Neutral Citation Number: [2020] EWHC 3229 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

(1) ETC EXPORT TRADING COMPANY SA
(a company incorporated in Switzerland)
(2) ETC GROUP LIMITED
(a company incorporated in the Republic of Mauritius) **Applicants**

- and –

(1) APLA IMPORTER
(a company incorporated in Ethiopia)
(2) BERHAN BANK SC
(a company incorporated in Ethiopia)

Respondents

- -

James Watthey (instructed by **Baker & McKenzie LLP**) for the Applicants
No appearance for the Respondents

Hearing dates: 24-25 November 2020

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE PEPPERALL :

1. While sitting as the duty judge on the night of 24/25 November 2020, I granted ETC Export Trading Company SA an injunction against Aplas Importer and Berhan Bank SC following a remote hearing upon ETC's urgent without-notice application. This judgment sets out my reasons for granting such relief.

THE FACTS

2. The application was supported by the draft affidavit of Fernando Barreiro Perez Pardo, ETC's regional manager with conduct of this matter. I was told that the affidavit had been approved by Mr Pardo but that the combination of the ongoing COVID-19 pandemic and the urgent nature of this out-of-hours application meant that it had not been possible for the affidavit to be sworn. I accepted an undertaking that the affidavit would be sworn in the form of the draft before the court and indicated that I was prepared to proceed on the basis of this unsworn evidence.

3. ETC is a commodity trading company incorporated in Switzerland and the subsidiary of a Mauritian company, ETC Group Limited, which I shall refer to as "ETC Group" in order to save confusion. On 22 May 2020, ETC entered into a joint venture agreement with an Ethiopian commodity importer, Aplas Importer, for the supply of milling wheat to the Ethiopian government. The agreement included a dispute resolution clause mandating London arbitration under the rules of the London Court of International Arbitration ("LCIA") and an English choice of law clause.

4. Pursuant to their joint venture, on 22 May 2020 ETC and Aplas entered into a sale agreement under which ETC agreed to supply 100,000 metric tonnes (plus or minus 10%) of milling wheat for delivery between 15 July and 15 August 2020 at a price of US$218 per metric tonne, giving a total contract value of circa US$21.8 million. The sale agreement included a dispute resolution clause mandating London arbitration under the Grain and Feed Trade Association ("GAFTA") Arbitration Rules and an English choice of law clause.

5. Payment for the shipment was to be by a deferred letter of credit for the supply contract with the Ethiopian government to be opened by the Commercial Bank of Ethiopia with ETC named as the beneficiary. The letter of credit was required to be opened by 1 June 2020 and in any event before the shipment was loaded. No such letter of credit was opened. By an amendment to the sale contract dated 1 July 2020, the parties agreed that the letter of credit should be opened by 15 July 2020 and that ETC's obligation was to declare the load within seven days after the letter of credit was fully open and operable. Again no letter of credit was opened and accordingly no wheat has been shipped. ETC contends that it was not in breach of the sale agreement since the opening of the letter of credit was a condition precedent to its own obligations.

6. Meanwhile, ETC was required under the sale agreement to issue a performance guarantee in favour of "Aplas Importer for National Disaster Risk Management Commission" at its address in Addis Ababa in the sum of US$2,180,000, being 10% of the total value of the contract. ETC instructed BNP Paribas (Suisse) SA to arrange such performance guarantee.

To that end, on 3 July 2020 BNP Paribas issued an instruction to Commerzbank AG to issue a counter-guarantee in favour of Berhan Bank SC, an Ethiopian bank based in Addis Ababa, in the sum of US$2,180,000 in order that Berhan could in turn issue a performance guarantee in favour of "Aplas Importer (for National Disaster Risk Management Commission)" in connection with the contract for the supply of milling wheat. BNP gave precise instructions as to terms upon which Berhan was to issue the performance guarantee to Aplas. Such instruction included a clause that the guarantee would be governed by and construed in accordance with English law and subject to the exclusive jurisdiction of the English courts.

