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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 1548 (Comm)



No. CL-2021-000210

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 28 May 2021

Before:

MR JUSTICE CALVER

(In Private)

B E T W E E N :

UAU

Claimant

- and -

HVB

Defendant

ANONYMISATION APPLIED

MS S. PARUK (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not attend and was not represented.

J U D G M E N T

MR JUSTICE CALVER:

1 This is the final hearing of the claimant's application for anti-suit injunctive and declaratory relief. The defendant has been given notice of this hearing and served with the relevant documents but has failed to attend. The claimant now seeks a final mandatory injunction and declaratory relief as follows.

2 Firstly, (i) an injunction pursuant to s.37(1) of the Senior Courts Act 1981 to (1) prohibit the defendant (who I will call "the defendant") from taking any further steps in the Equatorial Guinea proceedings that it has commenced (I will call those "the EG proceedings") save to discontinue them or from commencing any further proceedings in relation to the agreements other than by way of arbitration seated in London; and (ii) an order that The defendant must take immediate steps to discontinue the EG proceedings against the claimant. Secondly, the claimant seeks declarations that the defendant is obliged to arbitrate all disputes relating to the agreements in accordance with the arbitration agreements therein and that the EG proceedings against the claimant constitute a breach of the agreements and, in particular, the arbitration agreements therein.

3 The background is that the claimant and defendant are parties to a Block 1 farmout agreement dated 23 July 2007. The farmout agreement was varied by the parties from time to time thereafter. The agreement governed certain parts of the parties' relationship as regards their participation in an oil and gas block offshore Equatorial Guinea. The operator of the block under the joint operating agreement is XY. Pursuant to the agreement and in accordance with the provisions contained in them the claimant gave notice to the defendant that it intended to terminate the carry arrangements under the agreements with effect from 31 December 2020. The defendant responded to the notice to propose an extension, but that was rejected by the claimant. The farmout agreement contained an agreement to arbitrate at Article 11 in the following terms:

"11.2 Dispute Resolution

Any dispute arising out of or in connection with Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this Article.

The number of arbitrators shall be three.

The seat, or legal place, of [sic] arbitration shall be London.

The language to be used in the arbitral proceedings shall be English".

4 The amendments and restatements to the farmout agreement either contain arbitration agreements in the same terms or expressly refer to the clause in the farmout agreement. Despite the incorporation of the arbitration agreement into the agreements, the defendant nonetheless commenced proceedings against the claimant for breach of contract in Equatorial Guinea in November 2020. The defendant did so by issuing a claim in the Equatorial Guinea Court of First Instance on 18 November 2020 and, as Ms Paruk, counsel for the claimant explained, the defendant made a main claim as well as a claim for interim relief. The main claim is for breach of contract and the interim relief sought was for the

precautionary seizure of the claimant's assets in Equatorial Guinea, although even in the case of the interim relief that was founded on an alleged substantive breach of contract.

