Neutral Citation Number: [2023] EWHC 2720 (Comm)

Case No: CL-2022-000456

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

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

Date: 03/11/2023

**Before** :

**THE HON MR JUSTICE BUTCHER**

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**Between :**

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|---|---|
| **LLC EUROCHEM NORTH-WEST-2** | **Claimant** |
| **- and -** | |
| **(1) SOCIÉTÉ GÉNÉRALE S.A.**<br>**(2) SOCIÉTÉ GÉNÉRALE PARIS**<br>**(3) SOCIÉTÉ GÉNÉRALE MILAN**<br>**(4) ING BANK N.V.**<br>**(5) ING BANK N.V. – MILAN BRANCH** | **Defendants** |
| **-and-** | |
| **(1) TECNIMONT S.P.A.** | **Third Party** |

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**Justin Fenwick KC, George Spalton KC and George McDonald** (instructed by **Vinson & Elkins RLLP**) for the **Claimant**
**Richard Handyside KC and James Duffy** (instructed by **Herbert Smith Freehills LLP**) for the **First to Third Defendants**
**Camilla Bingham KC** (instructed by **Clifford Chance LLP**) for the **Fourth and Fifth Defendants**
**Tom Leary** (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Third Party**

Hearing date: 26 October 2023

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# Approved Judgment

This judgment was handed down remotely at 10am on Friday 3 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE BUTCHER

## The Hon Mr Justice Butcher :

1. The Claimant seeks, in its application notice, an order for payment of the sums which it claims from the Defendants into court or into a frozen account in either the United Kingdom or the EU.

2. The Claimant's claim is for the payment of EUR 137,159,881.61 by the First to Third Defendants ('SG') and of EUR 75,285,299.85 by the Fourth and Fifth Defendants ('ING') pursuant to on-demand bonds ('the Bonds'). The Bonds were procured by the Third Party and/or LLC MT Russia in support of contracts entered into between those entities and the Claimant for the design and construction of a fertiliser plant in Russia.

3. In August 2022 the Claimant made written demands under the Bonds.

4. Both SG and ING (together, 'the Defendants') have declined to make payment under the Bonds on the basis, in summary, that to make payment would breach international sanctions. This is said to be because the Claimant is part of the EuroChem group which is closely associated with Andrey Melnichenko, who is subject to both EU and UK sanctions.

5. Following a CMC heard in September 2023, the court has ordered a trial with an estimate of four weeks to be listed not before 13 January 2025.

6. The Defendants dispute that there is any jurisdiction in the court to make the order sought by the Claimant; alternatively, if there is, contend that the present is not an appropriate case and that the court should refuse such an order as a matter of any discretion which it may have.

7. The Claimant's application is said, in the witness statement of Ms Louise Woods, which supports it, to be made under CPR r. 25.1(1)(c), 25.1(1)(k) and/or 25.1(1)(l), alternatively the court's inherent jurisdiction and/or CPR r. 3.1(2)(m). In its argument at the hearing the Claimant also added CPR 25.1(1)(a) as a basis on which the order might be made.

*CPR Provisions*

8. It is convenient to set out what those and related rules provide. CPR r. 25.1 provides, in part:

> '(1) The court may grant the following remedies-
>
> (a) an interim injunction;
>
> …
>
> (c) an order-
>
> (i) for the detention, custody or preservation of the relevant property;
>
> …

(k) an order (referred to as an order for interim payment) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;

(l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund.'

CPR 25.1(2) states that in paragraphs (1)(c) and (g) 'relevant property' means 'property (including land) which is the subject of a claim or as to which any question may arise on a claim.' CPR 25.1(3) provides that: 'The fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.'

CPR r. 25.7 provides:

(1) 'The court may only make an order for an interim payment where any of the following conditions are satisfied-

…

(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial sum of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim…'

CPR 3.1(2)(m) provides that the court may 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…'

9. I intend to consider the Claimant's application under each of the bases relied upon, in turn.

*CPR r. 25.1(1)(k): interim payment*

10. As CPR r. 25.7 expressly provides, the court may only make an order for interim payment when one of the relevant conditions is satisfied. That relied on here is (c), which depends on the court being satisfied that if the claim went to trial the claimant 'would obtain judgment'.

