IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO: BVIHCM (COM) 120 of 2012

Between:

INTECO BETEILIGUNGS AG

Respondent

and

SYLMORD TRADE INC

Applicant

Appearances: Mr Stephen Moverley-Smith QC and Mr Jonathan Ward for the Applicant
Ms Barbara Dohmann QC and Ms Arabella di Iorio for the Respondent

2013: 30 April, 9 May

JUDGMENT

(Default judgment – CPR Rule 13.3 – whether applicant to set aside applying as soon as reasonable practicable after finding out that judgment had been entered – relevance of CPR 10.3(1) (time for serving defence) to that question – meaning of 'good explanation' in CPR 13.3(1)(b) – whether fact that proceedings brought in breach of arbitration agreement 'exceptional circumstances' for purposes of CPR 13.3(2))

[1] This is an application by the Defendant, Sylmord Trade Inc ('Sylmord') to set aside judgment entered against it on 28 January 2013 for default in acknowledging service and serving a defence. The claim is for repayment of seven loans made by the Claimant, Inteco Beteiligungs AG ('Inteco'), to Sylmord between 18 February 2010 and 13 July 2011, amounting in aggregate to Euro 3.7 million, together with some Euro 700,000 by way of interest.

[2] The loans were made in connection with a joint venture entered into in February 2008 between a Russian lady called Elena Nikolaevna Baturina ('Ms Baturina') and a Russian gentleman called Alexander Nikolaevich Chistyakov ('Mr Chistyakov') for a proposed hotel development in the Kingdom of Morocco. Sylmord was the vehicle through which Mr Chistyakov and associates of his were to participate in the venture, contributing 35%

of its costs in return for a 35% stake. Ms Baturina was to contribute the remaining 65% in return for a corresponding share. The intention was that these should take the form of holdings in a Morocco-incorporated joint venture vehicle which would hold the development itself. Such a company was indeed incorporated, although it is unclear from the papers exactly when that happened. I shall refer to the holding company, as it was referred to at the hearing, as 'Andros.' Its sole shareholder has at all material times been Sylmord.

[3] Funding was advanced on behalf of Ms Baturina pursuant to an English law governed joint venture agreement made in February 2008 between Ms Baturina and Mr Chistyakov, which provided, broadly speaking, for the matters which I have set out above. Funds were duly provided by a company affiliated to Ms Baturina and remitted by Sylmord to Andros, in whose hands they were consumed as development costs. On 29 October 2010 Ms Baturina and Mr Chistyakov entered into a supplementary agreement. This set out that during 2008 a Russian company associated with Ms Baturina had advanced project finance in the amount of some Euro 71 million by way of convertible loans to Sylmord as payment for her, or her affiliate's, stake in Andros and that upon transfer to Ms Baturina or to her affiliate of a 65% shareholding in Andros Sylmord would cease to be liable for repayment of the convertible loans. The supplementary agreement further recites that between 18 February and 6 December 2010 Inteco had made further advances to Sylmord pursuant to agreements between Inteco and Sylmord constituted (as it turns out) by the acceptance by Sylmord of money advanced to it by Inteco pursuant to so called 'Loan Offers' made by Sylmord to Inteco. I will refer to these advances as 'the Loans.' As will be seen, there is material in the application papers suggesting that this rather curious way of arranging the transactions may have had something to do with requirements imposed upon Inteco by its bank, but nothing turns on that for present purposes.

[4] Each Loan Offer was subject to the law of Austria and provided for payment to an account of Sylmord in Switzerland. Each contained an arbitration clause in the following terms:

> 'The Parties agree that any dispute arising from and with reference to their legal relationships in case of a loan agreement concluded according to this Offer, and with reference to the validity, nullity and interpretation of this Offer; and with reference to the validity, nullity, enforceability and interpretation of this Arbitration Agreement, shall be exclusively submitted for resolution and decision to arbitration and the court of arbitration to be composed of a sole arbitrator. The Parties agree that Prof. Dr. Peter Dorait, Althanstrasse 39-45, 1090 Vienna, Austria, shall be appointed sole arbitrator. The Parties agree that proceedings shall be conducted in accordance with §§ 577- 618 Austrian Code of Civil Procedure ('ZPO')

and that proceedings shall be conducted in English Language. The Parties furthermore agree that the decision (award) of the arbitration panel shall be final and binding and that the parties, accordingly, waive their right to appeal decision. The Parties furthermore waive their right under § 611 (2) 'ZPO'.

