Neutral Citation Number: [2019] EWHC 3422 (Comm)

Case No: CL-2018-000585

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2019

Before :

MR. JUSTICE TEARE

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Between :

JAMES KEMBALL LIMITED	**Claimant**
- and -	
(1) "K" LINE (EUROPE) LIMITED	**Defendants**
(2) KAWASAKI KISEN KAISHA LTD	

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James Collins QC and Richard Hoyle (instructed by **MFB Solicitors**) for the **Second Defendant**
Nigel Jacobs QC and Ruth Hosking (instructed by **HFW**) for the **Claimant**

Hearing dates: 3 December 2019

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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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THE HONOURABLE MR JUSTICE TEARE

Mr. Justice Teare :

1. This is an application by the Second Defendant, "KKK", to set aside the permission granted by Moulder J. on 14 December 2018 to serve the proceedings on KKK out of the jurisdiction in Japan. Two grounds are relied upon. First, it is said that the claim against KKK has no reasonable prospects of success. Second, it is said that there was a failure to give full and frank disclosure on the *ex parte* application seeking permission.

An outline of the facts

2. KKK is a Japanese company which, until 1 April 2018, operated a worldwide container shipping business. The First Defendant, K-Euro, was its agent pursuant to an Agency Agreement dated 1 January 2003 and, later, pursuant to an Agency Agreement dated 1 February 2015 (but signed on 24 August 2016). K-Euro arranged road transport to and from UK ports for inbound and outbound containers. To that end, it concluded a Service Agreement dated 22 April 2016 with the Claimant, JKL. Pursuant to the Service Agreement K-Euro was obliged to offer JKL a minimum number of haulage jobs. In the event of a shortfall a surcharge was payable by K-Euro to JKL.

3. Prior to 1 April 2018 KKK, and two other Japanese container shipping companies, decided to amalgamate their container businesses and for that purpose created a new joint venture entity, Ocean Network Express ("ONE"). ONE commenced operations from 1 April 2018.

4. A consequence of ONE conducting the business which KKK would have conducted in the absence of the joint venture was that, after KKK's business had been run down after 1 April 2018, KKK had no work to give to K-Euro and so K-Euro had no jobs to offer JKL.

5. JKL has commenced proceedings against K-Euro for breach of the Service Agreement and for sums due under it. There is no dispute that JKL has an arguable claim against K-Euro. But in addition JKL has commenced proceedings against KKK for damages caused by KKK procuring or inducing a breach by K-Euro of its contract with JKL. The principal question is whether it has an arguable claim for that tort.

6. There was a close connection between KKK and K-Euro. K-Euro was in fact an indirect subsidiary of KKK and KKK had placed senior personnel in the employment of K-Euro. At this stage in the litigation (prior to disclosure) there are no documents available as to what passed between KKK and K-Euro concerning the creation of ONE and the effect that ONE's taking over of the business of KKK would have on the Service Agreement between K-Euro and JKL. JKL suggested that it was likely that there would be such documents and that it was likely that there had been discussions between KKK and K-Euro concerning the effect of the creation of ONE. For the purposes of this application it is accepted that there is an arguable case that KKK had knowledge of the Service Agreement between K-Euro and JKL.

The pleaded case

7. The Claimant, JKL, has pleaded that the haulage operations which were the subject matter of the Service Agreement formed part of the "Container Shipping Business" which was the subject of the joint venture agreement; see paragraph 7(iii) of the Statement of Claim. It was further pleaded that the conclusion of the joint venture "meant that [K-Euro] would no longer be able to perform the Service Agreement from its planned date of commencement, namely, April 2018"; see paragraph 7(iv). The Claimant, JKL, pleaded its case against KKK in these terms:

