Neutral Citation Number: [2021] EWHC 3226 (Ch)

Case No: BL-2021-000962

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 1/12/2021

Before:

MASTER CLARK

- -

Between:

THE DEPOSIT GUARANTEE FUND FOR INDIVIDUALS
(as liquidator of National Credit Bank PJSC) **Claimants**

- and -

(1) BANK FRICK & CO AG **Defendant**
(a company incorporated in Liechtenstein)
(2) EASTMOND SALES LLP

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Michael Ryan (instructed by **PCB Byrne LLP**) for the **Claimant**
Andreas Gledhill QC and Luka Krsljanin (instructed by **Mishcon de Reya LLP**) for the **Defendants**

Hearing date: 3 November 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 26 November 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

Application

1. This is my judgment on the application of the first defendant, Bank Frick & Co A.G. ("Frick"), dated 13 October 2021 ("the second application"), which seeks a declaration and directions as to the disposal of its application dated 26 July 2021 ("the first application").

Parties and the claim

2. The claimant, The Deposit Guarantee Fund For Individuals, is the liquidator of PJSC National Credit Bank ("the Bank"), a Ukrainian company. Frick is a company incorporated in Liechtenstein, which, unsurprisingly, trades as a bank.

3. The claim arises out of 6 pledge agreements made with Frick in 2013-2014 ("the pledge agreements"), under which the Bank pledged funds as security for various loans made under agreements between 3 entities incorporated in the UK ("the debtors"), including the second defendant, Eastmond Sales LLP.

4. The claimant's case is the debtors did not carry on any legitimate business. They had been incorporated shortly before obtaining the loans, and their shareholders of record were off-shore entities. The loan monies were, it says, dissipated shortly after being transferred to the account of the debtors.

5. In 2015, the debtors having failed to repay the loans, Frick enforced the pledge agreements, and thereby obtained US$25.8 million held by the Bank in its Frick account.

6. The claimant's case is that the pledge agreements and associated loan agreements were part of a dishonest money laundering scheme instigated by 2 senior managers ("the Employees") at the Bank, for the purpose of extracting assets from and putting them beyond the reach of the Bank's creditors.

7. The claim is brought under ss.423-5 of the Insolvency Act 1986. These provide, so far as relevant:

> "**423 Transactions defrauding creditors.**
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
> …
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
> …
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

424.— Those who may apply for an order under s. 423.

(1) An application for an order under section 423 shall not be made in relation to a transaction except—

(a) in a case where the debtor …is a body corporate which is being wound up or is in administration, by the official receiver, … or the liquidator or administrator of the body corporate or (with the leave of the court) by a victim of the transaction"

8. The reduction in the Bank's assets resulting from Frick's enforcement of the pledge agreements led to insolvency proceedings, in which, in February 2016, the claimant was appointed liquidator under the relevant Ukrainian legislation.

9. By the order dated 29 April 2021 of Deputy Insolvency and Companies Court Judge Passfield, the liquidation was recognised as a foreign main proceeding, and the claimant was recognised as the "foreign representative" under the Cross Border Insolvency Regulations 2006.

10. This claim was commenced on 7 June 2021. Frick acknowledged service on 28 June 2021, stating its intention to contest jurisdiction. The second defendant has not responded to the claim.

11. On 26 July 2021, Frick issued the first application notice. This seeks orders:

(1) staying the claim in favour of arbitration pursuant to s.9 Arbitration Act 1996 (alternatively, the court's inherent jurisdiction), and the arbitration clauses in each of the pledge agreements ("the Stay Application");

alternatively, and "only in the event that the Stay Application is unsuccessful",

(2) striking out the claim under CPR 3.4(2)(a) (no reasonable grounds), or for summary judgment ("the SJ Application"); as to this, the application notice states:

"In advancing this conditional application in the alternative **and only in the event of the Stay Application not succeeding**, the First Defendant does not (and does not intend to) take any substantive step in the proceedings which would affect the Stay Application."
(emphasis added)

(3) for a directions hearing in respect of both applications.

