IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No CL-2020-000358

[2024] EWHC 247 (Comm)

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 31 January 2024

Before:

HIS HONOUR JUDGE PELLING KC

(Sitting as a Judge of the High Court)

B E T W E E N :

ALEXANDER GORBACHEV — Claimant

- and -

ANDREY GRIGORYEVICH GURIEV — Defendant

MR P STANLEY KC and MR C LLOYD (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Claimant.

MR T WEISSELBERG KC and MR D CASHMAN (instructed by PCB Byrne) appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft Teams)

JUDGE PELLING:

1 On 16 January 2024, I heard an application made jointly by the claimant and defendant for an order that the evidence of the defendant and his son Mr Guriev Junior, be taken on commission at the DIFC court in Dubai by me sitting as a special examiner. Following the conclusion of the hearing, I informed the parties that I had decided to accede to the submissions for reasons I would give at a hearing fixed for 31 January 2024. This judgment sets out those reasons.

2 As both parties accept, there are two elements to the application. The first is whether the English court has jurisdiction to make orders for a trial judge to designate him or herself a special examiner for the purpose of taking evidence overseas during the course of the trial; and secondly, assuming there is such a jurisdiction, whether, as a matter of discretion, an order to that effect should be made.

3 By an email sent to the parties prior to the hearing, I asked them to consider the degree to which there was a public policy consideration relevant to either jurisdiction or the exercise of discretion given that the only reason either the defendant or his son is precluded from giving evidence in England is that they are designated persons under Regulation 5 of The Russia (Sanctions) (EU Exit) Regulations 2019 (the 'Regulations'). This point had not been addressed by the parties down to that point. That issue was addressed at the outset of the hearing. It is convenient to consider this issue first before turning to the more general considerations that arise relating to jurisdiction and discretion.

4 The express purpose for which the Regulations were made are those set out in Regulation 4 of the Regulations, being, for the purposes of:

> "(1) encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty, or independence of Ukraine: and
>
> (2) promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine on or after 24 February 2022 as a result of Russia's invasion of Ukraine."

5 The Regulations are divided up into a series of Parts. By Regulation 20 of the Regulations designated persons are excluded persons for the purposes of section 8B of the Immigration Act 1971. The effect of this provision is that neither the defendant nor his son are able to enter the UK. Regulation 20 appears in Part 4. Part 4 contains no anti-circumvention provisions. Regulation 20 does not come within the scope of Regulation 3, which is concerned with contraventions that occur by conduct occurring wholly or partly outside the UK. Broadly, aside from the immigration effect already described, the Regulations operate by freezing the assets of designated persons - see Part 3 of the Regulations. Chapter 3 of Part 3 contains express anti-circumvention provisions. They expressly apply only to the prohibitions contained in Regulations 11 to 18(c) and so do not apply to Regulation 20. I should add that, as is well known, the asset freeze prohibitions can be disapplied by HM Treasury, either by general licence or by a specific licence, that general licences have been issued that permit designated persons to use frozen assets to meet legal costs including the costs of litigation before the courts of England and Wales and the defendant has been able to fund his defence of these proceedings by reason of the permissions contained in both the general licence relating to legal expenses and a specific licence granted to him in relation to

these proceedings. There is no other express anti-circumvention provision within the Regulations.

6 In those circumstances, it is highly improbable that any public policy can be derived from the Regulations as being a basis for refusing the order sought applying conventional construction techniques if otherwise there is jurisdiction to make the order sought and the order sought is otherwise one that ought to be made as a matter of discretion. This is all the more likely to be correct in relation to someone in the position of the defendant because he is a foreign national who has been joined to these proceedings as a defendant against his will. His son is the defendant's witness on whose evidence he wishes to rely in order to defend the claim. Even if there was a public policy point to be derived from the Regulations that precluded me from making the order sought, and in my judgment there is not, its impact would require to be balanced against the well-established strong public interest in permitting a defendant joined into English proceedings in the manner I have described to be able to properly defend those proceedings – see, by analogy, the reasoning of the House of Lords in Polanski v Conde Nast Publications Limited [2005] UKHL 10, [2005] 1 WLR 637. As the Court of Appeal noted recently in another sanctions case "*… the court system in England and Wales does not have outlaws or as they were described in Taruta pariahs…"* see Mints and others v. PJSC National Bank Trust and another [2023] EWCA Civ 1132 per Sir Julian Flaux C at [178]. As Sir Julian added in paragraph 179 "*… the fundamental right of access to the court will only be curtailed if that is the necessary implication from the express words … where the implicit proposition was clear because it was inescapable"*.

