

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2020/0223

BETWEEN:

BRIEFLINE ASSETS LTD

Claimant

and

**(1) NIKOLAY ANATOLYEVICH FALIN
(2) BELFAST SERVICES SA**

Defendants

Appearances:

Mr. Steven Thompson QC and Adam Cloherty, with them Ms. Alana-J Joseph of Conyers for the Claimant

Mr. Stuart Adair, with him Mr. Oliver Clifton of Walkers BVI for the First Defendant
The attendance of the Second Defendant was excused

2022 January 26 and 28
February 15

JUDGMENT

[1] **JACK, J [Ag.]:** I gave a judgment in this matter on 17th June 2021.¹ I shall not repeat the facts stated in that judgment which should be treated as incorporated in this judgment.

¹ [2021] ECSCJ No 598.

[2] This judgment deals with two applications. The first, dated 15th October 2021, is made by the first defendant ("Mr. Falin"), who seeks to strike out the claim of the claimant ("Briefline"), alternatively that reverse summary judgment be given against Briefline. The second dated 29th November 2021 is made by Briefline, which seeks to amend the re-amended claim form and the amended statement of claim and to add additional claimants.

[3] The first application states the following grounds for making the order:

"6. Mr. Falin applies for an order striking out the Amended Statement of Claim and Amended Claim Form ('Briefline's Statement of Case') under CPR 26.3(1)(b) on the ground that they do not disclose any reasonable ground for bringing the claims. In particular:

- (1) Briefline's Statement of Case does not disclose any case that Briefline was a party to the Transfer Back Agreement and Briefline, therefore, has no standing to enforce that agreement;
- (2) Briefline's Statement of Case discloses no case that Briefline has any beneficial interest in the Shares or that the Shares are held on trust for Briefline;
- (3) Briefline's Statement of Case does not disclose any ground for rectifying Belfast's Register of Members;
- (4) At paragraph 49 of his judgment dated 17th June 2021 Jack J found that: 'The Statement of Case, thus, does not show a case on the facts... On the Statement of Case as currently pleaded, in my judgment no arguable case is shown on the facts.'

7. Further or alternatively, Mr. Falin applies for an order striking out Briefline's Statement of Case under CPR 26.3(1)(c) on the ground that the proceedings are an abuse of process for the following reasons:

- (1) During the course of arbitration proceedings between Mr. Falin and Belfast, which were commenced by Mr. Falin serving a Notice of Arbitration dated 26th July 2019 (the 'Arbitration Proceedings'), Briefline was the privy of Belfast and sat back and allowed Belfast to fight its battles, whilst seeking to preserve its right to challenge Mr. Falin's ownership of the Shares in the BVI Court;
- (2) Briefline refused to participate in the Arbitration Proceedings when invited to do so;
- (3) By virtue of the aforesaid matters Briefline is bound by the decisions of the tribunal in the Arbitration Proceedings set out in the award published on 27th November 2020 and the plea of *res judicata* additionally applies in respect of all claims which Briefline ought to have brought in the Arbitration Proceedings, including the claim to a beneficial interest in the shares, the claim to rectification

of the Register of Members of Belfast and the claim in respect of the share transfer form dated December 2019...

8. Further, Briefline's claims in respect of the Transfer Back Agreement rely on and are tainted by the alleged illegal purpose of the agreement. In particular, it pleads at paragraph 5 of the Amended Statement of Claim that the purpose of the Transfer Back Agreement was to deceive banks into providing Mr. Falin and/or his companies with a financial benefit in the form of better lending terms to which he and/or his companies would not otherwise have been entitled. In the premises, as a matter of public policy, the claims under the Transfer Back Agreement are liable to be struck out.

9. Further or alternatively, Mr. Falin is entitled to summary judgment in respect of Briefline's claims because Briefline has no real prospect of succeeding on those claims because the contemporaneous documentary evidence establishes that Briefline:

- (1) Was not a party to the Transfer Back Agreement and has no standing to bring an action to enforce that agreement;
- (2) Has no proprietary interest in the shares or right to rectification of Belfast's Register of Members."

[4] Paras 6, 7 and 8 of the application seek to strike out the claim as disclosing no cause of action. Briefline disputes the para 7 ground (*res judicata* and **Henderson v Henderson**²) and the para 8 ground (illegality) on substantive legal grounds. As regards para 6, in para [49] of my judgment of 17th June 2021, I held that Briefline's pleadings as they then stood did not disclose a viable cause of action. The proposed re-re-amended claim form and the re-amended statement of claim, together with the addition of three additional claimants, are said by Briefline to meet the points raised on Mr. Falin's behalf. I shall therefore deal with the strike-out claim by reference to these rather than to the earlier pleadings.

