QB-2019-000183

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

[2020] EWHC 75 (QB)

23rd January 2020

Before :

MASTER DAVISON

- -

Between :

LENKOR ENERGY TRADING DMCC	**Claimant**
- and -	
IRFAN IQBAL PURI	**Defendant**

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- -

Mr James Collins QC and Mr Philip Jones (**Mackrell**) for the **Claimant**
Mr Nigel Cooper QC and Ms Zahra Al-Rikabi (**Hill Dickinson**) for the **Defendant**

Hearing date: 13 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. This is the claimant's application for summary judgment. The application seeks recognition at common law of the judgment of the Dubai First Instance Court (Judge Haidar Abdulrahim Hajj Omar) dated 30 May 2017. Judgment was entered against the defendant, Mr Puri, for AED (Dirhams)123,727,048 (plus interest at 9% per year). The total amount claimed within the Claim Form including interest is AED 173,342,180.

2. There was an appeals process which included two visits to the UAE's highest court, the Court of Cassation. The net effect of the appeals was to uphold the judgment. It is common ground that the judgment is the final and conclusive judgment of a court of competent jurisdiction. Therefore the *prima facie* position at common law is that it is to be recognised and enforced within this jurisdiction. But the defendant resists on the basis that recognition would be contrary to public policy.

Narrative background

3. Mr Puri was the sole shareholder in and managing director of a Dubai company, IP Commodities DMCC ("IPC Dubai"). On 20 July 2014 and 7 August 2014 IPC Dubai drew two cheques in favour of the claimant ("Lenkor Dubai") on a Dubai branch of Habib Bank Ltd. These were cheque 156851 for AED 91,400,200 and cheque 156862 for AED 117,100,000. Each of the cheques was signed by Mr Puri. Neither cheque stated expressly that Mr Puri was signing on behalf of IPC Dubai, but both had the name of that company stamped on them. The cheques were delivered to the claimant pursuant to an agreement made on 4 June 2014 between Lenkor Energy Trading Limited ("Lenkor HK") (a sister company of the claimant incorporated in Hong Kong), IPC Dubai and a Pakistani corporate entity, which was the Buyer. There is no need to identify this entity in this judgment and I will continue to refer to it simply as "the Buyer". The agreement provided for Lenkor HK to sell six cargoes of gasoil to the Buyer, with IPC Dubai acting as middleman ("the Tripartite Agreement").

4. Paragraph 15 of the Tripartite Agreement provided for payment by Letter of Credit as to 50% of each cargo value and by telegraphic transfer as to the other 50%. By paragraph 15(c) IPC Dubai was "to issue a payment guarantee for hundred percent of the cargo value by cheque in favour of [Lenkor Dubai] … 3 days before the vessel commences loading". It was pursuant to this provision that the two cheques referred to above were drawn.

5. The payment provisions were varied so that payment was in fact agreed to be made by the Buyer to IPC Dubai as Lenkor HK's nominee. Two cargoes were delivered to the Buyer. The discharge port was Karachi. Pursuant to the payment obligations as varied, the Buyer made part-payment of approximately US$35m to IPC Dubai. This consisted of a payment of USD 4,008,900 to IPC Dubai in Dubai and (at IPC Dubai's direction) PKR 3,196,855,717 (Rupees) to its sister company in Pakistan, IP Commodities Pakistan Ltd ("IPC Pakistan"). However, neither IPC Dubai nor IPC Pakistan paid any of this money over to Lenkor HK. The Buyer also refused to pay the balance.

6. As a result, Lenkor HK initiated arbitration proceedings in London, with Mr Steven Berry QC as arbitrator. The main issues in the arbitration were resolved by the corrected and clarified partial final award of 26 February 2018. IPC Dubai was found liable to pay to Lenkor HK the monies which it and its sister company, IPC Pakistan, had received. The Buyer was found liable to pay a sum in US dollars which represented the difference (or "extra") between what it had already paid over to IPC Dubai and the actual value of the cargoes. The arbitrator did not award Lenkor HK the full contract price of the cargoes because he found that the contract was tainted by illegality. The nature of that illegality was that Lenkor HK, through its servant or agent Mr Atiyeh, intended to deliver and did deliver a type of gasoil known as "Heavy End Product" sourced from Iran rather than the "High Speed Diesel" sourced from the UAE which the Tripartite Agreement actually contemplated and provided for. To this end, load port documents such as bills of lading were falsified and so were loadport test results. IPC Dubai and Mr Puri were complicit in this deception – though the arbitrator found that Lenkor HK was the more culpable party.

