

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

CLAIM NO: BVIHC(COM) 2010/0112

BETWEEN:

TULLOW DRC BV

1st Claimant

TULLOW OIL PLC

2nd Claimant

and

CAPRIKAT LIMITED

1st Defendant

FOXWHELP LIMITED

2nd Defendant

Appearances: Mr John McCaughran QC and Ms Keisha M Durham for the Applicants/Claimants
Mr Terence Mowschenson QC and Mr Oliver Clifton to the Respondents/Defendants

JUDGMENT

[2010: 21 October; 19 November]

(Injunction - tort - inducement of breach of contract – contract awarded to Applicants by Republique Democratique du Congo ('RDC') in July 2006 for the sharing of oil production ('PSC') at Blocks 1 and II of Albertine Graben ('the Territory')) – contract expressed to come into force when President of RDC issues decree of approval – no decree issued - in May 2010 RDC awards similar PSC to Defendants for the Territory - also subject to Presidential approval – President issues decree of approval for Defendants' PSC in June 2010 –Claimants alleging that PSC awarded to Defendants inconsistent with PSC previously awarded to Claimants and that Defendants accordingly induced breach by RDC of Claimants' PSC – whether Defendants to be enjoined from exercising rights under the Defendants' PSC – whether Defendants to be enjoined from assigning benefit of their PSC)

- [1] **Bannister J [ag]:** On 21 October 2010 I heard an application for the continuation of an interim injunction granted to the Claimants (together 'Tullow') on 21 September 2010 by Hariprashad-Charles J. That injunction restrained the Defendants from (in short) exercising or assigning rights

granted to them by the Republique Democratique du Congo ('the RDC') pursuant to a reduction sharing agreement ('the Defendants' PSC') dated 5 May 2010 under which the Defendants were granted rights to survey and explore for oil over an area known as Blocks I and II of the Albertine Graben ('the Territory') and, if successful, to exploit any reserves discovered on a profit sharing basis with the RDC.

[2] The reason why the Judge granted her injunction (which was made without notice to the Defendants) was because some four years earlier, on 21 July 2006, the first Claimant (together with two other entities who are not party to the present proceedings¹) and the RDC had executed, I do not say an identical, but for present purposes an all but identical, agreement also covering the Territory ('the Tullow PSC'). It was Tullow's contention before Hariprashad-Charles J and it is Tullow's contention before me that by entering into the Defendants' PSC the RDC broke the Tullow PSC, which was expressed to confer exclusive rights upon the first Claimant and the other named parties to it. Tullow contends that the Defendants entered into the Defendants' PSC with knowledge of the Tullow PSC and thus induced the RDC's alleged breach of the Tullow PSC. Tullow further contends that by insisting upon the validity of their PSC and upon their right to perform it the Defendants have wrongfully interfered with the Tullow PSC. They claim that this conduct is tortious both in the BVI, where these proceedings are brought, and in the RDC, where the events happened.

[3] Accordingly, Tullow claims a declaration that the Defendants have procured a breach of the Tullow PSC and damages but also, and more importantly for present purposes, a final injunction, in the following terms:

'30.2 An injunction restraining the Defendants from seeking to exercise its rights pursuant to their contract with the DRC in respect of the grant of exclusive hydrocarbon survey and, exploration rights over and the right to obtain any exploitation concession in Blocks I and II of the Albertine Graben pending the determination of the arbitration proceedings between the Claimants and the DRC concerning the same.'

The reference to arbitration is to an ICC arbitration commenced by Tullow against the Government of the RDC on 20 August 2010 pursuant to provisions in the Tullow PSC.

¹ no point was taken on this by Mr Terence Mowschensen QC, who appeared, together with Mr Oliver Clifton, for the Defendants

