Case No: HC-2013-000211

Neutral Citation Number: [2018] EWHC 3715 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 20 December 2018

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

THE HIGH COMMISSIONER FOR PAKISTAN IN THE UNITED KINGDOM

Claimant

- and –

(1) ~~PRINCE MUKARRAM JAH, HIS EXALTED HIGHNESS THE 8th NIZAM OF HYDERABAD~~
(2) PRINCE MUFFAKHAM JAH
(3) SHANNON CONSULTING LIMITED
(4) THE UNION OF INDIA
(5) THE PRESIDENT OF INDIA
(6) HILLVIEW ASSETS HOLDINGS LIMITED
(7) THE ADMINISTRATOR OF THE ESTATE OF HIS EXALTED HIGHNESS THE NIZAM VII OF HYDERBAD

Defendants/Interpleader Claimants

-and-

(8) NATIONAL WESTMINSTER BANK

Defendant/Stakeholder

Mr Khawar Qureshi Q.C. and Jonathan Brettler (instructed by **Stevenson Harwood LLP**) appeared on behalf of the **Claimant**
Hodge Malek Q.C. and Jonathan McDonagh (instructed by **Devonshires Solicitors LLP**) appeared on behalf of the **Second and Third Defendants/Interpleader Claimants**
Timothy Otty Q.C., Clare Reffin and James Brightwell (instructed by **TLT LLP**) appeared on behalf of the **Fourth and Fifth Defendants**/Interpleader Claimants
Eason Rajah Q.C. and Bryony Robinson (instructed by **Withers LLP**) appeared on behalf of the **Sixth Defendant/Interpleader Claimant**
The **Seventh Defendant** did not attend nor was represented

Hearing date: 20 December 2018

Approved Judgment

Mr Justice Marcus Smith:

Introduction: the proposed amendments

1. At this case management conference, I am required to determine various applications that are before me. The first of these concerns an amendment that the Claimant ("Pakistan") seeks to make to her Particulars of Claim. The Particulars of Claim have already undergone two rounds of amendments. It is now sought to re-re-amend the Particulars of Claim, as I shall continue to refer to them.

2. The amendments in question are set out in purple at paragraphs 22A to 27. I shall not read them out but will take them as read.

3. The broad nature of the amendments is focused on what is said to be the dishonest conduct and unclean hands of the Fourth and Fifth Defendants (collectively, "India"). It is said that by virtue of such dishonest conduct and unclean hands India is not able to advance the claim that she makes in relation to the fund.

4. The nature of the dishonest conduct and unclean hands alleged by Pakistan is twofold. First, it is said that India dishonestly denied her entitlement or claim to the fund (the "Fund"), the claims to which are presently being litigated before me, in the course of litigation some years after the Fund was constituted. The Fund was constituted, I remind myself, in 1948, and the first episode of dishonest conduct or conduct lacking clean hands is said to arise in the course of correspondence between solicitors in May and June of 1954.

5. The second form of dishonest conduct or unclean hands that is asserted by Pakistan relates to an assignment which took effect over a decade later (the "Assignment"), whereby a claim to the Fund was assigned to India by other Defendants to these proceedings. It is said that, in order to procure this Assignment, India exercised duress over these other Defendants, so as to cause the Assignment to take place. Again, self-evidently, these events take place some years after the actual establishment of the Fund.

6. I should note, for the record, that both of these allegations of dishonest conduct or conduct involving unclean hands are factually contentious and are not accepted by India.

7. The interesting point that arises out of these pleadings is that Pakistan seeks to rely upon *ex post* events, that is to say events that have occurred after the facts which give rise to the claims in issue have occurred, in support of the defence she seeks to plead. By the "claims in issue", I mean the claims to the Fund.

The claims to the Fund

8. It is necessary, before I consider the amendments in detail, to understand how it is that

the claims before me arise. As I say, this is a claim to the Fund, which came into being in 1948.

9. The first, and primary, claim that needs to be determined is Pakistan's claim over the Fund. Should that claim succeed, then any claim the Defendants might have to the Fund will fall away. Pakistan will be entitled to a declaration of title in its favour to the Fund.

10. On the other hand, should Pakistan succeed in its alternative case and successfully assert a limited form of sovereign immunity, the claim will be stayed and no-one will obtain the Fund.

