IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1999: No. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.
(On behalf of itself and all other shareholders of Avicola Villalobos S.A. and on behalf of Avicola Villalobos S.A.)
Plaintiff

- and -

LEAMINGTON REINSURANCE COMPANY LTD.
First Defendant

- and -

AVICOLA VILLALOBOS S.A.
Second Defendant

EX TEMPORE RULING

Date of Ruling: July 20, 2007

Mr. Stephen Leonard, Attride-Stirling & Woloniecki, for the Appellants
Mr. John Riihiluoma, Appleby, for the First Defendant -in attendance.

Introductory

1. In this case I am minded to refuse leave to appeal on the following principal grounds. Firstly, I do not believe that the Notice of Motion for Leave to Appeal, despite being elegantly drafted, properly raises arguable grounds of appeal for setting aside a discretionary decision with respect to strike-out. And, secondly, as regards the discovery issues, I simply do not believe that the grounds of appeal are arguable.

2. In the alternative, having regard to the history of this matter, it seems to me that the Notice of Motion for Leave to Appeal is liable to be struck out as an abuse of process in that the thinly veiled motivation of the Second Defendant appears to be to do everything in its power to prevent this matter from proceeding to trial. Mr. Leonard, who has presented the best possible argument that could be presented, is the third lawyer to represent the Second Defendant in three months, and although he does not seek to use his recent instructions as grounds for delay, the application, it seems to me, is clearly designed to achieve that effect. And if, in fact, the Defendant was interested in having the claim disposed of, it seems to me that the Defendant would be keen to have the matter proceed to trial and have a decision rendered in its favour

which it could use in other jurisdictions to put an end to the wider dispute between the parties.

Ground 1

3. Looking at the various grounds of appeal, the first ground of appeal is a complaint that I erred in refusing to strike-out the Re-Amended Statement of Claim on the ground that the Plaintiff's claim depended in law on facts which were not pleaded and could not be proved, namely that the Second Defendant had paid insurance premiums to the First Defendant on policies of insurance. Mr. Leonard made the arguable point that I failed to link the premium issue to the Reply, because this issue went to the cogency of the theory the Plaintiff relied on for being deprived of profits[1]. But in my view, the broad complaint was met by the supply of particulars which affords the Second Defendant with an opportunity, if it so wishes, to raise any answer that it wishes to in answer to the case as clarified by the Plaintiff[2].

Ground 2

4. The second ground of appeal is that I erred in refusing to strike-out the Re-Amended Statement of Claim on the grounds that it failed to indicate that the Companies were not subsidiaries. This issue was also dealt with by the supply of particulars and, in my judgment, it is not arguable that the Defendant is deprived of the opportunity of meeting any arguments that are set out in the particulars, nor indeed is it seriously arguable that in the context of managing modern, complex commercial litigation, the Court is required in a commercial case to require a Plaintiff or any party to embody all particulars of its case in a formal pleading[3], particularly when the litigation is approximately eight years old and the Defendant in question has already consented to the matter proceeding to trial. In the present case the particulars were supplied, and answered in large part to the complaint made orally at the hearing, that the way in which the Plaintiff put its case could not be understood, and the particulars were supplied in order to clarify the case. And, in my view, it is not seriously[4] arguable that it is an error of law to allow a case to be particularized instead of striking out the claim. Certainly, Mr. Leonard was unable to point me to any submission being made by his predecessor that the particulars ought to have taken the form of an application for Leave to Re-Re-Amend[5].

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[1] This point, technically, was not a point which could and should have been taken before the February 2007 Reply. However, as pointed out in paragraphs 22- 24 of my Reasons for Decision, the Second Defendant ought to have known from the original Statement of Claim that the operating companies were not its own subsidiaries and that the case pleaded could not in this respect be proved. The points which form the subject of draft appeal grounds 1 and 2 could in practical terms have been raised before February 2007. Indeed the January 2006 application to re-amend could have been opposed on the grounds that the Plaintiff could not prove that (a) the Second Defendant paid premiums to the First Defendant, or (b) that the companies which did were subsidiaries of Avicola.

