

SOUTH AFRICA / JUDGMENT

Scate Solar SA 163 (Pty) Ltd and Another v Terrafix Suedafrika (Pty) Ltd and Another (499/2014) [2014] ZAWCHC 24 (5 March 2014) [2014] ZAWCHC 24

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

499/2014

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)

Case

no: 499/2014

DATE:

05 MARCH 2013

In the matter

between:

SCATEC SOLAR SA

163 (PTY) LTD.....First

Applicant

ITOCHU

CORPORATION.....Second

Applicant

V

TERRAFIX

SUEDAFARIKA (PTY) LTD.....First

Respondent

HSBC BANK

PLC.....Second

Respondent

Court: Justice J

Cloete

Heard: 13, 17,

18 and 19 February 2014

Delivered: 5
March 2014

JUDGMENT

CLOETE J:

Introduction

- [1] On 15 January 2014 the applicants ('Scatec' and 'Itochu') launched an urgent application against the respondents ('Terrafix' and 'HSBC') for certain interdictory relief pending the final determination of arbitration proceedings to be held between Scatec and Terrafix.
- [2] On 17 January 2014 and by agreement, the relief sought was postponed to 13 February 2014 for hearing, when the matter came before me. Included in the order of 17 January 2014 was a timetable for the filing of answering and replying affidavits. Also included was certain agreed interim interdictory relief against Terrafix, which essentially prevented it from compelling payment from a bank in Japan ('Sumitomo') of a total amount of some R42 million under irrevocable standby letters of credit ('LCs') issued by Sumitomo to Terrafix.
- [3] On 17 February 2014 (the second day of argument) the applicants were granted leave to amend their notice of motion without opposition from Terrafix and were ordered to pay the wasted costs incurred thereby. HSBC has fallen out of the picture. It was initially the bank (in South Africa) nominated by Terrafix into which the monies demanded under the LCs were to be paid. Terrafix subsequently nominated a different bank in Germany for this purpose. The latter bank is not a party to these proceedings.
- [4] The first part of the amended relief sought is a declaratory order that Terrafix's demands to Sumitomo under the LCs are invalid, unenforceable and unlawful by reason of fraud. The second part (which follows from the first) is that Terrafix be ordered to revoke the demands forthwith. The relief sought is final in effect and is no longer linked to the outcome of the arbitration to be held between Scatec and Terrafix.
- [5] The applicants now accept, for purposes of this application, that the LCs are 'classical' and that accordingly the only basis upon which they can be declared unlawful and unenforceable is by reason of fraud on the part of Terrafix. The applicants no longer ask that this issue be determined on the papers alone, but seek a referral to oral evidence on specified issues as detailed in the amended notice of motion, alternatively, that certain of Terrafix's deponents to affidavits, as well as two other individuals who are not deponents, be ordered to appear to be cross-examined. The applicants further seek what is essentially an extension of the interim interdictory relief granted on 17 January 2014 pending the final determination of the main relief by way of oral evidence, alternatively cross-examination (the interim relief has been extended by agreement pending judgment herein).

- [6] Terrafix opposes all of the relief sought and contends that it falls to be dismissed on the papers alone.

