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Neutral Citation Number [2024] EWHC 590 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

No. CL-2023-000251

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 23 February 2024

Before:

MR JUSTICE ANDREW BAKER

B E T W E E N :

SOCIETE AFRICAINE DE RAFFINAGE — Claimant

- and -

SAVANNAH SA — Defendant

MR C MORRISON KC (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Claimant.

MR S O'SULLIVAN KC (instructed by Holman Fenwick & Willan LLP) appeared on behalf of the Defendant.

J U D G M E N T

(Approved Transcript)

Mr Justice Andrew Baker:

1 Claim CL-2023-000236 is a claim brought by Savannah as claimant against SAR as defendant. In that claim Savannah claims unliquidated damages it has quantified at about US$16 million for an alleged wrongful repudiation by SAR of what Savannah says was a contract for sale by it to SAR of petrol and diesel with deliveries to be scheduled in May, June and July 2022. The existence of a binding contract between the parties, and liability for repudiation of any such contract, is disputed by SAR. SAR also in that action envisages a significant dispute as to the *quantum* of any claim that proves to be well-founded. That claim has been fully pleaded and was the subject of a first main case management conference conducted by HHJ Pelling KC, sitting as a Judge of this Court, in November of last year.

2 By agreement between the parties in that claim, Savannah is obliged under a consent order of mine issued at about the time of that CMC to provide security for costs to SAR. In that respect: Savannah agreed, in the face of what would otherwise have been an application for security pursued before the court, to provide security for costs (in an amount that came to be agreed) to cover SAR's costs up to and including the CMC; the consent order which I granted then provided for security for costs to be put up in two tranches in relatively short order following the CMC such that, in aggregate, security for costs of about £600,000 in total would have been provided, intended to represent security for the costs of SAR generally in that claim.

3 In the event, Savannah has claimed to have encountered difficulties with putting up the two tranches of security as thus ordered in time. The first tranche was not provided by the agreed date of 1 December 2023, although it was, I understand, subsequently provided. The second tranche is yet to be provided. In the light of certain correspondence with the court addressed to the judge in charge, Foxton J, relating in particular to the possibility of expediting one or more aspects of either or both claims, the court indicated that if on the one hand the security

was not being provided as ordered, but on the other hand Savannah, as claimant in that action, was intending to provide security as soon as it could and thus proceed with that claim, the claim should be stayed for the time being.

4 For reasons that may only be of administrative oversight in the court office over the Christmas period, it appears that the form of order to formalise that, which was agreed between or at all events acceptable to both parties, that was lodged with the court just before Christmas by the solicitors for SAR, has not yet been processed. In the course of the dialogue on today's application this morning I have effectively received a joint request from the parties to take carriage of that matter and, subject to a final check they were going to make over the short adjournment that the wording proposed remains apposite, I shall grant that order formalising the stay in that claim pending, as it now is, the provision of the second and final tranche of the consent order for security following the CMC.

5 This claim meanwhile (that is, the claim in which the application I have been considering this morning was listed for hearing today, CL-2023-000251), is a claim by SAR as claimant against Savannah. In this claim SAR sues on what it says is a contractual debt of about €7 million in respect of the supply of light naphtha and naphtha pursuant to two contracts entered into in late 2022. There has not yet been any defence filed or served, but it has been made clear to SAR and to the court that Savannah does not dispute that the contractual debt arose as alleged. It says, however, and as at present advised I anticipate it will plead in any defence, that it was and is entitled to set off against that debt its entitlement, as it asserts, to damages on the claim it is pursuing in the other action. The defence will assert that an equitable set-off arose such that strictly the debt was discharged by Savannah's entitlement to set it against its right to damages.

6 The application before the court today, then, in that second action brought by SAR, is by application notice dated 15 December 2023. By that application notice Savannah seeks

security for its costs in this claim up to and including any first case management conference, and an extension of time to file and serve the defence until, as it stated it in the application notice when issued at any rate, the later of 15 January 2024 or seven days after the provision of security for costs. It will be apparent immediately, today being 23 February 2024, that the business of getting this application on for hearing has somewhat overtaken the specifics of the application for an extension of time. In the event, I have not been troubled at any length by that aspect of the application. It is agreed that the defence would be served either seven days from today, if the application for security for costs does not succeed, or within seven days after the provision of whatever security for costs is ordered, if the application succeeds.

7 Turning then to the application, it is common ground that the formal jurisdictional threshold of Rule 25.13(2)(a) is met in this case. SAR, the claimant, is resident out of the jurisdiction, namely in Senegal, and Senegal is not a State bound by the 2005 Hague Convention. It is also common ground that the satisfaction of that threshold requirement provides the court with a discretion to order security for costs if it is satisfied that it is just to make such an order, but that the court cannot properly be satisfied that it is just to make such an order solely on the ground that the threshold requirement has been satisfied. To rely solely on the existence of that threshold for the grant of an order for security for costs would be to act in a discriminatory fashion.