7 Further, in my judgment, it would be incoherent to conclude that public policy operated so as to prevent a court from making an order it otherwise had jurisdiction to make and which, as a matter of discretion, it would wish to make, by reference to Regulations under which general licences have been granted permitting the expenditure of otherwise frozen assets on legal costs, including the cost of defending claims brought against designated persons. In relation to this point, I accept Mr Weisselberg KC's submission that the position of the defendant and his son is materially no different from that of Chief Etete in Energy Venture Partners Limited v Malabu Oil & Gas Limited [2013] EWHC 2118. Chief Etete would have been refused entry into the United Kingdom under the Immigration Act by reason of an order made by or on behalf of the Secretary of State for the Home Department. Gloster LJ (as she had become by the time the judgment was handed down), travelled to France for the purpose of taking Chief Etete's evidence - see paragraph 9 of the judgment). While Gloster LJ did not expressly comment on the public policy issue, in my judgment, it is improbable that she would have overlooked or ignored the possibility. If no such issue arose in that context it is difficult to see how it could arise from an immigration bar under the Immigration Act simply because it was imposed by the Regulations where no anti circumvention rules have been imposed and under which a general licence permitting the expenditure of frozen assets on litigation in England and Wales has been issued. In those circumstances I conclude that there is no public policy reason for refusing to make the order that the parties ask me to make.

8 I turn now to jurisdiction. Until recently, there does not seem to have been any doubt that there was jurisdiction for a trial judge to appoint him or herself as special examiner for the purpose of taking evidence from a witness overseas during the course of a trial. So, for example, Lindsay J held that he might appoint himself a special examiner in Peer International Corporation v Termidor Music Publishers Limited [2005] EWHC 1048 - see paragraphs 8 to 14, where Lindsay J concluded that he had the necessary jurisdiction to appoint himself as special examiner, whilst recognising that in that capacity he could not force the attendance of witnesses, and that he would have no powers to remedy either

contempt of court or otherwise have any of the coercive powers available to a judge sitting in his or her own jurisdiction - see in particular paragraph 16. Gloster LJ did not consider there was any jurisdictional difficulty in doing what she described herself as doing in Energy Venture Partners (ibid.) to take Chief Etete's evidence in France. It did not occur to the Court of Appeal in Attorney General of Zambia v Meer Care & Desai [2006] EWCA Civ 390 that there was no jurisdiction to make such an order - see paragraphs 48 to 49.

9 The question of whether a trial judge has jurisdiction or should exercise such jurisdiction as a matter of discretion has been considered most recently by Andrew Baker J in the SKAT Litigation [2024] EWHC 19 (Comm). He did so in rather more detail than has been the case in the earlier authorities which I have mentioned. In SKAT (ibid.) three defendants applied for similar orders to those sought in this case, on the basis that they could not travel to Europe because each was the subject of a European arrest warrant, and in addition one was also precluded from Dubai because he was subject to a travel ban imposed by the government of Dubai on the application of the claimant in those proceedings. The order sought was refused and it was directed that their evidence be given by video link.

10 Although it was suggested that Andrew Baker J might have reached the conclusion that there was no jurisdiction to make an order similar to those made in the earlier cases, or which is sought from me in this case, on a close reading of the judgment I consider that Andrew Baker J proceeded on the assumption that there was jurisdiction but concluding, as a matter of discretion, that the order sought in that case should not be made - see in particular paragraph 9 of the judgment - and in so doing drew attention to a number of factors that will apply in many, and possibly most cases, and which, where they apply, will point firmly towards refusing the orders sought. In those circumstances it was not necessary for Andrew Baker J to consider jurisdiction and he did not do so. That said, there were two points that might be thought to support the view that there was no jurisdiction to make the orders sought, although the judge in the end did not reach any final conclusions about them.

11 The first is the proposition at paragraph 20 of the SKAT judgment that there is no power to make the orders sought because of the effect of CPR r.34.8, which, when read in conjunction with CPR r.34.13, is that such evidence could only be taken on commission before the start of and not during the trial. In my judgment, this would be an unduly narrow approach to those provisions since they have to be read both in conjunction with CPR 3.1(d) and (m) which to my mind enable a court to do what is appropriate in this area; and also because it ignores the role played in issues such as those I am now considering by the inherent power of the court to make appropriate orders in the management of its own procedures and the case manangement of the cases before it – see by analogy the approach of Chitty J in Ross v Woodward [1894) 1 Ch 38. Andrew Baker J did not in the end find it necessary to decide this point both because the parties had not addressed the point in the case before him, and because he did not need to do so, given the conclusions he reached concerning applying his discretionary analysis but he recognised that the court's general case management powers may provide an answer to any jurisdictional concerns based on the effect of CPR r. 34.8 on the scope of CPR r. 34.13 - see paragraph 21.

