IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 493 (QB)

No. IX GNC 647/18 and EEOP 46/19

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 6 February 2019

Before:

JOHN KIMBELL QC

(Sitting as a Deputy High Court Judge)

B E T W E E N :

OAKFIELD FOODS LIMITED — Claimant

- and -

ZAKLAD PRZEMYSLU MIESNEGO BIERNACKI SP — Defendant

- and -

HIGH COURT ENFORCEMENT GROUP LIMITED — Additional Defendant

MR B. DYE (instructed by Clyde & Co LLP) appeared on behalf of the Applicant.

MS D. GILBERT (instructed by IMD Solicitors) appeared on behalf of the Defendant.

THE ADDITIONAL DEFENDANT did not attend and was not represented.

A P P R O V E D J U D G M E N T

JOHN KIMBELL QC:

1 On 21 January 2020, I gave an *ex tempore* judgment in which I granted a stay on the enforcement in England of a European Order for Payment issued by the Poznan Regional Court in Poland on 1 June 2018 ("the EOP"). The applicant for the stay was the EOP debtor, Oakfield Foods Limited, an English company. The respondent to the application was the EOP creditor, ZPM Biernacki ("Biernacki"). The judgment followed a hearing on 13 January in which Oakfield was represented by Brian Dye of counsel and Biernacki by Daniella Gilbert of counsel.

2 The means of domestic enforcement of the EOP in this country was a High Court writ of control dated 21 September 2019. Having granted a stay of the enforcement in England of the EOP pending the resolution of an application brought by Oakfield in Poland to challenge the enforceability and validity of the EOP, I ordered that a sum demanded and paid by Oakfield in response to the writ of control, namely £182,887.72 be paid into court. I dismissed Oakfield's application for a declaration that the EOP was invalid and unenforceable.

3 After the terms of the order reflecting my judgment had been agreed but before it had been approved by me and sealed by the court, I received two applications to reconsider my judgment.

4 The first application by Oakfield was that I reconsider the section of my judgment in which I dealt with whether or not the Annexe 2 form signed by a Mark Glass, of Oakfield, on 3 December 2018, rejecting the service of the EOP on Oakfield had been returned to the Foreign Process Section of the High Court within the meaning of the Service Regulation, that is to say Regulation EC1393/2007, in light of some new evidence which had come to light after the hearing.

5 The second application is by way of written submissions only received from solicitors acting for the High Court Enforcement Group Limited ("HCEG") seeking permission to deduct the sum of £15,264 from the sum paid by Oakfield and therefore from the sum I had ordered to be paid into court. The deduction represents the fees that HCEG says it is entitled to charge for enforcing the writ of control. That application is opposed by Oakfield. Biernacki is neutral in relation to it and it is only fair to record that counsel who appears for Biernacki today was not aware of the contents of the application by HCEG until I came into court. Mr Dye kindly explained the basis of the application. In those circumstances, she has not had time to take proper instructions and is therefore neutral as to that application. I will deal with each application in turn.

The first application

6 Dealing first then with the Oakfield application, the details of the new evidence which Oakfield are asking me to admit and to consider are contained in the third witness statement of Pavani Reddy dated 29 January 2020. I have also received submissions in writing from Mr Dye on behalf of Oakfield and submissions in writing from Daniella Gilbert for the respondent dated 29 January 2020. I have also read short submissions in response from Mr Dye to 30 January 2020.

7 The piece of evidence which was found after the conclusion of the last hearing and after judgment is a DX (that is a Document Exchange) tracking report. Mr Dye submits that this document shows that the package containing the Annexe 2 declaration signed by Mr Glass on 3 December 2018 was not only prepared for dispatch in the DX by OGR Stock Denton (Oakfield's then solicitors) for sending to the Royal Courts of Justice in the DX, as I accepted in my judgment, but that he was now able to show more than that. His submission was that the tracking receipt shows that it was delivered into the DX system that evening, that it had arrived in the Strand DX office the following morning, at 0514 hours, and most importantly of all for his purposes, that it was collected from there by someone authorised to collect DX items from DX 44450, which is the DX number that it was sent to. DX 44450, as I heard in evidence at the last hearing, is one of the DX numbers used by the court offices located in the Royal Courts of Justice though not the dedicated DX for the Foreign Process Section. The Foreign Process Section has its own DX, namely 44459 Strand.

