Neutral Citation Number: [2020] EWHC 952 (Comm)

Case No: CL-2019-000632

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/04/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

A	**Claimant**
- and -	
B	**Defendant**

- -
- -

Adam Baradon (instructed by **Joseph Hage Aaronson LLP**) for the **Claimant**
Richard Power (instructed by **Carter-Ruck Solicitors**) for the **Defendant**

Hearing dates: 31 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the reserved judgment on the defendant's application dated 7 November 2019 (the "Set Aside Application") to set aside the order of Teare J of 17 October 2019 (the "October Order") granting leave to enforce an arbitration award made on 4 December 2018 (the "Award").

2. Due to the coronavirus, the hearing of the Set Aside Application was held remotely. As the matter related to an underlying arbitration, the court ordered that the hearing should be in private. Following circulation of the draft judgment to counsel, the court considered submissions from the parties as to whether this judgment should be public having regard to the principles set out in Department of Economic Policy and Development of the *City of Moscow v Bankers Trust Company* [2004] EWCA Civ 31. The court has concluded that a public judgment is desirable given the issue which arose in this case in relation to section 66 of the Arbitration Act which may offer future guidance to lawyers or practitioners (*City of Moscow* at [39]). However the court has also taken into account the fact that the proceedings in this particular case relate to an application to enforce a confidential arbitration award. In this particular case, having regard to the parties' expectation of confidentiality in arbitral proceedings and the nature of the application, the court has concluded that the use of initials to preserve the confidentiality of the parties strikes an appropriate balance between the desirability of a public judgment and the confidential nature of arbitration proceedings (*City of Moscow* at [54]).

Evidence

3. In support of the application I have two witness statements from C dated 7 November 2019 and 26 March 2020. C is the deputy chairman of B Group and the defendant is the founder of B Group. C makes the statements on behalf of the defendant.

4. For the claimant I have the witness statement of Michelle Duncan, a solicitor and partner in the firm of Joseph Hage Aaronson LLP acting for the claimant, in support of the claim for leave to enforce and her second witness statement dated 27 March 2020. I also have the witness statement of D, a Ukrainian lawyer acting for the claimant, dated 22 November 2019.

Background

5. The background to this matter is that an earlier dispute between the parties in relation to a 2015 settlement agreement was referred to arbitration and that arbitration was settled by consent through a settlement agreement in 2018 (the "2018 Settlement Agreement"). The arbitrator was then asked to make an award to reflect that settlement. The Award was thus made by consent.

6. The Award provided for the defendant to pay US$34.6 million plus interest of $10.2 million provided that no interest was payable if the principal was paid in accordance with the payment schedule set out in the Award, namely an initial payment of $2 million and then further payments of $1.25 million each quarter (1 January, 1 April, 1 July and 1 October) until payment of the total principal amount had been made.

7. The instalment payable on 1 October 2019 was not paid until 16/17 October 2019. It is the defendant's position that under clause 2.3 of the Award the claimant must provide the defendant with payment instructions 10 business days prior to payment and that the payment instructions for the instalment on 1 October 2019 were only received by the defendant on 23 September 2019.

8. The Award also provided (clause 3.5) that if a payment was made by a company E Limited ("E Limited") to F Limited ("F Limited") and payment exceeded the principal sum under the Award, payment of the principal sum under the Award would be accelerated and become due 14 days thereafter. On 1 October 2019 there was a public announcement by E Limited that it had reached a settlement with F Limited.

9. On 4 October 2019 the claimant, A and D met the defendant and C. It is the defendant's position that at the meeting the claimant agreed orally not to enforce the Award and thus the Award was superseded by the oral agreement or, in the alternative, that the claimant is estopped from relying on the Award. The defendant's case is that at the meeting C informed the claimant that there would be a delay in payment of the instalment. C's evidence (paragraph 15 of his witness statement) is that the defendant is a "politically exposed person" and this can sometimes lead to difficulties in clearing bank payments. His evidence is that the claimant raised no objection and agreed not to take any action over the delay in return for the Defendant agreeing to explore alternative security and potential acceleration of future payments. C's evidence is that there had been a material change in circumstances by reason of the actions of F Limited and the defendant proposed that the defendant could provide alternative security and could accelerate the existing payment schedule. C states that the claimant agreed that he would not enforce his rights pending the parties' agreement regarding new payment terms and in reliance on this the defendant did not make the October payment until 16 October 2019. The claimant disputes this version of what occurred at that meeting and/or that a binding oral agreement was reached.

