Neutral Citation Number: [2021] EWHC 164 (Comm)

IN THE HIGH COURT OF JUSTICE **CL-2016-000095**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Date: 3 February 2021

BEFORE:

DANIEL TOLEDANO Q.C.

(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between:

NATIONAL BANK TRUST
(a company incorporated in Russia) **Claimant**

- and -

(1) ILYA YUROV
(2) SERGEY BELYAEV
(3) NIKOLAY FETISOV
(4) NATALIYA YUROVA
(5) IRINA BELYAEVA
(6) ELENA PISCHULINA **Defendants**

Mr Anton Dudnikov (instructed by **Steptoe & Johnson UK LLP**) for the **Claimant**
The **Second Defendant** appeared in person

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Hearing Date: Friday 22 January 2021

JUDGMENT

Introduction

1. The court is concerned with an application by the Second Defendant ("Mr Belyaev") dated 14 September 2020 to vary a post-judgment worldwide freezing order made by Bryan J on 27 February 2020. The WFO has already been varied by order of Teare J dated 12 June 2020 (the freezing order as varied is referred to in this judgment as the "WFO"). The WFO was made following a 9-week fraud trial between the parties which resulted in a judgment given by Bryan J on 23 January 2020 ("the Judgment"). Mr Belyaev's application also seeks a stay of execution of the Judgment.

2. In the Judgment, Bryan J found Mr Belyaev, together with Mr Yurov and Mr Fetisov, liable to the Claimant in damages exceeding US$800m in connection with a series of dishonest transactions which they had caused the Claimant to enter into during their stewardship of the Claimant, prior to its collapse in December 2014. The permission to appeal applications made by Messrs Yurov, Belyaev and Fetisov have recently been dismissed by Flaux LJ, who described the proposed appeal as "*totally without merit*". Mr Belyaev has not paid anything in satisfaction of the judgment debt over the last year (although the Claimant has recovered certain funds formerly held in the Vestra Account of the Fifth Defendant ("Mrs Belyaeva", the wife of Mr Belyaev), referred to in paragraph 44 below). He is, instead, resisting the Claimant's enforcement proceedings in the USA and Finland, where he is said to own valuable properties.

3. Although he was represented by a city law firm during the trial, as well as by leading and junior counsel, this application was pursued by Mr Belyaev acting in person. The orders he seeks are as follows:

    a. **Legal expenses**: Mr Belyaev asks for the reinstatement in the WFO of a legal expenses allowance.

    b. **Permission to sell frozen assets**:

        i. Mr Belyaev wishes to sell what he refers to as his 50% interest in certain assets located in the USA and to transfer the proceeds into his

account in the USA to fund his living expenses. The assets are a Mercedes-Benz G550 (2015), a Ford F-150 (2013) and a Porsche 911 (2014).

ii. Mr Belyaev wishes to sell what he refers to as his 50% interest in a house located in Connecticut, USA, so as to use the proceeds to buy another house in Texas, USA, where he wishes to live. Although not contained in the Application Notice itself, Mr Belyaev seeks permission to sell a property in South Carolina as well.

c. **Stay of execution of the Judgment**: Mr Belyaev asks for the execution of the Judgment in the USA, Switzerland and Finland to be stayed. Originally, the stay was to last until an application for permission to appeal against the Judgment was determined and, if granted, until the appeal was decided. Mr Belyaev now asks for the stay to last for a period of time to enable him to bring a claim against the Claimant alleging that the Judgment was procured by fraud.

d. **Order relating to Mrs Belyaeva**: Mr Belyaev asks for the WFO to be discharged in relation to the assets referred to in paragraph 9 thereof (the so called 38%) with the result, so it is contended, that Mrs Belyaeva would no longer be subject to the WFO.

Background to the application

4. As I have said above, the Judgment was given on 23 January 2020. On the same day, the Court made an order entering judgment for the Claimant against the First, Second and Third Defendants in agreed principal amounts of US$408m, RUB27bn and €14.7m.

5. On 27 February 2020, a hearing of consequential matters took place, at which the Belyaevs were represented by solicitors and by leading counsel. Bryan J made two

orders at that hearing, one dealt with consequential matters (such as interest, costs and declaratory relief) and the other was the WFO.

6. Mr Belyaev was permitted by paragraph 14 of the WFO to spend (a) £17,000 a month on ordinary living expenses for the time being on the basis that the extent of the allowance on an ongoing basis would be the subject of future determination by the Court; and (b) a reasonable sum on legal advice and representation. Bryan J also ordered Mr Belyaev to serve a witness statement stating what his actual financial requirements were going forward so that the court was in a position to consider whether the figure of £17,000 remained appropriate or whether it should be amended (consequentials judgment at paragraph 101).

