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Case No: 2013 Folio 73

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2013

Before :

THE HONOURABLE MR JUSTICE MALES

- -

Between :

AL NASR CO FOR COKE AND CHEMICALS	**Claimant**
- and -	
FAIRDEAL SUPPLIES LTD (FORMERLY FAIRDEAL SUPPLIES PVT LTD)	**Defendant**

- -
- -

Mr Alexander MacDonald (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Mr Rupert Hamilton (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing date: 11th October 2013

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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 MR JUSTICE MALES

Mr Justice Males :

Introduction

1. This is an appeal by Al Nasr Co for Coke & Chemicals pursuant to section 69 of the Arbitration Act 1996 against an award dated 6 December 2012, as amended by a memorandum dated 28 February 2013. The award was made by an arbitral tribunal consisting of Mr Edward Album, Mr Graham Perry and Dr Khaled El Shalakany. The arbitrators awarded damages of US $2,685,000 to Fairdeal Supplies Ltd. Essentially the issue raised is whether the contract remained alive for future performance at the time when the arbitrators found it to have been repudiated by Al Nasr or whether, by that stage, it had already expired unperformed. However, although this appears to be the real issue between the parties, it is not how Al Nasr formulated the questions of law on which permission to appeal was sought and the route by which this issue is reached is somewhat convoluted.

The sale contract

2. Al Nasr is a state-owned Egyptian company which produces (amongst other things) coke. I shall refer to it as "the seller". Fairdeal ("the buyer") is an Indian company principally involved in trading coal, coke and iron ore.

3. On 8 August 2007 the parties entered into a contract for the sale of "30,000 MT, three Cargoes $\pm$ 10% at buyer's option" of low ash metallurgical coke at a price of US $224.50 per mt FOB Alexandria. The award records that this was not the first occasion on which the parties had dealt together. There had been two earlier contracts, in 2003 and 2004, but in both cases each party had for one reason or another been dissatisfied with the other's performance. It would seem, therefore, that the conclusion of this latest contract represented the triumph of hope over experience.

4. Unfortunately experience was to prove a more reliable guide than hope. Very quickly it transpired that the parties could not even agree whether they had contracted for the sale and purchase of 30,000 mt or 90,000 mt of coke. The buyer contended that the contract was for three cargoes each of 30,000 mt, while the seller contended that the overall total was 30,000 mt, to be spread over three cargoes. It may be that this dispute had something to do with the fact that, after the contract was concluded, the market price of coke increased substantially. The dispute about the quantity was eventually to be resolved by the arbitrators, who decided in favour of the seller that the contract was for an overall total of 30,000 mt. There is now no challenge to that conclusion, but throughout the events which I must describe the existence of this unresolved dispute was part of the background circumstances.

5. The contract provided for a shipment in each of October, November and December 2007. Payment was to be by irrevocable confirmed letter of credit payable at sight after presentation of documents at the seller's bank, and the buyer was required to nominate a ten day laycan spread for the performing vessel at least five days prior to the vessel's ETA at the load port.

Events leading up to the amendment agreement

6. On 3 October 2007 the buyer asked whether a laycan of 13 to 25 October 2007 would be acceptable to the seller for the first shipment. The seller responded the next day that it was unable to accept this laycan due to the excessive cost of coal which it was buying in and freight costs, which had led to a decrease in coke production, and also due to a sunken barge at the port facility. It asked the buyer to accept delayed shipment and not to open a letter of credit for the time being. The tribunal described this message as a waiver of the date or dates for opening the letter of credit, and found that the consequence was to amend the shipping dates in the sale contract. There is no challenge to this conclusion.

7. The buyer did open a letter of credit on 23 October 2007, but the seller raised a host of objections as to why the credit was not as required by the sale contract. The arbitrators found that on the key issues the letter of credit was compliant, but that there were some relatively minor discrepancies which could easily have been rectified, which would have been necessary for full conformity with the contract. However, they found also that the main reasons given by the seller for rejecting the letter of credit were invalid, and that the seller maintained a refusal to ship any goods without the changes on which it was insisting being made. Consequently, even if the buyer had rectified those discrepancies where the arbitrators found the seller's objections to be valid, that would not have made any difference so far as shipment of goods was concerned.

