[2017 Gib LR 142]

IN THE MATTER OF WARDOUR TRADING LIMITED

COHEN (as Liquidator of WARDOUR TRADING LIMITED) v. NEKRICH and SAGREDOS

SUPREME COURT (Jack, J.): July 18th, 2017

Injunctions—Mareva injunction—court's discretion to grant injunction—further freezing order granted against overseas respondent who failed to swear affidavit of worldwide assets to enable enforcement, if applicant intends to seek committal for contempt of court—threat of contempt proceedings, coupled with real risk of extradition and imprisonment, may induce respondent to disclose assets so that applicant can take effective enforcement proceedings

The applicant applied to extend a freezing order indefinitely.

In February 2015, judgment was given in favour of the applicant against the respondents for over US$90m. A freezing order was subsequently granted against the first respondent. This was replaced in May 2015 by a worldwide freezing order which prohibited the first respondent from removing from Gibraltar any assets up to the value of US$90m. or from disposing of or otherwise dealing with his assets located outside Gibraltar, unless the value of his assets in Gibraltar exceeded US$90m. The order was to last two years. The order required the first respondent, within seven working days, to swear an affidavit giving details of all his worldwide assets that exceeded £1,000, which he failed to do.

In February 2017, the first respondent was arrested in Italy, pursuant to a Russian arrest warrant. He was currently on house arrest pending extradition to Russia.

In May 2017, on the day after the expiry of the freezing order, the applicant issued an application to extend it indefinitely. There was no indication on the application that there was any urgency and the matter was given a hearing date in July.

Before the court, counsel for the applicant did not contend that there were any assets that had been identified in Gibraltar as being subject to the previous order, although he considered that a freezing order would have some worth with respect to worldwide assets. The court was informed that the applicant did not intend to take proceedings against the first respondent for contempt of court. The court indicated that if such proceedings were contemplated it might be willing to grant a further freezing order for a short period. After circulation of the draft judgment, however, the

applicant indicated that he had changed his mind and intended to apply for an order for committal of the first respondent for contempt of court.

Held, granting the freezing order:

(1) As the applicant intended to apply for an order for the committal of the first respondent for contempt of court based on the first respondent's failure to comply and was prepared to give an undertaking to issue such proceedings within 28 days, there was some purpose in granting a fresh freezing order. The threat of contempt proceedings, coupled with the real risk of his being liable to extradition to serve a sentence of imprisonment if contempt was established and such a sentence passed, might induce the first respondent to disclose his assets so that the applicant could take effective enforcement proceedings. The order would therefore be granted (paras. 18–19).

(2) Had the applicant maintained his decision to take no steps to enforce any freezing order granted, the application would have been refused for the following reasons: (a) there were no assets in Gibraltar on which a freezing order could bite; (b) the freezing order (with limited exceptions) would not bind third parties resident outside the jurisdiction and none of the exceptional cases appeared likely to apply to any assets identified outside the jurisdiction; (c) the applicant intended to take no steps against the first respondent to enforce the terms of any freezing order granted. Insofar as the applicant identified assets outside the jurisdiction, those assets could be subject to enforcement in accordance with the *lex loci situs* and a Gibraltarian freezing order would add nothing; (d) the applicant had not been concerned to ensure that a freezing order had been in place between the elapsing of the previous freezing order and the hearing of the application for renewal; (e) a freezing order (if obeyed) had a dramatic effect on the judgment debtor's life—in the present case it had limited the first respondent's living expenses to £1,000 a week and greatly restricted his ability to use his assets—and the court must not allow its orders to be instruments of oppression; and (f) a freezing order was not intended to last indefinitely—a post-judgment freezing order was granted solely in support of execution of the judgment, not to show the court's disapproval of a defendant. Once its purpose had gone, it should lapse (para. 17).

Cases cited:

(1) *Al-Baker* v. *Al-Baker*, [2015] EWHC 3229 (Fam); further proceedings, [2015] EWHC 3725 (Fam), followed.

(2) *Pupino (Criminal Proceedings)*, [2006] Q.B. 83; [2005] 3 W.L.R. 1102; [2005] E.C.R. I-5285; [2005] 2 C.M.L.R. 63; [2006] All E.R. (EC) 142; [2006] C.E.C. 448, referred to.

(3) *Serious Fraud Office (Director)* v. *O'Brien*, [2014] UKSC 23; [2014] A.C. 1246; [2014] 2 W.L.R. 902; [2014] 2 All E.R. 798; [2014] Lloyd's Rep. F.C. 401, followed.

N. Howard for the applicant;

The respondents did not appear and were not represented.

1 **JACK, J.:** On February 9th, 2015, I gave judgment in favour of the applicant ("Mr. Cohen") against the respondents for over US$90m. I subsequently, on March 18th, 2015, granted a freezing order (formerly known as a *Mareva* injunction) against the first respondent ("Mr. Nekrich").

