

FEDERAL COURT OF AUSTRALIA

ENRC Marketing AG v OJSC “Magnitogorsk Metallurgical Kombinat”

[2011] FCA 1371

Citation: ENRC Marketing AG v OJSC “Magnitogorsk Metallurgical Kombinat” [2011] FCA 1371

Parties: **ENRC MARKETING AG v OJSC
"MAGNITOGORSK METALLURGICAL
KOMBINAT" and MMK - MINING ASSETS
MANAGEMENT S.A.**

File number: NSD 2110 of 2011

Judge: **RARES J**

Date of judgment: 25 November 2011

Catchwords: **PRACTICE AND PROCEDURE – SECURITY FOR
UNDERTAKING AS TO DAMAGES** – *ex parte*
application for freezing orders under Art 17J of
*UNCITRAL Model Law on Commercial Arbitration –
Model Law* given force of law by s 16 of *International
Arbitration Act 1974* (Cth) – international arbitration on
foot – applicant seeking to prevent respondent transferring
its shares in an Australian company which would put that
asset beyond applicant’s reach – undertaking as to damages
proffered in support of application – undertaking as to
damages unsupported – applicant with no assets or
presence in the jurisdiction – whether undertaking as to
damages sufficiently substantial proffer of protection in
circumstances – Court’s inherent or implied power to
require security for undertaking as to damages – market
volatility relevant consideration – possible effect of order
on third parties relevant

Legislation: *International Arbitration Act 1974* (Cth) s 16
UNCITRAL Model Law on Commercial Arbitration Art
17J
IFC Spry: *The Principles of Equitable Remedies* (6th ed)
(Lawbook Co, Sydney, 2001)

Cases cited: *Golf Lynx v Golf Scene Pty Limited* (1984) 75 FLR 303
followed
Hotline Communications Limited v Hinkley (1999) 44 IPR
445 followed
J Aron & Co v Newmont Yandal Operations Pty Limited

(2003) 47 ACSR 243 followed
Myring v Beale (1899) 20 NSWLR 6 applied
National Australia Limited v Bond Brewing Holdings Limited (1990) 169 CLR 271 cited
Patrick Stevedores Operations No 2 Pty Limited v Maritime Union of Australia (1988) 195 CLR 1 cited

Date of hearing: 25 November 2011

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 15

Counsel for the Applicant: Dr AS Bell SC with Mr C Bova

Solicitor for the Applicant: Freehills

Counsel for the Respondents: The respondents did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 2110 of 2011

BETWEEN: ENRC MARKETING AG
Applicant

AND: OJSC "MAGNITOGORSK METALLURGICAL
KOMBINAT"
First Respondent

MMK - MINING ASSETS MANAGEMENT S.A.
Second Respondent

JUDGE: RARES J

DATE OF ORDER: 25 NOVEMBER 2011

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. Ex parte freezing and other orders be made in the form annexed and marked "A".
2. Leave to file and serve subpoenas to the following entities:
 - (a) HSBC Custody Nominees (Australia) Limited;
 - (b) JP Morgan Nominees Australia Limited;
 - (c) National Nominees Limited,which call for production of "Any document or statement of account evidencing or recording the holding of shares in Fortescue Metals Group Limited for or on behalf of one or both of the respondents."
3. The time for service of the said subpoenas be abridged to 2.00pm, Friday 25 November 2011.
4. The said subpoenas be returnable before the Duty Judge at 10:15 a.m. on Monday, 28 November 2011.
5. Leave be granted to the Applicant to enter these orders forthwith.

6. The proceedings stand over to 28 November 2011 at 10:15 a.m. before the Duty Judge for hearing.

ANNEXURE A

**Originating application for relief under Model Law (section 16 of the International
Arbitration Act 1974)**

No. of 20

Federal Court of Australia

District Registry: New South Wales

Division: General

ENRC MARKETING AG

Applicant

OJSC “MAGNITOGORSK METALLURGICAL KOMBINAT” and another

Respondents

PENAL NOTICE

TO: OJSC “MAGNITOGORSK METALLURGICAL KOMBINAT”

AND

MMK MINING ASSETS MANAGEMENT S.A.

IF YOU:

- (A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED
IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- (B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER
REQUIRES YOU TO ABSTAIN FROM DOING,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY
OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING
WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER
MAY BE SIMILARLY PUNISHED.**

TO: OJSC “MAGNITOGORSK METALLURGICAL KOMBINAT”

AND

MMK MINING ASSETS MANAGEMENT S.A.

This is a ‘freezing order’ made against you on 25 November 2011 by Justice Rares at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavits listed in Schedule B to this order.