10. On 8 October 2019 the claimant's English solicitors wrote to the defendant's solicitors notifying the defendant that he was in breach of the Award by reason of failing to make the payment on 1 October 2019 and the full amount was therefore due under Clause 3.3 of the Award. The letter also made reference ("Further and in any event") to the acceleration of payment pursuant to clause 3.5 and stated that the solicitors understood that E Limited had reached a settlement (with F Limited). The letter concluded: "all our client's rights are reserved".

11. On 11 October 2019 there was a further meeting between the defendant, C, D and A. Again, the contents of that meeting are disputed. The evidence of C is that the defendant explained that he was continuing to have compliance problems making the payment and the claimant agreed not to invoke his rights under the 2018 Settlement Agreement.

12. On 14 October 2019 the claimant issued a claim form seeking leave from the court to enforce the Award.

13. On 16/17 October 2019 the October instalment was paid.

14. On 17 October 2019 Teare J made an order on the papers giving permission;

> "under sections 101(2) and 66(1) of the Arbitration Act 1996 to enforce the operative part of the Award".

Award

15. The provisions of the Award (so far as material to the issues before this court) are as follows:

> "2 .1 The Respondent will pay the Claimant:
>
> 2.1.1 The sum of USD$34,632,475.62 (the "Principal Sum");
>
> 2.1.2 Accrued interest on the Principal Sum, being USD$10,229,128.56 as at the Execution Date (the "Accrued Interest"), subject to clause 3.10 of this Award.
>
> …
>
> 2.3 Payment must be paid to the bank account of any of the Claimant's companies and/or payment agents as may be nominated by the Claimant in writing prior to payment. Nomination shall be capable of change by the Claimant 10 business days prior to payment.
>
> 3.1 The Respondent must make a payment of USD $2 million on or before 31 December 2018, in partial discharge of the sum referred to in clause 2.1.1 above…
>
> 3.2 Thereafter, and subject to clauses 3.3 to 3.5 below, the Respondent must make a payment of USD $1.25 million every quarter, payable on or before 1 January, 1 April, 1 July and 1 October of each calendar year (the "Instalments"), until payment in full of the Principal Sum ("the Final Settlement Date").
>
> 3.3 In the event that the Respondent fails to pay… the Instalments or any part thereof on or before the requisite date, the sums referred to in clauses 2.1.1 and 2.1.2 above …will become due and owing in full and payable immediately."

Set Aside Application

16. The grounds advanced in support of the Set Aside Application are (in summary) as follows:

    i) the application for leave to enforce the Award was made in the alternative under section 101(2) and section 66(1) of the Arbitration Act 1996 (the "Act") but the Award was made in the United Kingdom and therefore is not within the definition of a "New York Convention Award" set out in section 100 of the Act;

    ii) there is no power under section 66(1) to order judgment in the terms made;

iii) the court should exercise its discretion under section 66 and refuse leave to enforce the Award.

Relevant law

17. Section 101 of the Act provides (so far as material):

> "(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
>
> (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

18. Section 100 defines a New York Convention award as:

> "an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention." [emphasis added]

19. Section 66 (1) of the Act provides:

> "(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

Submissions

20. It was submitted for the defendant that:

i) although the claimant now accepts that it is not within the scope of section 101 as the Award was made in the United Kingdom, the claimant cannot merely excise the reference in the October Order to section 101 and the October Order should be set aside;

ii) an order pursuant to section 66(1) can only be to enforce rights which the judgment or award has established (*West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27 at [36]) and the circumstances (i.e. the acceleration of the debt pursuant to clause 3.3 of the Award) have not been established in the Award;

iii) the court has to determine whether to exercise its discretion under section 66 and make a judicial determination whether it is appropriate to enter judgment (*West Tankers* at [38]).

