Claim No: CFI 016/2020

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE
BEFORE HIS EXCELLENCY JUSTICE SHAMLAN AL SAWALEHI

BETWEEN

DIFC INVESTMENTS LIMITED

Claimant

and

DUBAI ISLAMIC BANK

Defendant

AMENDED REASONS FOR THE ORDER OF H.E JUSTICE SHAMLAN AL SAWALEHI MADE ON 25 MARCH 2020

UPON reviewing the Claimant's claim form issued 6 February 2020

AND UPON reviewing the first witness statement of Mr Alaa Mohamed El-Shafei filed 20 Feb 2020

AND UPON reviewing the first witness statement of Mr Mohammad Al Najjar filed on 6 February 2020

AND UPON reviewing the second witness statement of Mr Mohammad Al Najjar filed on 27 February 2020

AND UPON reviewing the Defendant's Response filed on 2 March 2020 with the witness statement of Dr Makkawi Awad El Makkawi

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at a hearing on 22 March 2020

AND UPON the order of H.E. Justice Shamlan Al Sawalehi made on 25 March 2020

REASONS FOR ORDER

Introduction

The dispute between the parties concerns a contract entered into on 26 October 2016 (the "**Contract**") between the Claimant and a third party, BIC Contracting LLC"1 (the "**Contractor**") for the design and construction of a new development in the Gate Avenue area of the DIFC (the "**Gate Avenue Project**"). Under the Contract, the Defendant was subject to an on- demand performance guarantee of up to AED 77,930,064.57, issued on 5 January 2017, as security for its obligations to carry out specific tasks for the Gate Avenue Project (the "**Performance Guarantee**").

2. On 30 January 2020, the Claimant made a demand under the Performance Guarantee for AED 76,256,887.60 (the "**Demand**"). By 6 February 2020, the Defendant had still not paid the money demanded from it, and in the circumstances, the Claimant issued this claim for judgment on the Performance Guarantee. Also on 6 February 2020, the Defendant wrote to the Claimant stating it had received an order from the Dubai Court to "freeze and stop" payment under the Performance Guarantee (the "**Dubai Court Order**"). Consequently, the Claimant sought judgment for the sum through the DIFC Courts, plus interest accruing from the date of the demand, being 30 January 2020. The instant claim is, therefore, primarily for debt, but alternatively for damages for breach of the Defendant's obligation to pay.

3. The matter was heard on 22 March 2020, and on 25 March 2020, and I ordered the Defendant to pay the sum of AED 76,256,887.60. I herein give my reasons for accepting that there was a debt owed, and also that there is a legitimate claim for interest. I keep my legal reasoning brief as the relevant principles are well established, there is no dispute of fact, no allegations of fraud have been made and as the Claimant's case is strong, while, in my judgment, the Defence lacks merit.

Discussion

4.First and foremost, I shall quickly dispense with the matter of the Claimant's use of the Part 8 procedure. I agree with the Claimant's contention that the Part 8 procedure was "particularly appropriate here," primarily because, in my judgment, performance bonds and other documentary credits have at common law a "status equivalent to cash": *National Infrastructure Development Co Ltd v BNP Paribas* [2016] EWHC 2508 (Comm) at [17] . Moreover, I am persuaded by the Claimant's submissions pertaining to urgency; any further

1 Previously named "Al Habtoor Leighton LLC", subsequently named "HLG Contracting LLC".

delay in acquiring payment would indeed undermine the commercial purpose of such instruments. Indeed, this is the very reason I made my order immediately, with reasons to follow.

5. Echoing the sentiments of Kerr J, it might be said that it really is only in exceptional cases that the DIFC Courts will interfere with the machinery of irrevocable obligations assumed by banks such as performance guarantees. Such guarantees are the "lifeblood of international commerce" and such obligations are collateral to the underlying rights and obligations between merchants in the DIFC. Without them, businesses would not want to conduct business here. Only in clear cases of fraud, for example, of which a bank has had notice, will this Court interfere, and therefore be

required, in the interests of justice, to deal with a claim under Part 7 to determine whether an interference with the machinery of these irreversible obligations is justifiable (see *RD Harbottle v National Westminster Bank* [1975] QB 146 at 155).

6. This case is not exceptional and there are no allegations of fraud. As is evident from the documentation on the Court file, the Defendant owes the Claimant a significant sum (circa USD 19.5 million). The Performance Guarantee clearly stipulates at clause 4 that the obligations of the Defendant are "direct, primary, irrevocable and unconditional." Clause 1 should also be highlighted in this regard. It provides:

> We, Dubai Islamic Bank whose registered office in The Emirate of Dubai is P.O. Box 1080, Dubai, UAE hereby irrevocably and unconditionally undertake that immediately upon our receiving a written demand made by you or on your behalf and authorised by you, stating that the Contractor has failed to comply with the conditions of the Contract we will, notwithstanding any objection which may be made by the Contractor or otherwise, pay to you or as you may direct in U.A.E. Dirham such an amount as you may in such demand require not exceeding (when aggregated with any such amount(s) previously so paid) UAE Dirhams Seventy Three Million Five Hundred Thousand Only (AED 73,500,000.00).2

2 The Bank initially issued the Performance Guarantee for up AED 73,500,000, valid until 10 June 2019. On 28 January 2019, 15 May 2019, and 21 November 2019, the Bank issued amendments increasing the value to AED77,930,064.57 and extending the Performance Guarantee's validity to 10 June 2020. The Performance Guarantee stipulated that a valid demand must be in writing and state that the Contractor has failed to comply with the provisions of the Contract, and furthermore such a demand must have a signature from the Claimant, authenticated by its bankers or a notary public.