12 The other point mentioned in SKAT that might concern jurisdiction was the suggestion that by making the order the judge was giving him or herself unauthorised leave of absence. Andrew Baker J did not, and did not need to, reach any final conclusions on that point either - see paragraph 25 of his judgment. I do not immediately see how directing that evidence is to be taken by a trial judge sitting overseas as a special examiner constitutes unauthorised leave. This is not something that any of the judges who have made orders to this effect in the past, including Lindsay J and Gloster LJ, considered created an insuperable

jurisdictional difficulty. I do not see that the order sought is one that involves the trial judge taking an unauthorised leave of absence. Rather it seems to me that in making the order and then carrying it into effect the judge is performing an incidental function in the course of the duties of a trial judge. In any event, along with other circuit judges, I am entitled to take leave by arrangement when I choose to do so, and if necessary the four or five days involved in the exercise that is proposed by the parties is leave which I can take without that being unauthorised.

13 I respectfully agree entirely with Andrew Baker J that in all cases the choices between evidence being given by video link during the course of the trial on the one hand and the taking of evidence abroad by a judge using the special examiner procedure is not a choice between a sub-optimal and an optimal solution, but in truth involves deciding which of two sub-optimal solutions is the most appropriate in the circumstances of any particular case. In SKAT the balance came down firmly in favour of evidence being adduced by video link, because the benefit to the defendants of avoiding the risk that something would be lost from the quality of their oral evidence being given remotely was at best limited and any such benefit was outweighed by the cost and inconvenience caused by having to travel overseas, and more particularly because the judge, sitting as a special examiner, has none of the powers of a judge to control the evidence or control the questions asked or compel witnesses to attend, or, more importantly, to answer questions – see paragraph 34 of his judgment.

14 The fundamental difference between SKAT and this case is that in this case, but not in SKAT, witness testimony is ultimately the main or perhaps the sole basis for establishing, or failing to establish, what happened. This case is concerned with a disputed oral declaration of trust for which, by definition, there are no contemporaneous documents which assist directly on the issue that has to be resolved. The factors identified by Andrew Baker J, as leading him to prefer that evidence be given by video link rather than by using the special examiner procedure, are likely to be powerful factors in most cases, particularly since the quality of video links is now much better than was the case 20 or so years ago, and judges, advocates and court officials, are much more familiar with the taking of evidence by video link. In most cases in the modern era it is highly likely that the balance will favour evidence being given by video link on cost and convenience grounds. Indeed, I make it clear that in this case, but for the factors that I have referred to in passing already and refer to in more detail below, that would have been my preferred choice in this case.

15 In my judgment, exceptionally in this case the balance comes down in favour of the sub-optimal solution of taking evidence overseas using the special examiner procedure. That is so for following reasons:

(i) Each of the witnesses is Russian, and either speaks no, or no sufficient English to enable their evidence to be given in English. There is no suggestion of such a linguistic problem in SKAT. It follows that in this case questions will have to be translated from English to Russian, and the answers from Russian to English, using a simultaneous translation procedure, which typically involves interpreters being located both in London to translate the questions, and then either London or Russia to translate the answers. Again, anyone with any experience of evidence being given in this way by video link will appreciate the difficulties that can arise even if no technical interruptions occur.

(ii) This is not a conventional commercial claim in which the alleged commercial arrangement, an alleged oral declaration of trust, is the subject of extensive contemporaneous written material. The central allegation will depend upon a careful

assessment of the oral evidence of the defendant and his witnesses, as well as that of the claimant. In such a case, the opportunity of seeing the witness give evidence in person is likely to be significantly more important than it would be in many, and perhaps most, commercial trials, where essentially for the reasons identified by Andrew Baker J in SKAT at paragraph 34, the risk of something being lost in the course of a video link would not arise in the same way. In this case, therefore, the risk of something being lost is significantly more important than it would have been in SKAT. In my judgment, that point is all the more significant given that the claimant and his witnesses will be giving evidence in court in England, so there will not in that sense be a level playing field unless the order sought is made.

