

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

GOVERNOR & COMPANY OF THE BANK OF IRELAND

Plaintiff;

-v-

STATE BANK OF INDIA

Defendant.

WEATHERUP J

[1] This is the defendant's application to stay proceedings on the basis that the appropriate forum for the determination of the issues between the parties is India, where proceedings are already underway between the parties in respect of the same subject matter. Mr Good appeared for the plaintiff and Mr Horner QC for the defendant.

[2] The Writ of Summons was issued on 30 November 2009 and claims damages for loss and damage alleged to have been sustained by the plaintiff by reason of the breach of contract of the defendant in the refusal to reimburse the plaintiff pursuant to a letter of credit issued by the defendant. The Statement of Claim pleads that on 5 September 2008 the defendant issued an irrevocable letter of credit for a sum up to \$625,000 on behalf of the applicant, Sony Ispat Limited ("Sony") based in India, in favour of the beneficiary European Metal Recycling Limited ("EMR") based in Warrington, England. The purpose of the letter of credit was to facilitate payment for goods shipped and sold by EMR as seller to Sony as buyer where EMR requested the plaintiff to agree to act as confirming bank.

[3] It was a pre-condition to payment for the goods and the letter of credit that the seller presented specific documentation to the plaintiff as the confirming bank. The requisite documents relating to three shipments of goods by the buyer to the seller were presented to the plaintiff by the seller in October 2008. The plaintiff determined that the three sets of documents conformed with the requirements of the letter of credit and made payment to the seller in respect of the three shipments in a total sum of \$460,000. In October 2008 the plaintiff forwarded the documents to the defendant requesting reimbursement of the amounts paid at maturity and stating that the plaintiff had paid the seller in accordance with the terms of the letter of credit. In November 2008 the defendant, allegedly in breach of the letter of credit, rejected the documents, claiming discrepancies, and refused to reimburse the plaintiff for the sums that had been paid to the seller. Thus the plaintiff's claim against the defendant is for the loss of the reimbursement of the sum of \$460,000.

[4] The defendant entered a conditional appearance on 18 February 2010. The defendant has identified 13 discrepancies in the documentation and this, the defendant claims, justifies the refusal to pay. The plaintiff on the other hand rejects the alleged discrepancies and contends that there is no justification for non-payment on foot of the irrevocable letter of credit.

[5] The grounding affidavit on this application outlines the progress of proceedings in India. The Indian proceedings were initiated by the present defendant on 31 December 2008 in the District Court at Indore against the present plaintiff as first named defendant and against Sony, as buyer of the goods, as second named defendant and against EMR, as seller of the goods, as the third named defendant. In the Indian proceedings the Bank of India sought an injunction to restrain the Bank of Ireland from issuing any other proceedings in relation to the dispute, known as an anti-suit injunction, and also sought declaratory relief that the documents negotiated under the letter of credit contained discrepancies and did not satisfy the test for presentation of compliant documents.

[6] In the Indian proceedings the Bank of Ireland filed a written statement that specifically addressed the substantive issue between the parties concerning the discrepancies. The Bank of India contends that the Bank of Ireland did not seek to challenge the jurisdiction of the Indian court in the Indian proceedings.

[7] The District Judge at Indore declined to grant the Bank of India the anti-suit injunction and that decision was appealed by the Bank of India to the High Court and judgment was delivered on 27 November 2009. The High Court upheld the decision at first instance and held that the Bank of Ireland was amenable to the jurisdiction of the Indian courts and directed that the trial court should hear and determine the substantive merits of the case and

should expedite the suit and decide as expeditiously as possible, preferably within a period of nine months.

[8] In the present proceedings the grounding affidavit states that the defendant has obtained an expert opinion from an Indian lawyer which states that the plaintiff has failed to raise the issue of the lack of jurisdiction of the Court in the Indian proceedings and therefore has submitted to the jurisdiction of the Indian Court. Further the defendant contends that, unlike the plaintiff in connection with the Indian proceedings, it has not to date submitted to the jurisdiction of the Court in Northern Ireland. As indicated above the defendant entered a conditional appearance on 18 February 2010.

[9] The defendant contends that in the circumstances the appropriate forum for determination of the issues between the parties is India. It will be noted that the Northern Ireland proceedings were commenced immediately after the disposal of the appeal in the Indian proceedings. The substantive issue in both jurisdictions concerns the discrepancies in the documents supporting the irrevocable letter of credit and whether there are any discrepancies that warrant the refusal of payment.