7. This was in contrast to the position of Messrs Yurov and Fetisov, who were prohibited from using their frozen assets to pay living or legal expenses (paragraph 12 of the WFO). Bryan J (consequentials judgment at paras 82-98) concluded that Messrs Yurov and Fetisov bore the burden of persuasion that there were no other assets available to them to meet their expenses and that, having produced no relevant evidence, they had failed to discharge that burden. He also stated that he was satisfied that there was every prospect of both of these defendants being able to call on assets belonging to their wives to fund living and legal expenses, with the result that they were not entitled to allowances to meet such expenses.

8. Following the 27 February 2020 hearing, Mr Belyaev's solicitors ceased acting for him.

9. On 5 June 2020 a hearing took place before Cockerill J for the purpose of dealing with the moneys in Mrs Belyaeva's Vestra Account. 62% of the £1.4m remaining in that account (i.e. about £900,000) belonged to Mrs Belyaeva and had already been transferred to her prior to the hearing. So far as the balance of 38% was concerned (i.e. about £500,000), the Court held that Mr Belyaev was the beneficial owner of it and that the Claimant was therefore entitled to enforce against it.

10. On 12 June 2020 a further hearing took place concerning the living and legal expenses of Mr Belyaev. Teare J removed the allowance for legal expenses on the basis that

Mr Belyaev was no longer instructing solicitors (with a liberty for Mr Belyaev to apply if he were able to demonstrate a material change of circumstances, such as the re-instruction of solicitors): paragraphs 1-2 of the order; paragraphs 2-4 of the judgment. The Claimant's application to remove the living expenses exception was dismissed, but the allowance was reduced to a monthly sum of £8,000: paragraph 4 of the order; paragraphs 7-9 of the judgment.

11. I am told that the Claimant did not rely, at either of the hearings on 27 February or 12 June, on the allegation that Mr Belyaev had an undisclosed asset worth about US$3.8 which is central to the case made by the Claimant on the present application. It follows that the Court has not ruled on the impact of that allegation which I will consider below.

12. Mr Belyaev's application for permission to appeal, and those of Messrs Yurov and Fetisov, were dismissed by Order of the Court of Appeal dated 6 January 2021.

13. Having set out the background, I will now turn to Mr Belyaev's application.

Applications to vary the WFO: legal expenses and permission to sell frozen assets

14. I will first describe the relevant legal principles and how, in my view, they apply in the present case as regards both the legal expenses exception and the permission to sell frozen assets.

15. I accept Mr Dudnikov's submission that two principles are of particular importance.

16. First, that in a post-judgment context, the policy of the law weighs heavily in favour of the enforcement of judgments. This is clear from the decision of the CA in **Emmott v Michael Wilson & Partners Ltd** [2019] 4 WLR 53, at paragraphs 44 and 53-56 (Gross LJ). I do not lose sight of the fact that Mr Belyaev seeks a stay of execution of the Judgment but, for reasons which I will describe below, there is no basis for a stay of execution to be granted. The court should therefore strive to facilitate enforcement so far as is possible.

17. Secondly, it is well-established that where a defendant seeks access to frozen assets to fund its legal or living expenses, it bears the 'burden of persuasion' that no other assets are available for that purpose: **Serious Fraud Office v X** [2005] EWCA Civ 1564 at paragraphs 38, 43 and 46-47 (Sir Anthony Clarke MR); **Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd** [2015] EWHC 2748 (Comm) at paragraphs 36-46 (Males J). The authorities are also described in detail by Bryan J in his consequentials judgment in the present case which I have already referred to above (see paragraphs 73-81 of that judgment). In view of the fact that the principles have already been described in detail by Bryan J in this very case, I will not set them out again in this judgment.

18. I mention, by way of summary, that it emerges from the authorities that (a) a defendant must put the facts fully and fairly before the court; (b) judges are entitled to have a healthy scepticism about unsupported assertions concerning a lack of assets; (c) it is relevant to consider not only the defendant's assets, but also the assets of others who may be willing to assist the defendant; and (d) ultimately the court is required to make an assessment of the overall justice of the case.

19. In addition, I should also refer to **North of England Coachworks Ltd v Khan** [2020] EWHC 1972 (Lambert J) which is a recent example of a case where the court concluded that the burden of persuasion was not discharged because of a real prospect of alternative funding, in particular, from the wife of the first defendant, who was also herself a defendant.

