IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT

No. HT-2018-000228

[2018] EWHC 3924 (TCC)

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 6th December 2018

Before:

MR JUSTICE WAKSMAN

(**In Private**)

B E T W E E N :

WIRSOL ENERGY LIMITED — Claimant

- and -

TOUCAN ENERGY HOLDINGS LIMITED — Defendant

MR C. MORRISON (Counsel) appeared on behalf of the Claimant.

MR J. McGHEE QC and MR S. HATTAN (Counsel) appeared on behalf of the Defendant.

A P P R O V E D J U D G M E N T

(Transcript prepared without the aid of documentation)

MR JUSTICE WAKSMAN:

1 Today and tomorrow were to have been the hearing of an application for summary judgment brought by the claimant, Wirsol Energy Limited, against Toucan Energy Holdings Limited for the payment of some £6m pursuant to an invoice which was said to have fallen due by reason of what has been called the asset life agreement made between them dated 25 May 2017.

2 For reasons which I will describe, on 26 November, that application was withdrawn and what remains between the parties is the question of costs. The starting point, of course, is that costs follow the event, and the defendant, who no longer has to face this application, says that essentially that is what should happen. The claimant says that that starting point is clearly displaced here.

3 Before dealing with the rival contentions, let me say something by way of background. Wirsol is one of a number of groups of companies dealing with solar energy farms. Wirsol itself fulfilled the role of constructing and maintaining those farms, and other companies within the group, for example, Wircon, owned the various corporate assets. In this particular case, each farm was run by a special purpose vehicle which had been part of the Wircon Group.

4 The Wircon Group sold the entirety of that business to the Toucan Group. That involved, not only selling the companies and also the proprietary interests which those companies had,

but also the EPC contract with Wirsol by which Wirsol had maintained and continued to maintain the solar farms. The structure of the same amounted to this. Wircon sold to what has been referred to as Topco the share capital, I think, in Holdco, which, in turn, held the share capital in the SPVs, so that Topco acquired indirectly all the shares in the SPVs. Now, within the Toucan group of companies, the structure is as follows. This present defendant, Toucan Energy Holdings, as the name suggests, is for present purposes at the top of the line. It owns Topco and thereby Holdco and the SPVs.

5 The ALE provided effectively for an additional payment to Wirsol in the event that it was able to procure extensions to the leases involved in the assets of the solar farms which would obviously be of benefit to the Toucan Group. Effectively, it was being given an additional commission payment and, by 2018, Wirsol, which was going to be the beneficiary of the payments under the agreement, was claiming payment thereunder in the sum of something like £6m.

6 However, there were certain preconditions to payment on the part of Wirsol, which I can describe in this way. First of all, clause 13 said that the payment date, that is when the money falls due, is the later of 31 December 2014 and the date that all the conditions subsequent have been satisfied or waived by Bayerische Landsbank and by the guarantor acting reasonably. The guarantor here is the defendant, which, at the time, was known as Rockfire Energy Holdings Limited.

7 The conditions subsequent were set out in the schedule to the agreement, and a very large number of them were, in fact, a repetition of conditions subsequent to the loan facilities provided by BLB to the operating entities of the solar farms, not to Toucan Genco, but to one or more of the companies beneath it. Under the loan facilities, if a condition subsequent was sought to be waived by any of the relevant borrowing entities, then the bank had to give

its consent to any such waiver. The borrower would obviously want to have the waiver because that would remove an obstacle within the context of the loan facilities. All of those loan facilities predated the sale of the business to the Toucan Group, and indeed were already in operation and being used by the SPVs who were already running the solar farm businesses. Clause 9 then said that:

> "If all the conditions subsequent have not been satisfied in accordance with this deed by no later than 30 June 2018, then the claimant would not be entitled to any payment under this deed."

8 When the claimant first sought payment in respect of this, the defendant simply refused to pay. At that stage, it ran three different types of defence. It is not necessary to go into detail. They were debated between the parties in June and July 2018, the claimant taking the view that there was nothing in them.

9 It is worth making mention of them for one reason, which I will come to hereafter, and I take by way of example the letter of 13 June which said that the invoice was invalid. The argument here is that the invoice, which, in fact, had been sent on 30 December 2017, was premature because some of the conditions precedent at that stage had not yet been fulfilled; therefore, not only was the money not yet due yet, the invoice sent on 30 December was entirely invalid. It is important to note that, in this letter, it was not suggested that, as at 13 June, there would have been some current obstacle to payment in the form of an as yet unmet or unwaived condition precedent,. The second point made was that there was an agreement at a meeting on 18 May 2018 to put off or extend the time for payment and the third was a point on quantum.