11. The simple answer to the application for an interim payment is that I am not able, on this application, to be so satisfied. SG pleads that they have been excused from performing or making payment under the Bonds and/or are obliged or entitled to withhold performance; and/or that the Bonds have been discharged and/or terminated and/or frustrated because payment by SG to the Claimant was and is illegal under EU, French and Italian law. They rely on what they call the principle in Ralli Brothers v Compania Naviera Sota y Aznar [1920] 2 KB 287, to the effect that a contract is invalid insofar as its performance is unlawful by the law of the place in which it is to be performed, namely France and Italy. They plead also that payment under the Bonds would be contrary to English public policy; and that SG is excused from their obligation to pay under the Bonds, relying on a term which they say is to be implied into the Bonds, to the effect that they are excused from performance if to perform would cause SG to be in breach of any restrictions imposed by sanctions. ING puts

forward similar defences, relying in particular on the so-called Ralli Brothers principle.

12. Thus, in the present case, the fact of sanctions is said to give rise to substantive defences to the claims. For this reason, the decision in PJSC National Bank v Mints [2023] EWCA Civ 1132 does not provide the support for the Claimant's position on this application which the Claimant argued it had. Mints decided that the entry of a judgment against a designated person would not be a breach of the Russia (Sanctions) (EU Exit) Regulations 2019. However, in that case, the existence of sanctions did not form part of the defendants' substantive defence: the claim there being in tort or delict for an alleged conspiracy and the hypothesis was that the claim could be made out. That is a significantly different position from that which appertains in the present case.

13. Insofar as Mr Fenwick KC suggested that I could decide now that the Defendants' defences, to which I have referred, were bound to fail, I considered that that was not a course which was fairly open to the court. The relevant defences are pleaded. There has been no application to strike them out; nor has there been any application for summary judgment in relation to them. The present application and hearing are not a suitable occasion for an argument to the effect that the relevant pleas are, in effect, demurrable; and I accept what the Defendants said, namely that they had reasonably not come prepared to argue against the summary dismissal of significant parts of their defences.

*CPR r. 25.1(1)(c): detention, custody or preservation of relevant property*

14. Here, the Claimant's contention is that the sums which it claims are due to it from the Defendants are 'relevant property' for the purposes of CPR r. 25.1(1)(c)(i). In my judgment they are not.

15. I was referred to two authorities in relation to this. The Defendants relied on Sports Network Ltd v Calzaghe [2008] EWHC 2566 (QB). At [50]-[51] of that case, Coulson J said the following (obiter):

> '[50] I have concluded that, in general terms, property under CPR 25.1(1)(c) does not mean any money in issue in the litigation. First, the word "property" is not the usual way in which one describes money, be it a company's investments or balance at the bank. Secondly, the word "property" on its own should be contrasted with the words "property and assets" in CPR 25.1(1)(g) which latter category plainly does cover investments and money in the bank. Thirdly, to find otherwise would, I think, be contrary to the assumptions made both in the *White Book* and *Blackstone's*, when I consider that those assumptions are correctly made. In addition, I note that there is no post-CPR authority for the contrary proposition.
>
> [51] I recognise that, if it could be shown that the money in question was held by one party on trust for another, the word "property" might be applicable, but, for the reasons explained below, if there was a serious issue to be tried as to whether the money in question was held on trust then, whatever the position under CPR 25.1(1)(c), it seems to me that it would be a specified fund to which r. 25(1)(l) would apply.'

