CL-2014-000070

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

B E T W E E N :

(1) ANATOLIE STATI
(2) GABRIEL STATI
(3) ASCOM GRUP S.A.
(4) TERRA RAF TRANS TRAIDING LTD

Claimants

- and -

THE REPUBLIC OF KAZAKHSTAN

Defendant

***Draft* GROUNDS OF APPEAL**

All references to paragraphs are references to paragraphs within the judgment of Knowles J dated 6 June 2017 (the **"Judgment"**) which is the subject of these draft grounds of appeal.

I. BACKGROUND

1. The Claimants are the award creditors under a Stockholm-seated, 19 December 2013 New York Convention arbitral award finding in their favour with respect to serious breaches of the protections granted to investors under the Energy Charter Treaty and awarding them damages in excess of USD 500 million (the **"Award"**). By an order dated 28 February 2014, Mr Justice Burton gave permission for the enforcement of the Award in this jurisdiction.

2. The Defendant then applied on 7 April 2015 for that order to be set aside on a number of grounds, but not fraud. Very shortly prior to the hearing of that application on 27 August 2015, the Defendant applied to amend its application to add as a new ground that the Award had been procured by fraud in so far as a

portion of the damages awarded (with respect to an LPG Plant) were concerned, on the basis of evidence it said was newly obtained and could not have been obtained before (the **"Evidence"**). The Evidence addressed the construction costs of the LPG Plant and the involvement of an entity, Perkwood, and a contract that it had entered into regarding the construction (the **"Perkwood Agreement"**). The Defendant alleged that the involvement of Perkwood and other actions of the Claimants led to an inflation of the construction costs which where then relied upon in the making of an indicative offer by a third party for the purchase of the LPG Plant. This indicative offer was adopted by the Tribunal as the best evidence of the value of the LPG Plant. Given the pendency of a challenge to the Award at the seat in Sweden, the English proceedings were then stayed.

3. Further to over 3 years of proceedings, extensive pleadings and written and oral evidence and a 3-week hearing in Sweden in September and October 2016 (including cross-examination of numerous fact witnesses and experts), by a judgment dated 9 December 2016 the Svea Court of Appeal (the **"Swedish Court"**), having the benefit of the Evidence, rejected the Defendant's challenge to the Award, including the Defendant's fraud allegations, which had been the focus of the proceedings and hearing before it.

4. Further to a 2-day hearing in February 2017, and following a Judgment of 6 June 2017, it was ordered that the Defendant should have permission to amend its application to set aside the order of Burton J and that there should be a trial in this jurisdiction of the Defendant's allegation that the Award in so far as it related to LPG Plant had been procured by fraud. The Judgment contained the following determinations:

    4.1 That the Defendant did not have access to the Evidence prior to the Award and that it could not, with reasonable diligence, have discovered that Evidence;

    4.2 That the question of whether there had been a fraud as alleged had not been decided by the Swedish Court and therefore no estoppel arose;

4.3 That even if there had been an estoppel, it would not preclude a trial of the fraud allegations, in the light of the decision in *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2)* [2012] EWCA Civ 855; and

4.4 That the Defendant's fraud allegations in this jurisdiction following the disposal of the same allegations in the Swedish Court proceedings did not constitute an abuse of process.

5. As identified in the draft Grounds below, the Judgment is wrong, contains errors and is unfair.

II. GROUND I

6. The decision that the Defendant did not have and/or could not, with reasonable diligence, have discovered the Evidence prior to the Award was wrong. Moreover, in this regard the Judgment was also unfair. The following points are relied on:

6.1 The Judgment wrongly ignores and/or does not give sufficient weight to evidence from the underlying arbitration that demonstrates that the Defendant was aware and/or should have been aware on the basis of reasonable diligence of Perkwood's status as a related party, the Perkwood Agreement and its contribution to the costs of the LPG Plant;