[4] Hariprashad Charles J appointed 18 October 2010 as the return date for the injunction, but as it happened that proved unsuitable and the relief which she had granted was extended by agreement until 21 October 2010, when the matter was argued. I reserved my decision and continued the earlier injunction in the meantime, with additional wording designed expressly to prevent assignments on by either of the two Congolese subsidiaries to which the benefit of the Tullow PSC had been assigned as soon as Tullow served these proceedings upon the Defendants. I had raised at the hearing the question whether it was as a matter of general practice appropriate for the Court to grant an injunction restraining continued performance by the tortfeasor of a contract granted to him by the contract breaker in circumstances where it was *prima facie* apparent that the contract breaker did not intend to reinstate dealings with the injured claimant. I received helpful written submissions on this point on 5 November 2005, to which reference will be made later in the judgment. Having received those submissions, it appeared to me that the answer to the question required further consideration of the nature of Tullow's rights in the instant case. I accordingly forwarded a portion of the judgment which I had by then written in draft and containing my provisional views on this part of the case to the parties and invited their submissions upon it by Friday 12 November 2010. That proved an impossible deadline and I extended time until Wednesday 17 November 2010, when I received further written submissions. This judgment takes into account both the submissions made at trial and the further written submissions received. I regret the delay which has resulted, but it has enabled the Court to obtain a clear understanding of the parties' respective positions and to form a concluded view based upon a thorough examination of the issues requiring decision. I am most grateful to the parties and their lawyers for the high quality of their responses and for the parties' patience in the meanwhile.

[5] Mr McGoughran QC, who appeared together with Ms Keisha Durham for Tullow, stressed what he submitted were suspicious features surrounding the obtaining by the Defendants of their PSC. For example, he pointed out that the Defendants are brand new offshore entities with no track record in the oil industry; that Tullow paid a so-called signature bonus of \$500,000² upon execution of their agreement in 2006, whereas the Defendants paid a signature bonus of \$6 million; that the Defendants' PSC was entered into with unusual haste, with no tendering process and with the omission of various steps that one would expect to see before the eventual grant of such a

² it appears that the currency may in fact have been K\$, although there was no express evidence of that and nothing, in my view, turns upon it

contract; and that the very fact of the hasty assignments raises questions about the Defendants' motives and intentions. I do not think I should embark upon any sort of evaluation of the Defendants' conduct at this stage of the proceedings. It does not seem to me to have any bearing upon the question whether an interim injunction should be continued restraining the Defendants (or more accurately their assignees) from exploiting the contract which it is not disputed has been granted to them.

- [6] Each PSC is in French and subject to RDC law. Article 34.1 of the Tullow PSC is in the following terms:

'Le Contrat entrera en vigueur à la date de promulgation du Décret d'approbation du Président de la République.'

This has been rendered in the translation that was before the Court as:

'The effective date of this Contract shall be the date of the publication/promulgation of the Order of Acceptance of the President of the Republic.'

It is common ground that no *Décret d'approbation* (or Order of Acceptance) has been promulgated by the President of the RDC in respect of the Tullow PSC. Article 34.1 of the Defendants' PSC is in similar (but not identical) French, which has been translated as:

'The effective date of this Contract shall be the date of the publication/promulgation of the approval Decree of the President of the Republic.'

It is also common ground that the President issued such a Decree in favour of the Defendants' PSC on 18 June 2010.

- [7] The Defendants' contention is that the absence of a Presidential decree in respect of the Tullow PSC means that it has never had contractual force. Mr McCaughran QC submits on behalf of Tullow that clause 34.1 is a condition precedent to performance, but not a condition precedent to contract. In other words, that Tullow has a binding agreement with the RDC, but the time for performance must await the issue of the appropriate Presidential decree.

- [8] I have to say that, purely as a matter of language, the original French of clause 34.1 of the Tullow PSC reads to me as a condition precedent to contract, but it was accepted by the Defendants at

the hearing that there is a serious triable issue on this point. The question is to be resolved by expert evidence of Congolese law (including Article 79 of the Hydrocarbons Law 013-1981, upon which the Defendants rely in their defence). Although there was evidence of Congolese law in the application bundles, no permission had been given for it to be adduced and it was not referred to at the hearing, although it has been referred to extensively in the written submissions delivered on 17 November 2010. On the basis that the question whether the Tullow PSC is a binding and subsisting contract is for trial, I refused the Defendants' application for summary judgment on the point.

