IN THE HIGH COURT OF JUSTICE **[2023] EWHC 15 (KB)**

CLAIM NO. CL-2022-000103

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (KBD)

BETWEEN:

OOO NEVSKOE

(A company incorporated in the Russian Federation)

Applicant/Claimant

-and-

UAB BALTIJOS ŠALIŲ INDUSTRINIO PERDIRBIMO CENTRAS (formerly "UAB Alfagra")

(A company incorporated in Lithuania)

Respondent/Defendant

-and-

BILDERLINGS PAY LIMITED

(A company incorporated in England)

Third Party Respondent

JUDGMENT

OOO NEVSKOE v UAB BALTIJOS ŠALIŲ INDUSTRINIO PERDIRBIMO CENTRAS (formerly "UAB Alfagra") and BILDERLINGS PAY LIMITED

After authorised publication this judgment maybe cited as Re OOO Nevskoe (No. 1) to distinguish it from any later decision on an application to vary or set aside.

Judge: Dr Victoria McCloud, a Master of the Senior Courts Queen's Bench Division sitting in the Commercial Court KBD

Cases Cited (whether or not referred to in judgment)

James Bibby Ltd v Woods [1949] 2 K.B. 449

Re Suidair International Airways Ltd [1951] Ch. 165

Roberts Petroleum Ltd v Bernard Kenny Ltd [1983] 2 A.C. 192

Société Eram Shipping Co. Ltd v Cie Internationale de Navigation [2004] 1 AC 260

FG Hemisphere v Congo [2005] EWHC 3103 (Comm)

British Arab Commercial Bank v Algosaibi [2011] 2 C.L.C. 736

Novoship (UK) Ltd v Mikhaylyuk [2014] 1 All ER (Comm) 993

Midtown Acquisitions LP v Essar Global Fund Limited [2018] EWHC 789 (Comm)

Legislation Cited (whether or not referred to in judgment)

Arbitration Act 1996

The Cross-Border Insolvency Regulations 2006, SI 2006 No. 1030

Rules Cited (whether or not referred to in judgment)

CPR Part 72

Representation

For the Applicant: Mr Ryan James Turner, instructed by Messrs. Morgan Lewis & Bockius Solicitors

For the Respondent: Mr Ali Reza Sinai, instructed by Messrs. Kaur Maxwell Solicitors

Keywords: Brexit – insolvency – Third Party Debt Order – recognition of foreign bankruptcy – procedure – status of interim order – priority of application – Cross-Border Insolvency Regulations – assignment of debt – disclosure on ex parte hearing – porridge – falling number

Accessible language summary (not part of judgment)

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

The Claimant is a Russian company which sold wheat to the Defendant. The Defendant is a Lithuanian company which did not pay the bills for the wheat, and the Claimant obtained a an award from an arbitral tribunal in Lithuania for the money. Later, the Defendant became insolvent in Lithuania. The Claimant found out that the Defendant had money in a bank account held by the Third Party. It obtained an order that the award be recognised in this country. The Claimant then obtained a temporary order stopping the Third Party paying any of the money to the Defendant. This hearing was about whether the court should make a final order to allow the Claimant to receive the money. The Defendant was represented by the Court Appointed Insolvency Administrator from Lithuania. The next day, the Lithuanian bankruptcy was going to be recognised in England and Wales in a different court. That would stop the Claimant being able to get a final order for payment. The judge decided that

the Claimant could enforce its court order because it was the “first past the post” in the court, and in all the other circumstances.

During the hearing an argument was made about an agreement which apparently passed the rights to the debt to a different company. There was a dispute over whether that agreement should stop any enforcement by the Claimant and whether the Claimant was wrong not to have disclosed the agreement to the court when getting the interim order.

The judge ordered that the final order should be made but the money held by the Third party and not paid to the Claimant until some conditions were met. The possibly affected companies should be given the agreement and be allowed to apply to change the court’s order based on argument about the assignment and its non-disclosure.

JUDGMENT (Hearing dates 1 and 3 November 2022):

Master Victoria McCloud:

1. This case concerns, factually, international wheat shipments by train which were supplied by a Russian company, from the Russian semi-enclave of Kaliningrad into Lithuania. Consignments were to a Lithuanian company, and the case relates to the debt arising from non-payment by them, established by way of a Grain and Feed Trade Association (“GAFTA”) Arbitration. The Claimant has the benefit of an Interim Third Party Debt Order (TPDO), but between the making of that order and the date of hearing of the Final TPDO a foreign Court Appointed Administrator applied for the recognition in England and Wales of the debtor’s bankruptcy in a foreign jurisdiction (in this case Lithuania, an EU member state). However at the time of the Final TPDO hearing before me to which this decision relates the bankruptcy in that jurisdiction had not been recognised in the courts of England and Wales. An application for recognition was pending and due to be heard the day after the hearing before me. In this case, the situation in the case of Lithuania (the foreign jurisdiction) is that whereas before Brexit an insolvency order and Court Appointed Insolvency Administrator in an EU state would have been recognised automatically, after

Brexit the status of EU countries is that of foreign jurisdictions like any other, and hence for such foreign insolvency orders to be effective in this jurisdiction a court process has to be followed for recognition of the foreign Court Appointed Insolvency Administrator , under The Cross-Border Insolvency Regulations 2006 (see citations) ("CBIR")[1].

