School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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Award Name and Date: *GPF FP S.à.r.l. v. The Republic of Poland*, [2018] EWHC 409 (Comm). 02 March 2018

Case Report by: Harry Skinner**, Editor Ignacio Torterola***

Summary: Claimant brought a jurisdictional challenge to an arbitral award made by a Tribunal seated in London pursuant to a bilateral investment treaty ("**BIT**") between Poland, Belgium and Luxembourg wherein the Tribunal found that it lacked jurisdiction to consider whether certain measures by the Polish government constituted expropriation or measures similar to expropriation, particularly, "creeping expropriation." It was held that the Tribunal did have jurisdiction to consider whether measures short of expropriation could lead to consequences similar to expropriation in the aggregate based on the wording of Article 9(2) of the BIT and the reality of how creeping expropriation occurs. Creeping expropriation may be found to have occurred even where the act at the end of the chain is, or is argued to be, a specific act of direct expropriation. The Court further held that it is inappropriate for Tribunals to make definitive findings on which acts constitute which type of expropriation at the jurisdictional stage where such findings would preclude a consideration of all facts at the merits stage.

Main Issues: Expropriation, Indirect expropriation, Creeping expropriation, Fair and Equitable Treatment

Court: High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court

Judge: The Honourable Mr. Justice Bryan

Claimant's Counsel: Ricky Diwan QC (instructed by Dentons UKMEA LLP)

Respondent's Counsel: Stewart Shackleton (instructed by Gately Plc)

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Digest:

1. Relevant Facts

A Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg of May 1987 (the "**BIT**" or the "**Treaty**") became binding on 2 August 1991 (¶ 1). Article 9.1(b) of the BIT defines disputes that may be referred to arbitration as "…disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation" (¶¶ 4 & 14). Article 3.1 sets out a fair and equitable treatment ("**FET**") standard (¶ 12). Article 4.1 creates an obligation on its signatories to compensate for expropriation (¶ 13).

The claimant, GPF GP S.à.r.l. ("**Griffin**"), is a Luxembourg company that provided financing to White Star Property Group, a real estate group operating in Poland, acting through Parkview Terrace, to acquire 100% of the shares in 29 Listopada (¶ 17). 29 Listopada was the holder of perpetual usufructuary rights for a term of 99 years over a property located at 29 Listopada Street (the "**Property**") in central Warsaw, pursuant to a Perpetual Usufruct Agreement entered into on 6 February 2001 (the "**PUA**") (¶ 18). The property was comprised of two plots of land and a former military residential building (¶ 18).

Prior to acquiring 29 Listopada for the purpose of developing the building into residential apartments with underground parking spaces, the White Star Property Group applied for, and obtained, a recommendation from the Warsaw Monuments Conservator supporting its project proposal on 12 April 2007 (the "**April 2007 Recommendation**") (¶ 22).

On the basis of the 2007 Recommendation, Griffin, through a subsidiary, decided to invest in the Property by providing financing for the White Star Property Group's acquisition of the shares, which were acquired by Parkview Terrace on 15 September 2008 (¶ 24).

In 2009, the same Monument Conservator reversed her prior position and issued two decisions on the basis that the development was unacceptable from a conservation point of view (the "**2009 Monuments Conservator's Decision**") (¶ 25). The 2009 Monuments Conservator's Decision led to a negative zoning decision by the City of Warsaw and numerous administrative and court decisions between 2009 to 2015 going all the way up to Poland's Supreme Court (¶ 26). Parkview Terrace continued to carry out demolition work until 10 November 2010 when the Warsaw Monument Conservator issued a decision to order the halting of demolition work and initiated proceedings aimed at entering the former military barracks on the register of historical monuments (¶¶ 27-28). Parkview Terrace put forward modified development proposals, all of which were rejected (¶ 28).

On 20 December 2011, the City of Warsaw requested the termination of the PUA. It formally filed an action for termination with the Warsaw Regional Court on 22 March 2012 (¶ 29). In

the meantime, Parkview Terrace had allegedly been unable to develop the property, defaulted on its loan and Griffin became the sole investor in the development project through its subsidiary, PFS (¶ 30).

On 4 June 2013, the Warsaw Regional Court terminated the PUA for failure to develop the Property within the specified time limits. On 19 December 2014, the Warsaw Court of Appeal confirmed the termination of the PUA and dismissed an appeal from the Warsaw Regional Court and on the same date the mortgages on the Property were canceled (¶ 31). (It is Griffin's case that its investment lost its entire value as at the date (¶ 31).)

