In The Supreme Court of Bermuda

COMMERCIAL COURT

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

RULING
(PRE-TRIAL REVIEW-ISSUES TO BE TRIED)

Date of hearing: June 3-4, 2008
Date of Ruling: June 9, 2008

Mr. Narinder Hargun, Conyers Dill and Pearman, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the First Defendant
Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, for the Second Defendant

Introduction

1. On January 8, 2008, I directed the parties to seek to agree the issues to be tried, following the English Commercial Court Practice, to facilitate an efficient use of Court time and to rationalize the expenditure of costs before and at trial. The modern view, especially in the case of long and/or complex trials, is that the scope of the litigation should ideally be clearly defined before discovery and the preparation of evidence for trial. This direction was made at a late stage, and provided for any disputes about the issues to be tried to be resolved at the pre-trial review.

2. The issues set out in paragraphs 1-6 of the Defendants' Draft List of Agreed Issues were agreed, subject to the insertion in paragraph 4 of a reference to the Plaintiff's equitable fraud claim (RASC, paragraph 8 & 15). I decided at the conclusion of the pre-trial review hearing that the background fraud related issues (paragraphs 7(i)-(iv) and (x)) were subsidiary issues as the Plaintiff's counsel contended, which could properly be considered by the Court even if no positive findings in relation thereto were required[1].

3. The principal argument was between the Plaintiff and the First Defendant as to whether it was open to the Plaintiff to quantify its loss by reference to dividends declared by Leamington which could not be linked to premiums received from Avicola. Although it was clear by the end of 1 ½ days argument that the dividend issue fell outside the scope of the issues raised on the pleadings of a case commenced nearly a decade ago, I reserved judgment to consider how the exclusionary ruling should be formulated. I wanted to avoid any possibility of unfairly limiting the scope of the Plaintiff's damages claim prior to considering all of the evidence at trial.

Jurisdiction of Court to determine prior to trial the scope of issues to be determined at trial

4. Mr. Hargun relied upon the pre-CPR English Commercial Court Practice according to which a flexible approach was taken to pleadings, and pleadings points were frowned upon. Mr. Riihiluoma relied upon the post-CPR position and the following views set out in Colman, Lyon and Hopkins, '*The Practice and Procedure of the Commercial Court*', 5th edition[2]:

> "*Plainly the whole emphasis of the new rules on case management is to ensure that no departure from the pleaded case is likely. If it does happen, it is anticipated that in the majority of cases, the court would not consider an adjournment an appropriate indulgence and*

[1] I indicated that it seemed highly improbable that any positive findings would be made in relation to the commission of any tax offences under Guatemalan law.
[2] 5th edition (LLP: London/Hong Kong, 2000), at page 219.

permission to amend would be refused, especially if the point could have been pleaded at the outset."

5. Mr. Riihiluoma is clearly right that this Court should follow the modern case management approach and possesses the jurisdiction to decide in advance of trial what issues may or may not be fully investigated at trial. Order 1A of the Rules provides in material respect as follows:

> "***1A/4 Court's Duty to Manage Cases***
> *4 (1) The court must further the overriding objective by actively managing cases.*
>
> *(2)* **Active case management includes —**
>
> *(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
>
> *(b) identifying the issues at an early stage;*
>
> **(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others**…" [emphasis added]

6. The need to exercise this jurisdiction in the present case at a comparatively late stage only would only arise in relation to an issue which very clearly fell outside of the scope of the pleaded case. Bearing in mind that discovery and evidence preparation has already taken place, a cogent rationale for determining summarily any issues which did arguably fall within the scope of the pleaded case at the pre-trial review stage would very rarely exist.

Is the dividend point clearly outside of the Plaintiff's pleaded case?

7. I have dealt with two major interlocutory skirmishes which have resulted in appeals to the Court of Appeal. The Plaintiff's pleaded case has since in or about 2001 always asserted a claim for compensation referable to monies which Avicola ought to have distributed to Lisa but instead diverted to Leamington purportedly as premiums but in substance as a device to deprive Lisa of profits in which it was entitled to share. The RASC asserts claims against Leamington which are not asserted *qua* shareholder of Avicola. These claims make passing reference to monies distributed by Leamington to Villamorey but not distributed to Lisa. But these references can only arguably be read as referring to monies diverted by Avicola (profits generated by the poultry divisions) as opposed to profits of Leamington generated by other divisions of the Avicola group unrelated to the Plaintiff's expressly pleaded claims in relation to the loss of profits generated by Avicola.

8. The history of the pleadings demonstrates, as Mr. Riihiluoma was keen to point out, that the Plaintiff expressly agreed to abandon any claims to Leamington-

related profits. Paragraph 19 of the RASC (dated March 15, 2006) presently provides as follows:

> "*In the premises, all monies received from the fronting companies as premiums and transferred to Leamington as reinsurance premiums on account of non-existent risks or on account of grossly inflated premiums were and are held, up to the amount of Lisa's share of the distributions made by Avicola, by Leamington as a trustee for Lisa.*"

9. Paragraph 20 of the RASC now provides as follows:

> "*Further or in the alternative, by reason of the matters set out above, Lisa has suffered loss and damage, namely Lisa's share of the distributions made by Avicola; the Plaintiff is unable to give full particulars of loss until after the completion of discovery.*"

10. The prayer (paragraphs 1, 3 and 6) explicitly seeks relief in respect of "*Lisa's share of distributions made by Avicola*". Paragraph 5 seeks an account from Leamington of sums transferred on account of premiums "*from Avicola*". Paragraph 2 of the prayer, read with paragraph 19 of the RASC, seeks repayment similar sums. The re-amendments introduced in March 2006 essentially replaced the original derivative claims asserted by Lisa on behalf of Avicola for personal claims, substantially asserted against Leamington (a Bermudian company) for the recovery of monies said to have been improperly received by Leamington from Avicola. The core allegation is that monies which Avicola ought to have distributed to Lisa as one of its shareholders were diverted to Leamington as fictitious premiums with the aim of defrauding the Plaintiff. The March 22, 2000 Statement of Claim also originally sought to recover monies received by Leamington on account of premiums from Avicola.

