



Neutral Citation Number: [2018] EWHC 2052 (Comm)

Case No: CL-2017-000084

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QB)
FINANCIAL LIST

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London
EC4A 1NL

Date: 27/07/2018

Before:

MR. JUSTICE BUTCHER

Between:

DEUTSCHE TRUSTEE COMPANY LIMITED
(formerly Bankers Trustee Company Limited)

Claimant

- and -

(1) BANGKOK LAND (CAYMAN ISLANDS) LIMITED
(2) BANGKOK LAND PUBLIC COMPANY LIMITED
(formerly Bangkok Land Company Limited)

Defendants

MR. STEPHEN ROBINS (instructed by **Allen & Overy LLP**) appeared for the **Claimant**

THE DEFENDANTS did not appear and were not represented

Approved Judgment

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MR. JUSTICE BUTCHER :

1. This is an application to continue an interim anti-suit injunction made by Teare J on 13 July 2017 on an *ex parte* on notice basis. Teare J then said that he was "satisfied that it was a proper case for the grant of an interim anti-suit injunction. There is plainly a very strong case that the threatened commencement of proceedings in Thailand is a breach of the jurisdiction clause".
2. The nature of the proceedings is that the Claimant ("the Trustee") is a private limited company, incorporated under the laws of England and Wales, which provides trustee services and is part of the Deutsche Bank group of companies. The First Defendant ("the Issuer") is a company incorporated under the laws of the Cayman Islands, which was established as a special purpose vehicle for issuing bonds. The Second Defendant ("the Guarantor") is a public company incorporated under the laws of Thailand specialising in real estate development.
3. In October 1993 the Issuer issued US\$150 million of bonds pursuant to a trust deed. The Guarantor guaranteed the Issuer's liability in respect of the bonds. The final maturity of the bonds was 13 October 2003, with an option for early redemption on 13 October 1998. Pursuant to condition 6 of the bonds, the bondholder had the right to exchange any bond for shares in the Guarantor.
4. Pursuant to a pledge agreement, the Issuer pledged the shares in favour of the Trustee as security for certain obligations under the trust deed. The shares have been held in a custody account in Thailand since 1993. Since February 1994, the shares have been held by Standard Chartered Equitor Group, Bangkok Branch, in a custody account in the name of the Trustee.
5. The Trustee's case in the current proceedings is that in September and October 1998 pursuant to the put option in condition 10(C) of the bonds, notices of redemption were filed in respect of bonds with a principal amount of US\$96,400,000. In addition, the annual coupon due in accordance with Condition 5 of the bonds was due in respect of all bonds on 13 October 1998. As a result, the Issuer was obliged to pay US\$111,352,166.15 in respect of outstanding principal, premium and accrued interest. In breach of condition 10(C), the Issuer did not pay these sums and that this was an event of default under condition 13(A)(i).
6. On 2 February 1999, the Trustee notified the Defendants that an event of default had occurred, and pursuant to condition 13(A) declared that the remaining bonds, with a principal amount of US\$2,955,000 were immediately due and repayable at their principal amount together with accrued interest.

The current proceedings

7. On 9 February 2017, the Trustee filed and served its Claim Form and Particulars of Claim. The Trustee's claims in these proceedings are in relation to 13,379 bonds with a principal of US\$13,379,000. Those bonds consist of 13,019 put bonds and 360 accelerated bonds. The Trustee claims US\$27,544,132.68 as the total amount of principal, premium and interest remaining due under and in respect of the remaining bonds as at 31 January 2017.

8. The Defendants acknowledged service on 23 February 2017 and on 30 March 2017 filed and served their Defence and Counterclaim. In summary, the Defendants deny liability and say that they have no extant obligation to make any payment under the bonds because, firstly, all claims in respect of the bonds are prescribed pursuant to Condition 14, or are time-barred pursuant to the Limitation Act 1980; secondly that the Trustee is not entitled to claim on behalf of bondholders who do not themselves exercise the put option; and thirdly that the Trustee is estopped by reason of *res judicata* from making the claims. The Defendants also contend that because there are no continuing obligations of the Issuer in respect of the bonds, there is no continuing exchange right in respect of any bond. They seek, amongst other things, a declaration in respect of the release of the pledge and damages in respect of custodial charges and other expenses which the Issuer has continued to pay due to the Trustee's failure to release the pledge.
9. There has been a case management conference in this action on 23 November 2017, disclosure has been given and the trial is listed for March 2019.
10. On 12 June 2018, however, the Trustee received a letter dated 9 May 2018 from a Mr Suwat Apaipak of Arunamrin Law Co., Ltd. In that letter Mr Apaipak stated that he is "an Authorised Lawyer of Bangkok Land (Cayman Islands) Ltd" and made a number of points including that the indebtedness under the bonds was time-barred and that those who claimed to be bondholders were persons who had not legally acquired the bonds and that the Claimant as trustee is not entitled under law to take the legal fruits of the pledged shares.
11. Mr Apaipak's letter continued:

