IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
[2023] EWHC 414 (Comm)

No.CL-2021-000119

Rolls Building
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Fetter Lane
London EC4A 1NL
Court address

Friday, 17 February 2023

IN THE MATTER OF **AN ARBITRATION**

Before:

MR JUSTICE ANDREW BAKER

(Sitting In Private)

B E T W E E N :

NIGERIAN AGIP EXPLORATION LIMITED — Claimant

– and –

GEC PETROLEUM DEVELOPMENT COMPANY LIMITED — Defendant

MR P WRIGHT (instructed by LMS Legal LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

(Approved Transcript – For Publication)

MR JUSTICE ANDREW BAKER:

1 The claimant, Nigerian Agip Exploration Limited, is a Nigerian subsidiary of ENI SpA, an Italian energy company with multi-national business interests and operations. The defendant is a Nigerian company involved in the exploration and development of oil and gas reserves in Nigeria.

2 By a series of agreements, the claimant and the defendant entered into business together in relation to what was originally an offshore oil prospecting licence granted to the defendant by the Nigerian Government, given the code name OPL 2009. The agreements between these parties were: a Farm In Agreement, dated 16 July 2010; a Joint Operating Agreement, dated 11 April 2014; and a Technical Service Agreement, also dated 11 April 2014.

3 All three of those agreements contained a term requiring disputes, if they arose between the parties, to be referred to arbitration in London under the rules of the ICC. Disputes having arisen between the parties, the claimant commenced arbitration in August 2018.

4 The claimant made a primary claim for damages in excess of $200 million, alleging misrepresentations by the defendant as to its financial capabilities, and an alternative damages claim for breach of contract in a sum a little in excess of $30 million. The defendant participated generally in the arbitration until November 2020. The arbitration has relatively recently culminated in a final award, dated 19 October 2022. By the final award, the arbitral tribunal, having considered the merits of the claimant's primary and alternative claims with conspicuous fairness and care, dismissed the primary claim, broadly speaking on the grounds that, whatever else may have been true, inducement and loss had not been made out in relation to any misrepresentation. However, they allowed, but in a reduced amount, the alternative claim for damages for breach of contract, awarding, prior to interest and costs, a sum of around $22 million. For the purposes of this judgment, the precise amounts do not matter.

5 These proceedings were commenced by the claimant in March 2021 in response to proceedings commenced in Nigeria in late 2020 brought by the defendant (as claimant in Nigeria) against the claimant (as defendant in Nigeria), not joining the ICC arbitrators as defendants but in which the defendant (as claimant before the Nigerian court) obtained *ex parte* an injunction addressed to those arbitrators which directed them not to proceed further with the arbitration.

6 In consequence, this matter came before the court initially, *ex parte*, on 3 March 2021. On that occasion, HHJ Pelling KC (as he now is) granted an interim anti-suit injunction aimed at preventing the Nigerian court proceedings from proceeding any further. That interim relief effectively served its purpose in that the defendant, in response, filed a notice of discontinuance in those Nigerian proceedings. The injunction directed to the arbitrators therefore fell away and there was no ongoing restraint upon the completion of the arbitration.

7 Between that date and the return date that had been set for the interim anti-suit injunction application in this court, the claimant, by its solicitors, proposed to the defendant's representatives that, if suitable undertakings were provided, given after all the defendant's apparent acceptance of this court's intervention and the propriety of HHJ Pelling KC's requirement that the 2020 Nigerian proceedings go no further, the return date might then not be required. The defendant, in response, made clear that it had indeed discontinued in Nigeria in order to comply with the order of this court, in those circumstances, however, stating that no undertakings would be provided and it would not be coerced into providing

any such undertakings, and indicating that it would not engage with the court proceedings here. In the light of that response, and understandably, the claimant pursued the *inter partes* return date application to a hearing on 30 April 2021. At that hearing, Butcher J continued the interim injunctive relief, albeit in slightly modified form.

