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CHUGGA CHUGG PTY LTD V PRIVINVEST HOLDING SAL [2025] EWHC 585 (COMM)

BACKGROUND

On 16 November 2018, Chugga Chugg Pty Ltd ("**Chugga Chugg**"), an SPV controlled by the Australian billionaire, Mr Brett Blundy, the Claimant in these proceedings, entered into a contract with Nobiskrug GmbH ("**Nobiskrug**"), a subsidiary of Privinvest Holding SAL ("**Privinvest**"), to build a 79.99 m luxury motor yacht for EUR 99,550,000 (the "**Contract**").

Nobiskrug's obligations under the Contract were guaranteed by Privinvest, the Defendant in these proceedings, up to an aggregate of EUR 9,955,000 being equivalent to the first instalment paid by Chugga Chugg under the Contract on 30 November 2018 (the "**Guarantee**").

The Contract was governed by English Law and contained an LMAA arbitration clause.

The Guarantee was also governed by English law but subject to the exclusive jurisdiction of the English courts.

Around April 2020, in the wake of Covid and where there were concerns regarding the solvency of Nobiskrug, a number of telephone calls were held between Chugga Chugg and Nobiskrug in which it was made clear that Chugga Chugg wanted to terminate the Contract.

On 8 June 2020, Nobiskrug served a notice of termination on Chugga Chugg, asserting that Chugga Chug had by its conduct in April effectively renounced the Contract (the "**Nobiskrug Termination Notice**").

On 17 June 2020, Chugga Chugg notified Nobiskrug that it was in material breach of the Contract (i.e. for wrongful termination) and called on it to cure such a breach within 20 business days. Nobiskrug did not respond to this notice and so Chugga Chugg served its own notice of termination on 16 July 2020 (the "**Chugga Chugg Termination Notice**").

LMAA ARBITRATION

On 9 June 2020 Nobiskrug commenced arbitration against Chugga Chugg, claiming damages for repudiation on the basis that the

Contract had been validly terminated by the Nobiskrug Termination Notice.

Chugga Chugg counterclaimed however that the only wrongful termination was by Nobiskrug and that the Contract had in fact been validly terminated by the Chugga Chugg Termination Notice.

After pleadings were exchanged Nobiskrug went into insolvency and effectively stopped participating in the arbitration. The insolvency administrator who was appointed to oversee the insolvency process was not permitted by local laws to participate in the arbitration, but notwithstanding this did accept Chugga Chugg's claim and acknowledged them as creditors of Nobiskrug.

There was no hearing, and Chugga Chugg obtained two awards in its favour for the full amount of the Guarantee (the "**Awards**").

THE GUARANTEE

The Awards were not appealed and Chugga Chugg accordingly sent a letter of demand pursuant to the Guarantee to Privinvest on 21 December 2021.

The Guarantee contained the following terms in particular:

1: *... upon and with effect from the Builder's [i.e. Nobiskrug's] receipt of the first instalment of the Contract Price pursuant to Clause 6.1.1(a) of the Contract in full and without set-off, as security for the payment and performance of the Builder's obligations under the Contract (as may be amended from time to time with or without our knowledge or approval), or arising by reason or in consequence of any breach or termination of the Contract (as may be amended from time to time) we hereby guarantee to you the due and punctual performance of all of the Builder's obligations under the Contract up to an aggregate maximum amount of €9,955,000 (nine million, nine hundred and fifty five thousand Euros)...*

2. *If an alleged breach or termination is uncontested by the Builder, we shall procure performance or pay as required, on first demand being made by the Owner [i.e. Chugga Chugg]. If the alleged breach or termination is contested by the Builder, we shall procure performance or pay as required against presentation of both (a) a final unappealable award in favour of the Owner issued by the Arbitral Tribunal as per Clause 20.2(c) of the Contract, and (b) a written demand by the Owner stating that the Builder is obliged to pay the amount(s) or perform the obligations referring to the relevant clause of the Contract and which the Builder did not pay or perform.*

...

4(a) *We agree that the Owner may proceed against us as primary obligor, without first pursuing the Builder, in the event the Builder defaults under the Contract (subject to the terms in Clause 2 above being complied with).*

Privinvest rejected the letter of demand, contending that the Guarantee was a "*surety guarantee*" (an instrument of secondary liability) and that since Nobiskrug was not in breach of the Contract in the first place (i.e. that the Nobiskrug Termination Notice was valid) it was not required to pay out. Alternatively, Privinvest contended that the Guarantee was not engaged, as the breach was neither "*contested*" nor "*uncontested*" because Nobiskrug did not participate in the arbitration fully.

Chugga Chugg on the other hand asserted that the Guarantee was a "*demand guarantee*" and therefore Privinvest were bound to pay irrespective of whether Nobiskrug was in breach or not. Besides, Nobiskrug's breach can only have been "*contested*" or "*uncontested*" (i.e. it is a binary choice) and the Guarantee did not allow for a third category of breach which is neither contested nor uncontested. Chugga Chugg claimed in the alternative that Nobiskrug was in fact in breach of the Contract and liable to Chugga Chugg for damages for repudiation.

WHAT WERE THE ISSUES?

As regards whether the Contract:

(a) whether Chugga Chugg renounced the contract by its conduct in April 2020;

(b) if so, whether that renunciation was subsequently withdrawn or cured prior to the Nobiskrug Termination Notice; and

(c) whether Nobiskrug in any event affirmed the Contract prior to sending the Nobiskrug Termination Notice.

As regards the Guarantee:

(d) whether the Guarantee is a demand guarantee or surety guarantee;

(e) whether the breach was contested or uncontested or a third category; and

(f) whether the requirements in Clause 2 of the Guarantee were met.

FINDINGS REGARDING THE CONTRACT

Chugga Chugg was clear in its communications with Nobiskrug that it wanted to terminate the Contract (saying at one point on a call that it "*wanted out*"). It was also inflexible with Nobiskrug and would not agree during negotiations to provide an additional personal guarantee or to release funds from escrow which were requested by Nobiskrug.

Notwithstanding the above, and the fact that Chugga Chug was looking for a way out, the above conduct did not amount to a "*...clear, absolute and unequivocal renunciation on the part of Chugga Chugg*", either in April 2020 or thereafter.

Privinvest's case therefore fell at the first hurdle.

In any event, the Court found that Nobiskrug had in fact affirmed the Contract, since (among other things) throughout May 2020 a steel cutting ceremony was performed, progress reports were circulated and the parties engaged in reviewing various designs and plans.

Therefore, the Court found that the Nobiskrug Termination Notice was not valid and the Chugga Chugg Termination Notice was valid.

FINDINGS REGARDING THE GUARANTEE

The Court found that the Guarantee was a surety guarantee. I.e. Privinvest's liability was contingent upon Nobiskrug's liability being established. That notwithstanding, the Court also pointed out that where Clause 2 is satisfied, the Guarantee becomes "*indistinguishable from a conditional demand bond*".

As regards whether Clause 2 was satisfied, the Court decided that the breach was properly contested (notwithstanding the fact that Nobiskrug stopped participating in the arbitration and that the insolvency practitioner accepted the claim) and that, given there was a final unappealable arbitration award, the requirements of Clause 2 were met.

COMMENTARY

The precise wording of guarantees is crucial and it is essential that parties to guarantees – both guarantors and beneficiaries – understand how and when liability is triggered.

This dispute ultimately shows that where guarantees are not clearly drafted this can lead to protracted litigation and significant costs – and also potentially lead to a beneficiary not being paid.

A great deal of caution must also be exercised when accepting a repudiatory breach or affirming the contract. In the first place, you must ask yourself if the contract was in fact unequivocally renounced. If it was, a party must clearly state within a relatively short period of time whether the repudiation is accepted or whether it wishes to affirm the contract. If a party is considering accepting a repudiation, care must be taken in the meantime not to take any actions which might be interpreted later as an affirmation of the contract. In such circumstances, any subsequent termination would then itself be a repudiatory breach of the contract.

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