7. The arbitration award has not been satisfied.

8. With no payment received for the two delivered cargoes, the claimant also sought to cash the cheques. There is a dispute as to whether or how, and if so when, they were presented. However this may be, IPC Dubai did not have sufficient funds in its account to honour them and they were not honoured. This led to both criminal and civil proceedings in Dubai against Mr Puri.

9. In the criminal proceedings, Mr Puri was convicted for signing the dishonoured cheques and sentenced to 3 years in prison.

10. The civil proceedings resulted in the judgment set out above. The legal basis for the judgment was Article 599/2 of Dubai's Commercial Transactions Law. This was summarised by the Dubai Court of Appeal as follows:

> "… the cheque drawer for another account is personally liable in respect of his funds in the event that the claim of the beneficiary is filed on the basis of the bank obligation in accordance with Article 599/2 of the Commercial Transactions Law, unless the drawer proves that the drawee of the cheque had at the time of its drawing sufficient consideration for payment."

(The evident intention of this statutory provision was to encourage probity in cheque transactions by placing on the drawer a burden to ensure that the drawee account was in funds.)

11. An important fact to note is that the Dubai court did not order Mr Puri to pay the full value of the cheques. This amount would have been AED 208,500,200. What was ordered was AED 123,272,048 which was the total amount "received by [Mr Puri] and his company [IPC Dubai]"; see the Dubai Court of Appeal's judgment following the hearing of 28 March 2018. In other words, Mr Puri was found liable for the sums which the Buyer had paid over to IPC Dubai but which had not been remitted onwards to the Seller.

12. The interest of 9% was ordered to run from the due dates of the cheques (which fell in the last quarter of 2014). The rate appears to have been set by the exercise of a judicial discretion. The claimant asked for 12%; the judge awarded 9%.

13. The Claim Form was issued on 17 January 2019. The application for summary judgment was issued on 26 July 2019.

The law on recognition of judgments

14. The relevant law for present purposes is set out in Rules 42 and 51 of *Dicey, Morris and Collins on the Conflict of Laws*, 15th Ed:

> Rule 42
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> (1) Subject to the Exceptions hereinafter mentioned and to Rule 62 (international conventions), a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment is
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> (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
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> (b) final and conclusive,
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> but not otherwise. Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.

> (2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, which is not impeachable under any of Rules 49 to 54 and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England.
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> Rule 51
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> A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy.

15. In accordance with Rule 51, it is the judgment and not the underlying transaction upon which the judgment is based which must offend English public policy. That point has been illustrated in a number of cases, but perhaps most economically in the case of *Omnium De Traitement Et De Valorisation v Hilmarton* [1999] 2 Lloyd's Rep 222, a decision of Timothy Walker J. An ICC arbitration applying Swiss law as both the law of the contract and the curial law upheld a claim for fees rendered in respect of services performed in Algeria. The services consisted of approaching public servants and government officials in order to obtain a public works contract for OTV's benefit. These activities did not involve bribery or corruption but were nevertheless contrary to an Algerian statute and the contract was therefore unlawful in its place of performance. OTV offered this as a reason why the arbitrator's award should not be recognised in England. Timothy Walker J stated the point shortly as follows:

> The public policy point invoked by OTV is that the agreement was unlawful in its place of performance. It is however in my judgment necessary for OTV to go further and establish that this infects the award as well.

He went on to say this:

> … I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbirtral awards) that the award should be enforced.

15. Clearly, the same policy considerations would apply to judgments of a foreign court.

The law on summary judgment

16. The law governing the application is very familiar. In relevant part, CPR rule 24.2 says:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if – (a) it considers that – (ii) that defendant has no real prospect of successfully defending the claim or issue and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

17. The approach to summary judgment applications was set out by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15. But, as Mr Collins QC, who appeared for the claimant, pointed out, that approach is generally directed to cases where there are disputes of fact. In the present case there are no significant disputes of fact. The issues are legal issues in respect of which the following statement by Moore-Bick LJ in *ICI Chemicals & Polymers Ltd* [2007] EWCA Civ 725 has resonance: "if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better".

The public policy defences

18. These sub-divided into (1) illegality, (2) impermissible piercing of the corporate veil and (3) penalty. I will summarise the submissions of Mr Cooper QC, who appeared for the defendant, under each heading.

