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PJSC Tatneft v Bogolyubov: Security for costs order against Russian Claimant with assets in Switzerland and Cyprus

July 2019

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In *PJSC Tatneft v Bogolyubov [2019] EWHC 1400 (Comm)* the High Court gave a useful indication as to the readiness of the English Courts to award security for costs against a Russian domiciled claimant, in view of perceived enforcement obstacles in that jurisdiction.

Following the Defendants' application for security of costs against the Claimant, the Court found that there was **a real risk of substantial obstacles to enforcement** in Russia and that it was **just to make an order** for security of costs, despite evidence that the Claimant had assets in Switzerland and Cyprus.

Although applications for security of costs ordinarily have a time estimate of one hour under the CPR, the Court held a two-day hearing in order to determine the application.

Background

The Claimant in this matter is an oil company incorporated in Tartastan, one of the constituent members of the Russian Federation and the Defendants are four Ukrainian businessmen. The substantive dispute between the parties relates to the Defendants' alleged involvement in an oil payment siphoning scheme. However, this judgment concerned an application for security of costs made by the Defendants.

The vast majority of the Claimant's assets were held in Russia, but it also held assets in Switzerland and Cyprus. The Claimant argued that there were no obstacles to enforcement within Russia, and even if it was wrong in that regard, its assets in Switzerland and Cyprus would be sufficient to enable the Defendants to enforce an order against it.

Judgment

An order for security of costs can be made under CPR 25.13 if the Claimant is resident out of the jurisdiction (but not resident in, for example, a Brussel Regulation state) and if the Court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. In this case the Claimant was a Tatarstan company so therefore the Court had jurisdiction to make an order for secuGority for costs. However, as explained by the Court of Appeal in *Nasser*[1], the Court's discretion to make an order must be exercised in a manner which is not discriminatory to Articles 6 and 14 of the European Convention for the Protection of Human Rights.

1 *Nasser v United Bank of Kuwait [2002] 1 WLR 1868*

Accordingly, after determining that an order for security for costs would not stifle the proceedings due to Tatneft's significant funds, the Court had to determine:

(1) Whether there was a **real risk of substantial obstacles to enforcement** by reason of Tatneft's country of residence or the location of its assets (referred to as the *Nasser* condition); and

(2) If so, whether it would be **just to make an order for security of costs**.

Enforcement in Russia

The Court considered a number of factors in relation to enforcing cost orders in Russia and ultimately determined that **there was a real (as opposed to fanciful) risk of there being substantial obstacles** to enforcement in Russia for the following reasons, taken together:

(1) The results of an analysis of publicly available sources of information on the enforcement of recent court decisions and arbitral awards by Russian courts showed that enforcement of English court judgments, arbitral institutions and Ukrainian court judgments had materially declined between 2015 and 2018.

(2) The lack of a relevant bilateral treaty between the UK and Russia requiring the courts of each state to enforce judgments and costs orders made in the other.

(3) The most usual and cogent argument for enforcement in Russia would be on the basis of reciprocity. Given there was not sufficient evidence to prove a presumption of enforcement, there was a risk that it may be necessary to establish reciprocity before the Russian courts on a case by case basis. Given that no party could find a case where an English court had enforced a Russian costs-only judgment there was found to be a risk (which was more than fanciful) that reciprocity might not be found to be established in an attempt to enforce a costs order in Russia.

(4) There is (to the relevant standard) a sufficient risk that a judgment in Russia will not be enforced if it does not relate to a decision based on the merits of the case. An order for security for costs in this matter (where both sides appeared to accept that the Claimant's case was arguable) would not make any determination on the merits.

(5) The Court gave weight to evidence which established (to the relevant standard) that a Russian court might apply a public policy exception to enforcement in an expansive way (and take into account political considerations specific to the jurisdiction). The Defendants gave evidence that the Russian courts would not recognise foreign orders in favour of sanctioned individuals (i.e., the first and third defendants, who are subject to sanctions imposed by the Russian government). Even if a costs order was properly enforced in Russia, and the amount was credited to the relevant Defendants, those sanctions would require the money to be indefinitely frozen within Russia, which the Court considered to be a substantial obstacle to enforcement.

Enforcement in Switzerland and Cyprus

The Claimant sought to argue that even if enforcement was not possible in Russia, because of the existence of assets in Switzerland and Cyprus, it was inappropriate and unnecessary for an order for security for costs. The Defendants argued that such assets provided no real assurance that, at the point of enforcement, these assets represented substantial value which the Defendants could enforce against.

On the facts, rejecting the Claimant's arguments, the Court determined that there was **a real risk that the assets within Switzerland and Cyprus would not be available, or not available in sufficient amounts** if, and when the Defendants were seeking to enforce a costs order. Reference was made to the "*neither fully transparent, nor fully explained*" shareholding arrangements of the Claimant and the suggestion that there was no good reason to doubt that the Claimant would take a course of action available to it in order to diminish the assets which would be available to the Defendants to enforce against. [2]

[2] *PJSC Tatneft v Gennadiy Bogolyubov, Igor Kolomoisky, Alexander Yaroslavsky, Pavel Ovcharenko [2019] EWCH 1400 (Comm)*, para 48

Furthermore the Court rejected that, as a rule, if a non-Convention resident has assets within the relevant zone under the CPR, then in the absence of lack of probity, security will not be ordered. The Claimant indicated that they were willing to give undertakings to the Court in place of security. However, the Court stated:

"if the court considers…that because of the nature of the assets in the zone and the circumstances of the case, there is a real risk that enforcement will have to take place somewhere else where there may be substantial obstacles to enforcement, and the claimant seeks to eliminate that risk by offering undertakings, the court is unlikely to be persuaded not to order security unless ***those undertakings clearly and satisfactorily eliminate the risk****. If they do not, then it will usually, at least in a case in which there is no question of stifling, be preferable to order security, which will provide certainty."*[3]

In these circumstances, the undertakings were not sufficient to eliminate the risk of non-enforcement in Switzerland and Cyprus. Accordingly, the *Nasser* condition was met.

Was it just to make an order for costs?

The Court recognised that **if the *Nasser* condition is satisfied, this does not mean it is automatically just to make an order for security for costs**. The Court must consider all the circumstances of the case. Here, the Court considered submissions that the Claimant was a reputable and solvent organisation, which did not have a history of defaulting on its obligations and such a default would cause significant damage to its commercial reputation.

However, on the facts of this case, the Court determined it was just to make an order for security of costs. It found that in circumstances where the *Nasser* condition is met, and where the Claimant is able to put up security and has not pointed to any other specific prejudice it would suffer in doing so, and where the Defendants would be potentially be prejudiced if security is not put up, it is just to order security for costs.

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3 *PJSC Tatneft v Bogolyubov,* para 51