THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

THE TERRITORY OF THE VIRGIN ISLANDS

(COMMERCIAL DIVISION)

CLAIM NO:. BVIHC (COM) 2015/0117

BETWEEN

PT VENTURES, SGPS, S.A.

Claimant/Applicant

and

VIDATEL LIMITED

Defendant/Respondent

Appearances:

Mr Roger Masefield QC, Mr David Welford with him for the Applicant

Mr T.A.G. Beazley QC for the Respondent

2018: 4 July

2019: 2 May

JUDGMENT

Worldwide Freezing Order-Provision that "respondent must not in any way dispose of, deal with, or diminish the value of any of its assets"-Whether judgment debtor in breach of Order-Principles applied

[1] Adderley J, (Ag.). There were two applications before the Court. The application on behalf of the claimant dated 15 May 2018 seeks a declaration interpreting the terms of the Worldwide Freezing Order ("WFO"), and an order for further disclosure. The second application is on behalf of the defendant dated 6 June 2018 seeking to have the application of the claimant struck out or dismissed

Short Procedural History

[2] A temporary WFO was first imposed by order of Leon J dated 9 October, 2015, followed by a WFO on 12 October 2015. An application by Vidatel made before Farara, J (Ag.) on 25 November 2015 to discharge that Order was dismissed on 8 February 2016. A further application to discharge the WFO on the ground of material change in circumstances was made before Adderley J 6-8 March 2018 was dismissed on 26 March 2018 and a consequential order made 28 March 2018. Adderley J dismissed an application to stay the 28 March 2018 Order. An application was made by Vidatel to the Court of Appeal on 29 March 2018 to stay the 28 March 2018 Order, and this application was dismissed by the Court of Appeal on 4 April 2018.

[3] The 28 March 2018 Order contains the following paragraphs:

> "2. By 4pm on 11 April 2018 the defendant shall provide to the claimant the following information (the "Disclosure Affidavit"), verified on affidavit by a duly authorized officer, namely:
>
> (a) An explanation of whether the Defendant has received payment of US$193 million in dividends and interest from its shareholding in Unitel S.A. (or any other sums) since the date the worldwide freezing order granted by his court on 12 October 2015 (the "Worldwide Freezing Order");
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> (b) Confirmation that any such funds remain with the Defendant and have not been further disbursed (exclusive of payments made under the exceptions at paragraph 9 of the Worldwide Freezing Order);
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> (c) If such funds are no longer with the Defendant, confirmation that the Defendant's net asset position exceeds the minimum of US$2.449 billion protected by the Worldwide Freezing Order.
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> (d) If such funds are no longer with the Defendant, confirmation of the identity of the third party/parties who received the funds; and

(e) Details of the assets relied upon by the Defendant since the date of the Worldwide Freezing Order to satisfy the minimum asset position (including periodic bank statements since that date)."

[4] Paragraphs 4, 5 and 6 of the WFO dated 12 October 2015 reads as follows:

4. "…the Respondent must not-
(2) in any way dispose of, deal with or diminish the value of any of its assets whether they are in or outside the British virgin Islands up to the same value [US$2.449 billion] (square brackets added)

5. Paragraph 4 applies to all assets whether or not they are in its [Vidatel's] own name, whether they are solely or jointly owned and whether [Vidatel] is interested in them legally, beneficially or otherwise. For the purposes of this order assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it was its own. [Vidatel] is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions.

6. The prohibition includes the following assets in particular-

(1) the Respondent's 25% shareholding in Unitel S.A.; and

(2) dividends paid to the respondent in respect of its shareholding in Unitel S.A.

[4] Paragraph 9 of the WFO allowed for exceptions as follows:

"EXCEPTIONS TO THE ORDER

(9) (1) the order does not prohibit the Respondent from spending a reasonable sum on legal advice and representation. But before spending any money on legal advice or representation the Respondent must tell the applicant's legal representatives where the money is to come from, if it is not the Respondent's own money.

