Neutral Citation Number: [2024] EWHC 1152 (Ch)

Case No: BL-2022-001854

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/05/2024

Before :

MR JUSTICE ADAM JOHNSON

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Between :

INSTITUTO DE SALUD PARA EL BIENESTAR — **Claimant**

- and -

(1) VIVA ENTERPRISES LIMITED
(2) ROBERT GEORGE DANGOOR — **Defendants**

- and -

SERVICIOS DE SALUD DEL INSTITUTO MEXICANO DEL SEGURO SOCIAL PARA EL BIENESTAR — **Proposed Substituted Claimant**

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Zoe O'Sullivan KC and Andrew Gurr (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant**
Stephen Auld KC, Professor Mark Engelman and Kyle Lecuona (instructed by **Alterman Solicitors Limited**) for the **Defendants**

Hearing dates: 1, 2 and 3 May 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 15 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Adam Johnson:

1. This Judgment will explain my reasons for making Orders in this Action (1) dismissing the remainder of an application made by the Defendants on 7 July 2023 (the "*Strike Out Application*"), and (2) granting an Order for substitution of an entity I will refer to as "*IMSS*" as Claimant, pursuant to an application made by IMSS dated 11 December 2023 (the "*Substitution Application*").

2. The Action concerns a dispute about the provision of medical equipment during the Covid pandemic. The First Defendant, which I will refer to as "*Viva*", is an English company which on 11 April 2020 entered into an English law contract with a Mexican entity which I will call "*INSABI*". The contract was for the sale and purchase of ventilators. Viva was the seller and INSABI the buyer. Their contract has been referred to as the "*VSA*", meaning "*Ventilator Supply Agreement*." Among the other "*General Provisions*", the VSA contains a prohibition on assignment in cl. 38, which provides as follows:

> *"This Agreement will not be assigned either in whole or in part by any party without the written consent of the other Party".*

3. The parties' dispute has a number of elements, but among them is an allegation that the entry into of the VSA was procured by the making of fraudulent or negligent mis-statements by or on behalf of the Defendants – the Defendants being Viva and Mr Robert Dangoor, who is a shareholder in and director of Viva. The primary claim is for rescission of the VSA and for return of the purchase price. Some US$41m is said to be repayable. There are alternative claims for damages and for restitution.

4. On the Defendants' side, any wrongdoing is denied. They say that in fact the terms of the VSA as originally agreed were amended, so that the number of ventilators due for delivery was reduced from 1,000 to 700; and they say 700 ventilators have in fact been supplied, with over 500 now in use in hospitals in Mexico and another 185 warehoused. Viva thus brings a counterclaim and says that if it is correct that the VSA has been rescinded so that property in the ventilators never passed to INSABI, then it must be entitled to get its ventilators back or to payment of their monetary value, which it also puts at some US$41m.

5. The present proceedings started in October 2022 with an application by INSABI for a proprietary injunction. That application, which was made on notice, was compromised on the basis of undertakings given by the Defendants that they would not dispose of any part of what were referred to as the "*Traceable Proceeds*" – i.e., any part of the traceable proceeds of the purchase price paid by INSABI which INSABI said was due to be returned following its rescission of the VSA. Among the specific undertakings given was an agreement to transfer to a solicitor's account a sum of £3.5m, to be held pending further Order of the Court. That sum was duly was paid and remains in place. On the other side of the fence, INSABI gave its own undertakings to the Court as applicant – including the usual cross-undertaking in damages.

6. The present issue between the parties comes about because of steps taken over the course of the last year or so to reorganise the Mexican healthcare system. Such steps have included activity designed to transfer to a new entity, i.e. IMSS which I have referred to above, the responsibilities previously carried out by INSABI.

7. The formal steps for transfer began with a Decree of the Mexican Government dated 29 May 2023. Among other matters, the Decree set out certain Transitional Provisions, including (at para. 4) a requirement for the Ministry of Health, within 180 days, to issue provisions establishing the "*terms, deadlines and conditions for transferring of … property, rights and obligations from [INSABI] to [IMSS] or the Ministry of Health, as appropriate*."

8. Shortly after the date of the Decree, on 7 July 2023, the Defendants issued the Strike-Out Application. As I will explain further below, it relied on what it said was the uncertain status of INSABI and related uncertainty as to whether any of INSABI's claims could validly be transferred to anyone else. It also relied on a related point, that INSABI's fraud claims were not properly arguable, and so should be stuck out or summarily rejected on that basis.