THE COURT ORDERS:

INTRODUCTION

1. (a) The application for this order is made returnable immediately.
 - (b) The time for service of the application and supporting affidavit, excluding exhibits, is abridged to noon on 25 November 2011 and service is to be effected by:
 - (A). facsimile addressed to the First Respondent and Second Respondent, +7 (3519) 24-75-46;
 - (B). facsimile addressed to the First Respondent and Second Respondent, + 7 (3519) 25-44-77;
 - (C). facsimile addressed to Valentina Khavanceva, Corporate Secretary, +7 (3519) 24-31-43; and
 - (D). emailing Valentina Khavanceva, Corporate Secretary, at khavantseva.vn@mmk.ru;
 - (c) Upon confirmation of transmission of the application and supporting affidavit in accordance with the methods for service set out in paragraph (b) above, those documents will be taken to have been served on the First Respondent and the Second Respondent in accordance with Rule 10.48 of the Federal Court Rules 2011.
2. Subject to the next paragraph, this order has effect up to and including Monday, 28 November 2011 or such other date as the Court may order (‘the Return Date’). On the Return Date at 10.15am there will be a further hearing in respect of this order before the Duty Judge.

3. Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.
4. In this order:
 - (a) 'applicant', if there is more than one applicant, includes all the applicants;
 - (b) 'you', where there is more than one of you, includes all of you and includes you if you are a corporation;
 - (c) 'third party' means a person other than you and the applicant;
 - (d) 'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.
5.
 - (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions.
 - (b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

FREEZING OF ASSETS

6.
 - (a) You must not remove from Australia or in any way dispose of, deal with or diminish the value of any of your assets in Australia ('Australian assets') up to the unencumbered value of AUD\$857,639,955 ('the Relevant Amount').
 - (b) If the unencumbered value of your Australian assets exceeds the Relevant Amount, you may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of your Australian assets still exceeds the Relevant Amount.
7. For the purposes of this order:
 - (i) your assets are all or any of your assets in Australia including shares in Fortescue Metals Group Limited ACN 002 594 872:
 - (A) whether or not they are in your name and whether they are solely or co-owned;

- (B). which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and
 - (ii). the value of your assets is the value of the interest you have individually in your assets.

PROVISION OF INFORMATION

- 8. Subject to paragraph 9, you must:
 - (a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets in Australia including but not limited to your shares in Fortescue Metals Group Limited ACN 002 594 872, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject), the extent of your interest in the assets and to the extent you are not the legal owner of your assets the details (including name and address) of the legal owner;
 - (b) within 5 working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.
- 9. (a) This paragraph (9) applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:
 - (i). have committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (ii). are liable to a civil penalty.
- (b) This paragraph (9) also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:

- (i). have committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (ii). are liable to a civil penalty.
- (c) You must:
- (i). disclose so much of the information required to be disclosed to which no objection is taken; and
 - (ii). prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and
 - (iii). file and serve on each other party a separate affidavit setting out the basis of the objection.

EXCEPTIONS TO THIS ORDER

10. (a) This order will cease to have effect if you:
- (i). pay the sum of AUD\$857,639,955 into Court; or
 - (ii). pay that sum into a joint bank account in the name of your lawyer and the lawyer for the applicant as agreed in writing between them; or
 - (iii). provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.
- (b) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.
- (c) If this order ceases to have effect pursuant (a), you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

COSTS

11. The costs of this application are reserved to the Court hearing the application on the Return Date.

PERSONS OTHER THAN THE APPLICANT AND RESPONDENTS

12. Set off by banks

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

13. **Bank withdrawals by the respondents**

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

14. **Persons outside Australia**

- (a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.
- (b) The terms of this order will affect the following persons outside Australia:
 - (i). you and your directors, officers, employees and agents (except banks and financial institutions);
 - (ii). any person (including a bank or financial institution) who:
 - (A). is subject to the jurisdiction of this Court; and
 - (B). has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and
 - (C). is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and
 - (iii). any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

- (1) The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.
- (2) As soon as practicable, the applicant will file and serve upon the respondents copies of:
 - (a) this order;
 - (b) the application for this order for hearing on the return date;
 - (c) the following material in so far as it was relied on by the applicant at the hearing when the order was made:
 - (i) affidavits (excluding its exhibit);
 - (ii) any written submission; and
 - (iii) any other document that was provided to the Court.
 - (d) a transcript, or, if none is available, a note, of any exclusively oral allegation of fact that was made and of any exclusively oral submission that was put, to the Court;
 - (e) the originating process, or, if none was filed, any draft originating process produced to the Court.
- (3) As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.
- (4) The applicant will pay the reasonable costs of anyone other than the respondents which have been incurred as a result of this order, including the costs of finding out whether that person holds any of the respondents' assets.
- (5) If this order ceases to have effect the applicant will promptly take all reasonable steps to inform in writing anyone to who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