[5] It is convenient to deal with the four paragraphs in reverse order, so I shall commence with the reverse summary judgment application.

² (1843) 3 Hare 100 (Wigram VC).

Reverse summary judgment

[6] So far as the reverse summary judgment application is concerned, Mr. Thompson QC, who appeared for Briefline, submitted that Mr. Falin was limited to arguing the issues raised in para 9 of the application. The only matters which Briefline needed to address on the application were therefore the two issues identified in that paragraph of (1) lack of standing on Briefline's part and (2) the absence of any proprietary interest in the Belfast shares or right to rectification of the Register. The evidence adduced on Briefline's behalf in answer to the summary judgment application was a witness statement of Dr. Alecia Johns. Most of her witness statement consists of argument in relation to the strike out application. This was inappropriate. On well-established principles evidence is not admissible on a strike out application on grounds of defects in the pleadings under CPR 26.3(b). Evidence is admissible under CPR 26.3(c) (abuse of process), but in the current case this is limited to the para 7 *res judicata*/**Henderson v Henderson** point.

[7] What she says in relation to summary judgment consists of one paragraph, which reads:

“38. However, insofar as this part of the Application is confined to the two contentions at paras 9(1)-(2) of the grounds in the Notice of Application:

38.1 I have already addressed at paras 13 to 20 above why it is impossible for this court to strike out Briefline's claim on the basis that it lacks standing to bring it.

38.2 The contention that Briefline's claim should be summarily dismissed on the basis that it has 'no proprietary interest in the [S]hares or right to rectification of the Register of Members' is, with respect, hopeless. This contention appears to rest on the fact that, prior to transferring them to Mr. Falin, Briefline 'was merely a nominee shareholder'. That may well be right, in that Briefline ultimately held the Shares for the benefit of its ultimate beneficial owner (first Mr. Khorkov and then Mr. Thorstenn) but it does not get Mr. Falin anywhere. The only question is whether Briefline has a better right to the Shares than Mr. Falin. Plainly it does. (In any case, as indicated above, it is proposed that both Mr. Khorko[v] and Mr. Thorstenn will now join the proceedings as co-claimants — which would obviously dispose of this point, even if it were otherwise meritorious (which it is not).”

- [8] In fact, Mr. Zotov is also proposed as an additional claimant.
- [9] Mr. Adair complains that Dr. Johns does not address the matters addressed in Mr. Silver's third witness statement. This statement contains an extensive Section G entitled "summary judgment", consisting of 19 paragraphs, and a further Section H dealing with the alleged dishonesty of the "controllers" (defined by him in para 24 of his third witness statement as Ms. Denisova, Mr. Khorkov, Mr. Thorstenn and Tatiana Redina).
- [10] Mr. Thompson QC's answer is that Mr. Falin on his reverse summary judgment application is limited to the points raised in para 9(1) and (2) of his application. It is not, he submits, open to Mr. Adair to invite the Court to take a "holistic view" based on the case in the round on a summary judgment application. This is particularly so, where the grounds of the application have been limited to two discrete issues, as here.
- [11] Mr. Adair by contrast says that the Court can take a purposive approach to the requirements of CPR Part 11 as to the contents of an application. He points out that it is possible to make an oral application under CPR 11.6(2). In such a case, the grounds would be explained to the Court orally. The purpose of CPR 11.7(1)(a) is merely to avoid parties making applications in writing with the grounds explained solely as "see affidavit in support".
- [12] I do not accept this. CPR 11.7 is entitled "What application must include". CPR 11.7(1) provides:
- "An application must state—
- (a) briefly, the grounds on which the applicant is seeking the order; and
- (b) what order the applicant is seeking."

[13] These are not onerous requirements. Mr. Silver raises numerous matters in support of the summary judgment application, which go beyond what is in para 9 of Mr. Falin's application. His section G has six subheadings. Section H gives evidence of Mr. Zotov's incarceration whilst on trial for fraud. It alleges that "the Controllers have established a concerning track record of misleading tribunals, courts, expert witnesses and their own lawyers" and gives examples. If Mr. Falin had wished to rely on these matters, he could have done so by including them in his grounds for obtaining summary judgment.

[14] He did not do so and there may well be good reasons for that. It has long been recognised that allegations of dishonesty may be unsuitable for summary determination. Further, as a matter of tactics, in a summary judgment application it is often sensible to focus on small points to achieve a technical knock-out, rather than attempt complete victory on a broad front. At any rate, the reasons are irrelevant. CPR 11.7(1)(a) in my judgment requires a party to set out — albeit briefly — his grounds for his application. It is open to a party to seek to amend his notice of application to add grounds, but that was never done here. Briefline has in my judgment relied on the terms of para 9 to limit its evidence in answer to the minimalistic evidence of Dr. Johns. Mr. Adair may be right in saying that that is opportunistic on Briefline's part, but in my judgment Briefline was entitled to limit itself to meeting the case presented against it as stated in the application notice.