11. A third possibility arises if Pakistan fails in both her primary and alternative cases. In this contingency, the Defendants will have an entitlement to the Fund which will arise in the following way: the 7th Nizam of Hyderabad will have been the beneficial owner of the Fund in 1948, the Fund having been held on trust for him. I stress beneficial owner because on this hypothesis the monies will have been held on trust for the 7th Nizam. All of the Defendants claim through the interest of the 7th Nizam.

12. Until relatively recently, that outcome would have triggered the start of a further dispute between the Defendants as to which of them was entitled to the Fund. Pakistan – in this contingency – would not be involved, her claim having been disposed of.

13. It is unnecessary to consider the respective claims of all of the Defendants, but it is appropriate that I consider the claim advanced by India. Referring to India's Amended Defence, paragraph 6 asserts that India's entitlement arises by virtue of an assignment dated 5 July 1965, which is then further described in paragraph 70 of that pleading. (I should point out that the Assignment referred to in paragraph 5 above is a different, and later, assignment.)

14. As regards the position that pertained before this assignment, paragraph 36 refers to the 1954 action that was commenced in order to establish who was entitled to the Fund. These were interpleader proceedings. Paragraph 36 pleads that the 1954 action was commenced and was throughout pursued with the concurrence of the 7th Nizam at the expense of India, on the directions of India, and with the intention to recover the fund for the benefit of India and not for the benefit of the 7th Nizam personally.

15. It is no longer necessary to determine the respective entitlements of the Defendants to the interest of the 7th Nizam (assuming it to exist), unless Pakistan succeeds in her application to make the amendments to her pleadings. The reason an exploration of the respective entitlements of the Defendants is unnecessary is because of a settlement reached between the Defendants earlier this year, in May/June 2018.

16. The terms of that settlement are confidential to the parties and are unknown to Pakistan and the court. The consequence is that the Defendants, on whatever terms they have agreed, have settled their differences, with the result that the only question before the court when this matter comes to trial next year is the entitlement of Pakistan versus the claims of the various Defendants, now properly to be regarded as a single group.

17. It is right also to point out that, as a result of this settlement, the various pleas of the various Defendants as against each other were abandoned. They became unnecessary because of the settlement and they were deleted by way of amendment from the pleadings.

18. However, because the content of these averments was said to be of potential significance to Pakistan, Pakistan's interest in these averments was protected in the following way. By an order sealed on 7 November 2018, the Defendants were permitted to delete by way of amendment the averments that had become redundant because of the settlement. However, by paragraph 2 of that order, Pakistan remained entitled to rely upon the truth of these averments, should she wish to do so. Equally, Pakistan's entitlement to seek further disclosure, using the procedure set out in paragraph 3 of the order, was also confirmed.

19. The purpose of these provisions was to ensure that Pakistan was not prejudiced by the withdrawal, by the Defendants, of the averments rendered unnecessary by the settlement.

The new point sought to be pleaded by Pakistan

20. I turn then to the nature of the "defence" (as I think it is best described) that Pakistan now seeks to advance. That defence is, as I have noted, based upon India's alleged dishonest conduct and unclean hands.

21. The parties are essentially in agreement as to the relevant propositions that apply. In *Grobbelaar v. News Group Newspapers* [2002] 1 WLR 3024, Lord Scott said this at [90]:

> "It is a long-established practice that an equitable remedy should not be granted to an applicant who does not come before the court with clean hands. The grime on the hands must of course be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled and whether there is or is not a sufficiently close connection must depend on the facts of each case."

22. More recently, in *Fiona Trust v. Privalov* [2008] EWHC 1748 Com, Andrew Smith said this, beginning at [18]:

> "As to what constitutes a sufficiently close connection for the maxim to apply so as to deprive an applicant of equitable relief that he would otherwise have been granted, the test commonly cited is that of an immediate and necessary relation to the equity sued for, which was propounded by Eyre CB in *Dering v. Earl of Winchelsea* [1787] 1 Cox 818, 319-320 ER, Vol 29, page 1184:
>
> "…if the defendant's submission relying upon the plaintiff's misconduct can be founded on any principle, it must be that a man must come to a court of equity with clean hands. But when this is said, it does not mean a general depravity. It must have an immediate and a necessary relation to the equity sued for. It must be a depravity in a legal as well as a moral sense.""
>
> Omitting the citation of authority and continuing with Andrew Smith J's judgment:
>
> "I confess that for my part I find it difficult to understand what precisely is meant by the stipulation that there must be a necessary connection between the conduct and the equity sued for.

