Case No: 2014 FOLIO 1109

Neutral Citation Number: [2015] EWHC 25 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 15/01/2015

Before :

MR. JUSTICE TEARE

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Between :

IMPALA WAREHOUSING AND LOGISTICS (SHANGHAI) CO. LTD	**Claimant**
- and -	
WANXIANG RESOURCES (SINGAPORE) PTE LTD	**Defendant**

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- -

Simon Picken QC and Adam Turner (instructed by **Reed Smith LLP**) for the **Claimant**
Andrew Fletcher QC and Christopher Harris (instructed by **Edwin Coe LLP**) for the **Defendant**

Hearing dates: 17 December 2014

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Judgment

Mr. Justice Teare :

1. Wanxiang Resources (Singapore) PTE Limited ("Wanxiang") claims to be the owner of a quantity of aluminium which has been stored in a warehouse in Qingdao, China. Warehouse certificates were issued by Impala Warehousing and Logistics (Shanghai) Co. Limited ("Impala Shanghai") in respect of the aluminium to Rabobank International to whom the goods had been pledged as security. The sums advanced by Rabobank International have been paid off and, it is said, the warehouse certificates have been endorsed to Wanxiang. It appears that Impala Shanghai have not delivered the goods to Wanxiang because Wanxiang has commenced proceedings in China against Impala Shanghai seeking delivery of the goods. It did so on 5 August 2014.

2. On 19 September 2014 this court granted Impala Shanghai an interim anti-suit injunction. The injunction restrained Wanxiang from continuing with the proceedings in Shanghai. The basis on which such injunction was sought was that the warehouse certificates upon which Wanxiang was suing in Shanghai contained an exclusive jurisdiction clause in favour of the courts of England. At the hearing in September 2014 (which was *ex parte* but on notice) at which Mr. Fletcher Q.C. did not appear it was common ground that there was such an exclusive jurisdiction clause. What was said on behalf of Wanxiang was that Wanxiang's claim in fact lay under a different contract, a tripartite Collateral Management Agreement ("the CMA"), which did not contain such a clause. I asked counsel for Wanxiang to explain the basis upon which Wanxiang were suing Impala Shanghai in China. No explanation was given. I was critical of Wanxiang's position. Wanxiang appeared to be putting forward one argument in Shanghai (a claim based upon the warehouse certificates) and a different and inconsistent argument here (a claim based upon the CMA).

3. When Wanxiang acknowledged service it was said the jurisdiction of this court would be challenged and that expert evidence of Chinese law would be filed which would explain the basis of Wanxiang's claim in China. But no steps were taken to challenge the jurisdiction of this court and no such expert evidence of Chinese law explaining the basis of the claim in Shanghai was ever forthcoming.

4. Impala Shanghai then learnt that the Chinese proceedings would be advanced by the court even if Wanxiang did nothing to advance them themselves. The proceedings "had a life of their own" which would continue even if Wanxiang complied with the anti-suit injunction.

5. These developments led Impala Shanghai to issue a further application in this court seeking a final anti-suit injunction coupled with a mandatory injunction ordering Wanxiang to discontinue the Chinese proceedings. In the alternative an interim mandatory injunction to the same effect was sought. The basis of both applications was that the proceedings in Shanghai were (i) vexatious (on the grounds that Wanxiang was maintaining proceedings in Shanghai which it was telling this court had no foundation) and (ii) were in breach of the exclusive jurisdiction clause in favour of England.

6. Somewhat late in the day Wanxiang filed evidence. However, in essence that evidence merely confirmed that Wanxiang's claim lay under the CMA. Nothing was said by way of explanation of the proceedings in China under the warehouse

certificates. Indeed Miss Sun said that "it is wrong to say that production of the warehouse certificates to the warehouse will allow us to take delivery" and that "the warehouse certificates do not govern the relationship between the warehouse, the bank and ourselves." So Impala Shanghai continued with their application.

7. When the application came on for hearing on 17 December 2014, Mr. Fletcher QC, on behalf of Wanxiang, made two important submissions. First, he submitted that the warehouse certificates did not contain an exclusive jurisdiction clause in favour of England. On their true construction the governing jurisdiction clause was that contained in the CMA notwithstanding that Impala Shanghai was not a party to the CMA. This submission, which can now be seen to have been foreshadowed in paragraph 15 of Mr. Fletcher's Skeleton Argument, was elaborated or explained in counsel's oral submissions. Second, he submitted that Wanxiang did in fact have a claim against Impala Shanghai under the terms of the warehouse certificates. This submission only emerged during counsel's oral submissions.

8. In a brief reply (of necessity because time was limited) Mr. Picken QC, on behalf of Impala Shanghai, submitted that the case that there was no exclusive jurisdiction clause in favour of England was unsupportable and that the alleged change of position with regard to the China proceedings lacked any credibility. He therefore maintained his application.

The basis of the proceedings in China

9. Whilst Mr. Fletcher stressed that the CMA was the governing contract he said that any claim against Impala Shanghai, which was not a party to the CMA, had to be brought under the warehouse certificates. That was the only contract to which Impala Shanghai was a party. He accepted that the evidence which had been filed on behalf of Wanxiang did not say this in terms. Indeed, it had to be significantly re-written so that, for example, Miss Sun's statement that "the warehouse certificates do not govern the relationship between the warehouse, the bank and ourselves" should be read as saying that "the warehouse certificates do not *exclusively* govern the relationship between the warehouse, the bank and ourselves."

10. Mr. Picken submitted that this suggestion lacked any credibility in circumstances where it had not been advanced at the September hearing, where there had been no challenge to the jurisdiction, where the evidence of Chinese law explaining the basis of the claim in China which had been foreshadowed in the Acknowledgment of Service had not been forthcoming and where the evidence later adduced by Wanxiang was wholly silent on the subject and indeed said that "the warehouse certificates do not govern the relationship between the warehouse, the bank and ourselves."

11. There is undoubted force in Mr. Picken's criticisms. It would have been very simple for evidence to be adduced by a Chinese lawyer to the effect that the claim against Impala Shanghai lay in a contract or indeed in a bailment on the terms of the warehouse certificates. But no such evidence was adduced.

12. However, I do not consider that I can dismiss Mr. Fletcher's submission so easily. By letter dated 6 June 2014 Impala Shanghai acknowledged that Wanxiang was the owner of the aluminium stored under the warehouse certificates. Looked at from the

viewpoint of English law one can readily understand that Wanxiang has a claim against Impala Shanghai in bailment upon the terms of the warehouse certificates. There was no evidence that Chinese law was any different in this respect from English law. Indeed, the way in which Wanxiang's claim is expressed in Shanghai is consistent with the English law position although the language of contract rather than of bailment is used. Thus the claim form says:

> "……the Plaintiff is the holder of the warehouse receipts, that is, the title owner of the goods. The defendant sent a letter to the Plaintiff on 6 June 2014……confirmed that the Plaintiff was the owner of the goods under the specific warehouse certificates……..In view of the above facts, the Plaintiff considers that the warehouse certificates are evidence of title to the goods which could be transferred lawfully and validly, and the Defendant as the issuer of the warehouse certificates should fulfil its responsibility to supervise and obligation to deliver the goods under the warehouse certificates…..."

13. In those circumstances I do not consider that I can dismiss Wanxiang's belated explanation of their claim as lacking in all credibility. That being so the case based upon Wanxiang's conduct being vexatious loses its force and cannot found an application for a mandatory injunction. It can no longer be said that Wanxiang wishes to maintain an action in China against Impala Shanghai under the terms of the warehouse certificates whilst telling this court that no claim can be founded upon the warehouse certificates.

Do the terms of the warehouse certificates contain an exclusive jurisdiction clause in favour of England ?

14. There is a simple and cogent argument that they do. The first page of the warehouse certificate states that the "warehouse certificate and all disputes arising from it shall be subject to the Terms and Conditions of IMPALA". At the base of the page there is added "please note additional conditions of the warehouse certificate printed at the back of this page." On the reverse is found the following:

> "The Goods are received and stored under the Terms and Conditions of Impala-which updated by Impala from time to time. The latest version of the Terms and Conditions of Impala is posted on the official website of Impala at www.impalaterminals.com.
>
> The contents of the Terms and Conditions of Impala shall be noted and understood by any beneficiary and/or Holder of this Warehouse Certificate.
>
> …….
>
> This Warehouse Certificate itself and all disputes arising from it shall be subject to the Terms and Conditions of Impala."

15. Reference to the web site reveals three sets of standard terms. One relates to warehousing, another to website terms of use and the third to freight. In my judgment it is clear that those which relate to warehousing are the relevant terms. They contain at clause 10 an agreement to English law as the governing law and an exclusive jurisdiction clause in favour of England.