6.2 This evidence included Perkwood customs declarations submitted to the Defendant of US$ 138 million, referencing the Perkwood Agreement, pleadings filed by the Defendant in the arbitration describing Perkwood in the context of "*opaque service agreements*" and the *"opaque financing structure*", direct references to the Perkwood Agreement in two due diligence reports the Defendant relied on in the arbitration, one of which referred to Perkwood as a "*related*" party, indicated it was the largest supplier of the equipment for the LPG Plant and was deployed by the Defendant in cross examining the Claimants' witness in the arbitration and, finally, the disclosure of the Perkwood Agreement in a Schedule headed

"List of Suppliers for the LPG Plant", submitted in compliance with the Tribunal's document production order in the arbitration;

6.3 Instead, the Judgement wrongly and/or unfairly relied on and/or gave too much weight to two fact witness statements from the Defendant's counsel in the underlying arbitration, Ms Patricia Nacimiento (¶24 & 67-79);

6.4 There was no cross examination of Ms Nacimiento, nor had responsive evidence been filed with respect to much of her evidence, given the nature of the hearing and the very belated filing of the latest of her statements (filed without permission or consent two weeks prior to the hearing) (¶¶25 & 36); and

6.5 The Judgement proceeds on the assumption that Ms Nacimiento was to be taken to know the high expectations the Court would have of her and to have taken care in making her statements (¶25). There was no basis for these assumptions in circumstances where Ms Nacimiento has not yet been subjected to cross-examination, is not an officer of the Court, has an interest in seeing the Defendant's loss in the underlying arbitration overturned and may be susceptible to criticism as to the question of exercise of reasonable diligence.

7. The Judge's decision in this regard was accordingly wrong. It was also unfair because it was procedurally irregular for findings to be made against the Claimants on the basis of untested witness evidence, as to much of which there had also been no opportunity to respond and where contemporaneous documentary evidence calls that witness statement evidence into question.

III. GROUND II

8. The finding in the Judgment that no court had decided the question of whether there had been a fraud and that there was therefore no estoppel in this jurisdiction was wrong. The following points are noted:

8.1 The Judgment acknowledges that respect ought to be accorded to the Swedish and US courts (¶12) that had already rejected the Defendant's fraud case. However, the Judgment then wrongly engages in criticism of the reasoning of the decisions of those courts (or the expression of that reasoning). It is trite law that issue estoppel operates regardless of whether an English court regards the reasoning of a foreign court decision as being open to criticism;

8.2 In so far as the Swedish judgment is concerned, the Judge should have found (but did not) that the Evidence which was said to support the Defendant's case that the Award was procured by fraud had been fully deployed in the Swedish court at the seat of the arbitration in aide of the same allegations of fraud, had been dealt with at length occupying the majority of a 3-week hearing, including oral evidence and cross-examination of witnesses and experts, and had been conclusively rejected by the Swedish Court;

8.3 Instead, the Judge wrongly found that the Swedish court had only dealt with the question of whether the Evidence would have had a direct decisive impact on the Award if available to the Tribunal and had failed to deal with the question of whether the Evidence would have had an indirect decisive impact on the Award (¶¶60-63);

8.4 Further, this finding was not available to the Judge in circumstances where he found that the Swedish Court had concluded that the indicative bid was not false evidence (¶ 66).[1] If the indicative bid was not false evidence in the context of direct decisive effect, it could not be in the context of indirect decisive effect. Thus, a finding by the Swedish Court, based on the Evidence, that the indicative bid was not tainted, gave rise to an estoppel

[1] The question posed by the Judge as to whether the Swedish Court's finding would hold if the indicative bid was deployed by a party who knows (but continues to conceal) that it is the product of their fraud, was not a permissible enquiry to pursue in circumstances where the Swedish Court had addressed that question and responded in the negative.

as a matter of fact, whether in the context of the direct or indirect effect of that bid.

9. In summary, given that (i) as the Judge acknowledged (¶60), the Swedish Court held that as a matter of principle an award should be set aside if it was shown that false evidence had had an indirect but decisive influence on the outcome of the case; and (ii) the Swedish Court then rejected the fraud grounds, finding that the indicative offer was not tainted by fraud and ordered that the Award should be enforced; the Swedish Court plainly did dispose of the question of whether the Evidence would have had an indirect decisive impact on the Award as a fundamental element of its rejection of the Defendant's challenge. Further, the Judge's interpretation of the Swedish decision was wrong and/or was the result of an impermissible criticism of the Swedish Court's reasoning (or the expression of that reasoning).