8 Mr Dye says the new objective documentary evidence was not available at the last hearing and was reasonably considered to be unobtainable until a phone call was made to the operators of the DX system after the last hearing to doublecheck the correctness of its previous statement to Oakfield's lawyers that no records existed in relation to the package because DX records are routinely destroyed after six months. His submission, in light of the new evidence set out at paragraph 37 of his skeleton dated 29 January 2020, reads as follows:

> "The court is asked to find as a fact, or facts, that:
>
> (1) The package put in the DX on 3 December 2018 by OGR Stock Denton containing the documents and Annexe 2 form completed by Mr Glass did arrive at the Royal Courts of Justice on 4 December 2018 and therefore to reverse its previous finding on this;
>
> (2) Also, if the court thinks fit, to find as a new fact that documents were therefore returned by Oakfield within a week of their service on Oakfield on 29 November;
>
> (3) Also, if the court thinks fit, to find as a new fact that service was refused by Oakfield on account of language; and
>
> (4) Also, if the court thinks fit, to make such other findings as it may consider right."

9 Ms Gilbert, on the other hand, submits that the new evidence takes Oakfield's case no further because it fails to show that the Annexe 2 declaration was returned to the Senior Master at the Foreign Process Section in Room E16 at the Royal Courts of Justice. She says notwithstanding the new evidence, taken as a whole, the position remains that Oakfield has not been able to demonstrate that the Annexe 2 declaration reached the Foreign Process Section at the address set out in the Annexe 2 form itself.

10 I accept Mr Dye's submission that I have jurisdiction to reconsider my judgment. That follows from the decision of the Supreme Court in *Re L and Anor (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634. The Supreme Court in that case held that the power of a judge to reverse a decision at any time before his order is drawn up and perfected by being sealed by the court was not limited to exceptional circumstances. So I am more than satisfied that I have the jurisdiction to reconsider my judgment in circumstances where the order had not been approved and had not been sealed.

11 I also accept Mr Dye's submission that the DX tracking report satisfies the criteria of *Ladd v Marshall* [1954] 1 WLR 1489 as it has been applied in circumstances such as this, namely where new evidence has emerged after judgment has been given but before an order has been sealed. The tracking report is, as he submits, is a reliable contemporaneous record which Oakfield reasonably believed did not exist and the reason why it was reasonable was because the DX told Oakfield's legal representatives that it did not exist.

12 However, the critical question is whether the tracking report makes any difference to the outcome of the case and causes me either to modify my judgment in any material respect or to make a different order.

13 In my judgment, the tracking report does cause me to make an alteration to my previous judgment but it does not cause me to reach a different conclusion or to make a different order for the following reasons.

14 Mr Dye's key submission to me at the last hearing is summarised in paragraph 32 of his skeleton dated 10 January 2020. His submission then was as follows:

> "Oakfield therefore submits that on the evidence above, the court should be satisfied that the bundle was returned by OGR Stock Denton to the court on 3 December 2018."

15 The evidence referred to above is set out in six subparagraphs including reference to OGR Stock Denton's DX tracking log, Mr Glass's stamping and dating declaration, the evidence of the exchanges between Mr Glass and Mr Pearl of OGR Stock Denton, and the confirmation by email from OGR Stock Denton to Oakfield itself that it had put the package in what it called "the special post". The final point relied upon at the last hearing by Mr Dye in paragraph 31(f) of his skeleton was that OGR Stock Denton had checked the DX for tracking evidence but no such evidence was available. However, he pointed out that the documents had not been returned as undelivered by the DX to OGR Stock Denton.

