In The Supreme Court of Bermuda

CIVIL JURISDICTION

Commercial List

2012: No. 290

BETWEEN:-

MOYES & CO (UK) LIMITED

Plaintiff

-v-

NORTHERN GULF PETROLEUM HOLDINGS LIMITED

Defendant

EX TEMPORE RULING

(In Chambers)

Date of hearing: 10th December 2012

Mr Ben Adamson, Conyers Dill & Pearman, for the Plaintiff
Mr Martin Ouwehand, Appleby (Bermuda) Limited, for the Defendant

1. On 20th August 2012 the Plaintiff issued a specially endorsed writ against the Defendant, which was amended on 22nd October 2012. The Plaintiff claims damages for breach of contract in the sum of approximately $1.7

million; alternatively, approximately $1.7 million as a debt due and owing; interest at 7 per cent; alternatively, restitution and/or quantum meruit.

2. On 17th October 2012 the Defendant issued a summons for an order that this action be struck out pursuant to Order 18, Rule 19 of the Rules of the Supreme Court ("RSC") and/or under the inherent jurisdiction of the Supreme Court on the grounds that it is an abuse of process of the Court and/or discloses no reasonable cause of action against the Defendant.

3. The principles relating to such an application are not in dispute. I accept the helpful formulation of them set out at paragraph 18 of the skeleton argument submitted by the Defendant's counsel, Mr Ouwehand.

   (1) It is only in plain and obvious cases that a claim should be struck out.

   (2) The court should proceed with great caution in exercising its power on a factual basis when all the relevant facts are not known to it.

   (3) However a claim may be struck out where:

      (a) There is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known; or

      (b) Where the evidence relied upon by the plaintiff is "*shadowy*" or where "*the story told in the pleadings is a myth and has no substantial foundation*".

   (4) Another way of approaching the latter ground is to ask, "*is there a fair and reasonable probability of the plaintiff having a real or bona fide claim?*" or, "*is what the plaintiff says credible?*"

   (5) If after argument the court is persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts, the claim is bound to fail for want of a cause of action, there is no reason why the parties should be required to prolong the proceedings before that decision is reached.

(6) No evidence is admissible on the question of whether a pleading discloses no reasonable cause of action under Order 18, Rule 19(1): see Order 18, Rule 19(2). The question is whether the pleadings, taken at face value, disclose a cause of action.

(7) However, evidence is admissible under the other heads of Order 18, Rule 19(1) and under the inherent jurisdiction of the Court to strike out claims which are incredible.

4. These propositions are derived from the decision in the Supreme Court of Ground CJ in Re Taylor (deceased); Charles v Pearman [2010] Bda LR 1, approving the decisions of the Court of Appeal of England and Wales in Electra Private Equity Partners (Ltd Partnership) v KPMG Peat Marwick (A Firm) [1999] EWCA Civ 1247 and National Westminster Bank plc v Daniel [1994] 1 All ER 156.

5. The background to the case is set out, equally helpfully, in the Plaintiff's pleaded case at paragraphs 1 – 11. As the statement of claim is not long, and as it is the statement of claim which is in issue, it is helpful to set out those paragraphs in full.

"1. *The Plaintiff, Moyes & Co (UK) Limited ('Moyes'), a company incorporated in the United Kingdom, is a recognized industry expert in the evaluation, funding, development and marketing of oil and gas properties and companies worldwide.*

2. *Northern Gulf Petroleum Holdings Limited ('Holdings') is incorporated in Bermuda and is a holding company of the Northern Gulf group of companies ('the Group'), including Northern Gulf Petroleum Pte Limited ('NGP') and Northern Gulf Oil (Thailand) Co Limited ('NGO Thailand'). The Group at all material times owned and/or controlled various oil and gas interests in South East Asia.*

3. *Holdings is owned in equal shares by Chatchai Yenbamroong ('Chatchai') and his wife Catherine Clare Yenbamroong. Chatchai is a*

director of Holdings and at all material times represented Holdings and/or the Group in discussions with Moyes.

