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## O v C [2024] EWHC 2838 (Comm)

The English Commercial Court in *O v C* [2024] EWHC 2838 (Comm) granted an application by Owners ("**Application**") for the sale of a cargo of naphtha ("**Cargo**"), but, on Charterers' request, ordered for the payment of the Cargo's sale proceeds to be made into Court, instead of into a blocked account with a US financial institution ("**Blocked Account**")<sup>1</sup>. In doing so, the Court considered whether such an order would pose a real or fanciful risk of prosecution of Owners for breach of US sanctions. A key point in this regard was the fact that Owners are a wholly owned subsidiary of an entity ("**P**") that is incorporated in the Marshall Islands, headquartered in New York and listed on the New York Stock Exchange.

### Facts

On 9 February 2023, Charterers loaded the Cargo on board the Vessel in Singapore. The same day, Charterers were added to the US Office of Foreign Assets Control's ("**OFAC**") List of Specially Designated Nationals and Blocked Persons ("**SDN List**") pursuant to US Executive Order 13846. Owners terminated the charterparty and refused to discharge the Cargo as a result. The Cargo remained on board the Vessel, which was drifting in the South China Sea.

On 6 April 2023, Charterers purported to sell the Cargo to a buyer (the "**Buyer**"). On 10 May 2023 and 30 June 2023, the Buyer demanded delivery of the Cargo but Owners refused. The Buyer then arrested an associated vessel in South Africa and arrested the Vessel in Malaysia for the alleged unlawful detention of the Cargo. These arrests were

subsequently set aside, on 7 July and 27 October 2023 respectively.

Charterers commenced arbitration against Owners for damages for conversion of the Cargo. Owners relied on the sanctions and compliance clauses of the charterparty in its defence to justify its termination, in response to which Charterers argued that Owners were not within the reach of US sanctions<sup>2</sup>.

Following the commencement of arbitration, Owners applied to the English Court (with the tribunal's permission) under section 44 of the Arbitration Act 1996 ("**AA**")<sup>3</sup> for an order that the Cargo be sold and the proceeds be paid into a Blocked Account. Charterers did not oppose the sale of the Cargo, but requested the proceeds be paid into the English Court instead. Owners contested this on the basis that it would risk them breaching US sanctions. Owners also notified the Buyer of the application, but the Buyer did not respond.

### Issues

Ordinarily, where a cargo is sold and there is a dispute as to who is entitled to the sale proceeds, the Court would order that they be paid into court so that they are preserved and available to be paid to the person who establishes his claim to them.

However, Owners submitted expert evidence on US sanctions (Executive Order 13846 and the Iranian Transactions and Sanctions Regulations, together, the "**US Sanctions**"), that absent a license from OFAC, they would not be permitted to pay the proceeds of sale into Court because: (i) the Cargo is

<sup>1</sup> According to the [US Office of Foreign Assets Control \("OFAC"\)](#), once it has been determined that funds need to be blocked, they must be placed into an interest-bearing account from which only OFAC-authorized debits may be made.

<sup>2</sup> As this was a matter to be decided in the arbitration, the Court did not rule on this.

<sup>3</sup> Sections 44 (1) and 2(d) of the AA allows the Court to exercise its powers in support of arbitrations, including the sale of any goods which are the subject of arbitrations.

"blocked property"<sup>4</sup> under US Sanctions and (ii) Owners were caught by US Sanctions (as they are controlled by US persons<sup>5</sup>). There was therefore a real risk that Owners would be in breach of US Sanctions.

In response, Charterers' expert gave evidence that the Cargo was not blocked (and therefore Owners were not prevented from dealing with it) and, even if it was blocked, OFAC would only expect Owners to impose restrictions "akin to blocking" (which could include paying the proceeds into Court).

The Court therefore considered the following issues:

1. Whether it would be appropriate to order a sale of the Cargo (the "**Sale Issue**"); and
2. Whether the sale proceeds should be paid into Court, in view of the risk that Owners would find themselves in breach of US Sanctions (the "**Proceeds Issue**").

## Decision

### The Sale Issue

Whilst Charterers did not "actively oppose" the sale of the Cargo, they questioned whether relief under section 44 of the AA was available, and whether such an order would be appropriate, given its sale to the Buyer. The Court held that it was desirable, and appropriate to order for the sale of the Cargo:

1. **The continued presence of the Cargo on board the Vessel is prejudicial to Owners:** this was because (i) Owners could not make profitable use of the Vessel with the Cargo remaining on board; (ii) the Vessel's tank coatings were not designed to hold the Cargo (which is flammable) for more than 100 days and the Cargo had leaked to other parts of the Vessel; (iii) there were no viable alternative storage facilities; and therefore (iv) selling the Cargo would preserve its value and the Vessel could then be profitably employed on other business.
2. **In relation to the Buyer's rights under the sale:** (i) the Buyer was informed of the Application; (ii) the Buyer did not assert any claim to the cargo before the English Court; (iii) it was unlikely that the Buyer would oppose the sale that would preserve the Cargo's value; and

(iv) any claim the Buyer had to the Cargo could be asserted against the sale proceeds.

### The Proceeds Issue

In allowing the sale proceeds of the Cargo to be paid into Court, the Court applied the following principles:

1. **Discretion:** The Court can, at its discretion, order a party to do something that is (or may) be contrary to a foreign law, including a foreign criminal law.
2. **Comity:** An order will not lightly be made where compliance would entail a party breaching its own (foreign) criminal law, with considerations of comity in mind.
3. **Real and not 'fanciful' risk of prosecution:** The party relying on the foreign criminal law must prove that there is a real (not 'fanciful') risk of prosecution, where the foreign criminal law relied on is regularly enforced so the threat to the party is real.
4. **Prosecution is unlikely if there is doubt about the law:** Where the parties' experts express differing views on the risk of prosecution, it does not follow from the disagreement that there is a real risk of prosecution.
5. **Balancing exercise:** If a real risk of prosecution is established, the Court must conduct a balancing exercise, weighing the risk of prosecution with the importance of the relief sought by the order. The greater the risk of prosecution, the more weight is to be given.
6. **Minimising concerns under foreign law:** The Court can issue an order that reduces or minimises concerns under the foreign law for compliance with the Court's order.
7. **Compliance with the Court order:** Once the Court makes the order, the Court must be able to enforce its decision. A potential breach of a foreign law does not excuse non-compliance.

Applying the above principles and taking into account the following factors, the Court held that there was no real risk of prosecution of Owners. At most, it anticipated that OFAC might require additional information on the circumstances in which the proceeds of sale had been paid into Court.

<sup>4</sup> According to OFAC, "blocking" refers to freezing assets or other property. It immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property.

<sup>5</sup> The nationality of control of both Owners and P is US, and it is said by the Owners that all the operations, management, officers and personnel of both companies are in New York.

1. **Owners had been compliant with US Sanctions:** On 10 February 2023, the day after Charterers were placed on the SDN List, P filed a report to OFAC stating it was in possession by the Cargo. Owners also refused to discharge the Cargo unless permitted by OFAC, and when seeking payment of the Cargo's sale proceeds into a Blocked Account, they appeared to have done all they could to avoid breaching US Sanctions.
2. **Owners' actions were compelled by the order of the Court:** A document titled "*Economic Sanctions Enforcement Guidelines*", which provides a general framework for all enforcement of sanctions by OFAC, was presented before the Court. Owners' consideration of these guidelines demonstrated that it would not have acted wilfully or recklessly in breach of US Sanctions, but in compliance with an order of the Court (where payment into Court was ordered).
3. **Payment into Court does not frustrate or avoid the effect of US Sanctions:** The purpose of ordering the payment of the proceeds into Court was to "hold the ring" so that those proceeds are preserved pending the conclusion of the underlying arbitration. It would not damage the objective of US Sanctions, as Charterers would not be able to access those proceeds if the tribunal found that Owners were within the reach of US Sanctions and were obliged to "block" the Cargo.

For completeness, the Court also concluded that, even if there were a real risk of prosecution, the factors in favour of a payment into Court outweighed the risk of prosecution. If the proceeds of sale were paid into a Blocked Account, they might not be available to give effect to the result of the arbitration because OFAC might not permit their release. This disadvantage was not one that could be satisfactorily eliminated by Owners providing a cross-undertaking in damages, fortified by P. Charterers would be left in a situation where (if successful in the arbitration) they would need to make an application for payment to OFAC and, if that were refused, then make an application to Court for an order to be paid pursuant to the cross-undertaking. This was not a satisfactory substitute for the simple procedure afforded by a payment into Court.

## Comment

The Court in *O v C* adopted a sensible approach to balancing US sanctions risks with the need to ensure fairness in London arbitration. The case serves as a welcome precedent, offering practical guidance for future disputes involving blocked or potentially sanctioned assets.

The full decision of *O v C* can be accessed [here](#).

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