7. An on-demand payment guarantee is an independent contract between a bank and a beneficiary, however it is pertinent that the Contract obliged the Contractor to: i) provide the Claimant with security, including an irrevocable, on demand and unconditional performance bond in terms set out in the BIC Contract; ii) make various payments to sub-contractors and, if it failed to do so [.] immediately pay the Claimant those sums; and ultimately, to iii) complete the Gate Avenue Project works in accordance with the milestones in the BIC Contract; and iv) pay liquidated damages (capped at AED 49,000,000) in the event of delay to completion of the Gate Avenue Project.3

8. There is no dispute that the Claimant failed to comply with the conditions of the Contract, and as the Defendant irrevocably and unconditionally undertook that immediately upon receiving a written demand stating that the Contractor had failed to comply with the conditions of the Contract and thus it is simply the case that monies are owed, and remain outstanding, to be paid by the Defendant to the Claimant.

9. With regards to the alleged dispute of jurisdiction, I align myself with the Claimant. In my view, the Contractor's application to the Dubai Court's was misconceived. On 4 February 2020, the Contractor had applied to the Dubai Court (Commercial Court of First Instance) for a precautionary attachment to restrain the Defendant from paying under the Performance Guarantee (the "**Attachment**"). The application was approved on 5 February 2020.

10. The Dubai Court has no jurisdiction over this dispute. Clause 8 of the Performance Guarantee clearly provides:

> This security shall be governed and construed in accordance with the law of the Dubai International Financial Centre (the "DIFC") and we agree to submit to the non- exclusive jurisdiction of the DIFC courts.

11. Although this clause contains a non-exclusive jurisdiction agreement, all disputes in relation to the Performance Guarantee are indeed subject to the exclusive jurisdiction of the DIFC Courts, as under Article 5(A)(1)(a) the Claimant is a `DIFC Establishment'. I find, therefore, that the Dubai Court had no jurisdiction to issue its order.

12. The Contract, which is governed by DIFC law, is also subject to an arbitration agreement which provides for a DIFC-seated arbitration under the DIFC-LCIA rules in the event of a dispute. As the Claimant helpfully set out in written submissions, there is ample authority to show that the Dubai Courts have no jurisdiction to determine a dispute between the parties.

13. To return to the crux of the matter, the Defendant simply cannot assert that the Attachment is a defence to a contractual obligation to perform an act under DIFC law, as it might be unlawful in the jurisdiction of the local courts. This ultimately rests on two crucial points, as the Claimant has highlighted: (i) the Attachment was made in proceedings between different parties, being the Claimant and the Contractor; and (ii), in any event, Dubai Court judgments are not universally recognised by the DIFC Courts.

14. It is well-established that on-demand payment guarantees are a distinct category of contract at common law. As Counsel for the Claimant rightly points out, the English courts have rejected defences based on injunctions issued by a foreign court obtained by one party to the underlying transaction restraining the other from paying under a documentary credit. I am thus persuaded by the submissions of the Claimant in the respect that the Attachment provides the Defendant with no defence.

15. I align myself with Cooke J in *Tamil Nadu Electricity Board v St CMS Electric Private Ltd* [2008] 1 Lloyd's Rep 93, where he held that it is no defence that performance is illegal under a law which is not the law of the country where the contract stipulates that the act is to be performed.

16. To move onto the last issue to be determined, I am further persuaded that the Defendant committed a breach of contract by delaying payment.

17. In my judgment, the Defendant can only hold the payment for 7 days after the Attachment was made, but not thereafter, as the Contractor failed to obtain from the Dubai Courts a continuation of the Attachment. Therefore, payment should have been made by 17 March 2020.

18. Article 17(1) and (2) of the DIFC Law of Damages and Remedies provides that if a party does not pay a sum of money when it falls due, the aggrieved party is entitled to interest upon that sum from the time when payment is due (i.e. in the instant matter, 17 March 2020) to the time of payment whether or not the non-payment is excused. The rate of interest is calculated upon the average bank short-term lending rate to prime borrowers prevailing for the currency of payment (AED) at the place for payment (i.e. Dubai).

19. The Claimant has submitted that the appropriate rate is 3-month EIBOR. The Court accepts this submission.

Issued by:

Nour Hineidi

Deputy Registrar

Date of Issue: 4 May 2020

Date of Re-issue: 3 June 2020

At: 12pm