- 5 By an order dated 26 November 2020 the Court of First Instance made an *ex parte* order on the papers alone without reference to the claimant, ordering that in respect of the claim for breach of contract the claimant was required to continue to perform the contract and in relation to the interim relief to provide the defendant with the necessary documentation to conduct an audit. The claimant only became aware of these proceedings by way of a mention in an email and then via XY who were sent a copy of the order by the defendant's legal representatives on 30 November 2020. However, the claimant was not formally notified of the EG proceedings until 18 January 2021.
- 6 The claimant issued an appeal against the order of the Court of First Instance on the basis that the court had no jurisdiction to determine the dispute, given the terms of the arbitration agreement. That appeal was made to the Provincial Court with an appearance entered before the Court of First Instance, as was required. The basis of the appeal was that the proceedings should be annulled as, firstly, the court lacked jurisdiction and competence in the matter as the relationship between the parties was governed by the arbitration agreement. Secondly, the arbitration agreement means that the court could equally not order any precautionary measures against the claimant and, thirdly, in any event the other requirements for the ordering of precautionary measures were not present. The claimant entered an appearance before the Court of First Instance in respect of its jurisdiction challenge. Entering such an appearance is required by law in Equatorial Guinea and that document should have been included in the Court of First Instance file which was then transferred to the Provincial Court. The claimant did not, however, engage on the substantive merits of the claim.
- 7 However, despite the appearance before the Court of First Instance being properly entered by the claimant, the appeal document was not in fact included in the file sent to the Provincial Court and the consequence was that the Provincial Court dismissed the appeal on an incorrect procedural basis alone. As a result of that, in order to protect its position, the claimant was advised by its Equatorial Guinea lawyers to issue an appeal to the Supreme Court. It did so on 18 March 2021 and in its appeal it raised the following points. First, that the Court of First Instance did not have jurisdiction because of the arbitration agreement. Secondly, the Provincial Court did not consider the main issue of the appeal, namely the Court of First Instance's lack of jurisdiction. Thirdly, the Provincial Court's decision was based on a factual error. No submissions, however, were made on the merits of the substantive case and the Equatorial Guinea courts' lack of jurisdiction was reiterated by The claimant.
- 8 The current position is that the Supreme Court is yet to decide on whether the claimant's appeal is admissible. The defendant has filed submissions with the Supreme Court objecting to the admissibility of the appeal. On 14 April the Attorney General of Equatorial Guinea issued an opinion which was to the effect that the appeal is not admissible on the same grounds that the Provincial Court rejected the appeal, namely that the jurisdiction objection was not notified to the Court of First Instance. Submissions have been filed by The claimant in relation to the opinion, again reiterating that the required jurisdiction objection was notified to the Court of First Instance and that the Supreme Court should admit the appeal. Again, Equatorial Guinea lawyers advised the claimant that these submissions are required to maintain the appeal and do not constitute a submission to the jurisdiction. The defendant has now recently made submissions on the Attorney General's opinion and the decision of the Supreme Court on the admissibility of the appeal is awaited.

- 9 Finally, so far as the procedural background is concerned, the Court of First Instance unexpectedly handed down an additional order on 31 March 2021. This is apparently unusual, as the pending appeal in the Supreme Court should have had a suspensive effect on the proceedings in the Court of First Instance. It is also unclear when or how this order was sought by the defendant. The terms of the order are also puzzling as it seems to require the claimant to make payment of a specific sum of \$8,448,000 to XY and to refrain from performing the contract. The claimant has also protested against the making of that order by way of letters filed by it at the Court of First Instance and the Supreme Court on 7 and 8 April. By a letter dated 8 April the President of the Supreme Court wrote to the Provincial Court and also to the Court of First Instance requiring them to suspend any process until a decision of the Supreme Court is issued. That decision could, of course, be issued any day.
- 10 So far as the English proceedings are concerned, following an *ex parte* hearing on 13 April 2021 Bryan J granted an interim anti-suit injunction until the return date. The terms of the interim injunction were an order restraining the defendant from pursuing the claim it has made against the claimant in the Court of First Instance in Equatorial Guinea and prohibiting the defendant from commencing or pursuing any other claims against the claimant arising out of or in connection with the Block 1 farmout agreement of 23 July 2007 and its subsequent amendments.
- 11 I turn next to the applicable principles for the grant of an antisuit injunction. The court, of course, has the power to make an antisuit injunction under s.37(1) of the Senior Courts Act where it is just and convenient to do so. That includes anti-suit injunctions in arbitration cases. Where an anti-suit injunction is sought to enforce an exclusive London arbitration agreement, the well-known *Angelic Grace* principles will apply and the court will ordinarily exercise its discretion to grant an anti-suit injunction to restrain a party from commencing or, indeed, continuing with foreign proceedings in breach of the arbitration agreement unless the injunction defendant can show strong or good reasons why the injunction should not be granted. It has been held that those matters which fall to be considered as the strong reasons stage of an anti-suit injunction application as opposed to the general discretionary phase are principally concerned with justifications for suit in the foreign court as opposed to general discretionary considerations which arise on any application for equitable relief: see Cockerill J in *Times Trading Corporation v National Bank of Fujairah* [2020] EWHC 1078.
- 12 I remind myself that the burden of establishing a strong reason lies on the defendant. I also remind myself that the anti-suit injunction is sought in this case to give effect to an arbitration agreement and, as Males J, as he was, noted in *Nori Holdings Ltd* [2018] EWHC 1343 at para.105 to 106, this makes establishing a strong reason for not granting anti-suit injunctive relief all the more challenging. Accordingly, whilst the court should feel no diffidence in granting an anti-suit injunction to restrain a breach of a London arbitration clause, it has nonetheless been emphasised that that is provided it is sought promptly and before foreign proceedings are too far advanced (see *Angelic Grace* per Millett LJ p.96 column 2).
- 13 In *Qingdao v Shanghai Dong* [2018] EWHC 3009 Bryan J identified the following three relevant principles to the question of delay in the context of anti-suit injunctions:
- “(1) There is no rule as to what will constitute excessive delay in absolute terms. The court will need to assess all the facts of the particular case ...
 - (2) The question of delay and the question of comity are linked. The touchstone is likely to be the extent to which delay in applying for

