Neutral Citation Number: [2024] EWHC 834 (Comm)

Case No: CL-2024-000184

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

The Rolls Building
7 Rolls Buildings
Fetter Ln
London EC4A 1NL

Date: Tuesday, 26th March 2024

**Before**:

**HIS HONOUR JUDGE PELLING KC**
**(sitting as a Judge of the High Court)**

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**Between:**

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|---|---|
| **BARCLAYS BANK PLC** | **Claimant / Applicant** |
| **- and -** | |
| **(1) PJSC SOVCOMBANK**<br>**(2) LLC SODEISTVIE MEZHDUNARODNYM RASCHETAM** | **Defendants / Respondents** |

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**MS. LOUISE HUTTON KC** appeared on behalf of the **Claimant/Applicants**

**THE DEFENDANTS/RESPONDENTS** were not present and were not represented

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# Approved Judgment
# (In Private)

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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**HIS HONOUR JUDGE PELLING KC :**

1. This is an application by the claimant made without notice and in private for an anti-suit and anti-enforcement order against two Russian entities being (i) PJSC Sovcombank and (ii) LLC Sodeistvie Mezhdunarodnym Raschetam a former subsidiary entity of Sovcombank, now an independent corporate entity according to Russian law, to which Sovcombank's rights as against Barclays have allegedly been assigned.

2. The claim itself arises out of a syndicated loan agreement known in these proceedings as the senior facilities agreement, dated 17th July 2019, the Loan Agreement, under which Barclays is the agent and Sovcombank is one of the lenders.

3. The key point for present purposes is that when Barclays receives sums due by way of interest from the borrower under the Loan Agreement, it comes under an obligation to account to those who are the lenders including Sovcombank. There is such a sum of US$139,000-odd which is due to Sovcombank. The problem which has arisen is that Sovcombank, as well as being one of the larger financial institutions in Russia, was sanctioned variously by the United States in February 2022, by the United Kingdom later in the same month and by the EU in April 2022. The effect of the asset freeze is to prevent Barclays from paying Sovcombank.

4. The Loan Agreement contains provisions concerning governing law and enforcement. At clause 44, under the subheading "*governing law*" it was agreed between the parties that:

> "This agreement and any non-contractual obligations arising out of or in connection with it are governed by English law...".

5. So far as enforcement is concerned, that is dealt with in clause 45, which divides into two parts, one concerned with jurisdiction, the other with service of process. So far as jurisdiction is concerned, clause 45.1 provides:

> "(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a 'Dispute') including in relation to Schedule 15 (General Undertakings), Schedule 16 (Events of Default) and Schedule 17 (Certain New York Law Defined Terms) of this Agreement and any non-contractual obligations arising out of or in connection with those Schedules...".

Read in isolation and ignoring, as I must, the subheadings which have been used in the agreement, because by agreement between the parties it has been agreed that the subheadings are not material for construction purposes, clause 45.1(a) is an exclusive jurisdiction agreement between the parties which requires any dispute arising out of or in connection with the Loan Agreement to be settled by litigation in the courts of England and Wales. The phrase, "*arising out of or in connection with*" used in the exclusive jurisdiction agreement are of course words which are construed as a matter

of English law as words of the widest import and in my judgment give rise to a very strong case that they cover the disputes that arise between the parties.

6. Clause 45.1(b) provides:

> "The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary...".

That is significant because it constitutes a contractual estoppel between the parties which precludes them or those who derive their rights for the Loan Agreement from arguing that the courts of England and Wales are not the most appropriate courts to resolve the disputes which arise, which may be material both in relation to a contractual anti-suit application and to one which is advanced on a non-contractual basis.

7. I should refer to clause 45.2 only because sub-paragraph (c), quite rightly, has been drawn to my attention under the full and frank disclosure obligation that arises in applications of this sort. Clause 45.2 is concerned substantively with service. That much is apparent from clauses (a) and (b), which are concerned with the appointment of service agents in England and Wales and the obligations that arise if any person appointed as an agent is unable to act in that capacity at the relevant time. Sub-paragraph (c) is to the following effect:

> "This Clause 45.2 is for the benefit of the Finance Parties and Secured Parties only. As a result, no Finance Party or Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties and Secured Parties may take concurrent proceedings in any number of jurisdictions."