[15] In my judgment, Mr. Adair is limited to the two points raised in para 9 of Mr. Falin's application. Since these overlap with the strike-out part of the application, I shall consider these points on summary judgment, when I come to consider the pleading points.

Illegality

[16] The illegality issue arises in this way. As Mr. Carrington QC put it on Briefline's behalf in his skeleton for the hearing which led to my June judgment:

“(1) The stated purpose of the Transfer Back Agreement, as discussed by [Mr. Zotov] (who was then acting on behalf of Briefline and Mr. Khorkov, the then ultimate beneficial owner of Belfast) and Mr. Falin at the time it was entered into, was to transfer the Shares to Mr. Falin temporarily to give the appearance that the group of businesses under Mr. Falin’s control included ZHDA and SpetsLogistika. Mr. Falin represented that this would improve his negotiating position with banks and leasing companies and therefore allow his businesses to negotiate better payment terms.

(2) Thus, Mr. Falin would receive (effectively be lent) the Shares on the understanding that the arrangement was temporary and the Shares were to be returned to Briefline on demand. To that end, Mr. Falin was to sign an undated share transfer form and issue an irrevocable [power of attorney] in favour of a Briefline nominee to ensure that Belfast continued to remain under Briefline’s control.”

[17] The way this is pleaded by Briefline is as follows (I cite the proposed re-amended statement of claim, but there is no relevant substantive difference to the original statement of claim):

“Mr. Falin represented to Mr. Zotov that his intention was to be able to demonstrate at the end of that calendar year to banks and leasing companies with which he was dealing that he had consolidated the Russian subsidiaries of Belfast (i.e. ZHDA and Spetslogistika) with Mr. Falin’s other assets so that his businesses would be able to procure better lending terms.”

[18] That would have been (as is subsequently pleaded) a false representation. As pleaded, it on its face alleges that the purpose of the Transfer Back Agreement was to defraud banks and leasing companies. Under the doctrine of **Tinsley v Milligan**,³ that would be fatal to Briefline’s claim against Mr. Falin. The Transfer Back Agreement would be for an illegal purpose, namely the defrauding of banks and leasing companies. (Mr. Thompson QC submitted that that was not a proper reading of the pleading, but I disagree. The parties were conspiring to mislead the banks and leasing companies for their own benefit at the expense of the banks etc. Dishonesty can be implied from those facts.)

³ [1994] 1 AC 340.

[19] That, however, leaves the question whether **Tinsley v Milligan** is still good law. In my judgment of 17th June 2021, at para [19] I identified a number of problems on the facts with the issue of illegality. I also identified legal problems with the illegality defence as follows:

“The law on illegality is not entirely clear in this jurisdiction. As I said in **Ali Ganjaei v Sable Trust Ltd**:⁴

“The UK Supreme Court in **Mirza v Patel**,⁵ in a six-three split,⁶ held that deciding whether illegality barred a claimant from asserting a right required a multi-factorial approach. The majority refused to follow the House of Lords decision in **Tinsley v Milligan**, which held that the question was to be determined as a matter of how the cause of action was pleaded. If a claimant needed to plead the illegal matters to found his cause of action, then he lost; if he did not, he won (subject of course to proving his pleaded case). The difficulty for this Court is that there are at least three Privy Council decisions which support the **Tinsley v Milligan** approach: **Petherpermal Chetty v Muniandi Servai**,⁷ **Singh v Ali**⁸ and **Palianiappa Chettiar v Arunasalam Chettiar**.⁹ It is unclear whether this Court is bound to follow those Privy Council decisions or treat them as impliedly overruled by the UK Supreme Court decision.”

Precedent and illegality

[20] Mr. Adair argued that this was wrong. Unless and until the Privy Council decided to follow the **Mirza** line of authority instead of the **Tinsley** approach, I was bound to follow the three Privy Council cases. In support of that proposition, he relied on Lord Neuberger’s observations in the UK Supreme Court in **Willers v Joyce (No 2)**.¹⁰ The underlying dispute there was a claim that civil proceedings had been brought

⁴ [2021] ECSCJ No 466, BVIHC (COM) 2020/0182 (15th February 2021) at para [4]. In **Ali Ganjaei** I wrongly asserted that the Privy Council cases were not *cited*. I should have said that they were not *discussed* by the Supreme Court.

⁵ [2016] UKSC 42, [2017] AC 467.

⁶ Or five-four, depending on how one counts Lord Neuberger’s judgment.