16 Having considered all that evidence and the submissions that were made, I rejected his conclusion that he invited me to draw from that evidence, namely that the court should be satisfied that the bundle was returned to the Foreign Process Section in Room E16 at the Royal Courts of Justice, essentially for four reasons. I accepted on the evidence that I had had before me that it had been prepared for dispatch in the DX but I held that there was no or insufficient evidence that the package had actually arrived in Room E16 at the Royal Courts of Justice for four reasons:

> (1) No acknowledgement of receipt had ever been issued by that office;
>
> (2) no trace of the document had been found on any of the files inspected to date;
>
> (3) the wrong DX had been used to the extent that the Foreign Process Section authorises use of DX, the relevant DX box is 44459 Strand;
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> (4) The Foreign Process Section itself had confirmed to the Poznan Regional Court that service on Oakfield had been effected under the Service Regulation.

It seems to me that all four of those reasons still apply notwithstanding the new DX tracking report evidence.

17 In my judgment, the new tracking report amounts to no more than a very slight strengthening of Mr Dye's previous submission in paragraph 31(f). Instead of being constrained simply to rely on the fact that the documents were never returned by the DX, he can now show, by means of the tracking report, that an employee of HMCTS authorised to collect the items sent to DX 44450, collected the item, and took it away on the morning of 4 December 2018. However, the crucial question, in my judgment, is whether Oakfield can show that the Annexe 2 declaration was returned to the address as set out in the form itself, namely "The Senior Master, for the attention of the Foreign Process Section, Royal Courts of Justice, Room E16, Strand, WC2A 2LL".

18 I am not satisfied, even taking together the new evidence with the old evidence, that it can. As I have said, the Foreign Process Section did not issue a receipt and no trace of the declaration has yet been found on the court's files, and as I previously held, the Foreign Process Section has confirmed service has been effected. This all still, it seems to me, strongly suggests that the Annexe 2 declaration did not reach E16. I therefore accept Ms Gilbert's submission that the new evidence does not show that the Annexe 2 declaration reached the Foreign Process Section in Room E16 which is where the Annexe 2 document said it must be returned to.

19 The Annexe 2 document did not invite the recipient, in this case Oakfield, to return it to the RCJ generally, or indeed anywhere, by DX. Instead, the document required, on its face, to be returned to a particular office in the Royal Courts of Justice and the only two methods available on the face of the document read in light of CPR and the Service Regulation are hand filing at the relevant room, or via post, that is to say Royal Mail, no fax number, no email number having been supplied.

20 As I held in my previous judgment, paragraph 5.1 of Practice Direction 5A to CPR 5 sets out the domestic rules for filing documents at court and shows how filing in detail is to be acknowledged and recorded. Under that Practice Direction, it is quite clear that where a document is required to be filed in court that it will be acknowledged by means of a stamped acknowledgement and when it is permitted to be received by fax, then a time of receipt is also recorded. Furthermore, the information that the United Kingdom has applied under Article 22 of the Service Regulation makes it absolutely plain that documents received by the High Court when acting as a receiving agency under the Service Regulation may only be received by post or by fax. The DX is not an authorised method for filing for the purposes of Annexe 2 under the Service Regulation.

21 So any party choosing to use a DX takes a risk that if the document sent in a DX is not, in fact, received it cannot rely on any legal presumption of safe receipt and, instead, has to prove it positively. Had the Annexe 2 document been sent by first class post to the address as set out on the Annexe 2 form and received by Oakfield then, as Mr Dye submitted correctly at the last hearing, Oakfield could have relied on Section 7 of the Interpretation Act 1978 as there would be the presumption that the document had arrived. However, that is not what happened here. OGR Stock Denton instead chose to use an unauthorised form of communication and then it seems to me it compounded this mistake by using the wrong DX number. In doing so, it in effect relied on Her Majesty's Court and Tribunal Service staff to remedy its own error and I have no doubt that 9 or perhaps even 9.9 times out of 10, the conscientious staff of Her Majesty's Court and Tribunal Service would indeed remedied the mistake by transferring the documents internally. However, no system is infallible. It seems to me OGR Stock Denton failed to check the document had even arrived and at no stage appeared to have checked to see acknowledgement or asked for a receipt. Had it

chosen hand delivery, it would under Practice Direction 5A to CPR 5 have received a stamped receipt.