12. Both substantive applications are supported by evidence included in the application notice. The evidence in support of the SJ Application again states:

"This application is not intended as and should not be construed as a substantive step in the proceedings as it is made solely in the alternative to the s.9 application for a stay of proceedings in favour of arbitration."

13. The reference to a "step in the proceedings" is of course a reference to section 9 of the Arbitration Act 1996, which relevantly provides:

> "**9.— Stay of legal proceedings.**
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
> …
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or **after he has taken any step in those proceedings to answer the substantive claim.**"
> (emphasis added)

14. The parties then corresponded as to the directions to be made for the hearing of the applications. Frick asked the claimant to agree that:
    (1) the hearing (and determination) of the SJ Application did not constitute a substantive step in the proceedings, and therefore a submission to the jurisdiction;
    (2) on that basis, the SJ Application be listed for a hearing before the Stay Application.

15. The claimant declined to agree to this proposal. Its position is that determination of the SJ Application would be a step in the proceedings.

16. Frick therefore issued its second application notice. This seeks (so far as relevant)
    (1) a declaration that, in seeking case management directions for the determination of the SJ Application before the Stay Application, Frick shall not be deemed to have taken a step in the proceedings, or accordingly to have lost its right to apply for a stay;
    (2) if a declaration is made, an order for the listing of the SJ Application.

17. Although Frick's counsel submitted that it has made it "crystal clear" that the SJ Application seeks only a conditional order, its position has not been consistent.

18. Thus, the draft order attached to the first application notice includes:

> "[Alternatively: the claim is struck out pursuant to CPR 3.4(2)(a)/summary judgment be entered in favour of Bank Frick and the claim dismissed]"

19. At para 6 of the evidence section of the second application notice, it is stated that if the SJ Application were successful, the claim would be struck out in its entirety, obviating the need for any other issues to be addressed. Similarly, para 7 states that if the SJ Application were resolved in Frick's favour it would bring the proceedings to an end.

20. Frick's counsel submitted, and I accept, the SJ Application itself seeks only a conditional order. If, therefore, Frick succeeded, the resultant order would have to be expressed as taking effect only if the Stay Application was unsuccessful. It might be

the case that this would have the practical effect of bringing the claim to an end: Frick would no longer have any interest in pursuing the Stay Application, and the claimant no longer have any interest in resisting it. If, however, the claimant wished to appeal the result of the SJ Application, it might seek the determination of the Stay Application.

Issues in the application

21. In these circumstances, the two issues which arise are:
    (1) whether by pursuing the determination of the SJ Application before the determination of the Stay Application, Frick is taking a step in the proceedings to answer the substantive claim;
    (2) if not, whether as a matter of case management the SJ Application should be listed before the Stay Application.

"Step in the proceedings"

22. Both sides relied upon *Capital Trust Investments Ltd v Radio Design TJ AB* [2002] EWCA Civ 135, [2002] CLC 787 in support of their positions.

23. That decision therefore requires careful consideration. In it the claimant had applied for (and bought) shares in the defendant, by signing a subscription application form which it had submitted to the defendant's placement manager. The form provided that it was governed by Swedish law, and that any dispute was to be settled exclusively by arbitration in Stockholm. The claimant claimed that it had been induced to buy the shares by fraudulent or negligent representations.

24. The defendant applied for a stay of proceedings under s.9(4) of the Arbitration Act 1996, relying upon a combined choice of law/arbitration clause in the application form. This was supported by evidence of Swedish arbitration law as to the effect of the application form. When the stay application was still pending, the defendant applied for summary judgment. That application form stated:

> "The [defendant] has applied … for a stay in the proceedings against it on the ground that the issues in the claim against it are governed by an arbitration agreement and it wishes those issues to be determined by arbitration in Sweden. **In the event that its application for a stay is unsuccessful**, the [defendant] applies for summary judgment …"
> (emphasis added)

This application was also based on Swedish law: that it governed the claim, and that Swedish law gives immunity to a company (as opposed to directors or others) for misstatements in connection with an issue of its shares.