⁷ (1908) LR 35 Ind App 98 on appeal from Lower Burma.

www.casemine.com/judgement/uk/5b4dc2442c94e07cccd2363f

⁸ [1960] AC 167 on appeal from Malaya.

⁹ [1962] AC 294 on appeal from Malaya.

¹⁰ [2016] UKSC 44, [2018] AC 843.

maliciously. At issue was whether such a claim was actionable at all. Bringing criminal proceedings maliciously is a well-established tort, but the equivalent tort for civil proceedings is not. Lord Neuberger explained the background as follows:

“1. The appeal... raises an important issue, namely the status of decisions of the [Privy Council] in the courts of England and Wales. In her clear and informative judgment [at first instance], the Deputy Judge, Miss Amanda Tipples QC [now Tipples J], explained that there was a House of Lords decision, **Gregory v Portsmouth City Council**,¹¹ whose reasoning would lead her to strike out the claim, but that there was a more recent decision of the JCPC, **Crowford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd**,¹² whose reasoning would lead to a different conclusion. She concluded, on the basis of earlier decisions of the first instance and appellate courts of England and Wales, that the position was as follows. If there was a decision of the House of Lords (or the Supreme Court) which was binding on her as a first instance judge, she could ‘only follow [a] decision of the Privy Council’ to the opposite effect ‘if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council.’¹³”

[21] The consequences in terms of the binding effect of Privy Council decisions on courts in England, Lord Neuberger explained as follows:

“12. Three consequences have been held to follow... First, given that the JCPC is not a UK court at all,¹⁴ decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any decision of a court of England and Wales (let alone a decision of the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge. Secondly, given the identity of the Privy Counsellors who sit on the JCPC and the fact that they apply the common law, any decision of the JCPC, at least on a common law issue, should, subject always to the first point, normally be regarded by any Judge of England and Wales, and indeed any Justice of the Supreme Court, as being of great weight and persuasive value. Thirdly, the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme

¹¹ [2000] 1 AC 419.

¹² [2014] AC 366.

¹³ [2015] EWHC 1315 (Ch) at [26].

¹⁴ There are exceptions. The Privy Council hears UK appeals (a) under the House of Commons Disqualification Act 1975, (b) from Naval Prize Courts, (c) from the Arches Court (for the province of Canterbury) and the Chancery Court of York (for the province of York) (insofar as they are not matters which go to the Court of Ecclesiastical Causes Removed) and (d) from disciplinary proceedings against veterinary surgeons: see Halsbury's Laws Vol 24A (2019) para 80 footnote 7.

Court — at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales.

...

16. There is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC, but there is no question of it being bound to do so as a matter of precedent. There is also no doubt that a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of a court which is binding in accordance with the principles set out... above [the English High Court is bound by the English Court of Appeal; both are bound by the UK Supreme Court and the House of Lords; and the English Court of Appeal is bound by its own decisions.

17. The difficult question is whether this latter rule is absolute, or whether it is subject to the qualification that it can be disapplied where a first instance judge or the Court of Appeal considers that it is a foregone conclusion that the view taken by the JCPC will be accepted by the Court of Appeal or Supreme Court (as the case may be). There are decisions of the Court of Appeal which support such an approach... Nonetheless, I have concluded that it is more satisfactory if, subject to one important qualification [irrelevant for present purposes]..., the rule is absolute — i.e. that a judge should never follow a decision of the JCPC, if it is inconsistent with the decision of a court which is otherwise binding on him or her in accordance with the principles set out... above.

18. First, particularly given the importance of the doctrine of precedence and 'highly centralised nature of the hierarchy' of the courts of England and Wales, the doctrine should be clear in its terms and simple in its application. Secondly, ...there can be much argument and difference of opinion as to whether it is 'a foregone conclusion' that the Court of Appeal or Supreme Court will follow a particular JCPC decision which is inconsistent with an earlier decision of the domestic court. If there is a strict rule, there need be no such argument. Thirdly, even apart from this second point, there should be no more delay or cost in having a strict and clear rule rather than a more flexible rule."

[22] The converse, Mr. Adair argued, necessarily applied where this Court was having to decide whether to follow the local court of final appeal, here the Privy Council, or a foreign court of final appeal, the UK Supreme Court. Lord Neuberger's "absolute

rule” meant that I was bound by the earlier Privy Council authorities, regardless of the later UK Supreme Court decision in **Mirza**.

