IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

No.CL-2018-000650

[2019] EWHC 3518 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 15 November 2019

Before:

MR JUSTICE ROBIN KNOWLES

B E T W E E N :

(1) AAPICO INVESTMENT PTE LIMITED
(2) AAPICO HITECH PUBLIC COMPANY LIMITED — Claimants

- and -

(1) ABT INVESTMENTS (INDIA) PRIVATE LIMITED
(2) ABT AUTO INVESTMENTS LIMITED — Defendants

MR T. SMITH QC and MR R. PERKINS (instructed by Baker & McKenzie LLP) appeared on behalf of the Claimants.

MR L. EMMETT and MS A. STANSBURY (instructed by Fox Williams LLP) appeared on behalf of Defendants.

J U D G M E N T

MR JUSTICE ROBIN KNOWLES ::

This is a first hearing of the claimants' interim application for an anti-suit injunction to restrain proceedings in India.

1 The hearing is on notice to the two defendants, and one of the two defendants has a related challenge to the jurisdiction of this court. It is common ground between the parties that the matter will proceed to a fully effective hearing with a one-day estimate and that will mean a hearing in the first part of next year. That hearing, by agreement, will be a composite of a summary judgment application to be issued by the claimants and the substantive jurisdiction challenge by one of the defendants, the first defendant.

2 Mr Tom Smith QC and Mr Ryan Perkins, for the claimants, have indicated that the claimants are ready to give an undertaking to reassure the first defendant that its participation in that combined hearing will not be used as a concession on the jurisdiction question. The wording of that undertaking will be devised in the order that will follow this hearing.

3 The hearing today has involved helpful progress between the parties, although insufficient to resolve the matter at this stage. Some of the progress has been in relation to the forward procedure that I have just mentioned but, in addition, it is common ground that if the court's conclusion today is that the matter should qualify for an anti-suit injunction, that would be acceptable in the form of undertakings to the court from the defendants if they wished to offer undertakings in the same terms. Moreover, in the course of the hearing, the claimants have helpfully indicated, through Mr Smith QC, that 45 days' notice would be provided were it to become the case that a transfer of certain shares was proposed to be procured by the claimants between now and the hearing date next year.

4 The factual compass of the matter I will try to describe as shortly as possible, confining myself to those matters which are most essential for today's purposes.

5 The claimants are shareholders in the joint venture company known in these proceedings as SGAH. They are the shareholders alongside the second defendant, ABT Auto Investments Ltd. The second defendant and SGAH are both English companies. The second defendant's shareholding is slightly larger than that of the claimants. The claimants, however, have security for money lent in the form of a share charge supporting a guarantee - the share charge being over the shares of the second defendant in SGAH. The share charge is subject expressly to English law and jurisdiction.

6 SGAH, the joint venture vehicle, has certain subsidiaries. One of those subsidiaries is known as SACL, an Indian company. There is a shareholder agreement.

7 The parent of the second defendant is ABT Investments (India) Private Ltd., the first defendant. That is an Indian company. The first and second defendants have, higher up in the ownership structure, the figure of a Mr Mahalingham, although the information as to the up-to-date status of his ownership is information that may not be common ground between the parties, or the information on one side may not be identical to that on the other side.

8 There are certain other proceedings in the overall framework. This includes two arbitrations, one of which is brought against SACL by another entity named Sakthi Sugars. The other is an arbitration commenced by the claimants under the SIAC jurisdiction. But

the proceedings that are centre stage for today's purposes are, as I have mentioned, proceedings in India. These have been brought by the first defendant, and attack the share charge that, as I have indicated, is between the second defendant and the claimants. The first defendant has joined the second defendant, its subsidiary, as a defendant in the Indian proceedings.

9 In the Indian proceedings, as best one can tell and as sufficient for present purposes, a range of relief is sought by the first defendant, the heart of which is to precede any giving effect to the share charge agreement with the obtaining approval from the Reserve Bank of India.