2 That freezing order was replaced by a fresh freezing order on May 11th, 2015. This was a worldwide freezing order prohibiting, *inter alia*, Mr. Nekrich from removing from Gibraltar any assets up to the value of US$90m. or from disposing of or dealing with his assets outside Gibraltar unless the value of his assets in Gibraltar was above US$90m. The order provided for Mr. Nekrich, within seven working days, to swear an affidavit giving details of all his assets worldwide exceeding £1,000 in value with supporting documentation. Mr. Nekrich was permitted to spend £1,000 per week towards his ordinary living expenses as well as a reasonable sum on proper and reasonable legal representation. The order was expressed to last for two years from the date of the order.

3 Mr. Nekrich did not provide an affidavit of assets and appears *prima facie* to be in breach of that provision of the order.

4 After I gave the substantive judgment in this matter, Mr. Nekrich sought to appeal. The Court of Appeal ordered Mr. Nekrich to provide security for costs. Mr. Nekrich failed to give security for costs and his appeal was struck out. His solicitors, Messrs. Triay & Triay, came off the record both in the Supreme Court and in the Court of Appeal.

5 In mid-March 2015, Mr. Nekrich approached Rosneft, the Russian oil company which now owns Chernogorneft. He proposed assigning a claim which he said he had against a Mr. Amangeldi Makashov. Mr. Makashov, he said, was a wealthy Kazakhstani man. He owed Mr. Nekrich some US$43m. under a judgment obtained in Dubai. Unfortunately, it appears that Mr. Makashov's assets were situated in Kazakhstan, where Mr. Makashov was being held in prison pending the trial of murder allegations against him. In these circumstances, Rosneft took the view that there might be difficulties in enforcement of the judgment against Mr. Makashov.

6 In February 2016, Mr. Cohen had a conversation with a family friend, who said that he (the friend) had been approached by Rabbi Bleich, the Chief Rabbi of the Ukraine. Rabbi Bleich wished to facilitate a meeting with Mr. Nekrich to negotiate a compromise. Nothing in fact came of this approach.

7 Thereafter, Mr. Cohen and Rosneft lost contact with Mr. Nekrich. That has now changed. It will be recalled from my substantive judgment in this

matter (February 9th, 2015, unreported, paras. 34 *et seq.*) that Mr. Nekrich was the subject of an arrest warrant issued by the Russian authorities for the murder of Alexander Meenev on January 22nd, 2014. When he gave evidence before me at trial, it appears that Mr. Nekrich was not the subject of an Interpol red notice, so he was able to leave Gibraltar without hindrance. On about February 20th, 2017, Mr. Nekrich left Monaco, where he appears to have been living, to go for lunch in Ventimiglia in Italy. Italian military forces under the command of Col. Francesco Paulo Clemente and border police arrested him pursuant to the Russian warrant. Mr. Nekrich was committed to prison in Sanremo pending his extradition to Russia. Mr. Howard told me that Mr. Nekrich has now been released under house arrest and that extradition may take many months.

8 On May 12th, 2017, Mr. Cohen issued an application to extend the freezing order indefinitely. That was the day after the existing freezing order expired by effluxion of time. Despite the order having just expired, there was no indication on the application that there was any urgency about it. No request for an *ex parte* hearing that day was made. The court listing instead gave a date for the hearing of the application as July 14th, 2017.

9 Mr. Howard appeared before me on July 14th, 2017. Mr. Howard did not contend that there were any assets which had been identified in Gibraltar as being subject to the previous injunctions. So far as worldwide assets existed, he submitted that a freezing order would have some worth. Any bank holding assets of Mr. Nekrich would, in his words, "think twice" before allowing the funds to be transferred. I disagree. Paragraph 17(1) of both the lapsed and the proposed orders provides that, subject to irrelevant exceptions, "the terms of this order do not affect or concern anyone outside the jurisdiction of this court." A bank would not, in reliance on the freezing order, be entitled to refuse to follow Mr. Nekrich's instructions.

10 I asked Mr. Howard whether Mr. Cohen intended to take any proceedings against Mr. Nekrich for contempt of court. He said that Mr. Cohen did not intend to. I indicated that, if contempt proceedings were contemplated, I might be willing to grant a further freezing order for a short period. I offered him an adjournment to take instructions on that point (which I had already flagged up in an email which I had earlier sent to him). He refused the offer.

11 If Mr. Nekrich were found guilty of contempt of court and sentenced to a term of imprisonment, then it is an undecided question of law as to whether a European arrest warrant might be issued in respect of the sentence. Mostyn, J. in *Al-Baker* v. *Al-Baker* (1) ("*Al-Baker (No. 1)*") ([2015] EWHC 3229 (Fam)) indicated that such a warrant might issue for civil contempt. In *Al-Baker* v. *Al-Baker* ("*Al-Baker (No. 2)*") ([2015]

EWHC 3725 (Fam)), he recanted. He said that he had not been referred to the UK Supreme Court decision in *Serious Fraud Office (Director)* v. *O'Brien* (3), which was authority against extradition being possible for contempt.

12 The difficulty with this change of view is that *O'Brien* concerned an extradition of a prisoner from the United States of America (a category 2 territory) to Britain. Part 3 of the Extradition Act 2003 defines what constitutes an "extradition offence." Lord Toulson, giving the only judgment, said ([2014] A.C. 1246, at para. 37):

> "There is a distinction long recognised in English law between 'civil contempt', ie conduct which is not in itself a crime but which is punishable by the court in order to ensure that its orders are observed, and 'criminal contempt.'"