[23] His argument has a logic to it, but faces a number of difficulties. Firstly, he relied on two Eastern Caribbean Court of Appeal authorities for this proposition: **Allan Chastanet v Ernest Hilaire**¹⁵ and **Convoy Collateral Ltd v Broad Idea International Ltd and another**.¹⁶ Both state that Privy Council decisions on appeal from other jurisdictions will bind the Eastern Caribbean Courts insofar as the Privy Council determines English common law. Neither, however, deal with the effect of a subsequent House of Lords or UK Supreme Court decision on a prior Privy Council authority. They therefore do not assist on the circumstances in which a lower Court should refuse to follow a Privy Council decision in favour of a subsequent House of Lords or UK Supreme Court authority.

[24] Secondly, it has long been recognised that the House of Lords and now the UK Supreme Court have a special status in determining English common law. As Lord Dunedin, giving the advice of the Privy Council in 1927 in **Robins v National Trust Co**, said:¹⁷

“[The House of Lords] is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.”

Lord Neuberger recognises this when he says at para [12] that the Privy Council should follow UK Supreme Court decisions on English common law. If the Privy Council is bound to follow a UK Supreme Court ruling instead of its own determinations, it is unclear to me why a judge at first instance in this Territory is not bound also to follow the UK Supreme Court decision.

¹⁵ [2020] ECSCJ No 4, [2020] 4 LRC 12 at [35].

¹⁶ [2020] ECSCJ No 109 at [22] to [24]. The Privy Council dismissed an appeal, *sub. nom.* Broad Idea International Ltd v Convoy Collateral Ltd; Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy), without touching on this point [2021] UKPC 4, [2022] 1 All ER 289.

¹⁷ [1927] AC 515 at p 519.

[25] Thirdly, Lord Neuberger accepts that the Privy Council will not be bound if the local common law is different to English common law. The question of which version of the common law applies at any given time is not straightforward. The Australian experience is instructive: see my discussion of the development of Australian common law and its divergence from English common law in **Commercial Bank of Dubai v 18 Elvastone Place Ltd**.¹⁸ I noted that the divergence from English common law started as early as 1831,¹⁹ but was only finally recognised by the Privy Council in 1967 in **Australian Consolidated Press Ltd v Uren**.²⁰ The divergence was a gradual process, measured in scores of years rather than in decades. There was never a morning when all the Australian judges woke up and said: “Aha! Yesterday we applied English common law; today we apply Australian common law.” Whether there is a divergence between English and local common law will only be apparent when the Privy Council decides whether to follow House of Lords or UK Supreme Court authority on the one hand or its own decisions on appeal from local jurisdictions on the other hand. A refusal to follow the House of Lords or the UK Supreme Court will *ipso facto* show that there is at least *some* divergence of the local common law from the common law applicable in England, but there is no *a priori* means of ascertaining this.

[26] In my judgment, these are difficult questions of the law of precedent which are not suitable for determination on an application for strike out or reverse summary judgment. The **Supreme Court Practice 2022** (the White Book) helpfully summarised the correct approach:²¹

“[I]t is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact.”²²

¹⁸ [2020] ECSCJ No 202 at [49]ff. See also my conclusion at [58].

¹⁹ *Rex v Farrell, Dingle and Woodward* (1831) 1 Legge 5 (NSW Court of Crown Cases Removed).

²⁰ [1969] 1 AC 590.

²¹ At para 3.4.2.

²² Citing *Farah v British Airways* [2000] The Times, 26th January (English Court of Appeal), applying *Barrett v Enfield Borough Council* [2001] 2 AC 550 (House of Lords).

[27] There is also the problem that the full implications of **Mirza** have still not been completely worked through. The decision of the nine-judge court was intended to resolve the problems which had arisen in reconciling three Supreme Court decisions decided shortly before **Mirza**: **Hounga v Allen**,²³ **Les Laboratoires Servier v Apotex Inc** ²⁴ and **Bilta (UK) Ltd v Nazir (No 2)**.²⁵ Yet the decision in **Mirza** was by a majority. Of the nine judges who heard it, only Lord Hodge is still a member of the Court. There is ongoing uncertainty as to how the multi-factorial approach of the majority in **Mirza** should be interpreted.

Conclusion on illegality

[28] Mr. Thompson QC submits that it will always be necessary to have a trial, if “multi-factorial issues” are to be determined. I would not go so far. There may be cases which are perfectly clear examples of illegality. However, I agree that in the current case there are issues as to how **Mirza** should be applied. Firstly, the nature of the misrepresentations which were to be made to the banks needs to be considered. Conspiracy may well not be actionable in Russia. (It is not in many civil law countries.) The precise cause of action in Russian law will need analysis. Secondly, the effect of the passing of monies needs to be considered. Further it is unclear how far the dishonest plan (assuming there was one) was carried out. Thirdly, the extent to which restitution pursuant to the Transfer Back Agreement should be denied on grounds of illegality needs to be considered. Fourthly, the facts need to be established for the balancing exercise required by **Mirza** to be performed. Lastly, the same point applies as to this being a developing area of law.

