Legal Briefing

Doosan Babcock Ltd (formerly Doosan Babcock Energy Ltd) v Comercializadora de Equipos y Materiales Mabe Limitada (previously known as Mabe Chile Limitada)

[2013] EWHC 3201 (TCC), Before Mr Justice Edwards-Stuart

The Facts

Doosan Babcock Ltd ('Doosan') contracted to supply two boilers to Comercializadora de Equipos y Materiales Mabe Limitada ('Mabe') for a power plant in Brazil. In accordance with the Contract, Doosan arranged performance guarantees. The guarantees entitled Mabe to payment on demand and were to expire upon the issue by Mabe of Take-Over Certificates ('TOCs') or 31 December 2013, whichever was earlier.

During July 2013 Doosan requested that Mabe issue the TOCs on the grounds that the boilers had been taken into use in November 2012 and May 2013 respectively. Mabe refused and relied upon a provision in the Contract permitting it to withhold the TOCs if the boilers were only put into use as a "temporary measure".

During August 2013 Mabe notified a claim for US$57m for delayed supply and defects in the boilers. In reply Doosan requested that Mabe undertake to not make any demand on the guarantees without giving at least 7 days' notice. Mabe refused to give the undertaking so Doosan applied to the TCC for an interim injunction, contending that in refusing to issue the TOCs, Mabe was in breach of the Contract and was relying upon this breach to enable a demand for payment.

At the first hearing on 4 October 2013, the Judge agreed with Doosan that the Court had jurisdiction to grant relief under section 44(3) of the 1996 Act and listed the matter for a return date in two weeks' time in order to allow the parties time to prepare evidence upon whether or not the boilers were operating on a "temporary measure" basis.

At the restored hearing on 18 October, Doosan maintained that the boilers were in commercial use, relying upon press releases indicating that the boilers had exported over 7500 hours of power to the grid since installation. Doosan therefore submitted that where Mabe was relying upon its own breaches of the Contract to facilitate a call on the guarantees, it could show a strong case, entitling the Court to grant interim relief. Mabe argued that Doosan did not have a strong case for interim relief because it had misconstrued the contractual testing requirements that required performance tests prior to the issue of the TOCs.

The Issues

The principal issues were:

(i) Had Mabe only taken the boilers into use as a "temporary measure"?

(ii) Did Doosan have a strong case for interim relief?

(iii) Was Doosan required to prove fraud in order to restrain Mabe's calls on the guarantees?

The Decision

On the facts the Judge found that Mabe had taken the boilers into commercial use. He also found that Mabe had not complied with the contractual requirements to show that use of

the boilers as a "temporary measure" was in accordance with the terms of the Contract or as agreed by the parties.

In deciding whether to grant an interim injunction, the Judge recognised the principles set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and more recently in *Simon Carves v Ensus UK* [2011] BLR 340 where Mr Justice Akenhead said that a claimant who wishes to restrain a beneficiary from making a demand must show that it has a strong case that under the terms of the underlying contract, the beneficiary is not entitled to make such a demand.

The Judge rejected Mabe's argument that Doosan had misconstrued the Contract. He concluded that Doosan's factory tests were sufficient and that whilst any failure to achieve the performance tests would create a liability for liquidated damages, it would not justify non-issue of the TOCs. The Judge therefore agreed that Doosan had demonstrated a strong case.

As regards the third issue, in granting Doosan interim relief, the Judge drew an analogy with *Simon Carves v Ensus* where the parties had agreed expressly that the beneficiary's right to make a demand on the guarantee was either qualified or would be extinguished if certain events occurred. Applying the principle set out by the House of Lords in *Alghussein Establishment v Eton College* [1991] 1 All ER 267, the Judge made an alternative finding that interim relief could also be granted on the basis that Mabe should not be permitted to benefit from its own wrong.

Given that the Contract provided for arbitration, the Judge made it clear that the Court had no jurisdiction to make final findings on the facts or to finally determine the proper meaning of the Contract.

Commentary

The Courts will usually refuse to restrain a bank from making payment under and on-demand instrument unless there is clear evidence of fraud. Doosan submitted that it could not show fraud as Mabe had not yet made a call on the guarantees but that it should not have to because the position was different where it could dispute the validity of the Mabe's right to make a call.

The key point here is the emergence a class of cases in which the right to make a call under an on demand guarantee is qualified by the terms of the underlying contract. The Judge recognized that this decision, together with *Simon Carves v Ensus*, extended the law in this area, albeit in an incremental way.

David Toscano
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