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Case No: CL-2020-000696

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

Rolls Building
Fetter Lane
London, EC4A 1NL
Friday, 13 August 2021

B e f o r e :

HIS HONOUR JUDGE PELLING QC
(SITTING AS A JUDGE OF THE HIGH COURT)

Between:

Aramco Trading Fujairah FZE **Claimant**

- v –

Gulf Petrochem FZC **Defendant**

Mr J. Khurshid QC (instructed by Reed Smith LLP) appeared on behalf of the Claimant.
Mr Shirazi (instructed by Mills & Co) appeared on behalf of the Defendant.

HTML VERSION OF JUDGMENT

Judge Pelling:

1. This is an application by the claimant for an order pursuant to CPR 3.1(3) and/or 3.4(2)(c) for an order that unless the defendant fully complies with the mandatory orders, made by me on 29 October and 22 December 2020, by a fixed future date by paying, or otherwise paying into court, the sum of Singapore $7,866,823.44 and £116,298.28 in outstanding costs, the defendant's defence be struck out and judgment be entered for the claimant.

2. The relevant background to this claim is set out in my judgment of 22 December 2020 at paras.1 to 11 and paras.16 to 20. These paragraphs should be treated as incorporated by reference into this judgment. The application by the defendant to discharge the mandatory order I made on 29 October 2020 was advanced on two bases, namely that it was either legally or financially impossible for the defendant to comply with its obligations under the LOI relied upon by the claimant. My reasons for dismissing that application were summarised at paras.77 to 78 of my judgment. I do not propose to repeat those in this judgment. There was no application for permission to appeal from those conclusions, either to me or to the Court of Appeal, and the time for applying for permission to appeal has long since expired.

3. In my judgment, therefore, if financial impossibility is to be relied on, as it is in answer to this application, it will be necessary for the defendant to prove financial impossibility on the balance of

probability by reference to evidence that was not, or could not reasonably be, put before me at the hearing leading to the judgment of 22 December 2020.

4. The result of the dismissal of the discharge application was that the defendant was ordered to pay Singapore $7,866,823.44, to replace that paid into court in Singapore by the claimant, by no later than 4.00 p.m. on 22 January 2021, and to pay the claimant's costs summarily assessed in the sum of £116,298.28 by the same date and time. It is common ground that no part of this sum was paid either by the relevant date or time, or at all.

5. It is not in dispute that I have jurisdiction to make the order sought. The dispute has been as to whether, as a matter of discretion, I ought to make it. The defendant submits I should not because (a) the defendant is unable to pay the sums it has been ordered to pay; (b) there are various foreign law issues that arise which can only be resolved at trial and which, if resolved in favour of the defendant, would lead to a court refusing to make the order sought by the claimant; and (c) the claimant is not entitled to the full sum claimed because there is a sum admittedly due from the claimant to the defendant which the claimant has sought to set off against the sum claimed in these proceedings, in proceedings between the parties in the Dubai International Financial Centre Court ("DIFC").

6. The claimant maintains that these points should be rejected (a) in relation to financial impossibility because there is no new evidence from which it can be concluded that compliance is financially impossible; and (b) n relation to the set off point, because although the claimant is willing to set off its debt to the defendant against the sum due to the claimant, the defendant has made it clear in the DIFC proceedings that (i) it contends, that as a matter of UAE or Dubai law, set off is not available in the particular circumstances, and/or (ii) the defendant maintains that it has assigned the benefit of the debt due to it from the claimant to a third party; a financial institution that happens to have financed the index transaction that led to the claim in these proceedings.

7. I make it clear at the outset that in my view the set off point is not one that the defendant is entitled to rely on for each of the reasons relied on by the claimant, which I have summarised. Although it was submitted on behalf of the defendant that the claimant should not be permitted to approbate and reprobate, but is attempting to do so, I consider that point to be mistaken. Whilst an equitable set off does not extinguish liability until the netting off of the cross-claims has been agreed, ordered by a judgment or awarded by an arbitral award - see by way of example *Stemcor UK Ltd v. Global Steel Holdings Ltd & Anor* [2015] EWHC 363 (Comm) *per* Hamblen J, as he then was, at para.34, following earlier authority to the same effect. The effect of a claimed but as yet undetermined claim of set off effect is:

> "…to prevent each party from enforcing or relying on its claim to the extent of the other claim where the connection between the claims would make this manifestly unjust."

