Neutral Citation Number: [2018] EWHC 1780 (Comm)

Case No: CL-2017-000320

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2018

Before :

NICHOLAS VINEALL QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

GLENCORE ENERGY UK LIMITED	**Claimant**
- and -	
SPRINGFIELD ENERGY LIMITED	**Defendant**

- -
- -

Timothy Hill QC (instructed by **Ince & Co LLP**) for the **Claimant**
The Defendant was not present or represented.

Hearing dates: 9 July 2018

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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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NICHOLAS VINEALL QC SITTING AS A DEPUTY HIGH COURT JDUGE

NICHOLAS VINEALL QC sitting as a Deputy High Court Judge:

INTRODUCTION

1. The Claimant, incorporated in England, and the Defendant, incorporated in Ghana, both trade in oil. The Claimant Glencore Energy UK Limited ("Glencore") claims under a settlement agreement reached with Springfield Energy Limited ("Springfield") on 4 January 2016 and amended by an addendum dated 13 April 2016. Springfield paid almost US$1,500,000 towards its agreed liabilities under the settlement agreement, and in February 2017 admitted that a further US$1,234,206 was due. Glencore sued in June 2017. By its defence filed on 27 July 2017 Springfield alleged for the first time that the Settlement Agreement was unenforceable on the grounds of illegality under Ghanaian law, and claimed reimbursement of some of the sums it had already paid under the settlement agreement.

2. For the reasons set out in this judgment I allow Glencore's claim in full and dismiss the counterclaim. I find that there was no illegality of the sort belatedly alleged by Springfield.

THE COURSE OF THE TRIAL

3. From the commencement of proceedings until April 2018 Springfield was represented by Grosvenor Law, Solicitors, and played a full part in the proceedings. On 19 April 2018 Grosvenor served a Notice of Change which said that documents about the claim should thereafter be sent for the attention of Ms Akasemi Ollor of Springfield Energy, giving an email address akasemi.ollor@springfieldgroup.com. The parties' experts met on 24 to 26 April (but failed to reach agreement on any issue). By a letter dated 3 May 2018, Springfield consented to an extension of time for supplemental expert reports. That letter was from Ms Ollor, Springfield's company secretary, and was sent by email from the email address given on the Notice of Change. Springfield did not serve a supplementary expert report, and since 3 May 2018 has taken no step in the proceedings. Springfield has not responded to any of a series of letters posted and sent by email from Ince & Co LLP in relation to trial preparation, but the letters have not been returned and the emails have not bounced back. I am satisfied that Springfield has had proper notice of the hearing and satisfied that it is appropriate to proceed in the absence of the Defendant.

4. Mr Timothy Hill QC, Counsel for Glencore, did not invite me to strike out Springfield's counterclaim under CPR 39.3. Mr Hill also invited me to consider both the lay witness statements and expert evidence filed by Springfield, despite the fact that the makers of those statements were not called.

5. Glencore had filed the evidence of one factual witness, Mr Andrew Gibson, a former employee, now retired. Mr Gibson is living in France and has recently had a knee operation, and his recovery has been slower than expected. On the first day of the trial Mr Hill applied for permission to serve a Civil Evidence Act notice which would permit Mr Gibson's evidence to be adduced without calling him in person. I granted that application. Since there was no attendance from the Defendant, nothing was to be gained by requiring Mr Gibson to come to England, or to give evidence by video link,

when there would be no-one to cross-examine him, and the Defendant was therefore not prejudiced by the short notice of the application.

6. Accordingly the procedure adopted was that of an abbreviated trial. Mr Hill opened the case and adduced the evidence of Mr Gibson. He then called his expert witness, Dr Aziz Bamba, who gave brief oral evidence to explain some parts of his written expert evidence, and answered questions from the court. There being no attendance by the Defendant, Mr Hill then made brief closing submissions.