Illegality

19. This heading might better have been labelled "illegality of underlying transaction".

20. The cheques had been given pursuant to paragraph 15(c) of the Tripartite Agreement as a payment guarantee for the contract price of the cargoes of gasoil. The claim for the contract price had been found to be tainted by illegality so that the arbitrator had, in accordance with the law established by *Patel v Mirza* [2016] UKSC 42, found it proportionate to deny that claim (though he upheld Lenkor HK's claim for restitution). Under English law, the finding that the principal obligation was tainted by illegality would have prevented enforcement of the guarantee; see e.g. *Heald v O'Connor* [1971] 1 WLR 497. Although Mr Cooper QC acknowledged that the cheques and the Dubai judgment gave rise to autonomous rights and obligations, he submitted that the court should look at the reality. And the reality was that there was a finding of illegality of the underlying transaction which tainted both the cheques and the claim to recognise the judgment. Another way of putting it was that the claimant was trying to enforce "by the back door" a claim which the arbitrator had found that it was not entitled to enforce.

21. Mr Cooper QC sought to distinguish the *OTV* case on the ground that in that case the arbitrator had addressed and dealt with the issue of illegality. In this case, the Dubai court's decision pre-dated that of the arbitrator and the issue of illegality had not been aired. Mr Cooper QC submitted that I should therefore address the issue and form my own view. In support of that proposition, he referred me to a passage in a Court of Appeal decision relied upon by Timothy Walker J in *OTV*, namely *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [2000] QB 288 at 311. It is sufficient if I cite the closing words of the passage relied upon. Waller LJ said this:

> There are authorities which in my view support the proposition that where illegality is raised and at least where the evidence of illegality is so strong that if not answered it would be decisive of the case, the court would not allow reliance on issue estoppel, or on the principle in *Henderson v. Henderson* to prevent the point being ventilated. In other words, illegality can if raised provide the special circumstances in which an estoppel will not provide a defence.

22. Mr Cooper QC also referred me to *Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm), which is summarised in *Andrews and Millett, The Law of Guarantees*, 7th Ed, at 6-019:

> If a liquidated damages clause in the underlying contract is struck down as a penalty, a "saving" clause in the guarantee providing that the guarantor is not to be released from liability even if the contract is found to be invalid or unenforceable is unlikely to assist the creditor: in *Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm); [2011] 1 Lloyd's Rep. 473, Blair J held (obiter) that it would be contrary to principle to allow the indirect enforcement of a claim for a penalty by such means. Moreover, as the guarantee related to all the principal's obligations, it could not apply to a penalty, because that would never give rise to any "obligation."

23. The decision of Blair J that the wording of the guarantee did not overcome the finding of illegality affecting the underlying obligation was submitted to be encouragement for me to scrutinise the transaction underlying the cheques in this case. That transaction had been found to be unenforceable. So too the cheques, which had been drawn in support.

Impermissible piercing of the corporate veil

24. Mr Cooper QC's submissions on this point were focused on the respects in which the Dubai judgment ran counter to well-recognised principles of English law. In brief summary, these were as follows. Mr Puri was being made personally liable for the debts of IPC Dubai, which

was the relevant party (as guarantor) to the Tripartite Agreement and the holder of the account upon which the cheques were drawn. The cheques had not been presented or had been presented out of time – or there was at least an issue about that. The combination of these matters was to impose an exorbitant liability on Mr Puri for sums which he had not agreed to guarantee.

Penalty

25. Mr Cooper QC summarised the test under English law as "whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract" and Mr Collins QC did not dispute this formulation. Mr Cooper QC submitted that the interest rate of 9% (taken from the date the cheques were due) was exorbitant in that it had by now added some 40% to the principal sum. Taken in combination with the principal sum, the amount for which Mr Puri was liable was said to be an exorbitant liability.

Discussion

26. I will not recite the submissions of Mr Collins QC. They appear sufficiently from what follows.

(1) Illegality

27. The starting point is Rule 51 of *Dicey*. The judgment is only impeachable on the ground that its recognition would be contrary to public policy. It is agreed between the parties that the basis of the judgment was Article 599/2 of Dubai's Commercial Transactions Law, which imposes a personal liability on the drawer of a cheque where the drawer cannot prove (the burden being on him) that the account was sufficiently in funds. As already observed, there is a powerful rationale behind this statutory liability. It is not the law of this country. But it cannot be said to offend any principle of English public policy. English law certainly recognises that a cheque gives rise to rights and liabilities that are unconditional and autonomous such that a cheque is treated as akin to cash. That the law of Dubai provides for more onerous liabilities is neither surprising nor repugnant.