[5] It is not in dispute that the money, totaling Euro 3.7 million, was paid as recited in the supplementary agreement and in the manner required by the Loan Offers. The terms of the Loan Offers provided for the money to be repaid by, at the latest, 6 February 2011. Despite this, Sylmord says that it has a complete defence to Inteco's demand for repayment.

[6] On 2 November 2012 Inteco's Solicitors ('Maples') wrote to Sylmord demanding repayment of the loans and stating that unless the loans were repaid or Sylmord had agreed to go to arbitration by 16 November 2012, proceedings would be issued here in the BVI.

[7] There was no response to that letter and these proceedings were issued on 20 November 2012. The claim form, statement of claim, form for acknowledgement of service and Notes for Defendant were served on Sylmord and signed for on behalf of Sylmord's registered agent on the same day.

[8] On 22 November 2012 an in house lawyer, Irina Babirenko ('Ms Babirenko') of Mr Chistyakov emailed Paul Hastings with a request from Sylmord for copies of the agreements relating to the Loans. On 23 November 2012 Paul Hastings sent Ms Babirenko copies of the claim form and statement of claim and the letter which had accompanied them when served, but not the form for acknowledgement or the Notes for Defendant. It is common ground, however, that the claim form itself set out the requirement for acknowledgement of service and pointed out the risk that if that was not done within 14 days judgment might be entered in default.

[9] On 26 November 2012 Maples sent Sylmord, at its BVI registered office, copies of the Loan Offers together with evidence of the payments which Inteco had made pursuant to them. Further copies of the claim form and statement of claim were attached.

[10] On 29 November 2012 Ms Babirenko emailed Paul Hastings with a copy of a letter addressed to Inteco dated on 26 November 2012. In paragraph 39 of her first witness statement Ms Babirenko makes clear that she was involved in the preparation of this letter. The letter stated that Sylmord had no funds to repay the money because, in accordance with instructions from agents of Ms Baturina, it had been passed to the Moroccan entities and invested in the development. The money was never intended to be repayable, but was in the nature of project investment. The loan offer documents were signed only to provide Inteco's bank with evidence of a (sc contractual) relationship.

The letter challenged the existence of any binding contracts of loan between the parties on the basis of Austrian law to the effect that there were no concluded loan *agreements* in place and stated (confusingly) that while Sylmord was the 'formal' owner of the development Ms Baturina was entitled to have 100% of the development holding company, Andros, transferred to any affiliate of hers at her order. The letter ended with an offer to settle the matter out of court by transferring the whole of the issued share capital of Andros in this way. That offer was not taken up.

[11] No acknowledgement having been filed and no defence served, on 6 December 2012, Inteco made a request for entry of a default judgment. Default judgment in the sum of Euro 4,449,054, together with costs of US$5,100, was entered against Symord on 28 January 2013. The figures indicate that the judgment was intended to include interest down to the date of judgment. The judgment was served on Sylmord on 31 January 2013. Ms Babirenko became aware of the judgment on 1 February 2013 and instructed Appleby in the matter on the same day. On 20 February 2013 Appleby wrote to Maples indicating an intention to apply to set aside. The application was issued on 28 February 2013.

The test for setting aside

[12] The test for setting aside a default judgment is contained in the amended CPR 13.3:

> "Cases where court may set aside or vary default judgment
> 13.3 (1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -
> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
> (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
> (c) has a real prospect of successfully defending the claim
> (2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.
> (3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it."

[13] It is common ground that, unless sub–rule 13.3 (2) applies, each of the tests in sub-rule 13.3(1) must be met before a default judgment may be set aside. I shall take them in turn.