The underlying claim and orders

2. The Claimant ("C") is a Russian company and is the Applicant for the Final TPDO. It is an exporter of agricultural goods, in this case grain in the amount of 36,000 tonnes of wheat with a 10% error margin. It supplied grain by train to the Defendant ("D") a Lithuanian company during late 2020 and early 2021 in various consignments under a contract dated 24 November 2020. The price was by reference to the market price with a cap of €9m. There were various variations during performance. A total of 36,725.30 tonnes of wheat was supplied.

3. The debt in question in this case is an Arbitral award in the sum of €5,477,934.70 which was later converted to orders of the English Court, and it arose from breaches of D's obligation to pay. After the arbitral proceedings had begun D raised concerns over the quality/quantity of the product supplied and questioned the value of sums sought by C. D's case on those points failed in the arbitration. There were 21 consignments of grain. The first 19 were challenged on the basis that there was said to be a failure to provide certificates with the wheat. Consignments 20 and 21 were challenged on the basis of deficient 'falling number' of the grain: this is a process where one mixes the grain (in ground form) with hot water and measures the rate at which a stirrer drops (in

[1] Prior to the departure of the United Kingdom from the European Union, Article 19(1) of Regulation (EU) 2015/848 (better known as the Recast Insolvency Regulation) provided for the automatic recognition in member states of main insolvency proceedings opened in another member state. The Insolvency (Amendment) (EU Exit) Regulations 2019 (as amended by The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 and The Insolvency (Amendment) (EU Exit) Regulations 2020)) omit Article 19(1) from those parts of the Recast Insolvency Regulation that were retained as part of English law following the departure from the European Union.

effect, viscosity): it was likened to porridge in submissions[2]. During the Arbitration there were various extensions of time granted to D at its request. D failed at the Arbitration. I need not go into the detail of the argument but the points appear to have been easily defeated by C.

4. C discovered that D had received money into a bank account held with the Third Party. C commenced proceedings during the Arbitration seeking an injunction in the form of a freezing injunction under s.44 of the Arbitration Act 1996. That was granted *ex parte* by Lane J on 18 June 2021 and continued on notice by Cockerill J on 25 June 2021. The asset disclosure given by D as a result of the freezing order indicated that the money in the English jurisdiction is D's only asset, and it totalled only €627,717.11.

5. If C is to recover at least a part of the judgment sum from D then it needs to enforce against that asset. It does so by way of these TPDO proceedings under CPR Part 72. That was issued on 26 August 2022 and I made an interim order on 4 September 2022. It was sealed and served around 27 September 2022.

6. Meanwhile, in August 2021 a creditor of D called Horizon Capital Fund commenced insolvency proceedings in the Republic of Lithuania. Judgment for insolvency was given on 31 March 2022 and confirmed on appeal there. A Court Appointed Insolvency Administrator was appointed there ("the Administrator"). At the date of the hearing and decision in this Final TPDO application the foreign insolvency proceedings had not been recognised under the CBIR. This was no doubt because the foreign Administrator had not applied to be recognised, and in fact only did so after a delay of 5 months, on 27 October 2022, just days before this hearing. C was notified of that application after hours on Friday 28th October 2022.

7. The hearing of the application to recognise the Administrator was listed for hearing in the Bankruptcy and Insolvency Court of England and Wales on 4

[2] a colleague reminded me that porridge consists of oats, not wheat.

November 2022, a day after this hearing. Due to the urgency of the situation (since if recognition was granted, as was likely, the ability of C to enforce its judgment would be lost other than via proving in insolvency), I gave an extempore decision with reasons to follow. It was common ground that such would be the effect of recognition, if no final TPDO was made at this hearing. I gave my decision orally on the day of the hearing due to the urgency of the case and the fact that any decision would become otiose if made after recognition of the Administrator, and I indicated that written reasons would follow, in the form of this judgment. The CBIR provision which would bar enforcement is Art 20(1) in Sch 1 to the CBIR, which stays continuation of proceedings.

8. No party has filed notice of objection or witness statement in opposition to the making of a Final TPDO, and the time for doing so under CPR 72.8 expired on 27 October 2022, however the Defendant was represented before me acting by the Administrator, and objected to the making of the order, arguing that the recognition proceedings should take their course and the Claimant should not be permitted to obtain a Final TPDO. He provided a witness statement dated 1 November 2022 (the final TPDO hearing being 3 November). Prior to Brexit, as noted already, the Claimant would have been unable to obtain a Final TPDO because the Administrator would have been recognised automatically but after Brexit that is not the case. Accordingly at the date of my decision the Administrator had not been recognised here.

9. The question for me is therefore whether the Final TPDO should be made and what principles apply in these circumstances. The parties could find no previous authority in which the situation here had arisen for decision, ie where a Final TPDO was sought, and the hearing of that application was at a date when no foreign Administrator had been recognised but an application for recognition – issued after the commencement of the TPDO application – was pending.

The arguments and law

Claimant's case

10. According to C the issue for me was whether to exercise my discretion to make the Final TPDO. As far as C was concerned it had acted diligently in proceeding to enforce, and this contrasted it was said with D's conduct throughout which was one of 'trickery' (as it was put) in the form of unmeritorious objections in the Arbitration, and delays. But for those, C would have been able to obtain and enforce judgment long ago.

