IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 3653 (Comm)

No. CL-2020-000463

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 19 November 2021

Before:

MR RICHARD SALTER QC

(Sitting as a Deputy High Court Judge)

B E T W E E N :

BIOGRA TRADING LIMITED — Claimant/Respondent

- and -

SISTEM ECOLOGICA D.O.O. SRBAC & ORS — Defendants/Applicants

MS L. HICKS (instructed by Azarmi & Co) appeared on behalf of the Claimant/Respondent.

MR J. WATTHEY (instructed by Shook, Hardy & Bacon International LLP) appeared on behalf of the Defendants/Applicants.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

RICHARD SALTER QC:

1 In this action, begun by claim form issued in July 2020, the defendants now apply for a stay of proceedings. The application notice dated 20 July 2021 states as the ground for the application that:

> ".. there are related civil and criminal proceedings currently underway in Belgium and an action currently proceeding in the General Court of the European Union. If proceedings are not stayed by the English Court, then there is a significant risk of irreconcilable judgments. In respect of the criminal proceedings there is a real risk of serious prejudice which may lead to injustice to the Defendants. The parties are also likely to expend significant costs and take up valuable Court time in dealing with the matter in the English Courts when the Claimant's claim might ultimately fall away completely as a result of a decision of the General Court of the European Union and/or the Belgian Court."

2 The application has been supported by the third and fifth witness statements of Ms Alison Newstead, a partner in Shook, Hardy & Bacon International LLP, the solicitors for the defendants, and has been opposed by the fourth witness statement of Ms Sally Azarmi who is a director and partner of Azarmi & Co, solicitors for the claimants. I have read those witness statements and considered them in depth.

3 The background facts are not in dispute at least for the purposes of this application. By five contracts made between the end of May 2019 and the end of August 2019, the first defendant Sistem Ecologica D.O.O. Srbac ("Sistem") , a Bosnian company, sold to the claimant, a Hong Kong company, Biogra Trading Limited ("Biogra"), 8,800 metric tonnes of used cooking oil methyl ester, sometimes referred to as UCOME, for import into Europe through Rotterdam or Antwerp. It is said in the amended particulars of claim at para.6 (and is not, I think, in dispute) that UCOME is a biodiesel made from recycled used cooking oil ("UCO") as opposed to being a pure oil e.g. soyabean oil or soya methyl ester ("SME"). As a recycled product it is more valuable, benefiting from subsidies and tax benefits under European Union regulations. This was a consideration for the claimant when deciding to purchase the product as it was to be imported into Europe.

4 At the end of 2019, the *Office Européen de lutte Antifraude*, the European Antifraud Office (usually known as "OLAF"), inspected Sistem's plant. As a result of that inspection, it issued a report dated 9 June 2020. The terms of that report were essentially that it was OLAF's finding that Sistem could not have produced those quantities of UCOME and, therefore, that it had almost certainly been imported directly from the United States. The grounds for OLAF's conclusions were findings that Sistem had not purchased sufficient quantities either of methanol or of the catalyst necessary for making that quantity of UCOME and had not used the amount of electricity over the period as would have been necessary, had it done so.

5 OLAF then concluded its report by requesting Member States to impose customs and antidumping duties and fines. OLAF occupies an unusual and difficult position conceptually in European law. It is established by European Union regulation but it is not itself a prosecuting authority. Nor does it itself have the power to levy fines or, indeed, to make final judgments. It is dependent upon Member States to take action on the basis of its reports.

6 In this particular case, on 15 June 2020, the Belgian customs did indeed impose duties amounting to just over €3 million plus default interest at 2 per cent by a device which has variously been referred to by its Flemish name of *dwangbevel* or sometimes simply as an injunction.

7 As I say, the claim form in this action was issued on 23 July 2020 and amended particulars of claim were served on 9 February 2021. These plead that:

> "9. In breach of contract, in particular clause 3 of the Contracts, [Sistem] failed to deliver UCOME/the product to [Biogra], delivering a different biodiesel to that agreed.
>
> 10. [Biogra] reasonably believes the product delivered was American biodiesel, SME. This product was of a lesser value. As a consequence, [Biogra] has suffered damages.
>
> 11. Further, following delivery of the product in Rotterdam, [Biogra] suffered further damages and losses on account of the breach in that the product was subject to outstanding import duties, anti-dumping duties and countervailing duties of EUR 3,026,388.74 plus default interest of 2% which was levied by Belgian Customs.
>
> 12. The duties were imposed on the grounds that the product was not recycled biodiesel, namely UCOME processed from UCO by [Sistem] but rather biodiesel originating from America (e.g. SME). This was unbeknown to [Biogra], nor disclosed to [Biogra] by [Sistem]at any stage.
>
> 13. On 19 June 2020 Biogra] paid EUR 826,388.74 towards the duties. [Biogra] paid a further sum of EUR 61,111.15 towards the same on 18 September 2020, and continues to pay EUR 61,111.11 for a further 35 months, pursuant to an agreed payment plan. The balance outstanding is also secured by means of personal guarantees provided by [Biogra]."