(2) The respondent may agree with the Applicant's legal representatives that it may spend more than a reasonable sum on legal advice and representation or that this Order should be varied in any other respect , but any agreement must be in writing.

(3) the Order will cease to have effect if:

(a) the Respondent-

(i) provides security by paying the sum of US$2.449 billion into court, to be held to the order of the court; or

(ii) makes provision for security in that sum by another method agreed with the Applicant's legal representatives.

> (4) the Order does not prohibit the respondent paying such fees that are necessary to maintain its corporate status and existence including, for example, company fees required under Angolan law."

[5] Paragraph 11 provides for an application to the court for variation or discharge of the WFO of not less than 3 days notice by anyone served with or informed of the WFO.

[6] There was no "Angel Bell" exception in the WFO as Vidatel is not a trading company; it is a special purpose vehicle holding company.

[7] The applicant relied mainly on the Twelfth Affidavit of Charles George Stewart Balmain dated 15 May 2018 ("Balmain 12") and supplemental affidavit, and the defendant on the Seventh affidavit of Isabel dos Santos dated 11 April 2108 ("Dos Santos 7") and supplemental affidavit filed to comply with paragraph (b) of the 28 March 2018 Order.

[8] In Dos Santos 7 Ms Dos Santos on behalf of the company swore that as at 12 October 2015 Vidatel's only assets were, (i) the shares comprising 25% interest in Unitel SA (ie its ownership of the shares themselves and its shareholder's entitlement to dividends) and (ii) a small amount of cash in more than one bank account totaling less than US$75,000.

[9] Ms Dos Santos also swore that since 12 October 2015 Vidatel has received dividends from Unitel SA in the sum of Kwanza (AKZ) 65,570,000,000 (about US$400 million) in 6 tranches from 8 December 2015 with the last being 29 December 2017. Almost all of the funds were invested in real estate and various businesses.

[10] PT Ventures claims that the meaning of the WFO is clear, that Vidatel's breach is clear, and that Vidatel had the means under paragraph 9 and paragraph 11 of the WFO to apply to vary the Order if it wished to do so.

[11] Vidatel submitted that because the investments it made following 12 October 2015 effectively preserved the value of Vidatel's assets in the context of the devaluation of the Angolan Kwanza and inflation; and because the 28 March 2018 Order did not require Vidatel to provide any more information than had already been provided in Dos Santos 7, it was not in breach of the 28 March 2018 Order.

[12] Accordingly Vidatel applied for the application to be struck out on the following grounds:

(i) PTV is in breach of its express undertaking to the court in using information and documents provided by Vidatel under the 28 March 2018 Order to found and to use it in its application for a declaration that Vidatel has breached the WFO. They argue the undertaking was not to use the information in "contempt proceedings", and that in context that includes proceedings for a declaration of breach of the WFO, and as such the application is for an improper purpose.

(ii) The declaration sought would serve no useful permissible purpose.

(iii) It is disproportionate, unnecessary, inappropriate and the waste of the parties and the court's time to consider whether a declaration should be granted that there was an historical breach on the relevant facts and the law. If necessary the position should be dealt with by an amendment going forward or by an undertaking from Vidatel. If not its submitted that PTV did not prove a breach, which it stated should be as in a case for contempt of court, on a criminal standard, beyond a reasonable doubt.

(iv) Vidatel complied with the disclosure requirements of the 28 March 2018 Order, and/or there is no or no sufficient basis for the further disclosure elements of the 15 May 2018 [PT Ventures'] application. The new elements of disclosure are an attempt to widen the ambit of the disclosure that it could have requested in the previous application. It is unnecessary and oppressive. (*Halifax v Chandler* [2001] EWCA civ 1750 at [24]-[27].