- [9] More formidable, for present purposes is the submission of Mr Mowschenson QC, who appeared together with Mr Oliver Clifton for the Defendants, that in the events which have happened there is no realistic prospect that any Presidential decree will ever issue in favour of the Tullow PSC. He relies upon the minutes of meetings with the Minister of Hydrocarbons, the Prime Minister and the Governor of Huri Province held on 21 July 2010 and upon a letter to Tullow from the RDC Oil Ministry dated 8 October 2010, which seem to me to provide strong support for this contention.
- [10] In any case, this evidence only goes to confirm what must be an inevitable inference to be drawn from the facts (a) that in the four years (or so) since the Tullow PSC was executed Tullow has not received the benefit of a Presidential decree and (b) that in the full knowledge of the Tullow PSC a Presidential decree has been granted in favour of the Defendants. I should have thought it inherently improbable that the President of the RDC, having given his approval to the Defendants' PSC, would reverse his position and sanction the Tullow PSC. Of course, such a thing might happen if the RDC authorities fell out with the Defendants (or those who stand behind them) or, perhaps, upon a change of government in the RDC, but it still seems to me that even on the assumption that Tullow has the benefit of a binding contract and bearing firmly in mind that this is an interim application only, the prospects that the Tullow PSC will ever be performed are thin to just this side of vanishing point. I remind myself that it is no function of the Court at this stage to predict, let alone decide, outcomes, but in considering what is the nature of the rights to which I am being invited to give interim protection, or where the balance of convenience lies, I cannot, if I am to exercise my discretion judicially, shut my eyes to the uncontested facts and their likely consequences.

- [11] It is true, as I have mentioned, that Tullow has commenced arbitration proceedings against the Government of the RDC and Tullow's evidence is that the Government is actively participating in the process. In the arbitration Tullow seeks (in substance) specific performance and damages. Tullow may, for all I know, achieve an award equivalent to a decree of specific performance in favour of the Tullow PSC, but it remains, in my judgment, improbable that the President, having given his blessing to the Defendants' PSC, will willingly create an irresolvable conflict by granting a parallel (or replacement) decree in favour of Tullow's. The President, as has been pointed out, is not party to the arbitration and in any event has sovereign immunity.
- [12] If Tullow was in a position to compel specific performance of its PSC it would then have had an equity which the Court might see fit to protect at trial and by interim injunction in the meantime. But from an English law perspective and in the absence of any pleading that the position would be different under Congolese law, Tullow cannot obtain specific performance of its PSC. First, because even on its own case the time has not yet come for it to be performed and the event upon which performance is conditional is not within Tullow's power to bring about³. Secondly, because performance of the PSC would require the RDC to co-operate with Tullow and the RDC has given the plainest indication that it has no intention of doing any such thing. The Court will not make decrees compelling parties at odds with each other to work together.
- [13] Mr McCoughran QC referred me to **Cetelem SA v Roust Holdings Ltd**⁴, where the Court of Appeal in England and Wales accepted that a contract subject to a condition precedent to performance was an asset for the purposes of section 44(3) of the English Arbitration Act 1996. The Court also appears to have assumed that specific performance would be granted of it despite the fact that fulfillment of the condition was within the power of neither party to bring about. With respect, I think that that assumption, which was not essential to the decision, was wrongly made. I accept that if the Tullow PSA binds the parties, it is to be treated as an asset of Tullow, despite the fact that it remains conditional. I also accept that the mere fact that the time for specific performance of a contract has yet to arrive does not mean that the court will not intervene to prevent it from lapsing (as was done in **Cetelem**). The question for this application, however, is whether the Tullow PSC is a right or asset of such a character that when all the circumstances are

³ see Chitty on Contracts, 30th Ed at para 27-039.

⁴ [2005] 4 All ER 52

considered it ought to be protected by interim relief designed to prevent the Defendants' PSC from being performed.

[14] Mr McCoughran QC referred me to **Lumley v Wagner**⁵, where, despite the fact that Ms Wagner's contract to sing for Mr Lumley could not be specifically enforced against her, she was restrained, for the term of that contract, from singing at the Italian Opera for Mr Gye. Lord St Leonards held that the contract into which Ms Wagner had entered with Mr Lumley incorporated a negative stipulation not to sing, during its term, for anyone else. For good measure, Mr Gye was also restrained from employing her for the like period. Mr McCoughran QC says, correctly, that this case shows that a person who procures a breach of contract containing an express or implied stipulation not, during its term, to contract with another, will be restrained, at the suit of the injured party, from performing the contract which has resulted in the breach of the negative stipulation. He is also entitled to rely upon the case as authority for the proposition that such an order will be made even where the contract containing the negative stipulation is not specifically enforceable.