The issue that has been drawn to my attention, again in the satisfaction of the obligations of fullness and frankness and fair presentation is that it might be argued on behalf of the respondents to this application that that in some way should be read as qualifying the obligations which arise in clause 45.1. I am satisfied to the standard that applies to an application of this sort that that would be an erroneous construction of paragraph (c). In my judgment, it is at least realistically arguable that that clause has simply erroneously included. That is apparent from the fact that it appears in a clause concerned otherwise exclusively with service and appears to contradict what is in clear and unequivocal terms in clause 45.1.

8. Sovcombank maintains that it has assigned to the second defendant to these proceedings ("SMR"), its rights under the Loan Agreement. Whether that is effective as an assignment is a matter of debate but is immaterial for present purposes, other than in relation to another fullness and frankness point which has been drawn to my attention, which is that it might be argued by Sovcombank that it is an unnecessary party to these proceedings having regard to the assignment. I do not accept that to be so. Proceedings have been commenced in Russia by Sovcombank against Barclays in relation to its obligations to account as agent under the Loan Agreement. In those proceedings an application has been made by Sovcombank to substitute SMR as claimant. That application is yet to be determined and unless and until the issue

concerning the scope of the assignment, the relationship between SMR and Sovcombank and the application to substitute have resolved, in my judgment it is close to obvious that it is appropriate that Barclays should seek orders against both Sovcombank and SMR. If Sovcombank is correct on the assignment point, it could not be materially prejudiced by an order in the terms which are sought from me. SMR is not prejudiced by the order being sought against Sovcombank as well as itself for similar reasons. If it is not in truth the assignee of Sovcombank's entitlements under the Loan Agreement then the order does not affect it in any material way.

9. As I have explained, the effect of sanctions as a matter of English law is to preclude Barclays from making any payments to Sovcombank. Therefore, Barclays has done what one might expect, which is to credit the sum concerned to a frozen account to which it will remain credited until such time as the sanction regime changes or permission is obtained from the UK authorities permitting payment to be made.

10. Sovcombank has commenced proceedings in Russia against Barclays to recover the sums due to it under the Loan Agreement in breach of the exclusive jurisdiction clause in the Loan Agreement. The causes of action which are relied on are not entirely clear from the statement of case which is in evidence before me, but it would appear by reference to the use of the phrase "*abuse of right*" and the word "*negligence*" that Sovcombank's claim in the Russian proceedings is a non-contractual, delictual or tortious claim. The significant point that arises from the pleading in Russia for present purposes is that there is an acknowledgment on the part of Sovcombank that the Loan Agreement is governed by and is to be construed in accordance with English law.

11. The jurisdictional basis on which proceedings have been commenced in Russia is that Russian law confers on Russian registered entities a right but not an obligation to sue before the courts of Russia to recover sums it would otherwise be entitled to recover but for economic sanctions imposed by a foreign state. On that basis Sovcombank has asserted in the Russian proceedings that the Courts of the Russian Federation have jurisdiction notwithstanding clause 45 of the Loan Agreement. Although the proceedings in Russia have been on foot for some time, no material steps have been taken in those proceedings, apart from an application shortly to be heard by the Russian courts, by which Sovcombank seek to substitute SMR as a claimant in the proceedings.

12. It is now necessary to turn to the application which is made by Barclays which is for anti-suit and anti-enforcement relief against each of the respondents I have referred to.

13. So far as the claim against SMR is concerned, Barclays relies on the now well established principle to be found in cases such as The Jay Bola [1997] 2 Lloyd's Rep 279 and Royal Bank of Scotland Plc v Highland Financial Partners LP [2012] 2 CLC 109, that a third party to whom rights are assigned that are derived from a contract containing exclusive jurisdiction and/or arbitration agreements is bound by the arbitration or exclusive jurisdiction clauses that appear in the source agreement. It is not necessary that I set out the authorities in any more detail than that.

14. The claim for anti-suit relief is advanced on two alternative bases. The primary basis on which the orders are sought is by reference to what I can call for convenience the contractual basis which is that, since the Loan Agreement contains the exclusive

jurisdiction clause in clause 45.1(a) to which I referred earlier in this judgment, the claimant is entitled to an anti-suit injunction to prevent any further breach of the exclusive jurisdiction clause unless there was some strong reason for not granting such relief - see by way of example the well-known decision in The Angelic Grace [1995] 1 Lloyd's Rep 87.