As Mr Popplewell acknowledged during argument, the question whether the maxim should apply to deprive an applicant for relief will often arise when trickery on the part of the applicant, designed to promote his case, has been detected and so in the event the misconduct does not assist him to advance his case. But nevertheless, leaving aside the question of clean hands, he would be granted equitable relief. In such circumstances, it cannot be that the applicant needed to succeed in this trickery in order to obtain equitable relief. It might be that the connotation of necessary is that the misconduct is inherently directed towards the equitable relief sought. But what is clear from the authorities is that there must be a sufficiently immediate relationship between the misconduct and the relief."

23. In this case, declarations are sought by all parties as to the respective entitlements to the Fund created in 1948. The books are unclear as to how the remedy of declaratory relief is to be classified. Pakistan, for her part, asserts that the relief is an equitable one, to which the "clean hands" doctrine applies. That does not appear from the books to be an entirely uncontroversial proposition: in most, the declaration appears to be treated as a form of *sui generis* relief, not equitable relief.

24. However, to refuse Pakistan's application for permission to amend on the ground that a declaration is not equitable relief, such that the "clean hands" doctrine cannot apply, would be wrong. Neither the proper classification of the nature of declaratory relief nor the ambit of the "clean hands" doctrine were fully argued before me, and it seems to me that this would be an unduly technical point on which to refuse Pakistan's application to amend. I proceed on the basis that the clean hands doctrine can, in principle, be invoked in this case.

25. The defendants all resist the amendments being moved by Pakistan, on grounds that I shall now consider.

The amendments are factually unarguable

26. The Defendants contend that the averments on which the plea of dishonest conduct and unclean hands is based are factually unarguable. That is a bold contention. In an ordinary case, a court will proceed on the basis that, for the purposes of an application to amend, the factual statements in a draft pleading are assumed to be true, and that the arguability or otherwise of the plea is determined on the basis of that assumption.

27. In this case, as I have noted, there are two bases on which it is said that India has acted dishonestly or with unclean hands. There are described in paragraphs 4 and 5 above. The first relates to India's conduct in the course of litigation in 1954; the second relates to the suggestion of duress in relation to the Assignment.

28. So far as the second of these two bases is concerned, that is to say whether the Assignment was or was not procured by duress, it seems to me that it is appropriate that I do assume that what is pleaded is factually accurate. It cannot be said that the averment is factually unarguable. I note, in passing, that Pakistan may well have difficulties in making good this averment. Although it is true that Pakistan will be able to rely upon the provisions of paragraph 2 of my order sealed 7 November 2018, and can rely upon the averments previously made in the pleadings of the Defendants, those averments go both

ways: the averments in some pleadings assert duress, but in other pleadings (notably, India's) the existence of any duress is denied. It may be that Pakistan would need to adduce evidence, perhaps including the evidence of the Second Defendant, who is an elderly gentleman and who – but for the proposed amendments – would not have to give evidence. I will consider the effects of the proposed amendments on the witness in question in due course. However, for present purposes, in terms of considering whether these proceedings have a real prospect of success, I am – so far as the second set of allegations relating to the Assignment are concerned – prepared to proceed on the basis that the duress allegations are true, even though they are disputed and even though I can foresee significant difficulties in Pakistan making good these allegations at trial.

29. That approach does not, however, pertain so far as the anterior allegation is concerned. It is said in relation to that allegation that India, through her solicitors, lied; and that those lies were deliberate and dishonest. The document that is relied upon in support of that contention is a letter dated 11 June 1954. That letter is explicitly in response to an earlier letter dated 8 June 1954. I say that because the opening lines of the later letter of 11 June 1954 say this:

> "We have to acknowledge receipt of your letter of the 8th instant, but we have received no communication from either Mr Rahimtoola or Messers Sanderson, Lee & Co on his behalf as to the attitude they have adopted, although we have written to Mr Rahimtoola on the matter."

30. That paragraph makes it explicitly clear that this letter is in response to an earlier letter dated 8 June 1954. The letter of 8 June 1954 is a letter written to the firm of solicitors then acting for the India, Messrs Stanley Johnson & Allen, by the firm of Freshfields on behalf of the bank then holding the Fund, Westminster Bank. That letter, so far as material, says this:

> "In the event of proceedings becoming necessary, our clients have been advised that the matters in dispute could probably most simply be disposed of were our clients to seek relief from the court by way of interpleader proceedings. We are therefore instructed to ask you whether in this event you would be prepared to accept service of an interpleader summons on behalf of both HEH The Nizam and of the Government of Hyderabad since you state you are acting on behalf of each of them. Perhaps you could also let us know whether you are acting for the State of India and whether any claim adverse to that of your clients is made by that state."

