IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Before Mrs Justice Cockerill DBE

2 July 2021

VTB Commodities Trading DAC -v- JSC Antipinsky Refinery & Ors
[2021] EWHC 1758 (Comm)

CASE SUMMARY

Cockerill J upheld the challenge to jurisdiction, finding that VTB could not properly be classified as a defendant in the relevant proceedings and that the Court did not have jurisdiction to permit it to bring Part 20 claims against Sberbank and Machinoimport.

Background

The procedural background to this case is of some complexity and is fully summarised at [12] to [81]. However, in brief, VTB Commodities Trading DAC ("**VTB**") purchased VGO cargo from JSC Antipinsky Refinery ("**Antipinsky**") under a series of Offtake Contracts and Prepayment Agreements between 2018 and 2019. By January 2019, VTB had made advance payment of €194.8 million for 22 shipments, which it suggested reflected Antipinsky's entire VGO output until July 2019. However, in February 2019, VTB became aware that Antipinsky was, ultimately, shipping VGO cargoes to Petraco Oil Company SA ("**Petraco**").

VTB commenced six (now largely defunct) LCIA arbitrations against Antipinsky pursuant to the Offtake Contracts and Prepayment Agreements on 29 April 2019. On the same day, VTB applied to this court, under section 44 of the Arbitration Act 1996, for a Worldwide Freezing Order against Antipinsky (the "**WFO**") and a mandatory interim injunction requiring Antipinsky to deliver a particular VGO cargo (the "**Polar Rock Cargo**") to VTB, pending final determination of VTB's claims in arbitration (the "**Cargo Injunction**").

Both the WFO and Cargo Injunction were granted. However, on 8 May 2019, Petraco, intervening on the basis that it was entitled to the Polar Rock Cargo, applied to vary the WFO, to set aside the Cargo Injunction, and for an enquiry as to damages under VTB's cross-undertaking. VTB issued a cross-application seeking an order for sale of the Polar Rock Cargo. Ultimately, the parties reached a compromise under which the WFO was varied (removing a prohibition on Antipinsky delivering VGO cargoes to third parties), the Cargo Injunction was set aside, and an order for sale of the Polar Rock Cargo to VTB's sub-buyers was made in exchange for VTB paying US$ 30 million into court. Further, the court directed an expedited trial to determine the parties' rights and obligations in respect to the Polar Rock Cargo and/or the monies paid into court (the "**Cargo Trial**").

In its pleadings in the Cargo Trial, Petraco relied upon contracts between Antipinsky and JSC VO Machinoimport ("**Machinoimport**") and onward sale contracts between Machinoimport and itself to demonstrate title to the Polar Rock Cargo. VTB argued that these contracts were

void, as they were entered into by Antipinsky and Machinoimport in breach of the duty of good faith under Russian law. In particular, VTB alleged that each of Antipinsky and Machinoimport knew that the relevant cargo was 'booked' to VTB at the time the contracts were entered into and were engaging in a fraudulent 'double selling scheme'. In addition, VTB alleged that Sberbank of Russia ("**Sberbank**"), Antipinsky's largest creditor and the entity which, VTB suggested, controlled Antipinsky at the relevant time, and Machinoimport had made fraudulent representations to induce VTB to make further prepayments in this period.

VTB counterclaimed against Petraco seeking a declaration that Petraco had no interest in the Polar Rock Cargo and tortious damages, alleging that Petraco had procured Antipinsky to breach its contractual obligation to deliver VGO cargoes to VTB. In addition, on 1 August 2019, VTB applied to join Machinoimport and Sberbank as Part 20 Defendants to the Cargo Trial. This application was granted by Teare J on 5 May 2020 and Sberbank and Machinoimport applied to set aside that order, by way of a challenge to jurisdiction.

Issue 1: Is VTB a defendant in the Cargo Trial for the purposes of Part 20?

Each of the parties to the application agreed that the first, potentially decisive, issue before the court was whether, in substance, VTB was a defendant in the Cargo Trial and was, therefore, able to utilise the Part 20 process.

Applying *CT Bowring & Co v Corsi & Partners* [1994] BCC 713 (CA) and following her recent decision in *JSC Karat-1 v Tugushev* [2021] EWHC 743 (Comm), Cockerill J held that seeking damages under a cross-undertaking was fundamentally a defensive step, regardless of whether this was undertaken by the defendant to the originating application or a third party which, other than through its own volition, had been affected by the proceedings (at [141]). The starting point was, therefore, that, insofar as the Cargo Trial concerned a claim for damages under a cross-undertaking, VTB was the position of claimant.

Further, on the facts of the case, Cockerill J found there was nothing sufficient to indicate that the parties had, in effect, reversed roles. In particular, she was not persuaded that Petraco had, in seeking to resolve the question of ownership of the Polar Rock Cargo in the Cargo Trial, sought to litigate a new or separate issue as addressing this question was integral to Petraco's challenge to the injunction and claim under the cross-undertaking (at [147] and [148]).

Therefore, Cockerill J concluded that VTB was not, in substance, a defendant in the Cargo Trial (at [156]). As a result, the court did not have jurisdiction to permit Part 20 claims against Sberbank or Machinoimport and the applicants' challenge succeeded. Although this was decisive on the matter, Cockerill J proceeded to consider two further issues argued before her for the purposes of completeness and contingency.

Issue 2: How should the Court's discretion under Part 20 be exercised?

Cockerill J indicated, even if she had found the court had jurisdiction to permit Part 20 claims, she would have refused to exercise the court's discretion to permit such claims in this case. Two factors contributed to her finding in this regard.

First, the extent of overlap between the claims that VTB pursued against Petraco, on the one hand, and Sberbank and Machinoimport, on the other, was limited. In particular, when compared with its pleaded case in the Cargo Trial, VTB's pleaded case against Sberbank and Machinoimport was more wide-ranging, relied upon numerous additional factual events, and

centred upon allegations of dishonesty which had not been pleaded against Petraco (at [102] to [106]). Indeed, the manner in which VTB put its case effectively alleged that two different conspiracies existed – one between Antipinsky, Sberbank and Machinoimport with the aim of inducing VTB to make pre-payment for cargoes and one between Machinoimport and Petraco concerning 'double selling' of particular cargoes (at [107] to [112]), which need not be addressed together. Further, the relief which VTB sought to recover from Sberbank and Machinoimport (US$ 300 million) dwarfed the sum at stake in the Cargo Trial (US$ 30 million). Having regard to CPR r. 20(9)(2), Cockerill J found that these factors pointed strongly against permitting the proposed Part 20 claim, lest the 'additional claim' become the real substance of the proceedings (at [177] to [179]).

Second, Cockerill J expressed considerable doubt about whether the court had jurisdiction to add Part 20 defendants to an arbitration claim (at [158] to [166]). Ultimately, she declined to decide the point, but indicated that the factors leading to this doubt would weigh against the exercise of the court's discretion where an arbitration claim was concerned (at [167]). Further, since the underlying arbitration proceedings between VTB and Antipinsky were perpetually stayed, Cockerill J observed that the role of the English court as a supervisory jurisdiction was complete except in so far as it related to the s. 44 proceedings. That jurisdiction was a "*very slim basis upon which to found such a major piece of litigation*", the extent of which would not have been foreseen by the court when it initially provided for the Cargo Trial (at [180] to [181]).

Issue 3: Was England forum conveniens?

Lastly, Cockerill J indicated that, even if she had considered that it was appropriate for the court to exercise its discretion to permit claim against Sberbank and Machinoimport, she would not have permitted service out of jurisdiction under CPR r.6.37(3), as VTB had not demonstrated that England was the proper forum for these claims.

Cockerill J accepted that there would be a risk of irreconcilable judgments on certain common factual aspects of VTB's case against Petraco, Sberbank and Machinoimport if it these were not resolved in the same forum. However, applying *Lungowe v Vedanta Resources Plc* [2020] 2 AC 1045 and *ED&F Man Capital v Straits (Singapore) Pte Ltd* [2020] 1 All ER (Comm) 515 (CA), she found that this did not mean that the existence of the Cargo Trial operated as a trump card, allowing VTB to require that all claims be resolved in this jurisdiction.

Rather, Cockerill J observed that the substantive dispute was "*a truly Russian case*", given, among other things, the location of the parties, likely location and language of the evidence, and complex issues of Russian law at its centre. In this context, she found that the location of "*proceedings accessory to now defunct arbitrations*" was of little weight when balancing the various factors to determine the appropriate forum (at [228]). In light of this, Cockerill J found, "*the answer could only be that Russia is forum conveniens*" (at [243]).
