IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

Claim No: BVIHCV(COM)2015/0097 BETWEEN:

(1) JSC MCC EUROCHEM

(2) EUROCHEM TRADING GMBH

Claimants

-and-

(1) LIVINGSTON PROPERTIES EQUITIES INC

(2) NIMATI INTERNATIONAL TRADING LIMITED

(3) NAUTILUS SERVICES LIMITED

(4) GLOBAL MED SERVICES INC

(5) SEVAN PROPERTIES MANAGEMENT LIMITED

(6) RUMBAY ASSETS CORP

(7) BANTER INDUSTRIES LIMITED

(8) VALERY ROGALSKIY

(9) DIMITRY POMYTKIN (10)NEDJET BAYSAN

(11)KOPIST HOLDING LIMITED (12)1TRADE FERTILISERS S.A. (13)FABIO SCALAMBRIN (14)DARLOW ENTERPRISES (15)DARLOW INVESTMENT LP

(16)DEARBORN ENTERPRISES LIMITED (17)GIANTHILL MANAGEMENT LIMITED (18)DREYMOOR FERTILISERS OVERSEAS PTELIMITED

Defendants

Appearances:

Dan Wise and Andrew Gilland on behalf of Claimants Ben Mays on behalf of the 16th Defendant

2016: June 16; 23

JUDGMENT

GROUNDS FOR DECISION

[1] EDER J [Ag.]: There are two main applications before the Court. First, there is an application issued on 22"d April 2016 on behalf of the Claimants for an "unless order" requiring the 16th Defendant, Dearborn Enterprises Ltd ('Dearborn'), to give disclosure of its assets in accordance with paragraph 10

(1) of the Freezing Order made by the Court of Appeal on 25th February 2016

as continued by Bannister J. (the "Unless Order Application"). That application was originally due to be heard on 16th June 2016 with a lime estimate of 15 minutes.

[2] However, on 14th June 2016, Dearborn issued its own application for a stay of the disclosure provisions of the Freezing Order (the "Stay Application") and, at the same time, issued a further application on short notice for an adjournment of the Unless Order Application (the "Adjournment Application') so that the Unless Order Application and the Stay Application could be heard together with a suitable time estimate. In the event, I granted the Adjournment Application for 24 hours.

[3] Accordingly, I heard the Unless Order Application and the Stay Application on 17th June 2016. At the end of that hearing, I informed the parties of my decision viz. that I refused the Stay Application and granted the Unless Order Application. These are my reasons.

[4] I can take the factual background from the Claimants' skeleton which was, in summary, as follows.

[5] The first Claimant, Eurochem MCC JSC, is Russia's largest mineral fertiliser trader and is one of the leading fertiliser producers in the world. Its annual revenue totals approximately US$7 billion. Eurochem Trading GmbH is a Swiss company which purchases fertilizer product from Eurochem and its affiliates to resell globally. Eurochem and Eurochem Trading share an indirect common parent (together the "Eurochem Parties').

[6] On the Claimants' case, the Eurochem Parties are the victims of an unlawful bribery and corruption commission payment scheme that started in 2005 and continued on to at least 2014; and involved two of their former senior employees, the eighth and ninth defendants ("Rogalskiy" and "Pomytkin"). In particular, it is said:

(a) Rogalskiy and Pomytkin received, through companies owned and controlled by them, tens of millions of dollars in secret commissions from a number of the Eurochem Parties' trading partners.

(b) In return, and unbeknown to the Eurochem Parties, Rogalskiy and Pomytkin sold the Eurocarnp Parties' products on to some of their trading partners at a significant undervalue.

(c) The remaining defendants were either involved in the payment of secret commissions or the diversion and/or receipt of such payments.

(d) As a result of these alleged bribes, the Eurochern Parties suffered substantial losses including the immediate financial loss of their products being sold at an undervalue as well as further losses consequent upon a significant weakening in their market position as a result of such activities.

(e) The Eurochem Parties first learned of the bribery scheme in or around February 2014 following a self-report by one of the principal bribe payers. At least three trading partners have admitted paying secret commissions to Rogalskiy and Pomytkin through their various offshore entities and have provided relevant records.

(f) Since February 2014 the Eurochem Parties have conducted a series of investigations in Singapore, Cyprus and the BVI which have confirmed the involvement of Rogalskiy and Pomytkin in the bribery scheme along with various offshore companies owned and/or controlled by them including a number of the corporate defendants.