10 By August, the defendants were still running those and only those defences. Accordingly, the claimant issued proceedings and it issued an application for summary judgment on 2 August at the same time. So far as the claimant was concerned, therefore, in terms of anything positive being advanced by the defendant by way of defence, all it was dealing with were these three types of defence, in respect of which it thought there was nothing arguable at all.

11 The ALE invoice is described by Mr Allen in his first witness statement in support of the application at para.19, and he sets out there that the invoice was dated on 30 December. He then says this:

> "On 9 January 2018, Toucan Energy [which was then called Rockfire Energy] wrote to Wirsol to confirm that the sums due under the first ALE invoice had not become due because the conditions had not been met."

Then he said at para.21:

> "On 28 February 2018, Wirsol wrote to Toucan Energy and Toucan Genco to state that the conditions subsequent had been discharged, and the first ALE invoice was due and payable by 2 March 2018. It has never subsequently been suggested by Toucan Energy that the conditions subsequent have not been met."

12 When one looks at those documents, one can see, as Mr Allen says, that the claimant, having received the letter of 9 January which asserted in very general terms that the conditions had not been met and makes some other matters about un-particularised amounts and so on, wrote the letter expressly, not only to Toucan Genco Limited, but also to Rockfire, now Toucan Energy Holdings Limited, the party who was responsible for payment under the

ALE. It asserts in very clear terms that all of the conditions had been satisfied and waived, not only by BLB, but also by Rockfire. Then they attach a confirming letter from Eversheds saying that all the conditions subsequent are satisfied for the Wirsol 1 and 2 projects, which covers these transactions, including the FACCSs, and I will come back to that, but I accept that this would encompass what is now being referred to as condition 49, which has been waived by the bank and the waiver letter has been signed by the Wirsol 1 borrower.

13 It is plain to me that the reason why Mr Allen got into this, albeit briefly, is because, in making an application for summary judgment, he wanted to deal with one general assertion that had been made on 9 January suggesting that not all of the conditions subsequent had been met or waived, and what he does is to say that "This is how Wirsol responded to the matter and we never heard anything more about it."

14 I do not believe that Mr Allen was trying surreptitiously to concoct some sort of estoppel argument in the full knowledge that the conditions had not been met or waived. He was simply being cautious in dealing with something that had been raised potentially on the merits, but which, after he wrote to the defendant, had gone away. There is no reason, in my judgment, why he should have engaged any further with the question of the conditions subsequent issue. He spends most of his evidence understandably arguing that the three types of defences which had been raised in correspondence had no substance to them at all and, therefore, the application should succeed.

15 There the matter rested until 1 October or just afterwards, when the claimant was informed by the defendant that it had taken by way of an assignment a number of claims which had been made and certainly intimated in correspondence by the SPVs against Wirsol in relation to the construction and maintenance of the solar farms, which they said were seriously defective.

16 It is right that pre-action correspondence on behalf of the defendant raised the fact that there were or were going to be these actions in the Commercial Court. It is also right to say that, if one looks at the position globally, then, of course, there was an overall package containing a number of different contracts with different companies from the Wircon Groups on the one hand and on the Toucan Groups on the other. The claim under the ALE was to do with an effective commission payment. The claims brought originally by the SPVs and others were to do with the functioning of the solar farms. But the difficulty for the defendant prior to the assignment was that it was not going to be or not going to be mainly the claimant because it had no right of its own, because it was not party to the relevant contracts.

17 It appears from the correspondence that, at an earlier stage, one way round that problem which had been intimated by Eversheds was that, in fact, the Wircon Groups had all been guilty of conspiracy against the defendant. Sensibly and wisely, as I see it, that allegation was later withdrawn. So what the claimant knew just after 1 October or around 1 October was that the setoff argument was now going to be advanced or could be advanced by Wirsol because it had obtained an assignment.

18 What then happened was that the claimant waited for the defendant's evidence and that came forward on 16 October. Until then, the defendant was still maintaining the three types of defence which it had intimated to the claimant earlier in the year. But, on 16 October, things changed. First of all, in the affidavit on behalf of the defendant, the original defences were withdrawn, it being recognised that they were not strong defences. That is perhaps something of an understatement. One does not have to have a strong defence in order to defeat summary judgment. One simply needs to have a defence that has a real prospect of success. The reality is that the defendant recognised there was nothing in those points at all and wisely abandoned them.

19 But two other matters emerged. First of all, emphasis was now placed on a setoff argument since the defendant company was now in a position to advance those other claims by way of assignment. The second point was that issue was now taken on the question of the condition precedents. A particular point was made, and that was this. What was said by Mr Byford towards the end of the witness statement was that Toucan Energy never received the final acceptance certificates in respect of any of the solar farms, and those relevant contracts had now been terminated and it was now impossible for the final acceptance certificates to be provided. Then he says that Mr Allen was obfuscating by saying it had never been suggested by Toucan Energy that the conditions subsequent had not been met.

