Case No: CR-2017-003973
[2017] EWHC 2075 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Tuesday, 6 June 2017

BEFORE: **THE HONOURABLE MR JUSTICE BARLING**

IN THE MATTER OF OJSC INTERNATIONAL BANK OF AZERBAIJAN

MR RYAN PERKINS appeared on behalf of the Applicant

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MR JUSTICE BARLING:

1. This is an application by Ms Gunel Bakhshiyeva, in her capacity as the foreign representative of OJSC International Bank of Azerbaijan, for an order recognising the restructuring procedure now underway in Azerbaijan as a foreign main proceedings under Article 17, schedule 1 to the Cross-Border Insolvency Regulations 2006. The applicant is represented this morning by Mr Perkins of counsel. There are no other appearances before me.

2. The main evidence in support of the application is contained in an affidavit sworn on 24 May 2013 by the applicant, who has acted as the senior relationship manager of the bank for a number of years. There is also evidence before me from an expert on Azerbaijani law, Mr Anar Karimov. The bank itself is incorporated as a joint stock company under the law of Azerbaijan and is the largest commercial bank in that country. It is said to play a fundamental role in the stability of the Azerbaijani banking system, both in relation to retail banking and corporate banking. The largest shareholder in the bank is, in fact, the Governor of Azerbaijan.

3. Relevant to one of the points that I have to examine is the fact that the bank's registered office and its headquarters are situated in Baku, Azerbaijan, and that its management takes place from those headquarters. Furthermore, the bank is authorised and regulated by the Azerbaijani Financial Market Supervisory Authority.

4. By way of background, the bank fell into financial difficulties in 2014, as a result of declining oil prices, and is still the subject of substantial losses. Mr Perkins has told me that its financial indebtedness is in the order of £2.5 billion, comprising various loans, securities, and letters of credit. In March of this year, it defaulted on one of the loan arrangements. The reason the proceedings have been brought in this jurisdiction is because a number of the bank's transactions are governed by English law and contain English jurisdiction and arbitration clauses.

5. Mr Perkins has explained that in April 2017 the bank's supervisory board passed a resolution and commenced a voluntary restructuring procedure under Article 57 of the Azerbaijani Law on Banks. He showed me a copy of that resolution. That is a first step in opening a voluntary restructuring arrangement. The voluntary restructuring only formally commenced when approval was granted by the Azerbaijani court. Accordingly, later the same month the bank filed a petition in the District Court in Azerbaijan to approve the commencement of that procedure. I have been shown an order of the court dated 4 May 2017 formally commencing a voluntary restructuring and approving the board's April resolution.

6. In very simple terms, the aim of the restructuring, which is described in more detail in the expert evidence of Mr Karimov, is to give the bank a breathing space in order to propose a plan for reorganisation of its indebtedness. The effect of the order of the Azerbaijani court is to grant that breathing space, by way of a stay of execution, for 180 days and, therefore, to prevent, so far as Azerbaijan is concerned, disorderly litigation and enforcement by the bank's creditors in that period. The aim of the

application before me is to prevent disorderly proceedings in this jurisdiction for that period, depending on other applications that may be made before this court.

7. Mr Perkins has emphasised that the procedure in Azerbaijan is not a liquidation-style proceess but is a rescue procedure, during which it is intended and, indeed, necessary that the bank should be in a position to continue trading whilst undergoing reorganisation and re-arrangement of its liabilities. The intention is that it will do so subject to the supervision of the Azerbaijan Financial Markets and Advisory Authority and the Azerbaijan court. The process has been described as a debtor in possession procedure. The Azerbaijan authority has, in fact, approved an indicative restructuring proposal, that being a prerequisite of the order made by the Azerbaijani court. That indicative proposal can be the subject of modifications in the course of the procedure but it is a condition that it should be widely advertised at the outset and be approved, as it has been.