9. The Strike Out Application was listed for hearing in December 2023, but before that certain other events occurred in Mexico.

10. A further instrument had already been published on 1 June. This contained what have been referred to as the "*Transfer Bases*". As I understand it, the "*Transfer Bases*" are in effect the "*terms, deadlines and conditions*" for transfer which, by means of the Decree, the Ministry of Health was required to publish within 180 days. The Transfer Bases refer to the end-point for INSABI being its "*Disincorporation by winding-up*". Before that, though, the Fifth Transfer Base refers to INSABI continuing to enjoy legal standing "*for the purposes of the corresponding winding up*", and states that it will be responsible "*for closing all current programmes and actions*". It then goes on as follows:

> *"Notwithstanding the above, INSABI may enter into agreements relating to the assignment of litigation rights or the handover of administrative proceedings, such that the legal department or the appropriately empowered department of the Ministry or, where appropriate, if [IMSS], as appropriate, may provide the necessary attention to them."*

11. On 24 November 2023, a further document was then executed between INSABI, IMSS and the Ministry of Health in Mexico. This has a long title, but the first part of it in translation reads "*First Accord for the Transfer of Matters in Process, Documents and Archives*". It has been referred to by the parties as the "*Acuerdo*". It deals with the transfer as between INSABI and IMSS of a large number of legal, regulatory and administrative proceedings, including the present Action, as to which it provides (in summary) that *"[a] file corresponding to the lawsuit brought by 'INSABI' … under file number BL-2022-0001854, is transferred*."

12. Very shortly after that, and just over a week prior to the scheduled hearing of the Strike-Out Application in December 2023, IMSS issued the Substitution Application, seeking an Order that it be substituted for IMSS as Claimant in the present Action together with permission to make consequential amendments to the pleadings. It offered a cross-undertaking in damages corresponding to that given by INSABI. Notwithstanding the request for substitution, the draft Order accompanying the application also proposed that for the time being, INSABI too should remain as a Claimant, and be removed only

from "*the date of its dissolution*". At the time this was thought to be scheduled for 31 December 2023, but I understand it has not happened yet and its timing is uncertain.

13. At the hearing in December 2023, Miles J dismissed the Strike Out Application insofar as it alleged that INSABI's fraud claims were not properly arguable (see [2023] EWHC 3377 (Ch)), but he adjourned the remainder of the Strike Out Application and the Substitution Application because the Defendants said they needed time to investigate the Mexican law position in more detail and serve evidence.

14. Prior to the hearing before me, both sides obtained and filed evidence from experts on Mexican law. The Defendants had evidence from Prof. Lobatón Guzman ("*Professor Lobatón*"), and the Claimants evidence from Ms Pérez de Gante ("*Ms Pérez*").

15. In short, the reports revealed a basic difference between the experts, because Ms Pérez's view was that a valid transfer of all INSABI's rights as against the Defendants *had* taken place having regard to the Mexican law instruments I have referred to, whereas the view of Prof. Lobatón was that there had been *no* valid transfer. Central to Professor Lobatón's analysis is the prohibition on assignment in cl. 38 of the VSA referred to above at [2]: his analysis is that the Acuerdo is in substance a purported *assignment* of rights as between INSABI and IMSS, and so is ineffective because Viva has not consented to it as required by cl.38 and never will.

16. I come then to the hearing before me, which took place over three days, on 1, 2 and 3 May 2024. What became apparent during the course of Day 1, however, was that the areas of material disagreement between the parties were in fact quite narrow (and from my point of view at any rate, somewhat difficult to discern).

17. Taking the Defendants' position first of all, it became clear from the submissions of Mr Auld KC that although he was not in a position to make any formal concessions about it, he was resigned to accepting that it made little case management sense to try and resolve questions about the validity of the transfer to IMSS on a summary basis. I think that is correct. The way Mr Auld KC put it in submissions was to say that although there was a core issue of English law which the Court could resolve immediately, namely an issue about the proper scope and effect of the prohibition on assignment in cl. 38 of the VSA, that would not necessarily provide a clear answer to all the claims, and if so, then the Court might well regard it as making good sense (and I quote here from Mr Auld KC) "*for all questions of assignment, which claims, the effect of the clause, etc to be dealt with by the same judge at the same time*".