(v) There is no or no justifiable and /or sufficient basis for [PT Ventures] to be permitted to use information and documents ordered to be disclosed in these proceedings for the purpose of other proceedings. Vidatel should be granted a confidentiality order in respect of information and documents which it has disclosed and/or disclosed pursuant to orders of this court.

The Law

[13] The UK Supreme Court in JSC BTA Bank v Ablyazov (No 10) [2015] UKSC 64 set out some principles which serve as a guide to a court in construing freezing orders. It rejected the flexibility approach advocated by Beatson LJ in the Court of Appeal, and approved the strict construction principle, that being in the context of penal sanctions the provisions of freezing orders should be clear and unequivocal, and strictly construed. If it is desirable that a broader meaning should be given to it than is appropriate applying ordinary principles, the solution is not to give it a meaning which it does not have but to vary the order (and the relevant standard form of the order) for the

future. In this connection it determined that the term "assets or funds" in the standard forms of injunction does not extend to sums not beneficially owned by the defendant.

[14] The court approved the approach in the Hadkinson case [2000] 1 WLR 1695 that the context in which a freezing order was granted is of particular importance in determining its true construction in a particular case (see [26] of Ablyazov (No 10) per Lord Clarke). Like any document, a freezing order must be construed in context. The answer to the question of construction of the freezing order does not depend on an analysis of the defendant's conduct or motive.

[15] In the Michael Wilson & Partners case[1], Lady Gloster, although speaking within the context of determining whether transactions could be construed as being in the ordinary course of business, made a similar point at [35] that the determination of the question is highly fact-sensitive.

[16] In the Cayman Islands case of SAAD Investments[2] Chadwick, P gave an opinion, obiter, on the restraint in a freezing order at [42] as follows:

> "…if it were necessary to reach a concluded view, I would be inclined to think that restraint on " dealing", in the context of a freezing order, was directed towards acts which had the effect that the asset was less available (or of less value) than it otherwise would be to meet whatever relief by way of damages the plaintiff (if successful in the action) might obtain …"

[17] As to whether the declaration would serve any useful purpose both parties relied on the Bank St Petersburg case[3], where Hildyard J expressed the opinion that " *the making of a declaration is always discretionary, and when considering whether to grant a declaration or not, the court takes into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are other special reasons why or why not the court should grant such relief; see Nokia corp v InterDigital Technology Corp [2006] EWCA 1618*"

[18] The burden of proving that the disputed transaction falls outside the exception is on the applicant.

[19] However, in JSC BTA Bank v Ablyazov (No 3) [2010] EWCA Civ 1141 the English Court of Appeal made it clear that the scope of the injunction is not limited to transactions carried out with the intention to dissipate. Maurice Kay LJ clarified this at [75] where he stated:

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[1] Michael Wilson & Partners, Ltd et al and Michael Earl Wilson [2015] EWCA Civ 1028

[2] Ahmad Hamad Algosaibi and Brothers company v SAAD Investments company Limited and others [2010 (2) CILR 266]

[3] Bank St Petersburg,Alexander Savelyev v Vitaly Arkhangel sky, Julia Arkhangelskaya, OSLO marine ports LLC [2014] EWHC 574 (Ch)

> "The judge relied on the judgment in *Normid Housing* as providing support for his view that the 9(b) exception…" [the Angel Bell Exception] "… should be construed widely and not narrowly. It should, he said, be construed as extending to the activity of holding and managing assets so long as it is not aimed at dissipating a defendant's assets. We think that this is too widely stated. Literally applied, it would entitle any defendant to dispose of or deal with his investments free of the scrutiny of the court and is inconsistent with the form and structure of a freezing order which, for the reasons stated earlier, deliberately does not limit the scope of the injunction to transactions carried out with intention to dissipate. The need to protect a claimant from this risk (in a case which by definition must have involved a prior finding by the judge that there is a real risk of dissipation but for the grant of the injunction) is achieved by prohibiting all disposals of assets except those permitted by express exceptions to the order and by giving the defendant a general liberty to apply in respect of any particular disposal."

