Neutral Citation Number: [2017] EWCA Civ 315

Case No: A2/2015/4329

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF FI CALL LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006
MR JUSTICE HILDYARD
10850 of 2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/17

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LADY JUSTICE BLACK
and
SIR CHRISTOPHER CLARKE

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Between :

(1)	**APEX GLOBAL MANAGEMENT LIMITED**	**Appellants /**
(2)	**FAISAL ABDUL HAFIZ ALMHAIRAT**	**Defendants**
	- and -	
	GLOBAL TORCH LIMITED	**Respondent / Claimant**

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Al Mustakim Esq and Daniel Searle Esq (instructed by **Capital Solicitors LLP**) for **Apex Global Managment Limited and Faisal Abdul Hafiz Almhairat**
Justin Fenwick Esq QC, Daniel Saoul Esq and Michael Ryan Esq (instructed by **Mishcon de Reya LLP**) for **Global Torch Limited**

Hearing dates : 30 November 2016

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Approved Judgment

Lady Justice Gloster :

Introduction

1. This is an appeal by Apex Global Management Limited ("the second appellant") and Mr Faisal Abdul Hafiz Almhairat ("the second appellant") (collectively "the appellants") against a judgment of Hildyard J ("the judge") dated 30 November 2015 ("the stay judgment"). By that judgment, the judge refused to grant a stay of execution in relation to a previous judgment against the appellants in favour of Global Torch Limited ("the respondent") handed down by the judge on 11 November 2015 and reported at [2015] EWHC 3269 (Ch) ("the main judgment").

2. At the hearing of the appeal we dismissed the appeal with our written reasons to follow thereafter. These are my reasons for dismissing the appeal.

Background and procedural chronology

3. The background to this matter is set out by the judge in the main judgment.

4. The events relevant to the present appeal are as follows:

   i) In March 2011 a Mr Abdulrahman Al Shehri had purchased shares in Fi Call Limited ("Fi Call") for $16.7 million, under a share purchase agreement which I shall refer to as the "the SPA". The entirety of the $16.7 million consideration was paid to the first appellant.

   ii) In December 2011 the first appellant and the respondent each presented a petition under section 994 of the Companies Act 2006. Each sought an order that the other party purchase their respective shares in Fi Call.

   iii) In June 2013 the appellants resisted a jurisdictional challenge by the respondent (and certain other parties), successfully arguing that all matters should be adjudicated by the English courts: see the judgment of Vos J (as he then was) in *Apex v FiCall* [2014] BCC 286.

   iv) In July 2013 the two section 994 petitions were consolidated by Vos J into a single set of proceedings.

   v) On 27 October 2014 the trial of the petitions was listed to start with an estimated length of 6 weeks (disclosure having occurred, witness evidence and expert reports having been exchanged). However, the trial was adjourned following the second of two eleventh-hour applications (the first of which was dismissed) by the appellants who asserted that they could no longer fund their participation in the trial and that the second appellant, Mr Almhairat, had fled the jurisdiction and was seeking asylum in a secret location. The adjournment was subject to strict conditions which included the provision by the appellants of important information relating to their assets and other material needed to verify the assertions made;

   vi) On 18 December 2014, following repeated non-compliance with the adjournment conditions and subsequent orders for disclosure and the provision

of information arising from the respondent's allegation that the court had been misled by the appellants in their application to adjourn the trial, an unless order was made against the appellants requiring compliance.

vii) On 9 January 2015 the appellants failed to comply with the unless order, their statement of case was struck out and they were debarred from the proceedings.

viii) On 26 – 28 January 2015 the trial of the respondent's counterclaim against the appellants took place; the appellants did not participate.

ix) On 11 November 2015 the judge handed down judgment. In short the judge found in the respondent's favour in relation to its petition and ordered the appellants to pay $6.7 million, plus interest, to the respondent in connection with the SPA. The judgment contained a number of damning findings in relation to the appellants' misconduct in the affairs of the joint venture company Fi Call.

x) On 25 November 2015 the appellants applied for a stay of execution in relation to the 11 November judgment ("the application").

xi) On 30 November 2015 the judge refused the application.

5. An important aspect of the cross-petition dispute between the parties was the SPA. The appellants and the respondent each respectively relied upon a version of the SPA which the other said was forged. Under the appellants' version, all of the shares sold to Mr Al Shehri belonged to the first appellant. Under the respondent's version, around 40% of the shares sold were the respondent's. The respondent argued that the appellants had failed to account to it in respect of the purchase monies received for its shares ("the Al Shehri claim").