- see Gary *Fearns (t/a "Autopaint International") v. Anglo-Dutch Paint 7 Chemical Company Ltd & Ors* [2010] EWHC 2366 (Ch) by Mr George Leggatt QC, as he then was, at para.26, followed by Hamblen J in *Stemcor UK Ltd* at para.36. At para.35, in Stemcor UK Ltd Hamblen J cited with approval para.18.25 of **Derham on The Law of Set Off** , which is to this effect:

> "…where circumstances exist which give rise to the set off, the creditor is not permitted in equity to assert that any moneys are due to it, or to proceed on the basis that the debtor has defaulted in payment, to the extent of the set off. Because of the substantive nature of the defence its effect in equity is similar to a discharge of the debt *pro tanto* , but it does not bring about a reduction in or an extinguishment of the cross demands at law until judgment for a set off."

A principal debtor who has not met its obligations to its creditor because in good faith, it has asserted an equitable set off is not to be treated as having defaulted or liable for the sum claimed, unless either it is not entitled to or ceases to be entitled validly to assert an entitlement to set off. In this case, however, it is asserted by the defendant that the set off is not available as a matter of law and, in any event, benefit of the claimant's debt has been assigned to a third party, apparently in circumstances where the third party has taken the assignment in good faith and for valuable consideration. On the assumption that it is at least realistically arguable that the debt has been assigned to a third party for value without

notice of the claimant's alleged right to set off (and there is no evidence to contrary effect), it cannot be said to be manifestly unjust to prevent the claimant from enforcing its claim notwithstanding it has asserted a right to set off. In those circumstances, in my judgment, set off is not a good reason for refusing the order sought.

8. I now turn to the question of financial impossibility. As I have said the issue must be considered against the findings on this issue that have already been made. Since then (a) the Goels remain as directors of the defendant, (b) no formal insolvency process has been commenced either in the UAE or elsewhere, and (c) the defendant continues to operate as a going concern with the support of those creditors defined as " Lenders " for the purpose of the contract appointing Mr Sutton as the Chief Restructuring Officer of the defendant. All this leads the claimant to submit that the defendant's failure to comply is not because it cannot do so but because Mr Sutton chooses not to do so, because it does not suit the purpose of the defendant or those who stand to benefit from the sale of its assets and business to do so.

9. The only evidence in answer to this application is the witness statement of the defendant's solicitor, dated 23 July 2021. It was submitted by the claimant - and I accept that it is probable - that a tactical decision was taken by, or on behalf of, the defendant not to adduce any evidence from Mr Sutton on this issue. I accept that because no explanation has been offered as to why that course has been adopted, nor has any explanation been offered by the defendant as to why Mr Sutton has not provided full, frank and comprehensive evidence addressing this issue. The onus rests squarely on the defendant to prove financial impossibility if it can for all the reasons that I identified in my judgment of 22 December, and in the judgment I gave earlier this morning.

10. It is next necessary to consider what the defendant's solicitors' evidence is concerning the financial impossibility issue. In paras.24 and 26 to 27 of his statement he states as follows:

> "At para.14.3 reference is made to the fact that the defendant is paying its lawyers in England 'actively participating in the litigation proceedings,' the implication being that it is able to pay the amounts claimed. However, first the defendant's legal costs pale in comparison to the sums which the claimant is claiming as a condition of the Unless Order. I am been instructed by Mr Sutton, the defendant's Chief Restructuring Officer, that the defendant's monthly outflows are strictly budgeted and there is very little room for flexibility and certainly not enough to pay the sums set out in para.14. Secondly, the defendant is compelled to incur legal costs and to actively participate in litigation proceedings it is faced with unmeritorious claims by the claimant and has indicated its reluctance to engage in ADR …(e) the defendant is unable to pay.
>
> 26 …I have been instructed by Mr Sutton that the defendant would be unable to pay the sums that the claimant seeks in its Unless Order application, because its current cashflow does not leave sufficient margin for additional expenditure if it is to continue trading as a going concern and avoid liquidation, which will be to the detriment of all its lenders and creditors if the defendant's liabilities still exceed its assets. The inability of the defendant to pay the sums sought by the claimant in the Unless Order application is a live issue in the present proceedings. This is dealt with in detail at para.14 of the defence. In the circumstances it would be unfair to strike out the defence on the basis of the defendant's inability to put up the sums sough by the claimant …"

11. A number of points arise out of this. First, although it is asserted that requiring the defendant to pay would be a detriment "to all its lenders and creditors" this point, which in any event is argument rather than evidence, must be read in the context of my findings at paras.27 to 31 of my judgment given on 22 December last. The points I make there are all the more significant given that what is said is said by the defendant's solicitor on instructions and not by Mr Sutton in a witness statement. Secondly, even on its face the evidence does not purport to demonstrate financial impossibility. Thirdly, no attempt has been made to adduce evidence concerning the position of the financial institutions that continue to support the defendant following the issue of this present application.

