

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2021/0094

BETWEEN:

FG

Claimant

And

HJ

Defendants

Appearances:

Mr David Scorey QC with him Mr Mark Forte and Ms Alecia Johns of Conyers for the Applicant

Mr Vernon Flynn QC with him Mr Peter Ferrer and Mr Tyrone Bailey of Harneys for the Respondents

2021: November 24 (Argument and oral judgment)
December 14 (Written judgment)

JUDGMENT

[1] **JACK, J [Ag.]**: There are cross-applications before me by the Parties for respectively the continuation and the discharge of a freezing order which I granted on 2nd June 2021 against the Defendants, which I shall call A and D. I remind the Parties about what I said in **HQ Aviation Limited v Sun Vessel Global Ltd, the Motor Yacht Bacarella**¹ about the need to put any transcript of this judgment before me for approval.

¹ [2021] ECSCJ No 554.

- [2] The circumstances of this case are somewhat unusual. The Claimant G carries on business in the Far East and had extensive dealings with a company incorporated in Hong Kong, which I shall call J. J owed, by March of 2020, some US\$121 million to G. Negotiations ensued between G and J as regards payment, but they failed to result in any monies being forthcoming from J. A statutory demand was served on 31st July 2020, but no payment was made in response to that either. Unusually, there appears to be no dispute that the \$121 million is actually owed by J to G with contractual interest due on top.
- [3] The agreement between G and J provided for arbitration before the ICDR in California, with Californian law as the applicable law. The agreement to arbitrate provided, or at least purported to provide, for it to govern claims between G and “affiliates” of J. It is agreed, for current purposes, that A and D are affiliates, as defined in the Agreement. Hotly contested, however, is whether A and D are bound by the Arbitration Agreement. They never signed it and there is no express evidence of their giving J authority to sign the agreement as their agent.
- [4] However, it is common ground that the ultimate beneficial owner of A and D and (at the relevant time) J was a man whom I shall call S. That is relevant to the issues of Californian law to which I shall come. G has adduced evidence that S was involved in a separate business carried on in another Asian country. Just before the business went into administration, he extracted US\$7.3 million from that business and has subsequently refused to return the money to creditors of that other business. G relies on this to show a want of probity on the part of S, as indeed they say was shown by his failure to pay the \$121 million owed by J to G.
- [5] It is right to record that no criminal proceedings have been brought in respect of the \$7.3 million. Following the grant of the freezing order on 2nd June 2021, on 4th June 2021, G referred the dispute to arbitration before the ICRD. The named Respondents included A, D and J. The ICDR Center accepted the reference,

notwithstanding A and D's protest that they were not parties to the arbitration agreement.

- [6] I accept Mr. Flynn QC's submission on A and D's behalfs, that acceptance by the arbitration centre has no evidential weight. So long as the party seeking arbitration can show a colourable case that the respondent is a party to an arbitration agreement, the centre will accept a case and leave the question of that party's adherence to the arbitration agreement to the arbitral panel to determine.
- [7] I am told that a panel has now been formed and a chairman selected. A procedural hearing will take place later this year. A and D have reserved all their rights and are participating under protest in the arbitration proceedings. When I granted the injunction on 2nd June 2021, I applied ordinary Mareva principles, including the **Niedersachsen** test,² as to whether the Claimant had shown a good arguable case, one which is more than barely arguable.
- [8] The basis for the claim against A and D was that under Californian law it was legitimate to pierce the corporate veil or, in American parlance, treat A and D as the *alter ego* of J. This is much easier to show in America than the English test set out in **Prest v Petrodel Resources Ltd.**³ The other Californian law basis of the claim was that A and D could be treated as being in an agency relationship with J. It is relevant, as a matter of Californian law, that J appeared to have stripped itself of assets.
- [9] Mr. Flynn QC says G should have sought an injunction from the Californian Courts or similar relief from an ICDR arbitral panel under the Emergency Relief Rules of the ICDR. The difficulty, it seems to me, with that submission is that A and D were not recognising the applicability of the arbitration agreement to themselves. They

² *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412 (Court of Appeal); and [1984] 1 All ER 398 (Mustill J at p 400 and the Court of Appeal at p 415).

³ [2013] UKSC 34, [2013] 2 AC 415.

could, perfectly legitimately in my judgment, ignore any interim measure made by the emergency panel. Likewise, Eric George, A and D's expert on Californian law, says that there is no gateway under which a Californian state or federal court could assume jurisdiction over A and D.

- [10] In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or any institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. That puts the Court in different position to that given by section 43 which provides:

“(1) Article 17J of the UNCITRAL Model Law is substituted by this section.

(2) On the application of a party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside the Virgin Islands, grant an interim measure.

(3) The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 33 in relation to the same dispute.

(4) The Court may decline to grant an interim measure under subsection (2) on the ground that

(a) the interim measure being sought is currently the subject of arbitral proceedings; and

(b) the Court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.

