CL-2018-000555

Neutral Citation Number: [2018] EWHC 2806 (Comm)

Case No: CL-2018-000555

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

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Before:
MRS. JUSTICE COCKERILL

- -

Between:

AAL GROUP LIMITED — **Claimant**
(a company incorporated in the British Virgin Islands

- and -

VERTICAL DE AVIACON SAS — **Defendant**
(a company incorporated in Colombia)

- -

MR. PHILIP SHEPHERD QC (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
MR. WILLIAM McCORMICK QC (instructed by **Carter-Ruck Solicitors**) for the **Defendant**

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APPROVED JUDGMENT

MRS. JUSTICE COCKERILL:

1. The matter before me this morning is the return date of a freezing injunction which was granted by Males J on 23rd August 2018. The application before me is to continue that freezing and disclosure order. I have had before me Mr. Shepherd QC on behalf of the claimant. At a late stage in the day, the respondents have indicated that they are putting solicitors on the record, Messrs. Carter-Ruck, though they are not formally on the record. But on behalf of the respondent, on that semi-instructed basis, I have had the assistance of Mr. William McCormick QC. There has also been attendance by Mr. Paul Woodley of Holman Fenwick Willan LLP for Tokio Marine and Ms. Helen Evans of counsel for BMIB as a watching brief.

2. The question which I have to consider is whether it is appropriate to continue the injunction granted by Males J. The circumstances in which the application was made is that there was a claim by the claimant, AAL, against the respondent, Vertical, for a sum of $12,594,346.96 and £101,921.97 under a final and binding Partial Award made under the LCIA procedure which was published in London on 28th July 2016. That sum was awarded by way of damages, pre-award interest and expenses plus costs and post-award interest.

3. The proceedings in the arbitration are worth just outlining briefly. The arbitration was commenced by filing a request for arbitration dated 10th December 2015. On 1st February 2016 the LCIA Court appointed Mr. Akhil Shah QC as one of the Arbitrators. The Arbitration Clause then required the respondent to nominate a co-Arbitrator. That was required to be done by 30th December 2015. The respondent did not do so and informed the LCIA and the claimant on 16th January 2016 that it was looking for a lawyer in London and therefore an Arbitrator. Despite the communication of its good intentions, the respondent failed to nominate a co-Arbitrator and so on 1st February 2016, the LCIA Court appointed Ms. Dometille Baizeau as co-Arbitrator and then notified the parties on 8th February that upon the joint nomination the two co-Arbitrators and pursuant to Article 5 of the LCIA Court it had appointed Ms. Melanie van Leeuwen as the third and presiding Arbitrator.

4. The Award sets out a detailed procedural history in relation to the arbitration and I have read that carefully. It explains exactly how matters proceeded to cut the matter short, I will not go through those paragraphs in detail though it should, by anybody reading this, be assumed that I have read and have had careful regard to those relevant paragraphs of the Award. The hearing ultimately took place on 7th June 2016. It took place in the absence of the respondent. The position as to the respondent's involvement, through the slightly complex procedural history, was that its involvement was limited to two e-mails. The first was the e-mail I have already quoted dated 6th January 2016 stating that it was looking for a lawyer in London and, therefore an Arbitrator. The second was a letter dated 5th April 2016 to the Tribunal informing it that

the respondent had been taking steps towards instructing UK-based lawyers for the purposes of conducting the proceedings as well as collating documents and materials relevant to the preparation of its defence.

5. The sums in question at the hearing were sums which were in respect of hire charges, training costs and interest which was said to be owed by Vertical under a series of contracts relating to a fleet of helicopters leased to Vertical by AAL and a further agreement called the "Final Agreement" by which Vertical acknowledged the debts and agreed to pay by instalments.

6. Following the hearing in the arbitration the Award, as I have said, was published. The Tribunal found that Vertical had breached all of the six contracts.and the result of that was that the Arbitrators found that Vertical owed AAL those sums I have listed above.

7. On 23rd August 2018 Males J gave permission under section 66(1) and 66(2) of the Arbitration Act to enforce the Award as a judgment and judgment was duly entered.

8. Nothing has been paid in the two years that have elapsed since the Award was published. I am informed that Vertical has engaged in a series of legal manoeuvres in Colombia (where AAL has been seeking to enforce the Award) which are felt to be aimed at frustrating the enforcement of the Award. The Award was recognised in Colombia. The Colombian Supreme Court upheld the recognition in the face of opposition from Vertical on 30th October 2017 but all attempts to enforce the Award under the New York Convention in Colombia, where Vertical is incorporated, have come to nothing. It is said that Vertical has done all it can to frustrate that.

9. Pre-arbitration promises to pay the debts by instalment have not been adhered to. What is said on behalf of Vertical – and I take this from the evidence which was lodged in relation to the original application – was that promises of payment have been serially broken, that is promises to apply the proceeds of the sale of the aircraft to outstanding liabilities. They have not been complied with. An agreement in writing to pay by instalments has been broken. There have been legal manoeuvres opposing the recognition of the Award in Colombia (to which I have alluded). Additional legal actions by Vertical have been brought and have delayed enforcement. There are directors who are not in Colombia which has made it difficult to make them accountable. It also banks elsewhere than in Colombia and its accounts are currently empty or overdrawn which, it is suggested, means that Vertical has been careful to avoid keeping money anywhere that would facilitate enforcement. Its assets include a fleet of aging aircraft of various types that are the most mobile of its assets and AAL does not know whether such assets as it has have been charged for mortgage.