8. There will ultimately be a meeting of creditors and it is submitted that the procedure has considerable similarities to that which applies under an administration order in this jurisdiction. For example, there will need to be meetings and appropriate statutory majorities of affected creditors approving the proposal and so on, before any plan that emerges from the overall procedure can be confirmed, as it must be, by the Azerbaijani court. So, the restructuring that is underway in Azerbaijan is designed to prevent the *ad hoc* enforcement against the bank by individual creditors while the restructuring is underway.

9. As far as the application before me is concerned, the requirements for recognition are set out in the Cross Border Insolvency Regulations 2006 and are relatively straightforward. Article 17 of schedule 1 to the Regulations, pursuant to which this application is brought, requires the court to recognise the foreign insolvency proceedings if certain criteria are satisfied. First, the debtor must be subject to a foreign proceeding, as defined by Article 2 of schedule 1 to the Regulations. Second, the applicant for recognition should be a foreign representative, as also defined by Article 2 of schedule 1, and, third, the application must satisfy a number of evidential requirements in Article 15 of schedule 1. Then, recognition follows, subject only to an exception under Article 6 of the Regulations where it would be manifestly inappropriate in relation to the public policy of Great Britain or any part of it for the court to grant recognition. I should say that there is nothing in the evidence to which Mr Perkins has drawn my attention pursuant to the obligation of full and frank disclosure to which such applications as this are clearly subject, which would be a candidate for any such public policy exception in this case.

10. As to those requirements, I am satisfied in the light of the evidence (including the expert evidence of Mr Karimov) that there are proceedings in Azerbaijan that constitute foreign proceedings for this purpose. There is a collective judicial process underway in Azerbaijan that relates to insolvency, and for the purposes of those proceedings the assets and affairs of the bank are subject to control of or supervision by the court of Azerbaijan. The process is being undergone for the purposes of reorganisation.

11. The applicant is clearly a foreign representative within Article 2 of the Schedule. As I said, I have been shown the Azerbaijan court's approval of the bank’s board resolution

authorising the chairman of the board to delegate the role of foreign representative for present purposes, which he did by appointing the applicant by power of attorney dated 5 May 2017.

12. Then one comes to the evidential requirements to which I have referred. They are alternatives, and their effect is to evidence the existence of the relevant proceedings in a foreign country and the appointment of a foreign representative. Those conditions are clearly satisfied here in the light of the certified copies of the commencement order opening the procedure and requiring the chairman to appoint the applicant as a foreign representative. In addition, there is the factual evidence of Ms Bakhshiyeva and the expert evidence of Mr Karimov in relation to the criteria in question.

13. Article 17, sub-paragraph 2, of Schedule 1 provides that foreign proceedings shall be recognised as foreign main proceedings, if taking place in the state where the debtor has its centre of main interest ("COMI"), that being a concept derived from Regulation (EC) No. 1346/2000 on insolvency proceedings. Under Article 16(3) of the Schedule 1, there is a presumption, in the absence of proof to the contrary, that a debtor's registered office or habitual residence is the COMI. In the present case there is no evidence at all to rebut that presumption. Indeed, there is a good deal of evidence in support of the COMI being in Azerbaijan. I am satisfied, therefore, that the proceedings in question should be recognised as foreign main proceedings.

14. As far as relief is concerned, Mr Perkins has explained why the automatic relief under Article 20(1) of Schedule 1 would be inappropriate in a case where the intention is to rescue the bank as a going concern and enable it to continue trading. The automatic relief is a suitable way of dealing with a termination situation in the event of insolvency: it involves a stay of individual actions, a stay of execution, and a suspension of the right to transfer, as would be the case with a winding-up order in a case of compulsory liquidation. Such relief would clearly not be appropriate in the case of foreign restructuring proceedings such as those which are now in process in Azerbaijan.

