



Neutral Citation Number: [2021] EWCA Civ 1845

Case No: A4/2021/0484(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, London, WC2A 2LL

Date: 15 July 2021

Before:

Lord Justice Males

Between :

Helios Oryx Limited
- and -
Trustco Group Holdings Limited

Respondent

Appellant

Philippa Hopkins QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the
Appellant

Clare Reffin (instructed by **Stevens & Bolton LLP**) for the **Respondent**

Hearing dates: **15th July 2021**

APPROVED JUDGMENT

Lord Justice Males

1. On 13th May 2021, I granted permission to appeal in this case, subject to compliance with a condition that the appellant, Trustco, should pay into court the sum of USD 21,380,334 and should also pay the respondent's costs in the sum of £118,000. I set a deadline of 11 June 2021 for these payments to be made.
2. The parties have now reached an arrangement satisfactory to the respondent, Helios, for payment of the respondent's costs, subject to some dispute about the precise amount, taking into account interest, which I dealt with in the course of the hearing. I need say, therefore, no more about that aspect.
3. However, the payment into court of the USD 21 million has not been made. That was the principal sum for which judgment was given against Trustco by Sir Michael Burton GBE in the court below.
4. There was, or at any rate there is now, no dispute about the claim. Trustco says, however, that it has an arguable counterclaim, as a result of which summary judgment ought not to have been entered against it. As I noted when giving permission to appeal, Trustco accepted that no arguable counterclaim was pleaded and that the case which was pleaded was not arguable. It contended, however, that it did have an arguable counterclaim which it would be in a position to plead, essentially that it was entitled to damages for breach of a collateral agreement that certain security which it had provided to Helios, in the form of a mortgage over land in Namibia, would be reduced.
5. Based on the information provided to me when considering permission to appeal, I was not persuaded that an appeal based on this supposed counterclaim had any real prospect of success. The only reason why I gave permission to appeal was because I considered it to be arguable that the hearing in the court below had not been fair.
6. I said:

"4. The judge was entitled to refuse an adjournment at what was a very late stage. However, it is surprising that he said that there was no renewed application at the hearing, when it is apparent that the applicant's representative said repeatedly that he was in difficulty without legal representation.

"5. More troubling, it is at any rate arguable that in all the circumstances, the remote hearing was not fair. There was evidently a very poor internet connection and it will need to be considered whether the judge's interventions went beyond the kind of robust questioning with which a professional advocate is equipped to deal and deprived the applicant, effectively a litigant in person, of a proper opportunity to develop its case."

7. It is important to make clear at this stage that my decision was only that the point is arguable. Whether those potential criticisms of the proceedings below are valid will be a matter for consideration at the hearing of the substantive appeal, if that takes place.
8. I considered it important, if permission to appeal was to be given in these circumstances, that security for the claim should be given. The relevant principles are set out by Lord Justice Christopher Clarke in *Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2016] EWCA Civ 710 at [37]. In my judgment there was, and is, a compelling reason here to require security as a condition of permission to appeal. After all, if ultimately the proposed counterclaim has no real prospect of success, even a successful appeal would ultimately lead nowhere. That would be unjust to Helios, which was not responsible for any problems that may have arisen in the court below. Indeed, Trustco has accepted the principle that Helios should have security for its claim as a condition of permission to appeal.
9. Conversely, there was no suggestion that Trustco would be unable to provide security. On the contrary, it had emphasised that it is a substantial concern. Indeed, in the course of submissions in the court below, Sir Michael Burton had raised with Dr Van Rooyen, the president and chief executive officer of Trustco, whether Trustco would be able to provide security for the claim, if ordered to do so, by paying it into court or providing a bank guarantee. Dr Van Rooyen had indicated that Trustco would be able to do this.

10. In these circumstances it is not surprising that, in resisting permission to appeal, the respondent submitted in the alternative that if permission were to be given, it should be conditional on the provision of security. Reference was made to the transcript where Dr Van Rooyen had said that this could be done. Trustco did not suggest that this was not the case.
11. It is said now, on behalf of Trustco, that it did not dispute its ability to provide security in this way, when the point was made by Helios in resisting permission to appeal, because there is no provision in the rules for an applicant for permission to appeal to respond to the respondent's submissions. I do not accept that submission. Trustco did take issue with another statement made by Helios in the very same paragraph, concerning payment of costs to Helios's Namibian lawyers, and correspondence ensued about that which was put before me on the application for permission. If the statement about Trustco's ability to provide security needed correction or qualification, that could and should have been done.
12. It is now said that Trustco is not in a position to make the payment into court, because of Namibian exchange control regulations, Namibia being the place of its domicile and the place where it says that the majority of its assets and, as I understand it, its only liquid assets, are located.
13. As a result, it makes this application which has two limbs.
14. First, Trustco seeks an order that the requirement for payment into court should be treated as satisfied, by reason of Helios having obtained sufficient security in Namibia from Trustco's subsidiary company, EPDC.
15. Second, and in the alternative, it seeks an extension of time for making the payment into court until 30 days after the date on which exchange control approval is granted by the Bank of Namibia to make the payment.
16. The security which Helios has obtained in Namibia consists of a mortgage which formed part of the security given when the transaction, the loan facility agreement between the parties, was

originally concluded. EPDC guaranteed Trustco's obligations and provided the mortgage as security.