11. The sole asset of C is the money held by the Third Party and that is a fraction of the sum lost to C, given that in the freezing injunction proceedings here, it incurred over £100,000 costs.

12. The Administrator had not acted diligently. Even though appointed in Lithuania on 31 March 2022 he had not applied to be recognised here until just before this hearing, several months after his Lithuanian appointment. The result is that the Lithuanian appointment and bankruptcy is not currently recognised because the application for recognition has not yet been heard. It was argued that it was in fact only due to the enforcement application here that the Administrator made his application at all. To make matters worse in C's eyes, the Director of the Defendant which had behaved as set out above to frustrate C obtaining payment had, in the Lithuanian insolvency, been identified as a preferential creditor who would be paid ahead of C.

13. Shortly before this hearing the Administrator suggested that the hearing should be adjourned to allow the recognition hearing to take place, but as was agreed and as was pointed out by C, doing that would effectively bring the TPDO application to an end because recognition would render it pointless. It was common ground that not only would recognition be likely (and that I could assume it would be granted when it came on for hearing) but that it would indeed prevent any Final TPDO from being made by this Court.

14. There was however no issued application to adjourn nor any evidence in support of such filed, and C indicated that if one were to be issued it would be opposed.

C's position on the applicable law

15. The applicable law in most respects was not in dispute, rather the principles to be applied and how to apply them in the exercise of my discretion was the focus of argument. For a Final TPDO to be made the following requirements arise: (i) there must be a debt due or accruing due from the Third Party to the debtor (CPR r.72.2(1)(a)), (ii) the Third Party must be within the jurisdiction (CPR r.72.1(1)), (iii) the debt must be situated within the territorial jurisdiction of the court: *Société Eram Shipping Co. Ltd v Cie Internationale de Navigation* (see citations) and (iv) the Court must consider it right or just to make the order final taking into account all the circumstances of the case and may impose terms as part of its final order to reflect the justice of the case: *Novoship (UK) Ltd v Mikhaylyuk* (see citations).

16. Items (i)-(iii) above were not in dispute.

17. As to item (iv) the discretion of the court must be exercised according to previous case law and guidelines in it. This was the battleground in this instance between the parties.

18. Mr Turner for C characterised the existing relevant legal position as to exercise of my discretion as follows (quoting from his skeleton argument):

"(1) Where domestic insolvency proceedings have not been opened or cannot be opened the general policy of the law is "first past the post", for a creditor should be entitled (over other creditors) to the fruits of their diligence: *British Arab Commercial Bank v Algosaibi* [2011] 2 C.L.C. 736 at [53] per Flaux J. Goddard CJ described this policy in the following terms in *James Bibby Ltd v Woods* [1949] 2 K.B. 449:

"Garnishee proceedings are one form of execution and, as I have said more than once in the course of the argument, it not infrequently happens that where there are several

claims or may be several claims against money the person who gets in first gets the fruits of his diligence."

(2)Where domestic insolvency proceedings have not been opened, but the debtor is insolvent, the Court should take into account the position of other creditors and the effect of conferring priority on the applicant creditor. However, the insolvency of a debtor is not a bar to making the order final and allowing one creditor priority over another: see *British Arab Commercial Bank v Algosaibi* [2011] 2 C.L.C. 736 per Flaux J (debtor insolvent) and *Midtown Acquisitions LP v Essar Global Fund Limited* [2018] EWHC 789 (Comm) at [8] per Robin Knowles J ("solvency in question").

(3)(Although it is not the case here) where a debtor is subject to domestic insolvency proceedings at the time of the interim order or the final hearing, the policy of the law is different: an order will not be made final (other than in exceptional circumstances[3]) where it would interfere with the distributional policy provided for by domestic insolvency law: *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 A.C. 192 at 213F-G per Lord Brightman."

19. It was submitted that two key principles arose of relevance here namely (a) that there was nothing inappropriate about allowing a creditor to obtain priority over other creditors where the debtor is insolvent, if the distributional policy of the Insolvency Act 1986 is not (at that point) engaged and (b) that where foreign insolvency proceedings have not been recognised, the existence of those foreign proceedings does not prevent a diligent creditor such as C from obtaining the fruits of their diligence, ie to enforce the debt. It was stressed that those principles would rarely arise because, normally, an Administrator would act diligently in obtaining recognition under CBIR and hence an automatic stay of execution in the Insolvency system of this jurisdiction, but that had not happened here. Those two principles were said to be supported by

[3] Counsel's skeleton's footnote, to quote: That the opening of insolvency proceedings is not an absolute bar is indicated [it was argued by C] by s 183 of the Insolvency Act 1986, which presupposes (by the existence of the discretion in subparagraph (2)(c)) that there are circumstances in which the Court *will* allow an uncompleted execution to be completed and the benefits of it retained by the judgment creditor.

the following case law (there being no case law in exactly the circumstances here).