8 It is apparent from the evidence provided to the court in relation to these proceedings and from the final award of the arbitrators that the defendant, to a substantial extent, engaged in disruptive and delaying tactics within the arbitration rather than focus exclusively, as it might have been advised better to do, on seeking to present defences as to merits. The arbitral tribunal, it is apparent, both were not derailed by such procedural tactics from their duty to resolve the disputes properly referred to them by the parties, and were not caused by them to treat the defendant in any way differently than they would otherwise have done or in any respect unfairly. To the contrary, by a series of procedural decisions, it is apparent that the arbitrators bent over backwards to ensure that the defendant, as it were almost despite itself, was given every opportunity to present whatever case on the merits it properly could. They also, as I have already indicated, in and by their final award demonstrated to the highest degree their impartiality and independence of the parties in considering and determining the claims put before them simply on their objective legal and factual merits.

9 The defendant's response to the final award has been to issue a fresh set of court proceedings in Nigeria. That commenced by originating motion in the Federal High Court of Nigeria, Lagos Judicial Division, dated 28 October 2022. By that originating motion, the defendant (as claimant in Nigeria) gave notice that it would move the Nigerian Court on, as it originally was to be, 8 December 2022, on an application for relief in the following terms:

> "1. An order of this Honourable Court [i.e. the Nigerian court] setting aside the final award, dated 19th day of October 2022, delivered by the ICC Arbitral Tribunal in London....
>
> 2. An order of this Honourable Court declining and refusing to recognise and register the final award, dated 19th day of October 2022, delivered by the said ICC Arbitral Tribunal in London...
>
> 3. ...such further or other order(s) as this Honourable Court may deem fit to make in the circumstances."

10 The asserted grounds on which that application was said to be brought were allegations of misconduct by the arbitral tribunal in supposedly denying the defendant the right to a fair hearing and the opportunity to present its case, and/or by being partial and biased towards the defendant so as to fail in the tribunal's paramount duty to be independent, unbiased and impartial; alternatively, that the tribunal, it is said, misconducted itself in exceeding jurisdiction in relation to the Farm In Agreement by rendering a final award containing decisions on issues that it is said were not contemplated in that agreement; further or alternatively, and finally, that the tribunal, it is said, misconducted itself by failing to disclose the fact that the presiding arbitrator, who had been appointed to that position by the ICC, is a practising arbitrator who practises from the same chambers in London as does leading counsel for the claimant who conducted the first *ex parte* hearing for interim injunctive relief before HHJ Pelling KC in this court.

11 Referring briefly to the last of those grounds, first, on the evidence before this court, there is no reason to suppose that the presiding arbitrator had any involvement in or any knowledge of the 'without notice' application, nor would he expect to have any such involvement or

knowledge prior to that application being made or when it was being made. The fact that leading counsel instructed on that occasion practises from the same chambers was disclosed to this court as part of making the application and was, therefore, well-known to the defendant and is not something in respect of which, in the circumstances of this case, any additional separate disclosure by the presiding arbitrator was required or could have been expected by any reasonable observer. I have already made observations to indicate why I also would say that there appears, on the material presented to this court, to be no proper arguable basis for the allegations apparently made of misconduct by the arbitral tribunal in other respects.

12 As regards the allegation that the tribunal exceeded jurisdiction by reference to the arbitration agreement in the Farm In Agreement, preliminary objections to the claims brought by the claimant that included assertions of that kind were made within the arbitration and properly dismissed on cogent grounds by the final award. They were, on analysis, allegations in any event that would go not to the substantive jurisdiction of the ICC arbitrators but to the viability on the merits of the claimant's claims. As a result, whether those allegations had been well-founded, or, as the arbitrators have concluded, they were not well-founded, they were allegations that were well within the substantive jurisdiction of the ICC arbitrators to consider. It is, therefore, not necessary to say, although it would also be true, that, at all events in this court, it would not be open to the defendant, having not sought to challenge the final award on grounds of the tribunal having exceeded its jurisdiction, now to contend that the final award was invalid on any such ground.