17. In addition to the claim against Trustco here, under the facilities agreement, Helios has brought proceedings in Namibia to enforce the mortgage. It appears that Helios sought summary judgment against EPDC in the Namibian proceedings, but that the application for summary judgment failed, because the Namibian court concluded that the mortgage represented sufficient security for Helios. It appears that, under Namibian law, summary judgment will not be granted where the claim is secured to the satisfaction of the registrar.
18. It is therefore Trustco's submission before me that the Namibian court has determined that Helios is sufficiently secured for its claim, that any suggestion to the contrary would represent, in effect, a collateral attack on the decision of the Namibian court, and that, in any event, it should not be required to make the further payment into court, as provided in my order.
19. Subject to one qualification, I reject these submissions. While it is for the Namibian court to decide, in accordance with its own procedural rules, whether to refuse an application for summary judgment on the grounds that the claimant has sufficient security for its claim, it is for this court to determine whether security should be required as a condition of giving permission to appeal and, if so, what form that security should take.
20. It appears to me that the security obtained in Namibia, in the form of the mortgage, is not sufficient and is not equivalent to the provision of security in this jurisdiction, which is what I contemplated when I made my order. There is, in any event, a dispute about the enforceability of the mortgage in Namibia. EPDC has been resisting the proceedings there, on the basis of what appears to be essentially the same counterclaim as Trustco wishes to bring here, although I am informed that that counterclaim has not yet been formulated, because it has not been required as yet to be formulated under the relevant Namibian procedural rules.

21. There is also the fact that the mortgage is merely a second mortgage, the first ranking mortgagee being Bank Windhoek. There is scope for dispute about the amount of Trustco's or EPDC's liability to Bank Windhoek. At present, it appears that the amount outstanding is the equivalent of something just under USD1 million, but the mortgage covers all present or future loans and the possibility exists, therefore, that that may not remain the position. It appears that Helios will not be in a position to enforce its second mortgage without obtaining Bank Windhoek's agreement, which at present does not seem likely to be forthcoming, based on what their lawyers have said, or without litigation against Bank Windhoek, if that agreement is not forthcoming.
22. In all these circumstances, even leaving aside the dispute about the value of the land which is covered by the mortgage, I can have no confidence that, in the event of Trustco's appeal failing, the judgment sum would be paid to Helios within any reasonable time or perhaps at all. At present, anything like prompt payment seems highly unlikely.
23. In particular, it is open to the Namibian court to take a different view as to the counterclaim which EPDC may bring in Namibia, from the view which may be taken about that counterclaim in England. For example, if the English court were to say that there is nothing in the counterclaim, but the Namibian court takes a different view, there is a real risk that Helios would be considerably worse off than if the security were provided here.
24. Accordingly, and subject to one point to which I shall return, I reject the first limb of Trustco's application.
25. As for the second limb, there is a dispute whether permission is necessary, in view of the exchange control permission which Trustco has already, in relation to the original loan. It is accepted by Helios that permission would need to be obtained from the Bank of Namibia for a capital payment to be made, pursuant to that loan; but Helios's evidence and its case is that that permission could be sought and obtained.

26. Trustco, on the other hand, says that compliance with my order would be something materially and qualitatively different and would not be covered by the exchange control permission which Trustco has, in relation to the loan. I cannot resolve that dispute. On the assumption that exchange control permission is required, there is considerable uncertainty on the evidence as to what procedure needs to be followed, in order for that permission to be obtained, and indeed whether such permission is obtainable at all.
27. It does appear, however, that Trustco has done nothing to seek such permission, but rather has sought to place the responsibility for doing so on Helios, submitting that Helios needs first to obtain an order in Namibia for recognition of Sir Michael Burton's judgment or of my order, or perhaps both. I do not regard this as satisfactory. It is Trustco which needs to make this payment, if it wishes to continue with its appeal, despite what Sir Michael Burton has held and what appear at the moment to me to be the somewhat shaky merits of its counterclaim. If, in order to obtain exchange control permission from the Bank of Namibia, it is first necessary to obtain some order from the Namibian court, I see no reason why Trustco should not make whatever application is required, if necessary inviting Helios to join in with any such application.
28. More fundamentally, whether deliberately or not, Trustco led me to believe, on the application for permission to appeal, that it would be in a position to provide security in this jurisdiction, if I were so to order; and it was on this basis that I gave permission to appeal. That, in my judgment then, was the appropriate and just way for this appeal to proceed. That remains my view. Indeed, as I have said, Trustco has accepted the principle that Helios should be secured for its claim.
29. It is suggested in Trustco's evidence that Helios should have understood, when making the submission that permission to appeal should be conditional, that the provision of any security would have to be subject to Namibian exchange control permission. I do not agree. If that was the case, it was for Dr Van Rooyen to make this important qualification, when indicating to Sir Michael Burton that Trustco would be in a position to provide security if ordered to do so. Even

