Neutral Citation Number: [2022] EWHC 2525 (Comm)

Case No: CL-2022-000358

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 19/07/2022

Start Time: 10.30 am Finish Time: 1.00 pm

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

LONDON EV COMPANY LIMITED

Applicant

- AND -

OPTIMAS OE SOLUTIONS LIMITED

Respondent

- -
- -

Ms Helen Pugh (instructed by **Shoosmiths**) for the **Applicant**

Mr Simon Atrill (instructed by **Eversheds Sutherland**) for the **Respondent**

- -

APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

Mrs Justice Cockerill DBE:

1. I am not going to grant the injunction which has been sought on behalf of the London EV Company Limited today by Ms Pugh. This application was brought by the claimant for an interim mandatory injunction.

2. The application, as originally brought, was for an injunction requiring the defendant "to continue to comply with its contractual obligations pursuant to the supply agreement between London EV Company Limited and Optimas OE Solutions Limited, dated 6 September 2017, until after final judgment in this claim or until the agreement is validly terminated by either party following the correct contractual procedures. Alternatively, that the defendant must not terminate or purport to terminate … or otherwise refuse to perform their obligations under the agreement for any reason involving or relating to or touching upon or leading to the dispute between the parties."

3. The background to the dispute is set out in the skeleton arguments which have been served; in particular, the claimant's outline, the fact that it is an engineering and manufacturing company producing the TX Electric London Black Taxis and the VN5 commercial van. The defendant supplies the claimant with fasteners for its vehicles. There is a dispute between the parties as to the exact extent of the obligations. That has played out in the development of the arguments which are before me today.

4. In relation to the injunction as originally sought, the answer which came back to that was effectively that there was essentially no reason for an injunction because damages would be an adequate remedy and the complaints which the claimant really has would not be answered by the injunction, because the claimant says that it cannot identify the items it needs. That then has led to a genesis of the application as forwarded where the injunction, which is sought to be pursued in front of me today, now is cast in terms whereby the defendant must continue to comply with its contractual obligations, as supplemented by, for the purposes of the injunction, "the contractual obligations under the supply agreement shall include the vendor managed services provided by the defendant to the claimant, which shall include the non-exhaustive list of services in schedule 2 to this order".

5. Schedule 2 to the order then sets out a number of services under the headings of operational and quality and investigation, which are cast in somewhat broad terms, such as, "D will have full access to C's production areas to complete bin scan, bin collection and put away", "D to commit to 8D methodology or all production line disruptions which impact the production line", "D will complete an agreed level with correct countermeasures and investigations on all points of fit", "D will complete the 8D methodology and close with C's quality team", "D to be responsible for working within the guidelines in accordance with ISO 14001".

6. The injunction which has been sought reflects not simply the written sale supply agreement, which I have before me in the bundle, which is a fairly vanilla supply agreement. It reflects what is said to be a wider set of obligations which have somehow come into existence between the parties; the genesis of which and the

precise terms of which are not evidenced. That is the background against which this consideration of the injunction has to be considered.

7. In relation to the test for an injunction, I have, as I indicated to Ms Pugh, been prepared to assume that there is the requisite merits to the case of breach. Certainly, as regards the case of breach in relation to the written supply agreement, which is all about whether sufficient granularity was provided as to what had been sought by way of payment for excess inventory under clause 11.2 and obsolete inventory under 11.3, I have no difficulty in seeing the merits hurdle.

8. Matters are slightly different in relation to the supplemental obligations upon which the claimant relies; the service aspects. As I have indicated, there is no evidence as to how those extra obligations are said to have come into existence. There is no document which has been concluded. Ms Pugh relied on a bouquet of possibilities as to how those obligations might have come into existence, but there is no granularity on them. I am prepared to assume that the merits hurdle is surmounted in relation to some service aspects.

9. However, those service aspects cannot match the schedule which has been put in front of me to sign off on as part of an injunction. It is quite plain that these are matters which the parties do not say were fully agreed between them. It is quite plain that terms in relation to such matters were, in fact, under discussion until fairly recently and were not agreed. It is quite plain that there is no evidence as to the course of business which might be said to give rise to them. It is also quite plain that some of these are simply too vague to actually be reflected as contractual terms.

10. Although there is not a merits hurdle issue for the main thrust of the case, there is a merits hurdle which is not surmounted for some of the terms of the injunction which are sought.

11. Then we come to the question of balance of convenience. Here, I am simply not satisfied that damages would not be an adequate remedy. To the extent that the case on inadequacy of damages is based on those service terms, essentially for the reasons that I have just outlined, that case is insufficiently well made out. In so far as concerns a variety of the other matters, it seems to me that there simply is not the material on the basis of which I can say that damages are not an adequate remedy. In relation to the question of 18-month lead times, that is an artificial time given that there is an offer to supply from Optimas, given that there are identified other suppliers, given that the 18-month lead time is effectively based on a very partial view in relation to some parts, which parts Optimas itself says it has a delay on.

12. So, this is not a question of a mismatch of if I grant the injunction, no delay; if I do not grant the injunction, 18 months' delay. The question as to whether damages are an adequate remedy, there is a fundamental problem here in that this is an agreement which, on its face, is one set up with a damages remedy. So clear is it that the parties consider that a breach is capable of sounding in damages, that they have a clause which deals with what damages are recoverable. I regard the idea that is a reason for granting an injunction as an

unorthodox submission where what is being sought is effectively to enforce the agreement. To say that damages are not an adequate remedy when you have agreed a limitation of damages appears to be an illogical and unprincipled conclusion.

13. Further, there are plainly options as to getting hold of these parts. It is not a question of if this injunction is not granted, there is one supplier and they are the one who is refusing to supply, and they are refusing to supply. This supplier is offering to supply. Yes, there is a cost to it but that is a cost which can be got back in damages and part of which is being offered to be held as security pending the outcome of the dispute. There are also other suppliers. The suggestion as to the level of damages which might be said to feed into an analysis for damages being an inadequate remedy does seem to me to be speculative and insufficiently tightly nailed down, with some obvious problems such that it would not be possible to say that there was anything on which I could really put weight.

14. So, we have here an injunction which has considerable problems within it. We have damages looking likely to be an adequate remedy. We have a possibility, as I have indicated, that this matter could be brought on for trial early if the claimant could make that convenient to itself. There is an offer of supply. There is an offer of securing of the up-front payment which is being offered, or part of the up-front payment which is being required by Optimas as the cost of supply. Against that, the question comes of the claimant's financial position. In so far as that is concerned, there is some cause for concern. There is an overdraft which is anticipated to be fully drawn by the end of the year. The reassurance as to the parent company does not come, so far as I can see, direct from the parent company. There are no financials from the parent company.

15. When I look at the question of the balance of convenience, I am looking on one side at what is being sought is an injunction which I can be pretty confident, on any analysis, does not reflect the terms of any contractual agreement between the parties at the moment. It comes against a background where I can have relatively good confidence that damages will be an adequate remedy or that the extent to which they will not be an adequate remedy is a relatively small one on the evidence before me. There is an offer to secure part of any up-front payment of the amount which is the matter in dispute. There are doubts about the claimant's financial position.

16. Overall, the balance tilts, in my judgment, fairly firmly in favour of the conclusion that there will be a greater risk of injustice if the injunction is made than if it is not made. In those circumstances, it seems to me that it would be entirely wrong to grant the injunction. Therefore, the application is dismissed.

This judgment has been approved by Cockerill J.

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