Case No: 2010 Folio 403

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 13 September 2010

BEFORE:

MR JUSTICE HAMBLEN

BETWEEN:

RAZCOM CI

Applicant/Claimant

- and -

BARRY CALLEBAUT SOURCING AG

Respondent/Defendant

MR L AKKA (instructed by Walker & Co Solicitors) appeared on behalf of the Claimant

MR S SWAROOP (instructed by Spratt Endicott) appeared on behalf of the Defendant

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Approved Judgment

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MR JUSTICE HAMBLEN:

Introduction.

1. On 31 March 2010 Mr Justice Tomlinson made an order ("the order") granting permission to the claimant ("Razcom") to enforce an appeal award of the Federation of Cocoa Commerce Limited ("the FCC") dated 31 March 2009 ("the award") against the defendant ("BCS"). BSC applies to set aside or alternatively to vary the order. The essential basis of BCS's application is that the award has been complied with and the sums awarded thereunder paid.

The Factual Background

2. On or about 17 December 2007 the parties entered contract P313043 ("the contract") for the sale by Razcom to BCS of 500 metric tons of cocoa beans. Razcom purchased the goods with finance provided by Ecobank Cote d'Ivoire. Razcom's payment instructions contained in its invoice sought payment into Razcom's account with Ecobank, account number 10000057654103 ("the Ecobank account").

3. Disputes arose between the parties which were referred to arbitration by the FCC. The FCC arbitrators found at both tiers that BCS had wrongfully refused to pay for the cargo of 500 metric tons of cocoa beans to be delivered FOB Cote d'Ivoire for the December 2007/January 2008 shipment, despite having obtained both the documents and the goods, and BCS's defence of setoff was rejected. In the award the FCC board of appeal upheld Razcom's claim and BCS was ordered to pay €733,838.88 plus interest at the LIBOR one-month EUR rate plus 2 per cent compounded quarterly, together with costs.

4. Razcom was in dispute with Ecobank over Ecobank's handling of the transaction, the bank having delivered the shipping documents to BCS without obtaining payment in return, contrary to its instructions. Having parted with possession of the shipping documents, Ecobank would have lost the rights of pledge it had over the goods but, by letters dated 23 June 2009 and 13 November 2009, it nevertheless sought to assert such rights and claimed payment from BCS. Both Razcom and BCS dispute that Ecobank has any right so to do.

5. Because of its dispute with Ecobank, Razcom did not want payment of the sums due under the award to be made to its account with Ecobank. On several occasions express instructions were given to BCS that payment was not to be made to Ecobank but to Razcom's solicitor's client account and to Ecobank that it was not authorised to receive the payment. BCS nevertheless purported to make payment to Ecobank, which has applied it in purported reduction of a disputed debit balance. The essential issue is whether the payment to Ecobank is a payment in satisfaction of the award.

6. The award was published on 31 March 2009. On 3 April 2009 Razcom's solicitor, Walker & Co, required payment of the award to be made to its client account. The same instructions were given on 1 May 2009 in the following terms:

> "2. Please take good note that our client, Razcom CI, instructs that any and all payments made in satisfaction of Appeal Award AA020-08 dated 31 March 2009 ("the Appeal Award") must be paid only to Walker & Co's client account the details of which are set out above.
> 3. Payment to any third party other than Walker & Co, including but not limited to Ecobank CI, will not be considered by our client to satisfy the Appeal Award.
> 4. Our client considers that the only extant and current payment instructions are those set out in our letter dated 3 April 2009. Our client's position is that it does not consider that there are any prior instructions from it extant and current that payment to any third party other than Walker & Co, including but not limited to Ecobank CI, will be acceptable to our client as satisfying the Appeal Award.
> 5. Without prejudice to that position, any prior instructions from our client which your client may consider to be extant and current that payment to a third party other than Walker & Co, including but not limited to Ecobank CI, will be acceptable to our client as satisfying the Appeal Award are hereby expressly revoked and withdrawn."

7. Despite the terms of this letter, BCS wrote to Ecobank proposing that the awarded sums be paid to it. Walker & Co accordingly wrote again on 5 March 2009, repeating that Ecobank was not entitled to receive the money for Razcom. It also wrote on 6 May to Ecobank, stating:

> "Ecobank CI has no right to ... accept monies in settlement of the ... Award."