21. It was submitted for the claimant (in summary) that:

i) the application for leave to enforce was properly made pursuant to section 66 and there was no need to refer to section 101 in the claim form;

ii) there was no need for a determination by the court as to whether the circumstances under clause 3.3 had arisen; it was common ground that the defendant had failed to pay the October instalment on 1 October 2019;

iii) there was no basis to refuse enforcement of the Award: no agreement had been reached at the meeting on 4 October 2019 that the claimant would not accelerate the payment – any alleged oral agreement was uncertain, lacked consideration and was not intended to create legal relations; the defendant could not found an estoppel in light of the fact that he had received the letter of 8 October 2019 from the claimant's solicitors.

Discussion

Application for leave to enforce under section 101 of the Act

22. It was submitted for the claimant that the judge dealing with the matter on paper would have been aware (as stated on the claim form) that the seat of the arbitration was in London.

23. This submission appears to imply that the judge would have been aware that section 101 did not apply. In my view it is incumbent upon the applicant making an *ex parte* application on the papers to ensure that all relevant points are drawn to the attention of the judge and to assume that the judge will scrutinise the papers to identify mistakes on the part of the applicant misunderstands the nature of an application on the papers. Although the application was made in the alternative, the claim form clearly relied on section 101 and arguably placed greater reliance on that section. It stated:

> "The claimant applies for orders (in terms of the draft appended hereto):
>
> 1 Pursuant to section 101(1), (2) and/or 66 (1) of the Arbitration Act 1996.… for leave to enforce an agreed arbitration award dated 4 December 2018 (the "Award")… The seat of the arbitration is London. <u>The United Kingdom is a signatory to the New York Convention and the claimant seeks recognition and enforcement of the award as a New York Convention Award.</u>
>
> 2 The Award is an agreed award and is binding on the parties and <u>none of the grounds for resisting recognition or enforcement under section 103 of the Arbitration Act 1996 exist…</u>" [emphasis added]

24. The supporting evidence (the witness statement of Ms Duncan dated 14 October 2019) stated that the claimant sought leave pursuant to section 101 and 66 of the Act. Ms Duncan then stated (paragraph 19):

> "none of the grounds for resisting enforcement under section 103 of the Arbitration Act 1996 exist".

25. As cited above, the judge then made the October Order, in the terms of the draft submitted by the claimant, "under sections 101(2) and 66(1) of the Arbitration Act 1996".

26. In my view the judge may therefore have been led to make an order which he might not otherwise have done and the October Order should be set aside.

Scope of Section 66 of the Act

27. Even if I were wrong on that, the question arises as to whether it was open to the court to make an order under section 66 in terms of the October Order. The October Order was:

> "to enforce the operative part of the Award, namely that the Defendant shall pay to the Claimant the sum currently outstanding of USD $39,111,604.18." [emphasis added]

28. It was submitted for the claimant that the obligation to pay the sum arose under clause 2.1 and the provisions in clause 3 of the Award were merely the "payment mechanism".

29. I do not accept this submission. Clause 2 of the Award contains an obligation to pay but is silent as to when that sum is due and/or payable. In order to ascertain the amount which is due at any time, one has to have regard to the provisions in clause 3 which provide the scheduled due dates for payment and in certain circumstances, acceleration of the payments.

30. In my view it was not open to the court to make an order in these terms where the circumstances require a further adjudication, namely that there had been a failure to pay an instalment and the payment had become due under clause 3.3 of the Award. The Court of Appeal in the *West Tankers* case was addressing the question of whether there was power under section 66 of the Act to order judgment to be entered in the terms of an arbitral award in a case where the award is declaratory in form. The decision was not therefore on point. However it is relevant to note the following, at [35]-[37] of the judgment of Toulson LJ (with which the other judges concurred):

> "35. The question is whether the phrase "enforced in the same manner as a judgment to the same effect" is confined to enforcement by one of the normal forms of execution of a judgment which are provided under the rules or whether it may include other means of giving judicial force to the award on the same footing as a judgment.
>
> 36. The broader interpretation is closer to the purpose of the Act and makes better sense in the context of the way in which arbitration works. Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system, as Lord Hobhouse observed. Judges may give force to an

