



Neutral Citation Number: [2020] EWHC 1688 (Comm)

Case No: CL-2019-000771

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 24/06/2020

Before :

SIR MICHAEL BURTON GBE
SITTING AS A JUDGE OF THE HIGH COURT

Between :

P

Claimant

- and -

Q

Respondent

Timothy Killen and Ruth Kennedy (instructed by **Kennedys Law LLP**) for the **Claimant**
John Russell QC for the **Respondent**

Hearing and Judgment date: 24 June 2020

Delivery of these Reasons 26 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR MICHAEL BURTON GBE SITTING AS A JUDGE OF THE HIGH COURT

SIR MICHAEL BURTON GBE :

1. This has been an application made by Mr Timothy Killen on behalf of P (the Claimant) pursuant to s. 68 of the Arbitration Act (the Act) in respect of an Award made by Sioban Healy QC as (replacement) sole Arbitrator in an arbitration in which the Claimant claims damages against Q (the Respondent).
2. The Request for Arbitration dated September 5 2014 was in respect of a claim for damages arising out of a contract in August 2011 for shipment in September 2011 by the Respondent of natural organic pomegranate juice, including “*loss of sales profit due to the supply of falsified and defective pomegranate juice by the Respondent*”.
3. In a Reply dated 26 May 2015 the Claimant alleged (in paragraph 2.2) that there were test results which “*showed that the juice had been diluted with water, i.e. the juice was not 100% natural, but falsified*”, and alleged that the “*reputation of the Claimant as a supplier of 100% natural organic pomegranate juice was damaged (including and principally due to the supply of falsified water diluted juice)*”, (referring again in paragraph 4.3 to “*falsified juice*”). In the Amended Reply dated October 9 2015 it was further alleged (at paragraph 18.4.4) that “*the dilution of the juice by the Respondent could only have been deliberate and, therefore, fraudulent*”, this in the context of a plea that it was “*not necessary for the Claimant to demonstrate that any of the loss it is claiming was foreseeable to the Respondent at the time of the Contract*”. Finally, at paragraph 22.3.2 it was alleged that the juice was “*both unfit for human consumption and fraudulently diluted (by the Respondent)*”.
4. The Respondent wrote for clarification of the Amended Reply, and the Claimant's then solicitors replied as follows on 22 January 2016:

“We continue to be concerned that the Respondent's criticisms of the Reply are based on a wanton mischaracterisation of what is pleaded.....the references to the provision of falsified juice in paragraph 4.3 do not form the basis of any new claim but are mentioned for the purpose of: (i) identifying why the purchase of the additional... Juice and further quantities did not occur; and (ii) clarifying that the Claimant's principal breach of contract claim (and the main cause of its reputational damage) was the fact that the juice had been diluted.

There is simply no basis for inferring... that paragraph 18.4.4 is intended to form the basis of a deceit claim. It is not. The Claimant's claim in these proceedings has been (and remains) a claim for breach of contract. Para 18.4.4 merely explains why... the usual contractual principles of remoteness do not apply on the facts of this case.”
5. This is described by Mr Russell QC, for the Respondent, as a “*disavowal*” of any claim by the Claimant based upon deceit, as opposed to the breaches of contract pleaded by reference to ss. 13 and 14 of the Sale of Goods Act 1979 (as pleaded in paragraph 17 of the Claimant's Statement of Case in the Arbitration).

6. The then Arbitrator decided to take the course of ordering a preliminary issue as to quantum, before deciding liability. It was however agreed between the parties that the issues as to quantum would be addressed on the alternative bases that the dilution, and thus the breach of contract, either was or was not deliberate. In a challenge to the previous Arbitrator by the Claimant on the grounds of alleged impartiality, which was determined against it by Mr Uff QC (although in the end the Arbitrator withdrew for other reasons) Mr Uff summarised the position as follows:

“18. As to the Arbitrator's orders regarding the “deliberate dilution” issue, the issue was raised only in the Amended Reply, and the Claimant had itself confirmed that it was not pursuing a claim (such as deceit or the like) based on fraud. Whether or not a breach was deliberate was irrelevant in a breach of contract of sale case. Despite this, the Arbitrator was not shutting out the Claimant in making arguments based on deliberate breach. The Arbitrator's intention was to hear argument as to the preliminary issues on alternative assumptions. Thus the factual question of whether any dilution was deliberate would not be determined at the preliminary issue stage, but would be heard along with the breach issues.”

7. The preliminary issues hearing proceeded on that basis, heard by the replacement Arbitrator, with an oral hearing on 17 July 2019. She recorded in her Partial Award as follows:

“19. P argues that it is relevant to its claim...that, on P's case, the dilution of the .. juice.. was deliberate rather than accidental because... the allegedly deliberate nature of Q's breach was the reason why P's entire business venture importing... juice from Azerbaijan to Germany 'went down in flames”.

