



Neutral Citation Number: [2021] EWHC 3210 (Comm)

Case No: CL-2016-000282

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2021

Before :

SIR NIGEL TEARE
Sitting As A Judge Of The High Court

Between :

Apollo Ventures Co. Limited **Claimant**
- and -
Surinder Singh Manchanda **Defendant**

Iain Quirk QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Thomas Roe QC (instructed by **Gresham Legal**) for the **Defendant**

Hearing dates: 23 November 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE
SITTING AS A JUDGE OF THE HIGH COURT

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 November 2021 at 10:00.”

Sir Nigel Teare :

1. This is an application by the Defendant that the Court stay the proceedings brought against him by the Claimant on the grounds that Thailand is the forum which is clearly and distinctly the more appropriate forum for the trial of this action. The Defendant is out of time for bringing such an application and therefore seeks an extension of time in which to do so. The Claimant opposes the applications. In particular the Claimant says that the Defendant has long ago submitted to the jurisdiction of the court and in such circumstances the requested extension of time should be refused.
2. The procedural history of the Claimant's claim is long and detailed and the claim has already occupied the attention of several judges of this Court and of the Court of Appeal. I do not propose to summarise the whole procedural history but merely those steps in the action which are of particular relevance to the Defendant's applications.
3. The Claimant is a Thai company in which the Defendant is a substantial shareholder. The Claimant alleges that the Defendant caused the Claimant to enter into two loans with a Thai businessman under which the Claimant borrowed £4.4 million and became liable to repay some £5.8 million. The Claimant alleges that the Defendant purported to enter into the loans on the Claimant's behalf without the knowledge of other officers of the Claimant and by the use of forged documents. It is alleged that the greater part of the proceeds of the loans were not paid for the benefit of the Claimant but for the benefit of the Defendant and members of his family.
4. The claim was issued on 9 May 2016 against the Defendant and several other Defendants, originally 7 other Defendants. On the same day a Worldwide Freezing order was granted. There was an application by the Defendant and two other Defendants to set aside the order giving permission to serve the proceedings out of the jurisdiction and an application by all Defendants to set aside the WFO. Those applications were dismissed by David Foxton QC on 15 June 2016 (save that the WFO against the 8th Defendant was set aside); see [2016] EWHC 1416 (Comm).
5. On 20 February 2018 the Claimant served Amended Particulars of Claim and on 19 April 2018 the Defendant served his Defence. That amounted to a submission to the jurisdiction in the sense that the Defendant was content for the court to exercise the jurisdiction it had to determine the claim brought by the Claimant against him.
6. A number of claims relating to the loans have been issued in Thailand. Some had been commenced at the time of the applications before David Foxton QC; see paragraphs 12-13 of his judgment. Of particular significance is a later claim issued by the Claimant on 19 October 2018 against the Defendant and others concerning the aforesaid loans. This Thai claim against the Defendant is essentially the same claim as that brought against him in this court, save that the claim in this court includes a claim for proprietary relief (tracing) whereas the claim in Thailand may only have been for damages. On 21 November 2019 two shareholders in the Claimant also brought proceedings in Thailand against the Defendant concerning the same loans but claiming damages assessed by the reduction in value of their shares. (There is evidence that the former claim may reach trial in 2022 and that the latter claim has a trial fixed for 27 and 28 January 2022.)

7. On 27 July 2020 a CMC was heard before Christopher Hancock QC. On 10 August 2020 directions were given for trial. On 11 August 2020 Christopher Hancock QC ordered that the Claimant provide security for the costs of the other Defendants; the Defendant did not apply for such an order. The Claimant sought further time in which to provide the security and the other Defendants sought an order striking out the claim against them. Butcher J. dismissed the application for an extension of time and struck out the claim against the other Defendants on 15 January 2021.
8. On 6 May 2021 the Defendant issued his application for a stay of the proceedings against him.