> arbitral award by a number of means, including by applying the doctrine of issue estoppel. The argument that in such cases the court is not enforcing an award but only the rights determined by an award is an over subtle and unconvincing distinction and sits on a shaky foundation. For the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established. As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of the right (a right to payment) which the award has established. In the present case, as in AEGIS v European Re, the owners want to enforce the award through res judicata, and for that purpose they seek to have the award entered as a judgment.
>
> 37. At common law a party to an arbitration who has obtained a declaratory award in his favour could bring an action on the award and the court, if it thought appropriate, could itself make a declaration in the same terms. The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award, although the latter possibility is expressly preserved by section 66 (4) . I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award." [emphasis added]

31. It was submitted for the claimant that the position was the same as if there had been an award of a sum certain but say, a period of time for payment allowed. On the expiry of that period an order for enforcement could be obtained under section 66 and the court would determine whether the period for payment had elapsed and payment made. The claimant referred to CPR 62.18 which requires the applicant to state the extent to which the award has been complied with.

32. In my view a distinction is to be drawn with that scenario. In this case, using the language of *West Tankers*, the Award has not established the "right to payment" of the accelerated sum; there is no statement or finding in the Award that the entire principal sum is due pursuant to clause 3.3 but rather there is only provision in the Award for the sum to become due if certain conditions have been satisfied.

33. The October Order which the claimant obtained stated:

> "the defendant shall pay to the claimant the sum currently outstanding of USD $39,111,604.18."

However this does not reflect the terms of the Award. In my view the arbitrator has not decided the point i.e. whether clause 3.3 has been triggered and the principal sum accelerated.

34. Accordingly it was not open to the claimant to obtain the October Order pursuant to section 66 to enforce the accelerated sum and, if I were wrong in my conclusion that

the October Order should be set aside in relation to section 101, the October Order would have to be set aside on this basis.

Resolution of s66 Application

35. In the light of the decision that the October Order should be set aside, this court has to decide whether the claimant's application for leave to enforce the Award (to the extent it relies upon section 66) should be dismissed.

36. It was submitted for the claimant that there was no dispute as to the validity of the Award and in circumstances where the defendant is a "defaulting debtor" permission to enforce was rightly given.

37. Section 66 is a summary procedure: *Russell on Arbitration* at 8-003. The court has a discretion whether to grant leave. The approach to be taken where there are disputed questions of fact in relation to an application under section 66 was addressed in the judgment of Hamblen J in *Sovarex S.A v Romero Alvarez S.A* [2011] EWHC 1661 (Comm) at [46]-[49]:

> "46. Given that the court has the power under CPR Part 62 to give appropriate directions to enable issues of fact to be determined, there is no obvious reason why the enforcing party should be compelled to start proceedings all over again by commencing an action on the award, thereby potentially wasting both time and costs. S.66 is meant to deal with enforcement generally and there is nothing in s.66 itself or in the CPR which requires an alternative mode of procedure to be adopted in the event of the application being challenged on the facts. Consistent with the Overriding Objective the priority must be to progress matters sensibly and cost effectively rather than to waste time and costs for formalistic reasons….
>
> 48. For all these reasons I consider that the court does have the power to direct that there be a determination of disputed issues of fact under s.66 and that there is no necessity for this to be done by way of action on the award. No doubt there will be cases where it will still be appropriate for the proceedings to continue as if it was an action, particularly where the dispute is one of some complexity. However, in a case such as the present which involves relatively straightforward issues of fact such as are commonly determined on a s.67 application, I consider it is appropriate for the issues to be dealt with under s.66 and for appropriate directions to be given under CPR Part 62.7 .
>
> 49. Alternatively, if that be wrong, I would have ordered that the proceedings should continue as if they had been begun by a claim form in an action on the award and would have given the same directions as I am going to give in respect of the determination of the s.66 application so that the end procedural result would be the same."

38. I note that the claimant is not relying upon the terms of the 2018 Settlement Agreement in support of its application to enforce the Award, other than as forming part of the factual context to the question of whether there was a binding oral agreement reached between the parties on 4 October 2019. Accordingly this is not a reason why the dispute would need to be resolved through a further arbitration. (I note that the particular arbitrator is now *functus officio* so the matter cannot be referred back to the arbitrator.)