15. It is submitted, and is clearly correct, that the court has power to disapply or modify that automatic relief by virtue of Article 21(1) of Schedule 1, and to grant additional relief, including any relief such as may be "available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of schedule B1 to the Insolvency Act 1986." This is a reference to the moratorium which applies to an English law administration, and is the relief which is being sought by the applicant in the present case. It is relief which has been granted on other occasions in this court where, as in this case, a debtor is undergoing a rescue or turnaround procedure in a foreign territory.

16. Therefore, the relief that is sought to be substituted for the automatic relief is a moratorium, such as would apply in administration proceedings under English law. The key feature is that this enables the debtor to continue trading. I am satisfied that this is the relief which should be granted in this case, propose to make an order in the form of the draft provided in the papers before me, which, effectively, disapplies the automatic relief and grants relief very similar, if not identical, to that under paragraph 43 of schedule B1.

17. Mr Perkins has pointed out that there is discretion in relation to the grant of recognition under Article 17 of the Regulations, and that is clearly correct. There is discretion too with respect to the disapplication of automatic relief and the grant of an alternative remedy. I am satisfied that that is what I ought to do here.

18. In fulfilment of his client's obligation for full and frank disclosure, Mr Perkins has drawn to my attention the fact that there has been a correspondence between those instructing him and solicitors, Shearman & Sterling, representing an anonymous group of creditors of the bank. The correspondence commenced, as I understand it, on 17 May 2017 with a letter indicating that they were considering filing an objection to this application. Having regard to a decision of Snowden J in a case called *Re OGX Petroleo e Gas SA* [2016] Bus LR 121 and also a decision on Rose J in *Re Dalnyaya Step LLC* [2017] EWHC 756 (Ch), the applicant's solicitors served the application and supporting documents on Shearman & Sterling on 24 May 2017, and invited them to clarify their clients' position in relation to possible opposition to the application and in relation to the grounds of such opposition.

19. These creditors represent only a minority, albeit a substantial minority, of the bank's overall creditors. They represent about US$ 195 million, in a total indebtedness of £2.5 billion. The nature of the objections, or potential objections raised were outlined in only very general terms by the creditors' solicitors. They appear to be objections that go to the substantive procedure under way in the Azerbaijan court pursuant to the indicative proposal to which I have referred. As I understand the evidence of the expert, all such objections are properly made in the course of those proceedings in Azerbaijan. The objections do not, as far as I can tell, go to any of the criteria to which this court must have regard in the present application for recognition and relief.

20. Whether or not that is the case, Mr Perkins has put before me a letter from Shearman & Sterling dated yesterday, 5 June 2017, which states that the creditors in question "do not at this time oppose the Recognition Application in so far as it seeks recognition and relief under Article 20 of Schedule 1 to [the Regulations]. However," all their rights are reserved in relation to the application. Their rights include the right to apply to the court to have any stay that the court grants lifted.

21. The letter also makes clear that the creditors in question "will not oppose, on an interim basis, the relief that [the bank] seeks at the hearing of [this application], as set out in the draft order provided by you, and in particular the discretionary relief under Article 21 of Schedule 1 to [the Regulations]".

22. That Article requires the protection of the interests of creditors to be considered, as does Article 22 of the Regulations.

23. Leaving aside their indication of non-opposition, this application is of a very limited nature. Further, it is open, in any event, to any creditors or other interested persons or persons affected to apply to this court to modify or set aside the relief that is to be granted.

24. Mr Perkins has also properly brought to my attention that another creditor has filed a notice of appearance on 2 June 2017 in concurrent proceedings being brought under Chapter 15 of the US Bankruptcy Code in New York. However, there is no evidence, or anything else to suggest that the creditor objects to the recognition and relief that is sought in this application.

25. In all the circumstances, I am satisfied that, notwithstanding the reservation of rights referred to in the letter from Shearman & Sterling, I should grant the application for the recognition and the relief sought under Article 21. Therefore, with one small modification which we discussed in the course of argument, I will make the order sought.

WordWave International Ltd trading as DTI hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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