Neutral Citation Number: [2024] EWHC 1204 (Comm)

Case No: **CL-2023-000118**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **17 May 2024**

Before :

Mr Justice Andrew Baker

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Between :

Banco de Sabadell S.A.	**Claimant**
- and -	
Cerberus Global NPL Associates, L.L.C & ors.	**Defendants**

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James Collins KC and Akash Sonecha (instructed by **PCB Byrne LLP**) for the **Claimant**
Andrew Scott KC and Andrew Trotter (instructed by **Kirkland & Ellis International LLP**) for the **Defendants**

Hearing date: **17 May 2024**

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RULINGS

(Approved Transcript)

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Mr Justice Andrew Baker Friday, 17 May 2024

Rulings by **MR JUSTICE ANDREW BAKER**

(**11:22** am)

1. The position in relation to the re-amendment application is this. As formulated by the draft re-amendments, and this was put beyond any doubt by the solicitor's witness statement served in support of the application, the claimant seeks to introduce a new, very different, factual case, namely at para.8.02(i)/(ii) that privately, that is to say behind closed doors and although in no way communicated or evident to the counterparty at any time prior to the litigation, each party happened to have the same understanding of how the contract worked. That plea is then the factual content intended to be introduced into the case, by reason of which it is proposed to plead an additional specific aspect of Spanish law at 6.1A.2, namely and exactly that where both parties coincidentally happen to have the same privately held intention, that is a common intention, or it may be better translated "evident intention," as referred to in the second paragraph of article 1281 of the Spanish Civil Code (in which the Spanish term is "*la intención evidente*").
2. That, by nature, is precisely the type of case that it was originally asserted that the claimant had pleaded, an assertion the court did not accept when it was made, repeatedly, in various guises in relation to earlier case management decisions that had to be made. Logically correctly, when it was originally asserted that it had been made on the pleadings, it was said to be an allegation of a kind that would require a larger disclosure exercise than was ordered, specifically Model D, and it might well have required a wider range of factual investigations, on both sides, as to who might be appropriate witnesses and what witness evidence they would or would not then need to provide.
3. As it stands, therefore, I have no doubt that the re-amendments as proposed, and given the reasons expressed in evidence for wishing to make them, would be amendments that would require, if allowed, the scope of the disclosure to be revisited on both sides, the identity of appropriate factual witnesses, potentially to have to be revisited, and the scope of factual evidence already given by some of those witnesses, to have to be revisited, and that means it is a proposed re-amendment that would imperil the trial date. Mr Collins KC fairly acknowledges that if that is the court's conclusion, the application would not be pressed.
4. For completeness, I agree with the objective thrust of the submissions made in writing by Mr Scott KC in his skeleton argument, that there has been insufficient basis in evidence put before the court to conclude that as a matter of Spanish law, the particular new proposition proposed to be pleaded that will be necessary to render the factual plea potentially relevant is seriously arguable so as potentially to justify a very late amendment that threatens the trial date. In addition, in the particular case management circumstances of this case, and the proposed re-amendment having on its face the impact I have indicated, was essentially a blatant attempt to have another go at the one and one only round of amending, if there was to be one, such as might cause the court to have to revisit the case management more generally, that the claimant was offered and took advantage of, but in doing so plainly did not plead anything similar to that which it is now proposed to plead.
5. I find it surprising in the circumstances of this case and given the prior stages through which it has gone, that Mr Davies, the solicitor on the claimant's side, would have thought, as he suggests in his statement, that the proposed re-amendments, given their terms and given what he himself then went on to say in his reply statement lay behind the

desire to make them, merely clarified that which was already on the pleadings. He surely knew full well that what these re-amendments were doing, particularly given his own explanation, in his reply statement especially, as to why they were proposed to be made, was advancing, or attempting to advance now for a third time, precisely that which it had been suggested had been advanced originally and that which perfectly obviously had not been advanced the second time when amendments were made prior to the ruling I gave in December 2023 about disclosure.

6. So the application as issued by the claimant and supported by the claimant's solicitors through evidence was, in my judgment, a bad application that could not be allowed. Mr Collins KC, to be fair to his submissions, sought to finesse the matter by emphasising that, although there was room for the view that the way the proposed re-amendments were formulated, they might be thought to have that connotation or scope, actually, the intention, and I take it from that the expectation on his part as to the limited nature of the case he actually has in mind to advance at a trial, is only to rely on the same factual matters already pleaded, all of which are matters evident to the defendants when they occurred, for the purpose of an argument that that material conveys or indicates a certain understanding or intention as regards the meaning and effect of the relevant provisions of the agreement. Mr Collins acknowledged that there is not a realistic world in which that argument, namely the argument that that material conveys, which is an objective question, a certain understanding or intent on the part of the companies whose material it is, could fail for the claimant and succeed for the defendant, and then the claimant, by reference to the same material, could sensibly invite the court to hold that there nonetheless had been a private intention, to different effect, held by the defendant companies. I have to say that I consider that an internally coherent acknowledgement in an attempt to finesse the re-amendment application, but an acknowledgement that in substance thus recognises that the proposed re-amendments serve no purpose.

7. The reality therefore is that the attempted finessing of the application, given its inevitable acknowledged consequence, merely reinforces my primary conclusion, which is indeed that the only reason these amendments are proposed or ever were proposed is and was, and their only potential purported effect would be and has been, to try to open up a more general inquiry as to whether, behind closed doors, relevant individuals whose understanding or intention would count as the corporate understanding or intention on Cerberus's side, actually thought that the agreement worked in the way that the claimant will be arguing that it does work. In that sense, the intention was to try to contend, the defendant' case, by reference to objective matters of the purport of the contractual language and/or matters of evident intention manifested across the contractual fence, was different to some view they privately held about the contract.

8. I am therefore against the application. As formulated, it was an attempt to go back to that which had been said to be the claimant's case but which had not been pleaded, and which, had it been pleaded, would have led to very different case management, particularly in relation to disclosure and witness evidence. Introduced now, it would threaten the trial date, unless in some way the re-amendments were reformulated in line with Mr Collins KC's finessing acknowledgement. But that reformulation could only logically be a reformulation that would entirely neuter them and demonstrate that they did not need to be made at all, because in reality, the claimant was in fact simply advancing the same case it has currently pleaded, namely that the intentions of the parties evident from the material that has been pleaded, assessed objectively, match, and are and were different to that which Cerberus seeks to argue is, other things being equal, the meaning and effect of the contractual language.

9. There will then be the argument by reference to the expert evidence on Spanish law as to when, under Spanish law, one looks to matters of evident intent outside the apparent meaning or effect of the contractual language, and the entire exercise continues then to be an objective exercise of assessing the purport of, in the first place, the contractual language, and in the second place, matters that were evident on both sides. As previously ruled, that does not mean there is no room for factual witness evidence, because there are pleas as to matters being communicated otherwise than solely in documentary form, and the witnesses are addressing that through their evidence.
10. The re-amendment application therefore fails, but I do invite consideration, this point happening to have arisen in my mind out of the arguments on the re-amendment application, to improving the language of para.2(i) of the Issues in the expert instructions. We can come back to that at the end, and we should move on to Mr Scott KC's application in relation to the factual witness evidence. I shall deal with all matters of costs at the end of the hearing.

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(**11:40** am)

11. I will make the proposed adjustments to the CMC timetable. That means, formally, that there is no additional aspect of the defendants' application as issued that remains live for determination, but I will make the observation that, to my mind, it was not a well-founded application. It has, in Mr Scott KC's attractive and very fair oral submissions, undergone a not dissimilar process of finessing as I described in relation to Mr Collins KC's submissions on the re-amendment application. The application made sense only if there was some serious argument to be had, properly and carefully analysing the content of the witness evidence as served, that on the pleadings as they stood, without the re-amendments that were being proposed, there was, to a material extent, objectionable material that could not properly be led as evidence-in-chief, given the defined scope for factual evidence at this trial under one of my previous orders, and sufficiently so that as a matter of best case management it would be appropriate to explore that analysis, have a ruling on it and get the court to order, in some appropriate form, the editing or striking out of relevant statements.
12. Mr Scott KC (attractively, I say, and by way of finessing his clients' position) suggested that matters were advanced by the analysis set out by Mr Collins KC's skeleton argument as to how it is that the material in the witness statements as served is, or at least may well be, legitimate evidence within the scope of the order concerning factual evidence, even on the pleadings as they stood. I hope Mr Collins will not object to my describing his efforts in this way, but there is nothing in the nature of rocket science about the analysis that Mr Collins there presented. As it seems to me, careful consideration of whether really there was a basis for objecting to the factual evidence as served by reference to the pleadings as they stood and now still stand, and the order that I made about factual evidence, ought to have led to the conclusion that there was not.
13. In the usual way with trial witness statements, that is not to say there may not be aspects here and there where a witness has gone a little further than it would have been attractive for them to go, or may not have descended a touch more towards comment or argument than confine themselves to admissible factual evidence. But as Mr Scott KC recognised, if and to the extent that there are matters of that kind, that await trial, it is not now proportionate, and in my judgment it never was proportionate, to seek to turn those sorts of points into a freestanding strikeout application such as was issued.

14. So the finessing notwithstanding, in my judgment the correct order to make on today's hearing is that the evidence application or witness evidence application, as I might call it, is dismissed, just as the re-amendment application is dismissed, because I can recite in the order that the application notice from the defendants also included an application for orders tweaking the current pre-trial timetable, and I can give that a different label so that it is clear that I am then dealing with, effectively, two applications under the same application notice. The substantive order, then, is that the re-amendment application is dismissed, the witness strike out or witness evidence application is dismissed, but I allow the timetabling application and make those adjustments.
15. Before I then deal with costs, there was the matter that I have raised of my own motion, since we have not yet had the experts finalise and exchange their reports, whether it might not with hindsight be better in para.2(i) of the expert issues to refer explicitly to the relevant Spanish Civil Code term that we are talking about, which in some of the pleadings has been referred to as "common intention" but it may be is more literally or accurately translated as "evident intention" which is indeed the English phrase the claimant used in the Particulars of Claim. The idea would be to order that the phrase, "the common intention of the parties," is removed and replaced by, "the evident intention ([if I've got the Spanish right] "*la intención evidente*") of the parties referred to in the second paragraph of article 1281," because we identify article 1281 in paragraph one of the issues. I do not know whether as the hearing has developed on the other matters there has been any chance to take instructions in the background, or whether I leave that with counsel and not finalise the order until there has been an opportunity for me to be notified, via my Clerk, whether there is any objection to that, or for that matter happiness to accept it.