Banco Nacional De Comercio Exterior SNC v Empresa De Telecomunicationes De Cuba SA [2007] APP.L.R. 01/24

JUDGMENT : Mr Justice David Steel : Commercial Court. 24th January 2007

1. The applications before the court concern two freezing orders obtained by the Applicant ("BNC") in respect of the assets of the Respondent ("ETC"). The first, dated 29 September 2006, is a domestic order; the second, dated 23 October, is a worldwide order.

2. The domestic order coincided with the registration of an Italian judgment in BNC's, favour. The worldwide order was coincident with a variation of the domestic order to the effect that it should specifically cover debts purportedly assigned by ETC to a company called Gran Kaiman Teleco SA (GKT).

3. BNC seeks the continuation of the orders together with various amendments. ETC accepts the propriety of continuing the domestic order (albeit not amended as suggested by BNC) but opposes the continuation of the worldwide order.

The background

4. On 11 February 2000, BNC entered into an agreement entitled "Escrow Agreement". The agreement was governed by Italian law and subject to the exclusive jurisdiction of a competent court in Turin. Under the Escrow Agreement, ETC (and another entity) guaranteed the restitution of financing provided to Banco National de Cuba by BNC under a credit facility arising under a loan agreement dated 25 November 1994.

5. In May 2001, ETC entered into two agreements for the supply by GKT of telephone equipment and plant. Both agreements provided for invoicing of ETC by GKT of 100% of the relevant purchase price but for all payments to be made by ETC to Grupo de la Electronica ("GDE"). There was also provision for an advance of 15% of the price by ETC to GDE following receipt of the relevant debit note, but a corresponding advance return of 15% by GKT to ETC upon acceptance of the works.

6. Associated with these agreements was a financing agreement between ETC and GDE for the provision of funds for the equipment and plant repayable on extended credit terms secured by bills of exchange. GKT were also signatories of this agreement on the basis (as prescribed by Clause 9.5) that it would be liable "for non-compliance with any obligations contracted by this company" under the agreement. Whether "this company" is GDE or GKT remains somewhat obscure. In any event, what may be missing from this group of agreements entered in May 2001 is any agreement between GKT and GDE providing for payment of sums due to GKT in respect of the equipment and plant supplied.

7. On 30 April 2002, the Executive Committee of the Council of Ministers of the Government of Cuba issued Decree No.273 due "to political differences that have sprung up between the governments of Cuba and Mexico". The Decree proclaimed : -

   "One: The facilities and guarantees provided by [ETC]… as collateral for the obligations undertaken by the National Bank of Cuba with the Mexican Financial Institution [BNC] shall be deemed legally null and void… "

8. On 3 May 2002, ETC duly indicated to BNC that, because of the Decree, it could not comply with its obligations under the Escrow Agreement. Predictably this led to legal proceedings.

9. The loan agreements contained an arbitration clause which provided for ICC arbitration. The ensuing arbitration in Paris pursuant to that provision led to an award in favour of the Claimant dated 26 July 2004. In particular, the tribunal rejected ETC's reliance on the Decree as "force majeure". That award was recognised in Italy by a decree of the Court of Appeals of Rome on 15 December 2004.

10. However, immediately prior to the present hearing, it emerged that, on ETC's application, the Paris Cour d'Appel had annulled the ICC award. A translation of the judgment was not available. But I was told that it was common ground that the sole basis of the successful appeal was that the arbitration clause in one of the loan agreements provided that the seat of the arbitration was to be in Spain. Despite the submission on ETC's behalf that this turn of events was highly significant for present purposes, it does not strike me as such.

11. In the meantime, proceedings were commenced by BNC against ETC and others in the ordinary Court of Turin. The court gave judgment on 18 November 2005 in favour of BNC, the action having been stayed in 2004 pending the publication of the arbitration award. The court referred to the outcome of the arbitration but emphasised that, although there were functional links between the two agreements, it was concerned solely with the Escrow Agreement and not with the loan agreement.

12. The court rejected the submission by BNC that it was bound by the award as to the legal classification of the Decree. However, by reference to Italian law (and decisions of the Italian Courts) the court concluded that the decree did not constitute an event of force majeure because of the Cuban government's control of ETC. In short, the issuance of the decree constituted a case of abuse on the part of a shareholder so as to purport to release the company of which it was the controlling shareholder from the obligations that it had assumed to third parties.

13. The court ordered ETC to pay damages in the sum of about $167,000,000 plus interest and costs. On 20 January 2006, the Turin Court of Appeal overturned a stay on enforcement that had been obtained ex-parte. Thereafter, BNC recovered various sums totalling about €32,000,000 by way of enforcement of the Italian judgment in Italy.

