IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

2016 EWHC 2990 (Comm)

No. CL-2016-000563

Royal Courts of Justice

Wednesday, 9th November 2016

Before:

MR. JUSTICE KNOWLES CBE

B E T W E E N :

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED Claimant

- and -

BANCO SANTANDER S.A. Defendant

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MISS A. DAY QC and MR. H. SAUNDERS (instructed by Fenwick Elliott LLP) appeared on behalf of the Claimant.

MR. A. AYERS QC and MR. J. KINMAN (instructed by Thomas Cooper LLP) appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE KNOWLES :

1 Standby letters of credit were issued by the defendant in favour of the claimant. The claimant has made demand under those standby letters of credit. It now seeks summary judgment against the defendant.

2 The standby letters of credit are in a total sum of approximately US$38 million. The context for the issue of the standby letters of credit was a major construction contract between the claimant and OAS. That contract was governed by the law of Trinidad and Tobago, where the construction project - a major highway - was under way. The claimant says that OAS has abandoned that contract leading to its termination. An arbitration is on foot between the claimant and OAS.

3 As regards the standby letters of credit, a court in Brazil, where the defendant has a subsidiary, has issued an injunction to the apparent effect of requiring that the standby letters of credit are not honoured for the time being. I will return to this aspect later.

4 The standby letters of credit were stipulated as to form in the construction contract. The claimant and the defendant agreed, by the standby letters of credit, that those letters of credit were subject to International Standby Practice ISP 98, and that any matter not governed by ISP 98 should be governed by English law. They gave jurisdiction to the English courts.

5 The standby letters of credit provided, by clause 4, that upon the defendant receiving a written demand from the claimant in the form set out at annex 1 to the standby letters of credit, the defendant would pay the amount demanded. Clause 1(B) of the standby letters of credit identified the type of security in each case, for example, retention security or performance security. This clause was followed by the word "accordingly" before further terms followed. Clause 7 of the standby letters of credit provided:

> "The presentation of a Demand shall be conclusive evidence that the amount claimed is due and owing to you by the Contractor."

6 By ISP 98 1.06(d):

> "Because a standby is documentary, an issuer's obligations depend on the presentation of documents and an examination of required documents on their face."

By ISP 1.07:

> "An issuer's obligations toward the beneficiary are not affected by the issuer's rights and obligations towards the applicant under any applicable agreement, practice, or law."

By ISP 2.01:

> "(a) An issuer undertakes to the beneficiary to honour a presentation that appears on its face to comply with the terms and conditions of the standby in accordance with these Rules, supplemented by standard standby practice."

7 The written demands in the present case were made in the form set out at annex 1 to the standby letters of credit. In them the claimant stated:

> "We hereby notify you that the amount of [the relevant USD sum is given] is due and owing to us by the Contractor [i.e. OAS]."

8 For present purposes no points are taken by the defendant as to service of demands or presentation of documents. The defendant contends, by Mr. Andrew Ayres QC, that false notification has been given by these demands in that they were made at least recklessly in the sense of indifference as to what was due and owing.

9 This broad submission is developed as three main points. In approaching this case I have regard to the treatment of the subject by Teare J in *Enka Insaat Ve Sanayi A.S. v. Banca Popolare Dell'Alto Adige SpA* [2009] EWHC 2410 (Comm), especially at [24]-[25], and by Lord Clarke in the Privy Council in *Alternative Power Solutions Ltd. v. Central Electricity Board & Anor.* [2015] 1 WLR 697; [2014] UKPC 31, particularly at [52]-[59].

10 The first of the three main points taken by the defendant is the contention that the claimant has stated that sums are due and owing from OAS to the claimant when in truth no sums are due and owing.

11 The claimant accepts that it would be a defence to a claim under the standby letters of credit if the claimant had no honest belief that it was entitled to make the statement. The basis for the defendant saying no sums are due and owing is that the sums claimed are, it argues, for damages, and those damages have not been liquidated or awarded by a tribunal. Unless and until damages are awarded, argues the defendant, they are not payable.

12 Ms. Anneliese Day QC, for the claimant, argues that the construction contract contemplates entitlement to call in security now and reimburse later if it

transpires that there has been overpayment. This is not, she argues, simply about damages and the time at which those damages will be liquidated. A party who believes they are entitled to damages and in a particular sum, or to call in security now, may honestly believe that that sum is due and owing, submits Ms Day QC. She noted the language used by Carr J in *J. Murphy & Sons Ltd. v. Beckton Energy Ltd*. [2016] EWHC 607 (TCC) at [63]:

> "The trigger for a performance bond is belief on the part of the drawing party in its entitlement, not such entitlement having been subject to a final determination giving rise to a payment obligation."

Indeed, Ms Day QC emphasises that the claimant contends that its losses are well above the amount covered by the standing letters of credit.

13 Mr. Ayres QC, for the defendant, submits that what really matters is not the law of England but the law of Trinidad and Tobago when it comes to assessing whether an amount is due and owing. I have been shown, and have considered, a legal opinion on this question by Mr. Armour SC of the Trinidad Bar. However, in my view, what really matters is not the law of England, nor the law of Trinidad, but the belief of the claimant. It may or may not prove to be correct under English law or the law of Trinidad and Tobago that these sums claimed are due and owing. It may not ultimately be held in the arbitration or otherwise that the view that these sums are due and owing was correct, but that is not the question here.

14 Mr. Ayres QC counters that honest belief in breach of contract is not enough to justify a demand. He says, by way of emphasis, that the wording in the present case is quite strong when compared with other cases. In the present case the wording is "due and owing". He contrasts that with the wording in *Murphy* (above, "committed a breach" and "amount claimed as a consequence"), and the wording in other decisions to which reference has been made: *Esal (Commodities) Ltd. v. Oriental Credit Ltd*. [1985] 2 Lloyd's Rep. 546 ("written demand" in particular circumstances); and *Enka* (above, "failed to fulfil its obligations" and "accordingly entitled to receive payment"). Yet I note that the wording in the present case is simply "due and owing" and is not, for example, "determined by a tribunal to be due and owing", or "advised that due and owing as a matter of law".

15 In the present case I am not prepared to conclude that it is seriously arguable that the claimant did not and does not honestly believe in the validity of the demands; that it did not and does not believe that sums are due and owing. As I have said, its belief is not a function of the legal analysis urged by the defendant, or of expert legal opinion of law of Trinidad and Tobago.

16 The defendant, however, draws on further material. It refers to three factual matters, of which I will make brief mention. First, that in evidence to the Public Accounts (Enterprises) Committee on 1st June 2016, the President of the claimant stated that the claimant and OAS did not owe each other money (the paraphrase is that of the defendant). Second, there is no mention, submits the defendant, of any sums which are due to the claimant as opposed to other creditors in a letter from the claimant signed by its President, dated 21st June 2016, terminating the construction contract. Third, the claimant's letter to OAS dated 6th July 2016, again signed by its President, was expressly divided between separate consideration of debts in respect of advance payment that were described as due, and other sums which were indicated to require quantification and refinement in due course.

17 As to these three factual matters, the first, dated 1st June, is before termination, albeit not by a long period, and, by sight of the transcript, is in the course of an exchange that was dealing with very large overall sums indeed.

18 So far as the second factual matter is concerned, I do not regard it as persuasive in favour of the defendant that the claimant, in the letter terminating the contract, should have confined itself to that immediate business rather than go on to amplify on other sums said to be due to the claimant.

19 As to the third factual matter, doing the best that I can in reading the letter of 6th July 2016, to my mind it shows the way in which the claimant viewed their entitlement as a current entitlement in respect of all sums. Mr. Ayres QC understandably argues that it reveals that what has been demanded is based on estimates for future sums, but that does not, in my judgment, mean that the claimant held, or holds, other than an honest belief that those sums are due and owing now.

20 Mr. Ayres QC points out that none of the three key individuals involved for the claimant have given a witness statement in which they say expressly what they thought and what was in their mind when the demands were made by the claimant. The force of this type of point may vary from one case to the next; it is very fact-sensitive. But in the present case these three individuals and the claimant are, in my judgment, entitled to rest with what was said in the demand. I see nothing to warrant an inference being drawn against what the defendant would characterise as their silence. A Mr. Ramkissoon, who has given a witness statement on behalf of the claimant, refers to loss that the claimant "will suffer", but even that does not mean that the claimant held other than a belief that the sum was due and owing for now. Mr. Ramkissoon confirms the claim that the claimant advanced, relying on the good faith of its demand, by a statement of truth appended to the particulars of claim.

21 The second main point taken by the defendant is that the claimant has knowingly or recklessly over-claimed under the standby letters of credit. The defendant develops an argument from its analysis of the underlying construction contract between the claimant and OAS. On that analysis, if it is correct, the claimant had an entitlement to $31 million in retention monies, a sum referred to in the interim payment certificate dated 14th January 2016, yet demanded $35 million from those providing retention security standby letters of credit, which included the defendant as well as Citibank (who apparently have paid $15 million).

22 There is material from the claimant that contends that the analysis should be that the claimant could have demanded up to $58 million in this respect, let alone $35 million. That contention is roundly criticised by the defendant. I confine myself to the figure of $35 million.

23 There will be over-compensation, submits Mr. Ayres QC, but in addition he wished to cross-examine on the basis that if one was to take all of the demands together in this respect, they cannot be true. This is because they add up to $35 million, when, he submits, it is known that $31 million is the most that can be due.

24 I am again not prepared to conclude from this that it is seriously arguable that the claimant did not and does not honestly believe in the validity of demands for $35 million rather than $31 million, in the particular context of what was happening in this case and in relation to what was happening under the construction contract, and the future of the construction contract. Again, the claimant's belief is not a function of the legal analysis urged by the defendant, save perhaps in the plainest case, of which this is not one.

25 Mr. Ayres QC argues more generally for a trial and for the opportunity to cross-examine. This would, as he points out, allow states of mind to be further explored, but I do not believe there are the foundations for that cross-examination in this case. Those foundations need to be appropriately strong or this would be the call in many cases, and authority shows the importance of rigour where standby letters of credit are involved. I make no criticism of Mr. Ayres QC in the allegations made in this case, which allegations test whether the "fraud exception" could engage in this case. Indeed, I wish to pay particular tribute to the concise, measured submissions that he made, and to his straightforward response to questions that I asked.

26 The third main point taken by the defendant is that the law should develop to recognise a different approach to standby letters of credit used to settle performance obligations from the approach to letters of credit used to settle primary payment obligations. It is argued that such a development in the law is

especially suited to the construction industry context and where parties to the contract in dispute were already in arbitration. The effect would, it is suggested, be to admit an exception for unconscionable conduct alongside the existing, recognised, fraud exception.

27 Especially given the Brazil injunction to which I referred, I propose to say no more than that it is important that I apply the law as it is. The position under Singapore law is, it appears, different, and reference was made in the course of submissions to two authorities, including *JBE Properties PTE Ltd v Gammon Pte Ltd* [2010] SGCA 46, at para.6. However, the parties in the present case chose English law. Academic materials do debate the point that lies behind the defendant's contention, but ultimately what weighs with me particularly heavily is that this is a context in which if I postpone I positively undermine the element of time that was an important part of this type of transaction.

28 The defendant also seeks a stay of execution in the event that summary judgment is to be ordered. The defendant may face, it is true, financial consequences if it acts pursuant to a judgment of this court tin a way that is contrary to the injunction granted in Brazil.

29 I consider it important on principle that I decline the stay. I mean no disrespect to the Brazilian court. However, the effect of a stay would be to undo the straightforwardness for which the parties, in my judgment, bargained. There may be consequences for the defendant now by reason of the Brazilian injunction that a stay for a period could avoid, but that is part of the risk that one commercial party - here, in my judgment, the defendant - has taken.

30 It is true there are differences between this case and the decision in *Power Curber International Ltd. v. National Bank of Kuwait SAK* [1981] 1 WLR 1233, including by reason of the fact that in the *Power Curber* decision the outcome of foreign court proceedings was known. My attention was drawn to the reference in the judgment of Griffiths LJ at 1242H to his being tempted in other circumstances by the idea of a short stay, and it is the case that the question, or at least a large part of it, will come before the arbitral tribunal at some stage. But sitting where I am today, I cannot have confidence that the time will be short, whether one is awaiting further developments from the Brazilian court or further developments from the arbitral tribunal. In the exercise of my discretion, but, as I say, in addition on principle, I would refuse a stay.

31 Whether described as ‘the life blood of commerce’ or as ‘equivalent to cash’ or as in the nature of a secure payment, or for some in the present context as the equivalent of retention money, standby letters of credit must work in accordance with their terms, and that includes working on time.

32 This litigation may not be the last word in the overall commercial relationship between the claimant, the defendant and OAS, or in the ultimate financial account between those parties. The claimant notes that, amongst other things, in the present case there is express provision for an accounting at the end of the arbitration. In this connection, the passage at para.21 of the judgment of Lord Justice Tomlinson in *Wuhan Guoyu Logistics Group Company Ltd. v. Emporiki Bank of Greece SA* [2013] EWCA (Civ) 1679 is of relevance. I accept that the accounting may not reach to any penalties ordered by the Brazilian court against the defendant in the event that this judgment causes the defendant to breach the order of the Brazilian court, but that is a risk that the defendant has taken on. For now, the sums claimed by the claimant must be paid over and I will give judgment accordingly.