20. It was noted that in *British Arab Commercial Bank v Algosaibi* (see citations) the defendant was insolvent and liable to be made bankrupt in Saudi Arabia. Creditors sought charging orders. Flaux J (as he then was) made the charging orders final in the order in which the applications had been made based on a "first past the post" principle. He did not decline to make the orders final because the defendant was insolvent or because it would confer priority on the first-in-time creditor over other creditors. Per Flaux J at 53:

"I have reached the conclusion that Cooke J was right [in FG Hemisphere v Congo [2005] EWHC 3103 (Comm)] in saying that in non-statutory insolvency regime cases, the general rule is that the principle of 'first past the post' applies. However, it is only a general rule, to which there may be exceptions when it is appropriate in the exercise of the court's discretion not to make a charging order final. It seems to me that (despite Mr Lord's submissions to the contrary) there may be exceptional cases where even though no statutory insolvency regime applies, it is appropriate to conclude that someone in the position of HSBC should not have the benefit of a final charging order."

21. The learned judge indicated the type of conduct which might justify a charging order being made final on terms that did not reflect the general rule of 'first past the post' in a non-statutory insolvency case (ie 'sharp conduct' by the judgment creditor") (per Flaux J at 56).

22. I was also taken to *In Re Suidair International Airways Ltd* (see citations). A creditor in England who seized goods belonging to a debtor under a writ of *fieri facias* was permitted to retain the goods despite winding-up proceedings having been commenced in South Africa before the Writ had been granted. Wynn-Parry J held that, in determining whether the judgment creditor or the liquidator should be entitled to the goods seized, he had "*a free hand to do*

what is right and fair according to the circumstances of each case" under what was then s 325 of the Companies Act 1948. He permitted the creditor to retain the goods because (at p172):

"every possible obstacle was raised to the applicants' first obtaining their judgment and secondly obtaining any fruits from that judgment. In those circumstances it appears to me that it would be quite unjust if I were to exercise my jurisdiction otherwise than in favour of the applicants because, in my view, the company have here less than no merits, and it would be quite wrong that the other creditors should come in and, claiming through the company, deprive the applicants of the fruits of their judgment, which they would have gathered in but for the conduct of the company to which I have referred." (underlining added)

23. I was therefore asked to make the TPDO final so that C could obtain "*at least some modest payment in respect of the grain that it sold to D and which it has been seeking to recover for the past 18 months*". Either of two lines of reasoning were urged on me:

(i) I should apply the "first past the post" principle referred to by Flaux J in *British Arab Commercial Bank v Algosaibi* quoted above (in applying *FG Hemisphere v Congo* (see citations)). This would allow C to obtain the fruits of its diligence and neither the insolvency of D overseas nor the opening of unrecognised insolvency proceedings in a foreign state provided it was said a reason to deviate from the general policy of the law that the first-in-time creditor should get the benefits of their diligence. Thus, if the Court applied the first-past-the-post principle in determining the priority to be afforded to different creditors in the case of Flaux J's decision, there was no reason why it should apply a different rule where the priority contest was solely between one applicant creditor and other creditors generally in the foreign insolvency process, via the (as yet) unrecognised insolvency practitioner.

(ii) Alternatively even if the Court were to consider that the unrecognised foreign liquidation would tilt the balance in favour of not making the TPDO final, there were exceptional circumstances that would justify the Court nonetheless making the order final. These were that C had been the victim of the "trickery and deception" of D (though C stressed this was about effectively sharp or tactical actions and not dishonesty, to delay C in obtaining the fruits of its judgment), who had strung out the process for C to obtain a judgment debt and then enforce it against D's assets. If D had not taken its many unmeritorious steps to delay the judgment and enforcement, C would have been able to obtain a judgment debt and then enforce it prior to the onset of liquidation in Lithuania. Furthermore C had incurred substantial costs in order to prevent the money held by the Third Party in an account for D being dissipated, and specifically opposed an application by D for an order to allow it to use those funds. It would be wrong for C to have to bear the heavy costs of preserving that fund while the general body of D's creditors benefitted from C's actions. In those circumstances per Wynn-Parry J quoted above: "it would be quite wrong" *not* to make a final order that would allow C to execute against the debt that it had worked diligently to preserve. If I was against C as to the full sum sought, C ought to be allowed at least its costs expended in securing the sums held by the Third Party, protecting them for all creditors, as happened in *Novoship (UK) Ltd v Mikhaylyuk* (see citations).

Defendant's case (via Lithuanian Court Appointed Insolvency Administrator)

24. The insolvency practitioner of D, Mr Vladas Kerpauskas from Lithuania, provided a brief witness statement one clear day before this hearing. He produced a bundle of exhibited documents relating to the overseas insolvency proceedings. He gave details of D's present financial position namely some €12,633,317.80 debt to unsecured creditors and €124,140.44 to secured creditors, under the law of that jurisdiction.

25. He exhibited the recognition application which as noted was issued on 27 October 2022. The statement essentially thereafter deals with the fact that he had been heavily engaged in the insolvency and that he had seen no reason to be involved in the UK in terms of obtaining recognition of D's insolvency until such time as he had ascertained what assets were held on its behalf here, which he said he ascertained on 3 October 2022 or thereabouts, having it appears set in motion that process on 29 September 2022 (some 4 months after the Lithuanian court decision).

26. Mr Sinai for D via the overseas Administrator put his argument in the following way. He dealt with the criticisms levelled at D in terms of 'trickery' and delay first.