[14] Attached to an affidavit of Ms Sarah Masson is a chronology of the steps taken by Appleby in relation to this matter following its receipt and acceptance of instructions on 1

February 2013. It appears that they were also dealing with a statutory demand founded upon the debt and with an application to appoint liquidators (since stood over by agreement pending the outcome of the present application), but it took until 7 February 2013 to settle the terms of an engagement letter and there was further delay while translations were obtained and advice on Austrian law sought and obtained. The process looks fairly leisurely viewed in the cold light of day, but it is easy for a dispassionate observer to underestimate the turmoil of having to deal with clients at long distance and with language and foreign law complications. Taking into account the fact that an application to set aside requires a draft defence to be exhibited to the affidavit in support of the application[1] and that CPR 10.3(1) allows 28 days for service of a defence, I am quite unable to say that the application was not made as soon as reasonably practicable after Sylmord learnt that judgment had been entered against it.

[15] The next test that Sylmord needs to pass is whether it has given a 'good explanation' for its failure to file an acknowledgement of service or defence. The expression 'good explanation' is not an easy one. In its ordinary sense an explanation is a statement or account which explains something. It may be a bad explanation if the person to whom it is made is unable to understand what it is that is sought to be explained and a good one if the recipient is fully enlightened, but in the context of CPR 13.3 I do not think that a 'good explanation' is to be understood in that way. In my judgment, the expression 'good explanation,' where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered.

[16] In my judgment, the good explanation called for by CPR 13.3 must come from the defendant. Of course, it may be offered by someone authorized by the defendant to do so, but it needs to explain why the defendant failed to take the necessary steps.

[17] In this case no explanation of any sort has been offered by Sylmord. It appears that the documents were not forwarded by its registered agent to its officers in Cyprus until 18 December 2012 and were not forwarded by those persons to Ms Babirenko until 21 December 2012. No explanation is given for that delay.

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[1] in fact, the draft defence was not exhibited to the affidavit in support, but was attached to the application itself. The defect was rectified in Ms Masson's affidavit of 25 April 2013. The omission is sought to be explained by the fact that Sylmord is disputing the Court's jurisdiction on the basis of the arbitration clauses in the loan offers

[18] If it is legitimate at all to take account of Ms Babirenko's opinions and reactions on this issue, which I very much doubt, she now says that she thought, basing herself upon what are said by her to be the procedures of the Russian Courts, that it would be unnecessary to respond to the claim until this Court had made a determination that the claim should proceed. The final paragraph of Sylmord's letter of 26 November 2012, however, which was clearly drafted by Ms Babirenko, is in the following terms:

> 'In case you are still intended to refer this matter to a competent court in violation of all previous arrangements and existing agreements with the beneficial owner of your company and in the view of the paragraphs 1 and 3 above, **Sylmord Trade Inc. will have to proceed with partial sale of the assets in Morocco** which are formally owned by Sylmord Trade Inc. through its subsidiary, e.g. offices in Morocco, **in order to pay all necessary legal fees and other related expenses.** Acting amicably and relying on the same conduct from your side, we hereby ask you to save your own funds and come to agreements on terms of transfer of all assets of Sylmord Trade Inc, namely: 100% share in Andros Bay Holding Offshore SARL. to any person designated by you and settle this matter on an extrajudicial basis as soon as possible.'

This seems to me to show that Ms Babirenko did not regard the present proceedings as capable of affecting Sylmord's position. Hence her reference to a 'competent' court – by which she presumably meant the Courts of the Austrian Republic. Only in those circumstances, she is saying, will Sylmord resort to the sale of assets in order to meet legal fees incurred in such proceedings. This seems to me to indicate a conscious decision, on her part, at any rate, to ignore the proceedings here in the BVI. If it is legitimate to attribute her thought processes to Sylmord at all, therefore, they seem to point in the direction of indifference to, rather than forgetfulness about, the present proceedings until she found out about the judgment, when for the first time she reacted to what was happening here in the BVI.