8. No goods were shipped in October 2007. Neither party suggested, however, that the time for performance of the first shipment under the contract had expired.

9. On 1 November 2007 the seller sent what the arbitrators described as an important message to the buyer referring to the production difficulties and the need for time to overcome them, as well as to the letter of credit being "full of discrepancies". The seller said that it had decided in these circumstances to perform its contracts with other customers "and hence we decided to suspend our contract due to the reasons of the tricks and non-transparency which were evident in the letter of credit opened by Fairdeal and to regain the confidence".

10. In response the buyer maintained that the letter of credit was in order and proposed 15 December 2007 as the last date for shipment but subsequently, on 22 November 2007, "and no doubt mindful of the rise in the market price of coke" as the arbitrators observed, the buyer did instruct its bank to make some changes to the credit, including an extension of the latest date for shipment to 15 December 2007.

11. No goods were shipped in November 2007. Once again neither party suggested that the time for performance of either of the contractual shipments had expired.

The amendment agreement

12. Despite this unhappy start, on 5 December 2007 the parties succeeded in agreeing terms of an amendment to the sale contract. This provided that the contractual quantity was to be a single cargo of 30,000 mt, plus or minus 10% (but without specifying expressly whose option this was), with a loading laycan of 15 to 20 January 2008, and that the buyer would amend the letter of credit according to the

conditions in the sale contract and in the amendment (but without spelling out what amendments were needed).

13. Clauses 5 to 7 of the amendment agreement are central to this appeal. They provided:

> "5. After loading the above-mentioned coke vessel, this contract signed dated 8-8-2007 will be considered as fully executed, and none of the seller or the buyer has any right or reason for any claim whatsoever.
>
> 6. After execution of this contract by exporting the A/M coke vessel, both parties can meet in good faith and to discuss further cooperation for exporting two or more cargoes at buyer/seller's option at the agreeable price between the two parties.
>
> 7. This amendment to the contract which is signed dated 5-12-2007 will be null and void if it is not executed and earlier contract signed dated 8-8-2007 will be valid."

Events following the amendment agreement

14. Despite this agreement, problems continued. The buyer wanted the maximum quantity permitted by the amendment, ie 33,000 mt, while the seller wanted to ship the mean quantity or even 10% less than that. This point was not resolved. Disagreements continued about the terms of the letter of credit even after a further amendment to the credit on 26 December 2007 extending the last date for shipment to 25 January 2008. On 31 December 2007 the seller sent a list of the amendments which it still required, including a further extension of the latest shipment date, this time to 15 February 2008.

15. On 15 January 2008 the buyer amended the letter of credit again, including an extension of the latest date for shipment to 15 February 2008 as requested by the seller. The arbitrators found that as a result of this amendment the credit was fully in accordance with the contract of sale save in one respect. In other words, such of the seller's objections as had any validity had now been corrected. The one respect in which the credit was not in accordance with the contract was that it was not confirmed by the seller's bank. The arbitrators found, however, that the reason for this was that the seller had instructed its bank not to confirm the credit.

16. On 23 January 2008 the seller claimed that the coke was ready for loading and expressed astonishment (somewhat disingenuously in view of the arbitrators' finding mentioned above) that its efforts to persuade the buyer to amend the letter of credit in accordance with its requirements had been in vain. It imposed a deadline of 31 January 2008 for the buyer to amend the letter of credit "in a proper way" and threatened to dispose of the cargo elsewhere. The buyer insisted that the letter of credit was now in order and nominated a vessel, the "ATHOS", with a laycan range of 31 January to 5 February 2008 to lift the cargo. However, the seller maintained its position and on 4 February 2008 stated that the sale contract and addendum "were not considered any more" and that the cargo had been sold elsewhere. It added that any purchase of coke by the buyer would have to be discussed as new business.