- (6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.
- (7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the respondents or the respondents' assets.
- (8) The applicant will:
- (a) on or before 5.00pm (GMT) on 25 November 2011 cause an irrevocable direction to a bank to pay the sum of AUD\$30,000,000 to its solicitors, Freehills, which funds are to be:
 - (i) held on trust by Freehills, in respect of any order the court may make pursuant to undertaking (1) above; and
 - (ii) paid into Court by Freehills as soon as is reasonably practicable.
 - (b) as soon as is reasonably practicable, cause an irrevocable undertaking to pay in the sum of AUD\$30,000,000 to be issued by a bank with a place of business within Australia, in respect of any order the court may make pursuant to undertaking (1) above.

Upon the issue of the irrevocable undertaking, the funds paid into Court in accordance with sub-paragraph (a) above are to be released by the Court and transferred to the Applicant.
 - (c) immediately upon issue of the irrevocable undertaking, cause a copy of it to be served on the respondents.

SCHEDULE B

AFFIDAVITS RELIED ON

Name of deponent	Date affidavit made
Affidavit of Donald Bruce Robertson	24 November 2011
Affidavit of Donald Bruce Robertson	25 November 2011

NAME AND ADDRESS OF APPLICANT'S LAWYERS

The applicant's lawyers are:

Freehills
Level 32, MLC Centre
9 Martin Place
Sydney NSW 2000
Reference: 81984944: Donald Robertson

Fax: +61 2 9322 4000
Phone: +61 2 9225 5000
Phone (a/h): +61 414 275 523

Email: donald.robertson@freehills.com

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 2110 of 2011

**BETWEEN: ENRC MARKETING AG
Applicant**

**AND: OJSC "MAGNITOGORSK METALLURGICAL
KOMBINAT"
First Respondent**

**MMK - MINING ASSETS MANAGEMENT S.A.
Second Respondent**

JUDGE: RARES J

DATE: 25 NOVEMBER 2011

PLACE: SYDNEY

**REASONS FOR JUDGMENT
(REVISED FROM THE TRANSCRIPT)**

1 This matter commenced as an *ex parte* originating application for relief by way of a freezing order under Art 17J of the *UNCITRAL Model Law on Commercial Arbitration* which is given the force of law by s 16 of the *International Arbitration Act 1974* (Cth). Article 17J of the *Model Law* provides:

“Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.”

2 This Court has jurisdiction by force of Art 17J of the *Model Law* to make orders so as to prevent parties to arbitration agreements putting assets beyond the reach of any enforcement mechanism in the event that awards are made against them, in the same way as they would be able to be enjoined in domestic proceedings for a freezing order.

BACKGROUND

3 The parties are involved in the production of iron ore and steel products. The applicant (**ENRC**) entered into a long-term supply contract with the first respondent (**MMK**) for the provision of bulk quantities of iron ore that still has a number of years to run. ENRC is a company incorporated in Switzerland whose assets are mainly located in the Republic of Kazakhstan. It has no assets in this jurisdiction, as was disclosed in the affidavit in support of the freezing order.

4 MMK is alleged to be in breach of the long-term supply contract by refusing to accept large quantities of iron ore per month, of over 1 million tonnes, unless the parties had otherwise agreed. ENRC has concerns about a parcel of approximately 155 million shares in an Australian public listed company, Fortescue Metals Group Ltd. Those shares represent about 5% of Fortescue's listed capital. Those concerns centre on whether the Fortescue shares that have been held by a nominee for the benefit of MMK have been or will be transferred to the second respondent (**MMK-Lux**), an associated company of MMK that was recently incorporated in Luxembourg.

5 During the course of 2011, events in international markets have placed pressure on the ability of MMK to accept the quantities of iron ore contemplated in the long-term supply contract. The quantities have been reduced through some agreements between the parties during this year and lately by MMK's own assertions that it would take smaller quantities. On 14 November 2011, MMK wrote to ENRC and requested that from 1 December 2011 it deliver no further quantities of iron ore under the agreement.

6 In the meantime, on or about 10 November 2011, ENRC commenced proceedings in the International Court of Arbitration of the International Chamber of Commerce in Zurich for arbitration pursuant to the long-term supply contract, based on what it asserted were substantial breaches by MMK of that agreement. At the moment, ENRC has quantified its damages in the order of AUD850 million on hypotheses that MMK will continue to purchase and pay for some quantities of iron ore under the contract but without regard to MMK's most recent communication of 14 November 2011 requesting that ENRC deliver no quantities of iron ore after 1 December 2011.