39. It was submitted for the claimant that the burden is on the defendant to establish that he has a real prospect of establishing a ground on which enforcement should be refused and he has failed to do so. The claimant relied on *Honeywell International Middle East Limited v Meydan Group LLC* [2014] EWHC 1344 (TCC) at [68]:

> "68. On an application to enforce an award issues may arise, such as those which arose in Sovarex SA v Romero Alvarez SA [2011] EWHC 1661 (Comm) in which it is necessary for the court to decide an issue based on disclosure and cross-examination of evidence. However, in my judgment, the court should be cautious about taking that approach and will generally be able to come to a decision on whether the grounds are made out without the necessity for holding a full hearing but will be able to deal with them on the basis of the usual test on summary judgment that is whether there is a real prospect of successfully establishing a ground under s.103 or whether there is some compelling reason why the issue should be disposed of at a trial." [emphasis added]

40. It was submitted for the claimant that there was no real prospect of the defendant succeeding in defeating enforcement. It was submitted that:

i) the parties would not have entered into a binding oral agreement: the claimant relied on the inclusion of "no oral variation" clauses in the 2015 and 2018 Settlement Agreement;

ii) subsequent correspondence from the defendant's representatives in December 2019 referred to a "default" having occurred and thus the defendant acknowledged there was no oral agreement (paragraph 11 of the second witness statement of Ms Duncan);

iii) as a matter of law on the authorities, there was no (or no good) consideration for any oral agreement; the "exploration" of alternative security did not amount to consideration;

iv) the payment had already been accelerated by the missed payment on 1 October before the meeting on 4 October;

v) there could be no reliance on any waiver at the meeting of 4 October once the letter of 8 October had been sent;

vi) the payment of the October instalment should have been made to an account of which the defendant was already aware; there was no agreement that the

claimant would not insist on payment on the due date of the instalment where late payment was the result of KYC procedures with the bank through which payment was being made.

41. It is trite law that the threshold to defeat an application for summary judgment is only that the defendant has shown a realistic as opposed to a fanciful prospect of success; a claim that is more than merely arguable.

42. Dealing with the various issues raised:

i) the claimant relies on the "no oral variation" clauses in the 2018 Settlement Agreement to assert that there was no oral agreement and submitted that it was "compelling evidence" that negative an intention to create legal relations. These clauses may well form part of the factual context but in my view cannot be said to dispose of this issue at this stage;

ii) as to the December correspondence, the particular correspondence is not contemporaneous to the agreement alleged to have been reached in October, the alleged estoppel and its interpretation and relevance is a matter for trial;

iii) as to whether there was good consideration for any oral agreement, I accept that, whilst criticised, the law is as stated by the House of Lords in *Foakes v Beer* (1884) 9 App. Cas. 605 namely that "Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole"; however there needs to be a fuller investigation than is possible on the current evidence as to the consideration which is said to have been given, which according to the evidence of C was not only the acceleration of the existing payments but also the provision of alternative security;

iv) in relation to the alleged estoppel, the evidence of C is that the claimant "agreed not to take any action over the delay" (paragraph 16 of his witness statement) and the claimant agreed he would not enforce his rights (paragraph 21 of his witness statement). The letter of 8 October from the claimant's solicitors is relevant to the issue but having regard to its terms and in particular the statement that the claimant was "reserving its rights" (as opposed to demanding immediate payment), does not render the defence of estoppel "fanciful";

v) as to whether the claimant was in breach of the requirement to give payment instructions and the legal effect of any such breach on the obligation to pay the instalment on 1 October, the interpretation of clause 2.3 is a matter of construction considering both the factual context (including the prior conduct) and the literal meaning of the words. There will need to be full submissions on the construction and the evidence of the factual context.

43. For all these reasons in my view the defendant has shown on the evidence before the court a realistic prospect of establishing a defence to enforcement and the factual dispute needs to be resolved before the court can determine whether to make an order granting leave to enforce.

44. It was not suggested by either party that the factual dispute was not capable of being determined at a further hearing pursuant to the section 66 application and this is in my view the appropriate course. I therefore invite the parties to seek to agree directions consequential upon this judgment, failing which the court will make a ruling.