Background

- [7] Scatec is a contractor building two solar power stations in the Northern Cape, called Linde and Dreunberg respectively. Terrafix is the wholly owned subsidiary of a German company, Terrafix Anlagenbau GmbH ("Terrafix A"). Terrafix was a subcontractor of Scatec, appointed in terms of two written subcontracts in substantially similar terms. The subcontracts were concluded on 20 June 2013. The Linde project commenced before the Dreunberg project and is at a more advanced stage.
- [8] In terms of the subcontracts Terrafix was to do work for which it was to be paid by Scatec. Terrafix sought to secure payment by way of payment guarantees. On 31 July 2013 Scatec appointed Itochu, a corporation in Japan, as its payment agent. Itochu in turn arranged for LCs to be issued in favour of Terrafix by Sumitomo, a commercial bank in Japan. (During argument it was accepted by Terrafix that, upon payment being made by Sumitomo, the latter would have a right of recourse against Itochu, which would in turn have a right of recourse against Scatec.)
- [9] The first LC (for the Linde subcontract) was issued on 5 September 2013 and expires on 31 May 2014. The initial amount for which it was issued was R119 238 213.41. This was subsequently reduced on 23 October 2013 to the amount of R83 466 749.39. The second LC (for the Dreunberg subcontract) was also issued on 5 September 2013 but expires on 31 August 2014. It was issued for an amount of R251 558 105.36.
- [10] Each LC stipulates that the documents to be presented in order to trigger payment are:
- '1) A COPY OF DEBIT NOTE BY THE BENEFICIARY ATTENTION TO ITOCHU CORPORATION NUCLEAR FUEL AND SOLAR BUSINESS DEPARTMENT SOLAR BUSINESS SECTION NO.2, DELIVERED AT 5 – 1, KITA AOYAMA 2 – CHOME MINATO-KU, TOKYO 107-8077, JAPAN SHOWING THE DOCUMENTS APPLICABLE TO THE RELEVANT PAYMENT MILESTONE SET OUT IN APPENDIX 1 HERETO FOR PAYMENT OF A SPECIFIED AMOUNT.
- 2) BENEFICIARY'S SIGNED STATEMENT ATTENTION TO ITOCHU CORPORATION NUCLEAR FUEL AND SOLAR BUSINESS DEPARTMENT SOLAR BUSINESS SECTION NO.2, DELIVERED AT 5 – 1, KITA AOYAMA 2 – CHOME MINATO-KU, TOKYO 107-8077, JAPAN, CERTIFYING THAT THE AMOUNT OF ANY DRAWING(S) HEREUNDER REPRESENT(S) INVOICE(S) AMOUNT WHICH REMAIN UNPAID AND THAT PAYMENT(S) HAS NOT BEEN RECEIVED FROM ITOCHU CORPORATION.
- 3) SIGNED CONFIRMATION LETTER ISSUED BY ITOCHU CORPORATION, NUCLEAR FUEL AND SOLAR BUSINESS DEPARTMENT SOLAR BUSINESS SECTION NO.2 STATING THAT ITOCHU CORPORATION ADMIT TO HAVE NOT MADE PAYMENT TOWARD BENEFICIARY'S SIGNED STATEMENT...'

- [11] As will be seen from the above each LC contains, as one of its conditions for payment, the presentation of a debit note by Terrafix to Itochu 'showing the documents applicable to the relevant payment milestone set out in appendix 1 hereto for payment of a specified amount'. In addition Terrafix must certify to Itochu that the amount of any 'drawing(s) hereunder represent(s) [the] invoice[ed] amount'. Each LC incorporates an appendix 1, setting out a payment schedule linked to completion of work stages, or payment milestones.
- [12] Various material disputes arose between Scatec and Terrafix during the execution of the subcontracts. These appear to have had their origin in Terrafix falling behind in its work schedule, but over time extended to other disputes as well, one of which was the nature of the documentation to be submitted by Terrafix to Scatec for approval on milestones allegedly achieved. Each party blames the other. The disputes culminated in Scatec issuing a notice of termination to Terrafix in respect of each subcontract on 25 November 2013. Terrafix responded by informing Scatec on 10 December 2013 that it regarded the notices of termination as a repudiation of each subcontract; that it accepted such repudiations; and that it accordingly thereby terminated the subcontracts. The two parties subsequently agreed to refer all of these disputes to arbitration. The arbitration is scheduled to take place in May 2014.
- [13] On 17 December 2013 Terrafix (through its attorneys) presented two demands for payment to Itochu under the LCs.
- [14] The demand for payment under the Linde LC (no. 211LCJ-62055053) had annexed to it the following:
- 14.1 A certificate dated 10 December 2013 signed by Stephan Reisch (a director of Terrafix and the chief executive officer of Terrafix A in Germany where he is based). This certified that an amount of R13 414 299 (exclusive of VAT) was due and payable to Terrafix and that Itochu had not made payment. Reisch certified that the aforesaid amount 'represents the aggregate amount of debit notes and/or rendered invoices that have been issued and delivered' to Itochu;
- 14.2 Three tax invoices issued to Scatec, two dated 15 November 2013 and one dated 21 November 2013, each in the amount of R5 097 433.52 inclusive of VAT, in respect of milestones allegedly achieved for anchor installations on zones 1, 2 and 3; and
- 14.3 Three debit notes issued to Itochu on the same dates and containing essentially the same information as the three tax invoices, but exclusive of VAT and with a different specified payment period.
- [15] The demand for payment under the Dreunberg LC (no. 211LCJ-62055054) was to similar effect and had similar annexures. The certificate signed by Reisch was dated 12 December 2013. The total amount demanded was R28 300 286.85 exclusive of VAT; the invoices and debit notes were all dated 27 November 2013, and payment was demanded on the basis of milestones allegedly achieved for the first three deliveries of product on site.