8. She continued in paragraph 24 to record the common ground, including reference to the pleading of the “statutory implied terms of the contract”, and then as follows: –

“73. Thus the pleaded breaches to be assumed for the purposes of the Preliminary Issues relate to terms of the Sale Contract regarding description..., quality, fitness for purpose and adequacy of packaging of the goods. In accordance with Ms Prior's orders of 21 December 2016 and 26 June 2017 the Preliminary Issues are to be determined on alternative hypotheses that the alleged dilution of the juice supplied pursuant to the Sale Contract was either deliberate or not deliberate.

74. Q's submissions on the Preliminary Issues dated 15 March 2019 submitted that the only pleaded breaches of contract were terms as to quality and specification and described the claim as a simple one where the only breach alleged "is the usual one that the goods were off-specification”.

Q submitted that, as a matter of law, it could make no difference to the damages recoverable for such a breach of contract whether or not the breach was deliberate. In this context, Q's counsel noted that there was no pleaded allegation that the Sale Contract included a term that Q would not deliberately provide diluted juice or that Q would cooperate with any investigations being conducted by P or Voelkel.

75. In its Reply submissions on the Preliminary Issues dated 17 April 2019 P described the latter points as "extraordinary" and "astounding", submitting at paragraph 51 that "It goes without saying that a party cannot deliberately deceive the other party. At the very least, this is a term which must be implied into the Contract under Marks & Spencer", and at paragraph 61(c) that, regardless of Q's implied duties of cooperation under the Sale Contract and applicable law, Q had specifically agreed to investigate the causes of the fermentation/dilution of the juice and provide P with results by letters in December and November 2011.

76. Q's rejoinder submissions on the Preliminary Issues dated 24 June 2019 submitted that breaches of unpleaded terms of the Sale Contract such as those which appeared to be mentioned at paragraphs 51 and 61(c) of P's Reply submissions do not fall within the scope of the Preliminary Issues.

77. In the course of making submissions at the oral hearing on 17 July 2019 P's counsel said: "It seems to us that it goes without saying that a party cannot deliberately deceive the other party. At the very least, this should be an implied term under the Marks & Spencer standard." However, nothing further was said on this point and P has at no stage since first raising the issues in its Reply submissions on the Preliminary Issues in April 2019 made any application to amend its Statement of Case to plead any such implied term (nor an implied term requiring cooperation in investigations), nor has P made an application to amend the scope of the Preliminary Issues as ordered by Ms Prior and agreed by the Parties.

78. In all of the above circumstances, it seems to me that Q is correct in its submission that the Preliminary Issues are limited to the terms and breaches as pleaded in P's Statement of Case ... and this Award is confined accordingly.

79. Lest it be thought that this is merely a technical pleading point which could have been easily resolved by applications made on or after 17 April 2019 to amend P's Statement of Case and the scope of the Preliminary Issues, I would add that any such applications would have faced considerable obstacles if they had been made. The facts upon which P relies as to the alleged deliberate dilution of the juice were known to P in late

2011 or at the latest by March 2012, more than 7 years before P first suggested that the facts amounted to deliberate deceit..."

9. It is paragraph 79 of the Award which is the subject of the Claimant's application under s.68, and in particular the sentence, which the Respondent helpfully breaks up into A and B (which I adopt), hence A "*The facts upon which P relies as to the alleged deliberate dilution of the juice were known to P in late 2011 or at the latest by March 2012*" B "*more than 7 years before P first suggested that the facts amounted to deliberate deceit.*" It is common ground that A is correct. It is B to which the Claimant takes exception under s.68, alleging that:
- i) it is a finding of fact which is incorrect in the light of what I have set out above as to the Reply and Amended Reply. Hence there is alleged to be a breach of the Arbitrator's duty under s. 33 of the Act (s. 68(2)(a)), because it was an incorrect finding, said to have been later admitted as such by the arbitrator, which the Claimant was given no opportunity to correct and/or a serious irregularity under s. 68 (2) (i).
 - ii) the finding in the Partial Award will cause substantial injustice, as required to be established by s.68 of the Act, because when the Claimant comes, as it intends, to make an application to amend its case, to rely on the tort of deceit, it will be met by a finding in paragraph 79B of the Award which is not correct. Mr Killen relies upon the words of Langley J in **Cameroon Airlines v Transnet Ltd** [2004] EWHC 1829 (Comm) at 102, suitably adjusted to allow for the fact that this is a future anticipated substantial injustice rather than a past one (which is allowed for under s.68), namely that the applicant must establish not "*that the outcome of a remission will necessarily or even probably be different*" but that "*it has been unfairly deprived of an opportunity to present its case or make a case which, had that not occurred, might realistically lead to a significantly different outcome.*"
10. The Claimant made an application to the Arbitrator for corrections to the Partial Award on 17 October 2019, pointing to paragraphs 16 and 55 of the Award, in which the Arbitrator had said: "*as from the date of P's Amended Reply (9 October 2015) P has contended that the alleged dilution was deliberate.*" ... alleging "*for the first time in its pleadings that dilution of the juice supplied pursuant to the sale contract was deliberate*". By a Memorandum of Correction dated 14 November 2019 the Arbitrator accepted those errors and made the corrections, to refer to such first reference having been in the in unamended Reply and not for the first time in the Amended Reply. The application by the Claimant for correction also requested a correction to the paragraph 79 now in issue. But the Arbitrator did not make that or any correction to that sentence. Mr Killen has submitted that the fact that the Arbitrator made the corrections in paragraphs 16 and 55 indicates an admission that paragraph 79 was wrong. It seems to me however clear that this is not the case, and that the attitude of the Arbitrator was that, not least in the light of the accepted corrections to paragraph 16 and 55, paragraph 79 did not need correction.
11. Mr Russell for the Respondent, while not accepting the viability of the Claimant's claim, made the Respondent's position entirely clear in an open letter to the Claimant's solicitors dated 17 December 2019, now exhibited to a witness statement of Mr Akhmedov dated 26 February 2020. It reads in relevant part as follows:

"10. The challenge is only to part [B].

11. As to part [B] it is necessary to distinguish between:

11 (1) The allegation that Q deliberately and fraudulently diluted the juice, and the argument that that is relevant to the quantification of damages for the breaches of the Contract which have been pleaded in the Statement of Case (which was the limit of P's position up until April of this year, and its Reply Submissions for the Preliminary Issues); and

11 (2) The allegation that there was a separate implied term of the contract (not yet pleaded) that Q would not deliberately deceive P, and the allegation that P might have a claim in the tort of deceit.

12. There can be no doubt that P alleged that the dilution of the juice was deliberate and fraudulent in its Amended Reply dated 9 October 2015- see para 18.4.4.

13. In context, [B] of 79 does not contain any finding to the contrary.

14. For the avoidance of doubt, Q will not argue that [B] involves any finding of fact that P had not put forward the allegation of deliberate and fraudulent dilution by October 2015 at the latest (para 18.4.4 of the Reply came in by way of the Amendment).

15. Para 79 is plainly in the context of P's argument at the Preliminary Issues hearing, arising out of para 51 of P's Reply Submissions dated 17 April 2019, to the effect that there was an implied term that one party cannot deliberately deceive the other.

16. In context, all that the Tribunal was saying, in [B] of para79, was that prior to April 2019 P had not argued that there was a separate contractual term that there should be no deliberate deceit.

17. Again, for the avoidance of doubt, Q will not argue that [B] should be given any broader meaning.

18. That being so:

18(1) [B] is factually correct, so there can be no question of any serious misconduct; and

18(2) P has suffered no substantial injustice.

.....

21. Once again, for the avoidance of doubt, Q will not contend that there is any finding of fact in part [B] of 79 that is relevant to the question of time bar. P is entitled to argue that a claim in deceit is not time-barred. The Award does not preclude that argument. The issue of time bar was simply not before the Tribunal on the Preliminary Issues hearing, and it would be wrong to construe the Award as containing any factual ruling in relation to it."

12. The Claimant does not allege that the Arbitrator is biased and will not be open to reasoned argument as and when it makes its application to amend. It seems to be clear that, particularly as supported by Mr Russell's open letter, the Claimant will be able to argue its case, notwithstanding what the Arbitrator said in paragraph 79B:
 - i) The Claimant will contend that the words of the Request for Arbitration, quoted in paragraph 2 above, allows for the making of a claim by reference to the proposed new implied term and/or the tort of deceit, in which case the claim would not be statute barred;
 - ii) The assertion of fraudulent dilution was made in the Replies in 2015;
 - iii) The Claimant's then solicitors' "*disavowal*" was of a case that at that stage the pleading alleged deceit;
 - iv) Notwithstanding the hearing of the preliminary issue on the two alternative bases by reference to a contractual claim based upon the statutory implied terms, the Claimant should now be permitted to amend, and rely on what would be a matter of law as to the asserted different measure of damage in deceit, which could easily be dealt with at the same time as liability.
13. The part sentence at paragraph 79B was perhaps not entirely felicitously phrased (and was perhaps infected by the error made and subsequently corrected by the Arbitrator in paragraphs 16 and 55 of the Award). It may be that it could have said "*first suggested that the facts could be pleaded as akin to the tort of deceit*". But I have no doubt that the Claimant's amendment application (as to the chances of success of which I indicate no opinion) has not been rendered any more difficult by the words of the sentence, as so explained, particularly in the light of Mr Russell's letter. There is no realistic prospect "*of a significantly different outcome*" (Langley J) simply as a result of those words.
14. In summary:
 - i) Paragraph 79B was in my judgment obiter, and part of a comment on the absence of a pleading of deceit before the Arbitrator;
 - ii) Mr Killen has produced no example of a s.68 application (successful or otherwise) challenging a sentence in an Award, particularly if obiter. I am being asked, as I put it in argument, to tinker with part of such a sentence.
15. I am entirely satisfied that this is not a case where I can find that there has been a breach of s. 33 of the Act or a serious irregularity. The facts remain clear, particularly as corrected in paragraph 16 and 55 of the Award, and the rest is comment. If there were any risk of any prejudice to Mr Killen's proposed amendment application, whatever his chances of success, based upon the words of paragraph 79B, that has in any event been avoided by Mr Russell's letter. I conclude that this application should be dismissed.