IV. GROUND III

10. In the alternative to Ground II, the Judge was wrong to determine that the Defendant's pursuit of its fraud allegations in this jurisdiction was not an abuse of process. The following points are relied on:

10.1 All of the fraud allegations and contentions that were made in the Defendant's written evidence and argument before the Judge were pursued in the three-year Swedish proceedings, taking up hundreds of pages of written evidence and argument, and occupying the majority of the hearing time including extensive oral testimony. Detailed evidence of this was put before the Judge in the form of a witness statement of Mr Egishe Dzhazoyan on behalf of the Claimants, but this evidence was not referred to in the Judgment;

10.2 It was and is common ground that the Evidence, as now relied on in this jurisdiction to allege fraud, was all available, without exception, to the

Defendant throughout the material parts of the Swedish proceedings during which it pursued its fraud case there;

10.3 Having had all of that Evidence available to it and having had the same allegations in the forefront of its mind, even if the Swedish Court decision did not create an estoppel (which is denied), at the very least the Defendant's pursuit of its fraud case in this jurisdiction can only be characterised as abusive.

11. In summary, the Judgment erroneously provided for the dismissal of the Claimants' case as to abuse of process "*for the same reasons*" as the dismissal of the estoppel case (¶90). The Judge erred in treating the analysis of whether there is an estoppel and the analysis of whether there is an abuse of process as one and the same. The Judge should have approached the question on the basis that the latter (*i.e.* abuse) arises in circumstances where an argument as to the former (*i.e.* estoppel) has failed: the analysis is not the same. The Judge should have found (but did not) that the Defendant had all of the material available to it to mount an argument that the alleged fraud had an indirect but decisive effect on the Award in the Swedish proceedings and, in so far as it may be said that the Swedish proceedings did not technically determine that point (which the Claimants deny), a second bite at the cherry in this jurisdiction would be abusive, particularly given the Swedish Court's findings that the indicative offer was not false evidence.

V. GROUND IV

12. The Judge further erred in finding that, even if there had been an estoppel/abuse, it would not preclude a trial of the fraud allegations in this jurisdiction because English public policy is a matter for the English court.

12.1 The Judge should have found (but did not) that the decision in *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2)* [2012] EWCA Civ 855 should be distinguished in the circumstances of this case. In that case, no estoppel arose from a Dutch court decision that a Russian court had been partial

when setting aside an arbitral award. There are obvious public policy reasons why the English courts should hear an allegation that a foreign court was partial in full before pronouncing any decision on that question. By contrast with the *Yukos* dispute, this case, and in general cases dealing with New York Convention awards, do not involve highly contentious issues of comity and partiality of a foreign and friendly state's courts which may be important in considering whether an estoppel is said to arise or not;

12.2 The Judge was also wrong not to follow the decision in *House of Spring Gardens Ltd v. Waite and Others* [1991] 1 QB, a case where fraud allegations that had been ventilated at first instance and on appeal in a foreign court were considered to be an abuse when brought in this jurisdiction. The application of *House of Spring Gardens* to the circumstances of a case where, like here, a challenge to an arbitral award for fraud has been rejected at the seat was recognised by the Court of Appeal in *Westacre Investments Inc v Jugoimport-SDPR Ltd* [2000] QB 288 *per* Waller LJ at 309H "*it is clear that if an application is made to the local court and fails* [*i.e*. to set aside an award because it was procured by fraud] *the result may be an estoppel as per House of Spring Gardens v Waite*";

12.3 The Judge was also wrong to decide that Swedish public policy differed from English public policy with respect to fraud. He wrongly found that the Swedish Court had held that it had no power to intervene "*even if the arbitrators were deliberately misled*" albeit indirectly (¶89). The Swedish Court found to the contrary, as the Judge himself recognised earlier in his Judgment (¶60); and

12.4 In adopting the above approach to the authorities, the Judge also erred by failing to take due account of the public policy in finality of litigation.

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