25. A common issue to both applications therefore was whether the choice of law/arbitration clause of the application form applied as between the defendant and the claimant. The parties agreed that both applications be heard together and they were. The master gave a reserved judgment on the stay application first. Immediately after he delivered it on 27 June 2000, he was asked for permission to appeal which he granted. He then asked the parties whether they wanted a judgment on the strike out. They said they did, the matter having been argued, and there being a possibility of the stay decision being upset on appeal. So the master gave a reserved judgment on the strike out on 31 July 2000.

26. Having expressed his views on the strike out, the master made an order striking out the claim, which of course he had no power to do, because he had stayed the claim. On appeal, the parties agreed that that order could not stand.

27. On appeal to Jacob J, he held that a party who has initiated an application for a stay pending an arbitration has not taken a 'step' in the proceedings within the meaning of s.9(3) of the Arbitration Act 1996 if they, either simultaneously or subsequently, invoke or accept the court's jurisdiction, provided they do so only conditionally on their stay application failing.

28. On a second appeal on this point, the Court of Appeal approved the following principles:
    (1) In order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration: *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [l9781 1 Lloyd's Rep 357: [56];
    (2) Two requirements must be satisfied. First, the conduct of the applicant [for a stay] must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court: Mustill & Boyd, *Commercial Arbitration* (2nd edn, 1989): [57];
    (3) An act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that they intend to seek a stay: Merkin, *Arbitration Law*: [57].

29. Applying these principles, the Court of Appeal held that:
    (1) the defendant did not take a step in the proceedings when it made its application for summary judgment on the expressly conditional basis;
    (2) it did not do so at the hearing of the application, which was on the same conditional basis;
    (3) that position did not change when the parties asked the master to deliver a judgment on the summary judgment application, because they only did so in case an appeal against the stay succeeded i.e. if the stay was refused and the proceedings continued.

30. The inexorable conclusion which follows from this decision (and which was ultimately common ground between the parties in this claim) is that the following are not a “step in the proceedings”:
    (1) an application for strike out or summary judgment which is made expressly conditionally on a Stay Application not succeeding;
    (2) seeking a hearing and making of submissions at the hearing of such an application.

31. The claimant’s counsel submitted however, that a defendant could only avoid making an election to waive its objection to the jurisdiction, if it did not seek the determination of the summary judgment application before the stay application. This, he submitted, required the stay application to be determined before the summary judgment application. Thus, he relied on the fact that in *Capital Trust*, the master’s order on the summary judgment application was discharged.

32. As to this, as appears from Jacob J's judgment (at [1]), the master's order was discharged, because it struck out the claim when it had been stayed: the two orders were inconsistent. However, the Court of Appeal held that the defendant did not take a step in the proceedings when it (together with the claimant) invited the master to deliver judgment on the summary judgment application. The master's judgment must, in my view, have been requested on the same basis as that of the application, namely, that it would only result in an order of the court if the stay application failed. Indeed, it was sought on the conditional basis that the claimant's appeal against the stay order was successful.

33. As noted, the SJ Application is expressly conditional in the same way as that in *Capital Trust* was. The determination of the SJ Application would not therefore result in an order striking out or granting summary judgment against the claim. Whether that order was to be made is only be determined after the determination of the Stay Application. The fact that as a practical matter, the outcome of the Stay Application might be academic to the claim as a whole makes no difference to this conclusion.

34. If it were otherwise, then, on the claimant's case, the court could hear the SJ Application, with Frick making its submissions on a conditional basis, but the court's determination of the application by delivering judgment (on the same conditional basis) would result in submission to the jurisdiction. This is a distinction with a theological flavour, which in my judgment cannot be justified in principle.

35. I conclude therefore that by seeking the determination of its conditional application on that conditional basis, Frick would not, in my judgment, be taking a step in the proceedings for the purpose of s.3 of the 1996 Act.

Case management

36. It remains to consider whether as a matter of case management, the SJ Application should be listed before the Stay Application.