The grounds of the application to stay

9. The application is based upon the well-known *Spiliada* principles. It is said that Thailand is the forum which is clearly and distinctly the more appropriate forum for the claim against the Defendant. Reliance is placed on the factors listed by David Foxton QC as pointing to Thailand as the more appropriate forum; see paragraph 40 of his judgment. The claims arise from transactions between a Thai company and a Thai businessman which are said to involve unlawful acts under Thai law, key witnesses are in Thailand, the key events involve issues of Thai law and there are proceedings in Thailand concerning the loans. When the matter was before David Foxton QC the claims were also proceeding against other Defendants as of right and that provided a strong reason for England nevertheless being the appropriate forum, as allowing the claim against the Defendant to proceed in England “would avoid separate trials in different jurisdictions”; see paragraph 41 of his judgment. Now that those other claims have been struck out only the claim against the Defendant remains in this jurisdiction. There is now no reason, it is said, why Thailand should not be regarded as clearly and distinctly the more appropriate forum for the resolution of the claim against the Defendant. As was pointed out by David Foxton QC an application to stay proceedings is determined by reference to the circumstances existing at the date the application is heard; see paragraph 44 of his judgment.
10. This submission on behalf of the Defendant is contested on the grounds, inter alia, that there are assets in England against which enforcement will be sought, the proceedings in England have been under way for 5 years and very substantial costs have been incurred by the Claimant which will be “sunk costs” if the Defendant succeeds. For those reasons it is said that, unlike the position in 2016, it now cannot be shown that Thailand is clearly and distinctly the more appropriate forum.

The application for an extension of time

11. However, it is common ground that CPR 11(4) requires an application to stay proceedings to be made within 14 days (or 28 days in the Commercial Court) after filing an Acknowledgment of Service. That time limit expired in June 2016.
12. Logically, therefore, the first issue between the parties to be decided is whether the Defendant can obtain the necessary extension of time in which to make his application for a stay.

13. It is also common ground (by reason of the analysis in several authorities to which it is unnecessary to refer) that whether or not it is appropriate to extend time depends upon an application of the *Denton* principles. The first stage is to assess the seriousness and significance of the breach of the CPR. The second stage is to consider why the breach occurred. The third stage is to evaluate all the circumstances of the case with a view to dealing justly with the application. The jurisdiction which the court is exercising is that conferred by CPR 3(9). The court must have regard in particular to the need for litigation to be conducted efficiently and at proportionate cost and to the need to enforce compliance with the rules, practice directions and orders.

The seriousness and significance of the breach of the CPR

14. It was recognised by Lord Collins in *Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 at paragraph 70 that CPR Part 11 does not sit easily with applications for stays. “*For example circumstances may change and a defendant may wish to apply for a stay well after the proceedings have been commenced.....*” In the present case there has been a change of circumstances; first, additional proceedings were commenced in Thailand in 2018 and 2019 and, second, the claims against the other Defendants were struck out in January 2021 with the result that there is, on the Defendant’s case, no reason why the court cannot now conclude that Thailand is clearly and distinctly the more appropriate forum for determination of the Claimant’s claim against the Defendant.
15. If the delay from June 2016 is considered then there has obviously been a serious and significant delay. However, in reality there were no grounds to seek a stay until Butcher J. struck out the Claimant’s claims against the other Defendants. It was only then that the Defendant was able to say that the reason why David Foxton QC dismissed the application to set aside service out of the jurisdiction no longer applied, thereby presenting the Defendant with the opportunity to seek a stay on *forum non conveniens* grounds.
16. The delay from 15 January 2021 until 6 May 2021 was a little under 4 months. Whilst time was required to appreciate the significance of the striking out of the claims against the other Defendants, to obtain legal advice as to the merits of seeking a stay, and to prepare the evidence in support of an application for a stay it is not obvious that those steps would take a little under 4 months. I consider that at least 6 weeks would be required and so there was a delay of about 2 months or more. In the context of the CPR, and having regard to the express terms of CPR rule 3(9), that must still be regarded as a serious and significant delay.

Why did that delay occur?

17. There is no evidence to explain that delay. I cannot therefore accept that there was good reason for the delay. It is common ground that this does not spell the end of the application. But the absence of an explanation is one of the circumstances to be borne in mind at the third stage of the *Denton* principles.

All the circumstances of the case; dealing justly with the application

18. It is in this context that deciding this application raises novel issues. Counsel for the Claimant has been assiduous in his consideration of the many cases in which an application has been made to extend the time for seeking a stay on *forum non conveniens* grounds. He has submitted, without opposition, that where there has been a submission to the jurisdiction an extension of time has only been granted where the delay has been very short. Long extensions of time have only been permitted where there has been no submission to the jurisdiction. Counsel for the Defendant accepted that there has been no reported case in which following a submission to the jurisdiction a long extension of time has been granted to allow an application for a stay to be granted. However, counsel for the Claimant accepted that a submission to the jurisdiction was not a bar to a successful application.
19. Where there has been a submission to the jurisdiction that will obviously be a relevant factor to take into account. However, the weight to be given to that factor will depend upon all the circumstances of the case. For example, if as a result of the submission the parties have prepared for trial and have incurred substantial costs in doing so and the trial is shortly to take place considerable weight will be given to the submission and its consequences. In such a case an extension of time may well be refused, notwithstanding the strength of the argument that another jurisdiction is clearly and distinctly the more appropriate forum. If, however, nothing has happened after the submission to the jurisdiction and there is a strong case for saying that some other forum is clearly and distinctly the more appropriate forum then an extension of time may well be granted.
20. What then are the circumstances of the present case? In December 2016 the Claimant entered judgment in default. That judgment was set aside in January 2018 by Lionel Persey QC. Pleadings were exchanged in early 2018 (see above) but little further was done by the Claimant to proceed with the claim with the result that in October 2019 Phillips J. (whilst dealing with an application to allow a sale of property to proceed, notwithstanding the WFO) directed that the Claimant must file a witness statement showing cause why the WFO should not be discharged. That was done and in July 2020 the CMC took place.
21. At that CMC directions were given by Christopher Hancock QC. There was to be a short stay until 17 August 2020 to allow the parties to resolve or narrow their disputes. Disclosure was to take place by October 2020, witness statements were to be exchanged by December 2020 and experts' reports were to be exchanged by January 2021. A 10-day trial was to be fixed for a date not before 1 May 2021.
22. However, none of these steps took place because it was also ordered that security for costs in the sum of £500,000 be provided by the Claimant to the other Defendants by 24 August 2020. That security was not provided. Phillips LJ refused permission to appeal from the order for security on 28 September 2020. Ultimately, Butcher J. struck out the claims against the other Defendants in January 2021. Permission to appeal from that order was refused by Males LJ on 14 September 2021.
23. Those are the circumstances in which counsel for the Defendant submitted that the claim against him was "*almost back to square one*". That is on the basis that the claim against him must be re-pleaded and new directions for a trial are required. I think it is an exaggeration to say that the claim against the Defendant is back to square one. The claim against him has been pleaded. What is required is a pleading which removes the

claims against the other Defendants. Directions are required for trial but the parties, having been through a CMC in July 2020, must have a good idea of what disclosure and evidence is required. It can however be said that the claim against the Defendant in this court will not be ready for trial for some time.

24. This is a case where it appears that the Defendant now has a cogent case that Thailand is clearly and distinctly the more appropriate forum. Dealing with the application for an extension of time justly requires that weight be given to that factor. It is a good reason in favour of the grant of an extension of time.
25. If a stay were to be granted the costs already incurred by the Claimant will be, in counsel's memorable phrase, "sunk". That is said to be a serious head of prejudice, all the more so if the Claimant also has to pay the Defendant's costs of the stayed action in this court. Such prejudice is said to be a good reason against the grant of an extension of time.
26. Counsel for the Defendant raised a number of arguments against this suggestion.
27. First, it was said that there was reason to believe that the Claimant's costs were excessive. Reliance was placed on a comment to this effect by Christopher Hancock QC which was incorporated in his order of 10 August 2020. However, there is no doubt that substantial costs must have been incurred by the Claimant.
28. Second, it was said that the costs incurred by the Claimant related to both the claim against the Defendant and to the claim against the other Defendants which had been struck out. Counsel for the Claimant said that the Defendant was the lead Defendant and so most of the costs must have related to the claim against him. Whilst there is probably force in this suggestion no attempt has been made to quantify the costs of the claim against the Defendant as opposed to those costs which were incurred in order to advance a claim against the other Defendants. It seems likely, however, that a substantial sum will be "sunk" as a result of the stay.
29. Third, it was said that it did not lie in the Claimant's mouth to complain about wasted costs because such wastage flowed from the striking out of the claim against the other Defendants which only came about by reason of the Claimant's failure to provide security for costs as ordered by the court. The Claimant therefore only has itself to blame for the sunk costs. There does appear to me to be force in this point and it goes some way to lessen the weight to be accorded to the costs factor relied upon by the Claimant.
30. Weighing up those two factors, one in favour of an extension of time, and the other against an extension of time, I consider that the case for an extension of time is the stronger. Moreover, if an extension of time is granted and a stay subsequently granted, the Claimant will be able to pursue its claim against the Defendant in Thailand. The Claimant must obviously wish to do that because it issued proceedings against the Defendant in Thailand in 2018 whilst it was already advancing its claim against the Defendant here. Thus the orders sought by the Defendant will not bring an end to the claim against him.

31. It was suggested by counsel for the Claimant that the claim in England had the advantage that proprietary claims could be advanced against assets held in this country by one or more of the former Defendants. However, the proceedings in Thailand are also against the former Defendants and if judgment were obtained against them such judgment could be enforced here against assets held here by the former Defendants.
32. I must also bring into account the circumstance that the Defendant has not explained why he delayed from January 2021 until May 2021 before making this application. That is a reason against the extension of time. However, having regard to the other circumstances of the case I would regard a refusal of an extension of time as being disproportionate to the Defendant's two months' delay in making this application.
33. In my judgment, and having considered all the circumstances of this case, the just way of dealing with the application for an extension of time is to grant it. If exceptional circumstances are required to justify an extension where there has been a submission to the jurisdiction then the dismissal of the proceedings against the other Defendants, where the existence of such proceedings was a reason for keeping the claim against the Defendant in this jurisdiction, provides such circumstances.

The application for a stay

34. The reasons why Thailand can be said to be clearly and distinctly the more appropriate forum were summarised by David Foxton QC in his 2016 judgment. They remain valid today. Indeed, the case is all the stronger in circumstances where yet further proceedings have been brought against the Defendant in Thailand in connection with the loans in 2018 and 2019.
35. Counsel for the Claimant submitted that when one looks at the position today it cannot be shown by the Defendant that England is not the appropriate forum. There are assets in England. That is true but they will be preserved if the WFO is not set aside (and counsel for the Claimant has submitted that the WFO should not be set aside). The claim against the Defendant has been pleaded and costs have been incurred. That is also true but the claim here is a long way off being tried. It is not obvious that it will be ready for trial sooner than the claim in Thailand. Some costs will be "sunk" but, as explained above, there is a limit to the reliance that the Claimant can place on this factor.
36. In my judgment, in circumstances where it can no longer be said that proceedings against certain other Defendants arising out of the loans will take place in England, the Defendant can establish that Thailand is clearly and distinctly the more appropriate forum. The case for a stay is therefore made out.
37. Counsel for the Defendant submitted that in circumstances where the Claimant has failed to pay orders for costs made against it (some £216,000 plus interest), where it has failed to provide the security for costs as ordered and where it is being sued by its former lawyers for its fees there is in any event real doubt as to whether the claim against the Defendant will in reality be pursued in this jurisdiction. There was evidence from the Claimant that some form of litigation funding was in the course of being negotiated but no details were provided. I agree that there is real doubt as to whether the claim here will in fact be pursued. I have not needed to rely upon these matters in reaching my conclusion but they provide added support for the application for a stay.

Other matters

38. The Defendant has also sought an order that the WFO be discharged and that the Claimant pay the Defendant's costs of the action.
39. With regard to the WFO reference was made to the passage in *Spiliada* where Lord Goff said (at p. 483) that "*it would not, normally, be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum*". In the present case the Claimant is pursuing its claim against the Defendant in Thailand. David Foxton QC has held that the merits test for a WFO is satisfied in this case. Further, the Thai courts have since held in a criminal case in Thailand that the Defendant forged a signature on a document purporting to state that the Defendant had authority to act on behalf of the Claimant and in another criminal case in Thailand the Defendant has been found guilty of providing false information when registering the loan agreements. In those circumstances it appears to me to be fair and just to maintain the WFO so that if the Claimant recovers judgment in Thailand any assets of the Defendant here are not dissipated in the meantime.
40. With regard to the Defendant's costs of the action it can be said that, in circumstances where the reason why the stay can now be sought lies in the Claimant's failure to provide security for costs, there is no reason for not making the costs order sought. However, standing back and looking at the matter more broadly I consider that the more just result is that the costs of the claim against the Defendant in this jurisdiction lie where they fall. I therefore decline to make the costs order sought.