[10] There is also an issue as to whether the Bank of Ireland has submitted to the jurisdiction of the Indian court. Mr Forrester, solicitor for the plaintiff, has indicated in his replying affidavit, in response to the debate on the jurisdiction issue, that the plaintiff has now lodged in the Indian proceedings a specific challenge to the jurisdiction of the Indian Court.

[11] In Spiliada Maritime v Cansulex Limited (1987) AC 460 Lord Goff set out the approach to considering forum conveniens and I summarise as follows.

First of all the basic principle is that a stay will only be granted on the ground of forum conveniens where the Court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action, that is where the case may be tried more suitably in the interests of the parties and in the ends of justice.

Secondly, in general the burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant a stay.

Thirdly, the question being whether there is some other forum which is the appropriate forum for the trial of action, it is pertinent to ask whether, if the plaintiff has founded jurisdiction as of right in accordance with the law of this country, that of itself gives the plaintiff an advantage.

Fourthly, since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the Court will look first to see what factors there are which point in the direction of another forum. These will include not only factors affecting convenience or expense such as the availability of witnesses but also factors such as the law governing

the relevant transaction and the places where the parties respectively reside or carry on business.

Fifthly, if the Court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse the stay.

Sixthly, if however the Court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the Court will consider all the circumstances of the case including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.

[12] The prior proceedings in the Indian Court commenced between the same parties and additional parties and are concerned with the same issues and additional issues. The issue in relation to the discrepancies, which is the substantive issue between the parties in the present proceedings, is a matter which is before the Indian Court. The ruling on an anti-suit injunction was appealed and the substantive case is back before the Judge at first instance, with a direction that the matter proceeds with expedition.

[13] The plaintiff contends that there is likely to be inordinate delay if the dispute is dealt with by the proceedings in India. It is said that civil proceedings in India can take 20 years. There is also affidavit evidence which places the matter in more modest terms but nevertheless involving considerable delay in that at first instance the decision may take 5-7 years and if there is an appeal the whole process may take 10-12 years. The Indian High Court, on disposing of the appeal, directed that the matter should proceed with expedition and preferably within nine months. Recent correspondence in relation to the present state of the Indian proceedings suggests on the one side that the matter has been stayed pending the outcome of these proceedings, while on the other side it has been suggested that the proceedings have not been stayed but that they have been adjourned from time to time by the Bank of Ireland pending the outcome of these proceedings.

[14] The Indian proceedings have progressed and the first instance Court has been directed to proceed with expedition. I conclude that any failure of the first instance Court to proceed as directed by the High Court in India has been occasioned by the commencement of these proceedings in Northern Ireland. I am not satisfied that there is evidence of delay or the prospect of delay in the Indian proceedings such as would warrant excluding the Indian Court as a suitable alternative for the resolution of this dispute.

[15] There are issues about the convenience of witnesses who may be called on the hearing of the substantive proceedings. Inevitably, where there is

consideration of proceedings in Northern Ireland or proceedings in India, with witnesses being required to travel to the other jurisdiction. there will be inconvenience to those who have to travel. The defendant draws attention to its domicile in India and having no place of business in Northern Ireland, to the seller being an English company, the buyer being based in India, the plaintiff, while carrying on business in Northern Ireland, being an international company and the identity of witnesses based in India, including the defendant's expert witness. On the other hand some of the plaintiff's witnesses are based in Northern Ireland, some are based in England and the plaintiff's expert is not based in Northern Ireland. On balance the greater inconvenience probably rests with proceedings in Northern Ireland.

[16] A further consideration is the place of performance of the contract. The Contracts (Applicable Law) Act 1990 applies the Rome Convention on the Law Applicable to Contractual Obligations.

Article 4 of the Convention provides that, to the extent that the law applicable to the contract has not been chosen in accordance with Article 3, a contract is to be governed by the law of the country with which it is '*most closely connected*'.

By Article 4(2) it shall be presumed that the contract is most closely connected with the country where the party who is '*to effect the performance which is characteristic of the contract*' has, at the time of the conclusion of the contract, its base. If the contract is entered into in the course of the parties trade or profession, as in this case, that country shall be the country in which the principal place of business is situate or where under the terms of the contract the performance is to be effected.

[17] The Uniform Customs and Practice for Documentary Credits is a set of rules on the issue and use of letters of credit and they were incorporated into this contract between the plaintiff and the defendant.