18. I agree. I do not myself see that the question of the proper construction and effect of cl. 38, even if resolved in favour of the Defendants, would result in all the claims in the Action automatically falling away. The main reason for saying that is that cl. 38 only bites on *assignments*, and there is a substantial argument that what has happened in Mexico is not in the nature of an *assignment* at all, but instead in the nature of a transfer by way of universal succession or the like (see, for example, National Bank of Greece and Athens SA v. Metliss [1958] AC 509, and the other cases referenced in Dicey, Morris & Collins on the Conflict of Laws ("*Dicey*") (16th Edn.), para. 30-081). As I read it, that is one way of viewing the analysis of IMSS's expert Ms Pérez, because she characterises the Acuerdo not as a voluntary assignment of rights, but instead as an involuntary act mandated by Government Decree in Mexico, designed to achieve a transmission to IMSS not only of rights but also of all obligations previously owed by

INSABI. Based on Ms Pérez's evidence, and on the recent Court of Appeal decision in Dassault Aviation S.A v. Mitsui Sumitomo Ins. Co. [2024] EWCA Civ. 5, Ms O'Sullivan had a related argument, which was that the Acuerdo was not in any event an assignment "*by any party*" to the VSA, which is all that cl. 38 prohibits.

19. In light of such points, it seems to me that however wide the scope of the inhibition on assignment in cl. 38, there is a properly arguable case that what has happened in Mexico, when properly characterised, falls outside it. In order to resolve that question of characterisation there will need to be a determination of how the steps taken in Mexico *are* properly to be characterised under Mexican law, and that cannot happen without the parties' experts giving evidence and being cross-examined, because they take opposing views about it. As I have explained, Professor Lobatón says the Acuerdo *is* properly characterised as an assignment. Ms Pérez on the other hand says it is not: she characterises it as an involuntary administrative act of a public law character, designed not to effect an *assignment* but instead a wholesale transfer of all property, rights and obligations to IMSS. For what it is worth, the view of Ms Pérez seems to me at least superficially consistent with the fact that many of the sets of proceedings transferred to IMSS by means of the Acuerdo are proceedings in which INSABI is the *Defendant*, not the Claimant.

20. At any rate, such matters need further interrogation and investigation, and that can sensibly only happen at a trial. To put it shortly, and given the issues which arise as to the precise legal character of what has happened in Mexico, and how that relates to what would be regarded as permissible under cl. 38 of the VSA, I think it entirely clear that the present Action is not susceptible to summary determination, either by way of strike out or summary judgment, because there is a real prospect of the claims in the Action succeeding. In saying that, I include the proposition that there is a real prospect of IMSS demonstrating at trial that it is validly the transferee of all rights and interests previously vested in INSABI.

21. Perhaps sensitive to such realities, it was apparent from his submissions that Mr Auld KC's concerns were rather less about IMSS being substituted as Claimant, and rather more about (1) certain practical effects of that happening, and (2) the practical problems of INSABI possibly continuing alongside IMSS as co-Claimant, which is what IMSS's draft Order on the Substitution Application suggested (see above at [12]).

22. As to (1), the practical problems which particularly exercised Mr Auld KC were essentially as follows: (a) the Defendants' ability to enforce against IMSS any costs order(s) covering periods of time when INSABI not IMSS was the named Claimant; (b) the Defendants' ability to enforce as against IMSS the cross-undertaking in damages given at the start of the proceedings by INSABI (see above at [5]); (c) relatedly, the continuation (or otherwise) of the undertakings given by the Defendants to INSABI by way of compromise of INSABI's injunction application (again see above at [5]); and (d) the Defendants' ability to enforce as against IMSS the counterclaim presently asserted on the pleadings against INSABI (see above at [4]). Thankfully, however, such matters were largely resolved by agreement during the hearing before me, on the basis that IMSS would give its own undertakings to the Court designed to address points (a), (b) and (d), and meanwhile the Defendants would be at liberty – if they so choose – to seek release of their own undertakings at (c), but of course on the understanding that if they were to do so, that might prompt IMSS to refresh the application for proprietary relief made originally in the name of INSABI in October 2022. It was also

accepted in submissions that the Defendants would be at liberty to make an application for security for costs against IMSS, although they have not done so yet.