27. The complaint made by C, he said, was that D exercised a contractual right to have a dispute determined by an Arbitrator. These were hard nosed business entities, and it was not sensible to suggest that doing so was in some sense a 'trick' – they were merely exercising their rights under the Arbitration clause in the relevant contract. The argument over conduct fell away, in fact the advantage of having gone to Arbitration was that it was quick: there could be no complaint that D ignored directions by the Arbitral panel, no complaint within the arguments there of points in bad faith or procedural non-starters. What one was left with was a manoeuvring argument, pursuing an agreed process at Arbitration, making a jurisdiction challenge there which only added about 3 months to the proceedings and such challenges are very common.

28. The same points were made about the counterclaim D had brought in the Arbitration regarding quality of the grain supplied. It took argument and led to reasons. Simply saying that quality had not been raised before did not take matters further. It would not be appropriate for me to second guess the Arbitral tribunal in terms of the merits of the conduct and substance of the arguments which had taken place there. There had been no adverse comment about

'skulduggery' during the Arbitration. In short, I should not hold against D the fact that it had argued points in the Arbitration as it was entitled to do, albeit that it had failed. The same applied to agreements between the parties over extensions of time for payment which had been agreed from time to time: one could not hold that against D, there could be many reasons why parties would extend time. One should not assume that indulgence over payment was not of some benefit to C. Whatever it was, it was within the normal role of business entities in making business decisions.

29. The asset held by the Third Party had been frozen but this gave C no rights or security – hence the injunction had not necessarily been an instance of C securing assets by its diligence. The Freezing order however and the money expended by C on that had been simply the risks of litigation, and was not analogous to the £8,000 referred to in the case of *Novoship (UK) Ltd v Mikhaylyuk* (see citations) cited by C. D had acted reasonably in the course of the injunction application.

30. The starting point as to how to approach the issue of discretion was *Roberts Petroleum Ltd v Bernard Kenny Ltd* (see citations). I was taken to 208F-209A. The court per Lord Brightman there held that the question was whether the court should exercise its power to make an absolute order thereby taking the asset out of the "statutory scheme which, by virtue of the liquidation, is then in existence". His Lordship decided there that the court should exercise its discretion so that assets fell within the statutory scheme referred to there and which in that case was in progress (the English and Welsh insolvency process). D accepted however that the instant case 'fell between the cracks' that the domestic statutory scheme as to insolvency had not yet begun to apply since the Lithuanian insolvency had not yet been recognised under CBIR. Lord Brightman at 208G-H said:

"At the date of the order nisi [ie the interim order] the court has made no irrevocable decision. If therefore the statutory scheme for dealing with the assets of the company has been irrevocably imposed on the company, by resolution or winding up order, before the court has irrevocably determined to give the creditor the benefit of a charging order, I would have thought that the statutory scheme should prevail. … I do not see why a creditor should gain an advantage merely because he has a revocable order for security at the time when the statutory scheme comes into existence."

31. It was submitted that this was a judgment which had regard to the interests of creditors as a whole and that the mere fact that an interim order had been obtained ought not to override the English process (ie, whether or not the insolvency was as yet recognised here, albeit it was accepted that the *Roberts* case was a case where the English and Welsh statutory insolvency process was actually afoot as at the time of the hearing of the application for the charging order absolute). I was asked not to discriminate between an English insolvency order and a Lithuanian one: C had been aware that D was insolvent in fact, due to the Lithuanian proceedings and had been involved in them, such that the debt was taken into account in Lithuania as part of the insolvency, and it ought not to have sought to obtain enforcement here, leading to a possible advantage over other creditors.

32. It was accepted that the Administrator had not applied for a recognition order soon after the insolvency order in Lithuania, but it was argued that the explanation given by the Administrator in his statement for not having done so was a reasonable one. It was also accepted that the Claimant had acted as quickly as it could in seeking to enforce its debt, but it was no surprise to C that the Administrator would come back and object that C ought not to be allowed to gain priority over other creditors.

33. In the Lithuanian proceedings C had asserted that it had in fact assigned the debt in question to a company called “Dognus UAB” (“Dognus”). The Court of Appeal in Lithuania at its judgment at para. 12 - 15 had accepted that Dognus was the successor over the rights of C, and the court substituted Dognus for C in those proceedings. I note that at para. 15 of the judgment it appears that the Dognus was “established … as the successor of procedural rights” and whilst it is a little hard to follow it appears that the relevant paragraph in translation says that Dognus had “taken over the substantive subjective rights from [C]”.

34. The Administrator raised the apparent assignment in objection to the making of the TPDO final. The argument was that it went to my discretion: I queried whether this was potentially a ‘killer’ point rather than just a factor for discretion. An assignment, I suggested, might have the potential to be a bar to C enforcing the debt. The Administrator accepted that we did not have the actual assignment document and hence did not know whether it had a ‘carve out’ to allow C to enforce. Likewise we had no evidence before the English Court as to the position in relation to the assignment in Lithuanian law. I raised also that Dognus was not represented before me. The Administrator then also made the point that the role of Dognus had not been disclosed at the *ex parte* stage of the TPDO (the interim, paper stage). Hence it was said that it was not appropriate to make the TPDO final.

35. The ‘elephant in the room’ it was said was that even if there was merit in the argument about this not being an extant insolvency in the UK, the matter would be resolved in the courts here the following day. The CBIR provided a regime by which a foreign insolvency could be recognised and that statutory scheme – even if not the actual English insolvency process itself which was dependant upon the outcome of the recognition application – was applicable.

