TRANSCRIPT OF PROCEEDINGS

Ref. CL-2019-000793
Neutral Citation Number: [2020] EWHC 2665 (Comm)

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

7 Rolls Building
Holborn

Before

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

(1) FERAND BUSINESS CORPORATION, (2) ANGELIKI FRANGOU, (3) MARITIME ENTERPRISES MANAGEMENTS S.A. (Claimants)

- v -

(1) MARITIME INVESTMENTS HOLDINGS LIMITED, (2) KOLEN INTERNATIONAL S.A (Respondents)

MR D ALLEN QC & MR R ROBINSON appeared on behalf of the Claimants

MS C POUNDS appeared on behalf of the First Defendant; and

MR R SARLL appeared on behalf of the Second Defendant

JUDGMENT
7th OCTOBER 2020
REISSUE 1

JUDGE PELLING:

1. This was meant to be the start of a trial listed for four days. By an application notice dated 24 September 2020, the second defendant applied for permission to re-amend its defence and counter-claims to (a) the claims of the claimants against the defendants and (b) its defence and counter-claim to the third claimant's additional claim against the second defendant, and by a further application dated 28 September 2020 applied for permission to adduce and rely on the second and third witness statements of Captain Ioannis Frangos, dated respectively 20 and 27 September 2020.

2. So as to set these applications in context, I should say that the trial was due to commence on 5 October 2020. The applications were argued on the first day of the trial. The claimants' time estimates for the applications to amend was initially 20 minutes and for permission to rely on the statements was a further 20 minutes and then two and a half hours from counsel subsequently. Mr Allen originally estimated the length of time for the hearing between two and two and a half hours - see his letter to the court of 30 September 2020. At the start of the hearing, Mr Allen properly revised his time estimate to close to a day. In fact, the hearing started at 10.00 am and finished at about 4.10 pm.

3. All of this is entirely unacceptable. While I make no criticism of Mr Allen's initial estimate because it was arrived in difficult circumstances, there could be no objective justification for the 20 minute time estimates, not least because it must have been obvious that the applications would be opposed. This is a factor that I intend to take into account when making the relevant costs orders in relation to each of these applications.

4. Both applications are opposed by the claimants and by the first defendant in its capacity as additional claimant. At the outset of the hearing, I suggested to Mr Sarll, who appeared on behalf of the second defendant, that it would be appropriate for the amendment application to be heard first. He did not accept that suggestion. In my judgment, he was wrong not to do so since the second statement at least, in part, contains evidence that would be relevant only if the amendment application succeeds. I intend to address the amendment application first, having dealt with the application to rely on Captain Frangos's third statement.

5. The application for permission to rely on the third statement is one that I can reject at this stage, and summarily. It was prepared in reply to two statements that at one stage the claimants had intended to seek permission to rely upon. In fact, the claimants decided not to apply for permission to rely on those statements. On that basis, the ostensible purpose of Captain Frangos' third statement no longer applies. It follows that the application for permission to rely on the third statement is refused and dismissed.

6. I turn now to the application for permission to amend. I start by setting out the applicable principles. These principles are now well known but, in summary, are as follows:

> (a) an application to amend is made very late if permission threatens the trial date - see Swain-Mason and Others v Mills and Reeve [2011] EWCA Civ 14; [2011] 1 WLR 2735*; CIP Properties (AIPT) Limited v Galliford Try* [2015] EWHC 1345; and Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm) per Carr J (as she then was) at paragraph 38(c);

(b) where a very late application is made, a heavy burden rests on a party seeking permission to amend to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it - see Quah *ibid*. at paragraph 38(b);

(c) the risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission - see Quah ibid. at paragraph 38(b) - and may be an overwhelming reason for refusing the amendments - see CIP Properties *ibid*. at paragraph 19(e);

(d) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay - see *Quah ibid*. at paragraph 38(f); CIP Properties *ibid*. at paragraph 19(c); Donovan and Naled Limited v Grainmarket Asset Management LLP [2019] EWHC 1023 QB at paragraph 29; and Dany Lions Limited v Bristol Cars Limited [2014] EWHC 928 QB at paragraph 29;

(e) in carrying out the balancing exercise referred to in (b) above, prejudice caused to the resisting parties ranging from being "*mucked around*" to disruption to and additional pressure on their lawyers in the run-up to trial is material - see CIP Properties *ibid*. at paragraph 19E;

