Neutral Citation Number: [2023] EWHC 2043 (Ch)

Claim No: BL-2020-001416

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

2 August 2023

Before :

MRS JUSTICE BACON

- -

Between :

WWRT LIMITED

Claimant

- and -

(1) SERHIY TYSHCHENKO
(2) OLENA TYSHCHENKO

Defendants

- -
- -

Andrew Ayres KC (instructed by **Rosling King LLP**) for the **Claimant**
The **Defendants** appeared in person via Microsoft Teams

Hearing date: 2 August 2023

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Approved Judgment

Transcript of Epiq Europe Limited
Lower Ground, 20 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
Email: casemanagers@epiqglobal.com
(Official Shorthand Writers to the Court)

Mrs Justice Bacon:

Introduction and background

1. This is an application by the claimant seeking urgent relief to require Mr Tyshchenko to withdraw a claim in Ukraine against the claimant's Ukrainian law expert and other anti-suit and anti-enforcement orders against both defendants. The background to these proceedings is set out in previous judgments of this court, including in particular the court's judgment on the grant of an initial without notice freezing injunction [2020] EWHC 2409 (Ch), and a judgment dismissing numerous applications by the defendants seeking to strike out or stay the present proceedings [2023] EWHC 79 (Ch). Following recent case management conferences, the trial in these proceedings has now been set down to commence in January 2025, with a time estimate of 18 days.

2. The Ukrainian claim which is the subject of this application was issued by Mr Tyshchenko on 28 October 2022 with Mrs Tyshchenko joined as a third party. The claim is in quite extraordinary terms. It requires the claimant's long-standing expert in these proceedings, Dr Vadim Tsiura, to refute the entirety of two expert reports which he has given to this court in the course of these proceedings: specifically his first report dated 30 August 2020 and his fifth report dated 25 November 2022, which were relied upon by the court in the two judgments cited above.

3. The effect of the Ukrainian claim, if finally upheld, will be that Dr Tsiura will have to either breach his duty to this court by refuting opinions that he honestly holds, or breach an order of the courts of Ukraine where he lives and works.

4. The claimant first became aware of the claim on about 12 December 2022, when it was referred to in the witness statements of the defendants in these proceedings. On 10 January 2023 Dr Tsiura applied to set aside the claim. The Commercial Court of Kyiv gave its judgment on 27 January 2023, dismissing Dr Tsiura's challenge and allowing the claim in full. It ordered Dr Tsiura to refute the conclusions provided by him in the two reports "in the same manner as they were distributed".

5. Dr Tsiura appealed that judgment and the appeal was listed to be heard before the Northern Commercial Court of Appeal of Ukraine on 20 May 2023. Shortly before the hearing, Dr Tsiura's advocate received orders to engage with the defence of Kyiv in the ongoing war with Russia. Dr Tsiura applied to adjourn the appeal hearing on that basis, but the Court of Appeal refused and also refused to allow Dr Tsiura to instruct another lawyer. Instead, it simply proceeded to hear the appeal without any representation on the part of Dr Tsiura. The appeal was then dismissed on the day of the hearing, on the basis of a judgment circulated later which replicated almost word for word the first instance judgment.

6. Dr Tsiura then appealed to the Ukrainian Supreme Court. On 7 July 2023 he was informed that his appeal was listed to take place on 15 August 2023. That is the reason for the urgent listing of this application in the circumstances I have already explained in my judgment on the adjournment application given earlier today.

7. As in previous hearings, Mr Ayres KC has appeared before me today for the claimant. The defendants have appeared in person via Microsoft Teams, with submissions being made on their behalf principally by Mrs Tyshchenko. Those were followed by brief

further submissions by Mr Tyshchenko in Russian, translated into English for the court by Mrs Tyshchenko.

Legal test

8. The court's power to grant an anti-suit injunction is derived from s. 37(1) of the Senior Courts Act 1981, which provides that the court may grant interim or final injunctions where "it appears to the court to be just and convenient to do so". It is well-established that this power extends to the grant of anti-suit injunctions where the continuation of foreign proceedings is "unconscionable": *South Carolina Insurance v Assurantie Maatshappij* [1987] 1 AC 24, p. 40. A core example of that is where the foreign proceedings are regarded as "vexatious or oppressive": *SAS Institute v World Programming* [2020] EWCA Civ 599, [2020] 1 CLC 816, §90.

9. In *Deutsche Bank v Highland Crusader Partners* [2009] EWCA Civ 725, [2010] 1 WLR 1023, §50, the court set out eight principles applicable to the grant of anti-suit injunctions. From that and other judgments to which Mr Ayres has referred, I draw the following propositions of particular relevance to this application:

    i) The court needs personal jurisdiction over the respondent to grant relief. *Deutsche Bank* §50(1).

    ii) The party seeking an anti-suit injunction must generally show that the proceedings before the foreign court are or would be vexatious or oppressive: *Deutsche Bank* §50(2).

    iii) An anti-suit injunction always requires caution, and indeed "extreme caution", because by definition it involves interference with the process or potential process of a foreign court. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention: *Bank of Tokyo v Karoon* [1987] 1 AC 45, p. 59; *Deutsche Bank* §50(5).

    iv) The principle of judicial comity requires that the English forum should have a sufficient interest in or connection with the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails: *Airbus v Patel* [1999] 1 AC 119, p. 138.

    v) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility: *Deutsche Bank* §50(8).

10. One situation where it is established that an anti-suit injunction may be granted is where the foreign proceedings amount to collateral interference with the English proceedings: Raphael, *Anti-Suit Injunctions* (2nd ed, 2019), §§5.47–5.56. One line of cases concerns the use of s. 1782 proceedings in the US courts to obtain evidence or cross-examination of witnesses in circumstances where that would disrupt an English trial.

11. The converse situation noted by Raphael at §5.55 is where foreign proceedings are brought to punish, dissuade or prevent the use of evidence in the English action. While

the commentary notes that the case law here is undeveloped, §5.56 refers to *Arab Monetary Fund v Hashim (No. 6)*, Financial Times Law Reports, 23 July 1992, where Hoffman J held that there was "no doubt" that the court had jurisdiction to grant an injunction in circumstances where US proceedings had been commenced alleging that evidence filed by a witness in support of a freezing order in the English courts contained false statements. On the facts, the order was not made because among other things there was nothing to suggest that the US action had been commenced to dissuade the witness from giving evidence in the UK.

12. The courts may also consider the grant of an anti-enforcement injunction as an alternative to an anti-suit injunction, where judgment has already been given in the foreign proceedings. While these cases are rare, there is no distinct jurisdictional requirement that this sort of injunction should only be granted in an exceptional case. This sort of injunction will only rarely be granted because it is only in a rare case that the conditions for the grant of the injunction will be met, and not because there is an additional requirement of exceptionality: *SAS Institute* §93.

13. It is, as the authorities emphasise, a very serious matter for the English court to grant any injunction to restrain enforcement in a foreign country of a judgment to the court of that country: *SAS Institute* §98. But there is no absolute bar to the court doing so.

14. One relevant factor in relation to both anti-suit and anti-enforcement injunctions will be the promptness of the action taken by the applicant in relation to the foreign proceedings. In *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231 (CA), Christopher Clarke LJ noted at §133 that "The longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force."

15. Finally, as to the legal test, there is some debate as to whether what is required is to show a high probability that the applicant is entitled to the relief sought, or rather that the applicant is indeed entitled to that relief: Raphael §§13.44 to 13.47. Mr Ayres submitted (rightly in my judgment) that the latter higher test should apply, given that this is not in substance an interim application, but is an application seeking final relief. His submission was that this court can indeed be fully satisfied that he is entitled to the relief sought.

The present application

Effect of the Ukrainian claim on these proceedings

16. There is, as Mr Ayres candidly accepted, no case where an anti-suit injunction has been sought on facts comparable to the present. There is a likely reason for that, which is that it is extremely unusual for a party to proceedings to launch such a direct and unambiguous attack in a foreign court on the substance of the evidence given in domestic proceedings.

17. There is no doubt that the court has personal jurisdiction over both of the defendants in this case, and I am satisfied that the claim brought by Mr Tyshchenko against Dr Tsiura in Ukraine is very clearly both vexatious and oppressive. It is abundantly clear that the sole purpose of that claim is to interfere with the English proceedings by seeking to prevent Dr Tsiura from maintaining the evidence that he has given in these

proceedings. Indeed, it is quite an extraordinary collateral attack on the due process and the integrity of the English proceedings, which have been ongoing since September 2020.

18. It also interferes with the public policy principle of immunity from suit for adverse experts giving evidence. As Lord Collins noted in *Jones v Kaney* [2011] 2 AC 398, §73, there are wide considerations of policy which should prevent adverse experts from being the target of disappointed litigants, such that immunity from suit should be retained in that respect, although it was abolished in respect of experts being sued by their own clients.

19. The defendants (and in particular Mrs Tyshchenko) advance numerous arguments opposing the claimant's application. I will address them in turn.

The subject matter of the Ukrainian litigation

20. Mrs Tyshchenko argues that the Ukrainian litigation brought by Mr Tyshchenko against Dr Tsiura does not concern the subject matter of these proceedings, does not affect the claimant's rights in these proceedings, and will have no serious consequences in these proceedings.

21. I have no hesitation in rejecting those submissions. The case brought against Dr Tsiura precisely concerns the content of his evidence given on behalf of the claimant in these proceedings, and the claimant's right for its chosen expert to be able to provide the court with his honest and genuine opinion without the fear of harassment through litigation in his home country if he does so.

22. The defendants also object that the fraud (as they allege) by Dr Tsiura took place in Ukraine, and that the Ukrainian courts should therefore be permitted to adjudicate on the matter. That misses the point. The issue is not whether the forum for the defendants' claim against Dr Tsiura should be Ukraine or England. There is no suggestion of the English courts claiming jurisdiction over or adjudicating on that claim. The question is rather whether the claim that has been brought and will remain in Ukraine is by its nature vexatious or oppressive. In that regard, as I have said, the sole object of the Ukrainian claim is the evidence that Dr Tsiura has given in the English courts. The claim is thus an undisguised collateral attack on evidence which should properly be a matter for consideration at the trial in the English proceedings in due course.

Jurisdiction to determine matters of Ukrainian law

23. Mrs Tyshchenko repeatedly contends that it is only the Ukrainian court that can determine the content of Ukrainian law, and that this application is an attempt by the claimant to deprive the defendants of their Article 6 ECHR rights in that regard.

24. Those submissions misunderstand the role of the courts of this jurisdiction in determining matters of foreign law. It is well-established that issues of foreign law in domestic proceedings are issues of fact, albeit a special kind of fact, such that foreign law must in general be proven by expert evidence: see e.g. the discussion in the judgment of Simon Bryan QC in *The Kyrgyz Republic v Stans Energy Corporation* [2017] EWHC 2539 (Comm), §44 *et seq*. That does not however mean that the determination of the question of foreign law falls outside the jurisdiction of the English

courts. Where relevant materials are provided to the English courts, including relevant expert evidence, the English courts can determine the issue of foreign law in the same way as they determine any other issue of fact before them.

25. On that basis, both defendants have had every opportunity to challenge the evidence of Dr Tsiura in these proceedings and to contend that that evidence is incorrect. They have used those opportunities by filing voluminous expert evidence of their own, as recorded in previous judgments in these proceedings, including the judgment of 21 April 2021 [2021] EWHC 939 (Ch) continuing the freezing orders against both defendants, and the 2023 judgment referred to above.

26. It is important to note that none of the judgments hitherto given in the English proceedings have ruled finally on the merits of the points of Ukrainian law debated by the respective experts on both sides. Rather, the judgments have been given on the basis that the issues of Ukrainian law are matters for determination following the oral evidence of the experts at trial in due course. The defendants will therefore have a full opportunity to challenge the evidence of Dr Tsiura at the trial, by cross-examination and submissions, and to rely on contrary evidence from their own expert.

27. At the trial the expert witnesses of all the parties will be able to rely fully on the relevant jurisprudence of the Ukrainian courts as to the issues of Ukrainian law. The defendants will no doubt be relying on the various judgments already cited to this court during the course of these proceedings, generated as a result of litigation in Ukraine that is related to these proceedings. They are entitled in principle to do so.

28. What this court will not, however, condone is a direct interference in these proceedings through litigation initiated by one or other of the defendants in Ukraine, the explicit and sole purpose of which is to compel an expert witness in the English proceedings to change his evidence. As Dr Tsiura says, as matters stand under the judgment of the Northern Commercial Court of Appeal he has been put in the quite impossible position: either he will have to recant opinions given by him in these proceedings which were and remain his honest opinion of the relevant matters of Ukrainian law, or, if he refuses to do so, he will be in breach of the orders of the Ukrainian courts and will risk enforcement action in Ukraine. To any English observer, Mr Tyshchenko's attempts to interfere in that way with expert evidence given in the present English proceedings through litigation in Ukraine is a quite extraordinary abuse of process.

Merits of the Ukrainian claim

29. Mrs Tyshchenko claims that there is nothing unusual in this sort of claim in Ukraine. That is squarely contradicted by the claimant's evidence. The claimant relies on an expert report from Mr Vadim Medvedev, a partner at the Ukrainian law firm of Avellum, where he is head of the firm's tax and litigation practice. There is also a short addendum to that report to address some of the issues raised by the defendants in their initial response to the application.

30. Mr Medvedev says that the Ukrainian judgments so far issued upholding Mr Tyshchenko's claim are wholly unprecedented and indeed unheard of in Ukraine. He says that there are in Ukraine only a few examples of attempts to challenge expert reports, all of which were unsuccessful. He notes in particular that in one of those cases (case no. 761/11228/21) the Ukrainian Supreme Court concluded that filing a claim in

civil proceedings to invalidate an expert report was not permissible under Ukrainian law, and that no Ukrainian court in any jurisdiction could consider such a claim.

31. Mrs Tyshchenko disputes Mr Medvedev's evidence on this point, and has objected that the defendants have not been able to instruct their own expert to provide rebuttal evidence in the time available. I have already addressed the defendants' ability to obtain suitable expert evidence in my judgment on the adjournment application. As I have found, I am not satisfied on the evidence before me that the defendants have been unable to instruct an expert to provide evidence in this regard.

32. Ultimately, however, whether or not this sort of claim is unusual in Ukraine is not a determinative factor in my assessment. While the claimant does most vehemently dispute the Ukrainian judgments as a matter of Ukrainian law, that is not the point of this application. The question for this court is rather whether the Ukrainian proceedings initiated by Mr Tyshchenko are vexatious and oppressive, and in my judgment they plainly are.

The claimant's ability to instruct another expert

33. Mrs Tyshchenko also says that an anti-suit injunction is unnecessary since the claimant should have no problem finding another expert. I do not accept that argument. The claimant is entitled to use the expert that it has instructed from the outset of these proceedings, and the defendants have no entitlement to control the claimant's choice of expert.

34. Even leaving aside that point, the claim against Dr Tsiura is far from being an isolated claim. Quite the contrary, the claimant's solicitor Ms Sharp observes in her witness statement that the defendants and companies associated with them have to date filed no less than 15 claims in Ukraine against the claimant and associated entities including Dr Tsiura. If the claim against Dr Tsiura is allowed to proceed, it is not difficult to envisage that any other expert instructed by the claimant will very soon find themselves in the same position as Dr Tsiura.

Delay in bringing the present application

35. Mrs Tyshchenko objected to the time it has taken the claimant to bring this application. Mr Ayres accepted that delay is a relevant factor to consider in a case in which an anti-suit injunction is sought. There is, however, no absolute rule on delay. Rather, it is necessary to scrutinise the reasons for any delay, and the prejudice to the other side caused by that delay: *Ecom Agroindustrial v Mosharaf Composite Textile Mill* [2013] EWHC 1276 (Comm), §33.

36. One situation where an injunction might well be denied on the grounds of delay is where there has been detrimental reliance on the foreign proceedings such that considerations of judicial comity are engaged. That is, however, not the case here. While first instance and appellate judgments in the Ukrainian claim have been given in the course of this year, there is no evidence before me of any steps taken so far to enforce those judgments.

37. As for the reasons for delay, in *Ecom Agroindustrial* the court accepted that there were good reasons for the delay in applying for an anti-suit injunction where the applicant

had explained that it was hoping to be able to deal with the matter more quickly and efficiently in the relevant foreign courts, in that case the Bangladeshi courts. In the present case, as I have explained in my judgment on the adjournment application, the position was that until judgment was given by the Northern Commercial Court of Appeal in Ukraine, both the claimant and Dr Tsiura had every expectation the claim against Dr Tsiura would be dismissed as being wholly unmeritorious. It is in those circumstances entirely understandable the claimant did not at that stage incur the additional time and expense of applying in this court for anti-suit relief.

Urgency

38. Finally, Mrs Tyshchenko contends that there is no urgency in the claimant's application, given the time which the Ukrainian Supreme Court may well take to deliver judgment in the appeal.

39. I am mindful of the caution required when granting an anti-suit injunction. In the present case, where the application has been made on an urgent basis against litigants in person, it is particularly important to consider the grounds for the urgency claimed.