36. Under CBIR, I was told there was inevitably a gap between the issue of the recognition application and the actual order for recognition. The CBIR in that

period was a statutory scheme applicable and the court under CBIR had interim powers there if necessary.

37. It was said that none of the decisions referred to by C assisted. They could all be distinguished. The decision of Flaux J in *British Arab Commercial Bank v Algosaibi* was in the context of there being no insolvency proceedings in Saudi Arabia but the debtor was agreed to be insolvent (and there were no insolvency proceedings in England either) and D also submitted that the case was a dispute as to priority between co-creditors under the same judgment.

38. It was accordingly in that context that '*in non-statutory insolvency regime cases*' (per the headnote) '*the historic first past the post rule applied.*'

39. As to *Midtown Acquisitions LP v Essar Global Fund Ltd*, the context of that case was that when Knowles J decided the holder of an interim charging order should have preference over other creditors, there was no insolvency process afoot. It was a case about applying the first past the post rule (in, eg, the *British Arab Commercial Bank* case) in the context of multiple charging orders.

40. As to *Suidair*, it was apparent from the headnote that there was a UK winding up process afoot. The court stated (p166 headnote) that it "*ought not, by refusing to exercise its discretion in the applicant's favour, to give effect to South African law whereby the execution in England, which was put into force after the South African winding-up petition had been presented, would be void.*" The case was thus about whether to frustrate execution here, by refusing to exercise discretion and hence giving effect to South African law. That was a very different situation from that here.

41. As to *Novoship (UK) Ltd v Mikhaylyuk*: that case was very specific to its own facts concerning the recovery by an individual of just over £8,000 debt in factual circumstances where the judge was evidently very sympathetic as a matter of discretion in a case relating to sale proceeds of someone's home.

Reply

42. The Claimant in reply pointed out, on the Dognus assignment point, the assignee could only receive the assignment in equity: the creditor, C could still enforce the debt but would then hold anything recovered on trust for the assignee. That was English law but it was accepted that there was no evidence as to Lithuanian law on that point. The Administrator interposed to say that on these points the relevant parties should be heard, including Dognus (even if, as was not known, to the Administrator, Dognus turned out to be the same entity for practical yet not legal purposes as C). There would be no objection, said D, if an adjournment were sought (but C pointed out that the Judge in the Bankruptcy and Insolvency Court had an obligation to grant the recognition order if it came before her or him, so an adjournment might not stave off the recognition order if the case was delayed to address the Dognus point further and possibly give it notice and join it).

43. After the short adjournment I was taken by the Administrator to the White Book commentary to rule CPR 72.8, at the final paragraph just above "Effect of final third party order", where it was indicated that a TPDO order would not be made if the money was due to the debtor as trustee for another – and here D said that the Third Party might owe the money or hold the money on trust for Dognus in Lithuania. That was not known but it was accepted that there was no evidence before me by the Administrator that the money held by the Third Party was not a debt owed to D.

44. Resuming his Reply, Mr Turner for C did not accept that there could be any liability upon the Third Party to Dognus, as was implied by the Administrator's point summarised in the paragraph above and there was no evidence of any such liability before me such as might go to show that the Third party held the money on trust for Dognus.

45. I was told by Mr Turner, who had showed the assignment agreement to Mr Sinai during the short adjournment that it was a very short document and the Administrator had not raised the points now being made about the assignment to Dognus before this hearing, hence the agreement had not been included in the bundle and argument. His interpretation was that it preserved C's right to enforce, but that it would hold any proceeds on trust for Dognus. However D in any case had not raised the points it now made regarding the effect of the assignment and had not put in evidence of Lithuanian law to enable it to discharge any burden of showing that I ought not to make the final TPDO due to some asserted effect of the assignment upon which the Administrator now relied. Mr Turner asked to be able to put the assignment in evidence. That was opposed, asserting that the Administrator would suffer prejudice by its disclosure at this stage especially where counsel could not take instructions at such short notice, and furthermore it would likely be subject to Lithuanian law in any event and hence not of evidential value absent evidence of its effect in that legal system. It will be apparent from my decision below that I 'parked' that request in favour of an alternative approach.

46. *Roberts*, said Mr Turner, was a winding up order case where the English insolvency process was afoot already. It did not deal with circumstances such as this where the English distribution scheme did not apply (ie, here, the Lithuanian approach applied). In response to the point which the Administrator had made that the CBIR was itself a statutory regime and that regime was in play rather than the English insolvency regime, he said that it had always been the case that a foreign Administrator could apply for recognition here: the legal position was simply that until that was granted, the foreign proceedings were not recognised. A stay could have been sought under CBIR by the Administrator pending recognition but it had not been. We were in the unusual situation that no recognition order had yet been made. This was a case where the first past the post principle should apply in what was a contest in effect between one

creditor and others, outwith the domestic insolvency process, which was not yet afoot.

47. The CBIR did not in any case provide mandatory, automatic recognition for an EU country. There had been a deliberate move away from automatic recognition due to the end of the Brexit transitional period, and hence the deliberate policy was not now automatically to recognise insolvency orders from a member state as had been previously the case but to deal with them in an application under the CBIR process for foreign insolvency orders generally.