Discussion

[20] As correctly stated by Lewison LJ in the Michael Wilson & Partners case the primary (and some would say the only) purpose for a freezing order is to prevent the dissipation or concealment of assets that would otherwise be available to satisfy a judgment. It is to ensure that sufficient assets of the judgment debtor are preserved between the time of judgment and the time of execution to ensure that the judgment creditor's judgment may be met.

[21] Dos Santos 7 states that AKZ 65.570 billion (about US$400 million) in dividends was received in the period stipulated by the WFO. Ms Dos Santos states that the dividends (which represent about 20% of the minimum asset value which must be maintained) were spent acquiring interests in four ventures, including real estate, a shopping mall and a brewery. She seemed to say that it was to hedge against devaluation and inflation in order to ensure that sufficient funds were available to meet the judgment. She produced an expert report to corroborate that without the investments the money left in the Bank would have depreciated by more than 37%, but with the investment, the value was very likely maintained. However, she said that she did not know whether Vidatel's net asset position meets the minimum US$2.449 billion protected by the WFO; that would depend on the value of Vidatel's 25% interest in Unitel SA which is the subject matter of dispute before the ICC.

[22] Apart from maintaining that the investments were a clear breach of the terms of the WFO, PT Ventures expressed concerns that the investments did not appear to be at arms' length either. Three of the four entities had the same corporate address, the same signature was on all of the transaction documents, and the signatory was an employee of Ms Dos Santos, as well as the person's whose signature was on the fourth document. Ms Dos Santos controlled all of the companies, and the transfers were made in 2017 and 2018 when the company was on notice of the disclosure application. By controlling the companies she can direct a default, and in the case of a default because the Promissory notes provided were not backed by security, Vidatel would be left only with a remedy in breach of contract. There were also irregularities in the execution of the documents, for example, the "Hipergest Agreements" where the signature page is dated 14 December 2015 but the notarial certificate was not placed on until September and November of 2017. Similarly, the brewery documents were dated July 2017 but not signed until November 2017.

[23] Ms Dos Santos did not deny that she owned and controlled the companies but argued that her knowledge of the companies endured to the benefit of Vidatel in the negotiations and in the terms achieved.

[24] Mr Masefield QC pointed out that clauses 5 and 6 of the WFO were in standard form and that paragraph 6(2) expressly caught dividends as assets. Furthermore paragraph 9 excepted amounts for legal advice and representation, and apart from that any variation of the WFO must be in writing. None of the transactions were in the ordinary course of business because Vidatel is a special purpose vehicle not doing any business and no application was made for a variation of the WFO.

Conclusion

[25] This is one of those instances where, as stated in the UK Supreme Court case of JSC BTA Bank v Ablyazov (No 10)[4], it would have been appropriate to seek to vary the order rather than to attribute a wide interpretation for the definition of "dealing". By not taking that approach Vidatel wittingly or unwittingly breached the terms of the WFO in relation to dealing with specified assets (dividends). It fits neatly within the principles enunciated in JSC BTA Bank v Ablyazov (No 3) and JSC BTA Bank v Ablyazov (No 10). The details surrounding the companies chosen in which to invest, and the timing of the investments point to the breach being intentional although intention is not relevant per se because this is not a contempt hearing.

