Neutral Citation Number: [2023] EWHC 3135 (Comm)

Claim number: CL-2023-000575

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Tuesday, 5 December 2023

BEFORE:

MR JUSTICE ANDREW BAKER (in public)

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BETWEEN:

THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
Claimant

- and -

SUNLINK ENERGIES AND RESOURCES LIMITED
Defendant

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BEN JURATOWITCH KC and ANTON DUDNIKOV (Instructed by Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ) appeared on behalf of the Claimant.

The Defendant did not attend and was not represented

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JUDGMENT
(Approved Transcript)

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Mr Justice Andrew Baker:

1. In this claim, an interim anti-suit injunction was granted by Calver J on 20 September 2023 and by paragraph 8 of his order provision was made for a return date at which, as the order said, the claimant's claim for a final anti-suit injunction was also to be determined. It went without saying of course that, depending on developments thereafter, the court at any return date would retain a discretion to conclude that further interlocutory process was required before in fact determining the claim for final injunctive relief.

2. Following service of the proceedings, a matter to which I shall return very briefly in a moment, the defendant acknowledged service and stated in its acknowledgement of service an intention to contest the jurisdiction of the court.

3. An application under CPR Part 11 disputing the court's jurisdiction was in due course issued by the defendant dated 26 October 2023. The return date directed by Calver J was listed for today, 5 December 2023, and has in the event come before me for hearing.

4. In the very recent past, on and since 22 November 2023 the defendant's procedural stance has altered. Starting with communications on that date from Keystone Law, its solicitors of record in these proceedings, the defendant has made clear that it withdraws the jurisdiction challenge and will not take any step before the court to contest the anti-suit injunction claim. It was said on the defendant's behalf at the same time that that was not to be taken as a concession that the court had jurisdiction or that an anti-suit injunction was appropriately granted.

5. Mr Juratowitch KC for the claimant has drawn attention to the fact that in relation to that recently changed procedural stance, the defendant has not spoken entirely with one voice as to its motivation. In particular, he draws attention to the fact that, as first communicated, the primary motivation appears to have been that of saving costs, the defendant asserting that the proceedings it has sought to pursue against the claimant in Nigeria are the core proceedings and its focus would be upon those, but more recently, and in communications with the court, it has focused primarily on an asserted desire to

avoid taking steps in this court that might be regarded as a submission to its jurisdiction as to the merits of the anti-suit injunction claim. It does not seem to me that anything turns on those subtleties of the defendant's expressed motivation.

6. The position as regards the court's jurisdiction most straightforwardly is that by paragraphs 3 to 5 of the order of Calver J in September permission as to methods of service of these proceedings on the defendant were authorised. I have been shown the evidence of the service of proceedings in accordance with those authorised methods. The defendant having not sought to pursue but, rather, having withdrawn so that it will today be dismissed, its Part 11 application, there is no application before the court for Calver J's authorisations as to methods of service to be set aside. The position, therefore, is that the court is duly seised of this matter as against the defendant, which has been properly served with these proceedings. That gives the court jurisdiction to act if the claim on its merits is made out.

7. In any event, the arbitration agreement in respect of which the anti-suit claim is brought provides for arbitration before arbitrators under the auspices of the ICC and as recently as Friday, 1 December 2023 the ICC court has designated London as the place of arbitration, in the terminology of the ICC rules, which means that for the purposes of proceedings before this court, the seat of arbitration has been confirmed to be London. For either or both of those reasons, I am satisfied that the court has jurisdiction to entertain the claim now brought against the Defendant seeking final relief.

8. The arbitration clause, which appears in clause 25 of the underlying contract between the parties (a Joint Operating Agreement dated 15 November 2005 relating to Nigerian Oil Prospecting Licence 238 (subsequently converted to Oil Mining Lease 144)), is in these terms, at 25.2:

> "Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, which cannot be amicably resolved between the Parties (whether in its capacity as a Party to this Agreement or as a Technical Partner) shall be referred to and finally resolved by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce effective at the time notice of arbitration is served, which Rules are deemed to be incorporated by reference into this Clause."

9. Then Clause 25.3 is as follows:

> "The arbitration will be conducted in English in London by three (3) arbitrators. The arbitrators shall be retired judicial figures of standing, or Queen's Counsel practising at the commercial Bar, or similar qualified Solicitors. Where appropriate, the arbitrator's decision shall state a time for compliance with the decision. Each party shall bear its own arbitration costs and expenses, including the costs of its witnesses."

10. Clause 25.1 of the contract provides that the contract is governed by and to be construed, interpreted and applied in accordance with the laws of the Federal Republic of Nigeria. Pursuant to that clause, and in accordance with the approach of English law to matters of the law governing an arbitration agreement as it currently stands under the Supreme Court's decision in *Enka v Chubb* [2021] WLR 4117, Mr Juratowitch rightly accepts that the law governing the arbitration clause should be taken to be the law of Nigeria.