Decision

48. I indicated my decision at the end of the hearing with reasons to follow due to the urgency of the hearing which meant that a decision had to be made immediately. My decision is that the TPDO should be made final in all the circumstances, applying the approach characterised as the "first past the post" principle referred to above.

49. However as will be clear from what follows, I attached conditions and directions to my order in view of the absence from court of various parties: the Third Party and Dognus in particular, who might have submissions to make on the effect of the assignment of C's debt to Dognus and because there were live issues, or might be live issues, between the Administrator and C based on the effect of the assignment to Dognus.

50. In sum, I required disclosure of the assignment agreement to the Third Party and to the Administrator and gave the Third Party, Dognus and the Administrator leave to apply to vary or set aside my Final Order upon notice after considering what if any effect the assignment may have once seen. Counsel had time to consider the exact provisions and per the minute of order they produced I ordered payment of the monies to be made only upon certain

conditions having been satisfied so that payment would not occur before the conclusion of that process.

51. I did not feel persuaded that D's conduct in general had amounted to 'trickery' or sharp practice, of the sort which Flaux J identified at para 56 in his judgment in *Algosaibi* which might exceptionally encourage a court not to make an order absolute in non-statutory insolvency cases, or conduct of the sort referred to by Wynn-Parry J at p172 in *Suidair* in approving an order where 'every possible obstacle' had been raised to applicants' obtaining judgment in this jurisdiction in a case where there were South African insolvency proceedings to which effect would be given if no order were to be made. Rather this was in my judgment a case of the parties making use, albeit perhaps tactically, of their rights during the arbitration and thereafter, on both sides, where both sides are commercial entities in a competitive environment. Equally, C cannot be criticized for using the English legal system and TPDO process legitimately, on the basis that it somehow 'ought not' to have used the process simply because it would lead to a priority over an as yet unrecognised insolvency order in Lithuania. (It would have been, obviously, quite wrong in law to pursue the TPDO if the foreign insolvency had been recognised under CBIR but that is not the position and was not the position at the time this court came to determine this application.)

52. I was not persuaded by the speculative point made by the Administrator that the Third Party might hold the money on account for Dognus: there was no evidence to that effect and it is not something which obviously flows from the fact that the Third Party owed the money to D. If D had assigned the debt of the Third Party to Dognus then that might apply, but the situation here is different and relates to an assignment by C to Dognus, in relation to the debt owed by D to C.

53. As to the assignment to Dognus, it seems to me that the priority should be to ensure that all potentially affected parties should see that document and if so advised have a proper opportunity to make submissions, away from a very time-pressured urgent hearing with no practicable option to adjourn without prejudicing this application irretrievably, especially where there may be a question of the legal effect if Lithuanian law applies. It must be recalled that until the Administrator relied upon the assignment (of which it was aware from the insolvency proceedings) as at least potentially being a bar to me making an order, C was not on notice of that argument. I will deal with this in the form of order below.

54. When one looks back through the case-law history cited to me, back to the 1940's/1950's it was clear that absent the existence of insolvency proceedings here, the courts leant and still lean towards 'first past the post' in terms of enforcement as between creditors absent countervailing considerations such as domestic insolvency proceedings: *James Bibby Ltd v Woods*, through the judicial lens of Flaux J in *British Arab Commercial Bank v Algosaibi* more recently. In that case it will be recalled that '*in non-statutory insolvency regime cases*' (per the headnote) '*the historic first past the post rule applied*.' My reading of that decision is that the reference to 'statutory regime' is specifically to the domestic insolvency regime here, ie to domestic statute. As to the argument that the CBIR is itself 'a statutory regime', in my judgment that cuts both ways: it is expressly a system by which a foreign insolvency can be recognised, and it expressly does not grant automatic recognition but requires a court process. There are powers for interim orders in appropriate cases and they have not been used in this case. The scheme of the CBIR it seems to me is a strong statutory indication that the legislature intended to make a distinction between foreign insolvency and domestic insolvency.

55. Before Brexit there was a major difference to the above in the case of EU states: they did have the benefit of automatic recognition of insolvency decisions here, and we would not need to decide this case but for the change which came about at the expiry of the transitional period after Brexit. But once that had expired, EU states fell into the same category as other foreign states and CBIR applies to them unless and until the law is revised as part of any treaties or other coordinated international arrangements. Thus (a) CBIR evidences a deliberate distinction between foreign and domestic insolvency orders and processes by clearly making them unrecognised until a recognition order is granted on application to the court and (b) the previous preferential status enjoyed by EU insolvency orders was revoked by Brexit at the end of the transitional period evidencing a clear intention by the UK and EU that such mutual recognition was to end. The CBIR recognition process is quite streamlined and I described it as close to semi-automatic in that it is a rapid and straightforward process: but it is nonetheless a process, it creates a point in time before which the foreign insolvency is not recognised, and a point after the order is made when it is recognised. I must respect the legislature's statutory intent evidenced in the clear way in which the law operates.

56. The position therefore in my judgment is that the familiar 'first past the post' approach should apply here, in the absence of a recognised insolvency order. A creditor is thus entitled absent some abuse or other countervailing considerations, prima facie to the fruits of its own diligence in beating other creditors – whether directly 'creditor-on creditor' or via some unrecognised foreign insolvency process through the proxy of a foreign Administrator whose role is not subject to an extant recognition order.