31. The letter in response (that of 11 June 1954) says this in its two last paragraphs:

> "We are obliged by the suggestion you make regarding interpleader proceedings and when the attitude which is to be taken by the other parties has been more fully ascertained we will take our counsel's view as to the suggested course.
>
> The State of India, for whom we act, have no interest or make no claim to the funds in question."

32. It is said by Pakistan that this last sentence is a dishonest lie. I cannot accept that proposition. Even reading the letter in the most generous way in favour of Pakistan's case (which is not the proper way to read such letters, for one should not strain to find dishonesty), I cannot see how there is any statement by the State of India beyond

an indication that, whilst she is acting on behalf of HEH The Nizam and the Government of Hyderabad, as asserted in the 8 June letter, she is herself advancing no claim to the funds to be asserted in the interpleader proceedings.

33. Now, Pakistan says that I should not regard this as a statement of what India's position was in interpleader proceedings. Rather, I am invited to read the sentence as a general statement of India's position in relation to the Fund. In short, that India had no "interest" – legal or otherwise and related to the interpleader or otherwise – in the Fund. That, I am afraid, is a construction of these communications that I find unarguable. The whole point of the correspondence was to work out how the disputed claim or the various claims to the disputed Fund were to be resolved. Very sensibly, an interpleader arrangement was proposed by Freshfields on behalf of the bank, and very sensibly also Freshfields sought to ascertain who the potential parties to that interpleader might be. That was the purpose of the query by Freshfields to Stanley Johnson & Allen as to whether India was asserting any claim to the Fund. The answer from India's solicitors was unequivocal, as it had to be, because an equivocal answer would inevitably have resulted in India's joinder to the interpleader proceedings.

34. The whole point of the 11 June 1954 letter is that India was stating, as at that time, that it has no interest and no claim to the funds in question. That is the context and it seems to me that, as at the date of this letter, that statement was correct as a matter of fact.

35. As is stated in India's pleadings, and as I have described in paragraphs 13 and 14 above, the claim that India asserted to the Fund (until the settlement) arose some years later than this exchange, by way of assignment.

36. Accordingly, I hold that the pleadings that Pakistan seeks to insert by way of re-re-amendment into her Particulars of Claim are to this extent factually unarguable: there is no proper factual basis for making the point. I accept that this is an unusual conclusion, but the fact is that the correspondence that I have been taken to is pellucid and capable of only one reading.

The amendments are unarguable as a matter of law

37. Next, the Defendants say that, even if, on the facts, the points that Pakistan seeks to make by way of amendment were capable of argument, they are in law unarguable. The proposed amendments lack what in any amendment must have, which is a real prospect of success. Therefore, Pakistan's proposed amendments should not be permitted to proceed.

38. Notwithstanding my conclusion in relation to Pakistan's pleading in relation to India's conduct in the litigation in 1954, I propose to consider whether both forms of dishonest conduct and unclean hands alleged by Pakistan pass this test.

39. It seems to me that the connection between the dishonest conduct and unclean hands alleged by Pakistan and the matters presently before the court is so tenuous that the conduct relied upon by Pakistan cannot possibly constitute conduct that is relevant for

purposes of the "unclean hands" / dishonest conduct defence.

40. I have explained the context in which the new points that Pakistan seeks to plead would arise. They would arise contingently and only after Pakistan's anterior claim to the Fund had been disposed of, and then only if that claim were disposed of in a certain way, i.e. so as to uphold the entitlement of the 7th Nizam to the Fund and to dismiss Pakistan's claim. In short, the points that Pakistan seeks now to plead can only arise were her claim to the Fund already to have been found to be unsuccessful.

41. Pakistan's contention that India comes to these proceedings with unclean hands seems to me to fail to acknowledge the contingent nature of India's (and the other Defendants') claims.

42. Let me explain the point in this way. Suppose, as one might have, a staged process for dealing with these two parts of the proceedings before me, with Part 1 dealing with Pakistan's claim to the Fund; and Part 2 dealing with the various Defendants' claims, assuming the 7th Nizam's entitlement to the Fund were to be upheld. Of course, were Pakistan to succeed in Part 1, the Part 2 litigation would be pointless and would never take place.

