TRANSCRIPT OF PROCEEDINGS

Ref. LM-2017-000129

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON MERCANTILE COURT

[2018] EWHC 3860 (Comm)

7 Rolls Buildings
Fetter Lane
London

Before HIS HONOUR JUDGE WAKSMAN QC

BANK OF INDIA (Claimant)

- v -

CATI MANDENCILIK ITHALAT VE IHRACAT AS (First Defendant)
FACOR ALLOYS LIMITED (Second Defendant)

WILLIAM EDWARDS appeared on behalf of the Claimant
The Defendants did not attend and were not represented

APPROVED JUDGMENT
13th APRIL 2018

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HHJ WAKSMAN QC:

1. This is an application for summary judgment made by the claimant Bank of India in respect first of all of a default by the first defendant borrower in respect of monies lent pursuant to a facility agreement with a maximum sum lent of 1.5 million dollars, pursuant to a document dated 2nd May 2014.

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2. There is then a second claim made by the bank against the guarantor of the liabilities of the first defendant, this being the second defendant who in fact is a major shareholder in the first defendant. The first defendant is a company incorporated in Turkey, the second is a company incorporated in India.

3. There has been no substantive response by either defendant to these proceedings. So far as the first defendant is concerned, because, as I will show, there is a contractual service provision so that service can be effected locally in this country, there was no need for service out. So far as the position of the second defendant is concerned, there was no contractual service provision, but by an order previously made by this court the claimant obtained permission to serve out against the second defendant. I am satisfied by reference to paragraphs 18 to 20 of the witness statement of Mr Candy Kaka dated 29th January 2018 made in support of this application, that service both of the substantive proceedings and of this application has been duly effected, and in addition there are certificates of service behind divider 1 of the bundle.

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4. So far as the facility agreement is concerned, the sum, as I said, that was advanced was 1.5 million dollars. It was to be advanced for the purpose of a particular investment. And the drawdown date was 18th May 2014. The basic margin for interest, assuming that the loan ran its course, was 6 percent. The repayment was of both capital and interest over 20 equal instalments pursuant to paragraph 6 commencing on 18th May 2015. There was then a provision for default interest which is set out at clause 8, and in that event it would be 2 percent above the contractual rate, and there is also a provision for compounding.

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5. At page 36 it is provided that there should be an indemnity from the borrower to the bank in respect of obtaining any judgment, among other things, and the extent of the indemnity is set out in paragraph 40.1 and 40.2, and 40.3 says that the borrower will promptly indemnify the lender against any cost, loss or liability incurred by the lender. And then clause 20 sets out a number of familiar events of default. The only relevant one is 20.1 which is non-payment on the due date. 20.16 then entitles the bank in an event of default to accelerate the loan and then claim for all the outstanding amounts. Clause 32 contains an English law and jurisdiction clause and there is also the provision for local service, which is at 33.2.

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6. So far as the position in relation to the second defendant is concerned as guarantor, the written guarantee executed on 6th May contained a guarantee of the obligations and liabilities of the borrower under the finance documents (which is the facility agreement), up to a maximum amount of 1.6 million dollars, to include interest and costs and to pay those amounts on demand, to guarantee the payment by the borrower on demand and the due performance by the borrower of all the obligations which it had.

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7. The contract of guarantee is governed by Indian law, but there is no jurisdiction clause, neither is there any local service clause which is why the claimant had to obtain an order for permission to serve out of the jurisdiction.

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8. The borrower made some limited payments but then stopped paying the instalments altogether. It appears that there was an initial payment shortly after 18th August of a couple of hundred thousand dollars, but since that time the debt has steadily grown because of the accrual of compound interest at the default rate as is shown by the helpful schedule provided to me. The total amount now outstanding, including interest, is 1.491763.96 dollars.

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9. Demand has been duly made on both the borrower and the guarantor - see the letters of 17th February and 20th February and also 15th March. There has been no response from either defendant save a letter which in fact was responding to the claim against the guarantor dated 20th April 15th referring to the demand notice dated 20th February addressed to "our client Facor Alloys limited". It is a lengthy letter but the thrust of the letter is that the particular investment, which was a particular mining plant, has been a disaster, and the effect of all of that is that neither defendant has been in a position to pay the loan after the initial instalment. Paragraph 15 of the letter says, "The borrower and its holding companies, which includes the guarantor, are presently cash deficient and not in a position to pay off a liability", so there is an admission of liability. "In fact our client has already taken up the matter with its bankers." The upshot of the letter was to request an extension. That was refused by the bank, hence these proceedings.

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10.It is plain from what I have said and from the witness statement to which I have referred that there is no conceivable defence to the claim. This is what led the claimants to issue the present application which is for summary judgment against both defendants. The claimants must show that there is no real prospect of a successful defence and that there is no other compelling reason for a trial. It is plain to me, looking at the merits of the case, that there is no real prospect of a defence and indeed no suggested defence has ever been put forward by either of the defendants. There is no other compelling reason for a trial, and therefore I will grant to the claimants judgment in the sum claimed of 1,4491,763.96 together with costs.

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We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge

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