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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2018]EWHC 1086 (Comm)

No. CL-2018-000290

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 1 May 2018

Before:

MR JUSTICE MALES

B E T W E E N :

KAMOTO COPPER COMPANY SA

Applicant

- and -

(1) AFRICA HORIZONS INVESTMENTS LTD
(2) VENTORA DEVELOPMENT SASU

Respondents

MS C. BINGHAM QC and MR S. O'LEARY (instructed by Messrs Clifford Chance) appeared on behalf of the Applicant.

THE FIRST RESPONDENT did not appear and was not represented.

MR GILLIS QC (instructed by Messrs Mishcon de Reya) appeared on behalf of the Second Respondent.

J U D G M E N T

MR JUSTICE MALES :

- 1 This is an application by Kamoto Copper Company SA against two defendants for an anti-suit injunction prohibiting the defendants from pursuing proceedings in the Democratic Republic of Congo. The defendants are, first, Africa Horizons Investments Ltd and, second, Ventora Development SASU. As I understand it, the first defendant is a subsidiary of the second.
- 2 The claimant and the first defendant are parties to an agreement under which the claimant agreed to pay royalties relating to the mining of copper and cobalt deposits in the DRC. Those royalties are said to be denominated in United States' dollars. The agreement contains a provision in clause 9 relating to assignments and transfers of the agreement. The relevant part of the provision is a prohibition on assignment save as mentioned in clause 9.2 without the prior written consent of the written parties. Clause 9.2 provides:

“AHIL shall be entitled to assign its rights under this agreement to any of its affiliates that are wholly owned directly or indirectly by the same ultimate parent as wholly owns AHIL on the date of this agreement provided that (a) AHIL provides notice of such assignment to KCC prior to or concurrently with such assignment and in any event not less than five days prior to any AHIL royalty payment date; (b) such affiliate that is wholly owned first enters into an assumption agreement with KCC in form and substance reasonably satisfactory to KCC.”
- It is not necessary to read the rest of the clause.
- 3 The agreement provides in clause 14 that the governing law, including the law applicable to any non-contractual disputes, shall be that of England and Wales. Clause 16 is a jurisdiction agreement. It provides:

“The courts of England have exclusive jurisdiction to settle any dispute (including any non-contractual disputes) arising out of or in connection with this agreement (including a dispute regarding the existence, validity or termination of this agreement) (a dispute).”
- 4 It is the second defendant's case that it has had the benefit of the agreement assigned to it pursuant to clause 9.2. It is, as I understand it, accepted that there has been no assumption agreement as contemplated in that clause but it is Ventora's case that such an agreement has been offered and, as I understand it, unreasonably refused by the claimant.
- 5 Today's application arises out of proceedings in the DRC. The application is made on short notice to the defendants. Mr Richard Gillis QC, who appears before me for the second defendant, Ventora, made clear that he did so without prejudice to any future challenge to the jurisdiction of this court and does not submit. It is accepted that in these circumstances and given the short notice given to the defendants, the claimant's duty of full and frank disclosure is not affected, should that ever become relevant in the future.
- 6 Disputes have arisen between the parties as to entitlement to receive royalty payments under the agreement, not only as to which of the defendants is entitled to receive any such royalties but whether royalties are now payable at all in the light of an executive order issued on 20 December 2017 by President Trump. The executive order is order 13818 and is entitled “Blocking the property of persons involved in serious human rights abuses or corruption.” Pursuant to that order, the United States' Treasury Department's Office of

Foreign Assets Control has designated both Mr Dan Gertler, who, as I understand it, is the principal behind the defendants, and also the first defendant as “specially designated nationals”. It appears that the effect of that designation is that no United States’ person, a term which is defined to include all US domiciled entities, their non-United States’ branches and any United States’ citizen or person in the United States, may provide any funds or services to or for the benefit of those designated persons or companies under their majority ownership or control.