[19] As for the arbitration clauses, it does not seem to me that their existence can form any part of a good explanation for the failure to acknowledge service. For a start, Sylmord had been asked to agree to arbitration in Inteco's letter of 2 November 2012 and had failed to respond. Secondly, in its letter of 26 November it had denied that the Loan Offers amounted to agreements at all. That would not necessarily prevent the arbitration clauses from being stand alone agreements to arbitrate, but it remains the fact that at no stage before the application to set aside was made did Sylmord invoke or even refer to the arbitration clauses. Instead, it invited resolution of the dispute outside the context of either legal or, as I read the letter, arbitral process.

[20] In my judgment, no good explanation has been given by or on behalf of Sylmord for failing to file and acknowledgement of service or to serve a defence.

[21] Subject to an argument based upon sub-rule 13.3(2), which I will deal with in a moment, that is sufficient to dispose of this application, but in deference to the arguments which have been addressed to me I should go on to consider whether Sylmord would have had a real prospect of defending this claim.

[22] The principal argument of Mr Moverley-Smith QC, who, together with Mr Jonathan Ward, has appeared for Sylmord on this application, is that if Ms Baturina had not prevented it from happening, liability for these loans would have been novated to Andros long since, so that Sylmord would have ceased to have had any liability for them by the time the claim form was issued. The argument turns upon the terms of paragraph 9 of the supplementary agreement of 29 October 2010,[2] to which I have already referred. There are two translations of this agreement. In his oral (but not in his written) submissions, Mr Moverley-Smith QC relied upon the version to be found at page 46 of the application bundle, whereas Ms Dohmann QC, who appeared together with Ms Arabella di Iorio for Inteco, relied upon that at page 127. I shall use the latter version for the purposes of this judgment because (with the exception of one immaterial word) that is the version relied upon by Ms Babirenko in her evidence on behalf of Sylmord on this application. Paragraph 9 in that version reads as follows:

> 'The parties jointly recognize that the above Loans made to finance the costs of the project may not be further converted into any shares in any companies. The right and obligations of the Borrower under these Loans shall be transferred to HoldCo (in order of assignment of debt) at the Moment of transfer of ownership title to share in accordance with Art. 2 of this Supplementary Agreement, so at that the rights of the Lender under the Loans to SYLMORD TRADE INC will be terminated and the Lender will not make any claims to Sylmord with regard to the transferred rights and obligations under the Loans. The ratio of shares of the Parties does not change in connection with such transfer, unless the Parties agree otherwise. The conditions and procedure of the transfer of rights and obligations under the Loans shall be agreed by the parties additionally.'

[23] Mr Moverley-Smith QC says that Sylmord, which owns the entire issued share capital of Andros, has made efforts to persuade Ms Baturina to enter into arrangements for transferring 65% of the shares in Andros held by Sylmord to Ms Baturina or her nominee; that Ms Baturina has refused to enter into any such transaction and indeed has claimed that she is not bound by the supplementary agreement; that had she accepted the 65%

[2] the document was clearly backdated, but nothing turns on that for present purposes

Andros holding, the Loans would have been novated, leaving Sylmord free of any liability for them; and that in seeking to enforce the Loans in these proceedings Ms Baturina and/or Inteco are relying upon her own wrong in failing to perform the terms of the agreements, in particular, the terms of paragraph 9 of the supplementary agreement.

[24] Ms Dohmann QC says that the final sentence of paragraph 9 amounts to an agreement to agree, so that as things stand it is not open to Mr Moverley-Smith QC to assert that Ms Baturina (or anyone else) is in breach of contract. His answer to that is that it is not an agreement to agree, but mere machinery, the workings of which it would be open to the Court to decide in the course of the proceedings. He submits that Ms Baturina's agreement to accept the 65% is specifically enforceable, so that it is open to the Court to treat the transfer of the 65% as having already occurred, with the further consequence that the liability for repayment of the loans must be treated as having passed from Sylmord to Andros.