15. It is well established that if an injunction is to be sought by reference to a contractual provision, the court must be satisfied to a high level of probability that there is a contractual provision which establishes exclusive jurisdiction and/or which is an arbitration agreement. In so far as that is concerned, the point which is drawn to my attention as I have already said is the impact of clause 45.2(c) of what is otherwise an exclusive jurisdiction clause.

16. In so far as that is concerned, there are a number of points which can be made on behalf of the claimant as to why I should be satisfied to the requisite standard of the existence of the relevant agreement. The first is that in the Russian proceedings it does not appear to have been disputed by Sovcombank that that is the effect of the jurisdiction agreement contained in clause 45.1(a) with no attempt being made to rely upon clause 45.2(c).

17. Secondly, I am satisfied that clause 45.1 applies notwithstanding clause 45.2(c). Clause 45.1 is concerned exclusively with jurisdiction, whereas clause 45.2, is concerned exclusively with service issues until sub-clause (c) is arrived at. Given the obvious contradiction between clause 45.1(a) and clause 45.2(c), it seems to me that when reading the agreement as a whole there is a high level of probability that the parties intended that the courts of England would have exclusive jurisdiction to settle any dispute and that the inclusion of clause 45.2(c) is simply erroneous. It might be said that that would be a failure to give effect to the language used by the parties in clause 45.2(c). As far as that is concerned, as I have already said, the court is likely as a matter of construction to construe it as erroneously included and therefore giving effect to the language used does not arise. English law has long recognised that surplusage in commercial contracts is not an insuperable problem on construction exercises with authorities going back many years emphasising the relatively limited role that surplusage plays in the construction of commercial contracts. In those circumstances, I am satisfied to the requisite standard that there is a strong probability that at trial Barclays will establish that the Loan Agreement is subject to the exclusive jurisdiction agreement between the parties and effect ought to be given to that in accordance with general principle unless there is a strong reason not to do so.

18. So far as that is concerned, the only potentially strong reason that could be advanced is that there has been a delay in bringing the current applications. The Angelic Grace (ibid.) addresses that issue. The point that has been made in that case and many others is that delay ultimately is relevant only to the extent that it affects comity between the English and relevant foreign court. Comity only becomes an issue in this context if the foreign proceedings are advanced and the foreign court has become engaged substantively with the issues that arise. In this case, as I have already explained no material steps having been taken in the Russian proceedings with the next application that is to be heard being an application to substitute SMR as claimant. I am satisfied on this basis that delay is immaterial because the foreign proceedings have not progressed to a degree that makes comity a material or real issue in the circumstances.

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19. In any event, there are good reasons for the delay that has occurred. They are explained in the evidence in support of the application and are concerned with the degree to which it was necessary to take commercial steps in order to protect the bank from the effect of these proceedings and other proceedings commenced in Russia by reference to the provisions relied upon by Sovocombank.

20. The final point that I ought to make concerning the exercise of discretion concerns the suggestion that the defendants would suffer a juridical disadvantage by being required to litigate here given the impact of sanctions on their ability to participate effectively. In so far as that is concerned, I am satisfied that the Russian entities are able to litigate here entirely appropriately for three reasons. First, there is a general licence which applies in relation to parties to litigation in England which allows such a party to spend up to half a million pounds from frozen funds in relation to legal costs in connection with such litigation. Secondly, it is open to a party litigating in England to apply for a specific licence to spend further frozen sums on litigation to the extent necessary. Thirdly, the courts in England have shown themselves willing to delay the procedural steps which necessarily have to be taken in relation to litigation so as to allow a sanctioned party to make the necessary applications to the authorities in England to obtain a specific licence.

21. SMR may contend that England is an inappropriate jurisdiction or otherwise the order should not be made against them because they are not the subject of sanctions. That is immaterial. As I have explained, they derive their rights from a contract via Sovocombank which contains both governing law and exclusive jurisdiction provisions. In those circumstances, as it seems to me, the true issue is not whether they are sanctioned but whether they are obliged to comply with the governing law and jurisdiction provisions of the agreement from which they apparently derive their rights.