37. Whichever order the applications are heard in, there is a risk of unnecessarily incurred costs:
    (1) If the Stay Application is heard first and fails, then whether those costs have been unnecessarily incurred will depend on the outcome of the SJ Application: if the SJ Application succeeds, then the costs of the Stay Application will have been unnecessarily incurred; if the SJ Application fails, those costs will not have been unnecessarily incurred;
    (2) If the SJ Application is heard first and fails, then if the Stay Application succeeds, then, those costs will have been unnecessarily incurred (but not if the Stay Application fails);

    On the other hand,

    (3) If the Stay Application is heard first and succeeds, it will not be necessary to hear the SJ Application;
    (4) If the SJ Application is heard first and succeeds, then it may not be necessary to hear the Stay Application.

Complexity and length of SJ Application

38. Frick's counsel submitted that the SJ Application will be a significantly simpler application than the Stay Application. In doing so, he put the merits of the SJ Application at the forefront of his submissions, making an unspoken invitation to conclude that the SJ Application was bound to succeed. This confidence in its merits does not however extend to abandoning the Stay Application.

39. Frick's counsel made the following points about the claim, all of which he submitted could be determined shortly, and were issues of English law. As will be seen, the latter is not correct.

40. First, he said, a claim under IA86 s.423 is only maintainable if the Bank entered into the pledge agreements with Frick for the purpose (in broad summary) of putting assets beyond the reach of its (the Bank's) creditors, or prejudicing their claims against the Bank: see s.423(3). The particulars of claim allege that:

    (1) the Bank effected the pledge agreements "under the direction and control" of the Employees (§51);
    (2) the Employees so directed the Bank "for the sole or substantial purpose of putting assets beyond the reach of the Bank's customers and creditors" (§56); and
    (3) the Employees' "acts and state of mind fall to be attributed to the Bank for this purpose" (§51).

41. He submitted that the allegation as to the Employees' "sole or substantial purpose" is inconsistent with the rest of the case pleaded by the claimant. The gist of its case is, he said, that the Employees stole money from the bank they controlled, by causing it to make payments (via Frick) to shell companies that were mere fronts for them. It was, he submitted, incoherent to suggest that the officers of a company who steal from it do so for the principal purpose of frustrating the claims of its creditors: they do so for the purpose of lining their own pockets.

42. As to this, the claimant's counsel submitted that as pleaded, the alleged scheme operated by the Employees stealing customers' money from the Bank. Its purpose was, therefore, he submitted, to prejudice the claims of customers/creditors by stealing their money.

43. My task is not to form a view on the merits of these arguments, but I agree with Frick that the point appears to be a relatively short one.

44. Secondly, Frick's counsel submitted that the claimant's suggestion that the Employees' alleged "purpose" falls to be "attributed to the Bank" contradicts the position it took in the recent *Zhevago* case[1], where this issue also arose. He referred to the Chancellor's summary of the evidence of the claimant's Ukrainian law expert (Professor Kuznetsova) at §42:

> "if the management of a corporate entity are acting wrongfully and contrary to its interest, the knowledge of the individuals in question will not be attributed to the corporate entity. To attribute to the Bank the knowledge of the officials who had

[1] *PJSC Bank Finance & Credit v Zhevago* [2021] EWHC 2522 (Ch)

defrauded the Bank would be an unjust result that a Ukrainian court could not reach".

45. Frick's counsel submitted that if (as the claimant told the Chancellor) that is so, then its case on attribution in this claim is "false".

46. In response, the claimant's counsel submitted that the issue in *Zhevago* was whether the claims brought by a different Ukrainian bank were time-barred, and the issue as to attribution arose in that materially different context: whether for limitation purposes the knowledge of fraudulent actors was to be attributed to a company. Under English law, whether or not the knowledge of any individual is to be attributed to a corporate entity depends on the purpose of the attribution: *Bilta v Nazir* [2015] UKSC 23 [2016] A.C. 1 at [39] –[41], following *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

47. I accept the claimant's counsel's submission that under English law the question of attribution is context dependent, and not for me to decide in this application. I also note that if, as Frick appear to assert, the relevant law is Ukrainian law, it will need to set out and adduce evidence of Ukrainian law, and this may be a substantial undertaking. I cannot conclude that this will be a short point.