- 7 The claimant says that the result of that is that it cannot make royalty payments to the first defendant in United States’ dollars because the processing of those dollar payments would require the involvement of a Federal Reserve Bank in the United States. It says also that if the second defendant is the party entitled, contrary to the claimant’s case, to receive any royalty payments and is an affiliate of the first defendant, then it cannot make royalty payments to the second defendant either.
- 8 Broadly speaking, therefore, the claimant’s position is that the agreement has not been validly assigned, that nothing is payable under the agreement and that anything that is payable cannot be paid for so long as the effect of the United States’ Presidential Executive Order is as I have described.
- 9 This has led to proceedings in the Congo because the second defendant takes the opposite position. The first stage was an application by the second defendant for an attachment of the claimant’s property. Proceedings were issued on 26 April (“the first Congo proceedings”) on the basis that the second defendant had succeeded to the first defendant’s rights under the agreement. An application was made for what was described as a precautionary attachment without notice to the claimant. The application explained that the agreement pursuant to which the second defendant’s claim for royalties was made was subject to English law and contained a jurisdiction clause but, nevertheless, it was submitted that “the disputes related to this attachment are brought before the court of disputes of enforcement of the place of attachment at the Kolwezi Commercial Court,” the address of which was then given.
- 10 The Kolwezi Commercial Court issued an order authorising the second defendant, Ventora, to execute a precautionary attachment of the property in the possession of the debtor, that is to say the claimant, in the sum of over US \$2.2 billion, “as long as the applicant initiates proceedings or takes the steps necessary to obtain an enforceable instrument within the month following said attachment under penalty of nullity.” Ventora was therefore required, if it wished to maintain the attachment, to initiate proceedings on the merits within one month.
- 11 Pursuant to that order, the property of the claimant in the Congo has been seized. It is not clear from the documents to which I have referred so far whether that attachment contemplates proceedings on the merits in the Democratic Republic of Congo, which on the face of things would be contrary to the terms of the English jurisdiction clause, or whether the attachment was sought in support of a prospective English judgment on the merits. However, there is certainly nothing to suggest that the latter is what was contemplated. The second defendant has so far taken no steps to commence English proceedings on the merits or indicated any intention to do so.
- 12 It seems to me, therefore, that the more likely (albeit provisional) view is that this was an attachment obtained in support of contemplated proceedings on the merits in the DRC. This view appears to be confirmed by a second set of Congo proceedings initiated on 27 April 2018 in which the second defendant sought and obtained on the following day, the 28th, that

is last Saturday, an order against the claimant for payment of the total sum of US \$2.857 billion, the difference between the figure in the precautionary attachment and the final judgment apparently being represented by what on the face of it seem to be very significant lawyers' fees. At all events, the order is plainly an order which forms part of proceedings on the substantive merits of the second defendant's claim for royalties. I understand that it is not yet an enforceable judgment but will become a final and enforceable judgment unless the claimant files an opposition within 15 days of service of the order upon it.