7. On 4 August 2020, Commerzbank confirmed to BNP Paribas that it had received information from Berhan that it had issued the requested performance guarantee on 30 July 2020 and that such guarantee would expire on 26 November 2020.

8. Upon this application, ETC relies on a written undertaking given by Aplas dated 22 May 2020 that it undertook and agreed that:

> "it will not invoke the ETC Guarantee, or make any demands in terms of the ETC Guarantee, against ETC, unless such demand is based on a breach of the [sale agreement]."

9. On 28 October and again on 17 November 2020, Commerzbank advised BNP Paribas that it had received demands from Berhan under the terms of its counter-guarantee. On each occasion, Commerzbank rejected the demands as non-compliant with the terms of its counter-guarantee but informed BNP Paribas that Berhan had advised that the beneficiary had indicated its willingness to accept a two-month extension to the performance guarantee as an alternative to immediate payment.

10. On 23 November 2020, Commerzbank advised BNP Paribas that it had received a further demand for payment under the counter-guarantee. On this occasion the demand was compliant and accordingly Commerzbank in turn sought payment under its own counter-guarantee with BNP Paribas by 25 November 2020.

11. Meanwhile, both ETC and Aplas have treated the sale agreement as not yet capable of performance in the absence of the letter of credit from the Ethiopian government. Each expressly acknowledged this position in an exchange of emails on 5-6 November 2020 between Mr Pardo of ETC and Aplas's General Manager, Aron Haile Gebreslassie. ETC objected to the earlier demands upon the performance guarantee in circumstances where Aplas had already confirmed that the contract was not yet capable of performance and insisted that there should be no further demands. When ETC then complained about the most recent demand upon the performance guarantee, Mr Haile replied by email during the evening of 23 November in reassuring terms:

> "Alain just informed us of a request by Berhan Bank to Commerz for a payment of the guarantee amount. This is something that we are not aware of nor privy to. We will tomorrow morning first thing meet the Berhan officials in person to verify what they are requesting as their request is totally unexpected to us. On our side, as far as the guarantee is concerned, this morning we had meeting with the officials of the

> Ministry of Finance who oversee the PPPDS to instruct the latter for the release of the guarantee. They have promised us to effect the decision of guarantee release by talking with the PPPDS. This is all what we know and we feel there is no cause for concern. We will meet the officials at the Ministry of Finance tomorrow for an update which we will transmit to you immediately.
>
> If Berhan is interested in having guarantee extension for the shortest time posdible (sic) (such as a month) until we produce the release, their request would make sense and that at the approval of ETG and Aplas. Otherwise, Aplas is totally intent on termination and not extension."

12. Mr Pardo replied at 9.09pm indicating that ETC urgently awaited a further update after the meeting with Berhan and that it had meanwhile instructed its lawyers to take urgent legal action to protect its rights. At 6.44am the following morning, Mr Pardo sought Aplas's written confirmation that it had not called on the performance guarantee. By a further email sent at 11.42am, Mr Pardo insisted that Aplas should urgently:

    12.1 order Berhan to withdraw its demand on the counter-guarantee;

    12.2 notify Berhan that it regarded the demand on the counter-guarantee to be fraudulent;

    12.3 request that Berhan confirm its withdrawal of the demand under the counter-guarantee; and

    12.4 provide a copy of Berhan's SWIFT message confirming such withdrawal.

    Further, ETC sought the email address of the person dealing with the matter at Berhan.

13. By an email sent at 4.28pm, Mr Haile did not engage with ETC's demands but simply explained that Berhan was in reality seeking a two-month extension. He asked for ETC's view as to such extension. Mr Pardo replied at 6pm again repeating the demands set out in the 11.42 email.