THE FACTS

7. There was no material dispute as to the facts, which are as follows.

8. By written contracts dated 26 and 28 May 2015 ("the Sale Contracts"), Glencore agreed to sell and Springfield agreed to buy 12,000mt of gasoline and 12,000mt of gasoil.

9. Clause 8 of the Sale Contracts provided that "credit terms shall be under a letter of credit" and by Clause 9 the letter of credit was to be opened by Springfield by latest two calendar days prior to the first day of the delivery window.

10. Springfield did not open either letter of credit, and the consignments of gasoline and gasoil were discharged ashore into bonded shore tanks. That arrangement was proposed by Springfield, because the cost of storage was less than the rate of demurrage.

11. By the terms of a written addendum to each of the Sales Contracts made in June 2015 and treated by the parties as being backdated to May 2015 the parties agreed to amend each Sale Contract ("the Addenda"). Each addendum provided, in material part, for a letter of credit to be opened no later than 5-6 July 2015, and for the oil and the gasoil to be held at the Tema Fuel Company's ("TFC") Storage Facility in Tema, under the terms of a 2013 Throughput Agreement between TFC and Glencore. The recital to that agreement recorded that Glencore was committed to using a proportion of the tankage capacity "for a period of 5 years for the receipt, storage and throughput" of various oil related products.

12. In the event, Springfield opened letters of credit on 8 July 2015 but only in respect of reduced sums, sufficient only to pay for 6,350mt of gasoline and 6,000mt of gasoil. Those lesser quantities of were duly delivered by Glencore to Springfield from the TFC tanks.

13. By a letter dated 5 November 2015, Springfield stated that it was unable to obtain any further letters of credit and intended to '*retract*' from the Sale Contracts. Glencore said (and says) that this was a repudiatory breach of each contract, which it accepted. Springfield denies that there was a repudiatory breach because, it now says, the Sale Contracts, as amended by the Addenda, were not legally enforceable.

14. By a compromise agreement dated 4 January 2016 ("the Settlement Agreement"), the parties agreed that:

    i) Springfield was liable to the Claimant for breach of the Sale Contracts;

    ii) The Claimant's damages arising from such breach were US$2,250,000; and

iii) Springfield would pay the Claimant US$2,250,000 ("the Debt").

15. By Clause 1.1 of the Settlement Agreement, Springfield agreed to pay the Claimant the Debt in instalments of US$250,000 per month starting on 31 December 2015.

16. By Clause 2 of the Settlement Agreement:

i) Glencore agreed to waive interest on the Debt, provided that Springfield honoured the terms of the Settlement Agreement; but

ii) If an Event of Default under Clause 3 occurred, Springfield was to pay interest on the total Debt at the rate of 8% per annum, calculated from the date of the Settlement Agreement (4 January 2016) and taking into account any payments made by Springfield prior to its default.

17. By Clause 3, if Springfield breached the terms of the Settlement Agreement, then all of the outstanding Debt would become immediately repayable in full together with interest and costs.

18. On 13 April 2016 Glencore and Springfield agreed an addendum to the Settlement Agreement ("the Settlement Addendum") which amended the amounts payable under the Settlement Agreement by including monies said to have accrued under seven other contracts between the parties for the sale of gasoline, each of which provided for Springfield to pay the Claimant demurrage. Accordingly, by the Settlement Addendum, the parties agreed to increase the Debt by US$484,175.92 to US$2,734,175.92. The Addendum recorded that Springfield had repaid a total of US$1,000,000 of the Debt, leaving an outstanding balance of US$1,734,175.92 ("the Balance"). Springfield was obliged to repay the Balance by way of monthly instalments of US$250,000.

19. Springfield paid the June instalment but thereafter paid only US$50,000 a month, making total further payments of US$499,970 up to and including 25 November 12016.