- 13 I should add that in the application for the second Congo proceedings resulting in the order for payment, there appears to have been no disclosure of the English jurisdiction agreement and it may be that the order was made by the court in the DRC without appreciating that the parties had agreed, and that the second defendant was bound by that agreement, to litigate the merits of any dispute in this jurisdiction.
- 14 Viewing the two sets of proceedings together, it is clear, in my judgment, at any rate from the material put before me on this application, that these are proceedings on the merits which are contrary to the terms of the jurisdiction clause in the parties' agreement. I recognise that when there is an opportunity for further evidence to be filed, matters may appear differently, but on the information put before me at short notice, that is the view which I have formed. There is an issue, as I have explained, whether there has been a valid transfer of the rights under the agreement to the second defendant, Ventora. However this issue is resolved, it is clear that Ventora is bound by the jurisdiction clause in the agreement. It is claiming royalties under the agreement and claims to be the assignee of the agreement. If it is correct in saying that the rights under the agreement have been transferred or assigned to it, this is a straightforward contractual claim and it is bound by the jurisdiction clause. But even if its claim to be the assignee of those rights is ultimately held to be wrong, it is nevertheless clear that in accordance with well-established principles in cases such as the *Jay Bola* [1997] 2 Lloyds Reports 279, as well as other cases which have followed that approach, the second defendant would be equally bound (perhaps in equity rather than contractually but for practical purposes that makes no difference) by the jurisdiction clause in the agreement.
- 15 In short, Ventora cannot take the benefit of the agreement, that is to say the right to claim royalties, without what may be regarded as the burden or disadvantage, namely, the obligation to litigate claims subject to the exclusive jurisdiction of this court. The position, therefore, is that there is a sufficient case (and as at present advised, a strong case) for an anti-suit injunction so that, if sufficient urgency is shown for an injunction to be granted at short notice, then it is an appropriate case to do so.
- 16 Mr Gillis, for the second but not the first defendant, submitted that there was a distinction between an application in the DRC for precautionary measures, which would not constitute a breach of the exclusive jurisdiction clause, and an application to deal there with the merits of the claim. In principle I accept that there is such a distinction to be drawn, and indeed, Ms Camilla Bingham QC for the claimant accepted that an application purely for interim measures would not be contrary to the terms of the exclusive jurisdiction clause. However, looking at the two proceedings together which, in my judgment, is the right approach, it seems to me that the distinction sought to be drawn by Mr Gillis does not apply in this case. Looking at the proceedings together, it seems to me that they are all part and parcel of an attempt to litigate the merits in the DRC.
- 17 Although he made no concession, Mr Gillis did not advance any positive submission to explain why litigating the merits of the claim for royalties in the DRC would not be a breach

of the exclusive jurisdiction clause. That is not to say that there may not be some justification for so doing but at present I am not aware of any.

- 18 The question then arises whether this is a case where it is appropriate to grant an injunction now as distinct from leaving the position to be litigated further here by the filing of further evidence and a hearing which Mr Gillis suggests could take place within the 15 day period before which the order for payment in the DRC becomes enforceable.
- 19 It seems to me, however, that in what is on the face of things a clear case it is appropriate for an injunction to be granted now in order to make the position clear, albeit provisionally, not least because the Congo proceedings are likely to be causing significant prejudice to the claimant already. Moreover if, as may well be the case, the requirement in the first Congo proceedings that the second defendant, that is to say Ventora, is required to initiate proceedings to obtain an enforceable instrument within the month following the attachment means that it must take those steps by way of substantive proceedings in the Congo, it should be made clear that so doing is a breach of the jurisdiction clause.
- 20 Accordingly, I am persuaded that it is appropriate to make the order which the claimant seeks and that order will restrain the second defendant from taking any further steps in the first or second Congo proceedings, save for the purpose of withdrawing or discontinuing them and from commencing or pursuing any other substantive claim other than in this court or the court of another Member State of the European Union or Lugano Convention and will also restrain the first defendant from commencing or pursuing any substantive claim arising out of or in connection with the agreement save in the same way.
- 21 I am not prepared to make the order which is sought that the second defendant must withdraw, discontinue or otherwise abandon the second Congo proceedings. It seems to me that I should not do that at this very early stage of this litigation, just in case some justification subsequently appears as to why it is appropriate for those proceedings to continue, but unless an undertaking is given, I will order that the second defendant must not enforce or take any steps to seek to enforce the order for payment which it has obtained in the second Congo proceedings either before or after the expiry of the 15 day deadline.
- 22 Mr Gillis did indicate in argument that the second defendant would be prepared to give, as I understood it, an undertaking at least in relation to the 15 days, but he expressly made clear that he was not prepared to undertake that protective measures in support of those proceedings would not be taken. It seems to me that protective measures in support of a substantive claim on the merits in the DRC, such as the second Congo proceedings, would be unacceptable and I will therefore order that the second defendant is restrained from taking such steps.
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CERTIFICATE

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

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This transcript is to be approved by the Judge.