(iii) The point made in (ii) above, is all the more significant in this case for two reasons:

a. Firstly, as I have explained, the defendant is a foreign national who is being sued in England against his will. Given the nature of the claim, it would be wrong and contrary to the overriding objective to force upon such a defendant a method of giving evidence that would place him at a potential disadvantage.

b. Secondly, it is all the more significant because the application before me is one that is jointly made, or at least actively supported by the claimant, who is concerned that the effectiveness of cross-examination will be blunted unless it takes place face to face.

The importance the claimant attaches to the second of these points can be gauged from the firmness with which Mr Stanley KC, on behalf of the claimant, resisted my suggestion that one answer would be for the claimant's evidence to be given by video link as well as the defendant's. In truth, the oral evidence of the claimant and defendant is, as I have explained, critical to the outcome, or is likely to be critical to the outcome of the fundamental issue in this case. That is why Mr Stanley resisted the suggestion that all evidence be given remotely, why Mr Stanley supports the defendant's application and why the defendant is so anxious that his evidence be taken in Dubai rather than by video link,

16 All of that said, it remains the case that there are significant disadvantages to the course proposed, all of which were clearly identified by Andrew Baker J in SKAT. As he stated at paragraph 20 of his judgment, in taking evidence overseas the judge is not acting as a judge and has none of the powers normally available to a judge to control evidence. It will not be open to a judge taking evidence in this way to prevent an inappropriate question from being asked or answered. The question will have to be answered, and if the question is wrongly asked and answered, then there will have to be a formal, or at least figurative striking out of the question and answer on application following the return of the judge to London. It is also true to say that I will not be able to require answers to be given to any inconvenient question that a witness wishes to avoid answering.

17 These are undoubtedly major disadvantages. However, as I have explained, the claimant does not resist the application on this or any other basis, but actively supports the application. In those circumstances, it would be wrong to refuse the application by reference to these points. I am confident in the circumstances of this case that experienced counsel will avoid asking questions to which objection can properly be made, and I am equally confident that the witnesses will wish to answer all questions that are asked in an appropriate way not least because it is in their obvious best interests to do so, having regard to the nature of the issues that I have to resolve, and the importance that oral evidence and

my assessment of the truthfulness and accuracy of that evidence will play in the resolution of that issue.

18 All that said, I respectfully agree with Andrew Baker 's assessment as to why in most cases taking evidence abroad should be avoided. Requiring a judge to travel overseas to take evidence is costly, disruptive and can (though probably not in this case) extend the length of the trial and so inconvenience other litigants. I regard the making of such an order as wholly exceptional but justified on the particular facts of this case for the reasons I have identified.

19 In conclusion, therefore, I consider that I do have jurisdiction to make the order sought. I accept the circumstances in which it will be appropriate as a matter of discretion to make such orders are likely to be exceptional, but I am satisfied that, in the circumstances of this case, exceptional reasons exist for making the order sought for the reasons explained above. I have approved in principle the letter initiating the process as it was before me when the hearing took place. There are further amendments to consider, which I will consider after the completion of this judgment.

20 I would only add that, for the purpose of avoiding any misunderstandings:

(a) It will be for the parties to arrange for electronic bundles in markable form to be available for use by me at the hearing in Dubai since I will not be taking any judicial IT equipment with me.

(b) It will be for the parties to arrange a business visa that is apparently required if I am to perform the function that it is intended I should perform. My understanding is that that can only applied for once I am in Dubai, so that will mean that I can do nothing until the business visa is obtained. The parties appear confident that this can be obtained within one working day of my arrival in Dubai. I should make clear, however, that if that does not occur then it will be necessary for me to return to London and to hear the evidence by video link, since a protracted delay in obtaining visas in order to enable the exercise to take place will impact materially on the length of the trial, and therefore the inconvenience to others that will result.

(c) The parties must ensure that they fly separately from, and are accommodated in Dubai separately from when I am flying and where I am located.

(d) I will give all formal directions in relation to the evidence that is necessary after delivery of this judgment.

(e) The order will provide for the evidence to be taken over a strictly limited period of time as to which I will hear the parties further, but in principle I am prepared to adjust the hours of evidence taking in Dubai so as to extend them beyond normal court hours in the interests of completing the exercise, with a view to being able to return to London on the date planned so that the hearing can resume again as planned.

(f) It has been agreed between the parties that the defendant's solicitors will responsible for the costs of my flight and accommodation. Those costs must be paid by the defendant's solicitors from their office account direct to the service providers concerned and (subject to the redaction of personal details like addresses, passport details, phone number and email addresses) the invoices for each of these items must be made publicly available by putting them into the court bundle following my return to England and Wales, with all

parties agreeing that they are to be treated as having been read in open court so that they are fully available to any journalist or anyone else who wishes to read them.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.