2. Procedural History

Griffin advanced two separate claims in an arbitration against Poland - a violation of the FET standard contained in Article 3.1 of the BIT and a claim for indirect expropriation in breach of Article 4.1 of the BIT (¶ 36).

A three-member Tribunal seated in London rendered an award on 15 February 2017 wherein the Tribunal found that it had jurisdiction to rule upon one aspect of Griffin's claim in the arbitration, whether the judgment of the Warsaw Court of Appeal, as confirmed by the Polish Supreme Court on 2 June 2016, constituted an "expropriation, nationalization or any other similar measures affecting investments" in violation of Article 9.1(b) of the BIT, but that it lacked jurisdiction to rule on any other measures allegedly in violation of the BIT (¶ 5). The Tribunal further determined that it did not have jurisdiction to consider Griffin's claims for breach of the FET standard based on its interpretation of Article 9.1(b) of the Treaty (¶ 6). The Tribunal's finding with respect to its lack of jurisdiction to consider the conduct of Poland prior to the Warsaw Court of Appeal decision ("**Prior Measures**") (¶ 42) was made on the basis that:

> (i) a claim for creeping expropriation could not as a matter of international law be put forward given that there was a specific event (the Court of Appeal decision) that was said to be "similar" to an expropriation;
>
> (ii) the Prior Measures did not have effects "*similar*" to expropriation within the meaning of Article 9.1(b);
>
> (iii) the Tribunal should assume that Griffin would establish in law that the Warsaw Court of Appeal decision was "*similar*" to expropriation applying a pro tem test. (¶ 6)

Griffin brought a challenge to the arbitral award on jurisdictional grounds under section 67 of the Arbitration Act 1996 (¶ 1).

3. Claimant's Position

3.1 Fair and Equitable Treatment Standard Claim

The claimant argued that the April 2007 Recommendation constituted an administrative promise, which could not be reversed arbitrarily and gave rise to legitimate expectations (¶ 22). In the claimant's view, there were violations of its legitimate expectation that Parkview Terrace

and 29 Listopada would be able to develop the Property in the manner contemplated and that the required authorizations would be granted (¶ 41). The Claimant argued that Poland, through the City, the Monuments Conservators and the state-owned Lazienki Krolewskie Museum (the "**Museum**"), did not act in good faith in denying authorizations to Parkview Terrace, but instead acted in order to terminate the PUA, with the hidden agenda of giving the Property to the Museum which wanted to use the Property as a car park (¶¶ 33 & 41). The Claimant alleges that Poland breached its obligations not to adopt unjustified, arbitrary and discriminatory measures (¶ 41). In this regard, Griffin relied upon its pleaded case that no company placed in a similar position had ever suffered termination of a PUA for non-compliance with development deadlines and that the differential treatment of Polski Holding, a Polish State-owned company in a similar position, was case in point (¶¶ 29 & 41).

> Griffin says that the Tribunal failed to apply the applicable principles of international law under Article 31 of the Vienna Convention correctly, and in particular that the Tribunal failed to adopt a true textual approach having regard to all the words and phrases in Article 9.1(b) of the Treaty, misinterpreted the words and phrases that were used, failed to apply the *effet utile* principle and generally failed to give meaning and effect to all the words that fell within the second part of Article 9.1(b). (¶ 73)

3.1.1. Creeping Expropriation Claim

Griffin also made a claim for indirect expropriation in the form of creeping expropriation in violation of Article 4.1 (¶ 42). In support of this claim, Griffin relies on the Warsaw Court of Appeal Decision and the Prior Measures that led to the termination of the PUA by the decision of the Warsaw Court of Appeal, which, as a matter of legal principle, constitute a series of acts attributable to Poland and together constitute an indirect expropriation in the form of a creeping expropriation (¶ 42). Griffin's case treats all of the acts, culminating in the final act, as part of a creeping expropriation and therefore, Griffin submits, one cannot exclude from consideration any of the Prior Measures, because to do so would be to disregard key elements of Griffin's case and the reality of how the expropriation occurred (¶ 42).

Griffin again argues that the Tribunal erred in its construction of Article 9.1(b) and should have found that Griffin's indirect expropriation claim fell within the first part of Article 9.1(b) and that Griffin was entitled to advance its claim including by reference to the Prior Measures (¶ 77).

