Neutral Citation Number: [2014] EWCA Civ 1348

Case No: A3/2014/1031

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Eder
[2014] EWHC 901 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 16th October 2014

Before :

LORD JUSTICE TOMLINSON

LORD JUSTICE LEWISON
and
LORD JUSTICE KITCHIN

- -

Between :

IOT Engineering Projects Limited	**Appellant**
- and -	
(1) Dangote Fertilizer Limited	**Respondents**
(2) IDBI Bank Limited	

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Richard Lord QC, Kyle Lawson and James Leabeater (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
Stephen Dennison QC, and Peter De Verneuil Smith (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date : 2 October 2014
Judgment
As Approved by the Court

Crown copyright©

Lord Justice Tomlinson :

1. On 2 October 2014 we heard an appeal against an Order of Eder J made in the Commercial Court on 27 March 2014 whereby the judge refused to continue, except on an interim basis pending the appeal, a Freezing Order (i) freezing the assets representing rights under two Advance Payment Guarantees ("the APGs"); and (ii) directing that any payments made pursuant to demands on the APGs by the First Respondent be to the client account of the Appellant's solicitors, Messrs Holman Fenwick and Willan ("HFW") and held to the Order of the Court. Subsequent to the making of that Order payment under the guarantees was indeed made to the client account of HFW. The purpose of the appeal was to ensure that the sum paid, about US$19.2 million, should remain in HFW's account until after the conclusion of arbitration proceedings now underway between the Appellant and the First Respondent. In effect therefore the Appellant sought the preservation in London of a fund against which it could in due course seek to enforce any award in its favour. At the conclusion of the hearing we dismissed the appeal. These are my reasons for having joined in that decision.

2. The Appellant, IOT Engineering Projects Limited, ("IOTEP") is a substantial Indian company which offers services for the installation of refineries and petrochemical, fertilizer, power and cement plants. The First Respondent, Dangote Fertilizer Limited ("DFL") is a Nigerian company. It can for present purposes probably be described as a special purpose vehicle. It was incorporated in 2007 and is primarily engaged in the business of manufacturing, treating, processing, supplying and dealing in fertilizer and other substances suited to improve the fertility of soil or water. Its audited Statement of Affairs for the year ending 31 December 2012 shows its net assets as at that date as approximately US$600,000. DFL is part of the Dangote Group, a very large multi-company group trading prominently in the international community. Although only a minority shareholder of DFL, the parent company is Dangote Industries Limited, ("DIL"), also a Nigerian company which is the main holding company in the Group. DIL was incorporated in Nigeria on 18 April 1985. DIL is a business conglomerate with an annual turnover of approximately US$3 billion. It engages in cement, sugar, salt, pasta, beverages and real estate business in Africa. DIL is very well diversified across the African continent (with subsidiaries and affiliates having operations in 14 countries) with a wide product range which includes a broad range of sub-categories through which it has adapted to local markets. DIL is headquartered in Lagos, Nigeria, but it has operations in 14 African countries including Senegal, Zambia, Tanzania, South Africa, Congo (Brazzaville), Ethiopia, Cameroon, Sierra Leone, Côte d'Ivoire, Liberia and Ghana. Its activities include manufacturing and importing cement, manufacturing and refining sugar, refining salt, milling flour and semolina, manufacturing pasta, manufacturing noodles, manufacturing poly products, providing logistics services such as port management and haulage and engaging in real estate business. DIL also engages in activities such as owning real estate assets, which include warehouses, flats and commercial offices at various locations in Nigeria, steel bars and rods, power generation, gas exploration and fertilizer production, producing woven and laminated polypropylene sacks, producing cement, jumbo, open market and shopping bags and producing flexible woven polypropylene sacks, mat and twine. In addition it engages in terminal operations, stevedoring, bulk cargo operations and containerization; and producing fruit juices, pasteurized milk, flavoured milk, yoghurt drink and table water. Further,

the company processes gum Arabic for various food and non-food applications. It serves the oil and gas, telecommunications, fertilizer and steel sectors.

We were shown DIL's consolidated financial statements audited by Deloitte for the year ending 31 December 2012. In the financial year ending 2012 consolidated turnover of DIL was approximately US$2.9 billion with EBITDA of approximately US$1.3 billion and total assets less current liabilities of approximately US$3.5 billion. EBITDA margins increased to 43% in the financial year 2012, an increase from 33% compared with the financial year 2011. Profit after tax increased by 45% compared with the financial year 2011 to US$1.1 billion in the financial year 2012 and total assets increased by 10% to US$5.6 billion in financial year 2012.

In the most recently reported half year results for the six months ended 30 June 2013 revenue was US$1.63 billion, EBITDA was US$910 million (EBITDA margin 56%) and profit after tax was US$740 million. Of this the cement business contributes approximately 90% of the EBITDA with the sugar and salt businesses contributing the remaining 10% of EBITDA.

3. DFL, as employer, and IOTEP, as contractor, entered into two contracts for (1) the pipe work and (2) mechanical and electrical works for a fertilizer plant in Nigeria ("the Contracts"). Both Contracts were for present purposes identical. The Contracts were each subject to English law, and disputes were to be referred to arbitration in London under LCIA Rules.