23. As to Mr Auld KC's further concern at (2), about INSABI remaining as a co-Claimant alongside IMSS, his submissions again focused on the practical effects of such an arrangement, and its potential unfairness to the Defendants. For example, suggested Mr Auld KC, if INSABI were to remain as a co-Claimant, and if at the end of the day the Defendants were to obtain costs orders against it, what guarantee would there be that such Orders would ever be satisfied by INSABI, given that it is involved in a wind-down process with a view to its certain dissolution? Mr Auld KC said that the right thing to do was to take INSABI out of the picture now, so there was clarity.

24. There is obvious force in such points, but to begin with, Ms O'Sullivan for IMSS was reluctant to take the step of removing INSABI from the proceedings. The source of her concern was a section in the report of Professor Lobatón in which, so Ms O'Sullivan argued, Professor Lobatón seemed to suggest that the issue of the assignability of claims under the VSA might be regarded in Mexican proceedings as a matter of Mexican law, and the Mexican Courts might therefore take their own view about what was or was not assignable under the VSA, whatever the English Court might have to say about it. That being so, Ms O'Sullivan argued, it was desirable to keep INSABI as a co-Claimant in the proceedings, in order to provide her clients with a fall-back position – i.e., in order to enable them to say that if there was no transfer which Mexican law would regard as effective, the only impact would be to leave the present claims with INSABI, which could still prosecute them.

25. This was not, with respect, an entirely convincing submission. Amongst other objections, a central problem is that the viability of any fallback position rests on the premise that INSABI will still be in existence in the future. There is very considerable doubt about that. As I have mentioned (see above at [12]), in December 2023 the expectation was that INSABI would be dissolved by the end of the year. That did not happen, and no firm date is presently available, but the whole structure of the Decree and of the Transfer Bases (see above at [7] and [10]) is focussed on achieving a winding-down and dissolution of INSABI, and I am not attracted by the idea of retaining it as a co-Claimant speculatively, on the basis that it might still be in existence by the time of the trial, but very probably will not.

26. More fundamentally, however, I am not persuaded that Ms O'Sullivan's underlying concern was well founded. In my opinion, Professor Lobatón in his report was not casting any doubt on the idea that any question of the assignability of INSABI's English law claims in connection with the VSA would be regarded, even in Mexico, as a matter governed by English law. All he said at paras 45-48 of his Report was that a purported assignment undertaken in breach of (*inter alia*) a contractual agreement not to assign will be regarded as invalid in Mexico. But as I read it, in making that general point Professor Lobatón was not challenging the principle that if the relevant contractual agreement is governed by a foreign law, then all questions as to its scope and effect will be determined in accordance with that law. The matter was clarified with Professor Lobatón between Day 1 and Day 2 of the hearing, and on Day 2 Mr Auld KC was able to confirm my understanding.

27. On the basis of the undertakings and other matters described above at [22], and on the basis of the clarification provided at [26], the parties were largely able to agree the

terms of an Order between them. However, they were not able to agree precisely what should happen in terms of finally disposing of their respective applications, i.e. the Strike-Out Application and the Substitution Application. During the hearing, I indicated that I considered the appropriate Orders were Orders (1) dismissing the Strike Out Application, and (2) granting the Substitution Application to the extent of substituting IMSS in place of INSABI as sole Claimant under CPR 19.2(4), but no more.

28. I understand that, despite the manner in which the hearing unfolded and the large measure of common ground, the Defendants might nonetheless wish to seek permission to appeal against one or other (or possibly both) of those Orders. Having set out the background, I will therefore briefly explain my reasons for thinking it appropriate to make the forms of Order I approved.

29. The reasons in a sense run together, because once it becomes clear that the case is an appropriate one for substitution under CPR, rule 19.2(4), so that IMSS is to be treated as effectively stepping into the position previously occupied by INSABI, then it also becomes clear that the Strike Out Application must be dismissed.

30. As I understood the Defendants' submissions, they were not in principle resistant to the idea of IMSS being substituted for INSABI: their objections were more about the terms on which that should happen (see above at [22]), and about INSABI remaining as co-Claimant (see above at [23]). All the same I need to be satisfied that the case is a proper one for substitution.