Only the latter was potentially an "offence" under the 2003 Act in relation to a category 2 territory.

13 This reference to "offence" in the 2003 Act contrasts with the different language governing European arrest warrants, which only requires "acts punishable by the law of the issuing Member State." As Mostyn, J. said in *Al-Baker (No. 1)* (1) ([2015] EWHC 3229 (Fam), at para. 10):

> "It has been asserted that this being a sentence of nine months it would be open for this court to request that a European arrest warrant be issued. That would have the effect of detaining the respondent anywhere within the European Union and having him brought to this court if the European arrest warrant procedure is available. I confess that when I first read this I was surprised that it was being asserted that the arrest warrant procedure was available as it was my belief (it is fair to say not based on much education) that the European arrest warrant was confined only to what can strictly be described as criminal offences and a civil contempt was not in that category. However, Mr. Calhaem has placed before me the Council Framework Decision of 13th June 2002 on the European arrest warrant and Surrender Procedures between Member States of which Article 2.1 states:
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> > 'A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.'
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> The use of language for 'acts punishable by law' would certainly embrace a custodial penalty imposed for contempt of court and, recognising I have only heard only one side, I am satisfied in these

circumstances that the sentence I have awarded is properly to be backed by a request for a European arrest warrant and I will complete the necessary annex form when the order is made."

14 It is not obvious to me that Mostyn, J. was wrong in holding that a finding of guilt in respect of civil contempt could not be the subject of such a warrant. The definition of "extradition offence" in relation to category 1 territories (*i.e.* those to which European arrest warrants can issue) must be construed in accordance with the Framework Decision: *Pupino (Criminal Proceedings)* (2). The *O'Brien* definition of "extradition offence" could be interpreted as applying only to category 2 territories, with the Framework definition applying to category 1 territories.

15 Nor is it clear to me why Mostyn, J. in *Al-Baker (No. 2)* (1) considered that he had no jurisdiction to issue a European arrest warrant. In England, such warrants can be issued by an "appropriate judge," a category which includes "a judge entitled to exercise the jurisdiction of the Crown Court": 2003 Act, s.149(1)(a). As a High Court judge, he was entitled to exercise that jurisdiction.

16 The bringing of contempt proceedings against Mr. Nekrich would not be pointless if he could be arrested and brought back to Gibraltar to serve any sentence of imprisonment passed on him. However, in the light of Mr. Howard's refusal to accept my offer of an adjournment, it seemed to me I had to proceed on the basis that Mr. Cohen intended to take no step to enforce any freezing order granted.

17 At the conclusion of the hearing, I indicated to Mr. Howard that I was refusing Mr. Cohen's application for the granting of a further freezing order and that I would give reasons in writing. These are the reasons. In short:

(a) There are no assets in Gibraltar on which a freezing order can bite.

(b) The freezing order (with limited exceptions) does not bind third parties resident outside the jurisdiction. None of the exceptional cases appears likely to apply to any assets identified abroad.

(c) Mr. Cohen intends to take no steps against Mr. Nekrich to enforce the terms of any freezing order granted. Insofar as Mr. Cohen identifies assets outside the jurisdiction, those assets can be subject to enforcement in accordance with the *lex loci situs*. A Gibraltarian freezing order will add nothing to that.

(d) Mr. Cohen was not bothered to ensure that a freezing order was in place between May 11th, 2017, when the previous freezing order elapsed, and July 14th, 2017, when the application for renewal was heard. He does not appear to have been concerned by the possibility of disposal of assets in that interim period.

(e) A freezing order (always assuming it is obeyed) has a dramatic effect on the judgment debtor's life. In the current case, the freezing order limited Mr. Nekrich's living expenses to £1,000 a week and greatly restricted his ability to use his assets. The court must not allow its orders to be instruments of oppression.

(f) A freezing order is not intended to last indefinitely. A post-judgment *Mareva* is granted solely in support of execution of the judgment. A freezing order is not a vanity object, granted to show the court's disapproval of a defendant. Once its purpose goes, the order should lapse.

18 After a copy of the draft judgment had been sent to him, Mr. Howard took further instructions. Mr. Cohen has indicated a change of heart. He does now intend to apply for an order for the committal of Mr. Nekrich for contempt of court based on Mr. Nekrich's failure to comply and is prepared to give an undertaking to issue such proceedings within 28 days. He also asks that the duration of the order be limited to March 18th, 2018, when a similar freezing order granted against the second respondent, Mr. Sagredos, will expire.

19 In these changed circumstances, it seems to me that there is some purpose in granting a fresh freezing order. The threat of contempt proceedings, coupled with a real risk of his being liable to extradition to serve a sentence of imprisonment if contempt is established and such a sentence is passed, may induce Mr. Nekrich to disclose his assets so that Mr. Cohen can take effective enforcement proceedings. I will thus grant the order.

Order accordingly.