IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 November 2023
CASE No: AIFC-C/CFI/2023/0023

FREEDOM FINANCE JSC

Claimant

v

MR. EGOR ROMANYUK

Defendant

JUDGMENT

Justice of the Court:
Justice Sir Rupert Jackson

JUDGMENT

This judgment is in six parts, namely:

PART 1. INTRODUCTION

1.1. This is the second action between Freedom Finance JSC and Mr. Egor Romanyuk concerning alleged breaches of a Separation and Release of Claims Agreement dated 1 February 2020. I shall refer to that as the "SRCA".

1.2. The background facts and the relevant terms of the SRCA are set out in the Judgment which I gave on 1 February 2023 in the first action between the parties, Case No. 20 of 2022. I shall not repeat anything which I said in that judgment. I shall assume that anyone listening to or reading this judgment is familiar with the previous judgment and with the abbreviations used in that judgment.

1.3. After these introductory remarks, I must now turn to the facts.

PART 2. THE FACTS

2.1. Following the handing down of the Court's judgment in the first action, the Defendant continued to make adverse comments about the Claimant on social media. At a Directions hearing on 4 September 2023, I refused the Claimant's application for the hearing of this case in private. However, I directed that in order not to give wider currency to those adverse comments, they should not be read out in Court. Instead, they should be referred to by reference to paragraph numbers in the Amended Claim Form.

2.2. The relevant comments are set out in paragraphs 13 to 19 of the Amended Claim Form. The Defendant admits that he made the posts which are alleged in June and July 2023. We can see that they were viewed many times. The number of views may not be the same as the number of viewers, but it is not necessary to decide the precise number of views and the precise number of people who viewed those posts.

2.3. There is an issue about the post alleged on 1 August 2023 in paragraph 19 of the Amended Claim Form. It is clear to me from page 2-3.8 of the Bundle that the Defendant made the post which was alleged on 1 August 2023 but it was taken down quite soon after being posted. The reference in that post to "Monte Carlo" indicates that the Claimant was making the post from Monte Carlo rather than his home state Dubai because Dubai carries certain criminal sanctions for defamatory statements.

2.4. The Claimant was aggrieved by those adverse comments made about it. Accordingly, the Claimant commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

3.1. By a Claim Form issued on 10 July 2023 the Claimant claimed liquidated damages or penalty of USD 5 million pursuant to Clauses 7 and 9 of the SRCA. Those are the same two provisions as were relied upon by the Claimant in the first action.

3.2. On 4 August 2023, the Claimant amended its Claim Form to add additional posts in July and August 2023. On 15 August 2023, the Defendant served his defence and counterclaim. The Defendant denies that the SRCA remained in force after 1 February 2022, alternatively after 1 February 2023. He asks the Court to make a declaration to that effect. On that basis, it says that the Defendant says there is no liability to the Claimant.

3.3. There was as previously mentioned a Directions hearing on 4 September 2023. At that hearing, I fixed the trial date for 21 November 2023 going over to 22 November 2023 if necessary, as indeed proved to be the case.

3.4. At the Directions hearing Counsel for both Parties said that they did not intend to file expert evidence for the trial. Despite that indication, the Claimant subsequently filed an expert report by Messrs Shaikenov on 11 September 2023. That was one week after the Directions hearing. The Defendant has had ample notice of that expert report. Therefore, although parties really must comply with the rules for getting permission in respect of the expert evidence, I allowed that expert evidence in and took it into account.

3.5. The Defendant wishes to rely upon documents which the Claimant says should not be admitted because they were identified too late. The Claimant has had ample opportunity to consider those documents and so I allow them to go in evidence. The main function of this Court is to do justice between the parties.

3.6. The trial duly commenced yesterday on Tuesday 21 November 2023 with Mr. Tukulov appearing for the Claimant, as he did in the previous action, and Mr. Kholod appearing for the Defendant, as he did in the previous action. Mr. Romanyuk has been attending this trial remotely from Dubai where he lives. Although Mr. Romanyuk was not called as a witness, I allowed him to intervene during the hearing at one point yesterday to assist his Counsel in finding a relevant document. Counsel concluded their submissions yesterday afternoon.

