling QC on 30 September 2020, whereby he granted an anti-suit injunction, would have been the end of the matter, save possibly for questions of damages which may in any event be claimable

within the context of the arbitration. The substance of this case will not be proceeding before the court, but rather before a tribunal appointed by and under the auspices of the LCIA. In the LCIA arbitration, which is ongoing, the defendant is fully entitled to defend itself, notwithstanding that it has not paid the court's prior costs order. The nature of the application made by the claimants, however, seeks to shape the nature of what can and cannot be argued in the LCIA arbitration. It will have potentially a direct effect on that arbitration. Given that it has that potential impact, I consider that it is right that the defendant should be heard in March.

34. Fourthly, as I have indicated already, this is not a straightforward case where a solvent party has refused to pay. It involves an insolvent defendant and, in those circumstances, it is perhaps unsurprising that potential questions arise as to the ability of a company which is under insolvency laws of a different jurisdiction to pay funds.

35. Fifth, I take into account the possibility that, if I were to make this order, it might encourage the defendant to pay the costs which have been ordered. Mr Allen tells me, however, on instructions, that that is not what will happen. He says that his clients, in the light of the advice which they had received from two lawyers, will not pay. If that is right, then the effect of my order will simply be to preclude the defendant from participating in a further hearing, rather than to result in the desirable consequence for which the claimant contends. Since, in the light of what Mr. Allen has said, it is likely that the defendant will not pay the costs which have been ordered, in circumstances where there is written legal advice that this is not permissible, the possible encouragement to pay is not a strong factor.

36. Finally, it seems to me that ultimately the question is a case management question as to how best for the court to exercise its case management powers, given that there is, on the claimants' case, a default in payment of an order which the court has made. I have to look at that in the context of all the circumstances of the case, including what I regard as the undesirable satellite litigation to which this application has given rise, and including the nature of the application which is forthcoming.

37. When I look at those matters in the round, I consider, for the reasons I have given, that it is not appropriate to make the order which is sought. I therefore dismiss this part of the claimants' application.

(2:03 pm)

Decision in relation to costs

1. It does seem to me that the point on Russian law could have been articulated earlier than it was articulated on 30 November 2020 by Mr Melnikov. To that extent, at least to some extent, the defendant has brought this application upon itself, at least up until the time when the argument was first put forward.
2. I think it is also fair to say that the way in which it was put forward by Mr Melnikov on 30 November 2020 did not go into a significant amount of detail as to the Russian law. It is also reasonable to comment that, although Mr Allen has made case management considerations and put those rightly, in my view, at the forefront of his submissions today, the focus of his skeleton argument was very much on the Russian law issues.
3. All of that said, the position here is that the defendant is the successful party in relation to this aspect of the case, where there has been a separate hearing. The defendant is therefore entitled to be paid at least some costs. I consider that it is appropriate to make some deduction for the fact that the point was not taken in correspondence prior to Mr. Melnikov's statement on 30 November. I think it is also appropriate to take into account the fact that Mr Simonov's witness statement was not served until a very, very late stage. I do not know what costs were incurred at what stage, but I think that the claimants were entitled to a reasonable time, once Mr Melnikov's witness statement had been put in, to consider their position.
4. I will therefore order that the defendant is entitled to its costs on and after 14 December 2020, save for the costs of and relating to Mr Simonov's report. The costs of that report include not just the

work on the report itself by Mr Simonov, but any work by the solicitors and counsel related to that. That seems to me to reflect the justice of the case.

5. The costs should be set off against the £100,000 owed, and I am perfectly happy to summarily assess those costs myself at a later stage by reference to submissions in writing, but I think that there is probably good sense in the judge who deals with this in March dealing with any issues of summary assessment. I think the judge will be able to pick up quite quickly what this hearing was all about and work out what costs were and were not reasonable in the light of whatever arguments are put forward as to reasonableness on that occasion.