20 I am not sure that that was a fair criticism. What was certainly plain is that, between the 28 February letter in 2018 and this witness statement of 16 October, so that is a period of around eight months, Toucan Energy had never contested the clear suggestion made by the claimant in the letter of 28 February that all of the relevant conditions had been met or waived, and that was a letter addressed specifically to the defendant.

21 It is absolutely remarkable to me that the defendant did not come back and say "What do you mean? Of course, they have not been met and they have not been waived", if that was something in its mind at the time, because, if that was right and if it could really demonstrate that a condition precedent had not been met and the longstop date had now gone past, that was the end to the claimant's claim. But the defendant never asserted anything of the kind, and that is all that Mr Allen was pointing out.

22 What, however, Mr Byford then did was to say that the letter of 28 February enclosing the 16 February email was not itself sufficient evidence of any waiver on the part of the question of final acceptance certificates which was the subject matter of condition 59. He

contended that that was all about obligations under the facilities agreement and that is why the waiver was given by, or perhaps better to, the Wirsol 1 borrower. Toucan Energy was not that borrower and, therefore, you could not say that, by that email itself, Toucan had waived the conditions subsequent.

23 That was a new defence, and the parties engaged in correspondence about it. On 25 October, Enyo Law came back on it and said that this is not actually the case because there was an email exchange from November, which I will refer to in a moment, which shows that Toucan Energy's lawyers had waived condition 49. That is disputed by Eversheds in their letter of 30 October, in that that email exchange did not prove that at all.

24 Referring to that exchange, what happened here was that there was a letter which was written to the bank by Wirsol saying that they were in the process of meeting their obligations under the Asset Life extension document that had been agreed between the parties; as for the final acceptance certificate conditions that had been discussed previously with Rockfire via Gowlings, they did wish to give an undertaking for the delivery of those certificates because, in fact, they could not and requested that the bank confirm approval for dropping the requirement for the waiver without any further undertakings of the borrower. "Would you confirm at your earliest convenience?"

25 They write to the bank, and the bank comes back and says "Fine for BLB" and then, one way or the other, that appears then to be forwarded. In fact, it is forwarded again from CMS, acting at the time for the claimant, to Erika Pircher-Eschig, a solicitor at Gowling, who responds "Rockfire have confirmed they are fine with this waiver. Furthermore, I have received the following comments to the deed of waiver", and so on and so forth. The claimant took the view that that was indeed a waiver from Energy. The defendant says, no, it is not, because Gowling did not act for Energy at that time and they only acted for Genco.

26 There are different ways of looking at this email, and it is not necessary for me to decide which. Indeed, it is likely to be the subject of the litigation that comes hereafter. There is the question of who Rockfire means. On the face of it, the company that was being referred to as Rockfire, from what I have seen, is actually the Energy company, but it is said that that could mean the whole group, including those who would either have to give the waiver from the facilities purpose point of view or the beneficiaries of those waivers. On the other hand, this is an email which is written by Wirsol and specifically refers to the conditions precedent that will have to be satisfied or waived in relation to the ALE, not the banking facilities, the bank, of course, having a role in relation to both agreements.

27 They debated this in correspondence and disagreed, and the claimant said that they still had a strong case for saying it amounted to a waiver by Energy, and said so in a witness statement of 2 November. But the situation changed again on 20 November, when there was a witness statement, not only in response from Eversheds, but also from the solicitor at Gowlings. He said that they were only instructed in respect of banking matters and nothing to do with Toucan Energy on any view, and the only capacity in which that email was sent was in relation to Genco or one of the other companies, but not Energy, and moreover that the claimant knew full-well that that was the case.

28 What happened subsequently was that there was further toing and froing on the point. The claimant had put in the narrative from some of Gowlings' invoices suggesting that it was indeed dealing with the conditions precedent in respect of the ALE, and obviously Gowlings was not acting for the bank so ergo it must have been acting for Energy. The defendant took great exception to this because the claimant did not put in the invoices themselves, which it turns out were addressed to Genco, and it said that this was improper conduct on the part of the claimant.

29 I do not accept that. The significance or otherwise of the invoices will be gone into later on. But, in my judgment, it is not uncommon for invoices to be sent to a group company even though they may be not the company for which that particular piece of work was being done. But, in any event, what happened on 26 November is that by that stage and, in particular, in the light of the fact that it was alleging that the claimant knew perfectly well that Gowling were not acting for Energy Company, then they withdrew the application.