[29] I therefore conclude that the issue of illegality is not suitable for determination on a strike-out application. Firstly, there is an issue as to whether this Court is bound by the Privy Council authorities applying **Tinsley v Milligan** or by the UK Supreme Court decision in **Mirza v Patel**. Secondly, if the latter, then a factual investigation is necessary on the facts of the current case to apply the test in **Mirza**. A factual

²³ [2014] UKSC 47, [2014] 1 WLR 2889.

²⁴ [2014] UKSC 55, [2015] AC 430.

²⁵ [2015] UKSC 23, [2016] AC 1.

investigation cannot be carried out on a strike out application. Moreover each of these heads is an area of developing law, where the Court should not generally strike out a claim.

Res judicata: Henderson v Henderson

[30] I turn then to para 7 of the application, the averment of abuse of process. To succeed on this, Mr. Falin needs to establish three elements. The first is that Briefline was the privy of Belfast in the arbitration proceedings. The second is that Briefline refused to participate in the arbitration proceedings and that this refusal was abusive. The last element is that these matters mean that Briefline is bound by the result of the arbitration, not merely in relation to what the arbitral panel actually decided but also in relation to matters which the arbitral panel could have been invited to decide.

[31] As to the first matter, I have already considered in my June judgment at [41]ff “whether some form of *res judicata* arises from the arbitration award.” I referred to my decision in **Re Lenux Group Ltd**,²⁶ which applied the English Court of Appeal authority of **House of Spring Gardens Ltd v Waite**.²⁷ I concluded at [43]:

“In the current case Briefline were invited to join the arbitration on an *ad hoc* basis. Due to Belfast’s refusal to agree to the expansion of the arbitration that did not happen. Since at that time both Briefline and Belfast were under the joint control of Mr. Zotov, in my judgment **House of Spring Gardens** is directly applicable. Mr. Zotov decided for tactical reasons that Briefline should distance itself from the arbitration in case (as of course occurred) the decision went adversely to Belfast. In my judgment Briefline should be treated as Belfast’s privy, so as to be bound by the determinations in the arbitration award.

[32] Mr. Thompson QC seeks to persuade me to revisit that determination, but I do not consider that appropriate. That issue was fully argued at the earlier hearing. Where I agree with him is that my holding that Briefline is “bound by the determinations in

²⁶ JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd [2021] ECSCJ No 445.

²⁷ [1991] 1 QB 241.

the arbitration award” is not sufficient *of itself* to determine the beneficial ownership of the Belfast shares. The beneficial ownership of the shares was not an issue for the arbitrators, but Mr. Adair submits that it *should* have been. Mr. Thompson’s point in para 80.4 of his skeleton that “Briefline’s battle is an entirely different one to that which was adjudicated upon the Arbitration” is true, but does not necessarily meet Mr. Adair’s point.

- [33] I shall deal with the second and third points together. Mr. Adair submitted that in the current case the principle of **Henderson v Henderson** applies. Wigram VC held that:²⁸

“where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

- [34] Briefline was invited to join in the arbitration and, he submits, could and should have agreed to do so. The issue of beneficial ownership could then have been determined by the arbitrators. Given these factors, under the rule in **Henderson** Briefline was now estopped from trying to revisit that issue.

- [35] A third party, who was not involved in earlier litigation before the courts, can be subject to the rule in **Henderson: Aldi Stores Ltd v WSP Group plc**.²⁹ However,

²⁸ (1843) 3 Hare 100 at p 115.

²⁹ [2007] EWCA Civ 1260, [2008] 1 WLR 748.

care needs to be taken in applying this principle where the earlier dispute was resolved by arbitration.

[36] In **Michael Wilson & Partners Ltd v Sinclair (Emmott, Part 20 Defendant)**,³⁰ the claimant, MWP, had brought an arbitration claim against Emmott seeking recovery of certain shares said to have been a bribe paid to Emmott. Sinclair was not a party to the arbitration and had refused an invitation to join the arbitration voluntarily. The arbitral panel held that Emmott had not received the shares as a bribe and that he held them on behalf of Sinclair. In the subsequent litigation MWP sought to recover the shares from *inter alia* Sinclair on the basis that he had assisted Emmott in obtaining a bribe.

[37] At first instance, Teare J struck out this part of the claim as an abuse of process on the basis that MWP was seeking to go behind the arbitration award.³¹ The Court of Appeal allowed the appeal. Simon LJ, giving the judgment of the Court, held:

“67. ...There is no ‘hard edged’ rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process. The Court is concerned with an abuse of its *own* process; and there are abundant references in the authorities to the dangers of setting limits and fixing categories of circumstances in which the court has a duty to act so as to prevent an abuse of process.