8 Further on in the amended particulars of claim, it is pleaded in paragraph16 that

> "…as a consequence as the first defendant's breaches of contract, [Biogra] has suffered damages and/or losses of €3,026,388.74 being the duties imposed and payable by [Biogra] to the Belgian customs and the sterling equivalent of £2.7 million is given, plus default interest of €186,627.30, 2 per cent simple interest on EUR 3,026,388.74 until the effective date of payment."

9 In addition to those claims for breach of contract against Sistem, there is also a claim in fraud against the second and third defendants who are directors of Sistem, and a claim in fraud and conspiracy against the fourth defendant, Waste Oil Trade Incorporated, a Delaware corporation, which, on the defendants' case, supplied part of the raw materials from which they constructed the UCOME and, on Biogra's case, almost certainly provided the goods which were eventually supplied to Biogra and which were therefore not of the European Union but of US origin.

10 The basis of the defendants' application for a stay is as set out in their application: that there are proceedings overseas which challenge both the OLAF report and the fine and customs

duties which have consequently been levied by the Belgian customs authorities. There are four such actions which are potentially relevant to the stay application.

11 There is first an action filed by Sistem on 3 February 2021 before the General Court of the European Union in respect of the investigation carried out by OLAF. According to Ms Newstead, this action seeks the annulment of the series of decisions and measures relating to the investigations carried out by OLAF. It seeks damages for the prejudice caused to Sistem by those measures. It also seeks: a declaration that it was unlawful for OLAF to fail to take measures laid down by the relevant rules; annulment of the decision of OLAF refusing Sistem's request for access to the file; annulment of the decision of OLAF to consider Sistem's comments as complaints; annulment of the decision of OLAF rejecting Sistem's complaints; and annulment of the decision of OLAF indicating that the investigation regarding Sistem was closed; annulment of the decision of OLAF and Sistem's complaints will not be considered as complaints; a declaration that the information and data relating to Sistem and any relevant evidence forwarded to the national authorities was inadmissible; a declaration that any investigative procedures carried out by OLAF and its investigations was unlawful; a declaration that any conclusions drawn from the investigations were unlawful; a declaration that any information transferred to national authorities was unlawful, including OLAF's decision of 9 June 2020 and a later decision of 8 December 2020; an order that the Commission pays Sistem the €3 million, plus interest, in compensation due to OLAF's unlawful conduct and the losses caused to Sistem's professional activities and reputation; and an order for the Commission to pay costs.

12 The second set of proceedings is a civil action against the Belgian customs authorities which was filed by Sistem on 16 November 2020 before the Civil Courts of first instance of Brussels. This action requests the suspension annulment of the injunction order which levied the outstanding duties against Biogra. It also requests, again according to Ms Newstead, that the injunction of the Belgian custom authorities dated 20 June 2020 be suspended as a provisional measure; that the enforceability of the injunction be suspended until a decision in the proceedings has become final and conclusive; that the injunction be declared null and void; that the Belgian customs authority pay Sistem compensation for the damage suffered as a result of the injunction order (and a right to recalculate the amount sought on the basis of other costs that have been or will be incurred as a result of the unlawful injunction); that the injunction should be enforceable notwithstanding any appeal; and that the Belgian customs authorities should pay all costs of the proceedings.

13 Thirdly, there are criminal proceedings before the Belgian courts in which the defendants are accused of fraud and of making false customs declarations and statements, and thereby damaging the financial interests of the European Union.

14 Finally, I should mention a fourth set of proceedings which are said to have some relevance in this case. That is that one of Biogra's directors, a Mr Gianni Rivera, is due for trial on fraud charges in England in September 2022. I have not been given full details of that case, but it is suggested that the fact that Mr Rivera is facing trial is a material circumstance which I should take into account in deciding whether to stay the English proceedings.

15 As regards the timing of these foreign actions, I have seen a letter produced by Kocks & Partners, which was annexed to Ms Newstead's fifth witness statement. It is clear from this letter that the proceedings instituted by Sistem are all interconnected. The proceedings in the Belgian civil court, which are the only proceedings which actually seek annulment of the injunction, under which the €3 million penalties were exacted, have been stayed pending the determination of the criminal proceedings. However, Kocks & Partners, on behalf of

Sistem, has made a request to the Belgian criminal court that that court's decision be reserved pending the outcome of the challenge that has been made before the EU court. That request is to be considered at the hearing on 3 March 2022.