20. So far as the burden of persuasion in the present case, the Claimant submits that there are a number of reasons why Mr Belyaev is unable to discharge the burden of persuasion.

21. The Claimant relies first on evidence of undisclosed assets. In particular, the bank alleges that there is evidence of a gun collection located in Connecticut worth about US$3.8m which Mr Belyaev did not disclose when the WFO was continued post judgment (or indeed when it was originally made). The Claimant relies on disclosures made about this gun collection by the Swiss Prosecutor in the course of Swiss criminal proceedings. Mr Dudnikov took the court at the hearing to a chart

produced by the Swiss Prosecutor which shows what appear to be a series of transfers made by Mr Belyaev to Connecticut Shotgun (12 in total) in the period from February 2013 to May 2015. Although Mr Belyaev had referred in his asset disclosures to a shotgun collection in Russia worth about US$150,000, he did not refer to this Connecticut shotgun collection.

22. By letter dated 8 October 2020, the Claimant's solicitors asked Mr Belyaev to explain the position but he did not respond. The Claimant referred to this matter again in its evidence in response to this application. Mr Belyaev replied to this evidence but did not deal with the allegations concerning a valuable gun collection in Connecticut and he again failed to do so in a further witness statement served on 18 January 2021 (in which he said instead that he could not comment on it because it related to the Swiss criminal investigation, which assertion was not properly explained or supported).

23. In his submissions at the hearing, Mr Belyaev sought to cast doubt on the reliability of the Swiss Prosecutor's chart and said it was part and parcel of a "*throw away theory*". However, I am unable to accept this submission. It seems to me that, had Mr Belyaev had a legitimate explanation for the Connecticut gun collection and his failure to refer to it in his asset disclosures, he would have given one either in correspondence or in his evidence. As I have described, he was afforded plenty of opportunity to do so and it was incumbent upon him to take these opportunities in light of the applications he had chosen to make. In the absence of evidence from him or reasoned explanation concerning the Connecticut gun collection, I must conclude that there is a real possibility that Mr Belyaev owns an undisclosed asset worth about US$3.8m, such that he cannot begin to discharge the burden of persuasion for this reason alone.

24. Next, the Claimant submits that, although Teare J's order removed Mr Belyaev's legal expenses allowance in its entirety, that has not prevented Mr Belyaev from instructing, and procuring significant funding for, lawyers in the US and Finland, as part of his ongoing efforts to resist enforcement. Mr Belyaev accepts in his evidence that he has spent substantial sums in legal fees in these jurisdictions and claims that these amounts have been funded by unidentified third parties. He has not disclosed the terms of such funding arrangements although he says that "*there is no formal liability on my side in relation to the third parties' deposits*", which would seem to mean that

they are not ordinary commercial arrangements. Mr Belyaev does not suggest that any of the third parties in question would not be prepared to continue funding his legal representation. Nor is there any evidence from Mr Belyaev as to the means of such third parties or their ability to continue funding Mr Belyaev's legal costs. In my judgment, such matters reinforce the conclusion that Mr Belyaev has failed to discharge the burden of persuasion.

25. Finally, the Claimant relies on the position of Mrs Belyaeva. Both Mr Belyaev and Mrs Belyaeva have accepted in evidence in these proceedings that the assets she has accumulated during their marriage derive largely from Mr Belyaev's income during his employment by the Claimant. Mrs Belyaeva's assets include various properties (wholly owned or owned as to 50%) and other assets (such as a half-share in a boat). Further, on 5 March 2020, about £900,000 was released to Mrs Belyaeva from her Vestra Account.

26. At the hearing before Teare J in June 2020, Mrs Belyaeva gave a witness statement explaining that she would not be willing to fund her husband's expenses. However, as the Claimant has pointed out, since the June 2020 hearing (a) Mr Belyaev has incurred legal costs in the US and Finland, funded by unidentified third parties which might have included his wife and (b) there has been no further evidence from Mrs Belyaeva.

27. In all the circumstances, I am satisfied on the evidence that there is at least a real prospect that Mrs Belyaeva will fund her husband's living expenses and any legal expenses that he may incur. In my view, based on the evidence before the court, she has the means to do so and there is reason to think that she would do so if necessary.