57. Exercising my discretion, 'first past the post' is not the sole factor. That is the law: but here we also have the signal sent by the legislation as to a difference in principle between domestic insolvency, or foreign insolvency subject to an

extant CBIR recognition order on the one hand, and unrecognised foreign insolvency on the other. What of the other creditors? This would have the effect of prioritising the debt due to this creditor over others. However they themselves could have taken the steps which C has taken to enforce, and in a commercial setting they have chosen to place their 'eggs' in the overseas insolvency basket: I do not see that this court has a duty to protect overseas creditors proving in an unrecognised insolvency overseas. I do not feel that either side has engaged in 'sharp practice' such as might lead to a departure from a starting point that the diligent creditor may harvest its fruits or 'exceptional circumstances' such as might (if there had been domestic insolvency proceedings afoot under the English distribution scheme) justify departing from giving priority to domestic insolvency.

58. The above said, the CPR empower me to attach conditions or make directions in respect of issues. Ideally we would have been in a position to determine the putative issues around the Dognus assignment and criticism levied at C for not referring to it at the paper application TPDO interim stage, but not only the lateness of the issue being raised but also the fact that as a result potentially affected parties were not on notice or before the court meant that those aspects could not be determined at this point. Delaying would have defeated the purpose of this application given the pending recognition hearing within 24 hours (and I was invited by both sides to proceed on the assumption that if it went ahead recognition would be granted at that hearing, preventing further enforcement in this case and the making final of the TPDO).

59. I shall accordingly make an order that the TPDO be made final but subject to conditions and directions to enable the Dognus assignment to be disclosed to other possibly affected parties (Administrator, and Third Party) and to enable Dognus, the Administrator and the Third Party to make submissions on its effect if so advised, and if so advised on the question of whether C should have

disclosed the assignment at the interim TPDO stage. To protect the money and hold the ring between the parties the money should not be paid to C until that process had been completed.

60. The order made in this case is as follows taken from the agreed minute prepared by counsel after my oral decision was made (being late in the day by the time of my decision and I suspect all parties fatigued in what is not a straightforward case or situation) there was discussion of the outline of the order and counsel helpfully later proposed the following specific wording to give effect to my intent:

UPON the Claimant's Application for a Third Party Debt Order dated 26 August 2022

AND UPON Master McCloud making an interim Third Party Debt Order on 2 September 2022

AND UPON the adjournment of the hearing listed at 4pm on 1 November 2022

AND UPON READING the evidence

AND UPON HEARING Mr Ryan James Turner on behalf of the Claimant, Mr Ali Reza Sinai for the Defendant, and there being no appearance on behalf of the Third Party on 1 November 2022 and 3 November 2022

AND UPON the Court giving oral reasons for its decision to be supplemented by written reasons in due course

IT IS ORDERED THAT:

1. The Claimant shall disclose the assignment agreement dated 15 March 2022 (the "**Assignment Agreement**") to the Defendant and the Third Party within seven days.

2. The Third Party shall pay to the Claimant (the "judgment creditor") €627,717.11 upon the later of the period of 28 days from delivery of the Court's written reasons or (if such an application is made) the determination of an application under paragraph 5 of this Order.

3. Until the satisfaction of the conditions above the Third Party must not, unless the Court orders otherwise, pay to the judgment debtor or to any other person any sum of money due or accruing due by the Third Party to the judgment debtor.

4. The payment shall be made (if made) to the following Euro denominated account on behalf of the Claimant:

Account Name: Morgan, Lewis & Bockius UK LLP – EUR General Client Account

Sort Code: [redacted in judgment]

Acc.: [redacted in judgment]

5. The Defendant, the Third Party and UAB Dognus shall have leave to apply to vary or set aside the Third Party Debt Order within 28 days of receipt by the Defendant and the Third Party of the Assignment Agreement.

6. The Claimant shall serve this Order and, in due course, the written reasons on the Third Party and UAB Dognus.

7. The time for any party to make an application for permission to appeal shall be extended until 14 days after written reasons are delivered.

8. Costs shall be reserved.

61. Following the above, and prior to handing down of my reasons, the Administrator as insolvency administrator of D made an application under para. 5 of the order, to the effect that:

"Pursuant to the permission given in paragraph 5 of the Order of Master McCloud dated 3 November 2022 (sealed on 6 December 2022) (the "Order"), the Defendant seeks an order setting aside the Order because:

(i) the Claimant had on 15 March 2022 (and hence before the Order was made) assigned its rights to the Arbitration Award given by GAFTA on 21 February 2022; and/or

(ii) the Claimant failed to disclose the assignment of 15 March 2022 to Mrs Justice Cockerill before her Order under section 66 of the Arbitration Act 1996 was sealed on

16 March 2022 and also failed to disclose the said assignment to Master McCloud before the interim TPDO was made without notice on 2 September 2022."

62. That application will be listed before me in due course as in effect 'round two' of this application. However these reasons relating to the issues fully argued before me will be handed down after a period of 7 days, in the parties' absence, to enable the parties to send me one single consolidated list of suggested typographical changes, or a version of this judgment with 'tracked changes', for approval.

Handed down 11/1/23
Judge: Master Victoria McCloud