7 Since September 2011, MMK has indicated in publicly available announcements that it will transfer its interests in the Fortescue shares to MMK-Lux in a transaction that appears to be scheduled to be completed on or before 30 November 2011. The present market value of the shares is estimated at approximately AUD715 million. ENRC wishes to ensure that this significant asset of MMK is not placed beyond its reach for the purposes of being able to enforce any arbitration award subsequently made.

CONCERN ABOUT THE SECURITY FOR THE UNDERTAKING AS TO DAMAGES

8 ENRC proffered the usual undertaking as to damages in support of its application for a freezing order. During the course of the application being made *ex parte* yesterday, I raised with senior counsel for ENRC concerns that the Fortescue shares were assets, the value of which was subject to potential volatility in financial markets and appeared to be the subject of a transaction which, if interfered with, may have ramifications for third parties, including financiers.

9 This raised the question whether an undertaking as to damages, unsupported in any way by a party with no assets or presence in the jurisdiction, may not be a sufficiently substantial proffer of protection to persons, including the party to the proceedings directly enjoined, whose interests may be affected by the *ex parte* orders being granted in circumstances where, subsequently, the Court determined those orders ought be dissolved or ought never to have been granted. I said that I would require some form of support for the undertaking as to damages by provision of a significant security. This was to take account of the facts that the market volatility which displayed on international and the Australian stock markets recently, had seen movements in the order of between 2% to 4% per day on occasions, and, in any event, even a slight movement in the share price of such a large parcel could have very significant financial impacts on the persons who held the shares or financiers or others who were otherwise interested in them.

10 It was for these reasons that I considered it essential that the Swiss-based ENRC provide some form of security for its undertaking as to damages. Once I had raised this aspect with its senior counsel, the proceedings were adjourned until this morning.

THE COURT'S POWER TO REQUIRE SECURITY FOR AN UNDERTAKING AS TO DAMAGES

11 The Court has an inherent or implied power to require security for an undertaking as to damages as an incident of its ability to condition the making of its own orders. The provision of security can be required as a condition of the Court acting on an undertaking as to damages given by a person who is not present in the jurisdiction, or alternatively, does not appear to have sufficiently disclosed a substantive financial basis on which to meet any liability on the undertaking in the event that it is called upon.

12 Long ago, in *Myring v Beale* (1899) 20 NSWLR 6 at 7, Simpson CJ in Eq said that:

“... this Court ought not to be satisfied with an undertaking which may possibly prove to be illusory. The Court of Equity imposes this undertaking on a plaintiff as a condition of his injunction, and it ought to see that the condition is not a mere form, as it would be in cases where the plaintiff is out of the jurisdiction, especially where there is no evidence that the plaintiffs have any property in the jurisdiction.”

Similar views were expressed more recently in *Golf Lynx v Golf Scene Pty Limited* (1984) 75 FLR 303 at 313 per Legoe J; *Hotline Communications Limited v Hinkley* (1999) 44 IPR 445 at 456-457 [36]-[39] per Warren J, and *J Aron & Co v Newmont Yandal Operations Pty Limited* (2003) 47 ACSR 243 at 247-248 [16]-[17] per Barrett J; see too IFC Spry: *The Principles of Equitable Remedies* (6th ed) (Lawbook Co, Sydney, 2001) at 485-487.

13 In granting *ex parte* relief the Court must be mindful that its order could occasion loss not merely to the party immediately enjoined or affected by that relief but also to others as a result of that relief. Accordingly, in the absence of an exceptional circumstance, the Court ought require the party applying for relief not merely to provide an undertaking as to damages but to be mindful that, depending on what the consequences of the order may be, the undertaking be a real one that is able to answer in fact to any claim that may be made under it, were the order later discharged: see also *National Australia Limited v Bond Brewing Holdings Limited* (1990) 169 CLR 271 at 277 per Mason CJ and Brennan and Deane JJ and *Patrick Stevedores Operations No 2 Pty Limited v Maritime Union of Australia* (1988) 195 CLR 1 at 41-43 [65]-[66] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

CONCLUSION

14 As a result of the concern I raised yesterday, this morning ENRC proffered an undertaking that later today it will cause an irrevocable undertaking to be given to its London bank to pay forthwith the sum of AUD30 million to ENRC's Sydney solicitors' trust account. ENRC envisages that the cash paid will be returned to it when it has had time to arrange to substitute an irrevocable bankers' undertaking to pay that sum.

15 Having regard to the proffer of this undertaking to pay \$30 million, and in light of the short period during which the orders will remain in place, namely, up to and including Monday 28 November 2011 when the matter can again be reviewed by the Court, I am satisfied that it is appropriate to grant the freezing orders in the form sought.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 2 December 2011