Brown Rudnick CIS Briefing

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Tatneft ordered to pay security for costs due to real risk of substantial obstacles to costs enforcement in Russia

In a recent High Court judgment, Tatneft has been ordered to pay security for the legal costs of the four Ukrainian businessmen it is suing over an allegedly dishonest scheme to divert outstanding payments owed to it under an oil sale contract (PJSC Tatneft –v- Gennadiy Bogolyubov, Igor Kolomoisky, Alexander Yaroslavsky and Pavel Ovcharenko [2019] EWHC 1400 (Comm)).

In the English courts, a claimant may be ordered to pay funds into court as security for the defendant's legal costs. Under Civil Procedure Rule 25.13, the court may order security if (a) certain conditions apply, and (b) it is satisfied that it is just to make such an order, having regard to all the circumstances of the case. One of the relevant conditions will be met where the claimant is not resident in a country of the EU, EFTA, or bound under the Lugano or Hague Conventions. [1] However, the court is still required to take into account all of the circumstances of the case and to exercise its discretion as to whether it is just to order security.

When exercising its discretion, the court will consider whether there is a real risk [2] of either:

1. substantial obstacles to enforcement of an order for costs; or

2. a substantial extra burden in terms of cost or delay. [3]

The test of a "real risk" is a low threshold – it does not need to be a likelihood, merely a "non-fanciful" risk. [4]

If there are substantial obstacles to enforcement, the starting point is that the level of security ordered should be for the entirety of the defendant's costs of the proceedings (as opposed to just the costs of the extra burden of enforcement). This is to reflect the risk that the defendant will be unable to enforce any costs order at all. [5]

In Tatneft, the court found that the vast majority of Tatneft's assets were located in Russia, and that there was a real risk of substantial obstacles to enforcement of a costs order in Russia. Tatneft had also identified assets held in Switzerland and Cyprus (being shares in Tatneft group investment holding companies), but the court found that there was a real risk that those assets would not be available, or not available in sufficient amounts, if and when a costs order came to be enforced. In that case the defendants would have to attempt to enforce against Tatneft's assets in Russia.

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[1] CPR 25.13(2)(a)
[2] Bestfort Developments LLP –v- Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099
[3] Nasser –v- United Bank of Kuwait [2002] 1 WLR 1868
[4] In re RBS Rights Issue Litigation [2017] EWCA Civ 1802
[5] De Beer –v- Kanaar & Co [2003] 1 W.L.R. 38 and Bestfort

The court ruled that security should be for the entirety of the defendants' costs. It considered that the following factors constituted a real risk:

1. As there is no enforcement treaty between the UK and Russia, there is a risk of difficulty establishing a basis for reciprocity under which the Russian courts would recognise an English judgment. This would be a particular risk in the case of an English costs-only judgment, which may not be accompanied by a determination of the merits of the dispute – this was a possibility if Tatneft were to discontinue the proceedings. There was no evidence before the court that (a) an English court had ever enforced a Russian costs-only judgment, or that (b) any court in the Republic of Tatarstan (where Tatneft is incorporated) had ever enforced an English court's judgment, on the basis of reciprocity.

2. There was a risk of non-enforcement, either by the Russian courts or by Russian financial institutions, due to current Russian public policy and sanctions against Ukraine. The court considered, in particular:

    - the fact that Rustam Minnikhanov, then Prime Minister and now President of Tatarstan, had in 2009 sought to take up the alleged non-payment for oil with the Prime Minster of Ukraine;
    - the current heightened tensions between Russian and Ukraine, including over Crimea;
    - that the second defendant, Mr Kolomoisky, has been the subject of public criticism by President Putin, is the subject of pending criminal proceedings in Russia, and had given evidence to the court that his Russian assets had been frozen and certain of them seized by the Russian government;
    - that the First and Third Defendants, Mr Bogolyubov and Mr Yaroslavsky, are on a Russian asset-freezing sanctions list; and
    - that the Fourth Defendant, Mr Ovcharenko, is alleged by Tatneft to be a close associate of Mr Bogolyubov and Mr Kolomoisky.

This judgment is a reminder of the wide-reaching impacts of the current strained relationship between Russia the Ukraine over Crimea. It is also a reminder to litigants in the English courts that, even if a claimant has very significant assets, including in European countries (as was accepted was the case for Tatneft), if the majority of those assets are located in Russia then there is a real likelihood of the claimant having to put up substantial security for the defendant's costs of the proceedings.

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