43. Assuming that Part 1 concluded by determining that the 7th Nizam was entitled to the Fund, where – one might ask rhetorically – is Pakistan's standing to make any argument or point in Part 2? The answer is that Pakistan would have no standing at all. The outcome of Part 1 would, on this hypothesis, have been that the 7th Nizam was the beneficial owner in 1948, and that Pakistan had no such entitlement. Pakistan's interest in the proceedings ends with the conclusion of Part 1.

44. The points that Pakistan seeks to make relate to subsequent claims of ownership to the Fund. They relate to the entitlement to the 7th Nizam's interest in the Fund (assuming such interest to exist). It seems to me that it is entirely wrong to seek to conflate an entitlement arising in 1948 with subsequent dealings arising in relation to, but entirely separate from, this starting point.

45. So even if there had been no compromise as between the Defendants, had Pakistan sought to take this point against India, I would have held it to be unarguable as a matter of law. There is simply no sufficient connection between the dishonest conduct or the unclean hands alleged by Pakistan and her claim in these proceedings.

46. The settlement concluded between the Defendants actually makes the position worse for Pakistan. As I have explained, the Defendants have compromised the disputes arising between themselves and now make common cause in relation to the arguments arising in Part 1. Part 2 will not happen, because the disputes comprising that part have been settled. What Pakistan seeks to contend, however, is that the effect of the settlement is that the other, *ex hypothesi* innocent, Defendants are deprived of an otherwise valid claim because of the conduct of India.

47. Pakstan's case is that the consequence of the settlement between India and the other

Defendants is that the other Defendants' claims are also affected by India's misconduct and that (assuming Pakistan's case is made out) their right to advance claims that they previously could advance has been lost. It seems to me that it would be a matter of grave concern were it possible to eliminate a perfectly proper claim by suggesting that a compromise between one party that is innocent of all allegations of dirty hands with another party who is said to have behaved with unclean hands can affect the interests of that innocent defendant.

48. Whether that is indeed the case is a matter on which I express no decided view. I have not seen the compromise agreement as between the Defendants. It was suggested by the Defendants that the effect of the compromise agreement was to create a right arising out of the compromise that was capable of assertion by each of the Defendants in these proceedings. In short, a Defendant's disputed entitlement to the 7th Nizam's interest in the Fund was translated into an agreed share of the 7th Nizam's interest. So it may well be that the contention advanced by Pakistan as to the effect of the unclean hands defence is incorrect, and that the compromise does not affect the interests of any Defendant other than India.

49. Given the conclusion that I have already reached, that is not a point that I need decide now. It does seem to me, however, that it is a clear indicator of a stretch too far that Pakistan is contending that the effect of unclean hands, in combination with the compromise agreement, is to deprive innocent parties of a claim. That, it seems to me, is a clear indication of an argument going too far.

50. In conclusion, the connection of Pakistan's allegations of unclean hands and dishonest conduct with the matters in issue before me is entirely absent. These allegations are entirely distinct and cannot be said to be connected with the central matter that is before the court, which is the respective entitlements of parties as at 1948.

The lateness of the amendments and other factors

51. The third point that is taken by the Defendants is that these amendments are being put forward very late in the day. Certainly, there is no reason why these amendments could not have been moved by Pakistan much earlier. The argument about duress, by way of example, was articulated in pleadings between the defendants in June 2015, over three years ago.

52. Had Pakistan desired to articulate an unclean hands argument in this case, then there was plenty of time in which to do so. The fact is that, were these amendments to be allowed, there would be a need to revisit the question of disclosure and one party, the Second Defendant, would in all probability be required to re-involve himself in the action (as a witness of fact), having avoided this necessity by way of the compromise with the other Defendants.

53. Neither of these points, I stress, is determinative in the case of this application. Had I been of the view that the amendments were legally and factually tenable, then the application would have been altogether more difficult to determine, not least because all

of the Defendants (and, indeed, Pakistan) have accepted that whilst the admission of these new points would cause considerable cost and difficulties for the parties, the trial date would not be prejudiced.

54. Accordingly, I do not regard these factors as being of any great moment. However, it does seem to me that, for the reasons that I have given, these amendments are not properly arguable and should not be permitted to be made.