4. Pursuant to the contracts Dangote agreed to pay 15% of the total sums by way of "First Stage Payment". By clause 14.2 of each contract:

14.2 First Stage Payment

14.2.1 The Employer shall make First Stage Payment, as an interest-free loan for mobilisation. The First Stage Payment shall be in the amount of fifteen per cent (15%) of the Original Contract Value and shall be paid as detailed below . . .

14.2.3 The First Stage Payment shall be repaid through percentage deductions in Payment Certificates. Deductions shall be made at the amortisation rate of 15% (fifteen per cent) of the value of each Interim Payment Certificate.

14.2.4 If the First Stage Payment has not been repaid prior to the issue of the Mechanical Completion Certificate for the Works or prior to termination under Clause 24 (Termination), Clause 23 (Suspension) or Clause 22 (Force Majeure) (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer.

5. IOTEP was obliged to and did procure bank guarantees in support of its obligation to repay the First Stage Payments ("the Guarantees"). They were issued by the Second Respondent ("the Bank") as follows:

1) Number 130783FBGA00003 in the sum of US$10,410,000, later amended to US$10,411,215.75; and

2. Number 130783FBGA00004 in the sum of US$8,865,000, later amended to US$8,863,928.74.

6. It is common ground that by 17 March 2014, four days before the hearing before Eder J, the Contracts had been terminated. Each party regards the other as having repudiated the Contracts. IOTEP also asserts that DFL in bad faith purported to effect a contractual cancellation in circumstances where it knew that no such contractual right had accrued. IOTEP contends that it has at least a conventional claim for damages for repudiation which it has not yet quantified. It also asserts against DFL a breach of an implied term of the Contracts not to make fraudulent demands under the APGs, the damages flowing from which are arguably equivalent to the amount paid into the Client Account of HFW.

7. These proceedings began life as an urgent application before Popplewell J to restrain DFL from making a demand under the two APGs. Freezing order relief was only sought as an alternative and the relief sought in that regard was limited to requiring the Second Respondent bank, which has taken no part in the proceedings, to pay the sums demanded into a London bank account to the order of the Court. It was perhaps for that reason that the evidence deployed in support of the application for freezing order relief was confined to a much more narrow compass than is conventional. Before Popplewell and Eder JJ and before us the Appellant's case on likelihood of dissipation of assets by DFL has rested on a narrow basis. It is said that if the money now in the Client Account of HFW held to the Order of the Court is paid to DFL it will be transmitted to Nigeria and may be paid away by DFL other than in the ordinary course of business to another company or companies with the Group. It is said that it will be very difficult to enforce any award in Nigeria against DFL. Adopting a perhaps subconsciously Janus-like attitude, the Appellant's evidence asserts that "[DFL] is a substantial and . . . well-connected company which is likely to make any enforcement very difficult in practice."

8. I should place on the record that DFL denies that the money if made available to it will be used other than in the ordinary course of business. In wider ranging evidence not before the judges below which DFL sought to adduce before us it is asserted "that should the APG monies be released to DFL they will remain within the company for use on the project." We had no need to consider whether the introduction of this evidence or any part of it should be permitted, but the assertion above is no more than the inference which I would myself have derived from the evidence which was deployed before the judges below. Any inference to the contrary would need to be based upon evidence which IOTEP has not provided.

9. Mr Richard Lord QC for IOTEP also recognised that in any event any legitimate concern regarding dissipation to another Group company might be mitigated or even eliminated by the offer of a suitable guarantee from the parent company, on the evidence the main holding company in the Group. This was a realistic approach, since in the evidence deployed before Eder J on the return date DFL had indicated that DIL was prepared to issue a guarantee to IOTEP as a condition of the lifting of the Order made by Popplewell J. That offer was repeated in correspondence on 11 June 2014 when Messrs Pinsent Masons, for DFL, wrote to HFW in these terms:-

"Dear Sirs

IOT ENGINEERING PROJECTS LTD AND (1) DANGOTE FERTILIZER LIMITED (2) IDBI BANK LIMITED

APPLICATION FOR PERMISSION TO APPEAL REFERENCE 20141031

CLAIM No. 2014 folio 258

You will recall that before the hearing before Eder J on 21 March 2014, our client offered to provide a parent company guarantee from Dangote Industries Limited in favour of your client in order to address any issues regarding the financial standing of Dangote Fertilizer Limited.

The issue of the parent company guarantee was raised at the hearing before Christopher Clarke LJ on 14 May and we note that in you client's recently served skeleton argument it refers to the fact that such a parent company guarantee has not been provided.

For the avoidance of any doubt, our client has been and remains prepared to provide a parent company guarantee from Dangote Industries Limited in favour of your client, guaranteeing Dangote Fertilizer Limited's obligations under any arbitral award or settlement in favour or your client up to the amounts received by Dangote Fertilizer Limited from the Advance payment Bank Guarantees. As you are aware, Dangote Industries Limited is an extremely well resourced international business conglomerate with an annual turnover of some US$3 billion and, as such, more than capable of making good its obligations under this guarantee.

