Neutral Citation Number: [2023] EWHC 1948 (Comm)

Case No: **CL-2023-000372**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **21 July 2023**

Before :

Sean O'Sullivan KC (sitting as a Deputy High Court Judge)

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Between :

Nederlandse Financierings-maatschappij Voor Ontwikkelingslanden N.V.	**Claimant**
- and -	
(1) Société Bengaz S.A.	**Defendant**

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Mr Thomas Munby KC, Maxim Cardew (instructed by **Hogan Lovells International**) for the **Claimant**
Mr Abdul Jinadu (instructed by **WAGPCO**) for the **Defendant**

Hearing dates: **21st July 2023**

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RULINGS

Judge O'Sullivan KC **Friday, 21 July 2023**
(**15:01** pm)

Ruling 1 by **SEAN O'SULLIVAN KC**

1. This is the return date following the making of without notice injunctions, including a freezing injunction, by Mr Justice Bright on 5 July 2023.

2. The first defendant has attended via Mr Monnou, who is not an English lawyer, but is the chairman of the company.

3. I am satisfied, from the material I have seen, that the original injunction order was sent to Mr Monnou by email on 6 July 2023, and that was followed up thereafter with information, also sent by email and in other forms, about the date of this application and the details of its listing.

4. However, Mr Monnou today suggests that an adjournment is needed, on the basis that the material has only recently been, he says, provided to the first defendant. That material spans many hundreds and indeed thousands of pages, and is in English, which is not the first language of the employees of the company.

5. Moreover, he says that he requires English law advice and representation to deal with the application and the material on which it is based. He says he needs time for that in order for the battle to be fair. He says that the first defendant needs to be properly advised and represented.

6. He has indicated that, while finding money to pay lawyers is a problem, the first defendant is intending to obtain money for this purpose from its main shareholder. He tells me that he is in touch with a law firm, Candey, and hopes that that will shortly be possible to go ahead with instructing them.

7. I should make clear that the claimant disputes most of this. For example, it does not accept that there is no money to obtain advice, because its position is that, despite the order made by Mr Justice Bright in support of the freezing injunction, there has been no proper asset disclosure by the first defendant; indeed, no asset disclosure at all. The claimant also disputes various of the assertions made by Mr Monnou about when documents were provided to the first defendant.

8. What I have decided to do is to find a middle way. It would not , in my judgment, be appropriate simply to adjourn today's hearing, in circumstances where there has been notice of it, and the parties have attended at considerable cost. Indeed the second defendant, whose position I will deal with later, is in attendance by Counsel, no doubt at considerable cost. As the claimant points out, there is currently no sign that the first defendant has a substantive answer to the orders which have been made. But I do see that, even if the first defendant had moved with alacrity to prepare for this hearing once notified of the order of Mr Justice Bright, it might well be the case that it would not be ready to deal substantively with those orders today.

9. I will seek to strike a balance by ordering that the injunctions are to be continued, which course I understand to be accepted by both the first defendant and the second defendant --

that is not controversial, that the injunctions should all be continued – but, in respect of the first defendant, my *inter partes* order continuing the injunctions will be expressly without prejudice to a liberty to apply to discharge the injunctions without showing any change of circumstances.

10. The condition I will impose is that, if that liberty to apply is to be utilised, the application must be issued, together with any supporting evidence that is going to be relied upon for that purpose, within six weeks of today's date. There was some disagreement about exactly the time period I should use for this purpose, it being recognised that I cannot leave that liberty to apply open ended. I have decided to be generous to the first defendant and grant it six weeks, on the basis that it does not seem to me that the additional time the first defendant was seeking for this will prejudice the claimant in any significant way.

Judge O'Sullivan KC **Friday, 21 July 2023**
(**15:51** pm)

Ruling 2 by **SEAN O'SULLIVAN KC**

1. An issue has been raised about fortification of the cross-undertaking. The second defendant says that the risks to it of suffering loss as a result of the injunctions having been made are real risks. It points to orders that have been made in the past, in both Benin and Togo. In particular, my attention was drawn to an order, unrelated to the injunction, concerning whether Mr Monnou should be a director of the second defendant, in respect of which a penalty was imposed on the second defendant by the Benin court, in the sum (I am told) of about £260,000.

2. A further example concerns a dispute between the claimant and the second defendant as to the status of an order made by the Court in Togo about payment out of the money which is currently in the account that is the subject matter of the injunction. An order was made on 22 June 2023, at the request of shareholders in the first defendant, directing the second defendant to pay the money into an account of the Togolese Bar Association.