6. By the main judgment the judge found, inter alia, that the respondent had shown that the respondent's version was the true version of the SPA. Consequently the Al Shehri claim succeeded: the appellants were under a liability to account to the respondent for 40% of the $16.7 million purchase price, i.e. $6.7 million.

7. The basis on which the appellants sought a stay of execution of this judgment was that the respondent's version of the SPA contained an exclusive jurisdiction agreement in favour of the courts of Saudi Arabia ("the jurisdiction clause"). The essence of the appellants' case – both in the application and on appeal – was that if the respondent's version was the true SPA, the jurisdiction clause should be given effect; in effect, once the judge reached this conclusion, he should have declined jurisdiction to deal with any other issues.

8. As I have said, the decision under appeal is the judge's refusal to grant a stay.

Submissions

9. The arguments developed by the appellants in their written submissions and by Mr Al Mustakim in oral submissions may be summarised as follows:

i) The judge was wrong to find that the application was too late. The appropriate time for the appellants to raise the issue of the jurisdiction clause was after the

judge had determined that the respondent's version was the true SPA, i.e. it was not necessary to do so beforehand.

ii) The judge erred in his approach to the question whether the jurisdiction clause should result in a stay. The judge was wrong to ask himself whether the jurisdiction clause posed an "insuperable bar" to the adjudication of the Al Shehri claim in the English courts. The correct approach was to recognise that the claim should be adjudicated in Saudi Arabia unless there were strong countervailing reasons. No such strong reasons were advanced and the judge did not identify any.

iii) The judge was wrong to find that the jurisdiction clause did not apply to the Al Shehri claim as a matter of construction.

10. On behalf of the respondent, Mr Justin Fenwick QC advanced the following arguments in response to these three challenges to the judgment:

i) On timing: it was too late to challenge jurisdiction. If the appellants had wished to rely on the jurisdiction clause, they should (at the very least) have reserved their position at the outset of the litigation.

ii) The judge's approach to the jurisdiction clause was the correct one, and the decision to refuse to grant a stay of execution was a faultless exercise of discretion.

iii) As to construction, on a proper reading the jurisdiction clause did not apply to the Al Shehri claim.

11. Mr Fenwick advanced six further arguments as to why the application should have failed, which would be relevant if this court decided to consider the exercise of discretion afresh:

i) The appellants had no standing to bring the application as they had been struck out and debarred from defending these proceedings.

ii) Independently of any objections regarding delay per se, the appellants had submitted to the jurisdiction of the English court in respect of the Al Shehri claim and had waived reliance upon the jurisdiction clause.

iii) The unconscionable and dishonest conduct of the second appellant weighed against a stay, which would require the respondent to engage in further litigation.

iv) A stay in favour of the courts of Saudi Arabia would be perverse, given the second appellant's position that he could not obtain justice there and in the total absence of any indication that the appellants would submit to the jurisdiction of the Saudi courts.

v) A stay would be pointless, given that there was no indication that the appellants have any defence to the Al Shehri claim.

vi) It would be entirely impractical and procedurally inappropriate to hive off the Al Shehri claim when there were related, overlapping issues which fell to be determined (and, indeed, have now been determined) by the English courts.

12. Finally, Mr Fenwick relied upon a general consideration of the other circumstances of the case.

Discussion and determination

(i) Timing

13. It was common ground that CPR Part 11 was in principle applicable to an application to stay proceedings on the basis of the jurisdiction clause. Prima facie, this requires any such application to be brought "within 14 days after filing an acknowledgement of service" (CPR r. 11.1(4)(a)). A party who fails to do so is deemed to have accepted that the English courts have jurisdiction.

14. However, it was also common ground that it is possible to make a late application for a stay in certain circumstances. The issue of what circumstances would permit a late application for a stay of proceedings has been considered in a number of recent cases.

15. In *Texan Management v Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46, Lord Collins gave the judgment of the Judicial Committee of the Privy Council and concluded:

> "77. To summarise, the overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under EC CPR r.9.7/English CPR Part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction or EC CPR r.26.2(q)/English CPR r.3.1(2)(f)."