(f) prejudice to the amending party if the amendments are not permitted is a factor, but only one factor, to be considered and the weight to be given to it will be limited if the prejudice is the result of the amending party's own failings - see CIP Properties *ibid*. at paragraph 19F;

(g) where a very late amendment is applied for, the amendment must satisfy to the full the requirements of proper pleading because the resisting party must know from the moment the amendment is made what is the amended case that it has to meet - see Swain-Mason *ibid*. at paragraph 73; and

(h) it is not open to the applying party to rely upon the instruction of new counsel as a good explanation for the late or very late amendment - see Quah *ibid*. at paragraph 47 and Donovan i*bid*. at paragraph 28.

A critical issue, therefore, will be the reasons given as to why a very late application is being made. If a very late application is made without any or a weak or bad reason being offered, then that is likely to justify a refusal of the application particularly if there is prejudice to the other side if the amendment is permitted.

7. I now turn to the factual issues that arise. Since, whether or not the application succeeds, I will have to hear the trial, the factual background I set out must be limited. In essence, however this is a dispute between a brother and sister. Captain Frangos controls the second defendant which, in turn, controls 47.5 per cent of the first defendant. The first claimant is controlled by the second claimant which, in turn, also owns 47 .5 per cent of the first defendant.

8. The claimants' claim is for a series of negative declarations and damages for breach of clause 13.13 of a Stockholder Agreement relating to what the claimants characterise as a

series of false allegations made by the second defendant controlled by Captain Frangos in four documents recognised by Greek law called "*extrajudicial notices*". The first defendant makes common cause with the claimants.

9. In his substantive opening, Mr Allen characterised the second defendant's defence as "*vague*" and one which in various respects failed to join issue with the allegations made by the claimants. The claimants maintain that it can make good its case by reference to documents and, until the applications by the second defendant, intended to do so. Mr Allen is severely critical of the second defendant's conduct, which he maintains coincides with the instruction of Mr Sarll to act on the second defendant's behalf. He maintains that, since the beginning of September 2020, this litigation has been reduced to what he characterises as "*chaos*". The claimants' preparation for trial has been substantially disrupted with the result that, whereas the written openings from the claimants addressed the pleaded case as it currently is, Mr Sarll's written opening not only does not address that case as pleaded but assumes that the permission will be granted in respect of all the amendments that were apparently being sought and, in addition, advances, so it is said, a series of allegations that are not pleaded either in the amended defence or the draft re-amendments.

10. Although "*chaos*" may be a harsh word to use, it is fair to say that the application for permission to amend has not proceeded as certainly as it might have. Two separate versions of the draft amendments have been produced. In the second, but not the first, a new case in fraud that had not been previously pleaded is set out. One of the proposed amendments seeks to convert what is, in effect, an implied admission, applying CPR Rule 16.5(5) into an express non-admission so as to put in issue all the facts and matters to which the proposed non-admission would apply.

11. In the course of submissions in support of the application and then in reply to Mr Allen's submissions in opposition, Mr Sarll withdrew various of the proposed amendments. This resulted in the withdrawal of the attempt to withdraw the implied admission in the course of submissions in support of the application, amongst others, and the withdrawal of the new fraud claim in the course of the reply submissions. None of this is how an application for permission to amend should be made and that is all the more so in relation to a very late application.

12. It is common ground that this is a very late application and, to the extent that is not accepted by Mr Sarll, I hold that it is in the sense identified in the authorities summarised above. It is plain that an application as wide-ranging as the one made as late as this one has been made will threaten the trial date because if permitted it puts in issue allegations that were at least impliedly admitted and raises new positive cases not before mentioned that involve both issues of law and fact, as well as raising for the first time claims by way of counterclaim not previously mentioned. Since the proposed amendments all post-date the service of the witness statements served in accordance with the CCMC directions given in March 2020, it is inevitable that all the new issues would have to be investigated. It may be that additional witness statements would be required, possibly from individuals who are not currently to be witnesses, and it is possible that disclosure will have to be re-visited as well. None of this could be done without vacating the trial.