3. As it turned out, the second defendant did not take any steps to make that payment because it is said that there were, at that stage, multiple orders affecting those same funds. The claimant says that that Togolese order was only ever intended to hold the ring and was not actually concerned with **moving** the money. It says that the shareholders who obtained the order were not intending to enforce it so as to require money to be moved. The second defendant does not agree with this characterisation.

4. Ultimately, I do not feel able to resolve that disagreement about the effect of that order and I am not sure it matters. The point is that the second defendant could be faced with competing claims and orders by other courts in relation to this money, which it has been ordered by this Court, at the urging of the claimant, to retain. That point, given the history of this dispute, is undoubtedly a valid one. The second defendant is, as it puts it, at the mercy of the other parties and the orders that they may seek around the world, which may have financial consequences for it.

5. The second defendant also says that it may incur legal costs as a result of dealing with such foreign proceedings. The claimant points out that legal costs in relation to the current proceedings would be a matter for security for costs and not for a cross-undertaking to pay damages. I accept that, but I can see that there is scope for legal costs to be incurred elsewhere in the world as a result of this order made by this court. In any event, I accept the broad premise that there is scope for the second defendant to suffer losses, as a result of it being subject to this injunction.

6. The difficulty is identifying the realistic amount or extent of that exposure. There is no requirement for the second defendant to prove, on the balance of probabilities, that losses have been or will be caused by the injunction, at this stage. That is not the nature of the exercise with which I am concerned when asked to order that fortification of the cross-undertaking be provided. However, I do need to have some proper basis for concluding that there might be a significant loss, for which fortification is then required.

7. The suggestion that has been put forward by the second defendant is that I might "robustly" arrive at a figure of US$2 million. That seems to me to be something of a stab in the dark; or, perhaps an attempt to start the bidding high. There is no proper basis for arriving at a figure at that level. However, as I have said, I can see that there is a realistic risk of some more limited costs and/or penalties being imposed upon the second defendant as a result of the injunction, and, having regard to the figure given to me for the penalty imposed by the Benin Court, the best I can do is suggest that a figure of about £300,000 seems reasonable.

8. The next point is that the claimant is a very substantial Dutch bank, backed by the Dutch state, and said to have assets in the order of €3 billion in Holland. The claimant says that is a complete answer to any application for fortification.

9. I am not sure about that. I have regard to the Commercial Court Guide, which talks about a situation where the applicant for an interim remedy "*is not able to show sufficient assets within the jurisdiction of the court*". That same reference to assets **in the jurisdiction** is found in a series of cases. Perhaps the most often cited is Tarasov v Nassif (29 June 1994, unreported) in which Lord Justice Dillon referred to a similar paragraph in the then Guide and said that this formulation emphasises that: "The key question is whether there are assets within the jurisdiction". While the claimant undoubtedly has assets, there is no evidence of assets in this jurisdiction.

10. I have sympathy for the claimant's point that, realistically, a Dutch bank is very unlikely to refuse to honour its cross-undertaking if an order to pay damages were in due course made by this court. It is tempting for me to conclude that the claimant is so unlikely to refuse that I do not need to require any security. But that might be said to amount to a slippery slope: asking the Court to form a judgment about what an entity domiciled in a foreign jurisdiction may choose to do, and whether that entity may choose to wait for enforcement steps to be taken, in circumstances where the UK is no longer within the European Union and, therefore, there are no certainties about how enforcement would operate.

11. I do not agree that this situation is quite the same as if an application had been made for security for costs, where the burden would be very much on the party seeking that security to justify the making of such an order. Here, the claimant has obtained an injunction at the discretion of the English court, and the cost of doing so is generally that the applicant provide a cross-undertaking as to damages and, if it has not provided evidence of assets in the UK, it fortifies that cross-undertaking so as to ensure that the balance of convenience favours making the order.

12. I have no doubt that the claimant can do so by providing a bank guarantee, or something similar, at limited cost to it. There is no need for it to incur the opportunity cost of putting money in court unless it chooses to do so.

13. It does seem to me that it is appropriate for some fortification to be provided, as it seems to me would be the usual course with a foreign domiciled claimant. That was only not done here at the *ex parte* hearing because of uncertainty as to whether there was any real

risk of a loss being suffered by the second defendant. I am satisfied that there is such a risk, although not to the degree suggested by the second defendant.

14. For those reasons, I am going to require fortification in the sum of £300,000, by a first class bank guarantee from a London bank or other convenient form, unless you want some different wording for that, Mr Munby?