14. As already recorded, on 26 September, the Italian judgment was registered in England pursuant to Council Regulation (EC) 44/2001. This order afforded a period of 2 months for the filing of any of any notice of appeal. But this was without prejudice to the domestic freezing order that had been made at the time of the registration.

15. The basis of the domestic freezing order was the need to preserve assets of ETC situated in England in the form of monies due from "UK Roaming Partners" of ETC. The background to this was as follows. ETC, in common with other national telecommunications companies, entered into "roaming agreements" with telecommunication companies from around the world. The roaming agreements allowed individuals to connect to the ETC network; for which they would be invoiced by their own provider. Subsequently, corresponding sums would be paid by the foreign network providers to ETC.

16. Prior to 30 April 2002 and the issuance of the Decree, the regular payments which ETC's telecommunications partners paid to ETC were made into the escrow accounts under the Escrow Agreement. However, thereafter the payments were, as instructed by ETC, no longer paid into the accounts despite the earlier "irrevocable" instructions of ETC.

17. Thus, the domestic freezing order specifically referred to "the debt or debts due or to become due to them from" 02 (UK) Ltd, Orange PCS Ltd, T-mobile (UK) Ltd and Hutchison 3G UK Ltd, being companies listed as UK mobile roaming partners on the website of the GSM Association. Following service of the domestic freezing order, the parties agreed a postponement of the return date and of the date relating to ETC's disclosure obligations.

18. As regards the latter, on 18 October Messrs Freshfields wrote on ETC's behalf as regards the disclosure order in respect of assets in England and Wales exceeding £50,000. This revealed that in the region of $1 million was owed to ETC by the fixed line operators BT and Vectone. As regards the roaming partners, the total sum of about €1million was due. But the letter went on to record ETC's instructions that the respondent had assigned these sums to GKT on 29 September 2006 and, accordingly, they were not assets available for enforcement. No such assignment was disclosed.

19. On 23 October, BNC successfully applied to David Steel J for a worldwide freezing order and for a variation of the domestic freezing order so as to cover specifically the assets purportedly assigned to GKT.

20. In support of the application BNC had relied on, amongst other things, two letters dated 17 October send by ETC to Swisscom Mobile Ltd and O2 (Germany) respectively. The former gave notice of an assignment "put into effect" on 19 September in favour of GKT. The latter was more extensive. It referred to an "embargo" obtained by BNC against O2 Germany. "In this sense, we inform you that on 19 September 2006", the credits were assigned to GKT. "This credits assignment was previously informed via emails sent to O2 Germany in the first days of September 2006 and finally put into effect" on 19 September.

21. The letter went on to explain that ETC needed to withdraw the service unilaterally on 48 hours notice because Decree 273 constituted force majeure within the meaning of Article 15 of the Roaming Agreement. The letter accordingly gave notice of cancellation if willingness to make the payments as described was not forthcoming within 48 hours.

22. It is clear that a similar letter was sent to T-Mobile since on 19 October T-Mobile wrote to ETC as follows:

    "I refer to our roaming agreement dated October 2000 (the "Agreement"), and your email regarding the purported "Official Notification of Credits Surrender" and attaching the letter dated 17th October 2006 from Mairmir Mesa Ramos.

    ETECSA's purported transfer of its right to receive payments under the Agreement to Gran Kaiman SA is invalid and ineffective. Clause 19.1 of the Agreement does not permit transfer or assignment of the Agreement or any part of it in these circumstances without the prior written consent of the other party to the Agreement. As we stated in our email to you of 27th September 2006 we do not consent to the transfer of ETECSA's rights.

    Secondly we dispute ETECSA's suggestion that it has the right to suspend supply of roaming services to T-Mobile on the basis of "Force Majeure" if T-Mobile does not make payments to Gran Kaiman rather than to ETECSA. Clause 15 of the Agreement allows ETECSA to suspend roaming services only where Force Majeure prevents ETECSA from supplying the services. This is not the case here, as ETECSA still has the ability to continue providing the services to T-Mobile."

23. The two orders were duly served on interested parties including Vectone. Vectone responded on 25 October explaining that it had no notice of any assignment to GKT, but were nonetheless not handing over any payment to either GKT or ETC. However, on 23 October ETC had written to Vectone referring to "the sequestration of its goods in the UK" by BNC, and stating that ETC "will proceed immediately to suspend unilaterally the international telephone traffic services". Vectone gave notice that it would look to BNC for the losses it would sustain as a consequence.

24. This led to an application to Langley J seeking a variation of paragraph 7 of Schedule B of the worldwide freezing order so that the order should only cover the costs of any third party in finding out whether it held any of the relevant assets but not compensation for the losses sustained by the third party. That application was refused.

The world-wide order

25. Against this background, I turn to the question of whether the worldwide order should be continued.

26. The first point taken by ETC is to the effect that this court has no jurisdiction under Regulation (EC) No.44/2001 to grant relief in the form of a worldwide order. Put simply the argument ran as follows:

    i) The underlying jurisdiction of the court was by way of registration of a foreign judgment: Article 38 (2).

ii) The purpose of that registration was to achieve enforcement.

iii) The only mode of enforcement had to be by way of execution on assets within the jurisdiction, i.e. the place of enforcement within the meaning of article 39 (2).

iv) It is well established that provisional or protective measure under Article 31 are conditional on the existence of a real connecting link between the relief sought and the territorial jurisdiction of the state of the court applied to: ***Van Uden BV v. KG Deco-Line*** [1999] QB 1225 .

v) Thus the provisional or protective measures referred to in Article 47 must be confined to "domestic" measures.

27. I reject this submission. Chapter II of the Regulations is concerned with jurisdiction and Article 31 affords a discretionary jurisdiction to grant provisional or protective measures even if the courts of another state have substantive jurisdiction.

28. In contrast, Chapter III is concerned with recognition and enforcement. Article 47 is an enlarged version of Article 39 of the original 1968 Brussels Convention: -

"*1. Whether judgment must be recognised in accordance with this regulation, nothing shall prevent the Applicant from availing himself with provisional, including protective, measures in accordance with the law of the member state requested without a declaration of enforceability under Article 41 being required.*

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures… "

29. Accordingly, Article 47 provides an unrestricted and discrete code for the granting of provisional or protective measures in the context of enforcement. I detect no basis for restricting the measures to the freezing of domestic assets and/or for limiting the disclosure to domestic assets.

30. The limitations on such measures in Article 31, exemplified by the ***Van Uden*** case, afford no analogy with the situation post-judgment as the recitals to the regulation demonstrate. This is all the more so where, as here, the court exercising substantive jurisdiction had no power to grant anything other than a domestic freezing order.

31. ETC next submitted that it was not open to the court to make an order other than in respect of assets situated in England or outside the territory of the member states of the EU. This submission was based upon a discussion in paragraph 6.09 of ***Civil Jurisdiction and Judgments: Briggs***: 4th edition. The analogy is there drawn with ***Turner and Grovit*** [2005] 1 AC 101.

32. I reject this submission. The relief is clearly directed, not at the assets, but at the respondent. It carries none of the comity implications of being tantamount to interference with the jurisdiction of a foreign court as are involved in anti-suit injunctions. To the contrary, in the context of post-judgment protective measures, such an order is intended to safeguard the recognition and enforcement of the foreign court's judgment.

Risk of dissipation

33. I turn now to the question of whether BNC have established a real risk of dissipation.

34. Before considering this issue, it is necessary to revert to the chronology of events as supplemented by material adduced for the purposes of this hearing. The focus here is on the background to the purported assignment of sums due from other telephone companies. It is the Claimant's case that the material is only consistent with a recently hatched but sham transaction designed to avoid execution. The Respondent, in contrast, says that there is a manifest and genuine commercial justification for the transactions.

35. As already recorded the Italian judgment was handed down in November 2005 and the stay on execution was lifted in January 2006. Thereafter such documents as have been disclosed reveal the following course of events: -

i) In a letter dated 28 February 2006 (and I should record that the Claimants do not accept the authenticity of the dates of some of the documents), the auditors of GKT recommended that "the required measures should be adopted to guarantee the payment of your debts, mainly the balances recorded for [ETC]".

ii) This was followed up in a letter from the President of GKT to the President of ETC dated 3 May: -
" Bearing in mind the recent recommendations by the auditing firm that certifies the financial statements of [GKT], a subsidiary company of [GDE], acting as attorney-in-fact for the latter in the commercial transactions included in the Financial Agreement, which our Group signed with [ETC] on 9 May 2001… we are obliged to request the company under your management to negotiate a modification in the terms of conditions of the Financial Agreement so that we are granted a collateral guarantee based on international flows that will ensure payment of the long term debts related to the performance of the Agreement in the case of a default in payment by [ETC]. "

iii) Shortly afterwards Amendment No.4 to the Financial Agreement between ETC and GDE was entered into. It is dated 31 May. This is an unusual agreement. The principal terms were as follows: -
a) ETC granted GDE a guarantee to protect GDE against default by ETC.
b) As support for the guarantee, ETC "irrevocably assigns" its creditor's rights in respect of the roaming operators named in "Annex A" – this document was not disclosed.
c) The list in Annex A was a "minimum" to which ETC had the discretion to add other creditors.
d) ETC was to instruct the roaming operators to deposit any monies owed to ETC in an account of GKT.
e) Absent default by ETC, GKT was to transfer the monies to ETC within 3 days. In the event of default, GKT was entitled to transfer the monies to GDE.

iv) A draft form of "Notification of Credits Surrender" was prepared in June.

v) By letter dated 4 August, ETC informed GKT and GDE that two operators had been added to Annex A, namely Wind Telecomununicazioni S.p.A and Telecom Italia Sp.A.

vi) By email dated 14 September, O2 Germany were informed by ETC: -
"We would like to evaluate the possibility of credits cesion, the reason of this cesion is only commercial. I am sending in attachment the proposal to notification of Credit Surrender. We would like to obtain your position about that as soon as possible…"

vii) By letter dated 19 September ETC wrote as follows to GKT and GDE:
"… we hereby notify you that, as of the date of this letter, [ETC] has assigned the credits it holds with other roaming operators to [GKT], these being added to the list of Roaming Operators included in Schedule A… The details of these operators are attached to this letter."

In fact, the details were not attached, although it was said to nominate "the English telecommunications".

viii) As recorded above, notice of the purported assignment was given to Swisscom and O2 Germany on 17 October.

ix) Vectone, one of the English telecommunications operators, was not notified of the assignment but by letter dated 17 October from ETC, was informed that ETC would "proceed immediately to suspend unilaterally the international telephone traffic services" by reason of the decree and the subsequent domestic freezing order.

x) In contrast, T-Mobile another English company were clearly informed of the assignment as appears from their letter dated 19 October refusing consent in response to an email of September and a letter dated 17 October.

36. In my judgment, BNC have made out a real risk of dissipation. My reasons are as follows: -

i) The original decree was specifically directed at ETC's involvement in providing collateral for the obligations undertaken by the National Bank of Cuba. This in turn was said to be a response to the "malicious conduct" of the Secretary of State for Foreign Affairs of Mexico. Given that ETC is 70 per cent owned by the Cuban State, it was not surprising that it enthusiastically sought to respond to the decree without apparent regard to the fact that the loan agreement was governed by Mexican law and the Escrow Agreement by Italian law. (The extent of the Cuban state's control over ETC is exemplified by its entitlement to appoint its president and the apparent dismissal of the then president by the Cuban State in September 2006.)

ii) Having failed to establish an event of force majeure in the ICC Arbitration or before the Italian Courts, it would appear that every effort was made by ETC to avoid meeting the consequent judgments: indeed the letters to creditors threatening termination of the existing agreements make express reference to the decree. Indeed, as perceived by ETC the decision of the Council of Ministers still obliged ETC to take "any necessary action to achieve the strict enforcement" of the Decree.

iii) The apparent concern of GKT (and its auditors) about its exposure to ETC is somewhat surprising given that this arose from agreements entered into 5 years earlier in May 2001. BNC is legitimately sceptical about the timing of both the auditors' report to GKT in February 2006, shortly after the removal of the stay against enforcement, and the timing of amendment No.4, coming only shortly after BNC's initial recovery from the escrow agent in Italy in April 2006. It is of some further potential significance that the rash of activity vis-à-vis further assignments in mid-September coincided with the run up to BNC's further enforcement of proceedings in Italy and its preparation for registration of the Italian judgment in England.

iv) In any event, the terms of the Amendment No.4 are somewhat difficult to reconcile with the dictates of the ordinary course of business:

a) GDE were the "Funding Party" under the Financing Agreement. Whilst the position is not entirely clear, under amendment No. 4, GKT would appear merely to have become the "Agent" of GDE, with instructions to collect funds owed by telecoms to ETC and to pay them over to ETC within 3 days "as long as there is no default in payment" by ETC. There is no suggestion that ETC is or has been in default.

b) The auditor's recommendation was based on the premise that there was a substantial outstanding balance due to GKT from ETC. But the scheme of the Framework Agreement is that ETC should make all payments to GDE. The only apparent liability to GDE is a 15% deposit matched by "an advance return" in the same sum.