if that is putting too heavy a burden on him as essentially a litigant in person, it had become clear during the course of the application for permission to appeal that Helios was relying on what Dr Van Rooyen had said and, if it needed qualification, Trustco's lawyers ought to have made the position clear.

30. I am not, therefore, prepared to extend the time until 30 days after the provision of the exchange control permission, in circumstances where, on Trustco's own evidence, there is considerable uncertainty whether that permission will ever be given. Nor am I prepared to make an order along the lines proposed by Helios which, although no doubt intended to be helpful, seems to me to be an order involving a series of complex steps which would be liable to give rise to extensive further disputes.
31. What I will do is vary my order in three respects.
32. First, I will extend the date for compliance until 30th October 2021. That should give Trustco plenty of time to obtain exchange control permission and make the payment, if such permission is obtainable and it wishes to do so. It also leaves sufficient time before the hearing of this appeal, that the hearing and the steps necessary to be taken in advance of it will not be prejudiced.
33. Second, I will vary the order to provide that as an alternative to payment into court, Trustco may provide security in the form of a guarantee from a first class bank in this jurisdiction. If that is an option which it wishes to pursue, it will be incumbent on Trustco to identify the bank in question promptly and to agree with Helios the terms of any such guarantee. This case must not get bogged down in negotiating such terms, as sometimes happens. Alternatively, I would equally be prepared for the money to be held in Quinn Emanuel's client account, subject to their undertaking to hold it to the order of the court.
34. Third, and most importantly, I will require an undertaking from Helios that, in the event of security being provided in accordance with my order as now varied, Helios will release the security which it has obtained against EPDC in the Namibian court. That would be on the basis

that the security provided here should remain available until the final determination of these proceedings. It seems to me that if Helios is fully secured here, there is no justification for double security and indeed its proceedings in Namibia would no longer be necessary. It seems likely to me, therefore, that the appropriate undertaking would be that Helios will release the mortgage and terminate the proceedings in Namibia. However, I will give the parties an opportunity to reflect on the precise terms of the undertaking and submit agreed wording to me. If necessary, I will resolve any dispute.

35. On the other hand, if Helios were not prepared to give that undertaking, that would be a telling factor, suggesting that, after all, and despite the view which I have stated, Helios does regard the security which it has in Namibia as valuable, perhaps even as more valuable than a payment of the principal amount of its claim into court here.
36. There may, for all I know, be some force in that, in the light of the Securities and Exchange Commission filing in the United States dated 14th May 2021, to which Ms Hopkins took me in the course of the hearing. In that filing, made on behalf of a company, TriLinc Global Impact Fund LLC, which is in some way associated with Helios, TriLinc stated, referring to the mortgage which Helios has in Namibia:

"In addition to recourse against Trustco, Helios has the benefit of a security interest in property owned by the guarantor. The estimated proceeds from the property collateral are enough to cover the principal and the interest for the Trustco facility."

37. There was no suggestion of any difficulty in enforcing that security.
38. That reference does not cause me to change the view which I have expressed. There may be some good explanation for the absence of any qualification to what is said there. But it does, in my judgment, reinforce the point that Helios should not have double security.

39. Subject to those three points, and on the assumption that the undertaking will be given, I refuse this application. If the security is not provided by 30th October 2021 and no application is made, this appeal will stand dismissed without further order.
40. I will give liberty to apply, but I make clear that any application is highly likely to fail, unless there is clear evidence that exchange control permission is likely to be obtained within a short time. I will, if necessary, deal with any such application on paper.
41. I will give Helios 24 hours to decide whether it is, in principle, prepared to give the undertaking to which I have referred. If it is prepared to do so, there will then need to be a short period of time for the parties to agree the terms of that undertaking, but I hope I have made sufficiently clear what it should cover. If Helios is not prepared to give the undertaking, then that, it seems to me, would transform the situation and I will make an order in the terms of the first limb of Trustco's application.
42. Meanwhile, the respondent need take no further step in the appeal until 21 days after the security is provided.