14. At some point on 24 November, Mr Haile responded with a letter on headed notepaper clarifying his company's position. He claimed that "the request by Berhan Bank to Commerz in Germany for a payment of the counter guarantee amount is something that we were not aware of nor privy to." He reassured ETC that Berhan simply wanted an extension of the performance guarantee and that he felt that there was no cause for concern.

THE APPLICATION

15. ETC now applies to this court for injunctive relief. In view of Aplas's assertion that it has neither made nor is it privy to any demand upon the performance guarantee, its evasive responses to ETC's requests that the demand on the counter-guarantee be withdrawn and Commerzbank's obligation to pay out upon such demand without equivocation, I am satisfied that this application is urgent and that there are good reasons for not giving notice. Requiring this application to be made on notice would, in my judgment, give rise to the real risk that any such hearing would not be in time to prevent the payment out of the performance guarantee, Commerzbank's payment out under the counter-guarantee and BNP Paribas's payment out under its own counter-guarantee. Such chain of events would risk the loss of some $2,180,000. Accordingly, I am satisfied that there are good reasons for

proceeding without notice pursuant to rule 25.3 of the *Civil Procedure Rules 1998*. Equally, the time at which it finally became clear that litigation would be necessary meant that it was not practicable to issue the notice of application before the close of the court office.

16. James Watthey, who appears for ETC, provided the court with both written and oral submissions in support of this application.

JURISDICTION

17. Mr Watthey points out that it might be argued against ETC that any dispute as to the performance guarantee arises under the sale contract and that, since such agreement provided for GAFTA arbitration, the court's powers under s.44 of the *Arbitration Act 1996* might be ousted by the contrary agreement at clause 24. Nevertheless, I am persuaded by Mr Watthey's counterarguments and satisfied that there is a good arguable case on jurisdiction:

    17.1 First and foremost, the performance guarantee, if issued in accordance with BNP Paribas' instructions, bestowed exclusive jurisdiction on the English court.

    17.2 Secondly, although the undertaking did not itself have a jurisdiction clause, it is properly arguable that it was given in support of the performance guarantee which in turn specified the English court.

    17.3 Thirdly, the arbitration clause in the joint venture agreement, pursuant to which the parties entered into both the sale contract and the wider guarantee arrangements, provided for a London seat. Accordingly, in so far as the application for injunctive relief is made pursuant to the joint venture, the court has jurisdiction pursuant to s.44 of the 1996. Further, given the urgency in this case, the court can, pursuant to s.44(3), grant interim relief without either the permission of the intended arbitral tribunal or the consent of the parties.

    17.4 Fourthly, while it is arguable by reference to the decision in *B v. S* [2011] EWHC 691 (Comm), that the GAFTA rules, and specifically clause 24 of GAFTA's contract 49, might oust the court's jurisdiction under s.44, it is properly arguable that any claim in respect of the performance guarantee does not "arise out of or under" the sale contract.

    17.5 Fifthly, Mr Watthey argues that, in any event, clause 24 does not prevent parties from seeking to obtain "security" in respect of their claims and that the proposed injunction by seeking to preserve the status quo and prevent the loss of US$2,180,000 is in that sense seeking "security." I am, however, more persuaded by his alternative argument that even if this claim for injunctive relief arises under the sale contract and the GAFTA rules should be construed to oust the court's jurisdiction under s.44, the parties cannot on a proper construction be taken to have contracted out of the court's jurisdiction to restrain a possible fraud. In my judgment it is properly arguable that in circumstances where the beneficiary under the performance guarantee has clearly confirmed that it has no proper claim upon the performance guarantee and further has denied either giving or being privy to any instruction to call upon the guarantee, the court can intervene by way of injunction to prevent what would appear to be a fraud.

    17.6 Sixthly, I am satisfied that far from usurping the arbitral process, the injunction sought would support any arbitral proceedings by preserving the status quo and preventing

the loss of the funds in dispute. See generally *Cetelem SA v. Roust Holdings Ltd* [2005] 1 W.L.R. 3555.