13. In those circumstances, I accept Mr Allen's core submission that the starting point in relation to this particular application is to enquire as to the reasons for the application being

made so late. Notwithstanding Mr Sarll's best efforts, I find that there is no good reason why this application has been made as late as it has been made. My reasons for reaching that conclusion are as follows. First, prior to the application, the second defendant has made two attempts to plead to this claim. The defence was dated 16 January 2020 and was pleaded by the second defendant's solicitors, and the amended defence was pleaded by counsel and is dated 17 April 2020. None of the amendments that are the subject of the present application concern events that post-date even the original defence, much less the amendment to that pleading. These amendments could have been made at any time therefore. They could and should have been set out in the original defence and they could and should have been set out in the amended defence.

14. It is true to say that the second defendant has changed counsel. However, as the authorities make clear, the instruction of new counsel or a different perspective of the applying party's case by newly instructed counsel is not a good reason for permitting a very late amendment.

15. The only other reason offered was a claim by the second defendant that the failure to plead the matters on which the second defendant now wishes to rely was the result of impecuniosity caused, so it is alleged, by the failure of the claimants to pay what the second defendant alleges to be due from the claimants. In my judgment, none of this constitutes a good reason for making this very late application. First, the alleged impecuniosity did not prevent the second defendant instructing its solicitors to prepare its original defence and later to instruct counsel in a well-known specialist set of chambers to settle the amended defence. That alone is sufficient to dispose of the impecuniosity point. Secondly, there is no evidence that the impecuniosity is the result of the alleged misconduct of the claimants. As Mr Allen said in the course of his submissions, Captain Frangos has been found liable for a very substantial sum that far exceeds the value of the present claims in litigation with parties other than the parties to this litigation. That suggests another rather more fundamental cause of impecuniosity than the activities of the claimants.

16. However, this is largely beside the point. The real point is that each and every one of the points the second defendant now wishes to plead could and should have been pleaded much earlier this year when he was, as he is now, professionally represented by solicitors and counsel. The fact he has been professionally represented throughout and was able to retain a handwriting expert to review a document he was at one stage alleging bore his forged signature, suggests that funding has not been as serious an issue as it is now suggested. Whilst it would appear that there was a funding issue in relation to preparations for trial that was resolved only on 4 September 2020, it is clear that at least some work was being done throughout April to August - see the emails generated on his behalf by solicitors during that period. And as I have already said, he was able to retain counsel to draft amended defence in April 2020.

17. In my judgment therefore, there is no good reason for the very late application. Rather, the need for the amendment is that the facts and matters he now wishes to rely on were not pleaded at the outset. That can only have been the responsibility of either Captain Frangos himself or the second defendant, or the second defendant's solicitors and/or counsel.

18. I accept the evidence of Mr Shepherd, the claimants' very experienced solicitor as to the impact of permitting the amendments sought as being as he sets out in paragraph 70 of his witness statement in answer to the application. He says in summary, and I accept that:

> "I have practised as a solicitor for 35 years. In my experience it would take at least several months to properly complete such work". It follows that if the amendments are permitted there would have to be an order vacating the trial date with the requirement that it be fixed at some future date inevitably some months away."

Given that four days of court time has been set aside for the trial and there is no prospect of filling that time at this stage, the consequence is that public resources would be wasted and other litigants inconvenienced if the application was to be granted, the trial vacated and re-fixed at some date in the future.

19. It is now necessary to take a step back. On an application made this late a heavy burden rests on the applying party. The lateness of the application weighs heavily against permitting the application. On the facts of this case there is no good explanation offered for the delay that has occurred. I accept that of course in exercising my discretion I have to take account of the prejudice to the second defendant in not being permitted to amend in the manner sought. However, I have to weigh that both against the factors mentioned already and also the prejudice to the claimants. They maintain that costs orders against the second defendant are unlikely to result in the payment of costs. The costs the claimants have incurred preparing for this trial will have been substantial and a significant portion of those costs would be wasted if the amendments are permitted, the trial is then vacated and re-listed some months in the future while the new claims and assertions are investigated, the evidence and documentation assembled, amended pleadings prepared and served, and witness statements prepared and served as well.

20. All this is more than enough to lead me to conclude that the application to amend should be refused. However, that is not quite the end of matters. In the course of his submissions in support of the application, Mr Sarll abandoned a number of the proposed amendments. In his own submissions he abandoned the proposed amendments to paragraphs 8, 20, 28.2 and 28.6. In his reply submissions he also abandoned the proposed fraud amendment to paragraph 7. In the end he maintained the application only in respect of paragraphs 2 and 3 of the amended prayer to the counterclaim against the first defendant as an additional claimant.