3.1.2. Translation Issue

The BIT was signed in French, Dutch and Polish with each text being authentic. What was previously an agreed upon translation from French to English was provided to the court (¶¶ 4 & 10). The Claimant argued that it was too late to be seeking to introduce new translations and that it might have wanted to call expert evidence on the point (¶ 82). It also made some submissions including dictionary definitions that supported the originally agreed upon translation (¶ 82).

4. Respondent's Position

4.1. Fair and Equitable Treatment Standard Claim

Although the Court never expressly set out the Respondent's position with respect to the FET claim, it can be gleaned from the decision that the respondent defended the Tribunal's conclusion that the Tribunal's jurisdiction did not extend to claims for breach of the FET standard under Article 3.1 of the BIT. The Tribunal held that the phrase "deprivation or restriction of property rights by State measures that lead to consequences similar to expropriation" in Article 9.1(b) imposes two cumulative requirements: a State measure must (i) affect property; and (ii) lead to consequences that are analogous to an expropriation (¶ 74). There was no dispute that the first requirement was met (¶ 74).

The decision suggests that the Tribunal accepted the respondent's position that measures which produce less intrusive effects, such as a reduction of the value of the investment, may lead to violations of an investor's rights such as a breach of the FET standard, but cannot be said to have consequences similar to expropriation (¶ 74). According to the Respondent, the essence of expropriation is deprivation, therefore any "similar measure" must result in deprivation in order to be considered "similar" (¶ 74).

4.1.1 Creeping Expropriation Claim

The Respondent focused primarily on two arguments for why the claimant could not make out a claim for creeping expropriation: (1) creeping expropriation is precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation, and (2) the claimant should have, but has not, pleaded the precise effect of each Prior Measure (¶ 111). The Respondent has further criticized the claimant for failing to identify what act or acts are said, individually or collectively, to amount to indirect expropriation (¶ 42).

The Respondent submitted that only rights under the PUA are capable of being expropriated (¶ 127). While not clear from the decision, the Respondent also presumably defended the Tribunal's conclusion that the Prior Measures did not constitute expropriation because they could not be said to have given rise to a permanent deprivation of the investment which was a condition the Tribunal held was required for a finding of expropriation (¶ 78).

4.1.2 Translation Issue

Shortly before the hearing the Respondent raised issues with respect to the use of the words "that lead to" and later with respect to the words "as well as" in the wording of Article 9.1(b) (¶ 10, 81 & 83). The respondent submitted that the word "*entraîner*" from which the words "lead to" were translated, would be better translated to any of the terms; "to bring about", "to entail" or "to cause" (¶ 83). The Respondent also disputed the translation of "*ainsi que*" to "as well as" which it argued may suggest a difference of emphasis not intended in the French and may better be translated to "and" (¶ 84).

5. Court's Analysis

The Court divided Article 9.1(b) into two clauses for interpretation:

> (1) "disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision" (the "**first clause**")

> (2) "[as well as] any other deprivation or restriction of property rights by state measures that [lead to] consequences similar to expropriation." (the "**second clause**") (¶ 86).

5.1.1 Fair and Equitable Treatment Standard Claim

In respect of Griffin's FET Claim, Bryan J identified the following issues:

> (1) whether…any, and if so what, FET claims fall within the scope of Article 9.1(b), and if so,
>
> (2) whether Griffin's FET Claim falls within the scope of Article 9.1(b)? (¶ 76)

While it was held that the wording of the first clause did not confer jurisdiction in respect of any FET claim (¶ 92), it was held that the wording of the second clause did (¶ 99). The second clause was framed in broader terms, being concerned with measures other than expropriation that cause consequences similar to expropriation, without them being in and of themselves expropriatory (¶ 99). The reasoning for this is in the meaning of two terms: (i) "deprivation or restriction" was found to indicate a lesser level of interference than an expropriation, and (ii) "measures" as measures restrictive of investment appear to be broader than those which are expropriatory under customary international law (¶ 95). It was further noted that the second clause dealt with "property rights" only and not all investments which served as further evidence that the second clause was about something distinct from the first (¶ 96).

Bryon J found that the second clause of Article 9.1(2) was wide enough to cover Griffin's claim for breach of the FET standard as Griffin's claim was premised on Poland interfering with Griffin's property rights and this led to the termination of the PUA through the Warsaw Court of Appeal decision leading to consequences similar to expropriation (¶ 101 & 108).

