Neutral Citation No. [2013] NICh 4

Ref:	**McCL8739**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**07/02/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE INSOLVENCY (NI) ORDER 1989

IN THE MATTER OF DEMESNE INVESTMENTS

Between:

QUINN FINANCE

- and-

IRISH BANK RESOLUTION CORPORATION LIMITED

- and-

QUINN HOTELS PRAHA AS

and

DEMESNE INVESTMENTS LIMITED

Plaintiffs / Applicants

- and-

LYNDHURST DEVELOPMENT TRADING SA

- and-

DMYTRO ZAITSEV

-and-

OLEKSANDR SERPOKRYLOV

Defendants / Respondents

and

[by order dated 13 September 2012]

ELEGANT INVEST [UKRANIAN LIMITED LIABILITY COMPANY]

and

ZENITH [UKRANIAN LIMITED LIABILITY COMPANY]

Further Defendants

JUDGMENT: EPILOGUE

McCLOSKEY J

[1] As foreshadowed in paragraph [50] of the court's most recent judgment (delivered on 11/01/13), a further hearing was convened in an attempt to bring finality to this phase of the proceedings. As before, the moving parties were represented by solicitor and counsel; Mr Zaitsev & Mr Serpokrylov also continued to have the same legal representation; and Lyndhurst was still unrepresented. All three Respondents having been found guilty of contempt of court, the issue to be determined at this stage is whether any of the familiar sanctions of committal to prison, fine or sequestration of assets should be imposed.

[2] The further submissions of the parties brought to the attention of the Court the following decisions in particular:

- ***Motorola Credit Corporation The Uzan*** [2003] EWCA. Civ 752.
- ***Lakah Group –v- AL Jazeera Satellite Channel*** [2002] EWHC 2500 [QB].
- ***Masri*** *[supra]*.
- ***Crystalmews Ltd –v- Metterick*** [2006] EWHC 3087 [Ch].
- ***Aquilina –v- Aquilina*** [2004] EWCA. Civ 504.
- ***Re M (Children – Contempt)*** [2005] EWCA. Civ 615.

Council Regulation (EC) 44/2001 and two decisions of the CJEU relating thereto, ***Realchemie Nederland –v- Bayer*** [Case-406/09] and ***Meletis Apostolides –v- Orams*** [Case-420/07] also featured in the submissions on behalf of the moving parties.

[3] I take as a convenient starting point four unalterable facts of some significance. The first is that neither Mr Zaitsev nor Mr Serpokrylov is present in the jurisdiction of Northern Ireland. Both are Ukrainian nationals and the evidence points to the probability that the Ukraine is their permanent place of residence and principal place of business. Second, none of the three Respondents has any assets in the jurisdiction of Northern Ireland. Third, Lyndhurst, the corporate Respondent, is in receivership and is at present under the management of a Court appointed receiver in the British Virgin Islands. Fourth, the Ukraine is not a member state of the European Union.

Accordingly, there are no legal persons and no assets to which any order of this Court can efficaciously attach as of now.

[4] Next, I turn my attention to two final court orders of significance which have been made in the two jurisdictions concerned, in reverse order. Firstly, in this Court, an Order was made pursuant to the judgment promulgated on 3rd May 2012, in favour of the moving parties, to the effect that all of the impugned transactions, which include the transactions culminating in and underpinning the judgment and Order secured in the Ukrainian Court, were null and void. This Court further ordered that one of the Plaintiffs, Demesne, is solely entitled to the benefit of all rights purportedly transferred by the impugned transactions. This Order has no effect in the Ukraine, which is a non-EU state. Earlier, in the latter jurisdiction, the Kiev City Commercial Court ordered, following the hearing conducted on 23rd December 2011, that Lyndhurst has judgment against Univermag in the amount of some $45,000,000 US Dollars. Lyndhurst's action and the ensuing judgment were based on, inter alia, transactions (purported assignments of assets) which this Court later declared null and void. In the Ukraine, successive appellate Courts upheld the Order at the first instance Court – ultimately, by Order of the High Commercial Court of the Ukraine, dated 17th May 2012.

[5] There was still another twist in the tale. As the saga progressed, there was brought to the attention of this Court further evidence:

(a) Suggesting that on **6th December 2011** viz before the hearings in the Kiev City Commercial Court, Lyndhurst had assigned the entirety of its claim against Univermag to a new player, Zenith, a Ukrainian limited liability financial company, by formal assignment.

(b) Indicating the transfer by Zenith to Lyndhurst of ten promissory notes, on the same date, by a so-called "securities agreement".

(c) Documenting subsequent confirmation of the assignment of the Univermag debt by Lyndhurst to Zenith, by a "supplementary loan agreement" executed on 4th April 2012.