The award

17. The buyer claimed damages for repudiation by the seller, the damages claimed being calculated by reference to the market price of coke in February 2008, the time when the buyer contended that the goods ought to have been delivered. It appears that, if accepted, and on the basis as found by the arbitrators that the original contract of sale was for a total of 30,000 and not 90,000 mt, this would have resulted in an award of US $4.5 million or thereabouts.

18. In brief outline, the arbitrators concluded that (i) the original contract of sale was for a total of 30,000 mt, (ii) although there had been minor discrepancies in the letter of credit as originally opened, all such discrepancies had been dealt with by 15 January 2008, save for the requirement of confirmation where it was the seller's own conduct which had prevented the buyer from providing a confirmed credit, (iii) the transaction was changing continuously from October 2007 onwards, the true analysis of those changes being that the shipment dates in the original contract were waived or treated as amended, in particular because of the seller's requests for delayed shipment, and that performance was "suspended", (iv) the buyer's nomination of the "ATHOS" with a laycan of 31 January to 5 February 2008 was reasonable, and (v) as a result of these findings, the seller was "in repudiatory breach of the Amendment Agreement and also of the original Sale Contract" as a result of its message of 4 February 2008".

19. In the light of these conclusions, the arbitrators turned to consider the effect of clause 7 of the amendment agreement providing that the amendment would be "null and void if it is not executed" and that in such a case the original contract "will be valid". They held that the effect of this provision was that "the parties go back to all the terms of the original Sale Contract, including the quantity", but as they noted, "shipments in October to December 2007 were at the time of cancellation of the contract in February 2008 obviously no longer possible".

20. In this situation they appear to have held (I have to say that there is room for more than one analysis of what their reasoning was) that (i) the seller was in repudiatory breach of the original sale contract as a result of its message of 4 February 2008 so that the buyer was entitled to damages (the fact that the seller may also have been in repudiatory breach of the amendment, as the arbitrators also held, had no legal consequences as in the event the amendment had not been executed, ie performed, and therefore fell away as "null and void"); (ii) in order to assess damages it was necessary to review "the facts and circumstances of the original contract" (or, as they also put it, "in the hypothetical situation created by the null and void provision in the Amendment Agreement and the Tribunal's decision on the tonnage issue, damages should be calculated by reference to the original dates (or in this case the original months) when the material ought to have been delivered" that is to say October to December 2007); (iii) both parties were in partial breach of their obligations in 2007, the seller because of its refusal to ship unless unwarranted demands for amendments to the letter of credit were made and in any event because it was not willing to ship within the original contract period at all, and the buyer because at that stage the letter of credit did not fully comply with the contract, (iv) the buyer's breaches, however, "were far outweighed by Al Nasr's breaches in rejecting the letter of credit on unjustified grounds" and because it was "not able or willing to ship in the relevant period"; and (v) damages should therefore be awarded by reference to the average market price in each of the months of October, November and December 2007.

The questions of law

21. The seller sought permission to appeal pursuant to section 69 and identified two questions of law which it posed in the following terms:

> "First, the proper construction of a clause in an agreement which provides that the agreement will be 'null and void' when it is not performed or 'executed'.
>
> Second, whether a buyer under an FOB contract is entitled to damages for non-delivery when it has failed to open a compliant letter of credit."

22. These questions do not really identify the real issue between the parties. It is common ground between the parties that the effect of a clause providing that an agreement will be null and void if it is not executed is that, if the agreement is not executed, the agreement is null and void – which is, in fact, what the arbitrators decided. Rather unusually, therefore, the first question of law on which the seller sought permission to appeal was a question to which it said that the arbitrators had given the correct answer. As to the second question, it is common ground (not surprisingly) that the answer is no. But that question does not identify the real issue between the parties.