20. The Sales Contracts, Addenda, Settlement Agreement and Settlement Addendum are governed by English law.

21. Glencore sued on 29 June 2017.

22. By its Defence and Counterclaim served on 27 July 2017 Springfield contended, for the first time, that the terms of the Addenda rendered unlawful the Sales Contract (as amended), because the Sale Contracts were illegal by the law of Ghana, said to be their place of performance. It further alleged that, because the Sale Contracts were unlawful, any subsequent agreement founded upon or purporting to compromise a dispute arising out of the amended Sale Contracts, was also illegal and unenforceable.

23. The basis of the illegality alleged by Springfield was that the Addenda provided that the oil and gasoil "be held at the TFC storage facility under the terms of the throughput agreement between TFC and [Glencore] dated 1 October 2013 and the Seller shall retain title to it until such time as it released by the Seller to the Buyer." Springfield alleged that this meant that Glencore was carrying out the activity of "storage" of the oil products, and that this activity required a licence under the provisions of Ghana's National Petroleum Act 2005 (the "GNPA").

24. It is common ground that Glencore did not have such a licence.

25. Springfield further contended that Glencore's failure to have a licence was a criminal offence under the GNPA.

26. Springfield counterclaimed on the basis that, because the Settlement Agreement was unlawful, it was entitled to recover the sums paid under it by way of restitution. Springfield did however accept that it should give credit for the sums paid that were referable to its liabilities for demurrage under the other contracts, and sought repayment of the sums it had paid less its demurrage liabilities, making $1,056,362.

27. The ambit of Springfield's allegations of illegality was expanded in Springfield's Reply to Defence to Counterclaim, which alleged that when Glencore discharged the products from vessels in Tema port into the TFC facility, it engaged in several 'business or commercial activities' pursuant to section 11(2) of the GNPA, namely importation, sale, and/or transportation, in addition to storage.

28. It will be noted that it was not until after the Settlement Agreement had been reached, and part performed, that Springfield first raised any allegation of underlying illegality. It will also be noted that Springfield does not contend that the Settlement Agreement is on its face illegal or involves any illegal act. This is therefore a case in which a party seeks to escape from a settlement agreement on the basis that the underlying dispute which was settled concerned an agreement the performance of which was illegal by the law of the place of performance. Because the illegality was not raised prior to the compromise being reached, this is not a case where the dispute that was compromised included an issue as to illegality.

ISSUES

29. The parties agreed a list of issues. It can in my view be condensed to two main issues:

(1) Are the Sale Contracts, as amended by the Addenda, unlawful by reference to the law of Ghana because they involve Glencore performing an act of any of the following kinds, and for which a licence is required under the GNPA: (a) storage; (b) importation; (c) transportation; (d) sale?

(2) If so, should the Court decline to enforce the Settlement Agreement by which claims under the amended Sale Contracts were compromised?

(1) Whether Performance of the Amended Sale Contracts is unlawful under Ghanaian law

30. The burden of showing that performance of the amended Sale Contracts is unlawful lies with Springfield: see per Bowen LJ in Hire Purchase Furnishing Co v Richens (1887) 20 QBD 387 at 389: "There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The law presumes against illegality."

31. Questions of foreign law are questions of fact. Mr Hill was content for me to consider the expert report served by Springfield, so that the materials available to me are the relevant Ghanaian statue and the reports of Dr Aziz Bamba for Glencore and Mr Fugar for Springfield.

32. The Ghanaian National Petroleum Authority Act (GNPA) was (according to its preamble) passed to establish the National Petroleum Authority to regulate oversee and monitor activities in the petroleum downstream industry; to establish a Unified Petroleum Price Fund; and to provide for related matters.