"... your company has the legal duty to deliver all the ordinary shares totalling 212,096,990 shares and all the fruits being dividend and interest in the said dividend entirely to B-Land Cayman by instructions of your company to the Custodian in Thailand to effect the said delivery to B-Land Cayman within 7 days from the date of this letter, failing which I shall take legal action against your company and all other concerned persons/entities in both civil and criminal actions".
12. In that letter Mr Apaipak does not identify the country in which the threatened legal actions are to be commenced but it has been assumed by the Trustee, reasonably in my judgment, that he is referring to legal actions in Thailand given that he is a Thai lawyer. In any event, it seems clear that Mr Apaipak cannot be referring to the commencement of legal actions in England because the three points which he identifies in that letter to which I have referred are points which are already at issue in these proceedings in England having been raised by the Defendants in their Amended Defence and Counterclaim.
13. The solicitors for the Trustee have written to Mr Apaipak and to RPC, who were until yesterday the Defendants' solicitors on the record in these proceedings, stating that Mr Apaipak's approach was flawed and that the Issuer was not entitled to bring any proceedings in Thailand. The Trustee's solicitors asked the Defendants to undertake that they would not commence proceedings in Thailand, or anywhere else, and that if such proceedings were already under way that they would withdraw those

- proceedings and reserved their clients' right to seek an anti-suit injunction if no appropriate undertakings were forthcoming.
14. On Friday 29 June, RPC wrote to the Trustee's solicitors to say, "Your letter asked for certain undertakings to be given by today. Our instructions are that our clients will not be providing those undertakings". As I have mentioned, yesterday RCP came off the record for the Defendants and no further response from the Defendants or Mr Apaipak has been received, as I understand it.
 15. The trust deed by clause 23(B) provides: "The High Court of England is to have jurisdiction to settle any disputes which may arise out of or in connection with this Trust Deed, the Bonds or the Exchange Property and accordingly any legal action or proceedings arising out of or in connection with this Trust Deed or the Bonds or the Exchange Property ('Proceedings') may be brought in such courts. The Issuer and the Guarantor each irrevocably submits to the jurisdiction of such courts and waives any objection to Proceedings in such courts on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum. This submission is for the benefit of each of the Trustee and the Bondholders and shall not limit the right of any of them to take Proceedings in any other court of competent jurisdiction, nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not)."
 16. The term "Exchange Property", which is used in that clause, is defined as, "initially 32,033,898 shares and/or such other shares and cash as from time to time may or may be deemed or required by this Trust Deed to comprise all or part of the Exchange Property but excluding any such property as may or may be deemed by this Trust Deed to have ceased to be part of the Exchange Property", that is to say the shares to be exchanged under the exchange right which have been pledged pursuant to the pledge as security for the Issuer's obligations in respect of the Exchange Right. The pledge agreement does not contain any separate jurisdiction clause.
 17. In my judgment, that clause 23(B) confers exclusive jurisdiction on the courts of England and Wales to determine any disputes brought against the Trustee that arise in connection with the shares.
 18. The terms of clause 23(B) of the trust deed are materially the same as the jurisdiction clause in *Dana Gas Sukuk Ltd* [2018] EWHC 277 (Comm) in which case it was common ground that that clause amounted to an exclusive jurisdiction clause as regards claims made by the obligor, and the judge in that case did not disagree with that common ground. That common ground was based on *Continental Bank v Aeakos Compania Naviera SA* [1994] 1 WLR 588, in which case the Court of Appeal regarded clause 21 of the loan agreement there in issue as an exclusive jurisdiction clause.
 19. The Court of Appeal agreed with the statement in Dicey & Morris that the question is one of whether on its true construction the clause obliges the parties to resort to the relevant jurisdiction and this does not depend on whether the word "exclusive" is used. The Court of Appeal's principal reason for concluding that the clause there in issue was to be construed as an exclusive one was essentially that it "...does not contain a submission to English jurisdiction simpliciter. We regard the concluding words as significant: 'but the bank reserves the right to proceed under this agreement

in the courts of any other country claiming or having jurisdiction in respect thereof'. The juxtaposition of the submission by the defendants to the jurisdiction of the English courts and the option reserved in favour of the bank to sue elsewhere brings into play the *expressio unius exclusio alterius* canon of construction. It suggests that a similar option in favour of the defendants was deliberately omitted. In our judgment the language of clause 21.02 evinces a clear intention that the defendants, but not the bank, should be obliged to submit disputes in connection with the loan facility to the English courts".

20. It seems to me that the same considerations apply to the clause in this case. More generally the courts approach the question of whether it would be permissible for a party who is bound by a clause of this general type to sue elsewhere by asking whether the parties intended to permit duplicative parallel proceedings in a non-contractual jurisdiction.
21. Would the commencement of duplicative foreign proceedings be a breach? In my judgment, it would indeed be a breach of the clause in the trust deed for the Defendants to bring proceedings in Thailand or otherwise than in the courts of England and Wales.
22. Accordingly, I am prepared to continue the anti-suit injunction granted by Teare J on 13 July 2018 on the basis, firstly, that the threatened proceedings in Thailand would be within the exclusive jurisdiction of the courts of England and Wales pursuant to clause 23(B) of the trust deed and that if the Defendants were to bring threatened proceedings in Thailand, they would breach clause 23(B) of the trust deed and I have seen no strong reasons for not enforcing clause 23(B).
23. Secondly, the Defendants have voluntarily pleaded their case about the shares in their counterclaim against the Trustee in these proceedings. It would, in my judgment, therefore be vexatious and an abuse of process if the Defendants were to bring the threatened proceedings in Thailand.
24. For those reasons, it does appear to me that this is an appropriate case for the grant of an anti-suit injunction until trial and I am thus prepared to make the order in the form that has been handed to me subject to a variation as to the way in which the service of the order and supporting documents can be made.