31. Substitution cases are dealt with in CPR, rule 19.2(4), and here I must note an anomaly, because there is a difference between the text of CPR, rule 19.2(4) in the present version of the White Book and that shown in the online version at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.2. The difference is that in the White Book version the two limbs of rule 19.2(4) are shown as alternative cases for substitution, but in the online version they are shown as cumulative conditions, so that both must be satisfied before substitution is permitted. The difference appears from the inclusion of the word "*and*" in the online version, between limbs (a) and (b), as shown in the quotation below:

> *"The court may order a new party to be substituted for an existing one if -*
>
> *(a) that the existing party's interest or liability has passed to the new party; [and]*
>
> *(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings*."

32. The White Book commentary at para. 19.2.5 clearly treats the two limbs as alternatives, because it says that rule 19.2(4) "*specifies two circumstances in which … the court may order the addition of a new party in substitution for an existing one …*".

33. It will be appropriate to refer this oddity to the Civil Procedure Rules Committee, but I do not think it makes any difference to the outcome in this case because whichever test is the correct one, it seems to me it is satisfied. If the limbs are alternatives, then limb

(b) is clearly satisfied, because it is obviously desirable that IMSS be joined so that all matters in dispute in the proceedings can be resolved, including the question whether it is in fact a valid transferee of the relevant interests of INSABI. Even if the limbs are cumulative conditions, in my opinion it is also clear that limb (a) is satisfied. I note that the precise language of limb (a) is definitive ("*the existing party's interest or liability has passed to the new party"* – my emphasis), but I do not think it can be intended that the new party's entitlement has to have been finally established in order for substitution to be permitted. That would lead to inefficiency and absurdity, because in a contested case (as here) it would require a mini-trial before any substitution could take place. In my opinion it is sufficient if the new party has a real prospect of showing that the interests in question have validly been transferred to it. Cases involving the addition (rather than substitution) of parties under CPR, rule 19.2(2), have taken that approach (see PeCe Beheer BV v. Alevere Ltd [2016] EWHC 434), and I see no logical reason why rule 19.2(4) provisions should be treated differently. Here, I have already held that IMSS has a real prospect of showing that it is the successor to all the interests obligations if INSABI (see above at [20]).

34. I have mentioned above that to begin with, Ms O'Sullivan submitted that INSABI should remain a party, at least until it was dissolved (see above at [24]). Ms O'Sullivan though was content not to press the point in light of the clarification of Prof. Lobatón's report I have referred to above. The Order on the Substitution Application is therefore made on the basis that Prof. Lobatón's evidence is to be construed in the manner I have described, and accordingly it involves a clean substitution of IMSS for INSABI, rather than both parties remaining in play until the date of INSABI's dissolution (whenever that takes effect), which is what the Substitution Application originally sought.

35. Turning then to the Strike Out Application, the proper analysis here seems to me to turn on comparing what that Application was designed to achieve with what has actually happened.

36. As to the desired outcome of the Strike Out Application, this is easily identified by looking at the relevant Application Notice of 7 July 2023. This described INSABI as having become "*defunct*" by reason of the actions of the Mexican Government. It referred to the possibility of an assignment "*at some undetermined future time*" (the issue date of 7 July 2023 was some months before the Acuerdo in November). The Application Notice then went on to say that a number of matters made the "*continuation of the case untenable*", including the fact that any purported assignment to any other party would inevitably be ineffective, in light of the terms of cl. 38 the VSA and the lack of any consent from the Defendants. Paragraph 3 of the Application Notice then said:

> *"Thus it follows that, to all intents and purposes, there will shortly be no valid Claimant and the only basis upon which the subsistence of the Claimant has been preserved cannot be relied upon for the substitution of any party to continue the Claim."*

37. In my view, the case being advanced in the Strike Out Application was plainly that the Mexican Government's Decree of May 2023 had dealt a terminal blow to the claims in this Action, because INSABI had been rendered defunct, there was no way of its claims being validly transferred to anyone else, and so it would be an abuse of process to allow the Action to continue any further. Indeed, that is just what the draft Order

accompanying the Application Notice said, because it sought as the primary form of relief under the Application an Order that *"[t]he Claim be struck out …*".

38. Given the position now reached, which involves IMSS taking over the Action and pursuing it through to trial, I think it clear that the relief sought by means of the Strike Out Application has not been achieved. It is true that INSABI has been removed as a Claimant, but it would be entirely artificial to describe *"[t]he Claim*" as having been struck out, when all of its component parts remain in play and remain to be tested at a trial. The substance of it, therefore, is that the Strike Out Application has failed, and must be dismissed.