[26] The assets expressly identified in the WFO were the dividends received from Unitel SA. It must be remembered that this asset was expressly singled out within the context of PT Ventures holding a US$2.449 billion money judgment against Vidatel. Vidatel admits that the dividends were disposed of and dealt with. The word "or" is used in the phrase "…*must not in any way dispose of, deal with or diminish the value of any of its assets*". As a matter of construction the prohibitions may be construed disjunctively. Therefore, the admission by Vidatel that it has disposed of and dealt with the dividends is sufficient evidence to establish the breach. Vidatel only disputes that the value of the assets have been diminished. The reality is that the dividends no longer exist as assets and so their value has been diminished to zero. Assuming that they were in a bank before the investments, the dividends in the bank represented the property constituted by the account; that property consisted of a contractual chose in action enjoyed by Vidatel as against the bank (see Whitlock v Moree [2017] UKPC 44 at [26] per Lord Briggs). They have been transformed from choses in action as against a bank to interests in private investments. Although these investments are also caught by the WFO, the inherent risk in the assets now being held are different, and they have changed without the consent in writing by the judgment creditor as envisaged by the WFO. The current investments are of a completely different character. The investments also appear to fall within Chadwick J's definition (above) of "...acts which had the effect that the asset was less available (or of less value) than it otherwise would be…". In fact, in my judgment Chadwick J's definition should be expanded to include acts, as in this case, which, without the judgment

[4] [2015] UKSC 64

creditor's consent, change the fundamental character of any asset expressly named in the WFO. PT Ventures has already expressed its view that because of their illiquidity, it does not necessarily accept that the value of assets overall has not been diminished either.

[27] In my judgment, therefore, PT Ventures has proved on a balance of probability, which is the appropriate standard in this case, that Vidatel breached the terms of the WFO by dealing with and disposing of the dividends. I so find. It has also diminished the value of the dividends because it has disposed of them. It is an open question of whether the overall value of Vidatel assets subject to the WFO has been enhanced or diminished.

[28] PT Ventures gave an undertaking that it would not use the information obtained under the 28 March 2018 Order in contempt proceedings. I find that these are not contempt proceedings. That being so, seeking a prerogative order from the court such as a declaration of whether of its rights under the WFO are being breached is a very appropriate alternative means to police compliance with the WFO, and it therefore serves a very useful purpose. It is the same remedy that was sought in JSC BTA Bank v Ablyazov (No 3).

[29] Although Vidatel contends that it has not breached the WFO and that the investments were and are genuine investments made to protect Vidatel against losses that it may otherwise have suffered as a result of devaluation of the Kwanza and inflation, Vidatel has offered through Ms Dos Santos assurances in relation to its future conduct in respect of any further sums that it might receive from Unitel SA. It offered to undertake to give 10 working days' notice of any intention it may have to invest, transfer or make any arrangements with regard to any future dividends or other sums received.

[30] I have considered the above possible undertaking and agree with PT Ventures that it could lead to confusion as to whether or not the WFO is being varied outside the mechanism provided for in the Order itself which is standard and adequate. I therefore dismiss that application.

[31] PT Ventures has confirmed it no longer pursues that the information obtained in this application be used in the ICC proceedings and the Dutch Proceedings as set out in paragraph 4 of its Notice of Application. It also does not wish to pursue paragraph 2 thereof. Accordingly I accede to paragraph 2 of the application of Vidatel and order that all information and / or documents provided to PT Ventures in these proceedings pursuant to any order or rule of the Court may only be used

by PT Ventures for the purpose of these proceedings in accordance with EC CPR 28.17, and that such information and documents and the contents of such documents shall be kept confidential by PT Ventures and those acting on its behalf, and not to be disclosed by PT Ventures or those acting on its behalf to any third parties (save with the express permission of Vidatel or the court).

[32] However, PT Ventures continues to request the disclosure at paragraph 3 of its application relating to declaration of dividends, correspondence between Vidatel and Unitel SA relating thereto and relevant bank accounts controlled by Vidatel. To the extent that the information requested is historical I agree with the submission of Mr Beazley QC that it is irrelevant to PT Ventures policing the WFO going forward, and refuse to make an order in those terms. However, future correspondence and bank statements would assist PT Ventures to police the WFO and I accede to paragraph 3.1 and 3.2 of the application.

[33] I will hear the parties on costs.

Hon Mr Justice K. Neville Adderley,
Commercial Court Judge (Ag.)

By the Court

Registrar