13 In response to the new Nigerian claim, the 2022 Nigerian proceedings, the claimant returned to this court, accepting that it had not in the meantime listed what is now this short trial hearing for final relief, as, all things being equal, it ought to have done at some point following the return date before Butcher J. That factor notwithstanding, Cockerill J was persuaded, on substantial grounds, to grant a further interim injunction, dated 7 December 2022, clarifying or amending the wording of the interim injunction granted by Butcher J so as to make it explicitly clear that the defendant was not to continue with any prosecution of the 2022 Nigerian proceedings. As with all other stages in the litigation before this court, that further interim injunction was duly served upon the defendant by a range of means, permission for which as proper service had variously been granted by orders of the court that had been issued.

14 The defendant, by its director Mr Obot, has suggested in evidence filed for the 2022 Nigerian proceedings that the defendant takes the view that it has not, by the commencement or the continuation of the 2022 Nigerian proceedings, acted in breach of the interim relief granted by this court, specifically, that is to say, the return date injunction granted by Butcher J or the further, more specifically targeted language added to that order by the order of Cockerill J.

15 It is, however, impossible to contend that the continued prosecution of the 2022 Nigerian proceedings since the date of Cockerill J's order is anything other than the plainest of breaches of that order. I also agree, however, with the helpful submissions of Mr Wright on behalf the claimant that the commencement and initial prosecution of the 2022 Nigerian proceedings was always in breach of interim relief granted by this court, that is to say it was in breach of the interim injunction granted by Butcher J as long ago as 30 April 2021, which had continued in force and effect pending what has in the event been today's final trial hearing. I say that because, by that order, Butcher J defined the material "Disputes" as:

"All current or future disputes between the parties arising out of or relating to, or under or in connection with the FIA, JOA and TSA, including those currently the subject matter of the London arbitration."

Self-evidently, but as defined in the order, in case there might have been any doubt, the FIA, JOA and TSA are the three commercial agreements between these parties, and the London arbitration is the ICC arbitration to which I have made extensive reference already.

16 Depending on the context, given the similarity of that language to language that one might ordinarily find in an arbitration agreement, it could be that the use of such language in the context of an anti-suit injunction not to bring court proceedings in respect of any disputes, so defined, had effect only to prohibit the commencement of proceedings by which the claimant in those proceedings would seek to pursue claims that it was obliged to refer to arbitration. That said, the ordinary meaning of those words is plainly apt, depending on the context, also to cover proceedings such as the 2022 Nigerian proceedings which seek to impugn and challenge before the Nigerian Court the final award of the ICC arbitration reference, the substantive subject matter of which was, in turn, the disputes that had arisen between the parties under the three underlying commercial agreements.

17 The substantive prohibition set by the order of Butcher J enjoined the defendant from commencing, pursuing or assisting the commencement or pursuit of any further proceedings relating to the Disputes:
"…in or before any court or tribunal other than

(i) in arbitration proceedings under the ICC Arbitration Rules of the London seat; or

(ii) before the Courts of England and Wales under the Arbitration Act 1996 or under section 37 of the Senior Courts Act 1981."

In that regard, it was therefore made explicit that the subject matter of the prohibition was not only claims that ought to be brought before the arbitrators themselves, but claims that could properly be brought in relation to the arbitration before the English Court, either as the supervisory court of the seat under the 1996 Arbitration Act, or, as with, for example, these anti-suit proceedings, pursuant to section 37 of the Senior Courts Act 1981. That provided the context within which the term "Disputes" falls to be construed.

18 I am satisfied that court proceedings seeking to interfere with, affect, or after the fact challenge, an award of the arbitrators in the ICC arbitration are proceedings that were enjoined by para.1.12 (ii) of the order of Butcher J, effectively requiring any such court proceedings, if brought, to be brought in the courts of England and Wales.