30 The other point I should make because it has been stressed by the defendant is that, in effect, going back to the 3 November document was a radical change of position for the claimant, which had previously never mentioned it at all, but had only referred to the 9 January 2018 letter and its response on 28 February 2018. There is nothing in that point. In the early stages, there was simply a general point that had to be made in the light of the 9 January letter, which itself was entirely general, to the effect that there had been confirmation that everything had been satisfied or waived. It is perfectly true that the 16 February email refers to the FACs, but only in the context of saying all of the conditions subsequent, including the FACs, have been dealt with.

31 At that stage, in my judgment, there was no reason why the claimant's should have thought about a specific objection in regard to condition 49 and, of course, any such belief would have been confirmed by the fact that, for the following eight months, there was not. When that matter specifically was raised, the question of the FACs, then the claimant went back to the document which it said was one of the waivers which had been summarised in February had been given.

32 In the light of all of that, I have now got to decide what should happen with costs, and it seems to me that the essence of it, first of all, is to work out first of all should the application

for summary judgment ever have been made and, if it was reasonably and properly made at the time, when did the point arise when it should have been abandoned and was that earlier than when it was abandoned, and matters of that kind.

33 First of all, there is absolutely no reason why it can be said that the claim was not properly made when it was started. There were only three defences advanced. It was not for the claimant to try and divine what other defence, good or bad, might come out of the woodwork at a later stage. It had even raised in general terms the question of conditions subsequent and got complete silence from the other side, so it was perfectly entitled to assume there was nothing there and, on that basis, of course it was entirely properly raised.

34 Then we come to the period after it was raised, but up until 1 October. Up until then, absolutely nothing changed. The only defences being run were the defences in relation to the matters that were later abandoned. On 1 October, it was informed of the assignment of the other actions. But, in my judgment, that did not mean that it should have abandoned the claim then. After all, the three defences were still being run and, even if the setoff argument was a perfectly good one, there would have been merit in deciding that the three other defences had no legs and, therefore, there was no pure defence to the claim. So the claimant was perfectly entitled to keep on going.

35 The next thing that happens is on 16 October and, at that stage, there is then, not merely evidence which sets out the setoffs in more detail, but then, for the first time, there is the issue raised about condition 49. In my judgment, on one view, the claimant would have been entitled certainly to keep going after that, because it had to explore whether there was anything in this new issue or not and it had to go back and look at the documents, and then there was the debate in correspondence and then, after that, there was the question of further evidence and it was only on 20 November that Gowling actually put evidence in of its own,

which rather heightened the stakes and, quite rightly, the application could not go on beyond that point.

36 I think there is force in the claimant's suggestion that, so far as setoff is concerned, if that had been the only point, it may well have been reasonable to continue and challenge it, even without the other three defences having been raised. True it is that there was a package of contracts. True it is that the defendant was now in a position to maintain those claims. But, where there has been an assignment obviously for the purpose of bringing all of these matters together, even if, as it was here, an assignment which was specifically permitted by the underlying agreement, it does not follow, in my judgment, that the condition for equitable setoff will necessarily have been made out.

37 However, that does not matter in one sense, because the claimant's position on costs is that it should have its costs until 16 October in any event and then, after that, it is content for the costs to be in the case or for there to be some other alternative, for example, defendant's costs in the case or the final option, which is that they should be reserved. In situations like this where a summary judgment application was entirely properly started, but there comes a point when it is said that it should have stopped which was before when it did stop, the case law shows that there are a variety of options, which include defendant's costs in the case and another is costs reserved.

38 In my judgment, the proper costs order in principle is that the claimant should have its costs on the standard basis up to and including receipt of the 16 October evidence, by which I mean that the claimant was entitled at least to spend a day or two studying that evidence. Thereafter, in my judgment, the costs should be reserved.

39 There is no basis at all to suggest, as the defendant has suggested, that they should have their costs from day one because the whole of the summary judgment application was inappropriate. That is simply wrong and, for the period at which I think they chose from 16 October that they should continue to have their costs and on the indemnity basis until 26 November, there is no basis for that at all. The particular pieces of conduct which they say give rise to the indemnity order I don't agree with, and there is at least a strong argument that the claimant was entitled to go further beyond 16 October or even 2 November to see really what the strength of the evidence was and the real meat of the argument was that the defendant was advancing, and conceivably to wait until 20 November evidence was served.

40 But I am not making a final judgment about that now. All of that is much better dealt with by the judge who deals with the trial when the whole episode so far as condition 49 is gone into and when I suspect there will be much more material before the judge than there is now. The judge at that point may take the view that, having seen all of the material, the summary judgment application should have stopped completely by the end of October, and the fact that it did not means that the defendant should have its costs; or it may turn out on final analysis that it was the defendant's position which was inappropriate and the claimant should receive further costs or some other order. So, in those circumstances, that is the order which I am going to make.

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This transcript has been approved by the Judge (subject to Judge's approval)