[2] In the course of argument, I expressed my view that a significant factual error complained of in support of the application for leave to appeal was based on a misreading of the Re-Amended Statement of Claim. It is true that in paragraph 15 the re-amendment deleted the explicit reference to laundering the proceeds of live chicken sales, but this was merely to re-frame the main object of the Leamington fraud in terms consistent with the new personal claim. It is clear from the particulars under paragraph 15(i),(iii), that it is part of the Plaintiff's formally pleaded case that Leamington received the proceeds of the background frauds, and that the Defendants in a secretly taped meeting admitted to the existence of "off the books" profits. The suggestion that the voluntary particulars supplied advanced an entirely new case is misconceived.

[3] In the course of argument, I indicated that, having regard to the Overriding Objective and applying Order 72 rule 7 by analogy to a matter which ought to have been in the Commercial List, pleadings ought to be "as brief as possible" and could be dispensed with altogether. The Plaintiff was not pleading a new cause of action, but simply clarifying the factual basis of the existing claim.

[4] The term "seriously" was not used by way of raising the normal threshold for obtaining leave to appeal, but to reflect my view that the point was not a genuine one.

[5] Having subsequently reviewed the record, the position appears to be as follows. The Second Respondent's previous new Counsel did not reply to Mr. Hargun's submissions on the total strike-out application and the Plaintiff's decision to supply voluntary further and better particulars at all. The Second Defendant's main concern in reply was the scope of discovery and the background frauds. A short adjournment was sought and (over Mr. Hargun's objections) granted to afford Mr. Kessaram an opportunity to take instructions on the Plaintiff's proposal to limit the scope of discovery. It was not submitted that the Court ought not to have regard to the particulars supplied but should require the Plaintiff to make a further amendment application

Ground 3

5. The third ground of appeal represented the complaint that I erred in law in refusing to strike-out the Re-Amended Statement of Claim on the grounds that the subject matter of the claim had already been litigated in Panama and, in my view, the most that this ground of appeal makes out is a possible case for suggesting that another court exercising the discretion to decline to strike-out *de novo* might well reach a different conclusion. It, in my view, is not arguable that it was wrong in principle to refuse to grant the exceptional striking-out remedy in respect of a matter that could have been raised some seven or eight years previously, and on the slightly unusual basis of a foreign proceeding against different parties by the Plaintiff suing in a different capacity[6].

Ground 4

6. The fourth ground of appeal represents the complaint that the Court erred in finding that the applications had been made too late, and taking into account the lateness of the applications in deciding whether or not to strike-out the Re-Amended Statement of Claim. In my judgment, on the face of the Ruling the Court did, in fact, take into account the fact, in paragraph 15 of the Reasons for Decision, that the Court possesses the jurisdiction to strike-out an unsustainable claim at any time, and the Court also did take into account the fact that certain aspects of the strike-out could only have been raised as late as February 2007. And so, in my view, this ground is simply not arguable.

Ground 5

7. The fifth ground of appeal complains that the Court erred in failing to strike-out the unrelated frauds, or frauds which were referred to in my Reasons as "background" frauds. Here, again, it must be said that, in my view, this complaint is not arguable. The unrelated frauds or background frauds were clearly incorporated into the Leamington fraud, in paragraph 15.1 of the Re-Amended Statement of Claim, and indeed in the original Statement of Claim filed in or about March 1999. The suggestion that the averments in support of the unrelated frauds were liable to be struck-out merely because the Plaintiff confirmed in or about March of this year that no damages were sought in relation to the background frauds is in my view untenable[7].

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instead. No request was made for further time to consider the impact of the voluntary particulars, and the Court was left with the distinct impression that the Second Defendant accepted that the voluntary particulars met its complaints about being unable to understand the Plaintiff's pleaded case in light of the abandonment of the subsidiaries issue in the February 2007 Reply. So this appeal point was yet another example of a point being taken after the time when the issue could first have been raised.