- [16] It will immediately be apparent that the certification by Reisch in respect of the Linde subcontract took place on the same date that Terrafix purportedly accepted Scatec's repudiation and cancelled, i.e. 10 December 2013. Reisch certified on the Dreunberg contract two days later, on 12 December 2013. However, all of the invoices and debit notes annexed in support of both certifications pre-date Terrafix's cancellation. All of the Linde invoices and debit notes pre-date Scatec's purported cancellation on 25 November 2013; and all of the Dreunberg invoices and debit notes were generated after cancellation by Scatec, but before the purported cancellation by Terrafix.
- [17] On the same date that Scatec cancelled, i.e. on 25 November 2013, it made demand upon Lombard Insurance Company Limited ('Lombard') for payment of certain performance guarantees which Terrafix had issued in favour of Scatec totalling approximately R37 million.
- [18] Terrafix's letter of cancellation dated 10 December 2013 made no mention of its intention to demand payment under the LCs of amounts which it claimed were owed to it contractually by Scatec. Rather, it demanded payment of substantial damages from Scatec together with the return of the performance guarantees. Scatec refused to return the guarantees.
- [19] On 17 December 2013 Terrafix failed in its attempt to interdict payment under the performance guarantees by Lombard (per the judgment of Veldhuizen J under case no. 19686/2013).
- [20] On 20 December 2013 Terrafix presented its two demands for payment under the LCs to Sumitomo. On 30 December 2013 Sumitomo advised Terrafix that its demands did not 'constitute a proper presentation of the documents' for payment. Further communications followed, culminating in Scatec and Itochu launching this application on 15 January 2014. The ground of urgency alleged was that payment by Sumitomo to Terrafix was imminent.
- [21] Despite the agreed interim interdictory relief contained in the order of 17 January 2014, Terrafix furthered its demands for payment from Sumitomo on 22 and 23 January 2014. In separate communications through its attorneys dated 20 January 2014 and 31 January 2014 it similarly furthered its demands, subject however to payment being effected upon conclusion of these proceedings in favour of Terrafix.
- [22] It also emerged that two days after Terrafix purportedly cancelled, i.e. on 12 December 2013, Terrafix A was placed under self-administered

insolvency (which, I was given to understand, is a process akin to business rescue) in Germany. Reisch was the applicant in those

proceedings, but this was not disclosed by Terrafix (whose representatives, including Reisch, clearly knew of it) to this court.

On 29 January 2014 Terrafix A was placed in preliminary insolvency.

Issues

[23] The primary issue to be determined is whether, in certifying that payment was due under the LCs, Terrafix (in the form of Reisch) acted fraudulently.

[24] Inextricably linked to this is whether, applying the Plascon-Evans rule [1984] ZASCA 51; [1984 (3) SA 623 (A) at 634E-635C], the version put up by Terrafix is such that the application falls to be dismissed on the papers alone. A referral

to oral evidence (whether on specific issues or for cross-examination) can only be ordered if, on the papers as they stand, the probabilities are evenly balanced or the issue remains open.

[25] If the application must fail on the papers, the extension of the interim interdictory relief will of course fall away. If not, it is necessary to determine whether the applicants have made out a case for interim interdictory relief, in order to grant the extension sought pending finalisation of the application.

Applicable legal principles

[26] In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182 (29 November 2013) the Supreme Court of Appeal explained the meaning and application of the fraud exception as follows at para [18]:

‘Insofar as the fraud exception is concerned, the party alleging and relying on such exception bears the onus of proving it. That onus is an ordinary civil one which has to be discharged on a balance of probabilities, but will not likely be inferred. In *Loomcraft Fabrics CC v Nedbank Ltd* and another [1996 (1) SA 812 (A) at 817E-F] it was pointed out that in order to succeed in respect of the fraud exception, a party had to prove that the beneficiary presented the bills (documents) to the bank knowing that they contained material misrepresentations of fact upon which the bank would rely and which they knew were untrue. Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud. Nor was it enough to show that the beneficiary’s contentions were incorrect. A party had to go further and show that the beneficiary knew it to be incorrect and that the contention was advanced in bad faith.’

