Navigator Equities v Deripaska [2020] EWHC 1798 (Comm)

17 July 2020

Mr Justice Andrew Baker considered an application by the claimants to commit the defendant, Mr Deripaska, to prison. The parties were involved in a long-running dispute concerning a valuable central Moscow property. The main issue between the parties was whether the Second Claimant, Mr Chernukhin, was a party to a shareholder agreement governing the joint venture through which the property was owned. An arbitral tribunal decided that he was but the issue was effectively re-litigated before Teare J at a trial of a challenge to the arbitration award under s67 of the Arbitration Act 1996 ('the s67 Proceedings'). The arbitrators ordered, and Teare J upheld, that Mr Deripaska buy out Mr Chernukhin (see [2019] EWHC 1173). The appeal to the Court of Appeal was dismissed on 6 February 2020 ([2020] EWCA Civ 109). It is subject to a pending application for permission to appeal to the Supreme Court.

In support of the s67 Proceedings, on 11 May 2018, Knowles J granted a worldwide freezing order against Mr Deripaska. At the return date on 19 June 2018 it was agreed that this would be replaced by undertakings relating to certain shares in En+, at the time a Jersey company, in which Mr Deripaska had an indirect beneficial interest. Following the conclusion of the s67 proceedings, on 3 July 2019, Mr Deripaska was ordered to make a payment into court. The application for that order was occasioned by En+ redomiciling from Jersey to a recently established Russian Special Administrative Region ('the Redomiciliation'). Following a number of further applications, the joint venture buyout, at which the undertakings and payment into court were aimed, was completed, following which the undertakings were formally discharged. It was only after this that the charge of contempt arose. It was said that, albeit now no longer in play, the undertakings had been breached by Mr Deripaska by either facilitating or failing to block the Redomiciliation.

The Applications

The core of the contempt application was an allegation that Mr Deripaska procured the passing of a resolution by the shareholders of En+ in favour of the Redomiciliation, denuding the Jersey registered shares of their value and any use they might have had to the claimants. Further, they claimed damages on the basis that the undertakings took effect as a contract as well, the breach of which had caused loss in the form of legal costs in various jurisdictions.

Mr Deripaska denied that he had breached the undertaking but said that the matter was an abuse of process as: (i) the claimants were not seeking to enforce compliance with any Order; (ii) the claimants were seeking to relitigate matters already considered by the court at the 3 July 2019 hearing; (iii) there was an improper purpose behind the application, namely the personal animus of Mr Chernukhin towards Mr Deripaska (iv) the contempt application was disproportionate where the breaches were merely technical; (v) the contempt application had not been prosecuted even-handedly by the claimants as quasi-prosecutors.

Breach?

There was no dispute as to the applicable principles. The undertaking given was to be construed strictly, as would an injunction in like terms (see *JSC BTA Bank v Ablyazov* [2015] 1 WLR

4754). Any contractual promise given effect by the undertakings would stand and fall with this breach. If the undertakings were not breached, neither was the contract. It was held that on such a strict construction, the undertakings did not require Mr Deripaska to procure the blocking of the Redomiciliation. Accordingly, the damages claim was dismissed.

Contract?

The court also considered whether, if there had been a contract in the terms of the undertakings, the contract fell away when given effect to by the undertakings as given to the court. Andrew Baker J was referred to *Kensington Housing Trust v Oliver* (1998) HLR 608, a housing possession case where Thorpe LJ considered that the parties' contract had fallen away upon entering into a consent order. That view was *obiter* and, as understood by Andrew Baker J, not a rule of law but an analysis of the position in the case then before the court. Andrew Baker J highlighted that it was not addressed by Butler-Sloss LJ (with whom Thorpe LJ had agreed) and there were comments in Judge LJ's concurring speech which suggested that the contractual effect may have continued beyond the sealing of a consent order.

Andrew Baker J concluded that there is no principle of law to dictate what happens to a contract where an undertaking is given pursuant to an agreement. Any such question falls to be decided on the particular facts and circumstances of any given case. The disposal on terms proposed jointly by the parties of contested interlocutory applications, particularly where they have been argued or part-argued and the final disposal emerges out of that process, is a very particular context, quite far removed from ordinary commercial negotiations for or relating to business transactions. In such circumstance the parties will not readily be taken to have intended that such agreement will have private contractual effect. While an undertaking may be given pursuant to a bargain struck between parties (as the cases cited in [135] show), that was not what was happening here, where the parties agreed the wording for an Order.

Abuse?

Contempt proceedings have a particular and distinctive character. They are civil proceedings but have a quasi-criminal character. This means that a contempt application may be struck out if brought for an improper purpose. It also means that a claimant who pursues a contempt charge does so as much as a quasi-prosecutor serving in the public interest as it does as a private litigant. Adopting the language in *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm) [15], the proper function is to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment.

The only proper purpose that might be served by issuing and prosecuting the contempt application was so as to invite the court in the public interest to identify, pronounce and punish, if appropriate, an historic contempt. The contempt application ought to have been pursued dispassionately by the claimants as parties with no interest in the outcome. It was instead pursued *'in aggressive, partisan fashion, as if it were just the latest round in this long-running, 'no-holds barred', commercial litigation wrestling match*.' This was particularly inappropriate given that Mr Deripaska had been on *'the wrong end of the dispute'* with adverse findings as to his honesty arising from both the arbitration and the s67 Proceedings. His was therefore a paradigm example of a case where an alleged contemnor needed the protection of a scrupulously careful and even-handed prosecution of the charge against him. Accordingly, the application was struck out as an abuse of process.

Henderson v Henderson?

As to the application of *Henderson v Henderson* abuse in interlocutory proceedings, Andrew Baker J endorsed the statement of principle by Popplewell J in *Orb arl v Ruhan* [2016] EWHC 850 (Comm) [82]. The court will be astute to strike down as an abuse an attempt to '*upgrade'* interlocutory relief. Supplemental orders may be granted but the court will ask: why this particular order, why now, and why not when the applicant came before. Good answers are needed if the successive applicant is not to be at risk of a finding that the process is being abused by the successive application. It was not, therefore, enough to say that the contempt application was a different kind to the one before Teare J on 3 July 2019. However, equally, on the facts, there was not enough to justify making the leap to the contempt application being a *Henderson v Henderson* abuse.

Conclusions

In dismissing the claimants' application as an abuse of process and dismissing the damages claim Andrew Baker J deprecated the rise in hostility and aggressiveness in the conduct of disputes. In all disputes that was regrettable. However:

"when the court is being asked by a private litigant to consider a charge of contempt of court against the other side, especially against an individual whose liberty the applicant therefore seeks to put at risk, a better standard of conduct is not merely desirable, it is essential to the fairness and the appearance of fairness of the process."