33. Section 11 of the GNPA is entitled Licences and provides as follows:

> Requirement for licence
>
> (1) A person shall not engage in a business or commercial activity in the downstream industry unless that person has been granted a licence for that purpose by the Board.
>
> (2) The business or commercial activities of the downstream industry in respect of crude oil, gasoline, diesel, liquefied petroleum gas, kerosene and other designated petroleum products are
>
> (a) importation
>
> (b) exportation
>
> (c) re-exportation
>
> (d) shipment
>
> (e) transportation
>
> (f) processing
>
> (g) refining
>
> (h) storage
>
> (i) distribution
>
> (j) marketing, and
>
> (k) sale.
>
> (3) The Authority may by legislative instrument limit or expand the scope of activities under section 11 subsection (2).

Mr Fugar's evidence

34. Mr Fugar, Springfield's expert, holds a BA and LLB (Hons) from the University of Ghana and the degree of Barrister-at-Law from the Ghana School of Law. He was called to the Bar of Ghana in 1973 and is now Senior Partner of Fugar and Co a firm with over

15 lawyers and 10 paralegals operating in Accra. His CV lists an impressive series of commercial clients for whom he has worked over the years. It is fair, however, to observe that Mr Fugar does not identify any previous experience of advising on licensing requirements under the GNPA.

35. Mr Fugar notes that the Throughput Agreement recorded that Glencore would use the TFC terminal for storage of oil products. He concludes that the intention of the parties to the Throughput Agreement was that Glencore "was the party which covenanted to use the tankage of TFC not only for storage but receipt and throughput of the products." He further notes that under the Addenda to the Sale Contracts Glencore agreed that it would retain title to the products until they were released to Springfield. He then says

> "The combined effect of the aforementioned provisions of the Throughput Agreement (which agreement predated the Sale Contracts and the Addenda thereto) and the Addenda, is that the 'importation, receipt, storage and throughput' of the said products, which are 'business or commercial activities of the downstream industry' were carried out by the Claimant not TFC or any other person."

36. He goes on to say this

> "As far as the experience of the expert is concerned, the general practice within the downstream petroleum industry in Ghana is that where a supplier of Petroleum Products enters into a contract with an importer for the supply of petroleum products to the importer (buyer) in Ghana the supplier does not retain title to the petroleum products in Ghana. Under the contract, "title" to the products usually passes to the buyer once the products are delivered in Ghana. In circumstances where the buyer is unable to raise the requisite letter of credit (as was the case in the[se] proceedings) the supplier creates a lien or charge over the products in order to protect the supplier's interest in the event of default by the buyer. In the Sale Contracts and the Addenda between the parties to these proceedings that practice has not been followed. The supplier (claimant herein) maintained title to the products in Ghana contrary to the law and practice.
>
> The expert therefore finds that the Claimant has breached the NPA Act. The Claimant did not employ the option of a lien or a charge or any other security arrangement (as is generally done by suppliers in such circumstances) therefore the Claimant's contention that it did not carry out any business or commercial activities with the Ghanaian downstream industry, for which a licence is required, is not tenable. Since the Claimant retained title to the products, the Claimant's position that it did not engage in commercial activities is not valid."

37. Mr Fugar then goes on to deal with the question of whether, by not having a licence, Glencore committed an offence. He notes that section 11 of the Act makes no express provision regarding the consequences of non-compliance, but goes on to note that section 61(2) provides as follows:

> "(2) A person who commits an offence under this Act for which a penalty has not been prescribed is liable on summary conviction to a fine of not less than 2500 penalty units and not exceeding 15000 penalty units ... or to a term of imprisonment not exceeding ten years, or to both a fine and the imprisonment."

38. Mr Fugar opines that "section 61(2) of the Act has thus criminalized any offending conduct in respect of which no specific penalty has been provided for by the Act."

Dr Aziz Bamba's evidence

39. Dr Abdul Baasit Aziz Bamba holds an LLB from the University of Ghana and the degree of barrister from Ghana School of Law. He holds LLM and Doctor of Law degrees from Harvard Law School. He has acted for a range of commercial and governmental clients and was external counsel to the National Petroleum Authority from 2009 to 2015, advising on and litigating a wide range of issues on the petroleum downstream sector including the licensing regime.