(5) In relation to arbitral proceedings which have been or are to be commenced outside the Virgin Islands, the Court may grant an interim measure under subsection (2) only if

(a) the arbitral proceedings are capable of giving rise to an arbitral award, whether interim or final, that may be enforced in the Virgin Islands under this Act or any other enactment; and

(b) the interim measure sought belongs to a type or description of interim measure that may be granted in the Virgin Islands by the Court in relation to arbitral proceedings.

(6) Subsection (5) applies even if

(a) the subject matter of the arbitral proceedings would not, apart from that subsection, give rise to a cause of action over which the Court would have jurisdiction; or

(b) the order sought is not ancillary or incidental to any arbitral proceedings in the Virgin Islands.

(7) In exercising the power conferred under subsection (2) in relation to arbitral proceedings outside the Virgin Islands, the Court shall have regard to the fact that the power is

(a) ancillary to the arbitral proceedings outside the Virgin Islands; and

(b) for the purposes of facilitating the process of a court or arbitral tribunal outside the Virgin Islands that has primary jurisdiction over the arbitral proceedings.”

[11] I do not need to read the rest of the section. There is no dispute that the ICDR Tribunal is capable of giving rise to an enforceable award in this Territory, so section 43(5) is satisfied. Section 43(4), in my judgment, is the important provision on the facts of this case. When I granted the injunction, an arbitration had not commenced so the Court could not give deference to the Tribunal’s powers. It, therefore, had to act under section 44(3).

[12] The position now is different and it is right to allow the Tribunal to determine whether injunctive relief should be granted or not. As a general matter in the case such as the present where a defendant is not submitting to the jurisdiction of the arbitration panel, it is right to continue an injunction in support of the arbitration panel and any interim measure it may order. This depends, however, on there being a proper basis for an injunction being granted in the first place.

[13] Some of the issues raised by Mr. George are not, in my judgment, germane. Originally, the expert evidence adduced on behalf of G in the report of Mark Suskin, G’s expert, referred to “good faith averments” rather than a “good arguable case”. “Good faith” is apparently a term of art in Californian law and means a lesser test than good arguable case. However, it has now been clarified that Mr. Suskin meant the expression simply as a shorthand for good arguable case. Mr. George also points out that much of the evidence adduced on behalf of G is given on the basis of information and belief, whereas in California direct evidence would need to be

given. Evidence based on information and belief is, however, perfectly acceptable and normal on interlocutory applications in this jurisdiction.

- [14] There is a major controversy between Mr. George and Mr. Suskin as to whether the *alter ego* and agency claims can properly give rise to liability on the parts of A and D. I cannot resolve that matter on an interlocutory basis but G's case does, in my judgment, reach the **Niedersachsen** test.
- [15] Mr. George says that California applies a higher test than good arguable case in deciding whether to grant an interlocutory injunction. However, it would not, in general, be right to apply foreign procedural or evidential requirements in a domestic context. The Court when granting an injunction otherwise than in support of a foreign tribunal interim measure, must apply the BVI/English law test.
- [16] Mr. Flynn QC suggested a higher test should be applied where the validity of an arbitration agreement is in question. I do not agree that section 43 does require a higher test. After all, if there were no arbitration agreement, the Claimant could proceed in the ordinary courts. And there is no doubt that when considering an injunction in the ordinary courts, the **Niedersachsen** test applies to the grant of a freezing order
- [17] In my judgment, there is a risk of dissipation in the current case. S has not sworn any affidavits or otherwise given evidence in these proceedings, despite being the ultimate beneficial owner of A and D. He has shown a past want of probity. The failure to pay any part of the \$121 million is evidence of that want of probity.
- [18] Mr. Flynn argues that the movement of assets was part of a corporate restructuring. This was a fact that should have been brought before the Court, he submitted, as part of full and frank disclosure. He relies on the fact that Conyers, G's attorneys, acted for S's companies in a restructuring. I doubt Conyers could have put those facts before the Court, because Conyers was subject to a duty of confidentiality to S and his companies and had erected Chinese walls within the firm so that the

lawyers in this litigation had no access to S's documents. That meant that G could not put the information before the Court.

[19] However, the failure to pay the \$121 million and the apparent misappropriation of \$7.3 million by S, coupled with the movement of funds, is sufficient, in my judgment, to justify a finding that there is a concrete risk of dissipation. Looking at matters in the round, it is appropriate to continue the freezing order, but now in support of what will be a pending application to the arbitral panel for similar relief. The arbitral panel will apply the applicable Californian procedural and substantive law much more conveniently than this Court can.

[20] In those circumstances, I shall extend the injunction on terms and hear counsel on what terms of the order I should make.

Adrian Jack

Commercial Court Judge [Ag.]

By the Court

Registrar