28. I, of course, accept that there are circumstances where an English court might enquire into the underlying transactions which gave rise to the judgment. Timothy Walker J in the *OTV* case gave the examples of an award or judgment which was "infected" with the underlying public policy point or "which contained a finding of fact of corrupt practices which would give rise to obvious public policy considerations". In the course of his submissions Mr Collins QC gave the further (and very extreme) example of a money judgment in respect of a "contract killing". There are no such circumstances here. The most that can be said is that the judgment does not confront the issue of the illegality affecting the Tripartite Agreement. But to this there are two decisive answers:

(i) The judgment did not have to confront this issue. The judgment was squarely based upon the legal consequences of signing cheques in Dubai in circumstances where there were insufficient funds to meet them. On the face of the judgment, those legal consequences were self-contained and independent. That an English court might have approached matters differently is irrelevant. It was a Dubai court applying the law of Dubai.

(ii) Even if it were permissible to look at the underlying transactions, the question that would arise would be whether enforcing the judgment would amount to indirectly enforcing the Buyer's obligation to pay the contract price. It would not. The Dubai judgment was for a sum equal to the amount which the Buyer paid over to IPC Dubai, but which was not remitted onwards to Lenkor HK. This was considerably less than the contract price. If the judgment indirectly enforced any obligation, it was IPC Dubai's obligation to account to Lenkor HK for the sums which it had received. This was found by the arbitrator to be an enforceable obligation both in contract and restitution. Thus, if I were required to form my own view, it would be that the underlying illegality was confined to the Buyer's obligation to pay the contract price and that that obligation was not

indirectly enforced by the civil claim and judgment in Dubai. To express that proposition in the language used in the *Westacre* decision (albeit that the passage relied on related to issue estoppel and does not neatly "map" on to the question of recognition), illegality would not have been "decisive of the case".

29. For these reasons, I find that illegality is no bar to recognition of the Dubai judgment. I would add two further observations both of which concern the overall fairness of that conclusion to Mr Puri. In relation to point (i) above, Mr Puri operated in Dubai and he knew or must be taken to have known the consequences of putting his name to cheques there. In relation to point (ii), IPC Dubai is a company of which he was at the material time the managing director and sole shareholder. IPC Dubai has been found liable by the arbitrator to pay to Lenkor HK all the monies which it received in respect of the two cargoes of gasoil. The factors which favoured that finding were that IPC Dubai was privy to the deception and that the contractual claim against IPC Dubai would not amount to a profit for Lenkor HK but would in substance be part restitution to it of the value of the cargoes. These factors would have equal force with respect to Mr Puri, who was the controlling mind of IPC Dubai and a key actor in the relevant events.

(2) Impermissible piercing of the corporate veil

30. This point and the following one can be dealt with shortly. English law would not have imposed personal liability on Mr Puri in the same way that Dubai law did. That is because English law does not have a statutory provision equivalent to Article 599/2 of the Commercial Transactions Law, (though this is not to say that English law could offer no remedies at all in the circumstances under consideration). It does not, however, follow that English public policy would be offended by recognising the judgment. The rules that Mr Cooper QC referred to are English rules relating to English company and commercial law. They are not principles of public policy. The case against Mr Puri in Dubai was resolved according to the rules which the laws of Dubai apply to Dubai companies and to individuals who write cheques on Dubai accounts. As I have already observed, Mr Puri operated in Dubai and he knew that in writing the cheques he was subject to Dubai law. As I have already said, there is nothing repugnant to English public policy in recognising a judgment based upon Article 599/2. And to do so does not, as it seems to me, involve recognising that IPC Dubai's corporate veil has been pierced. The liability was Mr Puri's personal liability under that Article.

(3) Penalty

31. Self-evidently, the judgment for the principal sum cannot be characterised as a penalty. As to the interest period, this, in England under the Bills of Exchange Act 1882, would have run from the date that the cheques were presented and so there is little, if any, divergence from Dubai law. As to the interest rate, 9% is only 1% higher than the judgment debt rate in England and only ¼% higher than the current rate under the Late Payment of Commercial Debts (Interest) Act 1998. In the light of this, to characterise the interest rate of 9% as amounting to a penalty is unrealistic.

Conclusion

32. The clear conclusion that I have come to is that the judgment of the Dubai court should be recognised and summary judgment in favour of the claimant must follow.