> 26. In the premises the Second Defendant knowingly and intentionally procured and/or induced the First Defendant to breach the Service Agreement (for Period 3) with the Claimant directly and/or indirectly in order to enable ONE to take over the haulage operations which would otherwise have been performed by the Claimant for Period 3 under the Service Agreement:
>
> (i) By reason of (inter alia) its relationship with the First defendant and its involvement in the conclusion of the SPA and Service Agreements, the Second Defendant must have been aware of the existence of the Service Agreement concluded between the Clamant and the First Defendant and/or that the First Defendant had agreed that the Claimant would provide haulage services for an extended period thereunder.
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> (ii) The Second Defendant was or must have been aware, or was at least sufficiently reckless in regard to, the probable consequences for the ability of the First Defendant to continue to perform the Service Agreement with the Claimant following the establishment of O.N.E. as part of the joint venture. Under the joint venture O.N.E. would take over haulage operations of the joint venture companies in the United Kingdom, thereby disabling the First Defendant from performing its obligations under the Service Agreement with the Claimant.
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> (iii) The establishment of O.N.E. and its take-over of the Claimant's and First Defendant's services in the United Kingdom thus meant that the First Defendant was unable to perform to Service Agreement (as the First Defendant repeatedly acknowledged in 2017-2018). The establishment of O.N.E was inconsistent with the ability of the First Defendant to perform the Service Agreement as the Second Defendant must have known.
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> 27. In these circumstances the Second Defendant directly or indirectly induced and/or procured the First Defendant to breach the Service Agreement in order to enable O.N.E to take over the import and export haulage operations conducted under the Service Agreement by the Claimant. By establishing the O.N.E. subsidiary or group of subsidiaries in order to take over the haulage operations for Period 3 which were to be undertaken by the Claimant under the Service Agreement with

> the First Defendant, the Second Defendant knowingly and intentionally procured and/or induced the First Defendant (whether directly or indirectly) to breach the Service Agreement with the Claimant."

The arguments on both sides

8. The submission made on behalf of the Second Defendant is that the pleaded case that the Second Defendant procured or induced a breach of the Service Agreement has no real prospect of success and therefore that the permission for service out of the jurisdiction should be set aside. This submission is based upon the explanation of the tort of inducing a breach of contract by Lord Nicholls in *OBG v Allan* [2008] 1 AC1 at p. 60.

> "178. ………..There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party. The defendant's liability is a "stand alone" liability. Consistently with this, tortious liability does not arise in prevention cases unless …………the preventative means used were independently unlawful. "

9. Counsel for the Second Defendant submitted that in the present case all that has been pleaded is that the Second Defendant had prevented the performance of the Service Agreement. There is force in this submission for the third paragraph of the particulars alleged that "the establishment of O.N.E. and its take-over of the Claimant's and First Defendant's services in the United Kingdom thus *meant that* the First Defendant was unable to perform to Service Agreement (as the First Defendant repeatedly acknowledged in 2017-2018)."

10. Counsel for the Claimant accepted that the Second Defendant had to be shown to have "participated" in the breach of the Service Agreement. To use the language of Lord Nicholls, the Second Defendant had to have "joined with" the First Defendant in breaking the Service Agreement.

11. In *OBG v Allen* Lord Hoffman said (at paragraph 36) that the real question was:

> "Did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?"

12. Lord Hoffman said further (at paragraph 43):

> "……..if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at". "

13. Those comments express, in different language, the same point which Lord Nicholls made about mere prevention being inadequate to found an action for inducing a breach of contract.

14. Counsel for the Claimant submitted that the requirement of participation in the breach by the Second Defendant was arguably satisfied because "it is – at the very least – a "non-fanciful" and reasonable inference that the Second Defendant did "encourage" the First Defendant to breach the Service Agreement for period 3 in order to enable the Second Defendant to carry out the ONE joint venture." This was said to be arguable because of the "direct and indirect relationship between the First Defendant and the Second Defendant in terms of both agency and its subsidiary corporate relationship (including common officers)." Counsel accepted that this could only be determined at trial but that at present it was sufficiently arguable based upon a "fair and reasonable inference from the underlying facts". There is force in this submission but the difficulty is that the pleading does not expressly suggest that there was "encouragement". However, the pleading did allege that the Second Defendant "induced ………the First Defendant to breach the Service Agreement in order to enable O.N.E to take over the import and export haulage operations conducted under the Service Agreement by the Claimant." It seems to me that that is just sufficient to cover the case which counsel advanced. It is an allegation that the breach of the Service Agreement was the means by which the Second Defendant would ensure that ONE took over responsibility for the haulage operations as envisaged by the joint venture. It would however have been clearer had express reference been made to "encouragement".

15. In response counsel for the Second Defendant noted that there was some uncertainty in the formulation by counsel for the Claimant in the course of his oral submissions of what probably passed between the Second and First Defendants. At one stage it was said that it was likely that the Second Defendant instructed the First Defendant that it would not be able to perform the Service Agreement. Counsel submitted that that would not amount to encouragement because it was no more than a statement of fact which was not enough for inducement; see *Clerk and Lindsell on Torts*, paragraph 24-40. At another stage it was said that it was likely that the Second Defendant had instructed the First Defendant that the First Defendant was not allowed to perform the Service Agreement. That, counsel suggested, was quite different and could be an inducement but that it had not been pleaded. Further, reliance was placed on *Elite Property Holdings v Barclays Bank* [2019] EWCA Civ 204 at paragraph 41 where Asplin LJ said:

