



IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2020] EWHC 3873 (TCC)

No. HT-2020-000455

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 11 December 2020

Before:

MR JUSTICE KERR

B E T W E E N :

AIC LIMITED

Respondent/Claimant

- and -

THE FEDERAL AIRPORTS AUTHORITY OF NIGERIA

Applicant/Defendant

THE RESPONDENT/CLAIMANT did not attend and was not represented

MR RIAZ HUSSAIN QC (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) appeared on behalf of the Applicant/Defendant.

J U D G M E N T

MR JUSTICE KERR:

- 1 The applicant (**FAAN**) seeks a without notice freezing injunction to restrain dissipation of the proceeds of a call by the respondent (**AIC**) on a guarantee issued by Standard Chartered Bank (**SCB**) and provided by FAAN on 6 December 2019. The application was very fairly presented by Mr Riaz Hussain QC who directed my attention not just to the points he wished to make but those he would have expected AIC to make were it present.
- 2 FAAN is a Nigerian corporation created by a legislative degree in 1977. It operates airports in Nigeria. AIC started in the construction and property business in the 1970s. In 1998, FAAN leased land to AIC in Nigeria. The deed of lease included an arbitration agreement subject to Nigerian law, Nigeria being also the seat of any arbitration. A dispute arose leading to an arbitration award in Nigeria. AIC was awarded US\$48.13 million plus interest at 18 percent per annum (**the Award**).
- 3 In June 2013 the Award was set aside by a judge in Nigeria, The Honourable Justice Buba. Two years later in June 2015, the Nigerian Court of Appeal allowed AIC's appeal against the setting aside of the Award and remitted the matter to the Federal High Court. The parties appealed and cross-appealed to the Nigerian Supreme Court. That appeal and cross-appeal remains pending.
- 4 In January 2019, AIC issued an arbitration claim in the High Court in this country under section 66 of the Arbitration Act 1996 seeking to enforce the operative part of the Award. O'Farrell J made an order permitting enforcement on terms with permission to FAAN to apply to set aside her order. FAAN then did so, seeking an adjournment of AIC's application to enforce the Award on the ground that proceedings were ongoing in Nigeria concerning its validity. AIC cross applied seeking an order that any adjournment should be conditional on FAAN providing security.
- 5 In August 2019, Ms Veronique Buehrlen QC sitting as a Deputy Judge of this court allowed FAAN's application and ordered that it provide security in the sum of US\$24.062 million in a form to be ordered if not agreed (see [2019] EWHC 2212 (TCC)). On 17 September 2019, this court directed that the security should take the form of a bank guarantee to be provided by 29 October 2019. Provided the bank guarantee was forthcoming by that date, AIC's enforcement application would be adjourned pending conclusion of the proceedings in Nigeria.
- 6 The order provided that the guarantee must be in the sum of US\$24.062 million, must be valid and operative until nine months after the final and unappealable decision of the Nigerian Court as to the setting aside of the Award and must be, "callable upon the English Court giving the claimant [AIC] permission to enforce the operative part of the Award." The learned Deputy Judge also gave AIC liberty to apply to enforce the Award should FAAN fail to provide the security.
- 7 Not having provided the security by the deadline of 29 October 2019, FAAN instead applied to the Court of Appeal for an extension of time for providing it. The Court of Appeal on 30 October 2019 granted an extension of time until three working days after either the hearing of FAAN's appeal if it were permitted to appeal, or three working days after refusal of permission to appeal. The Court of Appeal then refused permission to appeal on 11 November 2019.