5.1.2. Creeping Expropriation Claim

In respect of Griffin's claim for creeping expropriation, the following issues were identified:

> (1) is a claim for creeping expropriation precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of direct or indirect expropriation?
>
> (2) was the Tribunal correct, at the jurisdictional phase, and applying a pro tem test, to assume that Griffin would be able to establish that the Warsaw Court of Appeal Decision was in law similar to an expropriation within the meaning of Article 9.1(b) to foreclose reliance upon the Prior Measures?
>
> (3) was the Tribunal correct as a matter of jurisdiction, applying Article 9.1(b) of the Treaty, to exclude the Prior Measures from the Claimant's claim for creeping expropriation? (¶ 79)

The Court held that the words "or any other similar measures affecting investments" ensure that all forms of indirect expropriation including "creeping expropriation" are included in the

first clause and therefore under this BIT a tribunal has jurisdiction over a claim for "creeping expropriation" under the first clause (¶¶ 88, 92 & 109).

The Court agreed with Griffin's submission that, at the jurisdictional phase, it is inappropriate to assume that any acts amount to indirect expropriation (including creeping expropriation) or expropriation generally, or to make any findings that would foreclose consideration of all the facts, including the Prior Measures, from being explored at the merits stage (¶¶112 & 126).

It was found to be possible to have indirect expropriation occur before a direct expropriation as a matter of logic (¶ 113). It was found to be possible to have a creeping expropriation in addition to an indirect expropriation before a direct expropriation, and the final act in that expropriation may in and of itself be an indirect expropriation (¶ 114). And it was found to be possible to have a creeping expropriation where the act at the end of the chain is a specific act of direct expropriation (¶ 115). Further, it was held that there can be a finding of creeping expropriation, by reference to a progression of events culminating in an event that is arguably a direct expropriation by itself, without that final event rendering the prior events irrelevant or preventing the overall course of events from being a creeping expropriation (¶ 118). It was held that a tribunal may find a creeping expropriation without having to conclude on whether the final event was itself a direct expropriation (¶ 118).

The Tribunal was found to have misapplied the *pro tem* test, the purpose of which is to protect the integrity of the merits phase whilst making preliminary jurisdictional determinations (¶ 129). The Tribunal was found to have merged the factual and legal issues by restricting Griffin's case to the Warsaw Court of Appeal Decision as an event capable of amounting to an expropriatory act, foreclosing Griffin from running a case of creeping expropriation (¶ 130). This was found to be wrong in law as discussed above and ignores the pro tem test which would have required the tribunal to ask only whether Griffin could establish whether its factual case was capable of falling within the Tribunal's jurisdiction (¶ 130). The Claimant only needed to establish a *prima facie* case of indirect/creeping expropriation. (¶ 131).

The Court found that the Tribunal and the Respondent were wrong to require that the Claimant identify what act or acts are said, individually or collectively, to amount to indirect expropriation at the jurisdictional phase for a further reason, that being, such an approach fails to recognize that creeping expropriation refers to a process (¶ 132-135). Creeping expropriation is a series of steps that need to be viewed in the aggregate and often looking backward, with the "last straw breaking the camel's back" (¶ 136). Preventing an analysis of the whole process risks ignoring steps which have had an adverse effect, despite not being obviously wrong or illegal (¶ 136).

The Court was satisfied that the Claimant made out a sufficient *prima facie* case of creeping expropriation for jurisdictional purposes on a *pro tem* approach (¶142). It was clearly made out that each matter relied upon need not be an identifiable act of expropriation and need not in itself have a perceptible impact. The Court emphasized that it is unnecessary to single out matters as expropriatory, the precise date of occurrence and the precise property right said to have been expropriated at a particular point in time. To do so is inconsistent with the conceptual nature of creeping expropriation and should not be attempted at the jurisdictional stage (¶ 140-143).

5.1.3 Translation Issue

The Court did not find that the different interpretations of the term "*entraîner"* produce a different result applying Article 31 of the Vienna Convention as both parties accept that a causal connection is connoted by each side's proposed translation(s) (¶ 82). Further, it did not find that a difference in result would be produced by either translation of the phrase "*ainsi que*" as both "as well as" and "and" connote a new clause or sub-clause with its own separate and distinct subject matter (¶ 84). Moreover, it was held to be unacceptable for a party to make attempts at the last minute to go back on an agreed upon translation of a text after having produced it to an English court to interpret without applying for permission to adduce expert evidence which can be tested, if necessary, in cross-examination (¶ 85).

6. Costs

With respect to costs, the Court left the parties to agree to an Order consequential upon the judgment, including as to costs which, *prima facie*, should be awarded to the successful party to the litigation.