16. Subsequently, in *Zumax Nigeria Limited v First City Monument Bank Plc* [2016] EWCA Civ 567, Lord Justice Kitchin confirmed that – contrary to certain observations of Lord Collins in *Texan Management* – an application for an extension would be treated as an application for relief from sanctions:

> "27. Nevertheless, it has now been confirmed by the decision of this court in *Salford Estates (No 2) Ltd v Altomart Ltd* [2015] 1 WLR 1825 that an application for an extension of time for compliance with the rules falls to be decided in accordance with the same principles as an application for relief from sanctions, and that is so even if the rule in issue does not itself prescribe a sanction for its default."

This has been followed by Mr Justice Hickinbottom in *Le Guevel-Mouly v AIG Europe Limited* [2016] EWHC 1794 (QB) (at [34]), and must be regarded as correct in this court.

17. It follows that whether the appellants should be permitted to make a late application for a stay falls to be determined in accordance with *Denton v TH White* [2014] 1 WLR 3926. Otherwise they will be taken to have submitted to the English courts' jurisdiction.

18. In my judgment the application of those familiar principles clearly results in a refusal of the application. The failure of the appellants to make the application at the earliest opportunity was serious and significant. No good reason has been advanced for their failure to comply. In all the circumstances, it was undoubtedly just for the judge to refuse the application.

19. To elaborate on this:

i) The proper time at which the appellants should have made an application regarding the jurisdiction clause was when the terms of the version of the SPA upon which the respondent sought to rely were first known to the appellants. At that point the appellants would have known that there was a possible issue as to the English courts' jurisdiction, which they might (or might not) have wanted to raise.

ii) At the very latest (and on the favourable assumption that the appellants were not aware of the jurisdiction clause at the start of their proceedings), this would have been when the appellants received the witness statement of Mr Al Shehri, around September 2012. The witness statement could not have emphasised the jurisdiction clause any more clearly. Mr Al Shehri exhibited a copy of the respondent's version of the SPA and said:

> "20. …… The key terms of the agreement are as follows: ……
> (f) It is governed by the laws of Saudi Arabia and the parties submit to the exclusive jurisdiction of the Courts of Saudi Arabia.
>
> ……
>
> 24. I have now been shown a faxed copy of a contract that Apex claims to be the share purchase agreement signed on the 29th March 2011 …… Such a document was never entered into or signed by me
>
> ……
>
> 25. Further there are several errors in this contract which clearly indicate to me that this contract is a forgery for example …… (k) this contract does not specify that the contract is subject to the exclusive jurisdiction of Saudi Arabia.
>
> ……

> 29. …… As explained above the contract of 29 March 2011 expressly states that the Saudi Courts have exclusive jurisdiction."

iii) Of course, in light of the judge's conclusion that the respondent's version was the true version of the SPA, it is strictly the case that the second appellant in fact always knew of the jurisdiction clause.

iv) Various subsequent pleadings on behalf of each party also refer to the respondent's version of the SPA, including specific reference to the term containing the jurisdiction clause. Further, the jurisdiction clause was expressly referred to in a judgment of Vos J in June 2013.

v) Reference to the jurisdiction clause in evidence and pleadings did not however amount to the appellants raising the issue of jurisdiction. Nor was it in any sense incumbent upon the respondent to raise the issue of the jurisdiction clause, since the appellants had every opportunity to do so if they wished to take the point. Just as it is open to parties simply to ignore an exclusive jurisdiction agreement in a contract agreed to be valid and binding, it appeared that the parties here were content to ignore a potential issue as to jurisdiction.

vi) I therefore reject the appellants' submission that the proper time for them first to have made any application in relation to the jurisdiction clause was after the judge had handed down judgment. The appellants' essential proposition in this regard was that, since they were contending that the respondent's version of the SPA did not exist at all, they could not make any application which contemplated its validity.

vii) This proposition is wrong. It was open to the appellants to seek to reserve their position in relation to jurisdiction, even whilst disputing that the true contract contained any such jurisdiction clause. Such a position would have catered for the possibility that the court concluded, contrary to appellants' primary case, that the respondent's version was the true version of the SPA. At the very least, that would have alerted the respondent and the court to a possible issue as to jurisdiction, in the event that the contract turned out to be the respondent's version of the SPA.