[18] The defendant contends that the characteristic performance of the contract is the reimbursement by the defendant and that the reimbursing bank has its place of business in India. The plaintiff contends that the contract is most closely connected with Northern Ireland where the plaintiff has its place of business, where the plaintiff accepted the documents as confirming bank and made payment to the seller, where all documents were submitted by the seller from England, where all the documents were reviewed by the plaintiff, where the payment to the seller was arranged and where the documents submitted by the seller were forwarded to the defendant in India.

[19] The defendant relied on Royal Bank of Scotland v Cassa di Risparmio (Transcript 21 January 1992), decided in the Court of Appeal of England and Wales. The UCP was not incorporated into the contract and the terms of the contract provided for reimbursement in New York of the amount due on the letter of credit. The application was to set aside proceedings in England and it

was considered under the Civil Jurisdiction and Judgments Acts 1982 applying the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Convention concerns jurisdiction being conferred on the place of performance of the obligation in question. The Bank of Scotland sued the Italian bank because of a cancellation of reimbursement by the Italian bank. Phillips J at first instance was upheld by the Court of Appeal, having stated that the agreed mode of performing the reimbursement obligation was through an American reimbursing bank in New York or in one case in Philadelphia. In consequence the agreed place of performance of the reimbursement obligation was New York or in one case Philadelphia. The substantive issue was whether the defendant could justify the failure to effect payment. England was not the place of performance of the obligation in question. The terms of the contract provided that the place of reimbursement was American.

[20] The plaintiff relied on Bank of Baroda v Vysya Bank (1994) 4 CLC 41 where the confirming bank claimed against the issuing bank for withdrawing authority to claim the reimbursement from the reimbursing bank, Citibank in London. The plaintiff had been granted leave to issue proceedings out of the jurisdiction because the law of the contract was considered to be English law and the contract was to be performed in England. The letter of credit was governed by English law and the contract was to be operated in London because the plaintiff's London branch was effecting payment in London.

[21] It is necessary to determine what is the relevant contract and what is the characteristic performance of that contract. There are a number of contracts that arise in relation to the sale of the goods and I summarise the contracts as follows.

The first contract is between the buyer and the seller of the goods, that is, between Sony in India and EMR in England.

The second contract is between the buyer and the issuing bank whereby the issuing bank issues a letter of credit for the seller, either by itself or through a confirming bank, and the buyer agrees to repay the bank. The issuing bank is the defendant and the confirming bank is the plaintiff.

The third contract, being that with which we are particularly concerned, is between the issuing bank and the confirming bank, which provides for repayment of the amount paid upon provision of the appropriate confirming documents.

Fourthly, there is a contract between the confirming bank and the seller, in that the confirming bank will pay on foot of the documents.

Fifthly there is a contract between the issuing bank and the beneficiary, that is the seller.

[22] Within the above complex of contractual arrangements the dispute arises in relation to the third mentioned contract between the issuing bank

and the confirming bank because of the dispute over compliance of the documents that has resulted in the defendant's refusal to make the payment.

[23] What are the performance obligations that arise in the contract between the issuing bank and the confirming bank? On one side the obligation is to furnish the appropriate documents. On the other side the obligation is to make the payment on foot of the documents.

[24] What is the performance that is characteristic of the contract? Essentially the characteristic performance is reimbursement on receipt of the appropriate documents. Which party is to effect that characteristic performance? The defendant as the reimbursing bank is the party making the payment that is the characteristic performance of the contract between the plaintiff and the defendant. The defendant's principal place of business is India.

[25] Accordingly, I do not accept the plaintiff's approach to the place of performance. The contract in question, being the contract between the plaintiff and the defendant for reimbursement, will involve payment made by the defendant in India. It is India that is the place of the characteristic performance of the particular contract and the country with which the contract is most closely connected.

[26] Ultimately the burden is on the defendant to persuade the Court to exercise its discretion to grant a stay. The question is whether there is a more appropriate forum than Northern Ireland. I am satisfied that there is a more appropriate forum and that is India as the place of performance of the contract, the country with which the contract is most closely associated, the venue of the Indian proceedings already dealing with the same issues and involving the same parties and where the matter is advancing, where the proceedings can be completed without undue delay and which on balance is more convenient for all those involved.

[27] There being a more appropriate forum the question is whether there is any reason in justice and for the appropriate disposal of the proceedings that the matter should not be stayed in this jurisdiction so that it may proceed in India. In all the circumstances I am satisfied that there is not any such ground for refusing a stay.

[28] The defendant has discharged the burden of establishing that there is a more appropriate forum for the trial of the action. There will be an Order to stay the Northern Ireland proceedings while the proceedings continue in India.