JERSEY / JUDGMENT

FG Hemisphere and Dem Rep Congo [2009] JRC 244B (15 December 2009)

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judgment

the commissioner: 1. On Monday 14 th December, 2009, the Court discharged the first and second parties cited from the certain injunctions that had been imposed ex parte on 11 th December, 2009, for reasons which were to follow in a written judgment. At the same time the Court refused the Representor leave to appeal and its application for a stay. That evening the Representor applied to the Deputy Bailiff as a single judge of the Court of Appeal for and obtained a stay which on the 15 th December, 2009, the first and second parties cited applied to have lifted. This summary of the Court's reasons was prepared for the purpose of that application. 2. The Representor has acquired by way of assignment rights under arbitration awards made against the Democratic Republic of Congo which it is seeking to enforce both here and in other jurisdictions. It currently claims some US$116m with daily interest accruing. 3. The first party cited, which is a Jersey incorporated company, has a 70% interest in the Kibali gold mine operation in the Democratic Republic of Congo. The remaining 30% is owned by the Second Respondent (Okimo) which is wholly owned by the Democratic Republic of Congo and which the Representor maintains is an organ of the state. The first party cited is in turn owned by the second party cited (and another company Anglo-Gold). The second party cited is a publicly quoted company. 4. On 30 th November, 2009, the second party cited gave notice of an EGM for the approval of its acquisition (through the first party cited) from Okimo of a further 20% in Kibali gold mines, bringing its total ownership up to 90%. The consideration payable is US$113,600,000. The acquisition was contingent upon a number of factors including the approval of the shareholders at the EGM due to be held this Wednesday at 8.30 a.m. 5. The Representor applied to the Court ex parte on Friday 11 th December to injunct that contingent debt and to seek disclosure of the Share Purchase Agreement (SPA) and other documents referred to in the SPA, together with information that any of the parties cited might have about other assets of the First and Second Respondents including any bank account details. Those injunctions were granted and are set out in the two acts of Court issued that day for service upon the parties cited affected in the early evening of Friday 11 th December. 6. The Representor's application was premised upon the SPA (not then disclosed) creating a debt in favour of the Second Respondent upon which it could distrain. It was asserted that the parties citied were innocent parties who are not likely to collude with the First or Second Respondents. 7. The Court was concerned as to the impact of the

injunctions upon the SPA and received written submissions from the Representor. Crucially it was submitted that the injunctions would not prevent the parties completing the SPA - indeed the injunctions had been carefully worded to as to ensure that the parties were able to conduct business as usual. The Court accepted those submissions for the purpose of the ex parte application. 8. The parties cited applied on Monday 15 th December to be discharged from the injunctions, failing which to have the undertaking in damages fortified by security. The following points arose:- (i) The SPA and all of the named documents sought by the Representor under the disclosure orders have in fact been available to public inspection since 30 th November, 2009, at La Motte Chambers and at the offices of Ashursts in London. This is made clear on page 95 of the Notice. This would appear to have been overlooked by the Representor and its advisers and therefore not drawn to the attention of the Court. (ii) The SPA was subject to the proper law of the Republic of Congo and, in translation, the relevant provisions (Clause 6.4(c)) provided on its face that title to the shares would only pass to the first party cited after receipt by Okimo of the purchase consideration in the manner specified. (iii) The Representor had not only failed to obtain and disclose to the Court the relevant provisions of the SPA but it failed to produce expert evidence of Congolese law to support its central submission that the SPA gave rise to a debt upon which it could distrain. (iv) The parties cited did produce a letter from a Congolese lawyer dated 13 th December, 2009, advising that under Congolese law the payment of the sale price into the account specified by Okimo was a fundamental term of the contract and that Okimo would not be bound to perform its obligations under the SPA if the first party cited failed to pay the sale price as agreed, which would then enable Okimo to terminate the SPA. 9. The parties cited submitted that by maintaining the injunctions the sale of the shares would simply not be completed. The first party cited would be unable to pay the consideration in the manner prescribed in the SPA and Okimo would not therefore transfer the shares. No debt in Jersey would be created upon which the Representor could distrain. 10. The affidavit of Dennis Mark Bristow, the Chief Executive Officer of the second party cited sworn in support of the application to have the injunctions lifted, sets out the serious financial implications to the parties cited of the completion of the SPA being frustrated in this manner. The additional 20% due to be acquired by the first party cited was crucial to giving it control over the mining operations. Leaving aside the serious financial implications to the parties cited there were connected infrastructure projects within the Republic of Congo involving the building of roads, a power station and the relocation of some 15,000 people. 11. Mr Costa submitted that in addition to the SPA being frustrated, there was a potential for the first party cited to be placed in jeopardy of being legally bound to pay the consideration twice but more realistically it might have to pay the consideration twice in order to protect its substantial investment in the Kibali gold mine, giving rise to interesting conceptual issues at to the status of the funds that would have been lodged with the Viscount. 12. Mr Journeaux maintained that as a matter of Jersey law payment of the consideration to the Viscount would constitute compliance with Kibali's obligations under the SPA. He cited two cases in support of that proposition Swiss Corporation-v-Blehnische

[1923] CA 673 and Deutsche-v-Shell Internationa l [1990] 1 AC 295 which he said reflected the position under Jersey law. However, when pressed on the central concern of the parties cited that the transaction would simply not be completed as a consequence of the injunctions, he submitted that the first party cited should inform Okimo that it had been advised by its lawyers that if payment was made to the Viscount it would as a matter of law have complied with its obligations and therefore Okimo was bound to proceed with the transfer of the shares and would be in breach of contract if it failed to do so. 13. Mr Costa pointed out the first party cited had received no such advice. Indeed it had been advised that by paying the funds to the Viscount it would be in breach of its own obligations under the SPA. The Representor was effectively requiring it to engage in litigation with its co-shareholder at the behest and for the benefit of the Representor and to the detriment of the parties cited. More crucially the Representor had adduced no evidence of Congolese law in support of its submissions, Congolese law governing the rights of the parties under the SPA. 14. The position is as follows:- (i) The SPA was key to the Representor's application. It had failed to disclose the terms of the SPA to the Court and to adduced evidence as to its effect as a matter of Congolese law. (ii) The injunctions were granted on the representation that they would not impede the completion of the sale of the shares and would give rise to a debt upon which the Representor could distrain. (iii) The Court was satisfied on the evidence received from the parties cited that in fact the injunctions would frustrate the completion of the sale and would not therefore give rise to any debt upon which the Representor could distrain. (iv) The position taken by the Representor was that the first party cited should be required to enforce its rights against Okimo against its will and against the advice it has received. This suggestion was made without the Representor itself adducing any evidence as to the position of the first party cited under Congolese law. (v) The Court accepted that if the injunctions were maintained, the purchase of the shares would simply not take place. The Representor had no material assets with which to meet its undertaking in damages and therefore the only parties to suffer would be the parties cited who are innocent in this matter. 15. In the view of the Court the maintenance of these injunctions constituted an unwarranted interference in the commercial activities of innocent third parties and was thus inequitable. 16. As to disclosure, all of the documents sought by the Representor were in fact publicly available and Mr Bristow confirmed that the parties cited had no information in respect of bank accounts belonging to Okimo. As a result of these proceedings it was most unlikely that information in relation to bank accounts would now be supplied. He confirmed that the parties cited did not control any assets in Jersey belonging to the Respondents. 17. The Court did not need to consider the parties cited application for the undertakings in damages to be fortified by way of security. Authorities Swiss Corporation-v-Blehnische [1923] CA 673. Deutsche-v-Shell International [1990] 1 AC 295. Page Last Updated: 15 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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