16 As to the actions before the General Court of the European Union, the written submissions stage (according to Kocks & Partners) has now concluded and it is for the EU court to consider the submissions and to make a decision. The EU court can consider the matter solely on the basis of the written submissions filed. However, a request can also be made by either party for an oral hearing, and a request for an oral hearing was made on behalf of Sistem on 5 November 2021. A decision is yet to be made by the EU court as to whether there will be a hearing or when that hearing will be. If a hearing is granted, it would be expected to take place between six months and one year after the request. The decision handed down by the EU court could (again according to Kocks & Partners) be appealed. The letter that I have been shown suggests that any appeal could take one to two years to complete from the filing of the appeal to a decision being handed down.

17 It therefore appears from Kocks & Partners' letter that, if the request to the criminal court that its decision be reserved pending the outcome of the challenge before the EU court is granted in March 2022, there could then be a delay of between six months and a year while the oral hearing before the European Court of first instance takes place, and there may then be a delay of between two to six months before the decision is handed down. There could be then one to two years before any appeal could be completed. Thereafter, there could then be the time necessary to complete the criminal proceedings and, thereafter, there could be the time necessary to complete the civil proceedings. It is therefore not clear that matters will be dealt with rapidly. They could take of the order of two to three years. It is, on the other hand, also possible that matters could be concluded more rapidly.

18 The trial of the Belgian criminal proceedings is scheduled to take place on 3 March 2022 and, if that does take place and the trial is not adjourned pending the challenge before the EU court, a decision could be handed down within one to six months. That would be sometime between April and September 2022. If the criminal proceedings are decided against the defendants, it seems likely that the civil proceedings will follow the result in the criminal case. If they are decided in favour of the defendants, it is not clear whether the civil proceedings would thereafter need to be taken forward or whether they too would follow the result in the criminal case.

19 That is the somewhat unusual background against which I am asked to exercise the court's powers to grant a stay of proceedings. What is being requested here is a case management stay and, like any other discretionary matter, the court's powers have to be exercised having regard to the overriding objective which is defined in CPR 1.1 and involves dealing with cases justly, that is to say, amongst other things, expeditiously, fairly, and proportionately.

20 The court undoubtedly has jurisdiction pursuant to CPR r.3.1(2)(f) to stay the whole or any part of any proceedings or judgment, either generally or until a specified date or event under its general powers of case management. The court also has an inherent jurisdiction to stay proceedings preserved in s.49(3) of the Senior Courts Act 1981.

21 In *Hosking v Apax Partners LLP* [2016] EWHC 1986 (Ch), Sir Terence Etherton C, gave valuable guidance in [28] as to the correct approach to applications of this kind, and quoted at [30] from guidance given by Gloster J in *Klöckner Holdings GmbH & Anor v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm). As the Chancellor makes clear, the burden in such cases always lies on the applicant seeking a stay to demonstrate clearly by

cogent evidence that there are sound reasons for a stay. As Lord Bingham (then Lord Chief Justice) said in the case of *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173, stays are only granted in cases of this type in rare and compelling circumstances.

22 Among the considerations referred to by Gloster J in the *Klöckner* case are some which are particularly relevant to the present case. First of all, even where there are strong reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party. Secondly, a stay will not, at least in general, be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed. For that reason, a stay will not, at least in general, be appropriate if the parties to the other proceedings are not the same. Gloster J also pointed out that an action alleging fraud (of which this is an example) should, if possible, come to trial quickly. Thus unwarranted delay may lead to an action being dismissed for want of prosecution even before the limitation period has expired.

23 I now turn to the arguments of the parties. Mr James Watthey, who has appeared for the defendants, argues that it is plain that this is a case in which the jurisdiction ought to be exercised. It will allow for the orderly and efficient conduct of the proceedings. It will prevent a needless waste of parties' and the court's resources. It will allow the exchange of evidence and proper cross-examination of witnesses without the fear of prejudicing other (especially criminal) proceedings, and it will avoid the risk of irreconcilable judgments. He gives the following example., Suppose (Mr Watthey suggests) that Biogra is allowed to go ahead and get its judgment from this court within eighteen months or so of today. Suppose also that that judgment is in Biogra's favour, on the basis that the goods supplied under the contracts between Biogra and item were, in truth, imported from the USA and were not made in Bosnia, and, on that basis, Biogra gets a judgment in its favour for repayment of the €3 million-odd which it has been made to pay to the Belgian customs authorities. What then happens (Mr Watthey asks rhetorically) if, two or three years down the line, there is then a judgment in the Belgian civil proceedings which effectively sets aside the injunction granted by the Belgian customs authorities. states that the penalty is a nullity, and results in the repayment of the penalty to Biogra? In those circumstances, Mr Watthey argues, Sistem would have won only a pyrrhic victory in Belgium because, by then, there would be a judgment of the English court binding on them to the contrary effect. Biogra would not merely have the money that they had got from the defendants but also the repayment from the Belgian customs authorities, and the defendants would have no cause of action against Biogra which could not be met by an issue estoppel. That, he said, is a potential situation which ought very much to be avoided.