THE RELIEF SOUGHT

The claim against Aplas

18. The purpose of a performance guarantee is of course that it should be paid out without equivocation. While the court has always intervened to prevent fraudulent demands upon such guarantees, I am satisfied that the court's jurisdiction is somewhat broader and that ETC does not have to prove fraud where Aplas is clearly not entitled to make a claim under the guarantee: *Simon Carves Ltd v. Ensus UK Ltd* [2011] EWHC 657 (TCC), at [33]-[34].

19. In my judgment, ETC has a good arguable claim to enforce the undertaking and restrain Aplas from making any call on the performance guarantee:

    19.1 Aplas has clearly accepted that the sale contract has not proceeded through no fault of ETC but because of the failure of the Ethiopian government to issue the required letter of credit. Such concession inexorably leads to the conclusion that any call upon the performance guarantee would be in breach of Aplas's undertaking not to do so save in the event of ETC's breach of the sale agreement.

    19.2 Such case gains considerable support from Aplas's failure, in response to recent correspondence complaining at the attempted demands on the guarantee, to assert any allegations of breach of the sale contract upon the part of ETC or otherwise justify any call upon the performance guarantee.

    19.3 Indeed, ETC's case gains further support from Aplas's clear assurances that it does not seek to, has not and is not privy to any attempt to call on the performance guarantee. Despite such assurances, Aplas has failed to explain its failure clearly to instruct Berhan to withdraw its demand on the counter-guarantee issued by Commerzbank.

20. It is unclear whether Aplas is being duplicitous in making a demand on the performance guarantee to Berhan while denying any such conduct in its correspondence with ETC, or whether the current demand upon the performance guarantee is being pursued by a third party. Either way, I am satisfied that granting injunctive relief to enforce the undertaking and require Aplas urgently to confirm to Berhan that it:

    20.1 does not assert a claim under the performance guarantee; and

    20.2 withdraws any claim that might have been made,

    involves the least risk of injustice.

21. On the face of Aplas's assurances, such order will ensure that its position is made crystal clear to Berhan but cause Aplas no loss. If, however, the true position is that Aplas is seeking to demand funds under the performance guarantee then an injunction is necessary in order to prevent it from so acting in apparent breach of its undertaking. In such circumstances, Aplas's position will in any event be protected by the cross-undertaking in damages. Against that, if no injunction is granted, there is a real risk that ETC will not be able to recover the monies.

The claim against Berhan

22. On the evidence before the court, there has been no proper demand on the performance guarantee and there is a real possibility that a fraudulent demand is being made by a third party not entitled to its benefit. If Berhan is taking its instructions from a third party and Aplas is acting honestly then Berhan must know of such fraud. Either way, it appears that Berhan is about to enforce its demand upon the counter-guarantee and then remit the funds to the perceived beneficiary. Whether that payment would be to Aplas or another, on the evidence before me, there is a good arguable case that there is no entitlement to payment under the performance guarantee. Accordingly, I restrain Berhan from making any further call or demand upon the counter-guarantee issued by Commerzbank or from paying out the monies secured by the performance guarantee whether to Aplas or any other party. Such order will not prejudice Berhan since it is both restrained from calling on the counter-guarantee and paying out under the performance guarantee. If it does suffer loss then it will be protected by the cross-undertaking in damages. Again, if no order is made, there is a risk that ETC will lose over $2 million.

Cross-undertaking

23. ETC's draft order offered an undertaking but Mr Pardo's affidavit did not put any evidence before the court of the company's ability to meet any order that the court might make. I required some fortification and ETC volunteered a further undertaking in damages from its parent company, ETC Group, which was therefore added as a party to this application. ETC Group's most recent audited accounts to 31 March 2020 were obtained during the hearing and showed a net asset position of US$574 million. Such fortified undertaking is, in my judgment, plainly sufficient.

24. Accordingly, I granted injunctive relief and ordered an early return date.