22 So whilst I am prepared to amend the judgment to find as an additional fact that the package containing the Annexe 2 declaration was collected by a member of HMCTS staff authorised to collect documents received into DX 44450, I am not prepared to find and I am not satisfied that on the evidence I have seen, that the Annexe 2 statement was indeed returned to Room E16 as required within the seven day period. Therefore, I am also not willing to hold or find as a fact that service was validly refused by Oakfield on account of the documents not being in a language that Oakfield understood. So that is the first reason the new evidence does not change the result.

23 The second reason why the tracking report makes no difference to the outcome of Oakfield's application is that I held as a matter of interpretation of the EOP Regulation itself, this court has no jurisdiction in any event to declare that the EOP is unenforceable. As I said in that judgment, having dealt with Mr Dye's submissions on the facts of whether the document had actually been received, I said this:

> "It also fails as a matter of law. Even if I had been satisfied the document had arrived at court, it seems to me that issues of enforceability are for the court in the member state of origin to decide. This follows from Article 22(3)."

24 In the course of that judgment, I distinguished Moreno de la hija v lee [2019] 1 WLR 175 on which Mr Dye had relied and I held that if Oakfield wished to challenge the enforceability or validity of the EOP, it could only do so in the Regional Court of Poznan, i.e. the EOP issuing court. That is why I rejected the submission made at paragraph 33 of Mr Dye's original skeleton which followed on from his submission of fact that the court should be satisfied that the bundle had arrived. He then submitted in paragraph 33 that if that is accepted as a matter of fact, he submitted that the EOP is invalid and the Polish court's declaration of enforceability makes no difference. I rejected that submission and have no reason to change it now. So even if I were to accept that it is sufficient for the document to have arrived somewhere in the Royal Courts of Justice, then I would have still reached the same conclusion.

25 I do wish to emphasise, however, that my findings in this judgment, as with the previous judgment, are limited to those that I can safely make on the basis of the present evidence. A determination that I am not satisfied that the Annexe 2 statement was returned to E16 is not a finding of this court that it was not returned. I have made orders for inspection of the files held in the Foreign Process Section and for the Senior Master to be alerted to the existence of the letter from the Poznan Regional Court dated 23 October 2019 in which the court there asks questions about how it came to be that the EOP was certified as having been properly served in circumstances where Oakfield were saying that it had objected by returning an Annexe 2 statement. It may be that as a result of those further enquiries, further or other evidence emerges which may assist Oakfield in its attempts to show that the Annexe 2 statement was, in fact, received in E16 and was overlooked. If that evidence emerges, it may well be that that is relevant to the application in Poland. That, however, is not for me to decide. Nothing in this judgment or in my previous judgment should be read as seeking to preclude Oakfield from making further submissions on more or different evidence should it discover it later. I have only been able to make limited positive findings on limited evidence. So that deals with Oakfield's application. I will now deal with the application by the High Court Enforcement Group.

The second application

26 HCEG were added to these proceedings by order of Mr David Pittaway QC on 13 December 2019. The learned judge ordered that the sum of £182,887.72 be preserved intact and not charged or paid away. HCEG did not attend the hearing on 13 January 2020 to challenge that part of the order and it does not appear in front of me today.

27 The effect of my order at the invitation of Mr Dye is simply to move the preserved asset from being in the possession of HCEG to being in the possession of the court office. If at the end of the proceedings in Poland the EOP is upheld, then HCEG will have the opportunity to come to court to argue that it is entitled to be paid its fee before the sum is paid to Biernacki. If on the other hand the result is that the EOP is declared invalid, then again, HCEG will have an opportunity to come to this court and to say that it should pay its fee before the money is returned to Oakfield.

28 In my judgment, it is not appropriate to pre-judge that issue today by allowing HCEG to deduct now any fees that it might be entitled to claim. The purpose of my order remains, as Mr Dye put it, namely to hold the ring pending the resolution of the challenge to the EOP in Poland. So I decline the application by HCEG for permission to withhold any part of the £182,887.72 which it must transfer to the Court Funds Office by the date stipulated.

Conclusion

29 The net result is that both applications fail and my previous order remains unchanged. I will, later today, circulate an approved version of the order for the last hearing. A new order will need to be drawn up in respect of the two applications decided today and I will ask counsel to agree an order in relation to that and supply it to me by email, please

30 That concludes my judgment.