11. The admissible expert evidence in relation to the law of Nigeria concerning the seat of an arbitration under an arbitration agreement governed by English law comes in the form of two statements of Olumide Aju SAN, an experienced barrister and solicitor of the Supreme Court of Nigeria. His evidence explains the provisions of the Nigerian Arbitration and Mediation Act 2023, in particular, section 32 of that Act concerning the seat. He explains further how, in his opinion - which I accept for the purposes of these proceedings - the terms of clause 25.3 of the contract which I have quoted will be regarded, under Nigerian law, as specifying London as the seat of arbitration, and were that not the case, then by first default rule, the seat of the arbitration would fall to be stipulated by the parties' chosen arbitrators, or arbitral institution. In this case, as I have already indicated, that has now also occurred, the ICC court designating London as the seat or place, in ICC terminology, of arbitration.

12. The claim for anti-suit relief arose initially in September when the defendant commenced proceedings against the claimant in the High Court of the Federal Capital Territory, Abuja in Nigeria, asserting the ineffectiveness or inoperability of the arbitration clause, and articulating claims alleging breach of the underlying contract by

the claimant, and damages to be sought in excess of US$1 billion, with a claim for interest on such damages at a rate of 21% per annum.

13. The asserted basis for the claim that the arbitration agreement is, in some way, ineffective or inoperative, was as follows.

14. Firstly, the defendant pointed out that the current iteration of the ICC Rules is no longer entitled "Rules of Conciliation and Arbitration of the International Chamber of Commerce", the title for a set of ICC rules referred to in clause 25 of the contract. I have no doubt, however, that the proper interpretation of that clause, with its prospective aspect specifying that the rules in question are to be those in force from time to time, is that so long as one can identify a current set of ICC rules as being, in effect, the successors to what have historically been called Rules of Conciliation and Arbitration, then those current rules are the rules to which clause 25 refers. That, of course, is the position as a matter of fact as regards the current ICC Rules of Arbitration.

15. In my judgment, the suggestion that, on that point of wording, there was some basis to avoid the obligation to arbitrate, was at no stage an arguable defence.

16. Secondly, it is suggested to render the arbitration agreement, as the defendant's Nigerian lawyers have expressed it, a pathological agreement incapable of being performed and, therefore, void, that it calls for the arbitrators to be retired judicial figures of standing, or current Queen's Counsel (meaning, now, King's Counsel) practising at the Commercial Bar, or similarly qualified solicitors. The suggested argument there is that because English retired judges, King's Counsel or solicitors, will not be, or have been, practising Nigerian lawyers, somehow the arbitration agreement is incapable of application and void. Again, I have no doubt that there is not, and never has been, any arguable merit in that point.

17. Thirdly, it is suggested that the subject matter of the claim raises fundamental matters of Nigerian public and economic policy that are incapable, as a matter of Nigerian law, of being the subject of a valid reference to arbitration. There is no evidence of Nigerian law before the court to support any such proposition. The value of the dispute may be

high, but there is nothing that the court has seen in the evidence concerning the dispute to indicate that, ultimately, it is anything other than a high value commercial dispute arising out of a commercial contract. Furthermore, in the context of the Nigerian proceedings brought by the defendant, the position, as it currently stands, is that by decision of the Nigerian court on 21 November 2023, the claimant's application there to stay the Nigerian proceedings in favour of arbitration, has been upheld. The proceedings have been stayed on the simple ground that there is, between the parties, a valid and effective obligation to refer the matter to arbitration.

18. I have no doubt, in the circumstances, that the parties are, and have throughout, been subject to a valid and effective obligation to arbitrate disputes, if they wish them to be resolved having been unable to agree them, pursuant to clause 25 of their contract, that agreement extending to all of the matters which the defendant has sought to put before the Nigerian court. The suggested reasons for the defendant going to court in Nigeria rather than arbitration have no arguable merit and have never had any arguable merit, but, rather, have been concocted pretexts for seeking to litigate in the face of a plain obligation to arbitrate.

19. The defendant has not rested upon the bringing in Nigeria of substantive contractual claims in breach of its obligation to arbitrate. It has, in addition, sought directly to interfere with the due process of the arbitration by issuing and seeking to have the Nigerian court deal with an application by way of contempt against the claimant and some seven of its directors or officers for any part they have played, or might play, in seeking in these proceedings to have the obligation to arbitrate enforced by this court, or in the ICC reference that has now been commenced to have substantive matters dealt with there.

20. In those circumstances, it is the plainest of cases in which the defendant has breached, without colourable excuse or justification, its obligation to arbitrate. It plainly, and, indeed, in this case, explicitly, threatens and intends to continue, unless restrained, to pursue the claimant through the Nigerian proceedings, and appeals within those proceedings, in breach of that obligation to arbitrate. There is no, and there never has been any, good reason for the defendant's actions in breach of its obligation to arbitrate, and final injunctive relief should be granted accordingly.