24 Mr Watthey also submits that to take any other course than to allow the proceedings in Belgium to go ahead whilst staying the English proceedings will result in his clients fighting on two separate fronts, quite unnecessarily, and with there being a powerful waste of costs and court time in so doing.

25 Finally, he says that it would be greatly unfair to require his clients to go through the English process, which involves pleading a full defence, giving disclosure, and providing witness statements and experts' reports and the like, when they have criminal proceedings pending against them in a jurisdiction which does not, as is common ground, have equivalent disclosure requirements, so that they are placed at a disadvantage as against the prosecuting authorities in Belgium.

26 As to the relevance of the criminal proceedings against Mr Rivera, Mr Watthey did not pursue that in oral argument. In his skeleton argument, however,, he makes the point that Mr

Rivera's credibility may be in issue at any trial in England and he may be able to plead the privilege against self-incrimination against answering questions if the trial of these proceedings takes place before Mr Rivera's trial on the criminal matters. I confess I find that a difficult argument to accept, not least because Mr Rivera's trial is presently due to take place in September 2022. With the best will in the world, it seems to me to be highly unlikely that the trial of the present action could take place before then.

27 Biogra's arguments were put forward by Ms Lara Hicks. She places reliance upon the fact that the English courts have jurisdiction either (as is her client's case) by virtue of exclusive jurisdiction clauses in the relevant contracts, or (as is common ground) by virtue of the fact that the defendants have voluntarily submitted to the jurisdiction of the English court. On that basis, she says that it is just and right that Biogra should be entitled to have its complex, important, and high value claim, involving allegations of fraud, resolved expeditiously in accordance with the overriding objective and without any due delay before the Commercial Court, which has exclusive jurisdiction.

28 Ms Hicks also argues that the prejudice to Biogra, far outweighs any benefits or prejudice to the defendants. In summary, she says that there is considerable financial prejudice to Biogra in continuing to have to pay the amount exacted by the Belgian authorities. She also says there would be prejudice to the defendant in the prosecution of its case were the action to be stayed, as the delays inherent in any stay would inevitably give rise to a real risk of witnesses' memories fading, or of those witnesses dying, or becoming unavailable.

29 Ms Hicks also submits that the foreign civil proceedings are not going to be finally determined within a year and that further delays and stay applications are only likely to ensue. This, Ms Hicks argues, will cause yet further prejudice to Biogra, together with associated costs. Furthermore, if the defendants lose their defences to the Belgian proceedings - if they are, for example, found guilty in the criminal proceedings – they may as a result become insolvent, Biogra may therefore be at risk of having nothing in its hands and no solvent part against which to enforce any English High Court judgment. Ms Hicks accepts that Biogra does hold some $480,000-worth of security in a client account of Dutch lawyers but that, Ms Hicks argues, represents only about 13 percent of the quantum of the claim.

30 Ms Hicks moreover submits that the defendants' assertion that Biogra's claim will fall away as a consequence of the foreign proceedings presupposes that the defendants will be successful in their actions in Belgium. She further submits that there is some question as to the standing of Sistem to bring the claim in the Belgian civil proceedings (which are the only material ones, in that they are the ones which could directly result in the setting aside of the Belgian injunction order) in that Sistem is not a person who has paid the amounts exacted by that injunction order. Ms Hicks points out that this has already been questioned by the court at first instance in Brussels in the order that it made staying in the civil proceedings pending the determination of the criminal trial.

31 Ms Hicks also points out that the OLAF report, which is what is challenged by the proceedings before the Court of Justice of the European Union, is not the only evidence on which Biogra relies. So that even if that evidence is undermined, it will not necessarily determine the outcome of the litigation in England.