- 8 On 14 November 2019, FAAN applied to vary the order of Ms Buehrlen QC and sought an extension of time until 5 December 2019 to provide the required security. AIC countered that with an application of its own on 21 November 2019 seeking to enforce the Award. Those two applications were heard together before the same Deputy Judge, Ms Buehrlen QC, on 6 December 2019.
- 9 She gave an *extempore* judgment permitting enforcement of the Award on the ground that FAAN had failed to provide the requisite security. That was accompanied by an unsealed order to the same effect. However, after court the same afternoon, after 5pm, the guarantee from SCB appeared and was provided by FAAN’s counsel to AIC’s counsel. That guarantee is before me today.
- 10 The recitals refer to the Award, the English Court proceedings and the adjournment of AIC’s application to enforce the Award pending resolution of the court proceedings in Nigeria. After the recitals the guarantee set out its three clauses. SCB:
“unconditionally and irrevocably declares as follows:
(I) that this guarantee is in the maximum sum of USD24,062,000.00 ...
(II) that this guarantee shall be valid and operative until the earlier of any of the following events (and upon any of the following events occurring this guarantee shall be null and void):
(A) 9 ... months after the final and non-appealable decision of the Nigerian Supreme Court confirming that the Award is set aside,
(B) cancellation or release by the claimant of this guarantee, and
(C) payment by the bank to the claimant under this guarantee, and
(III) that this guarantee is callable upon the claimant’s first written demand stating that the English court has made an order giving the claimant permission to enforce the operative part of the Award and stating the amount being claimed under this guarantee which shall be an amount not exceeding USD24,062,000.00.
Only one valid demand may be made under this guarantee.”
- 11 Armed with the guarantee which was dated 6 December 2019, FAAN applied to return to court before the Deputy Judge and invited her to reconsider her decision and recast her order. After hearing argument on 13 December 2019, she acceded to that application and agreed to reconsider her decision.
- 12 She recorded in her revised order, which was sealed, that FAAN had provided security for the Award as required and she granted it relief from sanctions in respect of the lateness of the security. She therefore adjourned AIC’s application to enforce the Award and determined that the guarantee “is deemed by the Court to be compliant with paragraphs 2 and 3 of the Order dated 17 September 2019.”
- 13 AIC then appealed to the Court of Appeal against that decision, submitting that the learned Deputy Judge had been wrong to accede to the invitation to reconsider her original decision and the unsealed order of 6 December 2019; and had been wrong to grant relief from sanctions.

- 14 While that matter was pending before the Court of Appeal, AIC issued a written demand on SCB stating that it was making a call under the guarantee. SCB, however, did not pay the amount guaranteed, reasoning that the conditions were not met in view of the Deputy Judge's revised decision.
- 15 When the matter eventually came before the Court of Appeal, it allowed AIC's appeal and determined that the Deputy Judge's first decision should be restored and her second decision set aside. The reasons are set out in detail in the leading judgment of Coulson LJ and I need not repeat them here: see [2020] EWCA Civ 1585. In its order, the Court of Appeal gave AIC permission to enforce the operative part of the Award and ordered that FAAN must pay AIC sums amounting to approximately US\$150 million inclusive of interest.
- 16 The Court of Appeal's order recorded that those sums were payable:
"in the same manner as a judgment or order of the High Court to the same effect; and... judgment be entered against the respondent [FAAN] in the terms of the Award for the sums specified... ."
- 17 The Court of Appeal refused permission to appeal to the Supreme Court. FAAN has applied to the Supreme Court for permission to appeal and its decision on that application is awaited.
- 18 Fortified by the Court of Appeal's judgment and order, AIC repeated its demand under the guarantee addressing it to SCB. This time AIC was successful. The following day on 27 November 2020, SCB paid US\$24.062 million to AIC's London bank account.
- 19 According to the affidavit evidence of Mr Timi Balogun, FAAN's solicitor, payment by SCB to AIC under the guarantee has caused loss to FAAN because SCB, he says on instructions, has made a corresponding recovery of the amount paid out from the Central Bank of Nigeria under the terms of SCB's relations with the Central Bank of Nigeria which, Mr Balogun notes, has an account with SCB.
- 20 FAAN does not have an account with SCB but, says Mr Balogun, will become obliged under the terms of its contractual relations with the Central Bank of Nigeria and local regulations to make good the loss of the latter by reason of its obligation to reimburse SCB in respect of the amount paid out under the guarantee. In other words, says Mr Balogun, the loss of the US\$24.062 million will ultimately fall on FAAN.
- 21 Such are the facts presented in evidence in this application. FAAN submits through Mr Hussain QC that the guarantee has not at any stage become callable and does not do so unless and until the Supreme Court of Nigeria has decided the currently pending appeal against FAAN which has not yet happened.
- 22 In support of that submission, FAAN emphasises the recitals in the guarantee and the references therein to the "appeal" in Nigeria and the "adjournment" of AIC's claim to enforce the Award in this country. And, Mr Hussain submits, the guarantee is in no sense a performance bond and is not callable unless that condition is met.
- 23 He relies on a passage in the reconsidered judgment of Ms Buehrlen QC at paragraph 19. Although that judgment and the decision in it was overturned by the Court of Appeal, Mr Hussain submits that the reasoning in that paragraph is good; it states as follows:
"19 ... The purpose of the guarantee was to provide AIC with security whilst its application for enforcement of the Award was adjourned pending a final and unappealable decision of the Nigerian courts as to the setting aside of the Award.