12. It is now necessary to consider the defendant's Defence in these proceedings. At para.14, the defendant asserts:

"(a) that its liabilities exceed its assets;

(b) the defendant's available cash is limited and is required to keep the company's business as a going concern;

(c) the defendant's funders have declined to provide the funds required or provide security on the defendant's behalf; and

(d) there is no justification for giving priority to the claimant over other creditors."

There is no evidence from Mr Sutton (or for that matter from the defendant's solicitor) to support any of these points, far less evidence which is full, frank and comprehensive. There is no dispute that liabilities excess assets, though by how much is entirely unclear. As I held in my 22 December judgment that supports the conclusion that the defendant is technically - i.e. balance sheet - insolvent. However, that of itself is not an answer where the company continues to trade, as the defendant has now for months, with the support of the class of creditors referred to in Mr Sutton's appointment as " Lenders ," and where even the defence makes clear that paying the claimant as opposed to other creditors is a matter of choice. It is startling that on the one hand the defendant should plead that its cash is required to keep the business as a going concern, whilst on the other hand that paying the claimant (to whom the defendant is liable in the ordinary course under its letter of indemnity) would be a preference. The reality is this. Either the defendant is in a statutory, or court sanctioned or approved liquidation or administration process, or it is not. The defendant is not in such a process and the re-structuring process is apparently being carried on for the benefit of a limited class of creditors (the Lenders") The claimant remains fully entitled to enforce its liabilities by all means at its disposal unless the defendant can prove that compliance with the mandatory orders made in this case is financial impossible. The onus rests on the defendant to prove that and it has not done so, either down to 22 December 2020 or thereafter.

13. There is a final point to make. It was submitted on behalf of the defendant that financial impossibility was demonstrated by a report by Mr Sutton dated February 2021, exhibited to the claimant's solicitor's evidence in relation to another point. This was, in my judgment, opportunistic. It is nowhere referred to, as I far as I can see, in the defendant's skeleton. It is not exhibited to or referred to in any evidence filed by or on behalf of the defendant. It has not been verified by Mr Sutton and the material, in any event, is now some months out of date.

14. The material in the report relied upon by the defendant is this, and appears under the heading, " Current Status and Next Steps ." Under the subheading, " Creditor Enforcement Actions and Standstill ," the following appears, apparently expressed by Mr Sutton:

"I am pleased to report that discussions with the majority of members of the Lending Steering Committee in relation to the Draft Standstill Agreement are in the final stages. I expect to circulate an updated version of the Draft Agreement to Creditors for review during the coming days. Notwithstanding progress made on the Standstill it has still been necessary for GP to continue defending several legal proceedings commenced by creditors and in the UAE and the UK seeking to enforce their rights before the restructuring had been implemented. One of the fundamental concepts of the restructuring plan is creditors are treated equally and fairly. It therefore remains the case that no creditors, who have commenced enforcement actions, will be preferred or given special treatment. GP will therefore continue defending the actions until they have either been determined by the applicable courts or withdrawn by the plaintiffs. If GP is compelled by any of the courts to satisfy enforcement orders, GP will file for liquidation in the UAE immediately.

The deadline, 22 January 2021, for GP to put up security to cover the claims of certain banks made in connection with the legal proceedings commenced by ship owners in the UK recently expired. In addition no positive responses were received from GP's other lenders to put up security, further to my letter of 29 December 2020. Notwithstanding the above it remains the case that GP is unable to put up the security for the discharge of

claims of the banks connected with the ship owners' legal proceedings and therefore no security will be provided."

15. As this has been relied on opportunistically, none of the correspondence referred to has been provided and there is no evidence as to what has been said to, or by, the " lenders " in light of the present application, particularly given the likely benefits to " lenders " of a successful sale; as to which see para.52 of my 22 December judgment. None of this material relied upon, as contained in the February 2021 Report, has been adduced in evidence and nor has any attempt been made to verify the contents of the report by evidence at the hearing. There is no evidence in those circumstances to show the judgment I arrived at - at para.53 of my 22 December judgment - is any less valid now than it was then.

16. No reliance appears to be placed on legal impossibility on this application, at any rate to the same degree that was relied on previously. However, to be clear, I conclude that there is no relevant substance to these points for the reasons identified in the 22 December judgment and in the written and oral submissions made on behalf of the claimant on this application.