4. *In or about May and/or June 2010, the Group investigated and pursued the sale of equity in or farmout of various Thai oil concessions ('the Transaction'). Moyes was hired to find a buyer or farmout partner and, on June 10, 2010, Moyes signed a written contract whereby Moyes would be paid an initial retainer of $25,000, subsequent monthly retainers of $2,000, and a success fee of 3% of the transaction value on successful completion ('the Original Contract').*

5. *The Transaction was at this stage structured as a sale by NGP of shares in or property rights belonging to NGO Thailand.*

6. *Following further discussions between Moyes and the Group, the Transaction was in or about July 2010 restructured as a sale by Holdings of shares in NGP ('the Amended Transaction'). The terms of the Amended Transaction were reflected in a term sheet, prepared for potential buyers by Holdings and Moyes, dated July 28 2010.*

7. *Moyes marketed the Amended Transaction for Holdings and/or the Group ('the Amended Contract'). The Amended Contract was not embodied in a written document but evidenced by the conduct of the parties thereto, namely Moyes and Holdings.*

8. *It was or remained a term of the Amended Contract that Moyes would be paid the 3% success fee if and when the Amended Transaction was completed.*

9. *The Amended Transaction completed on or about October 13 2010, when Tap Oil Ltd announced the purchase of a majority stake in NGP ('the Sale').*

10. *In breach of the Amended Contract, Holdings has refused to pay Moyes the success fee. Pending discovery, 3% of the transaction value of the Sale would amount to some $1.7 million.*

11.By reason of the matters aforesaid, Moyes has suffered loss and damage.

AND THE PLAINTIFF CLAIMS

1. *Damages in the sum of approximately $1.7 million;*
2. *Approximately $1.7 million as a debt due and owing;*
3. *Interest at 7%*
4. *Restitution and/or quantum meruit."*

6. Mr Ouwehand focuses on paragraph 7. He makes two points. First, he submits that the material facts necessary to found the amended contract have not been pleaded with sufficient particularity. He submits that, given the existence of the original contract, there is nothing alleged which is capable of sustaining a finding that there was a contractual relationship between the Plaintiff and the Defendant.

7. Mr Adamson in reply cites the commentary to the 1999 Edition of the Rules of the Supreme Court of England and Wales ("RSC/EW"):

"*Where a contract is alleged to be implied from a series of letters or conversations or otherwise from a number of circumstances, the contract should be alleged as a fact, and the letters, conversations or circumstances set out generally, and further particulars requiring details will not generally be ordered.*"

8. Notwithstanding the broad terms of the commentary, with which I agree, the Defendant is entitled to sufficient detail of "*the conduct of the parties*" relied on to understand the Plaintiff's case. As the Court of Appeal of England and Wales stated in British Airways Pension Trustees Limited v Sir Robert McAlpine & Sons Limited (1995) 72 BLR 76 at paragraph 2:

"*The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.*"

9. This point can be dealt with, however, by giving the Plaintiff the opportunity to amend paragraph 7 under Order 18, Rule 12(3) to indicate the nature of the conduct relied on. In that regard, I am mindful of the commentary to the RSC/EW at 18/19/13, which states:

"*Where a pleading is defective only in not containing particulars to which the other side is entitled, application should be made for particulars under r. 12, and not for an order to strike out the pleading under this rule.*"

10. I should also refer to the Plaintiff's claim for restitution. The Defendant relies on the decision of the Court of Appeal of England and Wales in MacDonald Dickens & Macklin v Costello [2012] QB 244. The Court stated at paragraph 4 that:

"*The issue of principle on the appeal is whether Mr and Mrs Costello can be held liable in restitution for unjust enrichment when the services of the claimants from which they have benefited were given pursuant to a contract between a third party, Oakwood, and the claimants.*"

11. The Court held at paragraph 23:

"*The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance*."

12. Mr Ouwehand suggests that, as the Plaintiff and NGP circumscribed their mutual obligations in terms of a written contract, that precludes the possibility that the Plaintiff is liable to the Defendant, a third party, for any payments in relation to that contract. But that submission assumes what is in issue, namely that there was no contract with respect to a success fee between the Plaintiff and Defendant. I have already held that it would be premature to assume on the face of the pleadings that there was not.

13. In summary, the strike-out application fails with respect to the allegation that the statement of claim has not been properly pleaded or discloses no reasonable cause of action against the Defendant.

14. However there is another limb to the Defendant's application. Mr Ouwehand submits that on the face of the evidence the Plaintiff has no credible claim on the undisputed facts. He submits that the claim is therefore an abuse of process. If the Plaintiff has no case, its claim might also be frivolous and vexatious.

15. In considering this limb, I have read the affidavit of Chatchai Yenbamroong dated 21st September 2012, which was filed on behalf of the Defendant. Mr Chatchai is the joint owner of the Defendant and a director of the Defendant and NGP. I have also read the affidavit of Christpher Moyes dated 11th October 2012, which was filed on behalf of the Plaintiff. Mr Moyes is one of its directors.