21. The justification for this was that it tracked article 8.1 (C) of the Stockholder Agreement that is the basis of this claim. The difficulty about that is the second defendant's case is premised in part at least on the facts and matters stated not merely in the proposed re-amended defence to the Additional Claimant's additional claim but also the proposed re-amended defence and counterclaim against the main claimants, critical parts of which have now been withdrawn. No attempt whatsoever has been made to identify what facts and matters are relied on in any focussed way, something that in itself is objectionable since it violates the basic principles set out in Swain-Mason *ibid.* at paragraph 73 and summarised at paragraph (g) of the summary of the law set out above. Thus even the limited amendment in the end contended for fails to identify with precision the case the first defendant has to meet. This leads Ms Pounds to submit on behalf of the first defendant, correctly in my judgment,

that there is no reference within the text of the defence to the basis of the claim for relief. It is said by Mr Sarll that the counterclaim against the first defendant is unanswerable but that is to put the cart before the horse. The first defendant is entitled to consider its position in relation to an issue of this sort, to take considered advice from its solicitors and counsel, and if appropriate, to permit them to carry out the necessary investigations, evidence gathering, prepare responsive pleadings and maybe to obtain additional disclosure.

22. The mischief of very late applications for permission to amend is that they can deprive the recipient of the application of any reasonable opportunity to consider and respond properly to the case that it is proposed should be advanced by way of amendment unless the trial is vacated. There will be cases where this can be shown not to be a significant burden and that the trial can safely proceed without an adjournment but the second defendant has not discharged the heavy burden of showing that this is one of those cases here.

23. Finally, and before leaving the application for permission to amend, I record that it was submitted on behalf of the second defendant that negative declaration claims must be approached with caution and granted only if satisfied that all the relevant evidence is available and arguments considered. I do not dispute this statement as a matter of broad general principle but as Mr Sarll accepted in the course of his argument, correctly, that does not trump the law and practice applicable to late and very late amendments. If material is not before the court because of the late amendment or very late amendment rule, or because of a very late application to adduce additional evidence, the responsibility for that rests with the party making the application - in this case, the second defendant.

24. In those circumstances the application for permission to amend is dismissed.

25. The application to adduce a second statement of Captain Frangos is also dismissed. My reasons for reaching that conclusion are as follows. Most of the material contained within it is material that could and should have been included in the first statement or which is in support of amendments for which permission was in the end not sought or has been refused. It is entirely wrong that the claimants should be faced at the last minute with a statement containing highly contentious material which is not relevant to the pleaded cases of the parties. If and to the extent it is responsive, the application could and should have been made much earlier than it was. In any event, the responsive material is intermingled with material which is not responsive. It is entirely wrong that the claimant's counsel should have to work out what parts are relevant and for what purposes and what parts are not, particularly when it is said that unidentified parts of the material may be relevant to credit. It is impossible to expect the second defendant to produce an edited version at this stage. It is likely that some of the material will emerge in the course of cross-examination to the extent it is genuinely responsive.

26. Finally, it is necessary to consider what to do with the trial. Originally, the trial was estimated for four days though now only three days are available. Mr Allen submits, and I accept, that this is the responsibility of the second defendant. Accordingly, he submits that I should guillotine the trial with one day made available to the second defendant to cross-examine, one day to the claimants and first defendant to cross-examine, with the third day being left for submissions. That would mean broadly two and a quarter hours for the claimants, half an hour for the first defendant who makes largely common cause with the claimants, or as they may decide to divide that time between them, two and a half hours for

the defendant, with about three quarters of an hour left for replies by the claimants and the first defendant.

27. With great reluctance I have to say, I was prepared to agree this approach because it preserves the trial which is something both the claimants and first defendant are entitled to, and for what it is worth the second defendant encourages me to preserve as well. To the extent that it ultimately prejudices the second defendant, that is a consequence of issuing and persisting with these applications that I have refused by this judgment so that it can have no legitimate complaint and because the only alternative would, as I have said, be to adjourn the trial which is the solution of last resort and is not one sought by any of the parties. The only other alternative available would be to allow the trial to proceed over three days with written closing submissions following thereafter and a later oral hearing of submissions if required. That is scarcely better than an adjournment given the extended time needed in order to accommodate that process.

28. I direct therefore that this trial should continue in accordance with the timetable I have set out in this judgment.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge