Neutral Citation Number: [2024] EWHC 2838 (Comm)

Claim No. CL-2024-000299

HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2024

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

- -

Between :

O	**Applicant**
- and -	
C	**Respondent**

- -
- -

Luke Parsons KC and Mark Stiggelbout (instructed by **Stann Law Limited**) for the **Applicant**
Oliver Caplin KC and Tom Foxton (instructed by **Belgravia Law**) for the **Respondent**

Hearing date: 31 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 08 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

Sir Nigel Teare :

1. This is an arbitration claim pursuant to section 44 of the Arbitration Act 1996. It is brought with the permission of the arbitral tribunal.

2. The application concerns a cargo of naphtha which was loaded on board the Vessel by the Charterers, C, at Singapore on 9 February 2023.

3. The Cargo has remained on the Vessel for over 20 months because, shortly after it was loaded, and on the same day, the US Office of Foreign Assets Control ("OFAC") added the Charterers to its List of Specially Designated Nationals and Blocked Persons (the "SDN List") pursuant to US Executive Order 13846.

4. In consequence the Owners of the Vessel, O, purported to terminate the charterparty in question and refused to discharge the cargo to the Charterers. At present the vessel is, I was told, drifting in the South China Sea.

5. This arbitration claim has been brought by the Owners who seek an order that the cargo may be sold and that the proceeds be paid into a blocked account with a US financial institution. I was told that on 10 March 2023 OFAC issued a license which permitted that to happen without any breach of sanctions. The Charterers no longer oppose the sale (subject to consideration of one matter to which I refer below) but say that the proceeds should be paid into this court. The Owners oppose paying the proceeds of sale into court because to do so, they say, would risk breaching sanctions.

The arbitration

6. I understand that in the arbitration the Charterers are seeking damages against the Owners for the conversion of their cargo. The Owners are defending that claim by saying that they were entitled to terminate the Charterparty in reliance on para (D) of the BIMCO Sanctions Clause and/or para (h) of the Compliance Clause which were terms of the charterparty. The Charterers seek to resist this defence by saying that the Owners are not within the reach of US sanctions. Thus the arbitral tribunal will have to decide upon the reach of US sanctions.

US Sanctions

7. The debate before this court has more than touched upon the issue as to the reach of US sanctions (see the Owners' skeleton argument paragraphs 42-52 and the Charterer's skeleton argument paragraphs 40-57) but this court must obviously avoid trespassing upon the agreed jurisdiction of the arbitral tribunal.

8. The parties relied upon expert evidence of US law with regard to sanctions. There are two relevant sources of law with regard to sanctions. The first is Executive Order 13846. The second is the Iranian Transactions and Sanctions Regulations. They contain complex and detailed provisions. In addition, there is advice published by OFAC as to how the sanctions work. Much depends upon the concept of a "US Person" which is said by the Owners to include, for certain purposes, foreign entities which are owned or controlled by US Persons. In this regard it is to be noted that the Owners are a company incorporated in Liberia, and a wholly owned subsidiary of P. P is a company incorporated in the Marshall Islands but headquartered in New York, USA, and listed on the NY Stock

Exchange. The nationality of control of both Owners and P is US, and it is said by the Owners that all the operations, management, officers and personnel of both companies are in New York.

9. Mr. Hal Eren, an expert on US sanctions, was instructed by the Owners. He gave evidence that the cargo was "blocked property" pursuant to US sanctions and that the Owners, being controlled by US persons, were not permitted to deal with it. He noted that OFAC has permitted the sale of the cargo on the condition that sales proceeds are deposited into a blocked account at a U.S. financial institution. He was asked whether it was possible for the Owners to deposit the proceeds of sale into any account other than a blocked account at a U.S. financial institution without a license from OFAC. His opinion was that it was not possible.

10. Mr. Paul Cohen, another expert on US sanctions, was instructed by the Charterers. He gave evidence that the cargo was not "blocked" and that the Owners were not prevented from dealing with it. Even if the cargo is "blocked" and the Owners are prevented from dealing with it, OFAC would only expect the Owners to impose restrictions "akin to blocking", which in his view would include the proceeds of the cargo being paid into the English Court. (However, he also said that if the cargo is blocked, it would not be possible for the Owners to sell the cargo and deposit the proceeds anywhere other than into a blocked account in the absence of a license from OFAC.)

11. I do not propose to examine the reasons for the differences of view between Mr. Eren and Mr. Cohen, still less to say whose opinion I prefer. These are all matters which I have no doubt will be fully explored in the arbitration.

12. However, in circumstances where an experienced expert on the subject of sanctions has expressed the opinion that the cargo is blocked, that the Owners are caught by the sanctions and that, absence a license from OFAC, they would not be permitted to pay the proceeds of sale into court, there is a real risk that Owners would find themselves in breach of US sanctions if they paid the proceeds of sale into court. The fact that OFAC has granted a license for the sale of the cargo and for the payment of the proceeds of sale into a blocked account at a US financial institution also suggests that there must be a risk that payment of the proceeds of sale into court would be regarded as a breach of sanctions.

The reasons for a sale

13. There is no dispute that there is good reason to sell the cargo. The continued presence of the cargo on board the vessel is prejudicial to the Owners because they cannot make profitable use of the vessel. Further, there is evidence that the vessel's tank coatings are not designed to hold the cargo for more than 100 days and that the cargo, which is highly flammable, has leaked into areas where it should not be. There are no viable alternative storage facilities. A sale of the cargo will preserve the value of the cargo and the vessel will then be able to be profitably employed on other business.

14. Although the Charterers do not "actively oppose a sale" (see counsel's skeleton argument at paragraph 10) the Charterers say that on 6 April 2023 they sold the cargo to a buyer, B, which gives rise to the "vexed question" whether section 44 relief is available at all and that it would be "inappropriate" to make an order for sale under section 44 (see counsel's skeleton argument at paragraphs 2, 9 and 12).

15. B has asserted rights pursuant to the alleged contract of sale. On 10 May 2023 and on 30 June 2023 they instructed the Owners to discharge and deliver the cargo to them. On 4 July 2023 B arrested an associated vessel in South Africa in support of its claim against the Owners for their alleged unlawful detention of the cargo. On 7 July 2023 the Durban High Court set aside that arrest. On 31 July 2023 B arrested the vessel in Malaysia to seek security for its claim against the Owners. On 27 October 2023 the High Court of Malaysia set aside the arrest of the vessel. At paragraph 64 of its judgment the court held that the alleged contract of sale was "a sham and by reason thereof, the Plaintiff has not shown that it is the lawful owner having title and/or is a person entitled to possession of and/or having other legal or equitable interests in respect of Cargo shipped onboard the Vessel." At paragraphs 74 and 77 of its judgment the court held that B was therefore unable to establish that the Owners were liable *in personam* or that it had a right to proceed *in rem*. Further, at paragraphs 90, 93 and 94 the court held that the arrest had been wrongful and that B was liable for the damage caused by that wrongful arrest.

16. On 20 August 2024 the solicitors acting for the Owners wrote (by email) to B asking whether B wished to make representations to this court in relation to the arbitration application. The letter was addressed to B at their address in Dubai. It was sent to B's email address. The letter said:

> "Without prejudice to our clients' position, noting your purported interest in the Cargo, we write to make you aware of the fact that our clients have made an application to the English Court for an order for sale of the Cargo (the **Application**). You may already have been apprised of this by [C].
>
> We therefore write to ask whether you wish to make any representations in relation to the Application. If so, we would be grateful to receive your response by COB (London time) on 22 August 2024, in order to ensure that these might be put before the Court in a timely fashion.
>
> The deadline for [O]'s responsive evidence is this Friday, 23 August. Further, in response to the parties' agreed request for expedition, the Court has indicated that it can offer a hearing date in the first half of the upcoming term (with limited availability and the hearing will need to be fixed without regard to the availability of particular counsel)."

17. It is to be noted that the Owners sought a very prompt response from B which may well have been unrealistic. However, the letter gave notice of the arbitration application. There has been no response from B seeking any further information about the arbitration application or asserting any right to the cargo.

18. Counsel for the Charterers noted that B had not been formally served with the arbitration application and said that there was no evidence that the email addressed to B had been received by it. However, there was no suggestion from the Charterers, who claim to have sold the cargo to B, that the email address was incorrect.

19. In circumstances where (i) there is evidence that B has been informed of this arbitration application, (ii) B has not sought to assert before this court any claim to the cargo, (iii) it is improbable that B would oppose the sale since a purpose of the sale is to preserve its value and (iv) any claim B has to the cargo may be asserted against the proceeds of sale

I am satisfied that, given the reasons why a sale is desirable, it remains appropriate to order a sale, notwithstanding that B may have a claim to the cargo.

The account into which the proceeds of sale should be sold

20. Ordinarily, where a cargo is sold and there is a dispute as to who is entitled to the proceeds of sale, the court would order that they be paid into court so that they are preserved and are available to be paid to the person who establishes his claim to them. The difficulty in the present case arises because there is a risk that if the Owners pay the proceeds into court they will act in breach of US sanctions.

21. The submission made by counsel for the Owners was that the court should apply (I think, by analogy) the principles set out in *American Cyanamid v Ethicon Limited* [1979] AC 396 which apply when deciding whether or not to issue an interlocutory injunction. The court should ask itself whether there is a serious issue that payment into court will give rise to a risk of a breach of US sanctions and whether damages would be an adequate remedy for the Owners. If, as the Owners say, there is such an issue and damages would not be an adequate remedy the court should ask itself whether, if the Charterers succeed in the arbitration and they suffer loss by reason of the proceeds having been paid into a blocked US account in accordance with the license granted by OFAC, the Owner's cross-undertaking in damages would be an adequate remedy for the Charterers, bearing in mind that the undertaking can be fortified by an undertaking to pay from the Owners' holding company P, in respect of whom no suggestion was made that they were not good for the money. If the cross-undertaking would be an adequate remedy (as the Owners say it would be) then the court should order that the proceeds be paid into an account with a US financial institution.

22. The submission made by counsel for the Charterers was that the fact that the Court's order may require a party to do something that is (or may be) contrary to a foreign law, including a foreign criminal law, does not by itself mean that the Court should not make the order. Instead, the Court should adopt the following nuanced approach:

    i) An English court can order a party to do something that is (or may) be contrary to a foreign law, including a foreign criminal law: *Akhmedova v Akhmedov* [2020] EWHC 2235 (Fam) at [62]. It is a question of discretion.

    ii) An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e.. foreign) criminal law, not least with considerations of comity in mind: *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [63(iii)]; *Akhmedova* at [64].

    iii) The burden is on the party relying on the foreign criminal law to prove that there is a *real risk* of prosecution: *Bank Mellat* at [70(ii)]; *Joshua & Ors v Renault SA & Ors* [2024] EWHC 1424 (KB) at [77] – [78]. The party must show that the criminal law relied on is not merely a "*text, or an empty vessel, but is regularly enforced so that the threat to the party is real*": *Tugushev v Orlov* [2021] EWHC 1514 (Comm) at [33] per Butcher J. What must be shown is a 'real' (rather than 'fanciful') risk, and the risk must be of prosecution, not merely of the breaching of foreign law or of the imposition of a sanction falling short of prosecution: *Tugushev* at [32]; and *Renault* at [78].

iv) Where the parties' experts express a different view about the risk of prosecution, the Court should exercise care when approaching the issue of foreign law, but it does not follow from the disagreement that there is a 'real risk': "*[t]o the contrary, there is force in the view that prosecution is relatively unlikely if there is real doubt about the law*": *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 at [156] per Henshaw J.

v) If a real risk of prosecution is established, the Court must then conduct a balancing exercise, weighing the risk of prosecution with the importance of the relief sought by the order: *Bank Mellat* at [63(iv)]; and *Renault* at [78]. The greater the risk of prosecution is, the more weight is to be given to that factor: *Tugushev* at [34]; *Renault* at [78].

vi) The Court can fashion an order that reduces or minimises the concerns under the foreign law (*Bank Mellat* at [63(v)]; *Tugashev* at [35]), and considerations of comity may be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the Court's order: "*Comity cuts both ways*" *Bank Mellat* at [63(vi)]; *Tugashev* at [36].

vii) Once the Court has decided to make the order, the fact that compliance would or might constitute a breach of a foreign law does not excuse non-compliance, as the Court must be able to enforce its decision: *Akhemdova* at [65].

23. Counsel for the Owners did not challenge these principles but said that whilst they were appropriate in circumstances where the English court wished to make an order to ensure a fair trial (e.g. disclosure of relevant documents) they were not appropriate where the English court was not making such an order. However, I was not persuaded that the principles were inappropriate in the present context. If the court wishes to order that the proceeds of sale are paid into court that is to ensure that the proceeds are available for the party who establishes his claim to them. An ability to realise or enforce a right is one aspect of ensuring a fair trial (or, in this case, a fair arbitration).

24. I therefore consider that in exercising my discretion as to the destination of the proceeds of sale I should be guided by the principles relied upon by counsel for the Charterers. In circumstances where there is a risk that payment into court may be a breach of US sanctions this court will not lightly make an order that the proceeds of sale be paid into court. However, it is relevant to consider whether there is a real risk (as opposed to a fanciful risk) of prosecution.

25. In this regard I was shown a document entitled "Economic Sanctions Enforcement Guidelines" which provides "a general framework for the enforcement of all economic sanctions programs administered by the Office of Foreign Assets Control (OFAC)." Section II listed the actions which OFAC might take. They included "No action", a "Request for Additional Information", a "Cautionary Letter", a "Finding of Violation", a "Civil Monetary Penalty", a "Criminal Referral" or other Administrative Action including the withdrawal of a license or a cease and desist order. Section III listed 11 general factors which OFAC would take into account when deciding upon the appropriate course of action. They included whether the breach of sanctions had been wilful or reckless, whether the person in question had been aware of the breach, what had been the degree of harm to the objectives of the sanctions and what were the characteristics of the person in question (e.g. was he commercially sophisticated).

26. Mr. Cohen is "unaware of any precedent for a sanctions designation, criminal prosecution, or imposition of civil penalties - whether on a company or individuals (including directors or employees) - simply for complying with an order of a court in an allied jurisdiction such as the UK in circumstances such as [the present case]." In his opinion the risk is fanciful, or unreal. He further said that "based on the lack of precedent and OFAC's enforcement guidelines, the fact that the payment would be made pursuant to a court order in an allied jurisdiction would be a factor weighing significantly *against* an enforcement action *(e.g.,* sanctions, prosecution, civil penalty) against [the Owners] or [P]."

27. Mr. Eren said in his second report that the risk of prosecution is real, not fanciful. However, although he has worked at OFAC, he has not explained his opinion by reference to the above Guidelines. He does however accept that the fact that the Owners' actions would be pursuant to a court order in an allied jurisdiction would weigh against prosecution, though not eliminate it.

28. Counsel for the Owners referred to two examples of prosecutions resulting in substantial fines but neither case was comparable to the present case where the relevant breach of sanctions is the payment into court of sale proceeds pursuant to an order of the court.

29. I have to form a view as to whether, in the event that payment into court of the sale proceeds is a breach of US sanctions, the risk of a prosecution of the Owners or of the US citizens in New York who control the Owners is real or fanciful.

30. There seems to me to be a very powerful argument for not prosecuting them.

31. First, there is the context in which the supposed offence has occurred. On 10 February 2023, the day after the Charterers were placed on the list of SDN List, P filed a report to OFAC stating that it was in possession of the cargo and that it understood the cargo to be the property of the Charterers who were on the SDN List. When asked to return to Singapore and discharge the cargo to the Charterers the Owners refused. When asked by B to discharge the cargo to them the Owners refused saying that they considered the cargo to be blocked property which could only be discharged as permitted by OFAC. When seeking from this court an order for the sale of the cargo the Owners argued forcefully that the proceeds of sale should be paid into a blocked account as permitted and authorised by OFAC. Thus the Owners appear to have done all that they could to avoid any breach of US sanctions. They are not seeking to breach US sanctions but to comply with them.

32. Second, consideration of the Guidelines would suggest that the Owners (or those in New York who control them) would not have acted "wilfully or recklessly" but in compliance with an order of the English court. Further, payment of the proceeds into court would not damage the objectives of US sanctions. That is because the Charterers would not be able to access those proceeds if, after a careful review of US sanctions law, the arbitral tribunal considered that the Owners were within the reach of US sanctions and were obliged to "block" the cargo.

33. On the material before this court it is certainly much more likely than not that there would be no criminal prosecution. At most, OFAC might require additional information as to the circumstances in which the proceeds of sale had been paid into court. But the crucial question is whether there is more than a fanciful risk that there would be a prosecution.

Given that the Owners have done all they could to comply with US sanctions, given that the Owners' actions would not be voluntary but would be compelled by the order of the court and given that the purpose of the order for payment into court would be "to hold the ring" so that the proceeds of sale are preserved pending the result of the arbitration rather than to avoid or frustrate the effect of US sanctions, I have concluded that there is no real prospect of a prosecution.

34. That being so, and applying the principles set out above, the court should order that the proceeds of sale be paid into court.

35. If, contrary to my view, there is a real risk of prosecution then the court must conduct a balancing exercise, weighing the risk of prosecution with the importance of the court's order that the proceeds be paid into court. There is guidance in the authorities that when deciding whether to order a sale "the court must look at all the factors in the round" (see *The Governor and Company of the Bank of Scotland v Neath Port Talbot Borough Council* [2006] EWHC 2276 at paragraph 27 per David Richards J.). The same approach must apply when deciding whether, in this case, the proceeds of sale should be paid into court or into a blocked account of a US financial institution.

36. The risk of prosecution, though real, must be very low.

37. The importance of the order for payment into court is that it is made in support of the arbitration and, in particular, to enable effect to be given to whatever the arbitral tribunal decides. If, instead, the proceeds of sale are paid into a blocked account at a US financial institution they may not be available to give effect to the result of the arbitration because OFAC may have a different view of the reach of US sanctions than the arbitral tribunal.

38. That disadvantage can be eliminated, it is said, by the provision of a cross undertaking to the court in damages, fortified by an undertaking of the holding company. Thus, if the arbitral tribunal decides in favour of the Charterers but OFAC does not permit the release of the proceeds of sale the Charterers could apply to the court for an order that the Owners, pursuant to their undertaking, pay an amount equal to the proceeds of sale to the Charterers.

39. Whilst there is merit in this argument, I am not persuaded that it eliminates the disadvantage. The procedure whereby effect can be given to the decision of the arbitral tribunal should be simple, not cumbersome. An order pursuant to section 44 of the Arbitration Act 1996 is, after all, an order in support of the arbitration. If the proceeds are paid into court it will be simple for the court to give effect to the decision of the arbitral tribunal. If the proceeds are paid into a blocked account of a US financial institution it will be necessary for an application for payment to be made to OFAC and, in the event that OFAC refuses, it will be necessary for an application to be made to the court for an order to be made pursuant to the cross undertaking in damages.

40. In my judgment the importance of the order for payment into court outweighs the very low risk of prosecution. Further, looking at matters "in the round" , and with particular regard to the desirability of supporting the arbitration, I conclude that the proceeds be paid into court.

Conclusion

41. The court will order that the cargo may be sold and that the proceeds of any sale shall be paid into court.

42. Having decided the issues of principle I invite counsel to agree the terms of the appropriate order.