8 It is agreed that for practical purposes the test to be applied in that regard, is satisfactorily stated in, firstly, *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099 and, secondly, *Danilina v Chernukhin* [2018] EWCA Civ 1802. In *Bestfort* at [77] Gloster LJ concluded that the court below had been wrong to uphold the approach taken that there was a need to establish a likelihood of the existence of substantial obstacles to enforcement redolent of the proof of a matter of fact on the balance of probabilities. Gloster LJ said that:

> "A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents".

The sense there, plainly, is that of the existence of a real risk as regards the enforceability of the English court's costs order sought to be enforced.

9 In *Danilina v Chernukhin* at [51], Hamblen LJ (as he was then) summarised the principles to be derived from the authorities in a series of numbered propositions. Having noted, as in *Bestfort*, the requirement to act in a non-discriminatory manner, Hamblen LJ articulated the following propositions:

> "(4) This requires 'objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned' – see *Nasser* at [61] and *Besfort* at [51].
>
> (5) Such grounds exist where there is a real risk of 'substantial obstacles to enforcement' or of an additional burden in terms of cost or delay – see *Bestfort* at [77]".

As Hamblen LJ went on to emphasise, logically, any order for security should then generally be tailored to cater for the nature and extent of the relevant risk that has been demonstrated. Thus, if the relevant risk demonstrated be that of a wholesale non-enforcement, one would normally expect to grant security by reference to an estimate of a likely, or at least not unlikely, level of recoverable costs that might be ordered in the proceedings. Where, on the other hand, what is demonstrated is only the existence of a real risk of costly procedural or other obstacles, the correct target of any order for security for costs will generally more properly be only some reasonable measure of the likely cost of overcoming those obstacles.

10 In the present case, having considered carefully the evidence submitted in support of and in opposition to the application and all of the submissions of counsel, I am not satisfied that any such real risk has been demonstrated to exist. The evidence in support of the existence

of such a risk comes from Savannah's solicitor, supported in his second reply statement by advice he has received and exhibited from Dr Aboubacar Fall, a senior attorney qualified and practising in Senegal. So far as concerns Savannah's solicitor's own experience of enforcing foreign judgments in Senegal, the evidence is thin almost to the point of non-existence. He is able to speak for himself only to an experience in which he indicates a decision of a Senegalese court not to regard itself as competent to grant some species of interim relief in support of a damages claim being pursued in ICC arbitration seemed a surprising result, leading him to suggest the existence of a demonstrated "*possibility of unpredictable and uncertain decisions from the Senegalese judiciary*".

11 So far as concerns the advice received from Dr Fall, it identifies three matters supposedly of potential concern. One is that for any costs order of this court, as with any other foreign judgment or arbitral award, enforcement would first require a declaration of enforceability by way of an *exequatur* order granted by the President of the Tribunal de Grande Instance of the place where execution was sought. Dr Fall asserts the existence of "*a high risk of dilatory procedures by application of the provisions of the CPC [that is to say, the Senegalese Civil Procedural Code]*". However, all he in fact identifies by way of real evidence is the existence of a procedural possibility that the need for *exequatur* could be used tactically to delay matters, and one example he has had in over 30 years of practice in which he says, but without providing any real information or detail to enable its impact for my purposes to be assessed, a foreign arbitral award was subjected to sufficiently lengthy appeal proceedings in relation to the *exequatur* order that had been issued in relation to it, that after three years of such process the defendant (I take that to be the award debtor in that case) managed *de facto* to escape execution of the arbitral award.

12 The second matter to which he refers is what in translation he identifies as the obstacle of the *judicatum solvi* bond. Dr Fall's advice is that under Article 110 of the CPC any foreign plaintiff in Senegal, so that would hypothetically here include Savannah as a plaintiff in

Senegal seeking to enforce or execute an English costs order, may be required to provide a personal bond to pay costs and damages to which they might be condemned. He indicates that in the arbitral award case, to which I have already referred, a demand that such a bond be provided was one of the, as he would see it, dilatory manoeuvres adopted by the award debtor. As to that, however, he reports only that the amounts of such bonds are a matter for the court's discretion and he has experience of seeing bonds set at several million FCFA, even in small cases where the disputes themselves involved sums less than those amounts. It is agreed at the Bar that a million FCFA is equivalent to something of the order of only £1,300 or so. In circumstances, therefore, where the supposed obstacle can be seen to be no more than a prospective need perhaps to put up a bond worth a few thousand pounds, which there is no reason to think, if the costs order had been duly made, would actually be called on, this amounts to evidence only of a possible need to incur a marginal cost of putting up a bond of that order of magnitude.

13 Thirdly, and without the particulars even of a single anecdotal example to indicate any experience of this actually occurring in practice in relation to a matter materially similar to the process of seeking to enforce a foreign court's costs order, Dr Fall suggests that SAR's strategic position as a 46% State owned, important industrial enterprise, might mean that "*judges could be inclined not to facilitate the execution of a foreign decision on [its] assets*". Though Dr Fall describes that as "*one of the most serious risks, in my opinion*", in my judgment, taken at its highest, that evidence, together with the extremely limited information that Savannah's solicitor himself can provide, amounts to no more than a speculative possibility that the costs order of this court in this claim, if ultimately there is such a costs order in Savannah's favour, might be subject to a degree of delay in securing its enforcement, but not that there is any real risk that it will *de facto* prove not to be enforceable in Senegal or that, at least so far as anything has been in any way quantified for the court to be able to consider, a real risk that there will be, relative to the sums sought to

be recovered, a material additional costs burden imposed that would not be similar to or as might be expected in this jurisdiction, if the order were enforceable here.

14 It will have been implicit in all that I have said that the application has, quite fairly, been presented throughout on the basis that a real risk *de facto* of finding that the putative English costs order would not be enforced must be made out. That is because it is accepted and, indeed, confirmed by Dr Fall's evidence, that in principle as a matter of Senegalese law, the machinery and processes do exist under which a duly granted costs order ought to be enforceable. The 46% State ownership of SAR, he advises in terms, would not provide any defence to enforcement, and there has been no suggestion that SAR would be other than comfortably able to discharge any costs order of the likely order of magnitude that might be made against it in this claim if the defence is ultimately upheld. The focus, therefore, has been, as I say, entirely on the existence or not of real risks of the sort I have been considering. It is not a case in which there is any suggestion that SAR would prove unable to discharge a costs order; that is to say, not good for the money.

15 The application, therefore, in my judgment, fails *in limine* and will be dismissed. I would add this observation, if only in the hope of providing reassurance to Mr O'Sullivan's lay client. That result does not mean that there is injustice or imbalance in the litigation as a whole, considering Savannah's obligation to provide security for SAR's costs in the other claim, where Savannah is the claimant. Firstly, that obligation was undertaken by Savannah, so far as material unconditionally, by agreement; that is to say, not with any string attached as to whether security would or would not be provided in this claim. Secondly, I have been able to see from the extracted materials from that case that are provided in the bundle for this application that whilst I am not in a position to, and am not attempting to, reach any view or judgment on the point, nonetheless the application for security for costs in that claim, had it needed to be pursued, was squarely founded on the proposition when it came to the exercise of the court's discretion that on the evidence available to SAR, including in that

regard the lack of evidence available to it concerning Savannah's assets, there was, it was said, real reason to doubt Savannah's ability to discharge any costs order made against it if its claim in those other proceedings failed.

16 It is common place in this court for a well-founded application of that sort, i.e. based on apparent impecuniosity, to lead to an order for security for costs in one direction where the same considerations do not apply the other way round so that even if there is a claim being made by that applicant for security, no security for costs is ordered against it. Equally, it is not uncommon for there to be, as in the present case, a voluntary provision of security for costs in the face of an application of that kind that is not obviously frivolous, as part of enabling the claimant against whom security for costs is sought to continue, legitimately, to retain a degree of confidentiality over its own financial position that it prefers to keep, even if it did not concede the proposition as to its inability to pay. So I do not consider that the rejection of the application made today creates a sense of injustice or imbalance in the litigation as a whole.

17 Finally then, on some smaller matters of case management that have arisen on the way through, as I said at the outset, and subject to being told there is any further thought on the drafting which arose over the short adjournment, I will make the stay order in the other claim in the form submitted by SAR's solicitors via CE file in that claim. Then, in this case, the focus that the security for costs application gave to the expected set-off defence, in particular because of submissions advanced by the claimant as to, it says, the likely weakness of that claim, that in the circumstances I have not had to deal with in this judgment, caused me in the course of the dialogue with counsel to make some critical observations concerning the choice made in the particulars of claim to plead in anticipation a partial response to what SAR envisaged the attempted set-off plea might be. Without going over the matter in unnecessary detail, it suffices to say that I adhere to the view I indicated that that was not the right choice in this case, and that it is not helpful to have an

anticipatory version of what might be part of the claimant's reply present in the particulars of claim to which Mr O'Sullivan may then feel obliged to plead back, whether or not it is responsive to the set-off defence he actually pleads on behalf of Savannah. But so that it is clear that in what I am about to do, the intention is not to suggest that there is in any other sense something improper about the content of what has been pleaded, I propose to direct that the claimant is by 4 p.m. on Monday to file and serve amended particulars of claim striking through para.20, para.21 and the first sentence of para.22, but that that is without prejudice to its entitlement, if so advised, to replead any or all of the matters there pleaded in its reply, if material, and on that basis, and for the sake of one additional working day, I propose to direct that the defendant will then file and serve its defence by 4 p.m. on Monday 4 March 2024. Although the small amendment to be made to the particulars of claim is just the removal of those two paragraphs and a sentence, meaning that Mr O'Sullivan and those instructing him know already exactly what it will look like, nonetheless I propose to grant until 4 p.m. a week on Monday, rather than only a week from today, for the defence.

18 Unless I am told I need to deal with anything else other than, of course, the costs of the application that I have now dealt with I think that is all I need to say by way of judgment.

CERTIFICATE

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