19 The defendant, upon whom the burden would lie to demonstrate good reason or strong reason, as it is variously expressed in the authorities, why it should be permitted to engage in court proceedings brought in breach of its obligations arising out of the ICC arbitration agreements it entered into, has at no time advanced any such good or strong reason. Mr Wright nonetheless, acknowledging, it may be, that the defendant was not participating, even though proceedings have been fully and duly served so that his clients are not under any duty of full and frank disclosure, has addressed such matters as can be identified that it might be that the defendant would wish the court to consider.

20 Other than the matter of possible delay, to which I have referred already, between obtaining the return date interim injunction and convening this short final trial hearing, there has been at no stage any delay by the claimant in the prosecution of these proceedings. Had there been any basis for contemplating that an earlier final trial hearing would have had a practical impact on the facts as they have unfolded, it might be that the court would wish to pause longer than I shall be doing over the question of strong reason in this case.

21 As it is, however, I am satisfied, given the approach and attitude latterly of the defendant to the orders of the court, that, had a final injunction been granted, as I am confident it would have been if this trial had been brought on some months after the order of Butcher J but still well before the final award, it would have been a final injunction in the same terms as that of Butcher J's interim injunction. In those circumstances, the effective position operating upon the defendant would have been exactly as it was in the event, namely the existence of an effective injunction in those terms, and there is no reason to suppose the defendant would have conducted itself any differently than it has.

22 As Mr Wright has also submitted, in any event, the existence of that degree of delay within the English court proceedings was fully taken into account by Cockerill J when granting the further interim relief in December, not only in the sense that she was aware of it and, taking it into account, was still persuaded that injunctive relief should be granted, but also in the affirmative sense that, by way of effectively marking the need for no such delay to continue, she placed on the claimant, in those circumstances, a requirement for the fixing of this trial hearing, with which they have duly complied.

23 In all those circumstances, in my judgment, the fact that this final trial hearing has occurred now rather than, it might have been, a year or so ago, is not of significance to the merits of whether to grant final relief.

24 The claimant has, as regards the two sets of Nigerian proceedings that have actually been commenced in 2020 and then again in 2022, acted entirely promptly and without submitting to the jurisdiction of the Nigerian Court, let alone participating in the Nigerian proceedings to any such extent as might arguably give rise to good or strong reason not to grant injunctive relief.

25 In *C v D* [2007] 2 Lloyd's Rep 367 at [29]-[34], Cook J considered observations of Colman J in *A v B* [2007] 1 Lloyd's Rep 237 at [111]-[112] and, adopting the analysis of Colman J, concluded *inter alia* that by agreeing to a particular seat (in the present case London), parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. As Cook J went on to observe in *C v D* at [55], the position is even stronger as regards the grant of relief to restrain an attempt to seek to interfere with the outcome of arbitration where an award has already been issued and a breach of the agreement to London arbitration consists of an unlawful attempt to invalidate the award.

26 I agree with the observations and analysis of both Colman J and Cook J in those earlier cases and I note that Mr Wright reminds me in his skeleton argument that the leading speech for the majority inf *Enka v Chubb* [2020] 1 WLR 4417, *per* Lords Leggatt JSC and Hamblen JSC includes, at [121], approval of the proposition advanced by Cook J, albeit that the point did not arise for decision in *Enka v Chubb*.

27 In those circumstances, I am satisfied, as was Cook J in *C v D*, that proceedings seeking to set aside an arbitration award resulting from arbitration proceedings with a London seat that

were properly constituted is a matter exclusively within the jurisdiction of the English Court as the supervisory court of the arbitration, and it is as much a breach of the obligations arising out of the arbitration agreement to seek such relief from (in this case) the Nigerian Court as it is or would be to seek to place before the Nigerian Court (or any court) substantive claims which, by the arbitration agreement, ought to have been referred to the arbitrators.