In effect, it was the price FAAN had to pay for the adjournment. It was not intended for immediate enforcement... .”

- 24 FAAN submits that it has an equitable right to an injunction on the basis that if one is not granted, there will have been a misuse of guarantee funds regulated by orders of this court. Mr Hussain submits that that is a sufficient equitable right to found the jurisdiction of the court to grant an injunction and that that is sufficient as a cause of action.
- 25 Mr Hussain referred me to a number of authorities; see in particular *Flightline Limited v Edwards* [2003] 1 WLR 1200 per Jonathan Parker LJ at [23], [44-47]. He relied on that authority for the proposition that an agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way; and submitted that, as Jonathan Parker LJ pointed out, while a freezing order does not itself create security in the sense of priority over other creditors, it does provide a means of preventing misapplication of assets.
- 26 On the basis of the authority, Mr Hussain’s proposition was that an injunction can be issued to protect assets offered as security; and not just under a contractual arrangement but also under a court order. He also pointed out to me more recent authorities extending the thrust of that reasoning; see *Sirius International Insurance Company (Publ) v FAI General Insurance Ltd* [2003] EWCA Civ 1470 per May LJ at [27]; *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC), per Akenhead J at [33]; and, most recently, *Doosan Babcock v MABE* [2013] EWHC 3201 (TCC) at [36] per Edwards-Stuart J.
- 27 Mr Hussain went on to submit that even if he was wrong and the guarantee had become callable under its terms, it was nonetheless provided as security for the adjournment and its use for a different purpose should be restrained by injunction. He pointed to the jurisdiction of the court to make restitution in cases involving well-known circumstances such as mistake of law or fact. He took me through the principles and authorities governing the restitutionary remedy in cases of unjust enrichment.
- 28 It is not necessary to go through the arguments and authorities here at the same level of detail. Mr Hussain submitted that AIC would indeed be unjustly enriched if they benefited from the guarantee prematurely, in the sense that it was never intended to operate other than on fulfilment of the condition that the Supreme Court of Nigeria must first have pronounced in the AIC appellate proceedings before it.
- 29 He submitted that, accordingly, AIC had unjustly obtained a better enforcement regime in respect of the Court of Appeal’s money judgment than it otherwise would have done because AIC via the guarantee had obtained immediate recovery of part of the unsecured judgment debt as if it had been a secured creditor when it was not.
- 30 FAAN went on to submit that the English Court had jurisdiction over its putative claim against AIC for an injunction restraining misuse of the guarantee funds and/or unjust enrichment. Mr Hussain pointed out that AIC has a place of business here in the jurisdiction, with an address for service, and that payment of the money under the guarantee, the act of unjust enrichment, he says, occurred in England and Wales. FAAN therefore submits that it would get leave to serve the claim out of the jurisdiction.
- 31 On that basis, FAAN submits that it has a good arguable case, firstly, that the guarantee was not callable under its terms and/or, secondly, that AIC was unjustly enriched by payment under the demand and that FAAN is entitled to restitution. Mr Hussain submitted that there

are good grounds for supposing that assets remain in this jurisdiction against which a freezing order can bite, because AIC received payment from SCB into its UK bank account. He submits that there is a clear and real risk of unjustified dissipation of those assets.