17. Against that background I now turn to the applicable principles. The defendant relied on the summary in *Michael Wilson & Partners v. Sinclair & Ors* [2017] EWHC 2424 (Comm) by Sir Richard Field at para.29. Whilst maintaining that it and other authorities in this area should be treated with caution, because frequently the respondent was not represented, in my judgment that qualification is not one that I can properly take into account. A High Court judgment, whilst not binding on me technically, is nonetheless one I am required to follow unless satisfied that it is plainly wrong. That principle applies whether all or only some of the parties in the proceedings leading to the judgment were represented.

18. Returning to Michael Wilson & Partners it is to be noted that it was concerned with an application for an Unless Order in relation to an unpaid Costs Order, rather than non-compliance with mandatory orders such as those made in this case. However, some at least of the principles identified will apply to applications based on non-compliance with mandatory orders and particularly mandatory orders to provide security or to meet obligations requiring the payment of money. In that case, and following a review of the authorities relevant to the imposition of an Unless Order following non-compliance with a Costs Order, Sir Richard summarised the principles that applied in these terms:

> "26. In my judgment, the following principles are applicable when dealing with an application that a party to on-going litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:
>
> (1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.
>
> (2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Art.6 of ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Art.6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial

position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.

(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

(6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

Clearly all these principles apply to the order sought in this case in relation to the non-payment of costs and in my judgment those referred to at (1), (3), (4), (5) and (6) apply in relation to the mandatory order as well.

19. In relation to para.(2), in my judgment there is a policy issue to be considered in relation to the mandatory order, although it is a different policy consideration from that which is relevant to the enforcement of costs orders. It arises from the commercial issues I summarised at para.11 of my 22 December judgment, para.15 of my judgment in these proceedings given on 29 October 2020, and in the authorities that decide the manner in which obligations under Maritime Letter of Indemnity should be enforced is by mandatory order. In summary, the conduct of the shipping trade in general, and that relating to hydrocarbons in particular, depends upon compliance with Letters of Indemnity. Whilst that is not in any sense a trump card and would, for example, properly be outweighed by evidence from a defaulting party that satisfied the fourth of the principles identified by Sir Richard Field, that is always a question of evidence, fact and degree.

20. I now turn to this case by reference to the principles identified by Sir Richard. I need say no more about (1), other than to emphasise it requires a consideration of the weight to be given to all the relevant considerations in the round. I have already considered the modified issue that arises in relation to para.(2). In my judgment that factor carries significant weight particularly where there are no alternative means available to enforce the orders that have been made. Turning to para.(3), the factor that is most material for present purposes is that referred to in subpara.(b), i.e. the availability of means of enforcing the order by alternative means. As Christopher Clarke J, as he then was, noted in *JSC BTA Bank v. Ablyazov & Ors* [2020] EWHC 2219 (QB) ; *[2011] 1 All ER (Comm) 1093* at para.38 :

> "There will be many cases in which it is only an Unless Order that will ensure compliance with orders made by the court."

That is this case. The claimant could bring contempt proceedings here but that would be futile because the defendant has neither a presence nor assets in the English jurisdiction. Insolvency proceedings are likely to be pointless for similar reasons, even if there was jurisdiction technically to seek either a Winding Up Order or an Administration Order in England against the defendant.

21. It is probably for that reason that the defendant has felt able to ignore the orders made. Whilst not providing the evidence that demonstrates financial impossibility, referred to earlier in this judgment, I fully accept - as I have accepted consistently in prior judgments in this litigation - that it would be a denial of justice to make or enforce orders to pay money where it was financially impossible for the defendant to comply. However, as I have said both earlier in this judgment and in earlier judgments, and as Sir Richard emphasised in para.(4) of his summary of the relevant principles, if such an assertion is to be made it requires detailed cogent and proper evidence which gives full and frank disclosure of the defendant's financial position, including that relevant to raising the necessary funds where its cash resources are insufficient to meet the liability. That is an obligation the defendant failed to comply with at any stage down to 22 December when I delivered judgment dismissing the defendant's application to discharge the mandatory orders. As I have said there was no appeal from that order and no attempt thereafter to grapple with the evidential requirements to which I have referred. In those circumstances Principle 5, as identified by Sir Richard, applies and applies to compliance with the mandatory orders as much as it does to the cost order.

22. A similar outcome follows if the tripartite test for relief from sanctions is applied. The failure to comply with the orders that have been made is obviously both significant and serious for the reasons outlined above and, in particular, those relating to the need to comply with the Maritime Indemnities given to ship owners in order to obtain the discharge of cargoes. The only explanation for such conduct is financial impossibility but, as I have explained, that has not been the subject of evidence with sufficient cogency that demonstrates that to be so to the required standard.