c) The precise relationship between GKT and GDE remains obscure. It would appear that GKT with majority-owned by GDE. The Funding Agreement allowed for substantial advances to ETC against Bills of Exchange. It seems highly likely that these advances would have been drawn down to meet GKT's invoices. Thus ETC's residual exposure to GKT remains unclear.

d) The terms of Amendment No.4 are unquestionably odd. It primarily records a guarantee by ETC of its own obligations to GDE. The amendment goes on to record the assignment of funds due from some roaming operators. But it is left to the discretion of ETC to extend the list. How that could be viewed as affording security to GDE remains obscure. Furthermore, it is common ground that at the material time ETC was not in

default of its obligations to GDE. In that case, the funds were transferable from GKT to ETC within 3 days which demonstrates perhaps the lack of any (or any urgent) need for security.

e) The whole concept of the assignment of funds due from the roaming operators has to be viewed against the background of the standard GSM form of contract. Clause 19 contains a detailed non-assignment clause as referred to in T-Mobile's letter of the 19 October. Furthermore the contract is expressly subject to Swiss law. Recognition of the difficulties in the way of assignment is reflected in the threats on the part of ETC to terminate agreements where the roaming operators refused to recognise the assignment.

f) Although the material was available to BNC at the time of the original application for a domestic freezing order, the uncertainties regarding events in Italy in relation to payment due from Telecom Italia come into sharper focus in the light of the more recent disclosure. Once again, it is not possible to make any findings but two features of the apparent changes in payment arrangements may be significant:
   i) After the ICC Award, payments for telecommunication services rendered by ETA were no longer channelled through Telecom Italia but through Telecom Italia Sparkle and Telecom Italia San Marino on a prepaid basis thus avoiding any accrual of funds.
   ii) The 2006 first quarter accounts of Telecom Italia shows a dramatic reduction in the flow of monies from Telecom Italia to ESC after the issue of the award.

Other discretionary considerations.

37. (a) The judgment of the Italian Court as registered in England is for a substantial sum. The assets of ETC (even including those allegedly assigned to GKT) constitute only a small fraction.

(b) The roaming partners of ETC are numerous, both within and without the EU, as revealed by the GSM website. Whilst proceedings have been instituted by BNC in France, Germany, Luxemburg, Belgium and Switzerland, the need for a freezing order of wide scope is reasonably necessary particularly in the post judgment context.

(c) I do not accept ETC's submission that there is any unusual risk of confusion (let alone oppression) arising from the conflict between those orders made by the local courts and the English freezing orders. The only route for enforcement of the latter is through the local courts which will necessarily manage matters in an orderly and sensible fashion.

(d) It is true that the initial application was restricted to a domestic order. But in my judgment, the material that has emerged since fully justifies BNC's supplementary application for a worldwide order.

38. I reject the submission that BNC has failed to make a full and frank disclosure. In any event, for all the above reasons, I conclude that the world-wide order should be continued.

39. I turn lastly to the terms of the undertaking at paragraph 7 of Schedule B to the worldwide order. It reads as follows: -

"The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondents assets, and, if the court later finds that this Order has caused such personal loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make."

40. This is part of the standard form prescribed in Appendix 5 of the Admiralty and Commercial Court Guide. BNC contends that the undertaking should be restricted to the first part so that there is no reference to any liability for loss occasioned by the order. This is prompted by the fact that BNC fear that, as with Vectone, it may be faced with claims reflecting the impact of ETC's cancellation of the roaming agreements. This application is said to be reinforced by the fact that no other European jurisdiction requires any such undertaking with regard to freezing orders.

41. I refuse this application:
a) it is part of the standard form;
b) it is limited to loss caused by the freezing order which the Court decides should lead to compensation;
c) the very same matter was raised before Langley J on 27 October: it was refused and no appeal was pursued.

42. A variation to this application was advanced in argument to the effect that the standard wording should be supplemented by the following proviso:

"…provided that the Applicant shall not be liable to any third party for any loss caused by this Order insofar as it flows from the termination or non-performance of contractual arrangements between such third party on the one hand and the respondent or any related party on the other hand."

This was said to be necessary to eliminate the uncertainty that such termination or non-performance might later be held to have been caused by the freezing order. Whilst I have some sympathy with this concern, BNC will if necessary argue, no doubt, that such a response was not and could have not been caused by the freezing order rather than the Decree. The proposed proviso, however, proceeds on that very assumption. I do not regard it as appropriate.

Mark Cran QC & Andrew Thomas (instructed by Travers Smith) for the Claimant
Daniel Toledano (instructed by Freshfields Breukhaus Deringer) for the Defendant