22. If I am wrong in relation to the application relying on the contractual route, the question then becomes whether or not in any event Barclays are entitled to an anti-suit injunction on what is usually described in shorthand terms as the non-contractual or vexation and oppression basis.

23. So far as that is concerned, the first question which arises in any case where that ground is relied upon is whether the English court can be said to be the natural forum for the resolution of the dispute. So far as that is concerned, I am entirely satisfied that England and Wales is the natural forum for the resolution of this dispute for at least the following reasons.

24. First, as I have already explained, clause 45.1(b) records the agreement between the parties, which, for these purposes, is binding upon SMR as it is binding on Sovocombank that by agreement the courts of England are the most appropriate and convenient court to resolve the disputes. As I have said that gives rise to a contractual estoppel which as a matter of English law would preclude Sovocombank or SMR from arguing to the contrary. If that is wrong, then in any event the English court is the natural forum for resolving the issue because by agreement between the parties contained in clause 44 of the agreement, the parties have agreed that the agreement and any non-contractual obligations arising out of or in connection with it are to be governed by English law. As I have already indicated, the claim which has been brought in Russia appears to be a non-contractual claim/ Whether there is a such a

cause of action available to Sovcombank or SMR is a question to determined applying English law applying clause 44 of the agreement between the parties. In those circumstances, the fact that the contract is governed by English law means that, of itself, the English court is likely to be the most convenient and appropriate forum for the resolution of the disputes between the parties.

25. It might have been said on behalf of the defendants or Sovcombank at any rate that commencing proceedings in England deprives them of a legitimate juridical advantage because the Russian courts will disregard as a matter of public policy the sanctions laws imposed by English law. If and to the extent that is relied upon then, in my judgment, it is a proposition to be rejected. The parties having agreed English law, to attempt to litigate in a foreign jurisdiction where full effect is not given to English law including therefore sanctions law is not to seek to obtain a legitimate juridical advantage but, on the contrary, is to seek to obtain an illegitimate juridical advantage, a point which has been recognised in the case law as a reason for treating a claim brought in such a jurisdiction as vexatious and oppressive.

26. The discretionary principles that would apply in relation to whether or not an order should be granted on the vexatious ground are those I have already referred to and are not a proper basis for refusing to grant the orders sought for the reasons I have given earlier.

27. In those circumstances, I am satisfied that Barclays is entitled to the orders it seeks based upon oppression and vexation even if for some reason the contractual route that I have identified was closed to them.

28. The next issue which arises is whether or not I should grant an anti-enforcement injunction. So far as that is concerned, the point which is made in relation to this by Barclays in the evidence filed in support of the application is that there is some reason for thinking that a Russian court might decline to give effect to an application on the part of a party the subject of an anti-suit injunction to either stay or discontinue proceedings commenced in Russia. I am satisfied to the standard that applies on an application of this sort that there is a realistic prospect that a Russian court might take that view having regard to the decisions of the Russian courts identified in the expert evidence that has been filed. In those circumstances, I am satisfied that it is appropriate as a matter of principle and discretion to make the orders sought.

29. The only other point which I ought to address at this stage concerns the question of whether or not the cross-undertaking in damages which is offered entirely correctly by Barclays ought to be treated as something which should discourage the court from granting the injunctions otherwise sought, having regard to the way in which the sanctions regulations currently work.

30. The point which again quite rightly is drawn to my attention is that it might be argued that the cross-undertaking is not an adequate protection to the defendants because Barclays would be precluded from paying out under a cross-undertaking in the absence of a licence granted by the relevant authorities in England and Wales even if the court were to make an order assessing sums due under the cross-undertaking.