28. Notwithstanding the force of the matters I have addressed above, Mr Belyaev argued in his submissions that the court should not reach a conclusion adverse to him on the burden of persuasion on the basis that the Teare J had already reached a conclusion in his favour on this point in his judgment of 12 June 2020. I do not accept this submission. Teare J dismissed the Claimant's application to remove the living expenses exception but substantially reduced it. He also permitted Mr Belyaev to use an available cash balance to meet his living expenses. Teare J was not asked to decide whether the burden of persuasion was discharged as regards the specific assets

that Mr Belyaev now wishes to sell. I must therefore address that issue for the first time. Moreover, it seems to me that the circumstances and evidence as at the date of this hearing are not the same as those at the earlier hearing. In particular, there is now evidence before the court of an undisclosed asset with a value of about US$3.8m.

29. Overall, I have reached the clear conclusion that Mr Belyaev has failed to discharge the burden of persuasion that no other assets are available whether to fund legal or living expenses. On the contrary, I conclude that the evidence discloses a real prospect of him being able to procure funding to meet his needs as regards both legal and living expenses. This means that I reject Mr Belyaev's submission that, without variations to the WFO, he would not be able to defend himself in enforcement proceedings in various jurisdictions.

30. These conclusions are enough to mean that I should dismiss the application for variations to the WFO concerning the legal expenses exception and the permission to sell assets. There are, however, some additional points that I should record.

31. So far as the application for a legal expenses exception is concerned, Mr Belyaev's main reason for seeking this exception was so that he could defend the enforcement processes in the USA, Finland and elsewhere. There is an obvious tension between the post judgment policy in favour of enforcement that I have already referred to, on the one hand, and the grant of a legal expenses exception for the purposes of facilitating the resistance of enforcement, on the other hand. Whilst there may be cases in which it would nonetheless be appropriate to grant a legal expenses exception even in such circumstances, I do not consider that the present case is one of them bearing in mind the scale and seriousness of the wrongdoing on the part of Mr Belyaev found by Bryan J in the Judgment and the other matters that I have already referred to above.

32. So far as the application for permission to sell assets is concerned, I am satisfied that there are further reasons why such permission should not be granted in addition to Mr Belyaev's failure to discharge the burden of persuasion.

33. First, it would be futile to grant permission to sell Mr Belyaev's 50% interest in the Connecticut property because, following the recognition of the Judgment by the

Connecticut court, the Claimant enjoys a judgment lien in respect of the property, which means it cannot be sold unless the Claimant consents or the Connecticut court sets aside the lien. I accept the Claimant's submission that there is therefore no practical utility in the order sought.

34. Secondly, I am concerned about the prospect of Mr Belyaev being allowed to use the proceeds of sale of his 50% interest in the Connecticut property to fund the purchase of a property in Texas where he claims to have an offer of employment. There are unanswered questions about this proposal such as (a) why a property in Texas could not be rented instead of purchased outright and (b) why a property in Texas could not be purchased from Mrs Belyaeva's 50% interest, with Mr Belyaev's share of the net proceeds of sale being paid to the Claimant in part-satisfaction of the Judgment debt. There is a real risk that, by permitting the sale of the Connecticut property, the court would undermine the Claimant's enforcement efforts to date and force the Claimant to start those efforts again in Texas. This result would cut across the policy in favour of enforcement that I have already mentioned. The Claimant also made submissions about the reliability of Mr Belyaev's job offer in Texas, but I do not consider that I need to reach any conclusions about that for the purpose of disposing of this application.

35. Thirdly, the position is not materially different as regards the South Carolina property. Although the Claimant does not yet have a judgment lien in South Carolina, an application to enforce the Judgment, and to register a lien, was made on 20 November 2020. I therefore accept the Claimant's submission that it would not be appropriate to vary the WFO so as to grant permission to sell this property.

36. Fourthly, the Claimant submits that Mr Belyaev is falsely claiming that the three vehicles are owned jointly by him and his wife whereas he previously stated that they were his alone. I do not consider that I need to make any findings about this in order to decide the present application.

37. Taking all of the above considerations into account, I conclude that it would not be in the interests of justice to vary the WFO in the respects sought and I therefore decline to do so.

Application for a Stay of Execution of the Judgment

38. As I have indicated above, the stay of execution in USA, Switzerland and Finland was originally applied for until permission to appeal had been determined and any appeal heard. That application has fallen away but Mr Belyaev has said that he wishes to seek a stay for three months to give him time to prepare a claim alleging that the Judgment was obtained by fraud. The fraud is said to include an allegation that the Claimant deliberately failed to disclose 150,000 documents to the Defendants.