8. Walker & Co's email of the same date to Spratt Endicott explained why payment should not be paid to Ecobank and repeated the clear payment instructions.

9. On 27 November 2009 Ecobank was again directly informed by Walker & Co that:

> "... we repeat that you are not authorised by our client Razcom CI to recover any amount whatsoever relating to the cargo which is the subject of the above Award, whether under that Award or otherwise."

10. Notwithstanding these repeated statements that Ecobank had no authority from Razcom to receive payment of the awarded sums and that Walker & Co was the only authorised third party to which payment could be made, on 29 January 2010 Spratt Endicott sent a fax saying that their clients had initiated steps to discharge the awarded sum by paying an amount of £728667.52 to Razcom's account with Ecobank:

> "... on the basis that Ecobank will hold that sum to Razcom's order."

11. On 2 February 2010 Walker & Co wrote stating:

> "We refer to your letter by fax dated 29 January. Your client has been made aware repeatedly of Razcom's instructions as to where payments of monies owing under Appeal Award AA020/08 are to

> be made. In particular your client has been made aware that payments other than in accordance with those instructions will not satisfy/be good discharge of your client's obligations under that award. Accordingly, if your client pays, or initiates steps to pay, otherwise than in accordance with the instructions it has received from Razcom then it does so at its own risk. As for Appeal Award AA019/08, as we have previously stated our client will settle off against your continuing obligations to Razcom any obligations which Razcom may have to your client[.]"

12. On 5 February 2010 Razcom informed Ecobank again that it was not authorised to receive any sum on Razcom's behalf or to its order and that any sums received should not be credited to Razcom's account. The letter concluded as follows:

> "As our solicitors have already told you, you are not authorised to receive this sum (or indeed any sum from Barry Callebaut) on our behalf or to our order. We do not and will not treat any payment to you as having been made to us or for our account. Any payment which will be or has been made to you is not to be credited to our account since it is not our money."

13. Nevertheless, it appears that on 1 February 2010 BCS made a payment to Ecobank and Ecobank is purported to have credited that sum to Razcom's account with a value date of 2 February 2010. This appears from a statement of account dated of 18 February 2010, which shows Razcom's overdraft from the Ecobank account being reduced from CFA 761,834,349 to CFA 216,135,243 by a payment from BCS of CFA 545,699,106.

14. On 26 March 2010 Razcom issued its application to enforce the award in the same manner as a judgment and the requested order was made by Tomlinson J on 31 March 2010.

15. On 2 April 2010 Razcom wrote to Ecobank stating:

> "We refer to our letter to you dated 5 February 2010. In spite of what we said it appears from our statement of account for the period to 17 February 2010 that you credited to our account the sum of CFA 545,699,106.00 remitted by Barry Callebaut. As we have told you this is not our money and we consider that you should remove it from our account immediately."

16. Since that time, Razcom has maintained its position, although it appears that BCS has not claimed repayment and that Ecobank has not removed the money from Razcom's account.

The Law

17. For present purposes, the relevant legal principles relating to enforcement of an arbitration award can be summarised as follows:

(1) Section 66(1) of the Arbitration Act 1996 provides that:

> "An award made ... by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

(2) Civil Procedure Rule 62.18 to 62.19 covers applications for permission to enforce under section 66. CPR 62.18(6)(c) requires the applicant for permission to file witness evidence stating *inter alia*:

> "... either (i) that the award has not been complied with; or (ii) the extent to which it has not been complied with at the date of the application."

(3) The court's jurisdiction under section 66(1) is a discretionary one. An award should not be enforced where the circumstances render it "inexpedient" or "unjust" to do so (see Arbitration Law edited by Robert Merkin at paragraphs 19.7 and 19.17).

(4) An award may be enforced in part (see Merkin at paragraph 19.7.1).

(5) An arbitration award extinguishes the rights of the parties under the original contract (see Merkin at paragraphs 18.12.8 and 19.2).

18. Whether the award has been complied with. BCS contends that it has complied with the award. It submits that:

(1) The award required BCS to "pay to" Razcom:

> "... the amount of EUR 733,838.88 plus interest of the LIBOR one month EUR plus 2% compounded quarterly from 31/03/2008 ..."