- 32 In that regard, he pointed to detailed evidence from Mr Balogun and other evidence, for example documents from the Register of Companies in Nigeria, showing that AIC was trading, if at all, at a very low level. It had not filed accounts since 2016 and the last filed accounts showed a turnover and profit amounting to the equivalent of merely thousands or tens of thousands of US dollars.
- 33 FAAN offers a cross undertaking in damages through Mr Balogun in his affidavit. Mr Hussain points out that FAAN is effectively a public body underwritten by the Nigerian government and is likely, therefore, to be able to meet its undertaking. Finally, Mr Hussain submitted that for all those reasons it would be just and convenient to grant a freezing order in the terms sought, which would prevent the sum of US\$24.062 million from being removed from the jurisdiction or otherwise dissipated; and would also freeze a further US\$100,000 to meet FAAN's costs.
- 34 Turning to my reasoning and conclusions, I am prepared to assume in FAAN's favour a number of things. First, I am content to assume that FAAN has or would have a sufficient cause of action or equitable right to an injunction if the guarantee had been or was wrongly called in breach of its terms.
- 35 Secondly, I am prepared to accept for present purposes as correct FAAN's account of the law relating to restitution in cases of unjust enrichment, as expounded by Mr Hussain; and I am prepared to assume in FAAN's favour that this court would have jurisdiction over its putative claim against AIC and would be prepared to grant leave to serve AIC outside the jurisdiction or, at any rate, to adopt a method of service that would be valid.
- 36 Nevertheless, having said that, in my judgment there are three fundamental difficulties with this application. They can be briefly stated.
- 37 The first is that I do not think FAAN has a good arguable case that the guarantee has not become callable under its terms. In my judgment, it is plain that it became callable on issue of the Court of Appeal's order on 26 November 2020.
- 38 Mr Hussain's reliance on and emphasis on what is set out in the recitals is in my judgment not persuasive. The recitals give testimony as to the circumstances in which the guarantee came to be given but they do not define the parties' rights and obligations under it. Those rights and obligations must be found in the terms of the guarantee itself and not in the recitals to it.
- 39 The guarantee, as I have said, contains three operative clauses. The first sets out the amount of the sum guaranteed. The second deals with the duration of the guarantee and the events on the happening of which it will cease to have effect. There are three such events, as I have noted. Not one of them had occurred until payment was made under the guarantee. The third operative clause addresses the circumstances in which a guarantee is callable.
- 40 It is callable:
"upon the claimant's first written demand stating that the English court has made an order giving the claimant permission to enforce the operative part of the Award and stating the amount being claimed... ."

- 41 That is exactly what happened. The English court, namely, the Court of Appeal, made an order on 26 November 2020 giving the claimant, AIC, permission to enforce the operative part of the Award and gave a money judgment in accordance with the Award. The demand stated those matters. It seems therefore to me plain that SCB was right to regard the guarantee as callable and to pay out upon it.
- 42 Secondly, by the same reasoning, I do not think that FAAN has a good arguable case that AIC has been unjustly enriched. If AIC can be said to have been enriched at all by receiving part of what it is owed under the Court of Appeal's money judgment, I cannot see anything unjust about that.
- 43 Finally, even if I had thought that FAAN had a good arguable case on either of those two matters, I would without hesitation decide that it is not just and convenient to grant an injunction in the terms of the freezing order sought. Rather, I think it would be most unjust to grant that relief. The Court of Appeal has given a money judgment in AIC's favour. The justice of the matter, I think, is that that judgment should be satisfied and not eluded.
- 44 To grant the injunction sought by Mr Hussain would help to undo the Court of Appeal's order and to outflank the Court of Appeal's refusal of a stay of execution pending FAAN's application for permission to appeal to the Supreme Court. FAAN is, in effect, asking this court for an order that would help to prevent satisfaction of a judgment debt. That is in my judgment the opposite of what a freezing injunction is supposed to achieve.
- 45 For those reasons, the merits of this application are, I fear, in inverse proportion to the eloquence with which Mr Hussain advanced it. It is without merit and it must be and is dismissed.
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