10 That proposed first stage towards effectiveness of the share charge agreement is said to arise because of certain exchange control requirements in India. Mr Smith QC for the claimants has taken me to the provision of the Indian regulations in order, powerfully, to make the point that on a reading of those provisions, they do not apply in the circumstances of the present case. In the present case the charge is not granted by an Indian company, but by an English company, the second defendant, and it is to Indian companies that the relevant regulation is, on Mr Smith QC's submission, directed. Mr Laurence Emmett, leading Ms Alyssa Stansbury, argues that the provision contains wording that extends its ambit to what is described as a "step-down subsidiary", but there was a real limit to how far Mr Emmett was able to assist me in this regard, there being no definition of that term in the regulations as far as his current instructions go.

11 This hearing is an interim stage but I do record that I see the real force of Mr Smith QC's argument on the material and evidence currently available to me. The commercial context of course, putting aside the detail of that provision, is that in the present case one is seeing an Indian parent company seeking to challenge security (governed by English law and subject to English law jurisdiction) that its own subsidiary, an English company, has entered into. That is the type of initiative that at times has attracted an allegation of illegitimate collusive conduct between parent and subsidiary, designed to circumvent a jurisdiction clause, and it is precisely that allegation that is levelled by the claimants against the defendants in the present case. The combination of control, timing and nature of the exercise of bringing proceedings before the English court provides, submits Mr Smith QC, the proper basis for an inference of collusion, and reference is made on the authorities to the decision of Phillips J in *Mace (Russia) Ltd v Retansel Enterprises Ltd and SPB Renovation LLC* [2016] EWHC 1209 (Comm), and authority cited within that decision.

12 The matter of the anti-suit injunction is clearly the province of that allegation. It affects also the jurisdiction challenge because the analysis that the claimants would urge is that the second defendant, being an English company, is properly within the jurisdiction and, in circumstances where collusion is alleged between the first and second defendants, the first defendant becomes a necessary and proper party and thus the jurisdiction threshold is reached. Reference here is made to the decision of Blair J in the decision of *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA* [2011] 2 CLC 942, [2011] EWHC 308 (Comm), with which on this point the Court of Appeal plainly agreed.

13 Mr Emmett's skeleton argument for this hearing focused particularly on the threshold relevant for today's purposes being that of a serious issue. In the course of oral submissions, Mr Emmett developed his clients' position to say that where, as was a possibility within the range of things, a hearing became dispositive, then the threshold should increase to that of high probability. In saying what I am about to say, I do not intend to prejudge the consideration at greater length and with potentially fuller material that will be available to the court at the forward date for full hearing. I will briefly review the points that Mr

Emmett put at the centre of his argument, but let me record, subject to the qualification I have just given, that the test of serious issue is amply passed in my judgment, and were the test of high probability to be the one that I should be engaging today, at present I am also satisfied at that level too.

14 The argument of Mr Emmett stressed that in the Indian proceedings the first defendant was seeking to protect its own interests - those interests being in avoiding penalties under Indian legislation or regulation. I have already expressed such view as I feel able to at this stage in that regard. Mr Emmett added that it cannot be assumed that the issues in India are purely private law issues. I say no more in that regard than that I do not consider that aspect should cause me to contemplate allowing the defendants to progress Indian proceedings which they have initiated and which, in effect, bring the question of whether the Indian law provisions apply or not, closer rather than further away.

15 Mr Emmett's submissions urged that jurisdiction was not likely to be established before this court against the first defendant. This argument involved an analysis that said that as the second defendant, the English company, was prepared to give undertakings to the claimants to hold the ring between now and the future hearing, there was no issue between the claimants and the second defendant, and if there was no issue between the claimants and the second defendant, the first defendant would not be a necessary and proper party. I do not, with respect, consider that that gets round the case that the claimants are fully able to advance and which I think has the quality I have indicated, which is one of collusion. Mr Emmett urged that the second defendant does not have an economic interest in the matter, but I am not prepared to treat the defendants separately when looking at the question of economic interest in a commercial manner for present purposes.

16 There are obviously further aspects of the matter before it is appropriate to reach any conclusion that the claimants should have interim injunctive relief. I take these relatively briefly but I have considered them closely. One is the question of delay. It is the case that in either July or August the claimants were aware of what the defendants were doing, and the claim itself, however, was not issued until 22 October. I am not prepared as at today to treat that period of delay as too long or as insufficiently explained, as Mr Emmett would urge me to do. I do take into account that nothing of substance over that period has, on the face of it, happened in India in the meantime. The Indian proceedings, however, are about to reach, on the face of it, an important stage, or potentially important stage, on 20 November, that is next week.

17 There is of course the question of considering prejudice on both sides. On the claimants' side, it does seem to me that the prejudice that is involved here is the very real and essential prejudice of being deprived of the bargain that they had, an undisputed bargain, with the second defendant that their litigation would happen before this court and not before another court. Mr Smith QC adds further elements to his argument on this, and I do weigh those too, but the essential point is the one that I have mentioned.

18 On the other side of the prejudice equation, Mr Emmett, again entirely understandably, seeks to invoke the point about the risk in India of penal proceedings that, on his case, face the first defendant. I have said what I need to say to the effect that I do not regard that as impressive at this stage and on the material before me. The argument for the defendants also includes the asserted prejudice that an injunction preventing them from advancing the Indian proceedings would deny them the ability to get interim relief in India in this matter. I agree with Mr Smith QC that that form of prejudice is not - what he usefully termed -

"legitimate prejudice". The security in the present case, on the face of it and not in issue, is valid under English law.

19 The balance of convenience does not take the matter further in any way favourably to the defendant.

20 Helpfully, at the beginning of his oral submissions, Mr Emmett captured what he suggested, and I understand, is at the heart of the matter, and of the overall consideration today. He urged me to think what are the consequences of the court making an order today, and that in that regard the court's ambition should be to hold the ring, language that Mr Smith QC would recognise, the difference between the parties being how the ring should be held ahead of the hearing next year.

21 This is where, and I have mentioned this already, Mr Emmett for the defendants refers to certain undertakings that are offered to the court. They are different in the case of the first and second defendants, and the ones that are most material are those offered on behalf of the first defendant. There is a difference in language between the undertakings offered by Mr Emmett on behalf of his clients, and the injunction sought by Mr Smith QC on behalf of the claimants. I ultimately prefer the language that is put forward by Mr Smith QC, but if that language is language that the defendants wish, on reflection, to offer by way of undertaking, I will accept undertakings rather than injunctions, but in those terms.

22 The essential difference, leaving aside the language, is that Mr Emmett for the defendants requests the inclusion of, in effect, a requirement on the part of Mr Smith QC's clients that before they used their rights and powers under their security to take steps to change the board of SACL, they should give 45 days prior notice. As often with a question of how the ring is to be held, on the one hand Mr Emmett says: "Well, look, the board is as it is, hold the ring by keeping it as it is", whereas Mr Smith QC's clients would say: "Well actually the security is as it is, and our rights are as they are, hold the ring without constraining us in that respect". I also fully understand Mr Smith QC's clients' concerns that they are not left with a period of potential economic exposure. I take into account as well that whether the board is as it is, or changes in constitution, a board of SACL will have its responsibilities in accordance with the relevant law, and can be expected to behave accordingly.

23 My own assessment is that holding the ring, if one took that overall approach, is in favour of the injunction that Mr Smith QC's clients seek. They are entitled to that injunction at this stage, in my judgment, for the reasons that I have mentioned, and clearly entitled to it at this stage, and it is, in my view, at this stage unhesitatingly appropriate to cause the defendants to desist from the Indian proceedings for the time being. I emphasise, in concluding, that the court's injunction, if it is to be an injunction in the present case, is directed against the defendants and not against the Indian court. But it is an injunction that the defendants must comply with until further order or, if later, reconsideration at the hearing next year. That is my decision.

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