(d) Documenting a further assignment of the same debt by Zenith to the newest of the players, Elegant Invest, a Ukrainian limited liability factoring company, on 22nd May 2012.

(e) Evidencing a further Order of the Kiev City Commercial Court, made on 22nd June 2012, whereby Elegant Invest, as legal successor, was substituted for Lyndhurst, thereby becoming (*ex facie*) the successful litigant and, hence, the beneficiary of the judgment for 45 million US dollars.

As this summary demonstrates, these events both pre-dated and post-dated the Mareva Order of this Court of 23rd December 2011 and the ensuing Order of the Kiev City Commercial Court. They are documented in a further judgment given by me, on 13th September 2012: see [2012] NICH 26. In short, whereas the judgment of this Court in May 2012 held that the Univermag debt vests in Demesne, one of the Plaintiffs herein, the beneficiary of this debt in the Ukraine is, on paper, Elegant Invest, Lyndhurst's litigation successor. The description contained in the September 2012 judgment of "*a progressively complex and intriguing scene*" seems, in hindsight, something of an understatement. For completeness, I observe that, by further Order of this Court, Zenith and Elegant Invest were added as Defendants some months ago and yet another Mareva order ensued.

[6] The net analysis is that the two extant final Orders of the relevant Court in each of the jurisdictions concerned are in direct conflict with each other. However, I am satisfied that this does not give rise to the kind of jurisdictional disharmony or possible inter-jurisdiction uncertainty or confusion which has been identified in some of the decided cases, including ***Masri,*** as a factor contraindicating the imposition of certain sanctions for contempt of court. I consider that to impose any such sanction in the present case would not trespass over the bright luminous line which separates the legal proceedings in the two jurisdictions concerned and any related duty of judicial comity. I add that there is no suggestion in the evidence of any dissipation of the asset embraced by the Ukrainian money judgment to date.

[7] I construe the submissions of Mr Lockhart QC as highlighting the following factors in particular:

(a) Since their contumelious conduct each of his clients has submitted to the jurisdiction of this Court, has co-operated with this Court and has treated it with all proper respect, sometimes at substantial personal inconvenience and expense.

(b) The role of the presiding Judge in Kiev City Commercial Court, to which Mr Zaitsev and Mr Serpokrylov owed their primary allegiance, mitigates their culpability and the gravity of their contempt. This embraces successive Orders of such Court [one predating the disobeyed order of this court] refusing the Bank's applications to intervene in the Lyndhurst –v- Univermag proceedings.

(c) According to the evidence, the asset in question viz the £45,000,000 US Dollars remains untouched, undiluted.

(d) Neither Mr Zaitsev nor Mr Serpokrylov had any part in the second and third phases of the Ukrainian proceedings at the two appellate tiers.

(e) Their conduct in no way prevented the moving parties from securing judgment in the substantive proceedings in this jurisdiction.

(f) This Court must be careful to avoid an Order which could give rise to any conflict or uncertainty in other jurisdictions and/or which might simply beat the air.

[8] I have found that the conduct of Mr Zaitsev and Mr Serpokrylov amounted to a determined and deliberate contempt of this Court's Order. I have described their defiance of this Order as flagrant. I have further found that their conduct was at all times accompanied by the necessary state of mind. At this stage, I consider it incumbent on the Court to focus with greater intensity on this conduct, its context and all the surrounding circumstances. In doing so, I accept that there is some merit in the factors highlighted by Mr Lockhart. I further take into account that there is no evidence of any connection of substance between either of these Respondents and the Ukrainian Plaintiff, Lyndhurst, their client (and the third Respondent herein). Nor is there any suggestion that either of these Respondents benefited in any way from the judgment obtained, other than by [at most] payment of their professional fees. My assessment is that these Respondents were acting in accordance with their client's instructions at all material times. Furthermore, making due allowance for cultural and procedural differences between the Northern Ireland and Ukrainian legal systems, I decline to find anything unorthodox or sinister in the sequence of events in Kiev City Commercial Court, from inception to conclusion. I further find that the conduct of these two Respondents is mitigated somewhat by the brevity of the timeframe concerned, the quite unexpected nature of what materialised and their lack of familiarity with and understanding of the new dimension and matrix which abruptly confronted them, with all its distant foreign connotations. By their reaction these two Respondents were undoubtedly disbelieving and sceptical. However, given the circumstances, while I have found this to be contumelious, I cannot condemn it as anything other than human.