40. The position is that the Ukrainian Supreme Court is due to hear the case on 15 August 2023, a listing at very short notice which was only notified to Dr Tsiura on 7 July 2023. Once the appeal is heard and the judgment is handed down by the Supreme Court, the damage will be done. The speed with which the appeal has been listed (and the rapidity of the previous judgments given by the Ukrainian courts in the claim) indicates that the claimant cannot make any assumptions about the time which the Supreme Court might take to deliver its judgment on the appeal. There is therefore only a short window of time before the case is heard to take action to prevent a final decision in those proceedings.

41. The claimant's evidence shows that it has carefully considered all possible alternatives to the orders that it now seeks. Mr Medvedev's expert report states that while the claimant could arguably submit its own appeal against the first instance and appeal judgments handed down in Ukraine it would only be able to challenge matters of law and not the factual conclusions of those courts, and it would first have to establish that its rights, interests and/or obligations were impacted by the Ukrainian judgments. Any relief that the claimant could obtain in the Ukrainian court is therefore a matter of considerable uncertainty.

42. Mr Medvedev also notes that there is no possibility under Ukrainian law for the parties to agree to allow an appeal by consent in the Supreme Court. At most the parties might agree to settle the proceedings before the Supreme Court has handed down judgment. Given the timing of the Supreme Court hearing in this case and the persistence with which the defendants have pursued their objections to these proceedings in both the English and Ukrainian courts, the prospect of a settlement of Mr Tyshchenko's claim against Dr Tsiura before the Supreme Court hands down its judgment in this case is vanishingly unlikely.

43. For completeness, I note that Mr Medvedev is of the opinion the precise obligations of Dr Tsiura under the Ukrainian judgments are unclear and he does not believe that there is a practical way to enforce those judgments. That does not, in my judgment, undermine the claimant's position in this application. Whatever the precise enforcement

mechanism may be, Dr Tsiura should be entitled to provide his evidence to this court without the threat of potential enforcement proceedings brought on the basis of the Ukrainian judgments hanging over him.

Conclusion

44. For all these reasons I have no hesitation in concluding that an anti-suit injunction should be granted in the terms sought by the claimant. Mr Tyshchenko's claim against Dr Tsiura is both vexatious and oppressive. It is a blatant and clearly abusive attempt to interfere with the due process of the English proceedings which have by now been on foot for almost three years. There are compelling reasons why this court should grant an injunction preventing such conduct and sending a strong signal to other litigants that this sort of conduct will not be tolerated.

45. The terms of the order require Mr Tyshchenko to submit to the Supreme Court by 4pm on Friday 4 August a written application to withdraw the claim, and to take all the necessary steps thereafter to ensure that the court issues a ruling on that application as soon as possible.

46. As for Mrs Tyshchenko, the order requires her to cooperate fully with Mr Tyshchenko and the court to enable the claim to be withdrawn, and she is prohibited from taking any steps to prevent Mr Tyshchenko from complying with his obligations under the order. Mrs Tyshchenko has objected that the extension of the order to her in this regard is unwarranted and vexatious, because she is simply named in the claim as a third party and, as Medvedev recognises, her procedural status does not allow her to take any action to withdraw the claim herself.

47. The fact that Mrs Tyshchenko is a third party to the claim, however, justifies her inclusion in the application. She was joined to the claim at the specific request of Mr Tyshchenko. While she claims that she was joined without her knowledge and that she has been a "silent participant" in the proceedings, she has not at any point opposed or objected to her joinder as a third party, nor has she applied to be removed from the proceedings. The orders sought against her are, moreover, proportionate and appropriate to her role in the Ukrainian proceedings: she is not required to take steps to withdraw the claim herself, but is prohibited from taking any steps to prevent Mr Tyshchenko from complying with this order, and is required to cooperate fully with Mr Tyshchenko and the court to enable the claim to be withdrawn. Those orders are, in my judgment, entirely appropriate.

48. To cover the possible situation where a judgment is given against Dr Tsiura by the Supreme Court before it has ruled on the application to withdraw the claim, the claimants also seeks, and I will make, an order that the defendants must not take any steps to enforce or rely on any judgment or order made by the first instance or appellate courts in Mr Tyshchenko's claim against Dr Tsiura.

49. As a final point, given that this is an application for final relief, I am satisfied that it is not appropriate to require the claimant to provide an undertaking in damages: *Dreymoor v Eurochem* [2018] EWHC 2267, §49.