[6] In the course of argument I also doubted whether a trial conforming to Bermudian constitutional notions of a fair trial had taken place in Panama. If it had, dealing with all overlapping issues, the Second Defendant ought to have already given discovery of the documents it was complaining in these proceedings it should not be required to produce. The rejection of this limb of the abuse of process ground was not based on a legal finding that it could never be abusive to pursue different parties in separate proceedings in respect of the same dispute, but rather on the basis that (a) the Second Defendant had produced no authority which supported the view that the facts complained of amounted to an abuse, (b) it was difficult to see how the parties to the present litigation could be bound by the result in the Panamanian proceedings, brought by the Plaintiff in its capacity as the shareholder of another company, (c) the rule against double recovery would prevent any financial injustice, and (d) "*it is wholly inconsistent with the spirit of the Overriding Objective to encourage litigants in substantial commercial cases to ride roughshod over case management directions without clear justification for disrupting a timetable which has been set*" : Reasons for Decision, paragraph 34.

[7] The background frauds were from the outset an integral part of the Plaintiff's pleaded case. The suggestion that these averments only became liable to be struck-out because it was recently explained that no recovery was sought in respect of these frauds in isolation from the Leamington fraud is either wholly tactical, or based on an inability to comprehend the plain terms of the Re-Amended Statement of Claim.

Ground 6

8. The sixth ground of appeal is the complaint that I erred as a matter of law in finding that the application has been made too late, and taking into account the lateness of the applications in deciding whether or not to strike-out the Re-Amended Statement of Claim. Reference is made here to the proposition that prior to the Plaintiff's request for discovery in March 2007, the Second Defendant did not expect these unrelated frauds to be investigated at trial, and secondly, that the Defendants had in fact applied to strike-out the claim. In my view, it is simply nonsensical to suggest that the Second Defendant did not expect the frauds which were not only set out in the original Statement of Claim, but which were also actually incorporated specifically in the Leamington fraud, to be the subject of discovery. It is difficult to see what credible basis there would be for such an expectation. The fact that the Defendants did previously apply to strike-out the whole claim, and did not pursue that application, seems to me to be wholly irrelevant to the question of whether or not it is reasonable for the strike-out application to be made at the late stage that it was.

Ground 7

9. The seventh ground of appeal complains that I erred in law in ordering the discovery to be given of certain classes of documents, notwithstanding the relevance to the matters in question. In my judgment, the complaint that these documents are irrelevant is not only inconsistent with an explicit finding set out in the Ruling that I consider the documents that are ordered to be disclosed to be clearly relevant, but is also inconsistent with any sensible reading of the Re-Amended Statement of Claim, which makes the background frauds an integral part of the Plaintiff's case[8].

Conclusion

10. As indicated, I am bound to find that the present application for leave to appeal should be refused, both on its merits and, alternatively[9], on the grounds that I believe the application for leave to appeal is itself an abuse of process.

Dated this 20th day of July 2007

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Kawaley J.

[8] In the course of argument I referred Counsel to paragraph 45 of my Reasons for Decision where I recorded my finding that the documents sought were "*clearly relevant*". I declined to order discovery of a wider class of documents on the grounds that their relevance was not sufficiently cogent to justify the oppression that discovery would entail for the Second Defendant.

[9] Although I formulated the abuse of process ground for striking-out the Notice of Motion for Leave to Appeal as an alternative ground for refusing leave, my view of the *bona fides* of the application obviously caused me to scrutinize the merits of the grounds of appeal more rigorously than I might have done in circumstances where I did not believe a would be appellant was seeking to misuse the processes of the Court. In the course of argument, I asked the following rhetorical question: bearing in mind that able counsel can always formulate what appear to be arguable grounds of appeal in respect of any interlocutory decision, how many times should a litigant be permitted to pursue interlocutory appeals which prevent a case from proceeding to trial?