16. The Claimant, by contrast, relied on what was said by Fancourt J in UTB LLC v Sheffield United Ltd [2018] EWHC 1663 (Ch). At [41]-[42] Fancourt J considered what Coulson J had said Sports Network. He said that while physical property which could be inspected, preserved and experimented on 'would doubtless be the paradigm case', the rule did not exclude other types of property. He said (at [42]):

'It may be that intangible property, such as shares or some intellectual property, cannot be detained, inspected, sampled or experimented on, but that does not mean that it cannot be "relevant property". Those types of property can be preserved, or sold if there is good reason to sell them quickly, or income from them can be paid to an applicant until trial. It cannot be said that if there is a dispute over ownership of a portfolio of investments, the court would not have power under this rule to order the sale of certain shares, or order the payment of income from the portfolio pending trial. The argument that the use of the word "assets" in rule 25.1(1)(g) in contradistinction to "relevant property" suggests that the latter has a limited meaning is not convincing: the reason for the use of the word "assets" in paragraph (g) is simply to distinguish assets over which a freezing order may be made from the relevant property that is the subject of the claim or as to which any question may arise on the claim.'

17. I agree with Fancourt J that 'property' need not necessarily be physical property, and am also inclined to agree, although it is not something I have to decide, that the examples he gives – of shares or some forms of intellectual property, or a portfolio of particular investments – fall within the meaning of the term as it appears in CPR 25.1(1)(c). But Fancourt J was not considering an argument that 'property' embraced money which was not in any way segregated and in respect of which there was no claim to beneficial ownership but which was simply a sum claimed by way of debt or damages from one party by the other. I do not consider that CPR 25.1(1)(c) embraces such sums within the term 'property', because, in my judgment, such amounts are not 'property (including land) which is the subject of a claim or as to which any question may arise on a claim' within CPR 25.1(3). That definition envisages that the property shall be in some way identifiable and distinctive, such that that particular property can be said to be the 'subject of the claim' or that a question may arise in relation to it. Furthermore, CPR 25.1(1)(c) envisages that relevant property shall be capable of detention, custody, preservation, inspection, sampling, experimentation, sale, or may yield an 'income'. None of those naturally applies to a sum of money claimed by way of debt or damages. Reading CPR 25.1(1)(c) as a whole, I think it is clear that it does not envisage that such amounts will be 'relevant property'.

18. If I am wrong, however, and 'property' in CPR 25.1(1)(c) does extend to such sums, then in this respect CPR 25.1(1)(c)(i) would give to the court a jurisdiction which overlaps with that for which more specific provision is made in CPR 25.1(1)(f), viz 'freezing injunctions', and CPR 25.1(1)(k), viz interim payments. I take the view that, save perhaps in a quite exceptional case, the court would not grant an interim order under CPR 25.1(1)(c)(i) requiring the payment of a sum claimed, but not adjudicated, to be due by way of debt or damages and where no proprietary claim is made, or preventing a party from dealing with its assets because of the existence of such a claim, unless the case were one in which the court could and would grant either a freezing order or an order for an interim payment. Those are the established bases on which orders of that type can properly be made, and the court should not, by resort to CPR 25.1(1)(c), grant orders free from the constraints which have been recognised

as appropriate to this species of order. I have already given reasons why an interim payment order cannot be made on this application. Nor is the case one which is – or indeed is said to be – suitable for the interim grant of a freezing injunction. This is not least because no risk of dissipation has been shown (or suggested) and no cross-undertaking in damages has been proffered.

*CPR r. 25.1(1)(l): Order for payment or securing of a specified fund*

19. I have already quoted CPR 25.1(1)(l). While this was relied upon in the Claimant's witness statement and skeleton argument, and was mentioned by Mr Fenwick KC, he did not press any case based upon it. In my judgment, he was right not to do so.

20. In Myers v Design Inc (International) Ltd [2003] EWHC 103 (Ch), Lightman J said (at [10]) that the conditions for the exercise of the jurisdiction under CPR 25.1(1)(l) are that:

'(1) the person against whom the order is to be made has legal title to or is in the possession or control of an actual identifiable fund, colloquially the fund must be in his hands; (2) there is a dispute as to a party's proprietary entitlement to or interest in the fund; (3) the circumstances are such that the fund should be secured by payment into court or in some other way.'

21. In that case, Lightman J was clear (at [12]) that while a debt was a chose in action, it was not itself 'a specified fund, nor did it give rise to the existence of a specified fund in which the claimant has a proprietary interest. Nor are there any monies (let alone a specified fund) held by the Defendant over which the Claimant has any proprietary rights.'