anti-suit relief has material increased the perceived interference with the process of the foreign court or led to a waste of its times or resources ...

(3) When considering whether there has been unacceptable delay a relevant consideration is the time at which the applicant's legal rights had become sufficiently clear to justify applying for anti-suit relief ...”

- 14 Finally, in *Ecobank Transnational v Tanoh* [2015] EWCA 1309 which was a claim for an anti-enforcement injunction, Christopher Clarke LJ addressed the issues of comity, to which I have referred, as follows at para.133. He said:

“Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not *per se* a bar to an anti-suit injunction ... But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force”.

- 15 The following issues arise in this case. (1) Are the EG proceedings a breach of the agreement? (2) Are there strong reasons why the injunctive relief sought should not be granted? (3) Does the time taken by the claimant in bringing this application justify refusing an injunction, notwithstanding the existence of an English forum arbitration clause? (4) Should the court in its discretion grant a mandatory anti-suit injunction requiring the defendant to discontinue its proceedings in Equatorial Guinea? (5) Should the court in its discretion grant the declaratory relief sought? I deal with each of those heads briefly in turn.
- 16 Issue 1: Are the EG proceedings a breach of the arbitration agreement? In my judgment, there is no question that the bringing of the EG proceedings by the defendant is a breach of the arbitration agreement. The arbitration agreement is widely worded and the clause governs any dispute arising out of or in connection with the agreements. In the present case, it is perfectly clear from both the proceedings that were issued by the defendant in Equatorial Guinea and the order that the court granted that the claim was firmly based upon an alleged breach, indeed breaches, of contract by the claimant which squarely engages the arbitration clause. Insofar as it is suggested that the interim relief which is sought by the defendant does not somehow engage the arbitration clause, that is also a hopeless argument, bearing in mind that it was squarely based upon an alleged substantive right under the parties' contract. I add that I have read the correspondence from the defendant's solicitors which is exhibited to Mr Cannon's witness statements and none of the suggestions which are made in that correspondence by the defendant as to why it is alleged that the arbitration agreement is not engaged has any merit.
- 17 Issue 2: Are there strong reasons for not granting an injunction? There is no strong reason why final anti-suit injunctive relief should not be granted in this case. The claimant has not submitted to the Equatorial Guinea jurisdiction. Although, again, the defendant has suggested in correspondence that the claimant has participated in the EG proceedings and

