

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT**

Before Mrs Justice Moulder

2 October 2020

**Raiffeisen Bank International AG -v- Asia Coal Energy Ventures Ltd and Ashurst LLP
[2020] EWHC 2602 (Comm)**

CASE SUMMARY

Moulder J rejected claims for (1) specific performance of a sale and purchase agreement, as the purchaser was entitled to rescind the contract for misrepresentation, and (2) breach of a solicitors' confirmation as to the funds held in respect of the purchase price.

The claim arose out of the sale by the Claimant, Raiffeisen Bank International AG (“RBI”), of a portfolio of defaulted loans totalling US\$374m (the “**Loans**”) and associated security to the First Defendant, Asia Coal Energy Ventures Ltd (“ACE”). Included in the security was the shares held in Asia Resource Minerals plc (“ARM”), which was listed and traded on the main market of the London Stock Exchange (the “**RBI ARM Shares**”).

RBI’s deal with ACE involved two sale transactions under documents dated 7 May 2015: (i) a sale of the Loans and associated guarantees and security (other than the RBI ARM Shares) (the “**Collateral**”) under a Sale and Purchase Agreement (the “**SPA**”); and (ii) a sale of the RBI ARM Shares under a Framework Agreement (and involving a general public offer under the Takeover Code) (the “**Share Purchase**”). ACE agreed to pay RBI a total of US\$120m for the assets, of which US\$70m was allocated to the Loans and Collateral.

The deal was originally structured so that satisfaction of the same conditions would trigger completion of both transactions; however, RBI subsequently released its security and completed the Share Purchase transaction first. When ACE refused to go ahead with the purchase of the Loans and Collateral, RBI brought a claim seeking specific performance to compel ACE to pay the US\$70m purchase price, alternatively damages for breach of contract.

ACE said that its entry into the SPA was induced by misrepresentations made in a nine-page document (known as the “**BORN Summary**”) which gave details of the Loans and Collateral, including a section summarising the security for each loan. The principal issue for determination was whether ACE could rescind the SPA on grounds of misrepresentation.

RBI also brought a separate claim against the Second Defendant, Ashurst LLP, which acted for the party funding the transaction. Ashurst gave a solicitors’ confirmation (the “**Confirmation**”) stating that it held US\$85m that would either be transferred to the escrow agent upon the parties signing an escrow agreement or, if no such agreement was signed within 30 days, held pending the parties reaching an alternative arrangement to achieve the

“*same commercial purpose*” (under clause 4.2 of the SPA). RBI claimed that Ashurst breached this warranty by releasing US\$79m to ACE on 7 July 2015, causing RBI a loss of the chance to agree an alternative arrangement and receive payment under the SPA.

Misrepresentation

In construing the representations made by the BORN Summary, Moulder J first considered its context. Moulder J rejected RBI’s submission that it was purely an internal document. The BORN Summary was made available to ACE through the virtual data room as part of the sale process and, notably, was the only document in the data room which provided a summary of the security. It was effectively a marketing document. By placing it in the data room, RBI had intended ACE to rely on the document and ACE was entitled to do so.

On its face, the BORN Summary was dated “*As at 30 Sep 2014*”; however, Moulder J held that a reasonable person would have inferred that the position as detailed in the document remained true at 16 March 2015, when it was placed in the data room.

Representations made by the BORN Summary

ACE alleged representations in relation to three categories of security: (i) a “Hypothec Deed” concerning the “**Samudra Vessels**”; (ii) mortgages of properties known as the “**Samarinda Land**”; and (iii) a pledge of the ownership interest in PT Samudra Pacific Marine, one of the borrowers of RBI’s loans. Moulder J held that the BORN Summary made a number of representations in relation to that security that were untrue:

- (i) Samudra Vessels: The statement “*on-going process. Total perfected: 42 vessels. Pending: 15 vessels*” was concerned with the process of taking security over the vessels (rather than the status of the vessels themselves). This impliedly represented that: (a) there were 57 vessels; (b) the process of obtaining mortgages was on-going in respect of the remaining 15 vessels, in the sense that active steps were being taken; and (c) in the absence of any qualification of the statement, no substantive difficulties were envisaged in the process of obtaining the mortgages. As some of the vessels could not be found or had not been registered, not all of the 57 vessels existed and no active steps were being taken to perfect security over the 15 remaining vessels;
- (ii) Samarinda Land: The document stated that certificates of title were “*in the process of*” being reissued for two land plots and renewed for another. The reasonable person would have inferred that steps were being taken in those processes; however, as at 16 March 2015, no such active steps were being taken. As above, in the absence of any qualification in the BORN Summary, the reasonable person would also have inferred that no substantive difficulties were envisaged in the execution of those steps; and
- (iii) PT Samudra Pacific Marine: The document described the security as a “*pledge of ownership interest*” without qualification. This implied that the security was not only a pledge but a *perfected* pledge. Contrary to the requirements in the pledge agreement, the share certificates had not been delivered and the pledge had not been registered in

the share register. Nor was any Indonesian law evidence adduced to prove that the pledge remained valid and enforceable despite the absence of these steps.

Reliance on the representations and inducement to enter into the SPA

RBI submitted, and ACE accepted, that ACE had in fact worked from an earlier version of the BORN Summary dated “as at 22 May 2014”, which was provided to ACE’s owner in July 2014 in connection with a previously proposed deal. This was not, however, fatal to the misrepresentation defence: ACE had compared the two documents, found that there was no material difference, and resolved to continue working from the May version. In doing so, ACE had relied upon the September version of the document.

ACE took steps to verify the Collateral and raised the defects with RBI at a dinner meeting on 3 June 2015. RBI submitted that these actions were not motivated by ACE’s concerns about purchasing the Collateral, but were taken for other purposes, such as in relation to the Fairness Opinion required under the Takeover Code or to ACE’s attempts to gain commercial leverage over RBI in its attempts to obtain extra funds for its offer for the RBI ARM Shares.

Moulder J held that ACE was genuinely concerned about the status of the Collateral. It was purchasing the portfolio of Loans and Collateral, and it was only through enforcement of the security interest that ACE could realise value in the assets. It had therefore relied on the representations in the BORN Summary as to the existence of the underlying assets and the nature and status of the security. The representations in the BORN Summary were one of the key inducing causes of ACE entering into the SPA; they did not need to be the sole cause.

RBI also relied on negotiations proposing amendments to the signed SPA, including a term that ACE would purchase the assets without relying on any representations by RBI. Moulder J held that the evidence was clear that ACE did not and would not agree to such terms.

Was ACE’s rescission of the SPA effective?

Moulder J rejected the submission that in two documents ACE had declared its intention to proceed with the SPA. The first, at best, was intended to provide comfort about RBI’s proposed amended deal, but was not an unequivocal declaration to proceed with the transaction, as the proposed amended deal was unacceptable to ACE. The second showed ACE maintaining its demand for documents to be produced in relation to the Collateral; ACE was not confirming an intention to complete the transaction without the issues being resolved. Nor did ACE’s work in May and June 2015 towards completion of the SPA amount to an unequivocal act inconsistent with an intention to rescind the SPA.

Moulder J further held that it was not inequitable to allow ACE to rescind the contract. First, as regards delay, the evidence showed that RBI had itself delayed in bringing the proceedings against ACE. Second, the suggestion that ACE could not give restitution of the RBI ARM Shares was no barrier to rescission; the SPA transaction and the Share Purchase were ultimately two separate transactions, such that ACE could rescind the purchase of the Loans and Collateral whilst retaining the RBI ARM Shares.

ACE's indemnity counterclaim

ACE brought a counterclaim against RBI seeking an indemnity for obligations it allegedly discharged under the now-rescinded SPA. The amounts claimed principally comprised costs incurred for ACE's professional advisors and with respect to valuation of the assets. Moulder J found that the evidence merely established that these were expenses incurred in relation to the SPA; they were not payments the SPA required ACE to make or incur. The sums claimed were therefore in the nature of damages and were not within the scope of an indemnity.

Claim against Ashurst under the Confirmation

It was assumed that Ashurst was required to hold the funds only for so long as the alternative arrangement contemplated by cl.4.2 was "*pending*" (i.e. remained a realistic prospect). RBI's case was that, when Ashurst released the US\$79m on 7 July 2015, an arrangement was a realistic prospect, but negotiations ceased because of the release of the funds.

Moulder J held that the words "*same commercial purpose*" in the SPA bore a narrower meaning than that suggested by RBI of an arrangement to use the funds held by Ashurst to pay the SPA purchase price; the purpose was to remove the risk that one party would perform its obligations on completion but not the other. Moulder J rejected Ashurst's submission that this purpose fell away once the price had become due and payable, holding that there remained a need for certainty that both parties would discharge their obligations.

However, once it became clear that ACE did not intend to complete the transaction, there was no longer a need to put in place the alternative arrangement. Whilst the parties had been negotiating an amended deal in June and July 2015 (including an escrow agreement within the scope of cl.4.2), a deal was not close and the parties remained far apart in their negotiating positions. By 7 July 2015, ACE had started asserting that it would only complete the SPA if perfected security was provided (e.g. by raising the security defects at the dinner on 3 June). At the time of Ashurst's release of the US\$79m, an alternative arrangement was therefore not a realistic prospect, and Ashurst did not breach the warranty in the Confirmation.

In any event, the release of the funds did not result in RBI losing the chance to receive the SPA purchase price. The evidence did not support RBI's submission that, if the funds had not been released, ACE would have agreed the amended deal with RBI to avoid having large sums of money tied up in Ashurst's account or in litigation. Nor would ACE have agreed the deal with RBI in order to secure its "*improved terms*". The proposed amended deal was not an improvement for ACE; its terms were unacceptable. ACE's position was clear: it would only have gone ahead with the purchase once RBI could deliver title to the Collateral.

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>