20. I also reject the appellants' submission that the decision of the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 supports their position:

i) So far as is relevant to the present appeal, in *Fiona Trust* Lord Hoffmann distinguished at [17]-[18] between challenges to a contractual agreement which did not attack an arbitration clause and challenges which did. The former category included a claim to rescind the agreement. The latter category included where "one of the parties claims that he never agreed to anything in the document and that his signature was forged"; this is obviously the position of the appellants in this case.

ii) It was common ground that *Fiona Trust* was equally applicable to exclusive jurisdiction agreements.

iii) The syllogistic conclusion is that the appellants' case in relation to the SPA was attacking the jurisdiction clause.

iv) Thus far the analysis is uncontroversial. Where I depart from the appellants is the suggestion that, 'therefore', the appellants need only raise the jurisdiction clause once their case has been shown to be entirely wrong. This is a complete non sequitur. *Fiona Trust* identifies which allegations will attack an exclusive jurisdiction agreement – but it simply does not bear on the question of when that attack must be raised.

21. I am not attempting to prescribe what a party should do, in any given case, where it disputes the authenticity of a contract which contains an exclusive jurisdiction agreement. It is sufficient to say that it was not permissible in this case for the appellants to have remained silent about what they claimed was the effect of that clause until after judgment had been given – that judgment having proceeded upon the appearance of no (extant) issues as to jurisdiction. The obvious but fundamental point is that challenges to jurisdiction must be made as early as possible.

22. In short, in my judgment the appellants' lateness in making an application by reference to the jurisdiction clause is dispositive of the appeal. The judge need not have even considered the substance of the application for a stay. All that I say below is merely by way of addition, given that the issues were argued at some length before us.

(ii) The correct approach to exclusive jurisdiction agreements

23. There was no real difference between the parties as to the correct test to be applied. This was unsurprising, given that the approach of the English courts to exclusive jurisdiction agreements in favour of foreign courts has been well settled since *Donohue v Armco* [2001] UKHL 64.

24. It was also not disputed that the judge's decision on the point was a matter of discretion. This court should only interfere if the decision was wholly wrong.

25. The appellants' challenge was in effect that the judge's phraseology – that he had not been persuaded that the jurisdiction clause constituted "some insuperable bar" – reflected a doubly incorrect approach. First, it did not sufficiently locate the burden upon the respondent to displace the jurisdiction clause. Second, it did not reflect the high threshold that was required to do so.

26. I take the point that the judgment is not couched in the conventional language but, in fairness to the judge, he had indicated that he was happy to "elaborate further" should any party wish him to do so. The appellants made no such request. What the judge did say provides no reason to think that he departed from the approach of *Donohue v Armco*, which had been cited to him.

27. Moreover, an application of the relevant principles does undoubtedly lead to the conclusion that the application should be refused. The arguments made by Mr Fenwick, which I discuss in detail below, do indeed constitute strong reasons for determining the Al Shehri claim in England, notwithstanding the jurisdiction clause. I therefore do not consider the judge erred in his consideration.

(iii) Did the jurisdiction clause apply to the Al Shehri claim?

28. I start with the wording of the jurisdiction clause:

> "This agreement shall be governed by and construed in accordance with Saudi Arabian law and the parties hereto irrevocably submit to the exclusive jurisdiction of the Saudi courts in respect of any dispute or matter arising out of or connected with this agreement."

29. I rely upon, without repeating, the modern approach to the construction of exclusive jurisdiction agreements, derived from *Fiona Trust*. Accordingly, on this issue, I agree with the appellants that the Al Shehri claim would in theory fall within the scope of the jurisdiction clause. The basis of the claim was that the appellants had failed to account to the respondent for monies received in respect of the respondent's shares, which had been sold under the SPA. This, in my view, falls squarely within the scope of the jurisdiction clause.

30. Mr Fenwick did not seek enthusiastically to defend the judge's finding on this point. It is, for the other reasons I give, a largely moot point.

(i) The appellants' standing

31. I agree with Mr Fenwick that a defendant whose statements of case have been struck out and who is debarred from defending cannot be heard, save in exceptional circumstances, to make an application to stay the proceedings.

32. *Theverajah v Riordan* [2014] EWCA Civ 14 provides some support for this conclusion. There, the first, second and fourth defendants had been struck out and were debarred from defending the claim, by an order of Henderson J. At [25]-[26], Tomlinson LJ quoted with approval the submission of counsel for the claimant as to what this did or did not permit the defendants to do:

> "MR BAILEY: And there was some controversy as to what they can and cannot do. We say the position is remarkably straightforward, which is that they cannot do anything. They are not in a position to contest anything that we say; they are not entitled to participate. However, that does not mean, of course, I can have any order I want, I am going to have to demonstrate to the court on my pleadings and on my evidence that I am entitled to the relief that I seek."

33. However, it is not necessary in this case to express a concluded view on the issue of what a defendant can or cannot do if their statements of case are struck out and they are debarred from defending the claim. It suffices to say that, in the circumstances of this case, the debarring order was effective in my judgment to deny the appellants any locus to make an application for a stay.

(ii) Submission to jurisdiction

34. Whilst I have already made clear that the failure to raise the issue of jurisdiction until after judgment was itself sufficient reason to refuse the application for a stay, in fact

the appellants' conduct in this case went far beyond a (very) dilatory taking of the point. In particular, the appellants had vehemently contended for all issues to be determined in one set of proceedings in England, culminating in a judgment of Vos J in June 2013 to that effect.

35. Accordingly, in the specific circumstances of the case, I agree with Mr Fenwick's submission that the appellants have:

i) submitted to the jurisdiction of the English courts; and/or

ii) waived any right to rely upon the jurisdiction clause; the appellants' conduct constituted a clear representation to the respondent that the Al Shehri claim would be determined by the English Court, which was relied upon by the respondent pursuing the merits of its claim to judgment.

(iii) Unconscionable and dishonest conduct

36. I accept Mr Fenwick's submissions that the second appellant has acted unconscionably and, on several occasions, dishonestly during the course of this litigation. Some of these events were recited by the judge in his judgment given in December 2014, [2014] EWHC 4316 (Ch). For example, the judge found that it was "beyond argument that the court has proceeded on a false basis", advanced by the second appellant, in relation to the adjournment of the trial in October 2014: see [33].

37. I accept that, in a general sense, such factors may be relevant to the enquiry whether it is just to stay these proceedings to force the respondent to engage in repetitious litigation elsewhere. It would have been a factor which, if necessary, I would have taken into account, albeit not on its own a dispositive one.

(iv) Perversity of a stay

38. I also agree with Mr Fenwick that it would be perverse for the court to order a stay in circumstances where there is no real indication that the appellants would submit to the Saudi courts' jurisdiction, notwithstanding Mr Mustakim's assertion to that effect. The reality is that second appellant has previously given evidence that if he were to travel to Saudi Arabia he would be subject to wrongful arrest, imprisonment and torture. Despite repeated requests for confirmation of the point by the respondent's solicitors, the appellants' solicitors have not responded.

39. In such circumstances, the court cannot take account of the assertion that the appellants might obtain a more favourable result as to interest in the Saudi courts.

(v) Pointlessness of a stay

40. A retrial of the Al Shehri claim would appear to be a pointless exercise because:

i) On *res judicata* grounds the appellants cannot challenge the judge's conclusion that the respondent's version of the SPA was the true version.

ii) The appellants accepted that they had received the $16.7 million from Mr Al Shehri and have not remitted any to the respondent.

iii) No other defence to the Al Shehri claim has ever been suggested.

The outcome of any further trial would thus be a foregone conclusion.

(vi) Impracticality of a stay

41. It would be entirely impractical and inappropriate to stay proceedings:

42. In the absence of any reservations about jurisdiction, both parties had prepared for a full trial of the Al Shehri claim. The appellants were struck out only after the trial was supposed to have taken place, in late 2014. There is no doubt that the appellants had every opportunity to put in all relevant evidence and to make their case fully. Any further trial of the Al Shehri claim would be repetitious of that already undertaken before the judge.

43. The Al Shehri claim was itself part of a wider dispute involving other issues – some of which might well have had to be determined in English proceedings in any event. It was therefore quite appropriate for the Al Shehri claim to be adjudicated upon in that context, rather than being hived off for determination by a foreign court.

(x) Any other circumstances

44. Both parties quite properly referred to *The El Amria* [1981] 2 Lloyd's Rep 119 where Brandon LJ said that the court is to have regard to all the circumstances of the case when considering whether to grant a stay, including a list of factors which is now well known.

45. Whilst Mr Mustakim and Mr Fenwick each referred to a number of facts said to be relevant, it is sufficient merely to say that none displace my conclusion that the judge was right to refuse the appellants' application for a stay.

Conclusion

46. For the above reasons I concluded that the appeal should be dismissed.

Lady Justice Black:

47. I agree.

Sir Christopher Clarke:

48. I also agree.