[25] Assuming that any difficulties about agreements to agree and ostensible authority can be overcome and that Sylmord and Inteco are to be treated as bound by and entitled to enforce the agreements entered into between Ms Baturina and Mr Chistyakov, the argument seems to me to be fallacious. The refusal of Ms Baturina to accept the shares means that Sylmord can, if it wishes, treat itself as no longer bound by an obligation to transfer them. It also has a claim for damages for breach of the agreement to take them, whether or not it accepts Inteco's repudiation. What it cannot do is treat the proposed novation to Andros as having already occurred The principle that equity treats as done that which ought to have been done does not extend to pretending that facts on the ground are other than they are. Even assuming it to be right that Sylmord could obtain an order compelling Ms Baturina to accept, personally or through an affiliate, the 65% holding in Andros, there is no way that the Court could force Andros to accept the liability to Inteco in place of Sylmord, nor is there any offer, whose terms are acceptable to Ms Baturina or which have been judged reasonable by the Court, from Andros to do so. The consequence of Mr Moverley-Smith's argument, therefore, is simply to make the obligation disappear, leaving Sylmord owning the whole development and Inteco out of its money.

[26] Even if the novation was in place, the only difference from the present position would be that Andros owed Inteco the money instead of Sylmord. Since Sylmord claims that its only asset is the Andros shares, the immediate commercial consequences would be identical. Either way, the development would need to be sold off in order that the Loans could be repaid. The only difference is that while present circumstances obtain Sylmord will be entitled to the whole equity in the development to the exclusion of Ms Baturina, whereas if the novation was in place it would be because Ms Baturina, or her interest, had acquired, or been compelled to acquire, 65% of Andros, so that Sylmord would be entitled to only 35% of the equity.

[27] In any event, it is impossible to see how the principle that in general a party may not take advantage of its own wrong arises in this case. The wrong leveled at Ms Baturina is the refusal to accept the Andros holding. But the Loans are due to Inteco, which is not concerned with the arrangements as to shareholdings in Andros. Even making the most generous inroads into the principle of separate corporate identity, I find it impossible to see why Inteco should be kept out of its money as a result of a wrong allegedly perpetrated by Ms Baturina.

[28] Mr Moverley-Smith raised a potential defence based upon the principle of estoppel by convention. It relies upon an alleged shared assumption that the loans would never have to be repaid by Sylmord and is said to have found expression in the terms of the supplementary agreement. Sylmord is said to have relied upon the shared assumption to its detriment. This argument is equally hopeless. It is a fancy way of saying that the agreements do not mean what they say. The efforts made by Sylmord in June and July of 2012 to persuade Ms Baturina to comply with them show that so far as Sylmord was concerned, they did.

[29] Then it is said that the claim for interest is bad because under Austrian law, by which the Loan Offers are governed, interest cannot be claimed because it would amount to permitting Inteco to carry on an unlicensed banking business. It is plain on the uncontradicted evidence that Inteco was not carrying on and has never carried on any business of that sort. There is nothing in the point.

[30] In my judgment Sylmord fails to show that it has a real claim prospect of defending the claim.

Sub-rule 13.3(2)

[31] Mr Moverley–Smith QC submits that the fact that the Loan Offer documents contain the arbitration clause to which I have referred, coupled with the fact that the commencement of these proceedings amounted to a breach of the clause, constitutes an exceptional circumstance, within the meaning of sub-rule 13.3(2). I do not think that that can be right. For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained. The fact that they were commenced in breach of an agreement to arbitrate cannot possibly amount to such a circumstance. So far from being exceptional, it is routine. Claimants regularly bring proceedings in breach of arbitration agreements where they prefer their chances in Court to the expense of arbitration and are prepared to take the risk of a successful stay application. Had Sylmord reacted timeously, it could have sought a stay in these proceedings. The fact that it did not is not a proper ground for setting aside the judgment.

Conclusion

[32] In my judgment Sylmord does not bring itself within CPR 13.3. This application must be dismissed.

Commercial Court Judge
9 May 2013