32 Mr Watthey answers that last point by saying that, as far as the present action is concerned, the reality is that the claim is a claim simply for repayment by the defendant seller to the claimant buyer of the civil penalties exacted by the Belgian customs authorities. It follows

that, if the Belgian tax authority penalties fall away, there will be nothing left of the claim. Ms Hicks suggests that there may be damages and costs and things like that: but, in Mr Watthey's submission, the reality is that if the Belgian penalties fall away, it must be highly unlikely that her clients would go to the effort of proving the facts in order to recover comparatively small amounts of money.

33 In exercising my discretion on the basis of these arguments, I have also to bear in mind the fact that although this is a claim in the Commercial Court, it is by Commercial Court standards quite a small one being for a matter of €3 million-odd and that it is very easy, therefore, for costs to become disproportionate to the amount at stake.

34 I have not found this an easy matter. My first instinct was that the appropriate answer was to say that matters should simply take their course, both in this jurisdiction and elsewhere. As has been indicated by the Chancellor, the burden lies on the applicant seeking a stay to demonstrate by cogent evidence that there are sound reasons for a stay and it will normally be the case that, unless there is very compelling evidence that injustice will be caused, proceedings ought to be allowed to continue in England, particularly where there is no question as to jurisdiction.

35 However, this is a very unusual case. I am particularly struck by the fact that the only matter which is in issue is the Belgium tax penalty. If that goes, then there will be little or nothing left of the claim, certainly nothing of substance in the claim as is presently pleaded. The Belgian courts and/or the CJEU are the only jurisdictions in which that penalty can be upheld or revoked. Nothing decided by the English courts in the present action could finally resolve that issue, since the English courts have no jurisdiction either over OLAF or over the Belgian customs authorities.

36 I am also struck by the fact that, just looking at the pleadings and listening to what Mr Watthey has had to say about them, it is plain that the next stages in these proceedings are not actually going to be moving the matter forward towards trial. They are going to involve applications for striking out various aspects of the pleadings, particularly the pleadings in fraud and conspiracy and the like, and to requests for further information concerning the nature of the contracts alleged (which are not pleaded out in the same detail as perhaps they ought to have been). There are going to be applications for security for costs and matters like that. So it is plain that a fair amount of money is going to be spent at an early stage which will not advance the resolution of the real issue in the case.

37 That having been said, I am conscious of the possible damage that may be caused to Biogra by being kept out of its money unnecessarily, and I have not forgotten that it was part of Ms Hicks's submissions that the defendants have already been the cause of unnecessary delay by disputing jurisdiction and requiring permission to serve out to be given by them. The defendants initially indicated an intention to dispute jurisdiction and sought extensions of time to do so, only thereafter to change their stance and voluntarily to submit the jurisdiction, that has all added to the delay and to the time which will be required in order to resolve this dispute. I am not persuaded that this conduct casts doubt upon the defendants' motives for seeking a stay. On the other hand, it is a factor that I must take into account in weighing justice and injustice.

38 Not without some hesitation, I am prepared on the very unusual facts of the present case to grant a stay. I am, however, only prepared to grant such a stay on conditions which are designed, so far as I can, to protect and to minimise the prejudice to Biogra. I asked Mr Watthey if he was prepared to offer some undertakings to protect Biogra's position. He said

he had no instructions to do so.. In the circumstances, I am not going to ask him to volunteer those matters, but instead am going to make them a condition of the order. If Mr Watthey wants a stay, then his clients must give an undertaking, first of all to be bound by the result of the Belgian criminal proceedings in the English proceedings so that there is no need for further delay after that, and, secondly, that he will prosecute the three sets of proceedings - the proceedings before the Court of Justice of the European Union, the Belgian civil proceedings, and the Belgian criminal proceedings - to the extent possible with reasonable expedition. I am also going to make it a condition of the order that the defendants should report on the progress of those proceedings to Biogra's solicitors on a regular basis, so that they know what is going on and so that they have a chance to come back to court if that undertaking is not being honoured, in order to seek the lifting of the stay.

39 I am not going to limit the stay to any defined period. I am going to allow the stay to be open ended but I am going to give liberty to apply in the event that the reports that are given are not satisfactory, or if the material reported shows that there has been some material change of circumstances, or the delay is likely to be inordinate before those foreign proceedings have resolved.

40 As I say, I am not giving Mr Watthey's clients the option. If they want their stay, that is the price of it. If they are not prepared to pay that price, then the action will go ahead and I will give case management directions, or another judge will do so in due course.

41 I will hear the parties on the terms of the order at some appropriate time. I encourage them both to cooperate in drawing up something that does its best to protect Biogra in these difficult circumstances while, at the same time, making practical allowances for what it is possible to do in Belgium and before the Court of Justice of the European Union.

CERTIFICATE

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This transcript has been approved by the Judge.