28 It is as plain a case as the court ever sees, in my judgment, for the grant of final injunctive relief. Historic and continuing breaches of the arbitration agreement have been made out. Initial apparent willingness to correct that indiscretion has not lasted. The resumed attempt to engage the Nigerian Court in matters where the only proper and contractually agreed forum is either the arbitral process itself or this court as the supervisory jurisdiction of the that arbitration, has extended in the way I have indicated to defiance of the orders of this court. In my judgment, in those circumstances, as a matter the court's discretion, it is a plain case in which final injunctive relief should be granted.

29 Mr Wright helpfully walked me through the proposed form of any order, if the court was persuaded to grant final relief. I am satisfied that it is appropriate, in the circumstances of this case, to grant the various different aspects of relief set out in that draft. By way of very brief further observation, however:

(i) Firstly, it is proposed that, by way of final declaration, so it is clear on the face of the order of the court today that these conclusions have been reached, I make clear that the ICC arbitration is governed exclusively by the English Arbitration Act and English curial law, meaning that this court had, and has, exclusive jurisdiction in various respects; and that the commencement and pursuit by the defendant of the 2022 Nigerian proceedings therefore constitutes a breach of the arbitration agreements and this court's exclusive jurisdiction as supervisory court. I am satisfied that it is proper to grant such declarations and that they are correct as to their substance.

(ii) Secondly, I am persuaded that as part of the grant of final relief, for similar reasons to those I expressed in *Mobile Telecommunications v His Royal Highness Al Saud* [2018] 2 Lloyd's Rep 112, at [10], there should be a specific mandatory injunction requiring the immediate discontinuance of the 2022 Nigerian proceedings as, in reality, no more than the expression, in inevitably mandatory form, of what is in fact required by the conclusion of this court that there must be an injunction to ensure that those proceedings now, as a matter of final relief, never go any further. In circumstances where there is, as the evidence indicates, a hearing date relatively imminent in the 2022 Nigerian proceedings, I shall spell out in the order that I make, in relation to which in a moment I will ask for Mr Wright's further assistance, that not only is the order, in principle, for immediate discontinuation, but it must occur by no later than a specific time on a specified date.

(iii) Thirdly, in view of the history of repetition of inappropriate litigation in breach of its arbitration obligations, although the mandatory injunction to which I have just referred should be sufficient to ensure that the 2022 Nigerian proceedings are brought to a halt, I agree with Mr Wright's submission that it is an appropriate case to grant by way of final injunctive relief a continuing prohibitory injunction in respect of the commencement, pursuit or assistance therein of further proceedings otherwise than in arbitration or before the courts here, in language essentially equivalent to that of the preceding orders made in these proceedings.

30 The claimant has made clear at all recent stages, that is to say both before Cockerill J in December and again before me today, that it accepts, of course, that its entitlement to injunctive relief of that kind can only to be preclude the defendant from initiating proceedings in any court, in particular in the Nigerian Court, that would be in breach of its obligations. It does not extend to any entitlement to prevent the defendant, if so advised, from defending itself in any proceeding brought by the claimant, if required, and in whatever jurisdiction it may be advised to seek them, for the enforcement or the recognition of the final award, by reference to the grounds for such resistance contained in Article V of the New York Convention. The general continuing injunction will, therefore, include a proviso making clear that defence on the basis of Article V in response to enforcement or recognition proceedings initiated by the claimant in any jurisdiction is not prohibited by the injunction I have granted.

31 Other parts of the order are formal, including provisions as to service, echoing provisions as to service that have been granted previously, which remain justified and the operation of which has plainly been effective and successful in the proceedings in ensuring that the orders of the court and the proceedings generally come to the attention of the defendant.

32 It is appropriate, in all the circumstances, to award the claimant its costs of this claim on the indemnity basis, to be assessed if not agreed. This is and has been, to the extent this court has had to be involved, the clearest of cases of a defendant breaching in blatant and repeated fashion its acknowledged obligations to arbitrate, without any colourable pretence of an excuse for doing so. Indemnity costs are plainly, in those circumstances, justified.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.