10. Very recently it seems that there has been a threat that Vertical would put itself into an insolvency procedure by which it will seek protection from its creditors. I find that in the affidavit of Anton Radchenko at page 32 which tells me that there was a motion on 18th August 2018 attaching a report from Vertical's Colombian lawyers saying that on 30th May, Vertical had requested an insolvency procedure by filing a request with the Superintendent of Corporations, that that request has currently been rejected and Vertical has been required to address certain procedural deficiencies and formalities in relation to the request. That was due to be done by the end of August.

11. So it is said that the evidence suggests that Vertical has been using the delay to dissipate its assets including directing payments to a previously unknown Panamanian bank account. As I indicated, my attention has been drawn to a number of assets which indicate what is said to be a serious risk of dissipation of assets. There has been evidence submitted in relation to high living on the part of the owners of Vertical and transfer of company moneys to the Lopez family who own and control Vertical. I have been directed to the affidavit of Mr. Matthew Anderson, a former Executive Vice President of Vertical USA.

12. My attention has been drawn also to the fact that in June 2018, AAL had filed a motion for additional precautionary measures to secure an enforcement order and that on 17th July 2018, the Civil Circuit Court of Bogota ordered that the enforcement process should move forward with sequestration and subsequently private auction; that Vertical's request to terminate or reduce the precautionary measures set out in the attachment order should be dismissed and that AAL's request for additional precautionary measures should be dismissed.

13. I have read the skeleton argument lodged in relation to the first application where it was submitted that this situation should not operate as any sort of inhibition or report, in that the orders here are directed at facilitating enforcement of a London Arbitration Award made in respect of contracts governed by English law. As such, the fact that the foreign court has been unable to grant further precautionary measures in the course of enforcement of the Award, should not operate as a bar to this court doing so in respect of funds that are within this jurisdiction and that the Act gives the court a discretion to permit the Award to be enforced and to be entered into as a judgment. The procedure for enforcement of Awards indicates that what has been done in this situation is perfectly standard and there is no doubt that there is a power none the less to grant the freezing order.

14. It is submitted that the situation cannot be equated with the creation of an issue or cause of action estoppel when the same parties have already litigated the substantive issue as opposed to asking the court to grant precautionary measures which are procedural in nature. It is here that the parties, it is said, are expressly agreed to confer on any court having

jurisdiction the power to enter judgment and that must apply to enforcement.

15. I have had a look at that potential wrinkle in relation to the proceedings and I am satisfied that the submissions made are valid ones and that although there is that previous application, I should not regard my discretion as being at all fettered by that.

16. I should note the freezing order is targeting insurance proceeds, that is the proceeds of an aviation hull policy which are due to be paid to Vertical by insurers/reinsurers in the London Aviation Insurance Market and they are, of course, the people who are here on the watching briefs this morning. The situation is that AAL learned that, following the total loss in a fire of a helicopter owned by Vertical, it was due to be paid a substantial sum by its hull insurers which were to be collected from underwriters by London Aviation Insurance brokers, Boston Marks Insurance Brokers Limited. There is no current visibility on the part of AAL as to the detail of those arrangements and it has sought disclosure in relation to them. The freezing order has been served on those relevant parties who are represented here and they are not making any active submissions in relation to the question which is put forward this morning.

17. Just rounding up the situation in relation to the order which I am asked to make, it is a continuation of the order made by Males J. Males J heard submissions on that, read documents and concluded that it was appropriate for him to make that order. As it comes back to me on the return date, it is appropriate that I should look afresh at the matters before me. There is no active opposition to the order which was sought but I have, none the less, as I have indicated, looked at the matter thoroughly and read the documents which I have indicated that I have read.

18. I am obviously satisfied that the merits hurdle in relation to freezing relief are amply satisfied. This is a case where there is a valid case of an Arbitration Award made in a LCIA proceedings by a reputable Tribunal which has not been the subject of any challenge in the years which have passed since it was made. That indicates there is a good merits claim. The assets which are sought to be frozen have been indicated to me. The reason why this injunctive relief has not been sought earlier has not been specifically addressed but it is fairly obvious that there has been no point in seeking freezing relief in this jurisdiction until the point when these proceeds were notified. The question of delay since the Arbitration Award was made is not one which troubles me.

19. So far as risk of dissipation of assets is concerned, I bear well in mind the authorities which indicate that the evidence in relation to risk of dissipation of assets must be solid and must indicate a real risk of dissipation. I have well in mind the principles indicated in *Holyoake v. Candy* [2017] 3 WLR 1131 at [34]

and [59]and in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at paragraph [70]. I have sifted the evidence which has been put forward on that basis and I am satisfied that, bearing in mind the factors which have been drawn to my attention, the hurdle in relation to risk of dissipation of assets is made out.

20. The situation being what it is, I am also satisfied that it is appropriate on a just and convenient basis to make the order sought. I have in mind here particularly that I have before me people representing not just the respondent but also the third parties who have been served with this order and they had nothing to say as regards its impact on them or any reason why the order should not be continued until further order, there being liberty to apply.

21. I have obviously thought about whether "until further order" is an appropriate one to make particularly at the time when it seemed like the respondent was not going to be present. Given the timeline of where we are at in these proceedings and now the fact that there is no active opposition at least in relation to that order, and in terms of practicalities I am amply satisfied that that is an appropriate order to make and I shall do so.

(For continuation of proceedings: please see separate transcript)

This transcript has been approved by the judge.

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