68. I agree with Reyes J’s observation in the **Parakou** case³² that, although a Court will be cautious in circumstances where the strike out application is founded on a prior arbitration award, that caution should not inhibit the duty to act in appropriate circumstances. I would also add my agreement with Teare J’s observation at [50] of his judgment that it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process.

69. In my judgment the real argument is whether the present case is one of those rare cases...”

The Court of Appeal proceeded to hold that it was not.

³⁰ [2017] EWCA Civ 3, [2017] 1 WLR 2646.

³¹ [2012] EWHC 2560 (Comm), [2013] 1 All ER (Comm) 476.

³² *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd* [2011] 2 HKLRD 1 at [173].

[38] In my judgment there are three relevant factors in the current case. Firstly, the arbitration claim was brought by Mr. Falin, not by Belfast or its privy, Briefline. Secondly, the issue between Mr. Falin and Belfast had to be arbitrated, because that is what the memorandum and articles of Belfast provided. Briefline always made it clear that it reserved its right to litigate. Thirdly, the arbitral panel were not concerned with the beneficial ownership of the shares, but solely the removal of Mr. Falin from the register of shareholders and the validity of the resolution of 20th March 2019.

[39] This last point was recognised by the arbitral panel itself. In its award it said:

“[79] The rectification case initially advanced by Mr. Falin has been withdrawn. The Tribunal is not being asked... itself to determine any question of ownership [of the Shares]. Rather, the Tribunal is being asked to issue a declaration that the 20 March Resolution was unlawful and ineffective in removing Mr. Falin from the Register of Members. That is a very narrow point upon which, as the Tribunal explains below, BVI law is clear.

[80] To the extent that there is a dispute as to ownership, that remains alive. It is open to Briefline, if it chooses to do so, to advance that case. It was invited to do so in this arbitration and declined to do so (as it was entitled to do)... The Tribunal was advised, during the course of the evidential hearing, that Briefline intends now to take such action. It remains to be seen whether it does so. If it does, the question of ownership (and the attendant disputes of fact) will be resolved by the court and not by this Tribunal.”

[40] In order to find **Henderson v Henderson** abuse of process in the current case, I would have to find that Briefline should be prevented from exercising its right to have its claim litigated before the Courts in circumstances where the dispute as to beneficial ownership was not, and in the absence of a separate agreement could not have been, the subject of the reference to arbitration: see **Lincoln National Life Insurance v Sun Life Assurance Co of Canada**³³ and **Spencer Bower & Handley**

³³ [2004] EWCA Civ 1660, [2006] 1 All ER (Comm) 675 at [41] to [44] (Mance LJ).

on Res Judicata.³⁴ In my judgment in the absence of special circumstances it is not abusive for a party to refuse voluntarily to become a party to an arbitration where the arbitration is not determining the issue which that party wishes subsequently to litigate. There are no special circumstances in the current case which would make the current litigation abusive. In my judgment this is not one of the rare or very rare cases where a refusal by a non-party to join an arbitration is abusive.

[41] There is also a subsidiary point made by Mr. Thompson QC, that the claim for rectification of the register of shareholders was not arbitrable. This is true. Only the Court can rectify the register: see **Sempacher Foundation v Lark Services Inc and others**.³⁵ Although this also points to the current proceedings not being an abuse, it is in my judgment of little weight. The issue of beneficial ownership was arbitrable. The Court would order rectification to give effect to any arbitration award declaring the beneficial ownership of shares.

[42] Accordingly, the abuse of process allegation in para 7 of Mr. Falin's application fails.

Strike out

[43] I turn then to the strike out application. It will be recalled that in my June judgment I held at paras [47] to [49] that Briefline had not shown on the pleadings (as they then stood) a viable claim that it was entitled to sue under the Transfer Back Agreement. In particular, I held that Mr. Zotov could not have been acting on behalf of Briefline, when the agreement was reached at the Matryoshka restaurant.

[44] Mr. Falin has now served a detailed defence. At para 31, he pleads:

"A number of meetings took place between Mr. Zotov and Mr. Falin during the autumn of 2018 before the Transfer Back Agreement was finally concluded orally between Mr. Zotov and Mr. Falin, on a date which was no later than 27th November 2018, during a lunch at the Matryoshka restaurant attended by Mr. Zotov, Mr. Falin and Ms. Sergeeva. Mr. Falin concluded the Transfer Bank Agreement with Mr. Zotov because it represented his best chance of recovering assets that he had been forced to hand over [to]

³⁴ 5th Ed (2019) at paras 8.05, 8.19 to 8.23 and 8.27.

³⁵ BVIHC (COM) 2018/0027 (determined 17th January 2020) (Farara J (Ag)) at [250] and [258].

