SCRUTINISING ANCHORS AND "NUCLEAR WEAPONS"

In the joint cases of *Tsareva v Ananyev* and *Galagaev v Ananyev* [2019] EWHC 2414 (Comm), the High Court considered the basis of applications for freezing orders and whether the presence of English companies in a Russian group structure is sufficient to ground jurisdiction in a case involving alleged conspiracy

Key issues

- The mere existence of English-incorporated holding companies in a foreign structure is not sufficient for the English Courts to seize jurisdiction.
- The Courts will carefully scrutinise the evidence produced by claimants in support of applications for Worldwide Freezing Orders as against each of the (potential) defendants to the proceedings individually.

Despite having faltered at the first hurdle (subject to applications by the claimants for permission to appeal), the case, which was struck out by a judgment of Mr Justice Andrew Baker in the High Court on 16 September 2019, raised two interesting issues of broad application:

1. The question of whether the mere existence of English SPVs in a foreign holding structure is sufficient on its own to give the English Courts jurisdiction to hear a case based on alleged conspiracy.
2. The scope of the English Court's power and willingness to deploy one of its "*nuclear weapons*", the worldwide freezing injunction, and some of the potential pitfalls for claimants when seeking such an order.

Two groups of Russian investors brought claims in the English Courts against brothers and former business partners, Dmitri and Alexei Ananyev, and a number of companies said to have been owned or operated by them. The claim arose out of four series of EUR- and USD-denominated loan notes issued and guaranteed in 2017 by companies within the Ananyev brothers' group.

The claimants in each case were investors in the notes, as well as customers of Promsvyazbank, which was, at the time the notes were issued, a private Russian bank ultimately owned by the Ananyevs. Following Promsvyazbank being placed in administration in late 2017, the notes fell into default. The claimants alleged that the notes were mis-sold to them and that the mis-selling was part of a conspiracy by the brothers together with various companies which they allegedly owned and/or controlled, designed to gain control of deposits which the claimants had previously held with Promsvyazbank.

Jurisdiction

The claimants sought to bring their claims in the English Courts on a variety of legal bases. However, their principal argument as to why the English Courts ought to accept jurisdiction was predicated on there being an issue to be tried against two English-incorporated SPVs, through which the Ananyev brothers

owned their stakes in Promsvyazbank. The English companies were passive holding companies.

The Judge had "no doubt that the only reason the English companies have been sued is so that the claimants can say they have anchor defendants for the purpose of the co-defendant gateways." Applying both the requirement under CPR PD 6B para.3.1(3) that there must be between claimants and anchor defendants "a real issue which it is reasonable for the court to try" for non-EU defendants, and case law including *Sabbagh v Khoury* [2017] EWCA Civ 1120 for EU defendants, he concluded that, if the claims against the English companies are hopeless, then the English companies cannot be used as jurisdictional anchors.

Distinguishing *VTB v Nutritek* [2012] EWCA Civ 808, the Judge found that "for there to be even a question of possible liability on the part of the English companies, they must have done something more than merely exist as corporate shareholders in Promsvyaz and thereby indirect majority owners of [Promsvyazbank]." However, it was not alleged that the English companies had done anything as part of the alleged conspiracy and the evidence plainly demonstrated that they had no active involvement with the issuance, sale or marketing of the notes, which left the claimants facing an "insuperable difficulty" to demonstrate conduct on the part of the English companies. This was different from VTB v Nutritek where there was evidence to support a future finding that the beneficial owner was acting for the holding company in respect of relevant conduct.

As there were no anchor defendants and the claimants did not succeed in persuading the Judge on any of their alternative bases, the Court did not have jurisdiction to hear the claims.

The judgment highlights the importance of the factual role played by English companies in a foreign group structure. However, this was a decision based on the facts of the case. Had the SPVs been more actively involved in the group's activities, even if such involvement was only relatively minor, it may have been sufficient for the English Court to take jurisdiction. Thus, it is important to consider the practical role of English SPVs in a proposed holding structure in assessing whether it gives rise to any litigation risk.

Worldwide Freezing Orders

The claimants in both sets of proceedings made separate without notice applications for orders to freeze the worldwide assets of all ten defendants. They initially obtained freezing orders but in both cases such orders were discharged. The *Tsareva* claimants' order was discharged by a payment made into court by one of the defendants; and the *Galagaev* claimants' order was discharged by the Court on the basis of material non-disclosure by the *Galagaev* claimants. However, new applications were brought in both sets of proceedings which were heard at the same time as the jurisdiction challenge.

Freezing order relief is made only where the Court is convinced that there is (i) a good arguable case in respect of an underlying cause of action, and (ii) a real risk of the respondent dissipating their assets with the effect that any future judgment may go unsatisfied.

Following his findings on jurisdiction challenge, the Judge considered that the basis for freezing order relief had fallen away. However, he went on to make specific comments about certain aspects of the application.

He considered that the claimants were seeking to sue the second and tenth defendants "*entirely speculatively*", such that the good arguable case element of the test for a freezing order could not have been established. In the case of the second defendant, he found that the allegations against him amounted to no more than assertions that, if what was said about his brother were true, it might also be true of him, which was insufficient. In the case of the tenth defendant, this was alleged to be a vehicle of the brothers but was in fact an independently-owned, regulated brokerage firm. At a subsequent hearing, the Judge ordered indemnity costs in favour of the second and tenth defendants.

The Judge was also unconvinced by the evidence put forward by the claimants to demonstrate a real risk of dissipation on the part of any of the defendants, noting that there had been "*no real attempt*" to evidence the argument against three of the defendants and disagreeing with the claimants' conclusions in respect of the other defendants.

Aftermath

The Judge refused permission to appeal and, following a request for permission to appeal addressed to the Court of Appeal by the Tsareva claimants, Lord Justice Flaux also refused permission to appeal on 11 November 2019.

The case serves as a valuable reminder that an application for a freezing injunction, even one on notice to the respondents, will be subject to close scrutiny by the Court before it agrees to enter the launch code and deploy this particular "*nuclear weapon*". In particular, any applicant for a freezing injunction against multiple defendants must consider the evidence it wishes to deploy and, in particular, ensure that it has sufficient evidence in respect of each and every potential defendant.

Clifford Chance acted for the second defendant.

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