3.7. I have considered the case overnight before giving this judgment today, Wednesday 22 November 2023. A number of issues have been debated during the trial: 1) whether Clause 7 remained in force after 1 February 2022 or 2023; 2) whether the Defendant's posts on social media constituted breaches of Clause 7; and 3) to what remedy is the Claimant entitled. Having identified those issues I must now address them in that order.

PART 4. FIRST ISSUE: DID CLAUSE 7 OF THE SRCA REMAIN IN FORCE AFTER 1 FEBRUARY 2022 OR ALTERNATIVELY 1 FEBRUARY 2023?

4.1. The Defendant puts his case in two ways. First, he says, properly construed, Clause 7 lapsed after two years. Secondly, and alternatively, he says, the effect of the judgment in the first action was to bring to an end the prohibition contained in Clause 7 on 1 February 2023, the date of judgment.

4.2. In support of his first argument, Mr. Kholod submits that free speech is a basic human right recognised by the United Nations, recognised in the European Convention on Human Rights, and also enshrined in Article 20 of the Constitution. Clause 7 infringes that right, it prohibits the Defendant from disparaging the Claimant. Furthermore, says Mr. Kholod, other provisions of the SRCA are limited in time to two years; see the provisions in that contract about non-competition, non-solicitation of customers, and non-solicitation of employees. Clause 7, he submits, should be read in the same way. It should be limited to two years.

4.3. Mr. Tukulov responds that the wording of Clause 7 is different from the other clauses to which Mr. Kholod refers. It is deliberately different. Whereas those other clauses specified a two-year time limit, Clause 7 says:

> *"Non-Disparagement. The Employee agrees and covenants that the Employee shall not at any time make, publish, or communicate to any person or entity or in any public forum any defamatory, maliciously false, or disparaging remarks, comments, or statements concerning any member of the Employer Beneficiary Group or its businesses, practices or activities, or any of its employees, officers, or directors and their existing and prospective customers, suppliers, investors, and other associated third parties, now or in the future."*

4.4. Mr. Tukulov relies upon the words "at any time", which appear in lines one and two of that provision, and also upon the phrase "now or in the future", which appears at the end of that provision. As to the point about basic rights, Mr. Tukulov points out that Kazakhstan is not a party to the European Convention on Human Rights. It is true that Article 20 of the Constitution confers a right of free speech, but Article 1 and Article 8 of the Civil Code enable citizens to waive their rights. That, says Mr. Tukulov, is what the Defendant has done in this case. The Defendant is an experienced and wealthy businessman. He has access to legal advice, if he needed it. He received a substantial payment in return for accepting the restriction in Clause 7. Mr. Tukulov stressed that this Court should enforce commercial contracts made between businessmen.

4.5. I have been troubled about how Article 277 of the Civil Code impacts upon Clause 7 of the SRCA.

Article 277 provides as follows:

> *"1. When an obligation stipulates or permits the identification of the date of its execution or a period of time during which it must be executed, the obligation shall be subject to execution on that date or appropriately at any moment within that period.*
>
> *2. In cases where an obligation does not specify the date for its execution and does not contain any conditions which allow identification of that date, it must be executed within a reasonable period after the emergence of the obligation.*
>
> *An obligation which is not executed within a reasonable term, and equally an obligation the term for the execution of which is identified as the moment of claim must be executed by the debtor within seven days from the date of the presentation by the creditor of the claim for its execution unless the duty to execute by any other date ensues from legislation, the conditions of the obligation, traditions of business practice, or the essence of the obligation."*

4.6. I pressed Mr. Tukulov as to how that Article applied in the present case and what was the reasonable period during which Clause 7 should remain effective in the light of Article 277. Mr. Tukulov submitted that Article 277 only applies to a specific obligation to do something, for example to deliver goods. It does not apply to a continuing obligation of the kind we have in

Clause 7 of the SRCA. In making that submission, Mr. Tukulov gained support from the expert report of Messrs Shaikenov at paragraphs 25 to 49. I have come to the conclusion that Mr. Tukulov's submissions are well-founded. There is a clear distinction between Clause 7, which is a continuing obligation, and the other Clauses to which Mr. Kholod referred in the contract.

4.7. By Clause 7, in return for substantial compensation, the Defendant agreed to restrict his right of free speech in relation to commenting on the Claimant's affairs. This was a commercial contract which the parties were entitled to make and which the Court will enforce.

4.8. The next sub-issue is this. Did the Court's judgment in the previous action have the effect of bringing the SRCA to an end on 1 February 2023, the date of judgment in that action?

4.9. Despite Mr. Kholod's valiant arguments, I cannot see why the previous judgment should have that effect. There is no indication in the previous judgment that it was somehow terminating the parties' agreement. Mr. Kholod said that the Court awarded damages of USD $ 100,000 for breach of contract that wiped out the payment which the Defendant received on entering the contract. That submission is correct, but it does not assist the Defendant. The Court only awarded damages of USD $ 100,000 because the Defendant had committed breaches of contract. If the Defendant had abided by the contract, he would have retained the USD $ 100,000 previously paid to him.

4.10. Mr. Tukulov raises a further point. He says that the Defendant never complied with the Court's order to pay the USD $ 100,000. He fairly conceded that for a large organisation like Freedom Finance, there is always the possibility of overlooking a small receipt, such as USD $ 100,000. Mr. Kholod says there is evidence that the Defendant did pay. But, says Mr. Kholod, in any event, that point is irrelevant. This Court is dealing with substantive issues, not enforcement. I agree with that submission of Mr. Kholod. Whether or not the Defendant complied with the previous judgment is not relevant to the issues which are currently before the Court in this action.

4.11. Although I agree with Mr. Kholod on that aspect of the case, for the reasons stated above, I do not accept that the SRCA or Clause 7 of the SRCA came to an end on 1 February 2022, when two years expired, nor did it come to an end on 1 February 2023, when this Court gave judgment in the first action.

4.12. Accordingly, my answer to the question posed in Part 4 of this judgment is yes.

PART 5. SECOND ISSUE: DID THE DEFENDANT'S POSTS ON SOCIAL MEDIA CONSTITUTE BREACHES OF CLAUSE 7?

5.1. The Claimant contends that the posts on social media were plainly in breach of Clause 7. The Defendant advances two reasons why they were not. One, they were merely expressions of opinion. Two, the statements were true. Therefore, they are not defamatory, maliciously false, or disparaging.

5.2. Let me deal with the first argument. In view of the Directions which I made on 4 September, I will not read out the Defendant's various posts. However, it will be clear to anyone who looks at those posts that they are not mere statements of opinion. They are statements of fact, and they are highly critical of the Claimant. Next, the Defendant contends that those statements are true. That would, of course, be a defence if the Claimant were basing its claim on the terms "defamatory" or "maliciously false". But the Claimant is not relying upon that part of Clause 7.

5.3. The Claimant contends that the word "disparaging" is a much wider term. The posts on social

media are disparaging of the Claimant, regardless of whether they are true or false. Mr. Tukulov says, assume hypothetically that all the Defendant's posts are true: they are still disparaging remarks concerning the Claimant. I have come to the conclusion that Mr. Tukulov is correct. He has demonstrated that the Defendant's posts were disparaging. The Claimant has not proved or attempted to prove that those posts were either defamatory or maliciously false.

5.4. Accordingly, my answer to the question posed in Part 5 of this judgment is yes.

PART 6. THIRD ISSUE: TO WHAT REMEDY IS THE CLAIMANT ENTITLED?

6.1. The Claimant submits that the Court should award liquidated damages or a penalty, whichever one calls it, in the sum of USD $ 5 million in accordance with Clause 9 of the SRCA.

6.2. Parts 5 and 6 of the Court's judgment in the previous action between the parties contained an analysis of Clause 9 of the contract. Those parts also contained a discussion about Articles 297 and 351 of the Civil Code. I adopt what the Court said in Parts 5 and 6 of its previous judgment about those matters.

6.3. Mr. Tukulov submits that a crucial distinction between the previous case and this one is that Mr. Turlov has stopped making critical comments about Mr. Romanyuk. Therefore, the Court's observations about lack of good faith in the previous judgment have no application to the present case. I accept that submission.

6.4. On the other hand, as Mr. Kholod points out, that is not the only distinction between that case and the present case. Mr. Kholod draws attention to numerous articles published by CNBC concerning Freedom Finance and Mr. Turlov. Those articles will have had an enormously wide readership. Far more people read articles published by CNBC than read Mr. Romanyuk's posts on social media. Against that background, says Mr. Kholod, the Defendant’s posts were of very little consequence. Mr. Kholod also said that the Defendant's posts were true. These are all factors which should lead to a substantial reduction of the penalty imposed by Clause 9. Mr. Kholod proposes that the Court in the exercise of its discretion under Article 297 of the Civil Code should reduce the penalty to USD $ 1 in order to express the Court's disapproval of the Claimant's conduct.

6.5. Mr. Tukulov submits that under Article 351 of the Civil Code, a penalty clause such as Clause 9 of the SRCA has two purposes, namely to compensate and also to punish. I accept that submission on the basis of the expert evidence in the previous trial: see paragraph 5.11 of the previous judgment. Mr. Tukulov submits that the previous award of USD $ 100,000 was an insufficient penalty. It has not deterred the Defendant from continuing to commit breaches of Clause 7. Mr. Tukulov also submits that Mr. Romanyuk is the source of all CNBC articles on pages 6.1 to 6.34 of the second bundle of documents. This bundle is entitled “Disputed Documents” because the Claimant sought unsuccessfully to persuade the Court not to look at them.

6.6. I have read the CNBC articles. As Mr. Kholod says, it is clear that CNBC has been basing its articles on many sources. It may well be that the Defendant is one of those sources, although that has not been specifically proved. If the CNBC articles are true, then they provide support for the Defendant's posts. Mr. Tukulov commented that the CNBC articles say the same sort of things as Mr. Romanyuk's posts. Mr. Tukulov also submitted that the CNBC articles reflect some American prejudice against financial companies operating out of Kazakhstan.

6.7. I find this issue extremely worrying. I do not know whether the CNBC articles and Mr Romanyuk's

posts are true or not. There is no evidence before the Court to enable it to reach a conclusion on those matters. If they are true, this Court would hardly be acting in the public interest by punishing a party for exposing wrongdoing in the financial sector. But they may not be true. Also, it is the role of this Court to enforce commercial contracts freely entered into, unless an illegal purpose has been proved, which is not the case here. Even if the Defendant put no posts on social media, the CNBC articles would still be in the public's domain, and they would still be widely read. That, of course, mitigates the significance of the Defendant's posts.

6.8. I have come to the conclusion that the Defendant has entered into a commercial bargain whereby he will have to pay a substantial sum if he makes public statements disparaging Freedom Finance. At the time of entering the bargain, the Defendant well knew whether or not there were grounds for criticising Freedom Finance and the way it did its business. The Defendant has made it clear that he is determined to publicly criticise Freedom Finance and that he is willing to take the financial consequences. The Defendant does not need to go on publicly criticising Freedom Finance. CNBC is doing that work for him.

6.9. I have weighed up all the conflicting considerations. I have also taken into account the general principles which govern the operation of Article 297 of the Civil Code, as set out in this Court's previous judgment.

6.10. Having carried out that exercise, I conclude that the penalty of USD $ 5 million specified in Clause 9 of the SRCA is excessively large compared to the losses caused to the Claimant by the Defendant's breaches. After considering the interests of the Claimant and Defendant that deserve attention, in accordance with Article 297 of the Civil Code, I reduce the amount of penalty which the Defendant must pay for breach of Clause 7 to USD $ 100,000. I award damages in that sum. I order that Mr. Romanyuk do pay the damages ordered within 28 days.

ORDER ON COSTS

1. This is an application for costs.

2. Most unfortunately, notice of the costs application was not sent to the Court or to the Defendant’s lawyer until 9:45 am Astana time this morning. When either party intends to apply for costs, they should send a proper notice of that application and details of the costs that they are seeking in good time well before the day when Judgment will be given.

3. Secondly, it was especially unfortunate that the Claimant did not make the application for costs when Judgment was handed down. As it was, I have had to come back into Court half an hour later and to deal with it; that holds up the next case in the Court’s list and it means that Mr. Kholod, who was about to leave the building, had to come back into Court to deal with it.

4. The Court will mark its disapproval of the late notification of its cost claim. Apart from those matters, the Claimant has only been partially successful in its claim. The Claimant has succeeded on liability, but has only recovered USD $ 100,000, not USD $ 5 million, as claimed.

5. Taking all these matters into account, I assess costs in the reduced sum of USD $ 8,000. I direct that that sum be paid to the Claimant in the same period that I specified before, namely 28 days.

By Order of the Court,

Sir Rupert Jackson,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexey Kholod, “Assistent Plus” International Law Firm, Moscow, Russian Federation.