23. The third element in the Denton Test relating to relief from sanctions requires the court to evaluate all the circumstances, as I have done already. This test requires me to consider the importance of compliance with court orders. That is an issue of particular importance here where there are no other means available to enforce compliance. As Lord Neuberger observed in Al-Saud v. *Apex Global Management Ltd & Anor* [2014] UKSC 64; [2014] 1 WLR 4495 at para.23 :

> "Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have."

This is particularly so where parties are actively choosing this jurisdiction but have no presence or assets here.

24. In those circumstances, in principle, I am prepared to make the order sought. I will hear counsel as to the time that should be accorded to the defendant in order to comply and I will hear the parties on whether, in the alternative to payment to the claimant, payment into court is appropriate as an alternative mechanism.

LATER

25. The issue that I have got to determine now, very shortly, is the summary assessment of the claimant's costs of and occasioned by the application. The sum claimed in the statement of costs is a sum of slightly in excess of £90,000. That is manifestly in excess of what is reasonable and proportion for an application of this sort, essentially for the reasons identified at high level by Mr Shirazi in the course of his submissions; that is to say it is an application which by its nature is less complex than the one that was decided earlier today and yet appears to have resulted in very significant costs.

26. The pointer as to why it is that such a significant sum is claimed is, as is frequently the case, in the section of the costs schedule concerning the work done on documents where even a very superficial examination shows that there is included work which should not be included, items which are not recoverable on a reasonable and proportionality basis, and items which are principally recoverable but for which the hours worked and sums claimed are in excess of what is reasonable and proportionate. In those circumstances both counsel ask me to adopt a very broad brush approach, which is to arrive a figure which overall I consider to be reasonable and proportionate for the application I have heard.

27. So far as that is concerned it is fair to say on behalf of the claimants that they have produced two statements rather than one, and that the second statement was an extensive document. It is fair to say that the claimants carried the burden of preparing the bundle for the hearing and therefore the costs would be a little more as a result of that, and it is fair to say also that the claimants, as they are entitled to, instructed leading counsel albeit at a relatively modest brief fee. In those circumstances I am prepared to accede to the submission made by both parties that I should adopt a very broad brush approach rather than seeking to analyse it on a line by line basis every sum that has been claimed.

28. The range that I have been invited to address comes between £25,000, identified by Mr Shirazi on behalf of the defendant, and £45,000, which was identified on behalf of the claimant. In my judgment the sums, as I have said, that are being claimed are substantially in excess of what is reasonable and proportionate for a case of this sort. I am satisfied that large parts of the sums claimed ought not to be included in this statement of costs at all and in those circumstances I have come to the conclusion that it is appropriate, and indeed the only sensible course, to adopt a broad brush approach.

29. As to the numbers, the claimants are in my judgment entitled to recover substantially more than the defendant has incurred in respect of the same application for the reasons that I have identified. Doing

the best I can with the very limited material available, I come to the conclusion that that sum should be £40,000.

LATER

30. This is an application for permission to appeal. The test I have got to apply is whether there is a realistic prospect of success in the Court of Appeal or whether otherwise there are good reasons for giving permission.

31. Two grounds appear to be relied upon. One is whether or not the threshold test is that which I have applied, namely the balance of probabilities in relation to financial impossibility. The second ground is whether or not it is a rather more amorphous ground based upon a suggestion that the court should be reluctant to grant an order in circumstances such as this, having regard to the draconian nature of it.

32. So far as the first is concerned I am entirely satisfied that is unarguable for the reasons identified by Sir Richard Field in his judgment, and for the reasons I have identified in my judgment in these proceedings and for the reasons which are identified in the authorities and relied on previously. In short, if a party is to allege financial impossibility as a justification for not complying with an order containing a penal notice, it is for it - that party - to prove on the balance of probabilities that it is impossible for it to comply, and that is no different on an application for an Unless Order than for any other.

33. So far as the second point is concerned, namely that I should be reluctant to make such an order, this is really a slightly different way of putting a point made in the course of submissions in which I have dealt with at length in the judgment; namely the court should not make an Unless Order when there are alternatives available. There are no alternatives available in this jurisdiction however for the reasons I have explained. Insolvency is not a viable option and contempt proceedings would be futile for the reasons I referred to in the substantive judgment.

34. In addition it seems to be suggested that the proceedings which are being commenced in England are in some way a basis that would justify not making an Unless Order in this jurisdiction. That is wrong. Those proceedings are proceedings between different parties. There is no other mechanism for enforcing this judgment that has been drawn to my attention and in those circumstances permission is refused.