48. Finally, Frick's counsel relied upon the principle (which was common ground) that an English court only grants relief in respect of a claim under IA86 s.423 if there is "a sufficient connection" between the claim and this jurisdiction: see generally *Orexim Trading Ltd. v. Mahavir Port & Terminal Pte Ltd* [2018] 1 WLR 4847 (C.A.), at [55]-[60].

49. As to this, he submitted that the connection in this case was plainly insufficient, and the only connection that the facts appear to have with this jurisdiction at all is that one of the three borrower vehicles used by the Employees (i.e. Eastmond) was incorporated in England:
    (1) the pledge agreements were transactions between parties in Ukraine and Liechtenstein, and were governed by Liechtenstein law;
    (2) the pledges contain a Swiss arbitration clause, in the following terms: "any dispute, controversy or claim which may arise under or in connection with this Pledge Agreement … shall be settled by the Swiss Chambers' Court of Arbitration and Mediation";
    (3) even on the claimant's own case, Eastmond was a pure conduit: "the monies … were immediately paid out to accounts in Latvia" (§46.3 of the PoC).

50. As to this, as the claimant's counsel referred me to the guidance of Sir Donald Nicholls V.C. in *Re Paramount Airways (No. 2)* [1993] Ch 223 (CA) at 240:

> "Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign

law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

51. As he submitted, I have not seen the parties' evidence on this issue, and I cannot form a view on it, or the amount of time it will take in the application.

Complexity and length of Stay Application

52. By contrast, Frick's counsel submitted that the issues in the Stay Application were of greater difficulty and complexity, making it a longer and more costly application. Those issues would, he said, be:
    (1) whether the fact that the claimant was not a party to arbitration agreements means that the claim is outside them;
    (2) whether the arbitration agreements cover claims under s.423, as a matter of construction i.e. is a s.423 claim a "dispute, controversy or claim … under or in connection with this Pledge Agreement"?;
    (3) whether the subject matter of the dispute is arbitrable at all, as a matter of public policy, given that IA86 s.423 is a statutory remedy for the protection of creditors.

53. He submitted that issue (1) gives rise to a difficult point on which there is no binding English authority, and which Foxton J. expressly left open in *Riverrock Securities Ltd. v. JSC International Bank of St. Petersburg* [2020] EWHC 2483 (Comm) [51]-[54].

54. As to this, in my judgment, as a point of law, this point would not require evidence and, indeed could be determined as a preliminary issue in the Stay Application.

55. Issues (2) and (3) are, Frick's counsel said, both issues of Swiss law, as both the governing law of the arbitration agreements, and the seat of the arbitration. If the parties disagree about Swiss law, or about how it falls to be applied to those issues, the court will then have to determine whether to give directions to enable that dispute to be tried (e.g. for Swiss law evidence, and cross-examination), or to stay the proceedings, to enable the arbitral tribunal to decide it for itself: see CPR rule 62.8(3).

56. As to this, as the claimant's counsel submitted, Frick has not served any evidence of Swiss law and in its application notice, does not identify any principles of Swiss law on which it relies. Furthermore, Frick's position at the hearing was that it was not going to serve any evidence in support of the Stay Application. In those circumstances, the court may be able to proceed on the assumption that the foreign law was the same as English law[2]. In addition, if evidence of Swiss law is adduced, I cannot assume at this stage that the parties will be unable to agree the relevant principles.

57. On this necessarily superficial overview, I cannot conclude that the Stay Application will necessarily be more complex and time consuming than the SJ Application. It is also clear, that unlike *Capital Trust*, there is no common issue which favours the two applications being heard together.

[2] See *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011

58. Finally, since the SJ Application is expressly predicated on the outcome of the Stay Application, as a matter of logic, that should be heard first, unless there are clear countervailing case management considerations to the contrary. I am not satisfied that there are such considerations.

Conclusion

59. For the reasons set out above, therefore, I will grant the declaration sought in para 1 of the application notice, but, as a matter of case management, I refuse to list the SJ Application until after the determination of the Stay Application.