22. The same position applies here. There is no identifiable fund in the hands of the Defendants. The evidence is that the Defendants have not ring-fenced any specific money for the payment of the Bonds. The Claimant has no arguable proprietary claim to monies held by the Defendants. There is thus no specified fund, and CPR 25.1(1)(l) is not available.

*Interim injunction (CPR 25.1(1)(a))*

23. Insofar as the Claimant relied on the power of the court to grant an interim injunction, set out in CPR 25.1(1)(a), it made no real attempt to show that this was an appropriate case for an order on American Cyanamid principles. I consider that it is clearly not such a case, not least because damages are an adequate remedy to the Claimant.

*Inherent jurisdiction*

24. The Claimant contended that, even if the order sought was not one falling within any of the heads of CPR 25.1(1) already discussed, the Court could make the order sought pursuant to its inherent jurisdiction. It pointed to the terms of CPR 25.1(3) and to CPR r. 3.1(2)(m).

25. In my judgment, this is not a case in which it is appropriate or necessary to make such an order as is sought. Given the nature of the order sought, I consider that it would not be appropriate to grant it in circumstances where the well-established and worked-out requirements for the grant of an interim payment or a freezing order are not met.

26. Further I do not consider an order such as is sought to be necessary because, in my judgment, the order sought would have no or minimal utility. As the nature of the relief sought is such that, even if granted, it would not mean that the Claimant receives the sums in question now, there is no question here of the order being justified on the basis that it will prevent any hardship which the Claimant might suffer from being kept out of its money. Furthermore, there is no suggestion that, if the Claimant succeeds on its claim, either SG or ING will not be good for the money.

27. While there was, in argument, some suggestion that the order sought would prevent the Defendants from being 'unjustly enriched', this was difficult to follow. The Defendants have not been paid the amounts under the Bonds by the Third Party or LLC MT Russia, and so this is not a case in which the Defendants are accruing sums on a fund in their hands. Further, the Claimant has claimed from the Defendants interest pursuant to statute and/or damages for late payment of the Bonds, and so if it succeeds in its claim for the amount of the Bonds, it will doubtless also recover such interest and/or damages. If, for some reason, it is not entitled to either interest or damages, then it is difficult to see that any 'enrichment' by the sums not being paid over sooner will be such as can be considered unjust.

28. The point on which, in argument, the Claimant principally relied was the suggestion that the order sought, at least if what was ordered was payment into court or into a frozen account in the UK, would have the beneficial effect of avoiding the possibility that, even if the English court were to hold in favour of the Claimant and even if under English law and the UK sanctions regime there was no objection to the judgment sum being paid over to the Claimant, the Defendants might refuse to pay the judgment sum on the basis that under the EU sanctions regime (and the law of France and Italy) payment remained illegal.

29. As to this, for the English court to find in favour of the Claimant, it would have to have held that any illegality under the law of the place(s) of performance contended for by the Defendants, viz France or Italy, did not provide a defence. In those circumstances it must be very doubtful as to whether the Defendants would refuse to honour a judgment on the basis that it would be illegal for them to pay under the law applicable in France or Italy. But if they did, then, as Mr Handyside KC said, they have very substantial operations in this jurisdiction and the judgment could be enforced against assets here. There is no good reason why the court should order that the Claimant's claim against the Defendants should be secured.

30. In the exercise of any discretion which the court has, it is also proper to take into account that, as the Defendants say, there is at least an argument that they would be in breach of EU sanctions, and exposed to criminal penalties, by making a payment into court or into a frozen account; and also that they may not be able to claim reimbursement on their counter-guarantees in respect of such a payment, and thus be out of pocket.

31. Bearing in mind therefore, the lack of any real utility in the orders sought, and the potential prejudice to the Defendants, I would, in the exercise of any discretion which I may have, decline to grant the orders sought by the Claimant.

*Conclusion*

32. For these reasons, I decline to grant the orders sought in the application.