40. I had the advantage of hearing him give evidence, during which I asked him some questions.

41. In relation to "storage" Dr Aziz Bamba noted that the GNPA does not define storage, but other sections of the GNPA indicate that the meaning of storage was "to hold or maintain stocks of petroleum products", in other words to have custody of such products. He noted that TFC holds an NPA licence to operate its storage facilities. His opinion was that there was storage of the petroleum products but the activity of "storage" was being carried on by TFC as operator of the store, not by Glencore. I asked Dr Aziz Bamba whether he had ever come across circumstances in which an owner of petrol products, in a similar position to Glencore, had been required itself to hold a licence permitting it to carry on the activity of storage, in circumstances similar to those in this case. Dr Aziz Bamba said he had never come across any such case.

42. In relation to "importation" Dr Bamba's evidence and opinion was as follows. The GNPA contains no definition of import but the Customs Act 2015 defines import as meaning "to bring or cause goods to be brought into Ghana". An importer of goods must sign an Import Declaration Form, and in this case it was Springfield that signed the Import Declaration Forms for the goods that were the subject of the Sale Contracts. His view was that there had indeed been an importation of the petroleum products, but it was Springfield that had imported them.

43. I asked Dr Aziz Bamba whether the fact that the storage facility was a bonded warehouse had any impact on whether there had been an importation at all (irrespective

of who it was that might have imported the goods) but he indicated that he thought that that was a difficult question to answer.

44. In relation to "transportation" Dr Aziz Bamba noted that a "transporter" is defined under s. 81 of the GNPA as "a person engaged in the transportation, distribution, haulage and carriage of petroleum products, in bulk or packed form, from the oil companies, refineries, and depots to the petroleum retail and consumer outlet stations." In his opinion "transportation" did not cover the mere discharge or final unloading of the cargo from vessels into onshore bonded storage tanks.

45. In relation to "sale" Dr Aziz Bamba's view was that although there had been a sale of the products to Springfield, so that Glencore had engaged in the activity of sale, Glencore had not done so within Ghana. His view was that the amendment of the Sale Contracts so that Glencore maintained title to the goods after they were discharged into the bonded facility, did not affect that analysis.

46. Finally Dr Aziz Bamba dealt with the question of whether, assuming that (contrary to his view) Glencore had carried on an activity that required a licence without having had one, a criminal offence had been committed. His view was that acting without a licence did not constitute a criminal offence. He noted that Article 19(11) of the 1992 Constitution of Ghana which is by Article 1(2) the supreme law of Ghana, stipulates that "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law." He noted that some provisions in the GNPA specifically create criminal offences: so for instance by section 59 a petroleum service provider who makes false statement commits an offence. But no offence was stipulated for a breach of section 11.

47. Dr Aziz Bamba's opinion was that it would be open to the NPA to require an unlicensed entity operating in the downstream, sector to pay a penalty administratively imposed by the NPA.

Findings of Fact in relation to Illegality

48. I prefer the evidence of Dr Aziz Bamba. He is better qualified than Mr Fugar and he has more relevant experience, including in particular his experience as external counsel to the NPA. His views also accord better with common sense. His report and oral evidence was careful and made sense. Mr Fugar's analysis was difficult to follow and superficial.

49. I accept Dr Aziz Bamba's evidence that, for the purposes of the GNPA, and under Ghanaian law, any importation of oil products into Ghana was an importation by Springfield, not by Glencore. That makes sense of the regulatory system. It would make no sense at all to treat a seller of oil products outside Ghana, who sold into Ghana, as carrying out, in Ghana, the activity of importing oil.

50. I accept Dr Aziz Bamba's evidence that, for the purposes of the GNPA, and under Ghanaian law, the activity of storage was carried out in Ghana, but that it was carried out by TFC, not Glencore. It would make no sense at all to require every person whose oil was stored at a storage facility like the TFC facility to obtain a licence to carry on the activity of storage, and I accept Dr Aziz Bamba's evidence that the NPA does not

in fact grant or require licences of that sort but instead licences those who operate storage facilities.