16. The Defendant's case, based on the affidavit evidence, is that I can be sure that there was no contractual relationship between the Plaintiff and the Defendant that could give rise to liability on the part of the Defendant to pay a success fee. Mr Ouwehand relied on the following facts and matters.

    (1) The written agreement dated 10th June 2010 ("the original contract") was between the Plaintiff and NGP.

    (2) The term sheet dated 28th July 2010, which was reissued on 15th August 2010, upon which the Plaintiff relies for its claim for a success fee, is expressed as an offer by NGP not the Defendant.

    (3) The Plaintiff has invoiced NGP, and been paid a retainer with respect to those invoices, subsequent to 28th July 2010 and 15th August 2010. Specifically, invoices with respect to a retainer were issued on 12th October 2010 and 1st November 2010.

    (4) The Plaintiff has invoiced NGP for payment under the original contract of a success fee arising from the share sale. Invoices were issued on 19th November 2010, 13th July 2011 and 4th September

2012. The most recent invoice was issued after the Plaintiff had issued these proceedings against the Defendant.

(5) The Plaintiff's solicitors have written to NGP's solicitors on 9th March 2011, and to NGP on 12th October 2011, seeking payment under the original contract.

17. Mr Adamson makes a number of points in response. First, as Mr Moyes states at paragraph 11 of his affidavit, NGP takes the position that the original contract does not cover consideration paid with respect to the sale of shares in NGP as it deals with property owned by NGP rather than shares in NGP. As presently advised, the Plaintiff is not disputing this.

18. Next, Mr Adamson submits that the Plaintiff could not sell its shares as it is a fundamental characteristic of company law that a company has no proprietary rights in its own shares.[1] See Palmer's Company Law at paragraph 6.0001.[2]

19. Mr Ouwehand's response is that a company can pay for the marketing of its own shares. Relying on MacDonald Dickens & Macklin v Costello, and in particular paragraph 21, he submits that there is no reason why the parties could not arrange a transaction in which legally enforceable promises were made only between the Plaintiff and NGP, even though the benefit of the contract was to be conferred on the Defendant.

20. Mr Adamson submits that only the holder of the shares in NGP could authorise their sale. Mr Ouwehand replies that Mr Chatchai, as director of NGP, could commit NGP to pay for the marketing with respect to the outcome of which a success fee is claimed precisely because, as a director of the Defendant, he had power to authorise the sale of the Defendant's shares.

21. Mr Adamson further submits that the sale of shares in NGP was not covered by the original contract. He relies on two passages in the contract in particular.

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[1] Unless they come to be held by a public company as treasury shares.

[2] Release 123: November 2009.

(1) At page 4, the original contract provides that: "*The Funding Success Fee shall be payable within ten business days of ... receipt of the Funds.*" Mr Adamson submits, and I agree, that this means receipt by the client company. But a company would not receive funds for the sale of its shares.

(2) At page 5, the original contract provides that, "*there is no success fee payable unless Client, in its sole discretion, enters into a transaction with a third party*." Mr Adamson submits that this wording would not cover the sale of the shares in the client company as a company's shares are held not by the company but its shareholders.

22. Mr Adamson therefore invites me to conclude, and I do not understand this to be controversial, that, with respect to the success fee, a contractual arrangement of some sort, other than that embodied in the original contract, was in force. There are only two plausible candidates for the counterparty to such an arrangement: the Defendant and NGP. That being the case, Mr Adamson submits, it is at least properly arguable that in fact the counterparty is the Defendant. Mr Ouwehand accepts that reasoning, save that he submits that all the available evidence suggests that the counterparty is NGP.

23. I conclude that the position is this. As matters stand, the weight of the evidence is that NGP and not the Defendant is the counterparty. But the fact that, on the material before me, the Plaintiff has a weak case, does not mean that the case is unarguable. I bear in mind that discovery has not yet taken place and there has been no oral evidence. These things may shed a new light on matters, or at any rate give the court a fuller picture. I pay particular regard to a passage on which Mr Adamson relies in Electra v KPMG [2000] BCC 368, a decision of the Court of Appeal of England and Wales, at 386 B:

"*It is trite law that the power to strike out a claim under RSC, O. 18, r. 19 or in the inherent jurisdiction of the court should only be exercised in 'plain and obvious' cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show*

that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known."

24. I am satisfied that the Defendant has not surmounted that high hurdle, and that I should not attempt to resolve this case on affidavit. For that reason this strike out application is dismissed.

25. I shall hear the parties as to costs and as to further directions to progress this case.

Dated this 10th day of December 2012 ______________________________

Hellman J