39. The principles relating to the grant of a stay of execution were described by Bryan J in his judgment in **Assetco Plc v Grant Thornton UK LLP** [2019] EWHC 592 (Comm) at paragraphs 56-57. The principles set out in those paragraphs relate to the grant of a stay of execution pending appeal. The position in the present case is different because the application for permission to appeal has already been rejected and the stay is therefore sought pending a fresh action which has not yet been brought. In these circumstances, the burden on a defendant seeking a stay is undoubtedly even greater. Ultimately, however, the proper approach no doubt remains what order will best serve the interests of justice.

40. I take into account that Mr Belyaev did not apply for a general stay of execution either from Bryan J or in his Appellant's Notice. I also take into account that the Claimant has already pursued enforcement proceedings which would be disrupted and prejudiced if a stay was now granted.

41. Moreover, Mr Belyaev wrote to the Court of Appeal in September 2020 asking it to take into account fresh evidence in support of his application for permission to appeal. The application to adduce fresh evidence was dismissed by Flaux LJ in paragraph 9 of his Order where he stated that "*the evidence comes nowhere near satisfying the principles set out in Ladd v Marshall…*". Mr Belyaev said in his evidence for the present application that he was planning to prepare a letter to the Court of Appeal to bring to its attention the further matters that he now wishes to include in a fraud claim, including the allegation of failure to disclosure thousands of documents. It is not clear to me whether Mr Belyaev sent such a letter to the Court of Appeal.

However, the position would seem to be that either (a) he did write to the Court of Appeal about the further matters and the Court of Appeal considered them as part of its paragraph 9 ruling or (b) he did not write to the Court of Appeal about the further matters, in which case he failed to do the very thing he said in his evidence that he planned to do. Either way, this tells against the imposition of a stay of execution.

42. The other matter that I should mention is that, in support of his fraud allegations, Mr Belyaev sought to rely on the contents of what I am told are privileged communications, including between the Claimant's solicitor and certain third parties. The Claimant has made it clear to Mr Belyaev in correspondence that it does not waive privilege in this material and that he is not permitted to use it. It is of course of the utmost importance that Mr Belyaev does not rely on material that is privileged. I do not think that I need to say more about this save that to direct, as requested by the Claimant, that copies of the current versions of Mr Belyaev's 9th and 10th witness statements (and the Exhibit to the 10th witness statement), as well as Mr Belyaev's skeleton argument, are not to be made available from the court records to anyone, whether pursuant to CPR 5.4B, CPR 5.4C, or otherwise. I will also direct that those witness statements (and the Exhibit) and the skeleton argument may be made available to others if, prior to their supply, they have been edited so as to remove all material alleged by the Claimant to be privileged.

43. Taking into account all of the matters I have addressed above, I dismiss the application for a stay of execution. In my view, the interests of justice would not be served by a stay. Whether Mr Belyaev chooses to bring a claim in fraud in due course is a matter for him, but I can see no possible justification for staying execution of the Judgment in the current circumstances.

Order relating to Mrs Belyaeva

44. The only paragraph of the WFO which relates to Mrs Belyaeva is paragraph 9. That paragraph restrained Mrs Belyaeva from disposing of, dealing with or diminishing the value of 38% of the bonds/funds remaining in the Vestra Account. As I have said above, Cockerill J has declared that Mr Belyaev was the beneficial owner of this 38% and that the Claimant is entitled to enforce against it. At the same time, Cockerill J

dismissed Mrs Belyaeva's application to vary and/or discharge the WFO so far as it concerned her (see Order dated 16 June 2020, paragraph 3). This application was dismissed on the basis that it was premised on Mrs Belyaeva being the beneficial owner of the 38%, which premise was rejected.

45. Mrs Belyaeva has not brought the application on this occasion; instead Mr Belyaev has done so. However, I cannot see any basis on which he should be able to obtain an order that Cockerill J refused to grant to Mrs Belyaeva.

46. I also do not discern any obvious prejudice to Mrs Belyaeva as regards the WFO. Mr Belyaev suggested that the prejudice lay in the fact that the Claimant could tell foreign courts in the context of enforcement that Mrs Belyaeva was also subject to the WFO. But those courts would obviously also need to be told that the only paragraph of the WFO relevant to Mrs Belyaeva was paragraph 9, that the 38% described therein had been held by the court to be beneficially owned by Mr Belyaev and that the relevant funds had already been paid over to the Claimant save as regards any part of them used up for living expenses.

47. Accordingly, I refuse the application to discharge the WFO as regards paragraph 9 thereof or as regards Mrs Belyaeva.