51. I also accept Dr Aziz Bamba's evidence that, for the purposes of the GNPA, and under Ghanaian law, Glencore did not transport petroleum products in Ghana, and did not sell petroleum products in Ghana, for the reasons he gave.

52. I should note that the parties agreed, at paragraph 17.4 of the Agreed List of Issues, that the Court was not required to determine whether Glencore required a licence for its onward sale of the balance of the petroleum products from the Tema facility to third party purchasers.

53. I therefore find as a fact that Glencore did not carry out any activity that required a licence under section 11 of the GNPA.

54. I also accept Dr Aziz Bamba's evidence that carrying out any of the section 11 activities without a licence does not constitute a criminal offence under the law of Ghana. The Act does not say that a criminal offence is thereby committed, and the constitution clearly requires an offence to be "defined in … a written law". I reject Mr Fugar's evidence that the effect of section 61(2) of the GNPA is to criminalise any offending conduct for which no penalty has otherwise been provided by the Act. Section 61(2), on its plain reading, does not create offences, it merely specifies the penalty for offences where no penalty is specified elsewhere.

55. Accordingly I find as a fact that Glencore did not, within the meaning of the GNPA, carry on, in Ghana, the activities of importation, transportation, storage, or sale, and therefore did not require a licence from the NPA. I further find as a fact that even had a licence been required, no criminal offence would have been committed.

56. The position is therefore that there has been no act by Glencore which is unlawful according to the law of Ghana. Neither the Settlement Agreement, nor the amended Sale Contracts that underlie it, are, in any sense, illegal contracts: they are not contracts for an illegal purpose, nor do they require, nor did they as a matter of fact involve, the performance of unlawful acts.

57. That is sufficient to dispose of the only defence to the claim, for if the Settlement Agreement is enforceable the arguments raised by Springfield in relation to the merits of the underlying dispute under the Sale Agreement obviously fall away.

58. Mr Hill invited me to deal with the position on the hypothesis that I had found that the amended Sale Contracts were unlawful under Ghanaian law because they required Glencore to have a licence that it did not have.

59. I was told that Glencore is likely to seek to enforce this judgment in Ghana, and it may be that in the course of such enforcement proceedings a Ghanaian Court takes a different view of the interpretation of the GNPA. I have considered whether in those circumstances the Ghanaian Court might be assisted by my finding as to the impact of such illegality as matter of English law, but I am not persuaded that that is a matter that would be likely to be relevant to the issues (in relation to enforcement) that the Ghanaian Court would need to deal with. I also bear in mind that I have only heard

argument from one party. In those circumstances I consider it inappropriate to decide more than it is necessary to decide in order to dispose of the dispute.

Disposal

60. It follows that there will be judgment for Glencore in the sum of US$1,234,205.91.

61. Because the Settlement Agreement has been breached, the effect of section 2 of the Settlement Agreement is that interest at 8% is applied to the total debt from 4 January 2016 at 8%, credit being given for any monthly payments made prior to any default.

62. Glencore has claimed interest at 8% on (only) the now outstanding balance of $1,234,205.91, and as to that part of that sum added under the Addendum to the Settlement Agreement, claims interest only from 13 April 2016. The figure claimed is less than Glencore's actual entitlement, and I will therefore also give judgment for that sum. Up to 9 July 2018 it is calculated as US$241,019. Glencore will no doubt provide an up to date figure when this judgment is handed down.

63. Finally I should note that Mr Hill encouraged me to make some adverse findings as to the evidence given in witness statements by one of the Defendant's witnesses. Although he showed me correspondence which was not easy to reconcile with what was said by the witness in question, the points were not material to any issue that I have to decide, and I decline to make adverse findings against a witness who was not present to give evidence when such findings would not affect my decision in any event.