has thereby waived its right to object to the jurisdiction of the EG courts, no reasons are given for that assertion and on the evidence before me it is false. At all times the claimant has maintained that it does contest the Equatorial Guinea jurisdiction. The advice of its lawyers is that the claimant has only challenged jurisdiction and procedural irregularity and, indeed, that has been its advice all along. Thirdly, no submissions have been made by the claimant on the merits of the substantive case. Even in circumstances where the Court of First Instance made findings on substantive rights of the parties on an *ex parte* basis on the papers, the claimant immediately appealed that order on grounds of lack of jurisdiction. Secondly, the defendant has now suggested in correspondence that the dispute between the parties involves a third party (XY) and that this is a ground on which anti-suit relief should be refused. That is a hopeless contention. XY is not a party to the EG proceedings, as is apparent from the claim form and the First Instance Court's order. XY were sent the order, it is true, as operator to guarantee compliance by the claimant with the order as to the requirement to assist in an audit, but XY is not a party to those proceedings. In fact, the relevant agreements to which XY is a party are also governed by English law and provide for disputes to be resolved by arbitration in London. Thirdly, the defendant has never given any valid reason as to why it should not arbitrate this dispute in accordance with its agreement with the claimant. Accordingly, there are no strong reasons why the court should not grant an anti-suit injunction.

- 18 Issue 3: The question of delay. The basic chronology here is that on 14 October 2020 the claimant notified the defendant of its intention to discontinue the carry arrangements. The defendant then commenced proceedings in the Court of First Instance on 18 November 2020. On 26 November 2020 the defendant informed the claimant by email that it had filed an emergency motion with the court in Malabo on the preceding Tuesday, but no further details were given. On that same day the Court of First Instance issued its order. On 7 December 2020 XY informed the claimant of the order of the Court of First Instance. On 18 January 2021 the claimant filed its appeal against the order of the Court of First Instance at the Provincial Court and by an email dated 29 January 2021 Mr Ayuk of Centurion Law Group on behalf of the defendant wrote to the claimant stating as follows:

“Pursuant to Prince Eze’s [Chairman of The defendant] instructions, I have been advised to put an immediate cessation to all legal actions and claims by The defendant”.

However, no steps were then taken in that respect by Centurion or the defendant itself. The Provincial Court then handed down its judgment on 23 February 2021. The claimant issued its appeal to the Supreme Court on 18 March 2021 and then on 31 March 2021 the Court of First Instance handed down its additional order. At this stage the claimant realised it needed to take action in England to protect its interests and so it prepared its interim anti-suit injunction which was then heard by Bryan J on 13 April 2021. As I have explained, at all times the claimant was advised by its Equatorial Guinean lawyers that the Equatorial Guinea courts did not have jurisdiction and that the claimant would likely be successful in persuading the Equatorial Guinea courts to decline jurisdiction. However, to date that has not proved to be the case. Accordingly, it is apparent that the claimant has engaged as much as necessary to preserve its position and challenge jurisdiction. Given the advice of its lawyers in Equatorial Guinea, the claimant reasonably believed that the jurisdiction issue could be dealt with effectively in Equatorial Guinea and that its appeal to the Provincial Court had good prospects of success. In addition, the claimant made attempts in correspondence with the defendant in March of this year to persuade it to withdraw its proceedings in Equatorial Guinea, but those attempts fell on stony ground.