We attach a draft of the parent company guarantee which Dangote Industries Limited is prepared to provide to your client and which remains open for acceptance in the terms attached hereto.

If your client wishes to receive this guarantee, please let us know as soon as possible."

10. The guarantee offered on June 11 2014 is to all intents and purposes the same as that previously offered. IOTEP's objection to it was twofold. First, it did not offer the comfort of a guarantee from a first class London bank. Secondly, and a related point, although subject to English law and jurisdiction, it was a guarantee given by a Nigerian company against which IOTEP would have to seek enforcement in the Nigerian jurisdiction.

11. After we had heard full argument from Mr Lord and brief submissions from Mr Stephen Dennison QC for DFL we adjourned. During the course of that short adjournment IOTEP by Mr Lord communicated its acceptance of the offer of the

guarantee. This was if I may say so prudent. However to my mind it also rendered further pursuit of the appeal quite hopeless.

12. In the light of the evidence as to the financial strength of DIL the first objection to the guarantee is unrealistic. The appeal therefore resolves into the simple question whether the alleged difficulty of enforcing an award in Nigeria justifies the court in restraining payment of the proceeds of the APGs to DFL in Nigeria. If not, it is unnecessary to consider the other requirements which must be satisfied by an applicant for freezing order relief.

13. It is as well to remember the relevant principles which must guide the court in determining whether freezing relief should be granted. The parties were content, as am I, to proceed upon the basis of the following summary essayed by Flaux J in *Congentra AG v Sixteen Thirteen Marine SA (the Nicholas M)* [2008] 2 Lloyd's Rep 602 at 614 LHC, paragraph 49:-

> "The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient "risk of dissipation" is that the claimant will satisfy that burden if it can show that:
>
> (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH and Co KG (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 per Mustill J as interpreted by Christopher Clarke J in *TTMI v ASM Shipping* [2006] 1 Lloyd's Rep 401 at 406 (paragraphs 24-27): or
>
> (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes: *Stronghold Insurance v Overseas Union* [1996] LRLR 13 at 18-19 per Potter J and *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 at 153 (paragraphs 142-146) where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant."

14. What Flaux J there meant by "mak[ing] enforcement of an award or judgment more difficult" was, I have no doubt, more difficult than usual. Enforcement of an award or judgment is rarely straightforward unless there happens to be a secure and otherwise unencumbered fund against which enforcement can be sought. It is well known that enforcement in some jurisdictions is more difficult than in others. Some legal systems move at a greater pace than others. I do not consider that a party who contracts with a Nigerian company can legitimately pray in aid as justifying freezing order relief the difficulties routinely encountered by those who seek to enforce judgments or awards in that jurisdiction.

15. Nigeria is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and has enacted legislation which broadly mirrors our own domestic legislation which gives effect to our adherence to the Convention. IOTEP relies upon evidence from a practising Nigerian lawyer, Mrs Funke Agbor, to the effect that a well-resourced party who is desirous of frustrating the enforcement of a foreign award or judgment in Nigeria could do so successfully for many years. This evidence is unimpressive in its failure to explain the extent to which what is described by Mrs Agbor as "constitutional rights of appeal" are dependent upon the obtaining of permission to appeal the decisions of the inferior courts. Carried to its logical conclusion the contention of IOTEP is that any party who contracts with a Nigerian company and may in due course need to enforce against assets in that jurisdiction can without more assert a significant risk of dissipation arising out of delay in enforcement. This is self-evidently absurd. The ingenuity of lawyers in this jurisdiction is often successful in delaying enforcement for considerable periods of time, if not perhaps of the length described by Mrs Agbor.

16. Finally, it is said, at second-hand by Mr Saha, President-Operations of IOTEP, that at a meeting on 7 March 2014 at which Mr Saha was not present Mr Edwin, Executive Director of DIL, displayed what is characterised by Mr Saha as hostility towards IOTEP. I do not propose to reproduce here Mr Saha's second-hand account of what was said. Needless to say DFL sought permission to introduce evidence from Mr Edwin rejecting the allegation of "hostile" conduct and suggesting that the tenor of the meeting had been misrepresented. Even taking Mr Saha's account at face value it does not add up to very much. It is common in commercial negotiations for parties to express strong views. It is common ground that the representatives of IOTEP were at the conclusion of the meeting wished a safe flight home. On the following day the Chairman of IOTEP emailed Mr Edwin thanking him for having given a patient hearing to his colleagues from IOTEP.

17. Looking at the matter in the round, the offer of a parent company guarantee completely undermines the Appellant's case as to risk of dissipation and frustration of enforcement. The evidence relied upon by the Appellant falls very far short of justifying freezing order relief.

18. Eder J in his judgment relied on a number of grounds for refusing to grant the relief sought, save on an interim basis, of which no sufficient risk of dissipation was only one. Because the Appellant cannot show a sufficient risk of dissipation it is unnecessary to consider those other grounds, upon which we heard sustained and erudite argument from Mr Lord, and I say no more about them.

Lord Justice Lewison :

19. I agree.

Lord Justice Kitchin :

20. I also agree.