(2) On or about 29 January 2010 BCS paid the relevant sum into the Ecobank account.

19. Razcom contends that the award has not been complied with because, as it made clear to Ecobank and BCS, Ecobank had no authority to receive payment on its behalf and it has not accepted or ratified the payment.

Authority

20. As to authority, BCS contends that since the payment was paid directly into Razcom's account with Ecobank, Ecobank did not receive the payment; Razcom did. However, Razcom's account consists of monies held by Ecobank as its agent and a payment into that account would only amount to payment to Razcom if Ecobank had authority to receive it.

21. As stated in Chitty on Contracts, 30th edition, in paragraphs 21-043 and 21-045:

> "21-043 Payment to agent. If payment is made to an agent of the creditor, this discharges the debt if it is made in the ordinary course of business, before the creditor demands payment to himself, and while the agent has actual or ostensible authority from the creditor to receive the payment ...
>
> 21-045 Payment or transfer into a bank account. Where the creditor instructs the debtor to pay a sum due to him by making a payment to the credit of a specified bank account, the creditor has made the bank his agent to receive the payment, which is made as soon as the bank receives payment in cash, or by means of a

> banker's cheque, draft, payment order or transfer which is treated by banks as equivalent to cash ..."

22. In the present case, Razcom made it clear to both Ecobank and BCS that Ecobank had no authority to receive payment of the award and thereby that it had neither actual nor ostensible authority to receive the payment.

23. BCS then contends that Ecobank had irrevocable authority from Razcom to receive the payment because of the contractual arrangements between Ecobank and Razcom as properly construed, in particular on clauses 2.1, 7.1 to 7.4 and 10(1) of the finance agreement between Ecobank and Razcom, and that it was therefore not open to Razcom to purport to withdraw that authority. BCS relies in particular on clause 7.3 which provides that:

> "Special matters regarding loans against pledged products. In the case of exports: the amount of the price of the Export Contracts in respect of which the Loans against Pledged Products have been granted and, where applicable, the amount of any loan against documentary collection granted by the Bank in this respect, must, in all cases, be allocated as a priority to the repayment, in principal and interest, of the related Loans against Pledged Products.
>
> To this effect, the Borrower authorises the Bank, on an irrevocable and ongoing basis, as from the collection, on its behalf, of the amount of the price of any Export Contract on its books, to allocate it directly to the payment of the sums owing by the Borrower in respect of the related Loans against Pledged Products.
>
> To this end, the Borrower should undertake to surrender to the Bank all the documents required for the collection. The Bank shall undertake to surrender the documents to the client or to its bank against the collection in cash of the price of the contract."

24. BCS argues that Razcom thereby gave Ecobank irrevocable authority to collect the contract price allocated to the payment of sums due from Razcom, as it has done.

25. However, this provision does not concern payment of an award and did not prevent Razcom from withdrawing authority from Ecobank to receive payment of the award, as it clearly did. In any event, this conferred authority is premised on Ecobank performing its undertaking to surrender the documents against the collection of the price. It did not do so and, as the board of appeal observed, had it done so, the situation giving rise to the present disputes would not have arisen.

Accounting

26. Alternatively, BCS contends that if Ecobank did receive the payment and if Ecobank did not have authority to receive the payment, then payment to Razcom has nevertheless been made and/or Razcom was not entitled to enforce the award so as to claim payment a second time because Ecobank has accounted to Razcom for the payment by crediting Razcom's account for the payment and/or amount an equivalent to the payment as shown by Razcom's bank statement.

27. However, the purported crediting of Razcom's account was unauthorised and Razcom has made it clear that it does not treat the money as belonging to it and that it should be removed from the account. In those circumstances, unless the crediting of the account has been accepted or ratified, there has been no accounting to Razcom.

Acceptance

28. BCS contends that Razcom has accepted the payment. In this connection it relies upon the decision of Hobhouse J in TSB (Scotland) v Welwyn & Hatfield District Council [1993] 2 Bank LR 267. This case makes it clear at page 273:

> "A party who receives money which he wishes to treat as the money of another and wishes not to accept as his own money must not deal with it as his own money. If he does so he loses the right to say that he has not accepted the money. This follows from the basic principle of acceptance."

29. As BCS submitted, the case shows (1) a party accepts a payment when it acts in a way that is inconsistent with rejecting it, (2) acceptance does not require communication or any other unequivocal *inter partes* act and (3) a party may be deemed to have accepted a payment by its conduct even where it has *inter partes* stated that it is not accepting the payment.

30. On the facts of TSB v Welwyn, it was held that the creditor had accepted the payment in question, in particular because:

> "[1.] ... they retained the money and did so for some three weeks.
> [2.] Further whilst they were retaining the money they did not, contrary to what they had said, place the money in a separate holding account or any form of suspense account. They treated it as their own money, inter-mingled it with other money of their own. They lent the money out to others ...
> [3. The creditor retained] interest which they had obtained through the use of the money between 18 July and 8 August ..."

31. In the present case, BCS contends that Razcom has acted inconsistently with any rejection of the payment because:

(1) The payment was made into the Ecobank account with a value date of 2 February 2010.

(2) Razcom knew or ought to have known from early February 2010 onwards that (i) the payment had been made and (ii) the payment was intended to discharge the award.

(3) Razcom has retained the money in its account since February 2010, that is for over seven months.

(4) Razcom has not paid back the money to Ecobank or to BCS, nor has it placed the money or its equivalent in any form of separate or suspense account.

(5) The payment has reduced the amount by which Razcom's account with Ecobank was overdrawn and accordingly has reduced Razcom's indebtedness to Ecobank and it follows that Razcom has used the money to earn interest and/or to reduce the amount of interest and/or charges that it would otherwise be liable to pay to Ecobank on the account.

(6) Razcom has continued to keep its bank account open and to use the bank account after the date of payment.

(7) Razcom has dealt with the money as if it were its own.

(8) Further and alternatively, the payment and/or the money paid is under the exclusive control of Razcom.

32. In the present case it is not entirely clear when Razcom first became aware that its account had been credited with the payment, but I accept that it was sometime after the payment was made and that it took time to ascertain from Ecobank what had transpired. I am satisfied that within a reasonable time thereafter Razcom reiterated its clear position that Ecobank had no authority to accept payment. It did so in clear and unequivocal terms in its application to this court of 26 March 2010 and in its letter to Ecobank of 2 April 2010.

33. In Razcom's application to the court it was stated in Mr Walker's supporting witness statement at paragraph 33 as follows:

> "Barry Callebaut has been well aware since 1 May 2009 that Ecobank was not Razcom's agent to receive money payable under the Award. The payment made by Barry Callebaut to Ecobank does not belong to Razcom. Razcom has not and does not intend to treat this money as belonging to it."

34. In its letter to Ecobank of 2 April 2010 it was stated:

> "As we have told you this is not our money and we consider that you should remove it from our account immediately."

35. Far from dealing with the money as if it were its own, Razcom has done all that it can to disown it. While BCS suggests that more could have been done and that further disclosure should have been provided, it is not clear what more Razcom could do. The money has been placed by Ecobank in an overdrawn account and cannot readily be transferred out, especially given the ongoing dispute between Razcom and Ecobank. Whilst in theory it would seem that the reduced overdraft would lead to a saving on interest and charges, Razcom has not claimed any such benefit and on its own case is not entitled to do so since it has made clear that it is not its money and should be removed.

36. I therefore do not accept that Razcom has treated the money as its own or acted inconsistently with rejection of the payment. It has not voluntarily in any way adopted the payment; quite the contrary.

Ratification

37. Alternatively, BCS contends that Razcom has ratified the payment and/or has ratified receipt by Ecobank of the payment. In this connection, BCS relies upon SEB Trygg Liv Holding AG v Manches & Ors [2005] 2 Lloyd's Law Rep 129, 155-6, [2006] 1 Lloyd's Law Rep 318 at 328-331 (CA). In light of that case, BCS stresses the following:

(1) Ratification requires an act which need not be communicated to the agent or the third party showing that the principal adopts or recognises the relevant contract or act.

(2) Silence or acquiescence may amount to ratification depending on the circumstances. Whether there has been ratification by silence or acquiescence depends on the objective character of the principal's conduct as it appears to the outside world. The principal cannot defeat the inference of ratification by stating that, contrary to appearances, it did not intend to adopt the transaction (see SEB at pages 115-6 and Suncorp Insurance & Finance Ltd v Milano Assicurazioni SpA [1993] 2 Lloyd's Rep 225 at 234-235).

(3) A principal should have knowledge of the material circumstances but in this regard the requirements are not strict and a person is imputed with the knowledge which, objectively speaking, he ought to have (see Ballast(?) on Agency at paragraph 2-068, SEB at pages 155-156 and 162-164, and also SEB in the Court of Appeal at pages 328-331).

(4) Ratification does not require any act of reliance by the third party or by anyone else (see SEB at pages 155-156 and 162-164).

38. In this case, BCS submits that from at least early February 2010 onwards, Razcom had or ought to have had knowledge of the material circumstances, namely that (1) a payment had been made into the Ecobank account and (2) that payment was intended by BCS to discharge the award. BCS submits that thereafter Razcom adopted or ratified the payment by reason of the various facts in the matter relied upon in relation to acceptance. As a further alterative, by reason of those facts and matters, Razcom has waived the right to contend it has not been paid and/or it is stopped from contending that it has not been made.

39. These arguments, therefore, depend on the same facts and matters as the argument on acceptance. As already stated, those facts do not found any acceptance because Razcom made it clear both before and after the payment that it would not and was not accepting the payment. For the same reasons, there was equally no ratification or waiver.

Discretion

40. Alternatively, BCS contends that in all the circumstances as a matter of discretion the court should not give permission to enforce the award. In particular, it submits that:

(1) Razcom has received and/or retained in its account with Ecobank the benefit of the payment, the benefit in its reduction of its overdraft and/or its liability to interest payments and charges. However, if it has received any benefit, as to which there is

no evidence, that has been a benefit volunteered by Ecobank contrary to the clear instructions given to it by Razcom.

(2) Razcom has failed to explain what prejudice it has suffered as a result of receiving the payment into its bank account with Ecobank. However, it is not a question of prejudice. The issue is whether payment has been made and the award thereby complied with. In the event, Razcom has suffered a clear prejudice as a result of the payment being made into its disputed overdraft account with Ecobank rather than into an account in which it would have full control over and use of the monies.

Razcom's undertaking

41. It is common ground that Razcom owes to BCS the sum of £150,500 plus interest under award AA019-08. It has undertaken that it will not enforce the award for more than the difference as at the date of the court's order.

42. BCS points out that the court's order does not reflect this undertaking and that accordingly the order is defective and should be set aside. However, it was not strictly necessary for it to be reflected in the order (see ED & F Man v Société Anonyme Tripolitaine des Usines [1970] 2 Lloyd's Law Rep 416). In any event, Razcom has no objection to the order being varied so as to reflect its undertaking.

Other points

43. Finally, BCS contends that the order is defective and should be set aside and/or varied because it is defective and/or for misrepresentation and/or material non-disclosure. BCS submits that Razcom failed to comply with CPR 62.19 in relation to the issue of interest and also that it misrepresented on the arbitration claim form that the address of BCS was the address of the law firm Spratt Endicott and/or failed to disclose that the order would need to be served on BCS out of the jurisdiction and/or failed to make provision for an appropriate period for challenging the order greater than 14 days as contemplated by CPR 62.18(9).

44. There is no substance in these points. Even if there has been some procedural shortcomings, it is not suggested that any prejudice has been caused thereby and they have in any event been cured.

Conclusion

45. For the reasons set out above, BCS's application to set aside the order dated 31 March 2010 is dismissed but the order should be varied so as to reflect Razcom's undertakings.

46. In principle, it seems to me the claimant is clearly entitled to the costs of successfully resisting the defendant's application. The amount sought is £13,476, which is to be contrasted with the defendant's total costs of £26,500.

47. I am asked to summarily assess those costs. They seem in general to be reasonable, although I recognise that on a detailed assessment there may be some taxing-down, although in this case I would have thought it would be limited in extent. I propose to summarily assess the costs in the amount of £12,500 to be paid within 14 days.

48. I refuse permission to appeal. It seems to me that this case does turn on the facts. There is no real prospect of the Court of Appeal taking a different view of the facts. But I will set out my reasons in a short written document in the usual way.