> "A claim does not have a [real as opposed to a fanciful prospect of success] where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are

> correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the court to draw the necessary inferences…"

Discussion and conclusion as to the cause of action

16. Given the connection between the Second and First Defendants, namely that the First Defendant was owned by the Second Defendant, was its agent and some of its senior personnel were common, I consider that the alleged inference is realistic and not fanciful or without substance. It is likely that there was discussion, either orally or in writing, between the Second and First Defendants concerning the joint venture. The underlying facts from which the inference of inducement is to be inferred have been pleaded; see paragraphs 5 and 6(f), albeit that more details of the senior personnel might have been pleaded. I note that the documents have been studied by the solicitor acting for the Second Defendant who has informed the court that there are no documents suggestive of instructions or persuasion and that the material indicates that the Claimant's case is unfounded. But disclosure has not yet been given and if the solicitor is right then it is likely, given the circumstances, that there were oral discussions.

17. I accept that it is not at this stage clear whether what was likely to have been said by the Second Defendant to the First Defendant was in the realms of information only or whether it amounted to "encouragement". However, it does not appear to me to be fanciful to suggest that it is likely that it amounted to encouragement. What amounts to the simple provision of information (and so not capable of being an inducement) and what amounts to encouragement (and so capable of being an inducement) will depend very much on the factual context. Given the context of the close connection between the Second and First Defendants what passed may have amounted to encouragement. I have noted and considered the points made by counsel for the Second Defendant at paragraph 24 of his skeleton argument in support of his submission that a persuasion case is baseless and nonsensical. But I do not consider that I can say at this stage that the Claimant's case is bound to fail or that it carries no conviction. To do so would be to conduct a mini-trial which is not appropriate.

18. Counsel for the Second Defendant submitted that even if there were an arguable case on persuasion such a case would not succeed on causation because whatever was said the ONE joint venture would have disabled the First Defendant from performing. However, causation is very much a factual matter and it would, I think, be premature to make such a finding at this stage. An event can have more than one cause.

19. Counsel for the Claimant had a further basis on which to allege the tort of inducement of breach of contract. He submitted that the tort is established where the defendant, with knowledge of the contract, has dealings with the contract breaker which are inconsistent with the underlying contract. Reliance was placed on *Middlebrook Mushrooms v T&GWU* [1993] ICR 612 at p.618, *Lictor Anstalt v Mir Steel* [2011] EWHC 3310 at paragraphs 48-52, *Global Resources Group v MacKay* [2008] CSOH 148 at paragraph 13 and *Clerk and Lindsell on Torts* paragraph 24-35 and fn 191. The inconsistent dealing was said to be the conclusion of the ONE joint venture; see the third particular pleaded under paragraph 26 of the Particulars of Claim. Counsel for the Second Defendant submitted that for this purpose the "inconsistent dealing" with the contract breaker had to be a contract with the contract breaker or something very

close to it and that in the present case there was nothing like that. Instead there was a "non-dealing" with the First Defendant by not providing it with any haulage work.

20. In the light of my decision on the first way in which counsel puts the case of the Claimant it is unnecessary to deal with this alternative way of putting the case. I will only say that the submission made by Counsel for the Claimant appears to be in conflict with Lord Nicholls' clear statement in *OBG v Allan* that mere prevention is not enough. However, in this difficult and (relatively) uncharted aspect of the tort of inducement of breach of contract it would be unwise to reach any firm conclusion without all the facts being known.

Failure to make full and frank disclosure

21. Counsel for the Second Defendant submitted that the Claimant's approach to the merits of its case in the witness statement of Mr. Neame was an inadequate presentation because it failed to refer to the absence of facts to support the necessary inferences and also failed to refer to the legal problems facing the claim. Indeed it was said that the treatment of the claims was flippant, by which I understood counsel to mean that the merits of the claim were not treated with the importance they deserved.

22. The relevant principles concerning the duty of full and frank disclosure have been fully restated by Carr J. in *Tugushev v Orlov and others* [2019] EWHC 20131 at paragraph 7. I note that the applicant must "investigate the cause of action asserted and the facts relied upon before identifying and addressing any likely defences" (paragraph 7(iv)). Although that case was primarily concerned with an application for freezing order, the same principles applied to an application for permission to serve out of the jurisdiction; see paragraph 8.