21. In relation to the form of order, on which I have been much assisted by the drafting and submissions of Mr Dudnikov, there will need to be the additional recitals that he and I discussed when he was taking me through the draft order. I would add that the final form of order should also recite the ICC arbitration reference number that the parties now have upon the commencement of the reference to arbitration and, on that basis, subject to precise wording that I can check and approve when I go through a revised draft that Mr Dudnikov will provide via my Clerk, the proposed declaration can also confirm that, in any event, London has been designated as the seat of the arbitration by the ICC court communication on Friday.

22. In line with the approach adopted in this court, recently expressed by way of example by Butcher J in *SM Production Corp v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm) at [53], but which I have also expressed myself in earlier cases, the final anti-suit injunction will now include elements of relief that are mandatory in form, requiring the defendant to take steps necessary to discontinue or withdraw proceedings in Nigeria. The defendant has currently, I should have explained, issued two separate appeal notices seeking to appeal against the decisions reached in the Nigerian court in November to entertain the claimant's application there to stay the proceedings in favour of arbitration, and to do so without adjourning or first considering the defendant's contempt application that it has sought to bring within those proceedings. To that extent, though mandatory in form, the order will do no more in substance than express what is expected and required to occur in order for the defendant, in prohibitory language, no longer to be pursuing, continuing, prosecuting, or taking further steps in its Nigerian proceedings.

23. As regards the service of the order, I accept the justification for the expressing, for the avoidance of doubt, in this order of the continuation of the permissions granted by Calver J in September as to how orders in the proceedings may be served on the defendant, and that, in addition, they continuing to be on the record for the defendant in front of this court, even if the jurisdiction application has been withdrawn and the defendant has chosen not to participate any further, for the order to record that service may be effected on Keystone Law by email. However, I am not persuaded, as matters stand, that it is necessary or appropriate either to widen the scope of permission as to authorised methods of service beyond those ordered by Calver J, so as now also to

include service on the defendant by way of service by email or courier on Chief Bolarinde, or that it is necessary or appropriate to order that personal service of the order on individual directors or officers of the defendant for the possible purpose in the future of proceedings for contempt against those individuals should be dispensed with at this stage.

24. In those circumstances, I apprehend, subject to Mr Dudnikov reviewing this as part of providing me with a revised draft, the provisions as to service can simply be his proposed paragraph 7, providing, for the avoidance of doubt, that the provisions as to service in Calver J's order continue to apply, and that the order may be served on the defendant's solicitors by email, his proposed paragraph 9 as to the date of service, for service by email, and his proposed paragraph 10, but without the closing words concerning officers or directors, so that paragraph 10, dispensing with personal service, will relate only to service on the defendant.

25. In relation, finally, to costs, plainly the claim has succeeded. It has succeeded in circumstances where I have made the observations I have made as to the meritlessness of the defences or suggested defences, whether as to jurisdiction or as to substance, that have been intimated by the defendant. This is a clear case in which the claimant should have its costs of the proceedings generally, including, for the avoidance of doubt, therefore, the original interim application before Calver J and the now withdrawn jurisdiction application, such costs to be assessed, in principle, on the indemnity basis.

26. The total costs claimed, converting all disbursements to US Dollar equivalents in light of the discussion with Mr Dudnikov as to the currencies involved, US Dollars being the primary currency in which the claimant has agreed with Clifford Chance to be billed for legal services in the case, come to, rounded off very slightly, U$575,000. Mr Dudnikov fairly recognises that a small downward adjustment needs to be made because the schedules anticipated attendance at the hearing today of Ms Marshall, the senior associate, but in fact she has not attended. He also acknowledges that the solicitors' fees are at hourly rates that are consistently very substantially in excess of the guideline rates as to normal, reasonable charge-out rates for commercial litigation.

27. It is, at least as asserted by the defendant, very high value litigation, the defendant having asserted in Nigeria that its claims for damages exceed $1 billion. I have not been invited to examine the credibility of that claim in order to be able to begin any assessment for the purposes of evaluating the reasonableness of the costs charged of the defendant's suggestion that it might have claims which, if valid as to liability, might approach that sort of value. It is not otherwise, by the standards of litigation in this court generally, or litigation by way of anti-suit injunctions in particular, a case of particular complexity or difficulty; but I do take into account the fact that, as is often the case with anti-suit injunction claims, there was a real degree of urgency involved in the need to respond, and respond comprehensively and rapidly, to the developments in Nigeria once they kicked off from the beginning of September of this year.

28. In all the circumstances, in my judgment, it is appropriate, so as to enable the parties to draw a line under the proceedings at this stage and not require the claimant to undertake the yet further processes and incur the delays of a detailed assessment, to assess the costs summarily, and I do so in the sum of $490,000. That is approximately 85% recovery on the costs as billed, reflecting the indemnity basis of assessment and taking account of the points I have mentioned.