[27] What must therefore be shown in order to infer fraudulent intent in this context is the following:

27.1 presentation by the beneficiary under an LC (this is not disputed);

27.2 disclosing a misrepresentation of a material fact in the presentation; and

27.3 that it was known by the presenting beneficiary to be untrue.

[28] In *Rex v Myers* 1947 SA 375 (AD) at 382-383 the court, dealing with the issue of a fraudulent representation, held that:

'I think it can be summed up, for the purposes of the present case, by saying that if the maker of a representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent...

The requirement that the belief should be honest is referred to in Halsbury (2nd ed., Vol. 23, sec.59) where it is said that a belief is not honest which,

"though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe."

... absence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there was in fact no such belief.'

[29] As regards the test for a referral to oral evidence, this is clearly set out in *Lombaard v Droprop CC and others* 2010 (5) SA 1 (SCA) at paras [29] – [33], more particularly as follows:

[29] It has long been recognised that a discretion resides in a High Court derived from the rules of court, to refer a disputed issue of fact which cannot be decided on affidavit for the hearing of oral evidence... The overriding consideration in the exercise of the discretion is ensuring a just and expeditious decision. In short, in the case of a dispute of fact the court must be persuaded that the hearing of evidence will be fair to the parties, and will conduce to an effective and speedy resolution of the dispute and the overall application...

[33] If, on the affidavits, the probabilities lie clearly against a party who requires evidence in order to succeed on motion, the court is unlikely to regard evidence as profitable or necessary to determine the issue. However, if the balance of the probabilities is even, or, at least, the court considers that the issue can fairly be said to remain open, then a just outcome may well require the hearing of evidence. With regard to the last-mentioned aspect, it is obvious that the court must take into account all factors relevant to the manner in which the parties presented their versions in the affidavits...'

[30] As to the requirements for interim interdictory relief pending a referral to oral evidence, the test is as set out in *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (CPD) and *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC).

[31] In *Spur Steak Ranches* at 714F-H the court held that:

'It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right *prima facie* established, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is

thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed. See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688.'

[32] In *Camps Bay Residents* at para [7], the court, after setting out the trite requirements for interim interdictory relief, confirmed that:

'In determining whether a *prima facie* right has been established, the right need not be shown by a balance of probabilities. If it is *prima facie* established, though open to some doubt, that is sufficient.'

Application of legal principles to affidavit evidence

[33] At the risk of repetition, it is not necessary for me to determine the issue of fraud at this stage. What I am required to evaluate is whether, applying the *Plascon-Evans* rule, the probabilities are evenly balanced, or the issue of fraud can fairly be said to remain open, because then a just outcome will, in my view, require a referral.

[34] It is common cause that Reisch is the person who acted on behalf of Terrafix in certifying and making presentation of the demands under the LCs. He certified that the amounts invoiced under the subcontracts were due and payable. It is thus his state of mind when he performed these acts that is crucial to the determination of fraud.

[35] Terrafix's main deponent was Martin Ramsauer, a project director on the subcontracts and the chief operating officer of Terrafix A. He was actively involved in the execution of the subcontracts as well as many of the disputes which arose between Scatec and Terrafix relating thereto. He filed a lengthy affidavit dealing with a number of disputed issues. However, what he singularly failed to deal with is whether, and in what manner, the attitude of Terrafix's representatives engaged in the dispute that it was entitled to payment, and the basis thereof, was conveyed to Reisch, so as to enable him to certify in good faith that the amounts claimed under the LCs were due and payable.

[36] A number of emails were annexed to Ramsauer's affidavit in support of his version. Of these, only three were copied in to Reisch; and they relate only to Terrafix's proposed recovery plan on the Linde subcontract submitted to Scatec on 7 October 2013, and the acceptance by Terrafix on 21 October 2013 of a reduced payment period on the Linde subcontract invoices. They are accordingly of no assistance in pointing to Reisch's state of mind when he certified.

[37] Reisch deposed to a "confirmatory" affidavit. The contents are also of little, if any, assistance. Paragraphs 3 and 4 of his affidavit record that:

'I depose to this affidavit firstly in order to confirm those allegations made by Martin Ramsauer in his affidavit of which I have knowledge... Secondly I depose to this affidavit in order to answer the allegations made by Scatec that Terrafix is in dire financial circumstances and insolvent.'