31. There was a debate in the course of the hearing as to whether or not the undertaking should be amended so as to make clear that in the event the English court ordered

sums to be paid to one or other of the respondents under the cross-undertaking in the future, Barclays could be required to apply for the necessary licences in order to enable that payment to be made. In so far as that is concerned, I am satisfied that it is unnecessary for me require an alteration to the undertaking in those terms at this stage. My reasons for reaching that conclusion are as follows: first, there is to be a return date; secondly, it therefore follows that this issue can be considered on the return date to the extent it is appropriate to do so; thirdly, the undertaking currently offered is in sufficiently general terms as at least arguably to include an obligation to apply for the necessary licence or at any event to permit the court to direct that an application for a relevant licence can be made. Fourthly, as Ms. Hutton identified in the course of her submissions, there is reason for supposing that the sanction regulations may change over time so that an attempt to address what is required under the sanction regulations as they now apply may have unintended consequences at a much later stage if and when the cross-undertaking comes to be in force. Finally, as matters currently stand, the sum which cannot currently be paid out to the defendants is a modest sum of $139,000-odd. Obviously that sum will increase at time goes on, but I am entitled to take into account the inherent improbability of any substantial sum becoming due under the cross-undertaking, at any rate that is likely to be assessed as accruing due between now and any return date. In those circumstances, I am prepared to accept the cross-undertaking in damages as currently offered.

32. The issues which then remain are whether permission to serve these proceedings out of the jurisdiction should be granted and if so whether service by alternative means should be permitted.

33. As to the service out issue, as is well known, there is a tripartite test that must be applied. The first element of this test is whether a good factual case has been established on the merits that is at least realistically arguable. Plainly it has for the reasons identified earlier in this judgment. Secondly, the court has to be satisfied that the claimant is able to bring its case through one of the gateways identified in CPR Practice Direction 6B. So far as that is concerned, I am satisfied that that is so, by reference to each of the gateways identified in paragraph 70 of the skeleton filed in support of this application. Firstly, SMR is a necessary or proper party applying paragraph 3.13 of the Practice Direction. Secondly, the claim is made by reference to a contract which is governed by the law of England and Wales and therefore comes within the gateway identified in paragraph 3.16. Thirdly, Barclays has applied for negative declaratory relief and that comes within the scope of sub paragraph 16 of paragraph 3.1. In addition, the claim is for final injunctions which comes within the scope of sub paragraph (4A), within paragraph 3.1. The third condition which has to be satisfied for permission to serve out is granted is the court must be satisfied that England is the most appropriate forum for the resolution of the dispute. For the reasons I identified much earlier in this judgment, I am so satisfied. The claims are governed by English law and the contract on which the claims depend contains and exclusive jurisdiction clause with a contractual provision that operates as a contractual estoppel against any party arguing that England is not clearly the most appropriate jurisdiction for resolution of the claim.

34. Finally, I must decide whether I should permit service by an alternative method. So far as that is concerned, the default position is that service must be affected in

accordance with what has either been agreed between the parties or as is required by the Hague Service Convention, as it has been adopted by the Russian state.

35. However, the English courts have long recognised that notwithstanding the effect of the Hague Service Convention, service by alternative means can be authorised where exceptional circumstances apply. The exceptional circumstance test is applied because making an order which permits service by an alternative method violates the Convention rights of the states concerned and therefore should be interfered with only exceptionally.

36. That said, as the Commercial Court has recognised on more than one occasion, and a good example is Axis Corporate Capital UK II Ltd v ABSA Group Ltd [2021] EWHC 225 (Comm), a decision of Calver J, that exceptional reasons can and will almost always in fact arise where a mandatory order or injunction has been granted by the English court which is potentially enforceable by coercive means. It is of critical importance that those who are respondents to such an order are alerted to the making of the order as soon as is reasonably practical. I am satisfied in those circumstances it is appropriate to make an order for service by alternative method since the orders I am making are precisely those which are likely to be enforceable by coercive means.

37. Reliance has been placed on expert evidence for the purposes of this application. I readily give permission for that to be relied upon by the claimant for the reasons I identified very briefly in the course of the hearing. This is a case where Russian law is a relevant consideration. The Russian law that is relevant is not sufficiently similar to English law to negative the need for expert evidence. I am satisfied it is appropriate in those circumstances to give the permission sought.

38. Finally, so far as full and frank disclosure is concerned, I record that I have taken account of each of the points which are identified in Mr. Boyce's witness statement in support of the application and that were further developed by counsel in the course of submissions, most of which I have already dealt with in the course of judgment I have given. I am satisfied notwithstanding the points which have been identified that this is appropriate to broadly grant orders in the terms sought and I will now hear counsel further on the details of the order sought.

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