16. As a matter of English law where terms are incorporated it must be shown that the party seeking to rely on the conditions has done what is reasonably sufficient to give the other party notice of the conditions; see *Chitty on Contracts* Vol.1 para.12-014. Here, the first page refers to the warehouse certificate as being subject to the Terms and Conditions of Impala. At the base of the page the reader is invited to refer to the reverse of the page for additional conditions. On the reverse the reader is referred to Impala's web-site for its Terms and Conditions. Thus the holder of the warehouse certificate knows that the certificate is subject to Impala's Terms and Conditions. He is referred to the reverse of the certificate. On the reverse he is told where to find the Terms and Conditions. I consider that these steps are reasonably sufficient to give the holder notice of the conditions. In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the web-site.

17. Before dealing with the important submission elaborated by Mr. Fletcher in his oral submissions I must mention two other arguments advanced by him.

18. First, Mr. Fletcher submitted that the web-site was difficult to follow and that any reader would have been confused as to which terms were applicable. I disagree. The warehousing terms were clearly applicable to a warehousing contract. The web-site and freight terms were clearly inapplicable to a warehousing contract.

19. Second, Mr. Fletcher submitted that general words of incorporation were not sufficient to incorporate dispute resolution clauses. In this regard he relied upon the well-known line of authorities to the effect that when a bill of lading incorporates the terms of charterparty that will not be effective to incorporate an arbitration or jurisdiction clause unless such clauses are specifically mentioned as having been incorporated. He referred to the discussion of this line of authorities in *Siboti K/S v BP France SA* [2003] 2 Lloyd's Reports 364. However, the words of incorporation in the present case were that the "warehouse certificate and all disputes arising from it" shall be subject to the Terms and Conditions of Impala. In my judgment the express reference to "disputes" is sufficient to make clear that not only are those of Impala's Terms and Conditions which are germane to the receipt, storage and delivery of goods incorporated but also that those which state how disputes are to be resolved, such as a choice of law and jurisdiction clause, are incorporated.

20. I must now deal with Mr. Fletcher's main and foremost submission. In essence it is as follows:

    i) The CMA contemplated that Impala UK would issue warehouse certificates to the Rabobank and that it might perform its obligations by an agent. The form of the certificates was annexed to the CMA and contemplated that they would in fact be issued by Impala Shanghai. The CMA provided that the governing law was that of Singapore and that the courts of Singapore had non-exclusive

jurisdiction. In so far as the terms of the warehouse certificates provided for English law and jurisdiction such terms were inconsistent with the terms of the CMA and the parties to the CMA must have intended, objectively, that the terms of the CMA would prevail.

ii) The terms of the warehouse certificates issued by Impala Shanghai and which gave rise to a cause of action in contract or bailment against Impala Shanghai were to be construed in their context, that is, by having regard to the background information reasonably available to both parties. Obviously Wanxiang knew that Impala Shanghai had issued the warehouse certificates pursuant to the CMA. Impala Shanghai must have known that as well. The signatory to the CMA on behalf of Impala UK was Mr. Bucknall who also had a position with Impala Shanghai. A notice provision in the CMA made reference to the address of Impala UK in Sunderland and to the address of Impala Shanghai in Shanghai. Thus, when construing the terms of the warehouse certificates they would reasonably be understood to have the same meaning as they have between the parties to the CMA and when annexed to the CMA.

21. Mr. Picken challenged both limbs of this argument. As to the first limb he said that rather than delete the incorporation of Impala's Terms and Conditions (and in particular the English law and jurisdiction clause) the court should endeavour to give effect to both the terms of the CMA and to the terms of the warehouse certificates. The obvious way to do that is to say that the terms of the CMA should govern the parties to the CMA but that the terms of the warehouse certificates, if issued by a non-party to the CMA, should govern the parties to the warehouse certificates. As to the second limb he said that the use to which Mr. Fletcher sought to put the principles established by cases such as *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 was novel and unfounded. Background or context was relevant to the construction of the words used by the parties. It could not be used to give a meaning to those words which they did not bear by reference to the meaning which those same words had in a contract to which Impala Shanghai was not party.

22. Mr. Fletcher submitted that it would be wrong to determine this application without evidence as to all the facts regarding the making of the CMA, the knowledge which Impala Shanghai had of the CMA and its appreciation, when issuing the warehouse certificates, that it was doing so as agent for Impala UK pursuant to the terms of the CMA. In this regard he relied upon the observations of Moore-Bick LJ in *Standard Bank PLC v Via Mat International Limited* [2013] EWCA Civ 490 at paragraph 17. In that case the court was concerned with an application for summary judgment and, as it happens, circumstances in which a framework agreement provided for the terms upon which goods were to be handled but permitted the contractor to provide its services by its agents (a set of circumstances not unlike those of the present case). Moore-Bick LJ said:

> "When the relationship between the parties involved in or connected to the dispute is contained or reflected in a series of documents, the court may be able to see without further evidence that the claim or defence has no substance. However, documents do not always speak for themselves and it is not at all uncommon to

find that it is not possible to appreciate their true significance without a clear understanding of the context in which they were created."

23. The present application is not one for summary judgment but is an application for final, alternatively, interim relief. However, because of the unusual circumstances in which the application has come to be made the court has little, if any, evidence regarding the matters mentioned by Mr. Fletcher. I do not consider that the court can fairly or properly determine the principal issue between the parties without a clear understanding of those matters. For that reason I do not consider that I can make a final order on this application.

24. It is well established that the court can only issue a mandatory injunction on an interim basis if it has a "high degree of assurance" that the basis upon which it does so is right. Whilst Mr. Picken's criticism of Mr. Fletcher's submission may well have force, without evidence as to the matters referred to by Mr. Fletcher the court cannot have the necessary high degree of assurance that Mr. Fletcher's submission will fail. I am therefore unable to make the mandatory order on an interim basis.

25. That is sufficient to determine this application.

26. In those circumstances it is unnecessary to consider whether, had I determined that there was an applicable exclusive jurisdiction clause in favour of England or that I had "a high degree of assurance" that there was such a clause, Wanxiang could have established the necessary strong reason for not enforcing the clause. I shall therefore express my view on this issue briefly.

27. Where a claim falls within an exclusive jurisdiction clause and the interests of other parties are not involved effect will ordinarily and in all probability be given to the clause. The burden lies on the party wishing to sue in another jurisdiction to show strong reason for departing from the exclusive jurisdiction clause; see *Donohue v Armco* [2002] 1 Lloyd's Rep. 425 at paragraphs 24 and 25 per Lord Bingham. Some of the matters which might properly be considered by the court were set out by Brandon J. in *The Eleftheria* [1969] 1 Lloyd's Rep. 237 at p.242.

28. Mr. Fletcher relied upon a number of matters in this regard. First, he said that the resolution of the claim against Impala Shanghai will depend on investigations, witnesses and evidence in China. This is true but the claim against Impala Shanghai is simple. Having stated that they have received the goods into their possession they are bound to deliver them from the warehouse. If they cannot do so they will, in all probability, be liable. It is difficult to see what investigations, witnesses or evidence will be required to establish Wanxiang's claim. Second, he said that there are likely to be many similar claims in China and it is desirable that they all proceed in the same jurisdiction. There is some force in this point but since the claims are separate and proof of liability ought to be simple (see the last point) I am not persuaded that this would be a "strong" reason for not enforcing the clause. Third, he said that the Claimant is Chinese, the warehouse is in China and the goods are in China. I am not persuaded that this adds anything to the first point. Mr. Fletcher's fourth to sixth points were in essence the same, namely, that the exclusive jurisdiction clause had not been the subject of specific negotiation and choice and so should be accorded little weight. However, the question is whether the fact that the exclusive jurisdiction clause, although validly incorporated in the contract between the parties, had not been

the subject of specific negotiation amounts to a strong reason for not enforcing the clause. I do not consider that it would be such a reason.

29. Lastly, it was said that Wanxiang would suffer prejudice if they had to litigate in England because any judgment of the English court would not be enforceable in China. This is because there is no reciprocal enforcement arrangement between England and China. A similar point was made at the last hearing but no specific reference was made to the absence of a reciprocal enforcement arrangement. I did not consider that the point then made was a strong reason for not enforcing the jurisdiction clause because I expected the parties to respect a decision of this court. However, an inability to enforce a judgment is a form of prejudice specifically mentioned by Brandon J. in *The Eleftheria*. The question which therefore arises is whether Wanxiang's inability to enforce any judgment of this court in its favour against Impala Shanghai in China would be a strong reason for not giving effect to the exclusive jurisdiction clause. Having reflected upon this matter, and in the absence of any suggestion as to how this prejudice could be reliably avoided, I have reached the conclusion that it would be such a reason.

30. For the reasons which I have already given this application for a final prohibitive and mandatory injunction, or, in the alternative, for an interim mandatory injunction must be dismissed.