[38] Reisch pertinently failed to address which of the many allegations in Ramsauer's affidavit fell within his (i.e. Reisch's)

knowledge. The only vague indication of Reisch's knowledge is to be found at paragraph 10 of his affidavit, which merely reads that:

'Terrafix further enjoys damages claims in respect of the two sub-contracts against Scatec for a total of R169 million.'

[39] None of the other confirmatory affidavits filed on behalf of Terrafix take this issue any further. None of the deponents state either in terms, or indirectly, that any of them conveyed anything to Reisch on this issue, or indeed that such information was conveyed directly or indirectly to Reisch by anyone else. In addition, two of the protagonists in the subcontracts dispute, namely Henk Lange of Lerumo (one of Terrafix's subcontractors) and Daniel Brandhuber of Terrafix, did not even depose to affidavits.

[40] Terrafix itself contended (during argument) that Reisch did not communicate with any representative on the ground in South Africa. This contention appears to have been made within the context of the submission that Reisch had no reason to "go behind the invoices"; in other words, that Reisch needed to have nothing more than sight of the invoices in order to certify that they were due and payable. Accordingly, so the argument went, Reisch was not obliged to determine for himself whether the amounts were due and payable. On Terrafix's argument, therefore, a certification is simply a document serving no attesting function.

[41] However, a certification serves as a representation to the bank that the amounts are due and payable. That being the case, it was surely incumbent upon Reisch to independently establish that the amounts were owing in order to enable him to certify that fact.

[42] Of course, the absence of cogent evidence by Terrafix as to Reisch's state of mind when he certified does not justify a finding on the probabilities in Scatec's favour. The onus to prove fraud nonetheless still rests squarely upon Scatec.

[43] By the same token, however, the "version" put up by Terrafix is certainly not such that the application falls to be dismissed on the papers alone. As matters stand, the probabilities are evenly balanced. Put differently, the issue can fairly be said to remain open (Lombaard at para [33]).

[44] It should also be pointed out that, as submitted by the applicants, the validity of Scatec's termination of the subcontracts does not have to be determined in its favour for purposes of the fraud issue. On the contrary, the court hearing oral evidence could assume, for purposes thereof, that such termination was invalid. The issue of fraud relates to whether payment under the invoices was knowingly not due. It relates to what Reisch knew, whether he made any enquiries or refrained from doing so, and if so, whether he was dishonest in making the representation that he did.

- [45] It was argued by Terrafix that all that Reisch had to do was to be aware that there was a cancellation; that it was unlawful; procure the invoices; and check that the time period for payment had elapsed. He was then entitled to assume that the amounts were due and payable. He was not obliged to look at documents or to have regard to any other information. Of course, whether Reisch was aware of any of these matters is an open question.
- [46] In addition, a mere perfunctory signing of a letter purporting to be a certification is not the test, and a studious avoidance to determine whether there are objective facts for a belief that the amounts are due and payable falls squarely within the parameters of the test for fraud set out in Myers.
- [47] I agree with Scatec's submission that the argument presented by Terrafix is not unlike the situation of a seller who claims under a letter of credit but who is aware at the same time that he may not have delivered the goods. It cannot be accepted that in those circumstances all he is obliged to do is to look at the invoice and send it; that he does not have to check that the goods have been delivered; and hence that he does not have to check that the monies are due and payable. A seller who knowingly fails to deliver the goods is fraudulent if he claims under the letter of credit concerned.
- [48] Also directly relevant to Reisch's state of mind is the basis upon which he certified that the amounts as claimed were due and payable, given that all of the invoices pre-dated Terrafix's purported termination; and were presented pursuant to Terrafix's acceptance of Scatec's repudiation and its consequent cancellation. The relevant provisions of the subcontracts come into play here and, for a just and expeditious decision, Reisch will have to explain what he considered and took into account when he certified.
- [49] The aspects to which I have referred are not in any way intended to be exhaustive, but are merely meant to illustrate the type of questions which Reisch, against the backdrop of the objective facts, will have to answer before a court is properly able to make a determination on the fraud issue. It is for these reasons that Reisch should appear and be cross-examined to explain himself.
- [50] That having been said, I am not persuaded that it is appropriate to refer the matter for the hearing of oral evidence on all of the issues detailed in the amended notice of motion, given that they may not be specifically relevant to the fraud issue. At the same time I am mindful of the possibility that one or more could become relevant during Reisch's testimony, and it would not be just to pre-empt this eventuality by closing the door on the parties at this stage. I thus intend to cater for this in the order that follows.

The extension of the interim interdictory relief

- [51] I am persuaded that, in accordance with the test set out in *Spur Steak Ranches*, the applicants have established a *prima facie* right, although open to some doubt, to interdict Terrafix from compelling payment under the LCs pending determination of the fraud issue by way of the referral.
- [52] As to the first stage of the test, the applicants have a right that a fraudulent demand not be made by Terrafix under the LCs. If Sumitomo is compelled to pay then Itochu, and in turn Scatec, will effectively be deprived of the fraud defence. Put differently, the applicants have the right not to have to incur substantial liability in consequence of an improper demand. As regards the second stage, on the papers as they stand, there are insufficient facts advanced by Terrafix to cast serious doubt on the applicants' case for fraud. At best for Terrafix there is a 'mere contradiction' of the applicants' allegations.
- [53] I am also persuaded that the applicants have established a well-grounded apprehension of irreparable harm. Terrafix attempted to explain away its material non-disclosure of the court ordered self-administered insolvency (and subsequent preliminary insolvency) of its sole shareholder on the basis that this was not a matter that required disclosure in German law. This is a wholly unsatisfactory

explanation. Reisch's affidavit was deposed to on 27 January 2014, about 6 weeks after he made application on behalf of Terrafix A to the German court; and 2 days before Terrafix A was placed in preliminary insolvency. He obviously knew that the issue of Terrafix's insolvency had to be addressed because he attempted to paint a rosy picture of its financial health in these proceedings.

It cannot seriously be suggested by Terrafix that the fact of the court ordered insolvency should not have been brought to the

attention of this court. To my mind, this material non-disclosure is, of itself, sufficient to ground the reasonable apprehension of irreparable harm on the part of the applicants. In addition, on Terrafix's own version, it has nominated a bank in Germany

(over which this court has no jurisdiction) to accept payment of the monies demanded under the LCs.

- [54] With regard to the balance of convenience, all that Terrafix has suggested would arise from its inability to obtain payment under the LCs is its being precluded from 'applying those funds in the ordinary course'. It has not paid its subcontractors on the two projects. It has no intention of doing so. Apart from the fact that Scatec has paid them, apparently to keep the projects going, Terrafix maintains that it itself has no obligation to pay them. It has referred to no other liabilities which fall to be met by payment from the funds to be derived from the LCs. Any possible balance of convenience in favour of Terrafix is outweighed by the potential irrecoverability of those funds by Scatec in the event of a successful arbitration.

[55] Finally, Terrafix has not challenged the absence of an adequate alternative remedy for the applicants.

Costs

[56] Having regard to all of the foregoing, and in the exercise of my discretion, it is my view that it would be appropriate to order that costs stand over for determination at the hearing.

Conclusion

[58] In the result the following orders are made:

1. The relief sought at prayers 2 and 3 of the applicants' amended notice of motion is postponed for determination at the hearing referred to in paragraph 2 below.
2. Subject to paragraph 3 below, Stephan Reisch is hereby ordered to appear personally on the postponed date to be cross-examined on the issue of whether the first respondent's written demands for payment made on Sumitomo Mitsui Banking Corporation of Japan ('Sumitomo') pursuant to Irrevocable Standby Letters of Credit numbered 211LCJ-62055053 and 211LCJ-62055054 issued by Sumitomo on 5 September 2013 ("the demands") are invalid, unenforceable and unlawful by reason of fraud ("the issue").
3. The parties are granted leave to apply to the court hearing Reisch's evidence to adduce such other evidence which, in the opinion of the presiding judge, is directly relevant to the determination of the issue set forth in paragraph 2 above.
4. The Registrar is directed to enrol the matter for hearing as set forth hereinabove on a preferential date during court term prior to 11 April 2014 pursuant to the permission granted by the Judge President, or such later date as the parties may agree in writing in consultation with the Registrar.
5. Pending the final determination of the relief referred to in paragraph 1 above –
 - 5.1 the first respondent is ordered to suspend, or cause to be suspended, the demands, and to do all things necessary to give effect to such suspension, including by notifying Sumitomo forthwith thereof and of the terms of this order;
 - 5.2 the first respondent is interdicted and restrained from implementing or doing anything to further the demands.
6. The costs of this application shall stand over for determination at the hearing on the postponed date.

J I CLOETE

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