[9] I find that the contumelious act of contempt by Mr Zaitsev and Mr Serpokrylov, committed in Kiev City Commercial Court on 23rd December 2011, was both irrevocable and irremediable. Based on all the evidence, I find that there was nothing either could have done subsequently in an endeavour to purge their contempt. The Ukrainian legal process took its course and neither of these Respondents had any further active involvement. Three successive Ukrainian Courts held that Lyndhurst was entitled to a judgment of some $45,000,000 US Dollars against Univermag. I have previously pointed out the failure of either of these Respondents to co-operate in a brief adjournment of the initial phase of the Court proceedings, on 23rd December 2011. However, having regard to all the evidence, I have no firm basis for inferring that such adjournment would have made any difference to the eventual outcome. Both were clearly acting on their client's instructions and I

infer that these were the main driver of their conduct. I am also bound to acknowledge the universal truism that, subject to certain limitations – imposed by, *inter alia*, legal and ethical constraints - retained lawyers are required to act in accordance with their client's instructions. I must, of course, balance these various factors against the incontestable fact that the contumelious conduct of these two Respondents was an indispensable link in the Ukrainian chain of events.

[10] The subject matter of Council Regulation (EC) 44/2001 is that of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in EU Member States. It emphasises the importance of judicial co-operation in civil matters and establishes a regime which is designed to promote the internal market. It is also designed to enhance the harmonious administration of justice and mutual trust therein throughout the EU area. This Regulation has no application in the present context since, as already noted, the Ukraine is not an EU member state. The zenith of the moving parties' submission on this discrete issue appears to me to be that I should take into account that such membership is a future possibility. So be it – but the Ukraine does not have so much as pre-accession status at this stage. Furthermore, while it is clear that a fine would be embraced by the machinery of the Regulation – see Article 32 and the decision in ***Mederland (Supra),*** paragraph [44] – it is unclear whether a sentence of committal for contempt of Court is similarly enmeshed. I consider this submission to belong to a legal vacuum.

[11] I discern no merit or attraction in the suggestion of the moving parties that I should have resort to this Court's inherent jurisdiction to transmit letters of request to some unidentified agency and/or unspecified Court in all EU member states. As the Ukraine is not a Member State, such letters would not be able to request any concrete assistance. Furthermore, Courts do not act of their own volition and no extant proceedings of relevance in any foreign state have been brought to the attention of this Court. Finally, in the future eventuality that the Ukraine becomes an EU member state, the issue will be governed by such of the EU legal rules which thereby become applicable. I decline the invitation to act in this further vacuum. To do so, in my estimation, would be more likely to generate perplexity and confusion, with associated expenditure of limited public resources, than to serve any truly useful purpose.

Outcome

[12] I am required to conduct a multi-faceted balancing exercise which takes into account the earlier findings and conclusions of this Court, the factors which I have rehearsed in the immediately preceding paragraphs, such guidance as can be derived from the jurisprudence in this sphere,

bearing in mind the intensely fact sensitive nature of every case of this kind and, finally, the valuable checklist of guiding principles contained in the judgment of Lawrence Collins J in ***Crystal Mews (Supra),*** paragraphs [8] to[13]. I have formed the view that Mr Zaitsev and Mr Serpokrylov are, in all probability, relatively minor players in the overall scheme. However, I must also bear in mind that, though given the opportunity to do so, they have declined to provide this Court with any evidence of their income and assets and have made no attempt to answer certain questions raised in my substantive judgment. They have continued to withhold the full story. Furthermore, their evidence bearing on remuneration for professional services rendered to Lyndhurst is sparse in the extreme. I have no evidence that these two Respondents are impecunious or that they have no support from well resourced sources. I can act only on the evidence before this Court and inferences to be legitimately made therefrom and from the conduct of these proceedings. Taking into account all of these factors, I conclude that, as regards Mr Zaitsev and Mr Serpokrylov, the fair, just and proportionate disposal of these proceedings entails the following:

(a) MrZaitsev and Mr Serpokrylov will each be fined the sum of £15,000.

(b) They will be granted a period of six months, operative from the date of the final Court Order, within which to pay their respective fines.

(c) In default, they will each be sentenced to four weeks imprisonment.

[13] As regards Lyndhurst, the evidential picture is uncertain and incomplete. Furthermore, the broader landscape is evolving and fluctuating, involving developments in other jurisdictions. The main question concerning this corporate Defendant is whether an order for sequestration of some identified asset and/or a substantial fine would be potentially efficacious and enforceable. Realistically, this appears unlikely at present. However, given that there is no pressing need for finality vis-à-vis this Respondent, the Court will patiently await developments and, if appropriate, the reception of further evidence. Accordingly, I adjourn the final disposal of the contempt application against Lyndhurst and will review it three months hence. The three final elements of the Order to be made at this stage are the following:

(d) The court declares that all three Respondents acted in contempt of the order in question.

(e) There will be an Order for costs against all three Respondents.

(f) There will be liberty to apply.

[14] There are two extant Mareva Orders. These shall remain in effect until further Order of the Court. They shall be reviewed at intervals of not more than three months and will be subject to liberty to apply. The balance of the substantive proceedings will also stand adjourned, to be reviewed three months hence.