



**CIVIL APPEAL NO. 18 OF 2007**

**Between:**

**Avicola Villalobos S.A.**

**Appellant  
(Second Defendant)**

**And**

**Lisa S.A**

**1st Respondent  
(Plaintiff)**

**Leamington Reinsurance Company Limited**

**2nd Respondent  
(First Defendant)**

---

**Before: Nazareth, JA  
Evans, JA  
Forte, JA**

Date of Hearing and Judgment: 15<sup>th</sup> November 2007  
Date of Reasons: 29<sup>th</sup> November 2007

**REASONS FOR JUDGMENT**

**Evans, JA**

1. On 15<sup>th</sup> November 2007, the Second Defendant (Avicola) applied for leave to appeal against an Order made by Kawaley J. on 26 June 2007 which dismissed its applications to strike out the Plaintiff (Lisa)'s claims pleaded in the Re-Amended Statement of Claim served on 15 March 2006, either wholly or in part.
2. The Court refused the application, for reasons which shortly stated were as follows.
3. Relevant principles were stated in *The Iran Nabuvat* [1990] 1WLR 1115. In that case, the Court of Appeal was concerned with the converse situation, where leave to appeal had been granted by a single Lord Justice and the Court of Appeal was invited to revoke that decision. Lord Donaldson of Lynton stated "no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal " (p.1117) and "That is really what leave to appeal is directed at, screening out appeals which will fail."

4. Mr. Stephen Leonard, Counsel for the Appellant, accepted, however, that when the Court is asked to reconsider a Judge's exercise of discretion, in this case to refuse leave, it is necessary to point to some serious error of fact or law made by the judge which could lead to his decision being reversed.
5. Kawaley J. gave his reasons on 3 July 2007. They reveal, not only what his reasons were for dismissing these particular applications, but also his familiarity with and close knowledge of these proceedings, which began in 1999 and have been bitterly and extensively fought every inch of the way since that date. It is not necessary to set out yet again the background and the history. That has been done several times, including in Kawaley J's Reasons for the Order from which leave to appeal is being sought and in the judgment of this Court dated 22 November 2006.
6. It would be sufficient for this Court to say that neither the written submissions made on behalf of Avicola (138 paragraphs covering 68 pages of so-called Skeleton Argument, plus a supplemental skeleton running to a further 18 paragraphs, plus the 67-page Third Affidavit of Annette C. Escobar, a Florida Lawyer) nor Mr. Leonard's oral submissions succeeded in identifying any error either of fact or of law made by the Judge, or any other ground which would entitle the appellate court to reconsider his exercise of discretion. The submissions merely rehearsed the arguments which were put before the Judge and essentially they invited this court to reach a different conclusion. They also revealed that the apparent object of the applications was to invite the Court to consider and decide the issues raised by the pleadings at this interlocutory stage, rather than permit them to go to trial, even though agreed pre-trial directions were consented to by Avicola as recently as 13 March 2007 (Kawaley J's Reasons for Decision, paragraph 35).
7. After that date, Avicola instructed fresh attorneys, who came on the record on 26<sup>th</sup> April 2007 (paragraph 7). The Judge 'had the distinct impression that the 2<sup>nd</sup> Defendant's recently instructed separate legal team were seeking, by their very recent arrival on the stage, to create the impression that this 8 year old action had just begun'. Nothing has occurred in connection with the present application which suggests that that impression was wrong.
8. The first application was to strike out the entire proceedings, essentially on the grounds that the claim as originally pleaded can no longer be pursued with the pleadings in their present re-amended state, and that Voluntary Further and Better Particulars which were produced during the course of the hearing before the Judge cannot be relied upon to extend the allegations pleaded in the Re-Amended Statement of Claim.
9. As the Judge observed, Lisa's case "which it has essentially asserted from the outset, [is] that the operating companies laundered "off the books" profits through Leamington, which distributed its profits through the Avicola Group in a way which deprived Lisa of its legitimate share of group profits" (Reasons,

par 48). The operating companies are, we were told, 18 companies engaged in the poultry (and related) trades in Guatemala. Leamington is a captive reinsurance company forming part of the Group and incorporated in Bermuda. Lisa represents the interests of one member, or faction, of the Guetierrez family and is a shareholder in the relevant group companies, including Avicola. The central allegation is that the group's affairs were manipulated fraudulently by or on behalf of other members of the family, in such a way that Lisa suffered losses as a shareholder in Avicola. In particular, the losses resulted from fraudulent and fictitious reinsurance arrangements which allegedly were made with Leamington, the first defendant. The pleaded claim against Avicola is for damages for such loss.

10. The Statement of Claim alleged that Avicola was the parent company of numerous operating subsidiaries engaged in all aspects of poultry production (paragraph 5). In its Defence, Avicola corrected this – “Avicola is a member of equal dignity [of] a group of companies engaged etc”. Lisa's Reply served on 22 February 2007 accepted this –

“Lisa accepts that the operating companies are not strictly speaking subsidiaries of Avicola Villabos SA under Guatemala Law. However for the purposes of reporting and the payment of distributions to shareholders of Avicola the income of all the operating companies is consolidated and is treated and distributed as group income.”