[15] The right granted by Ms Wagner to Mr Lumley, however, was not conditional. It was an immediate right to her services as a singer, coupled with an immediately binding promise not to perform in any other theatre for the term of her contract. Mr McCoughran QC submits that it would have made no difference if Ms Wagner's obligation to work for Mr Lumley had required the prior approval of a third party. I would agree with Mr McCoughran QC if the position had been that the approval had to be obtained within a limited period. Then, if Mr Gye had attempted to obtain the benefit of Ms Wagner's services before the expiration of that time, he would obviously have been interfering with Mr Lumley's contractual rights. **Smith v Butler**⁶, to which I was referred by Mr McCoughran QC, illustrates the principle. Equally obviously, he would not have been doing so had the time limited for obtaining third party approval expired without its having been granted. The difficult case is one where the efficacy (to use a neutral word) of a contract is dependent upon third party approval, but no time is limited for its obtaining and neither party is under any obligation to use best endeavours to obtain fulfillment of the condition. Why in those circumstances should a contracting party be

⁵ (1852) de Gex M&G 604

⁶ [1900] QB 694

entitled to a perpetual⁷ injunction neutralising an opportunity which it is only remotely possible that it will ever be entitled itself to exploit?

[16] Mr McCoughran QC referred me to **Manchester Ship Canal Company v Manchester Racecourse Company**⁸, where the defendant, which had granted a right of pre-emption to the plaintiff canal company, was restrained by injunction from performing a contract which it had entered into for the sale of the same land to the second defendant until the land had been offered to the plaintiff at the same price. Again, the purchaser was also restrained by the injunction from performing the contract for the purchase of the relevant land until after the canal company should have declined to exercise the right of pre-emption. Mr McCoughran says, again correctly, that this case demonstrates that notwithstanding the fact that the contract breaker has concluded an inconsistent contract with a third party, he and the third party will each be restrained from performing it in violation of the plaintiff's rights. The Court of Appeal, upholding the decision of Farwell J (but for different reasons) stressed the fact that there was to be implied a negative stipulation - not to sell in breach of the pre-emption provision – which brought the case within the principle of **Lumley v Wagner**.

[17] Mr McCoughran QC says that there is an implied negative stipulation in the present case, arising out of the exclusive nature of the rights granted (once the Tullow PSC binds) by the RDC to Tullow. So, he says, and on the assumption that the Tullow PSC is binding, it was a breach of contract to grant equivalent rights to the Defendants and a tort on the part of the Defendants, knowing of the Tullow PSC, to enter into their PSC. He says that that brings the case within the principles of **Lumley v Gye** and **Manchester Ship Canal Company**. For reasons similar to those mentioned above, it seems to me to be a considerable leap from cases where parties have been held to their contracts until time for the fulfillments of a condition has expired (**Smith v Butler**) or cases where one or other party has been in breach of an obligation to use best endeavours to bring about fulfillment (**Cetelem**), to a case where a party will never be in a position to insist upon performance of his contract unless an event outside the power of either party to bring about and which neither party is under any obligation to bring about occurs at an indeterminate time in the future.

⁷ In the sense used in *Snell, Equity*, 31st Ed at para 16-02

⁸ [1901] 2 Ch 37

- [18] Mr McCoughran QC relies upon Article 23 of the Tullow PSC as obliging the RDC to use best endeavours to procure the grant of the Presidential decree. I have to say that I do not find it easy to get that out of Article 23, which appears in terms to be confined to matters going to the performance, rather than to the conclusion of the contract, but I am prepared to assume in Tullow's favour that they have a serious prospect of being able at trial to establish that it imposes an obligation to use best endeavours to procure the grant of the decree.
- [19] In his excellent submissions upon the part of my provisional draft judgment upon which I asked for the parties observations, Mr McCoughran QC rightly rebuked me for at any rate appearing to decide that Tullow presently has no binding contract. I might further admonish myself in the words from **Wakefield v Duke of Buccleugh**⁹ cited in **American Cyanamid**¹⁰, that the insurance provided by a cross undertaking in damages 'aids the court in doing that which is its great object, viz, abstaining from expressing any opinion upon the merits of the case until the hearing.' In the passage of which Mr McCoughran QC makes complaint, it was not my intention now to decide whether Tullow has the benefit of a presently binding contract or whether the terms of the Tullow PSC oblige the RDC to use its best endeavours to obtain a decree in its favour from the President and, if so, whether the RDC is in breach. I accept that both formally, because of the course which this case has taken, and as a matter of principle, those are matters for trial.
- [20] But even assuming that Tullow has a presently binding contract and even assuming that the RDC is in breach of an obligation to use best endeavours to obtain the decree, it is both relevant, and thus legitimate, to ask the question, 'What then?' It was that question which I was clumsily attempting to address in the draft. In my judgment, even assuming that Tullow proves its case to the hilt at trial, it will still (unless the Government of the RDC and the President have meanwhile reversed their current positions) be left with no more than a hope that the President will issue a decree in its favour and, if it establishes that the RDC is in breach of an express or implied best endeavours obligation, a claim against the RDC for damages for breach of contract or for a mandatory injunction against the RDC obliging it to use best endeavours in circumstances where the RDC has already committed itself to the Defendants and the President has confirmed that commitment.

⁹ (1865) 12 LT 628, 629

¹⁰ [1975] AC 396 at 408A

[21] Thus, even if it is true that rights of Tullow were infringed when the RDC entered into the PSC with the Defendants or, perhaps, when the Defendants' PSC crystallized into an enforceable contract when it received Presidential approval, the fact remains that Tullow's prospects of *enjoying* those rights are and, even if it succeeds at trial, will remain, in the strictest sense of the word, precarious. Despite that, the Court is being asked by Tullow in effect to sterilise the Territory. On Tullow's evidence, there is no third party who might be both interested in and capable of entering into and performing a PSC covering the Territory who would be unaware of the fact of the grant in 2006 of the Tullow PSC, so that even if the RDC breaks the Defendants' PSC and deals instead with some third party, that third party, if Tullow is right, will be amenable to be restrained from performing its PSC as knowingly having interfered with the Tullow PSC. Tullow has waited some four years for Presidential approval and yet is now, as the evidence summarized above shows, never (absent exceptional circumstances) going to obtain it. Crudely put and irrespective of whether Tullow has a presently binding contract, the position is that Tullow has no obvious prospects of ever reaching the position of being entitled to enjoy the fruits of its PSC, yet is determined that no other person shall be permitted to exploit the Territory.

[23] In my judgment, this is not a case where the remedies in damages either awarded to Tullow at trial or to the Defendants under a cross undertaking from Tullow would prove adequate to either party. In those circumstances it is necessary to go on to consider the balance of convenience. I do not consider that against the background which I have summarized above it would be a proper exercise of discretion to attempt to restrain further performance of the Defendants' PSC. The Defendants are in a position to proceed with their PSC and it is clear that the RDC is keen that they should do so. If I attempt to restrain the Defendants from further performance of their PSC (even if only until after the ICC tribunal has handed down its award) I would be disadvantaging them without, so far as I can see, protecting any realistic prospect that Tullow will persuade either the RDC or the President of the Congolese Republic to embrace it as collaborator in the development of the Territory. In those circumstances, it is my view that the balance of convenience comes down firmly in favour of refusing to continue the interim injunction.

[24] I also bear in mind that if I were to enjoin the Defendants from performing their PSC I would be indirectly interfering with the expressed will of the President of a sovereign state. Whether, as a matter of strict jurisprudence, I would have jurisdiction to act in such a way is not something which I

propose to consider in this judgment, but even if I had I would require evidence of the most pressing need for the grant of relief having such an effect before I could be persuaded to grant it. That is not, in my judgment, such a case.

- [25] Mr McCoughran QC referred me to a number of authorities which show quite clearly that even where a proprietary right has been obtained by a grantee in breach of contract, the courts are prepared to grant mandatory injunctions compelling the grantee, in a proper case, to surrender it. No question of the grant of a proprietary right arises in this case, although Mr McCoughran QC is entitled to rely upon this line of authority as underscoring the readiness of the courts not to permit those who induce infringement of the rights of others to enjoy or exploit rights obtained by them in consequence at the expense of the injured party. For the reasons given above, I do not consider that the principles which those authorities exemplify require me to continue the injunction which has been granted in the present case.

Conclusion

- [26] It may be that in the result the Defendants will be proved to have unjustly profited at the expense of some present right of Tullow. The answer to that is that there comes a point where the prospects which a party seeks to protect are so uncertain, and the damage that will result if it proves at trial that the Court was mistaken in granting sweeping interim relief against a defendant so great and so difficult to compensate for, that the as yet unestablished rights of a claimant must yield to the balance of convenience.
- [27] This application is accordingly dismissed with costs to be assessed if not agreed and the injunction is discharged. I am very grateful to Counsel for the assistance which they have provided to the Court.



Commercial Court Judge

19 November 2010