11. The Plaintiff did at one time consider expanding the scope of its claim. By Summons dated June 21, 2001, Lisa applied for leave to amend the original Statement of Claim to read as follows:

> "20. <u>Further or in the alternative, by reason of the matters set out above, Lisa has suffered loss and damage, namely:</u>
>
> (1) <u>dividend or other payments which should have been made to Lisa by Avicola;</u>
> (2) <u>dividend or other payments which hould have been made to Lisa by Villamorey;</u>
> (3) <u>diminution in value of Lisa's shareholding in Villamorey.</u>"

12. However, following undocumented negotiations, on November 8, 2001 the Chief Justice ordered by consent[3] that the Statement of Claim be amended in terms of paragraph 20(1) of the draft, with proposed sub-paragraphs (2) and (3) being abandoned by the Plaintiff. It is obvious that the relief envisaged by proposed sub-paragraphs (2) and (3) would have radically expanded the scope of Lisa's claim and necessitated the joinder of Villamorey (a Panamanian company) as a party at a time when it appears that separate proceedings were pending against Villamorey in Panama. Mr. Riihiluoma made the astute submission that the references to Villamorey in the RASC which Mr. Hargun contended evidenced that relief was sought in respect of this third party in the present action (paragraph 15) have not been changed since the original Statement of Claim. If the original claim encompassed these matters, the need to amend paragraph 20 in 2001 to include the Villamorey claims would not have arisen at all.

13. In any event I am satisfied that Lisa is bound by its agreement to abandon the Villamorey claim for the purposes of the present proceedings, and may not at this stage re-introduce that claim: *Purcell-v- F.C. Trigell Ltd.* [1971] 1 QB 358 at 366.

14. Further, I accept the submission advanced by Leamington's counsel that the general prayer for "damages" set out in the RASC does not entitle the Plaintiff who is able to particularize its loss to invite the Court at trial to award damages for loss which is wholly unconnected with its pleaded claims: *Lonhro Plc-v-Fayed (No.5)* [1993] 1 WLR 1489 at 1498C.

15. It is unarguably clear that no claim in respect of monies which Villamorey ought to have distributed to Lisa falls within the ambit of the present proceedings. The only issue to be tried in relation to the Plaintiff's loss is the extent to which profits of Avicola were improperly received by Leamington. Within these factual and legal parameters, it may be indirectly relevant to consider what amounts received from Avicola were distributed by Leamington to Villamorey and not distributed by the latter company to Lisa. But Lisa's entitlement to any further monies by virtue of its status as a shareholder of Villamorey falls outside of the scope of the present proceedings.

16. Because veil-piercing arguments may arise, I decline to rule at this stage that the profits of the non-poultry divisions may not be taken into account because they are unarguably not profits of Avicola. In other words, it is open to Lisa to seek to prove (if its evidence supports such contentions) that profits accounted for as profits of the non-poultry divisions ought properly to be regarded as the profits of Avicola. Save to this extent, the profits of the non-poultry divisions of the wider corporate group fall outside of the scope of the loss-related issues to be tried in this action.

[3] Although the parties' agreement does not appear on the ace of the Order, the Chief Justice's notes show that the order was agreed.

17. It is only marginally less clear at this stage whether the related issue of whether or not Lisa sold its indirect shareholding in Leamington in 1995 has any bearing on this action. It obviously is irrelevant as a primary issue since Lisa's claim herein is limited to losses referable to monies it ought to have received as a shareholder of Avicola. Since it appears that evidence has been filed on this issue on both sides, I make no formal ruling at this stage that this issue need not be determined at all, even as a subsidiary issue.

Costs

18. Mr. Hargun submitted that costs should be in the cause; Mr. Riihiluoma submitted that 75% of the costs of the pre-trial review hearing were attributable to the dividend issue which I indicated I was minded to resolve in the First Defendant's favour. Leamington's counsel sought an award on this basis.

19. As between the Plaintiff and the Second Defendant, whose counsel merely supported the First Defendant and did not appear on the second day of the hearing, I order that the pre-trial hearing costs shall be in the cause.

20. The position is different as between the Plaintiff and the First Defendant. Lisa has, on the eve of the trial, unsuccessfully sought to resurrect a claim abandoned nearly seven years ago through an expert report in circumstances where it was not open to it to re-re-amend its pleading to revive the relevant claim which is properly asserted against a third party to this action. Further, it appears that the relevant claim has already been asserted in pending proceedings in Panama. I award 75% of the costs of the pre-trial review hearing to Leamington in any event, to be taxed if not agreed on the standard basis. The balance of the costs shall be in the cause.

Dated this 9th day of June, 2008

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KAWALEY J