11. Then in the Voluntary Further and Better Particulars dated 26<sup>th</sup> June 2007 Lisa amplified this still further, alleging inter alia that “the businesses of the operating companies in the Avicola group of companies are all integrated and inter-dependent” (par. 1(h)). These more detailed allegations were introduced as follows:

“1. [Avicola] is the de facto parent company of and / as the de facto principal of and / as the de facto controller of a group of numerous operating companies.....”

12. Avicola's submission in support of the strike-out application is that this latest formulation of the claim represents a departure from the original allegation that Avicola was the parent company, meaning de jure parent company; therefore, that claim has been abandoned, and the allegedly new claim based on the de facto relationships requires a further re-amendment of the statement of claim which would or might be opposed on limitation grounds.
13. We disagree. As the Judge said, the nature of Lisa's claim against Avicola has been throughout that it, as a shareholder in Avicola, suffered loss by reason of Avicola's participation in a fraudulent scheme involving false or fictitious reinsurance arrangements made with Leamington; in respect of which it is entitled to recover damages as compensation from Avicola. That was and is the

cause of action upon which Lisa relies. The cause of action remains the same, though the factual basis has been more fully and in some respects more accurately pleaded in the Voluntary Further and Better Particulars.

14. Mr. Leonard also relied on what he asserted were admissions by Lisa that no payments were made by Avicola to Leamington, of insurance premiums or otherwise and he submitted that the change in the alleged relationships between Avicola and the operating companies – not de jure parent and subsidiaries, but group companies with a de facto parent / subsidiary relationship – represents a departure from the original claim. Neither of these matters (and it was not clear to us that any admissions as to payment and non-payment of premiums has been made) in our judgment affects the conclusion we have expressed above. The strike-out application was not justified and the pleadings are in order.

### **Related Frauds**

15. The original Statement of Claim served on 22 March 2000 contained extensive allegations of “fraud and or unlawful conduct” concerned with activities of certain of the operating companies in Guatemala (paragraphs 9-11). They were distinguished from “the Present Action: The Leamington fraud and / or unlawful conduct” (paragraph 12). Avicola pleaded to the allegations in paragraphs 9-11, which were denied. No suggestion was made on its behalf that these paragraphs should be struck out, even when objection was taken to other parts of the Re-Amended Statement of claim which resulted in the judgments of Kawaley J. dated 10 February 2006 and of this Court dated 22<sup>nd</sup> November 2006. However, on March 8 2006 Avicola’s then counsel asked Mr. Hargun, counsel for Lisa, to confirm that Lisa “does not seek to recover damages arising out of” the frauds pleaded in paragraphs 9-11 of the Statement of Claim. Mr. Hargun’s reply email continued –

“I write to confirm that these three frauds are pleaded by way of background and no claim for damages is made in respect of losses arising out of these frauds. The general claim for damages should be read with this understanding.”

16. So far as this Court is aware, there has not been any request for Particulars of the Damages claim which might have resulted in a clearer definition of the claim along those lines. Rather, Avicola’s new representatives rely upon this informal reference to “background” frauds as a ground for applying to strike out the references to them in the Re-Amended Statement of Claim.
17. In response to this submission, Mr. Hargun readily satisfied us that the alleged frauds are “background” in the sense that Lisa does not seek to recover damages in these proceedings by reference to them. Nevertheless, they are an integral part of the central fraud allegation, which is that the Leamington insurance frauds were part of a course of conduct which also included what Mr. Hargun has also called the “feeder” frauds, and that Avicola was a party to them.

18. This application in our judgment is entirely without merit, and we need only record that Kawaley J., correctly in our view, also relied upon Avicola's failure to object to the pleading until the present application was made. Mr. Leonard explained that Avicola raised the objection in response to Lisa's application for extensive discovery in relation to these issues, in March 2007, but the proper scope of discovery has to be defined (as it was by Kawaley J.) on the basis of the pleaded issues, and the request does not provide any justification for contending that the allegations, which were pleaded to, should be struck out.

**Abuse of process, and related foreign proceedings**

19. The written submissions and Annette Escobar's Affidavit make extensive reference to a further ground for striking out the proceedings that was relied upon before Kawaley J., namely that they are an abuse of process in this court having regard to the large number of other claims which have been, brought or were sought to be brought in other jurisdictions. This was rejected by Kawaley J. (Reasons par. 31) and it was not enlarged upon in Mr. Leonard's oral submissions to us. We have not been made aware of any ground which would entitle us to give leave to appeal from his decision, and we are wholly unpersuaded that his conclusions were incorrect.
20. As regards the foreign proceedings generally, Mr. Leonard submitted (as we understood him) that Bermuda might be regarded as *forum non convenes* for the present action; but he acknowledged that no such application has been made to this court. Even if it were now being made, it would appear to be far too late to have any chance of success at this stage.

**Costs**

21. For these reasons, the application was dismissed. Mr. Hargun applied for the Plaintiff's costs of the application to be paid by the First Defendant in any event. Mr. Leonard indicated he could not oppose this. We so order.

I agree

\_\_\_\_\_  
Nazareth, JA

\_\_\_\_\_  
Evans, JA

I also agree

\_\_\_\_\_  
Forte, JA