23. This might seem an unpromising basis on which to seek permission to appeal. But it is fair to say that there are some oddities about the arbitrators' reasoning summarised above. In giving permission to appeal, Hamblen J commented that "the precise legal basis for the Tribunal's ultimate conclusion is unclear" and that the legal route by which they held the seller liable in damages seemed questionable. I respectfully agree with those comments. In an attempt to assist the parties, Hamblen J reformulated what he described as the "rather generalised" questions quoted above as follows:

> "1. The proper construction of a clause in an agreement which provides that the agreement will be 'null and void' when it is not performed or 'executed' and in this case, if the Amended Agreement was not 'executed', how the parties' rights and obligations fall to be assessed in accordance with the original sale contract or otherwise.
>
> 2. Whether a buyer under an FOB contract is entitled to damages for non-delivery when it has failed to open a compliant letter of credit and whether in this case on the findings made by the Tribunal Fairdeal is entitled to the damages awarded for breach of the original sale contract or otherwise."

The parties' submissions

24. For the seller Mr Alexander MacDonald submitted, in outline, that (i) the effect of clause 7 of the amendment agreement was that if for any reason (including fault on the part of either party) goods were not shipped in accordance with the amendment, the amendment became null and void so that the parties reverted to their position under the original sale contract -- that is to say under the terms of the sale contract as

originally concluded and disregarding any subsequent events such as extensions or waivers of the shipment periods; (ii) a buyer's obligation to procure a compliant letter of credit is a promissory condition precedent to the seller's obligation to ship the goods (*Kronos Worldwide Ltd v Sempra Oil Trading Sarl* [2004] EWCA Civ 3, [2004] 1 Lloyd's Rep 260); (iii) as the letter of credit opened by the buyer was not compliant at any stage during the original shipment period of October to December 2007, the seller was under no obligation to ship the goods and therefore cannot be liable in damages for failure to ship during those months; and (iv) under an FOB contract, the seller is only obliged to ship goods during the contractual shipment period, so that (absent variation or affirmation) if shipment does not take place during this period, the contract will simply "expire unperformed" (*Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) at [55]).

25. In the light of these propositions Mr MacDonald identified four principal errors which, he said, had been made by the arbitrators in applying clause 7 to the parties' dispute. The first was to hold that the seller was in repudiatory breach of the amendment agreement when that agreement had become null and void. The second was in failing to hold that by February 2008 there were no longer any extant obligations under the original contract of sale, which had simply expired unperformed at the end of each of the original shipment months. The third was to place the parties back in the period of October to December 2007 for the purpose of assessing damages. The fourth was to conduct some kind of balancing exercise by considering the relative seriousness of the parties' respective breaches during that period instead of simply applying the principle in the *Kronos* case that having failed to open a compliant letter of credit, the buyer could not claim damages for the seller's failure to ship.

26. In response Mr Rupert Hamilton for the buyer protested that these submissions range far beyond the questions of law for which permission to appeal was given, and that they largely involve the application of (undisputed) propositions of law to the facts of the case, which is not a proper subject of appeal (*Mayhaven Healthcare Ltd v Bothma* [2009] EWHC 2634 (TCC) at [10] and [11]). More substantively, however, he agreed that the effect of clause 7 was that in the circumstances the amendment fell away and the parties reverted to their position under the original sale contract, but contended that what this meant was that the parties reverted to the position under the original sale contract as it stood immediately before the amendment agreement was concluded. That position was that the periods for shipment contained in the original contract had been extended by agreement or waiver, and performance had been "suspended", so that the contract remained alive for performance.

27. Mr Hamilton submitted, therefore, that when the amendment became null and void it was still possible for the seller to repudiate the contract of sale, which is what the arbitrators found that it had done. In those circumstances, applying the conventional measure of damages in section 51 of the Sale of Goods Act 1979, the arbitrators ought to have awarded damages by reference to the market price in February 2008, that being the time when the goods "ought to have been delivered", which on the arbitrators' findings about the market would have resulted in a higher damages award. Nevertheless, he accepted that the buyer had not sought to challenge the award and did not seek now to recover any increase in the damages awarded.