- 19 In summary, at no point in the Equatorial Guinea proceedings and subsequent appeals has the claimant engaged with the merits of the dispute and it has, therefore, not submitted to the jurisdiction of Equatorial Guinea. Secondly, the EG courts have not given judgment or expressed any view in relation to the status of the arbitration agreement. Thirdly, there are good reasons for the time taken by the claimant, in my judgment, and no prejudice has been suffered by the defendant. The defendant could say that it had unnecessarily incurred costs in Equatorial Guinea as the claimant has engaged with the process there. However, it seems to me that any costs which the defendant has incurred in Equatorial Guinea have been incurred by reason of it choosing to ignore the clear terms of its agreement with the claimant to arbitrate any dispute between them and there is no suggestion that the proceedings in Equatorial Guinea have reached an advanced stage and that the defendant is prejudiced as a result of any grant of an injunction here. In all the circumstances, I accept the claimant's submission that it ought not to be criticised for seeking to appeal the Court of First Instance order in Equatorial Guinea in the manner that it did as opposed to seeking injunctive relief in the English courts immediately. It was reasonable to adopt the approach that it would be unnecessary and a potential waste of time and money to launch English proceedings when the EG proceedings were not being progressed in relation to the substantive claim pending the outcome of the jurisdictional challenge. That was especially so given the positive nature of the advice from the claimant's EG lawyers in relation to the merits of the claimant's appeal in Equatorial Guinea. When it became apparent that the EG proceedings and subsequent appeals were not progressing as envisaged, then relief was sought by the claimant in a prompt manner.
- 20 Since up to now the EG proceedings have not been progressed in relation to the substantive claim pending the outcome of the jurisdiction challenge, the delay, such as it is, in applying for anti-suit relief has not, in my judgment, materially increased the perceived interference with the process of the foreign court. The claimant has been careful to engage in the EG court's process only on the question of jurisdiction and any wasting of the EG court's time or resources has been caused by the defendant's own illegitimate actions, combined with apparent procedural anomalies of the lower EG courts.
- 21 So far as the exercise of the discretion is concerned, it may perhaps be said that it is highly probable that the injunction will not be obeyed and that the court should not act in vain bearing in mind that the defendant has refused to engage with these proceedings. However, as Blair J noted in *Impala v Wanxiang* [2015] 2 All ER 234 at para.137, it will be a rare case in which difficulties in enforcing an English injunction in the country where proceedings have been commenced would constitute a strong reason to refuse to grant an anti-suit injunction. Further, if any judgment obtained against the claimant in the EG proceedings was obtained in breach of an injunction of this court, that might well have implications so far as attempts to enforce such a judgment or hold the claimant to its findings are concerned (see *The Wadi Sudr* [2010] 1 Lloyd's Rep 193 at para.125).
- 22 Issues 4 and 5: In terms of the relief sought by the claimant, I am satisfied that it is appropriate to grant mandatory relief. If a prohibitory injunction may not be enough to ensure that the injunction is practically effective, whereas here the foreign action may otherwise have a life of its own, a mandatory injunction requiring the injunction defendant to discontinue the foreign proceedings may be granted in an appropriate case (see *Ecom v Mosharaf* at para.37 to 38). This is a final hearing and mandatory relief of the type sought is usually granted only after the final hearing (see *Mobile Telecommunications v Abdulaziz* [2018] EWHC 1469 at para.19) and a mandatory injunction requiring discontinuance may simply spell out the inevitable consequence of a prohibitory injunction, as is the case here. Moreover, as was the case in *RiverRock* [2020] EWHC 3324, it is appropriate that the final anti-suit injunction relief should restrain enforcement of any adverse judgment or order

made by the Equatorial Guinea court on the substantive claim. That is particularly so in this case as the defendant's behaviour to date in the Equatorial Guinea courts demonstrates the need for mandatory relief. A mandatory injunction is appropriate in order to give effect to the contractual position and to protect the claimant from the risk of an adverse judgment being entered against it at the next hearing in Equatorial Guinea (see by way of analogy again the *Mobile Telecommunications* case at para.19 and the *RiverRock* final judgment at para.6 to 8). Mr Cannon has set out in his fourth witness statement the prejudice that the claimant would suffer if the orders of the Equatorial Guinea court remain extant.

- 23 So far as declaratory relief is concerned, I am satisfied that it would serve a useful purpose to make the declarations sought and the court can exercise its discretion to grant declaratory relief in cases where the foreign proceedings are, as here, in breach of a contractual exclusive jurisdiction arbitration clause (see, for example, the analysis in *Raphael on Anti-suit Injunctions* at para.15.03 to 15.08).
- 24 Finally, the claimant seeks its costs of these anti-suit injunction proceedings on the indemnity basis and I have granted the costs on that basis, because it reflects the usual practice where contractual anti-suit injunctive relief is granted by the Commercial Court (see the *RiverRock* case, the final judgment, at para.11).
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CERTIFICATE

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