[7] On 9th February 2016, Bannister J. granted freezing order relief against the BVI defendants but refused to do so against the foreign defendants. In his Judgment, he stated as follows:

"What has been discovered can be put very shortly. They have discovered and there is really no doubt about this, that between 2005 *and early April or May 2014, two very senior executives of the Russian entity had been offering favourable business ffrms to purchasers from one or other of the two companies in exchange for secret commission payments or to give them their more common term, 'bribes'.'*

[8] On 16 t th February 2016 the Eurochem Parties filed an *ex parte* appeal to the Court of Appeal against the refusal to grant freezing injunction relief against certain of the foreign defendants including Dearborn. The appeal was granted on 25111 February 2016. Paragraph 1O (1) of the Court of Appeal Order sets out the usual freezing order disclosure requirements in that each Respondent (including Dearborn) was ordered to provide disclosure of their worldwide assets within 14 working days of the Order. The Court of Appeal Order was subsequenHy continued by Bannister J. until trial or further order of the Court.

[9] On 3rd March 2016, Dearborn filed its acknowledgement of service. On 29111 March 2016, Dearborn issued an application challenging jurisdiction. On the same day i.e. 29111 March 2016, the former counsel to Dearborn, Mourant Ozannes (now replaced by Carey Olsen} wrote to the Court stating that Dearborn would not give disclosure pending the outcome of an application to set aside the service out of order and/or challenge jurisdiction. Instead Dearborn has lodged a sealed envelope with the Registry containing its disclosure.

[10] On 22nd April, the Claimants filed their Unless Order Application. As stated above, this was listed to be heard on 16th June 2016 with a time estimate of 15 minutes. Nothing then happened for some 6 weeks until two days before that date, when Dearborn issued its Stay Application and also an application to discharge the Freezing Order. I understand that that latter application is supported by a substantial amount of affidavit evidence. However, it has not been lodged for the purposes of the present applications; and I have not seen or read tt.

[11] In summary, Mr Mays submitted on behalf of Dearborn that the Stay Application should be granted and the Unless Order Application be dismissed (or at least adjourned} on grounds set out in his Skeleton Argument which I would summarise as follows:

(a) First, Dearborn has issued a challenge to the Court's jurisdiction as well as challenge to the Freezing Order. These challenges are substantial. In essence, Mr Mays submitted that Dearborn should not be made subject to an "unless order" pending the detennination of these challenges.

(b) Second, Dearborn has shown its good faith by bringing the requisite documents into the jurisdiction and providing it to the Court within the time provided by the Freezing Order. Thus, Mr Mays submitted that the content of that disclosure has, therefore, been 'fixed" within the time allowed and can be policed by the Claimants and this Court if contrary to Dearborn's position, Dearborn is compelled also to make that disclosure available to the Claimants in due course.

(c) Third, although Mr Mays accepted that the English courts (including the English Court of Appeal) have generally been disinclined to grant a stay of the disclosure obligations in a freezing order pending a challenge to the freezing order, whether or not such stay should be granted was a matter for the Court's discretion in each case and there were special features of the present case which strongly favoured the grant of a stay.

(d) Fourth, what Mr Mays described as the "balance of prejudice" strongly favoured the grant of a stay. In particular, if the unless order were granted, Dearborn's application to discharge the Freezing Order will be rendered nugatory to the extent of the disclosure obligations. On the other hand, the prejudice to the Claimants in a stay is limited.

(e) Fifth, there was a number of other particular features of the case which pointed in favour of a stay including (i) the fact that there had already been much delay; and (ii) one of the grounds for discharge of the freezing order is the wholesale misuse by the Claimants of documents and information previously obtained from the Cypriot Courts; (iii) the Claimants were themselves in breach of a Court Order.

[12] Before turning to consider these submissions, it is convenient to identify the applicable legal principles which appear in number of English cases viz.; *Groupo Torras v Sheikh Fahad* & *Ors* JSC (2004) CA; JSC *BTA Bank v Ablyazov* [2010] EWHC 2352 (Comm); and *Malofeev v VTB Capital pie* [2011] EWCA Civ 1252; *Motorola Credit Corp v Uzan* [2012] EWCA Civ 989.

[13] For present purposes, I would summarise the relevant principles as follows:

(a) The disclosure provisions are a key part of a freezing order. As stated by Lord Woolf CJ in *Motorola* at [37]:*"The disclosure order gives the teeth which are critical* to *the freezing order".*

(b) The mere fact that there is a pending challenge to a freezing order including a disclosure order is not, of itself, justification to grant a stay of the disclosure order or to refuse an "unless order' and that is so even if the challenge is on jurisdictional grounds: see, in particular, per Christopher Clarke J in JSC *BTA Bank v Ablyazov* at [38]:

"In my judgment if the court makes an order for disclosure for information or documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at liberty to enter judgment. Were it otherwise, in many cases the order would be without effect. The making of such an order is of course a discretionary exercise. It is necessary in a case such as this, where there is a challenge to the jurisdiction and to the making of a freezing order, carefully to consider whether or not it is *right to require the immediate production of information given the prospect that the court may later hold that jurisdiction should not have been exercised or that the freezing order should not have been made. It is plain from Grupo Torras that it* is

open to the court to make an order for the production of information even during the pendency of a *challenge to the jurisdiction. If that be* soit *must, as it seems to* me, *follow that it is open to the court to impose a sanction for non-compliance as a means of securing compliance. The Court of Appeal in Grupo Torras cannot have contemplated that although an order for disclosure could be made during the*

currency of the challenged jurisdiction, it could not be enforced or could only be enforced by a sanction which did not involve entitling the claimants to enter judgment. There are

many cases in which it is only an "unless" order that will ensure compliance. Thus in Mellon Trust the Court of Appeal (at paras.49 and

177) agreed with the trial judge that on the facts he had no realistic alternative to making an "unless' order in the face of the persistent defiance of two of the defendants in relation to the disclosure of their assets. In the case of one of the defendants, Chacrona, the order was made during the pendency of its application to challenge jurisdiction: 1

(c) Third, it is ultimately a matter for the Court's discretion as to whether or not to impose an unless order or the grant of a stay. Thus, as stated by Jackson LJ in *Malofeev v VTB Capita/2* , it involves "*..weighing up competing factors and possible prejudice to both parties.."*

[14] Mr Mays submitted that the general unwillingness of the English Court to grant a stay is "controversial" and has been the subject of authoritative criticism. In that context, he referred me to a passage in *Commercial Fraud in Civil Practice,* Paul McGrath QC (2°d Edition)3 where it is stated that "... *it* is *not at all clear that an obligation to disclose should be maintained when the whole injunction* is *the subject of the application to discharge...'* In my view, that comment must be read in the context of the text as a whole. However, whatever the views of that author may be, the relevant legal principles are well established by the authorities referred to above and, in my view, uncontroversial.

[15] Turning then to the facts in the present case, it seems to me that the starting point must be to recognise that this Court has, on at least two occasions, in effect found that the Claimants have (at the very least) an arguable case that they have been the victim of a bribery scheme; that such bribes have been

1 See paras 3(19) and (22), See too, per Jackson LJ in Malofeev v VTB Capital at paras 39-42.

2 See para 43

3 Seeparas20.117to20.119

laundered and concealed through a web of shell entities, including a number of corporate defendants to these proceedings; and that Dearborn may have assets against which the Claimants have a proprietary claim. As things stand these assets remain vulnerable despite this Court taking steps, through the freezing injunction, to prevent further dissipation.

[16] On behalf of Dearborn, Mr Mays submitted that its application to discharge the Freezing Order raises extremely serious issues. It is, he submitted, a root and branch attack on the Freezing Order. Not only does Dearborn say that there were breaches of the obligation to give full and frank disclosure on the obtaining of the Freezing Order, it also maintains *inter* a/ia that (i) the Freezing Order was obtained in breach of an order of this Court; (ii) the Claimants were not entiHed to rely, at all, on the evidential material on which the Freezing Order as against Dearborn was based; and (iii) the Claimants had

previously demonstrated a propensity to misuse information obtained on disclosure, including the use of improperly obtained information to obtain the Freezing Order itself.

[17] These are or at least may be powerful points which I bear well in mind. The difficulty, however, is that it is quite impossible for the Court at this stage properly to evaluate such matters. As already stated, Dearborn's evidence has only recently been served; and the Claimants' evidence in response has not yet been served. As I understand, it is due to be served shortly. Be all this as it may, I am prepared to assume in favour of Dearborn that it has, at the very least, an arguable case that the Court should accept the jurisdictional challenge and/or that the Freezing Order should be discharged.

[18] It was primarily on this basis that Mr Mays submitted that it will not be long before Dearborn's challenges are resolved and no great harm would be done by extending the time until the outcome is known in relation to discharge. A very similar argument was advanced by the defendant in *Malofeev v VTB Capital.* It was addressed by Jackson LJ in para 42 of his Judgment. Like Jackson LJ in that case, I am unpersuaded by such argument on the facts of the present case. This is so for two main reasons.

[19] First, as things presently stand, it would seem that it will not be until sometime next year that the relevant challenges will be determined by this Court. The hearing of the application to discharge the Freezing Order is listed for November; and the jurisdictional challenge is listed at the beginning of 2017. Moreover, Judgment may be reserved; and appeals may follow. On any view, ii seems unlikely that the discharge applications will be resolved soon.

[20] Second, in *my* view, the delay in the production of these documents and information is causing substantial prejudice to the Claimants - or at least there is a real risk that this is so. Mr Mays submitted, in effect. that there is no prejudice or at least no material prejudice in particular because the content of the disclosure has been 'fixed". I do not accept that submission. First, the purpose of the disclosure order is to enable the Freezing Order to be policed - but such 'policing' cannot be carried out until the documents and information are provided to the Claimants. The documents and information are useless if they are hidden inside a sealed envelope which the Claimants cannot see. Second, at this stage, it is simply impossible to know whether or not Dearborn has complied with its disclosure obligations. That will only become known and possible to verify when the documents and information contained in the envelope can be seen by the Claimants.

[21] So far as Dearborn is concerned, I readily accept that if the stay is refused and the unless order is made, the consequence will be that Dearborn will suffer potential prejudice in the sense that the documents and information in the envelope will be made available to the Claimants and that this constitutes an invasion of Dearborn's privacy. Moreover, I also recognise that if one or both of the discharge applications are successful, such disclosure will have been "forced" on a false basis and that (as Lord Woolf recognized in similar circumstances in *Motorola* at [211) the 'genie cannot be put back in the bottle'. The existence of such potential prejudice is well recognised in the authorities referred to above; and I bear it well in mind. However, as appears, for example, in the Judgment of Steyn LJ in *Grupo Torras* referred to by Waller LJ in *Motorola* at para [28] the Court is,

in effect, required to carry out a balancing exercise. As in those cases, ii is my view that although there may ultimately be prejudice to Dearborn, that is not anywhere near as much prejudice as may be suffered if the Claimants are unable to police the Freezing Order.

[22] It is fair to say that it would at least appear that there has been some delay in this case on the Claimants' side. In particular, Mr Mays submitted that the (original) proceedings were commenced at the end of 2014. Thereafter, these present proceedings were not commenced until August 2015; and the application for the Freezing Order was not issued until November 2015. Even then the application was not heard until some three months later i.e. February 2016. Apparently, no attempt was made by the Claimants to bring the application on early by seeking expedition which, I have to say, would seem unusual both generally and in the particular circumstances of this case if the matter were indeed urgent This delay was heavily relied upon by Mr Mays in support of his submission that the production of the documents and information was in truth not "urgent" at all and that, given the historic delay, the grant of the Stay Application would not cause any substantial prejudice. However, the delay between the end of 2014 and August 2015 was, as I understand, due to the original proceedings being struck out on jurisdictional grounds. Thereafter, part of the delays was due to the nature of the case - Mr Wise explained that the Claimants wanted to be sure that they had everything in place; and part of the delays was apparently due to listing difficulties although I am still puzzled as to why the Claimants did not seek expedition. Be all this as it may and whilst I accept that some of the delays may be due to the Claimants, I am not persuaded that they undermine the importance of the enforcement of Dearborn's disclosure obligations.

[23] Another point relied upon by Mr Mays was that the Claimants had previously misused information obtained pursuant to orders made by the Cypriot Court; that therefore there was a risk that the Claimants would misuse any information that they obtained pursuant to the disclosure order in the present case; and that these matters supported the Stay Application. Again, the difficulty is that it is quite impossible for this Court to evaluate these highly contentious assertions at this stage. However, whatever may have happened in the past. the position now is that the Claimants act at their peril if they misuse any documents or information which may be produced pursuant to the disclosure order; and, as I am sure the Claimants are aware, this Court has strong powers to deal with any such possible misuse.

[24] Mr Mays also asserted that it was highly relevant that the Freezing Order had, as he submitted, been obtained by the Claimants in breach of an order of this Court. In short, at the *ex parte* hearing on 9th February 2016, it appears from the transcript that Bannister J. was concerned that the Claimants were relying upon evidence with regard to certain important allegations which related to parties who were anonymously referred to as ETP1, ETP2 and ETP3. On this basis, at the same time as making the Freezing Order, Bannister J. made a separate order which provided, in effect, that the Claimants were to provide the correct names of these entities *".. within* a *reasonable time·*. Mr Mays submitted that the Claimants had failed to comply with the Judge's Order; that, to compound the default, they had also failed to draw the Court of Appeal's attention to the Judge's Order, despite being *ex parte;* and that, even now, such information has not. to date, been provided by

the Claimants. These are matters which Mr Mays relies upon in support of his challenge to the Freezing Order.

[25] In response, Mr Wise submitted that there had been no breach of the Order. In particular, he drew my attention to other parts of the same transcript to the effect that, as Mr Wise submitted, the required identification was not necessarily linked to the Freezing Order but rather a desire by the Judge that such entities be identified before the trial. In any event, he submitted that the time period for compliance had not yet expired.

[26] In my view, these matters will or, at least, may have to be considered in due course; and for present purposes I am prepared to assume that they may assist Dearborn in its attempt to discharge the Freezing Order - although I should emphasise that I do not express any view on this point, one way or another. Further, I am also prepared to acknowledge that these matters are relevant in the present context such that I should - as I do - bear them in mind.

[27] At the end of the day, weighing up all these considerations and for the reasons stated above, it is my clear conclusion that the Court should refuse the Stay Application and grant the unless order as requested by the Claimants.

Sir Bernard Eder QC

Commercial Court Judge [Ag.]

23 June 2016