Discussion

28. Thus the essential issue raised is whether as at February 2008 the contract of sale remained alive for future performance or whether, by that stage, it had already expired unperformed. This depends in its turn on whether the intention of clause 7 of the amendment agreement was that, upon the amendment becoming "null and void" the parties should revert (a) to the position under the original contract of sale unaffected by post-contractual events or (b) to the position as it stood immediately before the amendment agreement was concluded. I would add that whatever may be said about some of the other submissions made by Mr MacDonald, this issue viewed in this way seems to me to be within the scope of the first question of law for which permission to appeal was given.

29. However, on the substance of the issue, I have no doubt that the latter position for which Mr Hamilton contended reflects correctly the intention of the parties. This seems to me to be the natural meaning of the terms of the amendment agreement and makes far better commercial sense than the position contended for by Mr MacDonald. The purpose of the amendment agreement was to resolve three principal matters about which the parties were in disagreement, namely (i) the overall contractual quantity, (ii) the terms of the letter of credit and (iii) when (but not whether) shipment would take place. The position immediately before the amendment was concluded was that, on the arbitrators' findings, the original shipment periods had been varied or extended by agreement or waiver. But nobody was saying that the contract would no longer be performed because two of the three shipment months had already passed and it was known that the third month would also have passed before any shipment would take place. In those circumstances, to construe the amendment as reinstating a contract which by then would have expired and could not be performed seems to me to be a most unlikely reading of clause 7. What the parties intended was not a raking over of the rights and wrongs of the abortive attempts at performance during October and November 2007 before the amendment was concluded, but a mechanism for future performance – as they hoped, in accordance with the amendment, but if not, in accordance with the terms of their original contract, performance of which had been (as the arbitrators put it) "suspended" but not extinguished.

30. There is in my judgment no conceptual difficulty with this analysis. On the contrary, it is in accordance with the classic analysis in *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 whereby a condition as to time (whether for the opening of a letter of credit or for shipment of goods) may be waived so as to prevent a party from insisting on strict compliance, but may also be reinstated by the giving of reasonable notice.

31. Accordingly the arbitrators were entitled to find that the contract remained alive for performance and was repudiated by the seller's message of 4 February 2008, which the buyer accepted as bringing the contract to an end. It followed that the buyer was entitled to damages assessed in accordance with section 51. I would agree with Mr Hamilton that this should have led the arbitrators to assess damages by reference to February 2008 (assuming this to be the time when the goods ought to have been delivered).

32. This means that, with respect, I consider that some aspects of the arbitrators' reasoning summarised at points (ii) to (v) of [20] above are rather questionable and

that the conclusion to which it led them is mistaken. But as the only consequence is that the award in favour of the buyer appears to be for less than it ought to have been, and as Mr Hamilton acknowledges that he cannot seek to increase the damages awarded, any error has operated in favour of the seller.

33. It is therefore unnecessary to address the hypothetical question whether the buyer would have been able to claim damages for failure to ship during October to December 2007 and unnecessary also to address Mr MacDonald's criticisms of the way in which the arbitrators assessed damages by reference to the position and conduct of the parties in those months. That exercise was not what clause 7 of the amendment agreement required. For the same reason it is unnecessary to consider further the extent to which, if at all, the submissions advanced by Mr McDonald extend beyond what is permitted on an appeal under section 69.

Conclusions

34. I conclude that the first question of law is to be answered by saying that the effect of the clause providing for the amendment agreement to become "null and void" is that the parties' rights and obligations fall to be assessed in accordance with their rights and obligations under the original sale contract as they stood before the amendment agreement was concluded. This means that the arbitrators were right to conclude that the contract remained alive for performance and that it was repudiated by the seller, so that the buyer was entitled to damages for repudiation. The arbitrators' assessment of damages was mistaken in my view, but the only consequence of the error was to award less than the damages to which the buyer ought to have been entitled.

35. The second question requires no separate consideration in view of the arbitrators' finding that a compliant letter of credit had been opened (save in one respect for which the seller was responsible) before the date when the seller repudiated the contract.

36. The seller's appeal is dismissed.