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Seller under fob contract liable for economic duress and tort of intimidation

Kolmar Group AG v Traxpo Enterprises Pvt Ltd [2010] EWHC 113 (Comm)

Background to dispute

The dispute in this case arose out of a contract for the sale and purchase of methanol, with shipment to be FOB Kandla within September 2007. Payment was to be at sight against an irrevocable documentary letter of credit ("L/C") payable against presentation of specified documents.

The buyer intended to sell the methanol to a large and important customer in the U.S., which was experiencing production problems and needed methanol cargoes urgently. However, at the time that the seller made the contract, it did not have access to sufficient cargo at the same or a lesser price with which to be able to supply the buyer at the contract price. After the contract was made, the market price of methanol increased dramatically. The seller, therefore, placed the buyer in a position whereby it had to agree to pay a higher price for some of the parcels of methanol, resulting in a considerable increase in the average price of the total cargo. Alternatively, the buyer would be obliged to take less than the agreed quantity of cargo and be faced with a huge claim for deadfreight for the shortfall.

The original L/C had been opened on 12 September but subsequently amended a number of times *inter alia* to reflect new shipment dates, to provide for partial shipments and to incorporate amended payment terms in respect of some of the parcels of cargo. The final amendments were made on 5 October following a "take it or leave it" proposal from the seller that compelled the buyer to agree to a price revision that would result in the average price for the total cargo increasing by about US\$100 per m.t. as compared to the original contract price. In its related correspondence with the seller regarding these final amendments, the buyer stated that it "*had no other alternative but to accept*". Nonetheless and notwithstanding the buyer's concessions to the seller, the original shipment date was much delayed and by mid-October, the vessel had loaded only a part of the methanol that the seller had been obliged to provide under the contract.

As the vessel was due to arrive at the discharge port around 15 November, the buyer decided to go ahead with a purchase from a third party importer of methanol at Kandla to replace the shortfall arising from the seller's failure to supply the contract quantity. It accepted the documents provided by the seller for the cargo it had actually supplied and paid the seller in order to prevent any risk of their delaying the delivery of the cargo. The buyer subsequently brought a claim against the seller for, amongst other things, restitution of sums the buyer claimed were extracted from it by economic duress.

Under English law, a threat to break a contract will generally be regarded as illegitimate, particularly where the party threatening to break the contract must know that it would be in breach of contract if the threat were implemented. It is also relevant to consider whether the claimant had a "real choice" or "realistic alternative", so that it could have resisted the pressure placed on it by the party threatening to break the contract. If there was no reasonable alternative, this might be very strong evidence leading to a finding of economic duress. Furthermore, whilst it might be relevant to consider whether the claimant protested against the threat made, a failure to protest does not necessarily mean any payment made as a result of the coercion was made voluntarily.

Commercial Court decision

Economic duress

The judge found that the buyer had been compelled to amend the L/Cs to increase the price and reduce the quantity of the methanol and to accept and pay for the documents tendered as a result of illegitimate pressure amounting to economic duress on the seller's part. In his view, the buyer was left with no practical choice but to agree to pay an increased price for such methanol as it did receive. For every day that the cargo was not loaded, the buyer was exposed to ever increasing claims from the shipowners in respect of demurrage and if a full cargo was not loaded, the buyer would be faced with a very large claim for deadfreight. Furthermore, had the buyer failed to supply its client with the order of methanol, it would have suffered a loss of reputation and would probably have been exposed to very large claims from that client. The judge also said that the seller had given no consideration for the increased payment because a promise to perform a contractual obligation which it was already obliged to perform was not good consideration. The buyer was therefore entitled to recover the increased payment it had been forced to make as a result of the seller's illegitimate threat to breach the sale contract.

The judge also held that the seller was guilty of the tort of intimidation in that it had made demands for price increases which were backed by coercive and unlawful threats that the seller would not perform its contractual obligations. Accordingly, the buyer was entitled to damages for intimidation.

Provision of a letter of credit

The seller sought to argue that it was not obliged to perform the contract at all because the buyer had failed to provide an acceptable L/C in accordance with the provisions of the contract. The issue in question was the relevant time for providing an acceptable L/C pursuant to an fob sale.

The judge referred to a number of authorities dealing with this point. He favoured the view taken in two cases, *Ian Stach v Baker Bosley Ltd* [1958] 2 QB 130 and *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 2 LLR 386. Mr Justice Diplock in the first case and the Court of Appeal in the second case held that the buyers under an fob contract were obliged to open an acceptable L/C in accordance with the contractual requirements before the shipment period began. On that view, the judge said that the buyer had failed in this case to comply with the contractual requirements because an acceptable L/C had not been opened by the beginning of the shipment period (originally this would have been 1 September).

However, he also stated that the seller had waived the buyer's obligation to open an acceptable L/C by that date in a number of ways, including by asking for further amendments to the L/C during the course of September and October, by confirming towards the end of September that the latest amendments to the L/C appeared okay, and by never suggesting that the contract was to be regarded as at an end or that it was not obliged to ship for want of a satisfactory L/C. Consequently, the seller was unsuccessful with this defence.

Comment

It is not often the English courts hold that there has been economic duress where those concerned are experienced commercial parties who are usually taken to have equal bargaining power. In the present case, however, the seller clearly went too far in trying to negotiate its way out of a commercial transaction that had become less favourable due to adverse market conditions.

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