Mr. Zotov as a result of the deceit and illegitimate financial pressure exerted on him and pleaded.... above.”

- [45] In the following paragraph, the defence asserts that the shares in Belfast were to be transferred to Mr. Falin for a year, so that ZHDA could be “removed from the Belfast Structure”. The defence pleads that Mr. Falin would procure that 37.3 million roubles would be paid to Mr. Zotov’s nominees.
- [46] In short, the defence agrees that the Transfer Back Agreement was made; and that it was an oral agreement. It asserts that Mr. Zotov and Mr. Falin were the parties to it. The case put forward on Briefline’s behalf is also that the Transfer Back Agreement was made and that it was an oral agreement. It also asserts that the human beings who did the relevant talking were Mr. Zotov and Mr. Falin. It is common ground that the agreement was concluded at the Matryoshka restaurant. The date it was made was originally in dispute, but it is now agreed that it was made in November.
- [47] The terms of the Transfer Back Agreement are hotly disputed, but the terms of an oral agreement can rarely be determined summarily. Likewise allegations of oral misrepresentations can seldom be decided summarily.
- [48] In my June judgment I held that the facts, as then pleaded, did not show an arguable case that Briefline was a party to the Transfer Bank Agreement. The re-amended statement of claim is proposed to remedy this defect. It does this in three ways. Firstly, it is said (in para 4C) that Mr. Zotov was the undisclosed agent for Mr. Khorkov, when Mr. Zotov was at the Matryoshka restaurant in November 2018. On this basis, both Mr. Zotov and Mr. Khorkov can sue as claimants on the Transfer Back Agreement. Secondly, the ultimate beneficial owner of Briefline is said now to be Mr. Thorstenn in place of Mr. Khorkov: see para 1(4). Mr. Thorstenn has thus inherited the benefit of the Transfer Back Agreement and was an appropriate claimant.

[49] Thirdly, the new para 7C pleads:

“Mr. Falin was well aware of the fact that Briefline was the new shareholder of the Shares and made no objection to and agreed to its interposition for the purposes of, and agreed that it would be or become a party to, the Transfer Bank Agreement. Further or alternatively, Briefline became a party to the Transfer Back Agreement by novation.”

[50] I turn then to consider whether these proposed amendments meet the objections, which I held were valid objections, to the claim as originally pleaded. In my judgment, they do. It is true that there are inconsistencies in the various cases run. For example, if there was a novation of the Transfer Back Agreement to Briefline, then none of the three men proposed as additional claimants would have a claim under that agreement. Equally, I noted the evidential weaknesses of the case for saying that Mr. Thorstenn was now the ultimate beneficial owner of Briefline. Nonetheless, it is perfectly normal for cases to be pleaded in the alternative. In my judgment, the proposed re-amendments to the statement of claim cover all the likely factual permutations as they might come out at trial. Together, they plead a viable case in law.

[51] Under CPR Part 20, I have a discretion whether to allow an amendment. I have to apply particularly the considerations set out in CPR 20.1(3). The application to re-amend is made reasonably promptly. There is no prejudice to the defendants by it. There would be prejudice to Briefline and the proposed additional claimants if the re-amendments were not permitted. No question of losing a trial date arises; there has not yet been the first case management conference. Looking at matters in the round, this is a plain case for allowing the proposed re-amendments.

[52] This is subject to one minor point. At present the prayer of the draft pleading still refers to “the claimant” (singular). This needs to be corrected to “the claimants and each of them” with consequential changes in the body of the prayer. I will initial a resubmitted draft, which can be attached to the order.

[53] I have not forgotten that there is also the summary judgment application in respect of the two matters in para 9 of Mr. Falin's application. As I remarked in the course of argument, the facts of this case are "murky". An oral agreement where the precise terms are in dispute will often not be capable of summary determination. The proposed re-amendments to the statement of claim deal with the possible permutations on standing, so para 9(1) of the application falls. Likewise, the permutations in respect of beneficial ownership cover the factual possibilities under para 9(2). This assumes of course that the claimants can establish their version of the terms of the Transfer Back Agreement, but that is not the subject matter of the summary judgment application.

[54] I do not consider that the claimants' case, as now put forward in the re-amended statement of claim, is fanciful. Under CPR 15.2(a), I find that the claimants have a realistic prospect of success on their claim (as now formulated). Accordingly, I dismiss the summary judgment application.

Conclusion

[55] Subject to the minor amendment to the prayer, I grant Briefline's application to re-amend its claim form, to re-amend its statement of claim and to add Mr. Khorkov, Mr. Zotov and Mr. Thorstenn as additional claimants. I dismiss Mr. Falin's application. I shall hear the parties on costs and any other consequential orders.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar