THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

24 November 2020

SUPPIPAT & ORS v NARONGDEJ & ORS

[2020] EWHC 3191 (Comm)

BEFORE: MR JUSTICE BUTCHER

CASE SUMMARY

Background

The facts of the case are of some complexity (paras. [3]-[19]). The Claimants brought proceedings against the Defendants, alleging a fraudulent conspiracy to deprive the Claimants of shares with an estimated value of US$1-2 billion in Thai energy companies (Renewable Energy Corporation Co Ltd ("**REC**"), which in turn held shares in Wind Energy Holding Co Ltd ("**WEH**")). The Claimants alleged that the First Defendant conspired fraudulently to induce the Claimants to transfer their shares in REC, under certain share purchase agreements, to companies owned, or majority owned by the First Defendant. Thereafter, the Claimants alleged that the WEH shares were fraudulently and covertly transferred out of REC away to various individuals and offshore entities, thereby depriving the First Defendant's companies of any valuable assets against which the Claimants might enforce any judgments or arbitral awards. It was alleged that the various Defendants took measures to conceal and obscure these steps.

All the Defendants (except for the Fourteenth Defendant who did not take part) denied the alleged conspiracy. They denied that the characterisation of the case as a case of conspiracy was valid or meaningful because the Claimants' principal claims were advanced by reference to Thai law which does not recognise conspiracy as a cause of action. Two distinct issues arose at the Case Management Conference: (a) the costs of amendments to the re-amended particulars of claim, and (b) an application to strike out or for summary judgment in respect of a claim under s. 423 Insolvency Act 1986.

Issue 1: Costs of Amendments to the Re-Amended Particulars of Claim

The issue concerned which parties ought to bear the costs of the Claimants' third and most recent round of amendments to their Particulars of Claim. The Claimants contended that the order should be for costs in the case and the Defendants submitted that the usual order that the Claimants pay the costs of and occasioned by those amendments was appropriate. The original Particulars of Claim, for which permission to serve out had been granted, advanced various claims under English law and contained various references to aspects of foreign law. At the *ex parte* hearing on service out of the jurisdiction and service by alternative means, the Claimants had, in observance of their duty of full and frank disclosure, recognised that some of their claims which were advanced under English law might be manifestly more closely connected with Thailand. It was further recognised that aspects of the claims advanced might be governed by Chinese, Singapore, Thai or BVI law. The Claimants had, at this stage, obtained expert advice on wrongful acts and the liability of joint actors under Thai law. The Claimants were

served with various requests for further information as to whether they intended to rely on foreign law and, if so, to particularise this. The Claimants responded that they were not obliged to set out provisions of foreign law. The Defendants asserted that it would be an abuse of the pleading process for the Claimants to plead their position on foreign (Thai) law by way of Reply rather than by amendment to the Particulars of Claim. They also submitted that the Claimants ought to have pleaded their position on Thai law when they originally amended their Particulars of Claim and be bound by the usual cost order which had then followed.

The Defendants submitted that the usual rule under CPR Part 17 that a party applying to amend their claim is ordinarily responsible for the costs of and arising from those amendments ought to apply. Three broad points were made (para. [28]). Firstly, it was said that the Particulars of Claim did, in fact, seek to advance claims under foreign law, but that these had been insufficiently particularised. In these circumstances rule 25(2) in *Dicey & Morris* (the "**default rule**") did not apply. Secondly, it was said that the Claimants were well aware when they sought permission to serve out of the jurisdiction that foreign law applied and was materially different from English law so that it was apparent that they would eventually have to plead their case on foreign law. Further, it was said that the Claimants now sought to introduce new claims under foreign law and abandon English law claims. Thirdly, it was submitted that the Claimants were trying to circumvent the costs consequences of an earlier order as to the costs of amendments, by which, if the amendments had been made earlier (as they should have been) the Claimants would have been responsible for the costs.

The Claimants submitted that they had been entitled to rely on the default rule until it was displaced by the Defendants. It was said that their factual case had remained unchanged and that faced with the prospect of a strike out application, they had acquiesced in the Defendants' insistence that the Particulars of Claim be re-amended to introduce particulars of Thai law. The Claimants submitted that they had made it clear before Defences had been served in their responses to the requests for further information that they were relying on the default rule. It was further argued that the default rule served an important and beneficial purpose; namely to encourage parties to litigate matters as economically as possible. Thus, it was said that to hold a party liable for the costs consequences of amendments in response to a defendant's pleading of foreign law would be to incentivise claimants to always plead foreign law, thereby incurring greater expense.

The Court considered the treatment of the default rule in *Iranian Offshore Engineering and Construction Co v Dean* [2018] EWHC 2759 (Comm) and in *FS Cairo (Nile Plaza) LLC v Christine Brownlie* [2020] EWCA Civ 996. The Court held that the starting point is that the rule as formulated in CPR Part 17 applies but may be departed from in an appropriate case (para. [44]). It was held that this was an appropriate case to depart from that position (para. [45]). The Claimants had averted in their original pleading to the fact that there was an applicable foreign law or laws, but did not, in the relevant respects, plead reliance on provisions of that law. They had, in relevant respects, relied on the default rule. It was clear from Underhill LJ's judgment in *FS Cairo* that they were entitled to do so (para. [46]). Further, it had not been essential for the Claimants to amend their particulars of claim and they would probably have been entitled to plead their case on foreign law by way of Reply. This had not happened because the Defendants had made clear their opposition to such a course. The Court held (para. [49]) that the fact that it was obvious to the Claimants from an early stage that there was the possibility that they might have to plead a case on Thai law was not a reason why the Claimants should be ordered to pay the costs of and occasioned by the relevant amendments. This approach would not be consistent with the way in which the default rule is employed in practice.

The default rule was very useful in helping to avoid the trouble and expense of pleading foreign law and allows parties to choose to have some parts of a case dealt with under a foreign law and other parts under the presumption. Butcher J held (para. [49]) that it would undermine this useful effect of the rule, if a party could too readily be penalised in costs if it has to amend its Particulars of Claim and it would provide an incentive to claimants to plead out a case under a foreign law in the initial Particulars of Claim with the attendant costs because of the risk that it might well be later said that it should have been anticipated that the claimant would end up pleading that case in the Particulars of Claim anyway. Although there will undoubtedly be cases where it will not be reasonable to rely on the default rule to avoid pleading a foreign law in the initial Particulars of Claim (for example where the defendant has already made its position on the application of such law clear), this was not such a case. Finally, Butcher J held (para. [50]) that the Claimants were not seeking to circumvent the costs consequences of orders in relation to previous rounds of amendments since they had no reason to assume they could not (at the time of those previous amendments) plead aspects of foreign law by way of Reply. Accordingly, the Court ordered that the just order in relation to the amendments was that they should be costs in the case (para. [51]).

Issue 2: The Application to Strike Out & Section 423 of the Insolvency Act 1986

The application was made by the Tenth Defendant to strike out paragraphs of the Particulars of Claim under CPR 3.4(2)(a) or the inherent jurisdiction of the Court, or for summary judgment on the claim made in those paragraphs. The claim was that certain of the transfers of shares in WEH to and from the Fourteenth Defendant amounted to transactions at an undervalue within the meaning of s.423 Insolvency Act 1986. The claim had been added after the Claimants had obtained permission to serve the Claim Form out of the jurisdiction and had not been formally added by the time the Tenth Defendant had submitted to the jurisdiction, which it had done without prejudice to any argument that relief under ss.423/425 of the Insolvency Act would be inappropriate because, *inter alia*, there was no sufficient connection with the jurisdiction. The Court considered *Re Paramount Airways (No. 2)* [1993] Ch 223, *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [200] BCC 16, *Dornoch Ltd v Westminster International BV, The WD Fairway* [2009] EWHC 1782 (Admlty), *Fortress Value v Blue Skye Special Opportunities Fund LLP* [2013] EWHC 14 (Comm), and *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2018] EWHC 2458 (Comm).

The Tenth Defendant argued that the claim under s.423 lacked any, let alone a sufficient, connection to this jurisdiction. This was because neither the Tenth Defendant nor the First Claimant had any connection to England and Wales. Neither did the Second to Fourth Claimants or the impugned transactions with which the Tenth Defendant was alleged to have had any involvement. The Claimants would not have standing to bring a similar claim under the equivalent provisions of Thai law and there were no other English law causes of action now relied on against the Tenth Defendant. The Tenth Defendant placed reliance on the sufficient connection test as applied in *Orexim* and submitted that a sufficient connection with the jurisdiction was a necessary pre-condition to be satisfied before the court would consider whether to exercise the discretion or not.

The Claimants submitted that there was no separate and anterior question of connection with England and Wales and that what had to be considered was a unitary question: whether the grant of relief under s. 423 would be, in all the circumstances, fair and just rather than unfair and oppressive. They relied on *Jyske Bank*, *Dornoch, Fortress Value,* and *Avonwick*. The

Claimants submitted that there was nothing unfair or oppressive in the Tenth Defendant having to answer a case for s.423 relief. It was argued that it was a necessary and proper party to claims which were made against a Defendant domiciled here (the Second Defendant), and to claims against other Defendants (the Third and Fifth Defendants) which were subject to a jurisdiction clause in favour of England. It would therefore be involved in the litigation in any event. It was argued that the s. 423 claim overlapped almost entirely with the factual issues which would be looked into at trial.

The Court refused (para. [71]) to strike out the s. 423 claim against the Tenth Defendant. Butcher J held (para. [72]) that the Court had to look at all the relevant circumstances of the case, in order to ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by those sections. The Court held (paras. [75]-[75]) that since the Tenth Defendant would be involved in the litigation in any event (irrespective of the claim under s. 423) and in relation to the very same transactions as those in relation to which s. 423 relief was sought, this meant that there was at least an arguable case of a sufficient connection in the present case. The decision in *Orexim* was distinguishable (para. [75]) on its facts. Accordingly, it was held (para. [76]) that the Claimants had a realistic prospect of success in their argument that it may be just and convenient to make an order pursuant to s.423 despite the foreign elements of the claim.

CONCLUSION

The Court:

(a) Ordered costs in the case in relation to the costs of and occasioned by the amendments;

(b) Dismissed the Tenth Defendant's application for strike out and/or summary judgment.