23. In Mr. Neame's first witness statement, which was made in support of the application for permission for service out of the jurisdiction on KKK, the Second Defendant, he noted (at paragraph 3) that the Second Defendant, having been provided with a copy of the Particulars of Claim, had stated that they did not understand the grounds on which the claim against them was made. Mr. Neame said (at paragraph 5) that he would address, inter alia, the "reasonable prospects of success" of the Claimant's claim. He referred (at paragraph 31) to the Service Agreement and (at paragraph 35) to the First Defendant being owned or controlled by the Second Defendant and to being responsible for the Second Defendant's business in Europe. He said (at paragraph 36) that the Claimant contends that the Second Defendant was aware of the Service Agreement. The ONE joint venture was described (at paragraphs 37 and 38) and (at paragraph 40) he said:

> "The conclusion of the joint venture meant that K Line would no longer be able to perform the Service Agreement (in accordance with its terms) from its planned date of commencement, namely April 2018 …….From 1 April 2018 K Line was no longer the UK agent of the liner business of KKK (or its successor ONE) and was unable to continue to perform the Agreement."

24. At paragraph 44 the basis of the claim against the Second Defendant was explained in these terms:

> "The basis of the claim for procuring/inducing breach of the Service Agreement is that KKK knowingly and intentionally procured and/or induced K Line to breach the Service Agreement (for Period 3) with Kemball directly and/or indirectly in order to enable ONE to take over the haulage operations which would otherwise have been performed by Kemball for Period 3 under the Service Agreement."

25. That was the extent of the explanation of the alleged cause of action against the Second Defendant. It is immediately apparent that there was no attempt to explain, as was done in the oral hearing before me, that the court would be invited to infer from the relationship between the Second and First Defendants that it was likely that the Second Defendant had encouraged the First Defendant to breach the Service Agreement. It is also apparent that no reference was made to *OBG v Allan*, the leading case on the tort of inducing a breach of contract. By contrast Mr. Neame referred to authorities relevant to the jurisdictional gateway and to the question of *forum conveniens.* Given what was said by Lord Nicholls as to prevention being insufficient and given what was said by Lord Hoffman as to the need for "acts of encouragement, threat, persuasion and so forth" this was, I think, a material omission. Had reference been made to those passages in *OBG v Allan* it would have been apparent that a likely defence was that this was a case of mere prevention, particularly in light of what was said by Mr Neame in paragraph 39 of his witness statement as to the effect of the joint venture. I accept that the statement in paragraph 44 that there was an inducement "in order to enable ONE to take over the haulage operations which would otherwise have been performed by Kemball for Period 3 under the Service Agreement" can be said to fall within Lord Hoffman's example of the breach being a "means to an end" but there was no explanation by Mr. Neame to that effect. I would not use the adjective flippant to describe Mr. Neame's treatment of the merits. Rather, I would say that he did not make a fair presentation of how, given the explanation of the tort in *OBG v Allan*, the claim was put and what the likely defence might be. This was particularly surprising in circumstances where the Second Defendants had said in terms that they did not understand the grounds on which the claim against them was made. There was therefore, in my judgment, a failure by Mr. Neame to give full and frank disclosure.

26. The court has a discretion as to what to do in those circumstances. The manner in which that discretion may be exercised is discussed by Carr J. in *Tugushev* at paragraph 7 (ix) – (xiii). Given that a freezing order has far-reaching effects on a defendant whereas the grant of permission to serve out merely provides for the service of proceedings on a defendant the court is more likely in the former case than in the latter case to set aside the order obtained in breach of the duty to give full and frank disclosure without re-granting it. In *Tugashev* itself the freezing order was set aside whilst the service out was set aside but re-granted on terms as to costs; see paragraph 95.

27. In the present case there is no time bar issue. Thus if the court were to set aside the permission for service out, a fresh application for permission to serve out could be made. In circumstances where the claim against the Second Defendant has a real, as opposed to a fanciful, prospect of success which carries a degree of conviction there would be little purpose in setting aside the permission for service out beyond marking

the gravity of the failure. But that failure can also be marked by ordering that the Claimant pay the costs of this application to set aside on an indemnity basis. The failure to draw the court's attention to the precise manner in which the claim against the Second Defendant was put and to the arguments which might be advanced against it in the light of *OBG v Allan* was sufficiently out of the norm to justify an order for costs on the indemnity basis.

28. There was a further submission that the proceedings against the Second Defendant were an abuse of the process of the court on the grounds that there were no reasonable grounds for advancing a claim against the Second Defendant and that it is to be inferred that that claim had been commenced not to vindicate a right but to pressure the Second Defendant into making a settlement. In circumstances where there are reasonable grounds for advancing a claim against the Second Defendant it is unrealistic to suggest that the claim is an abuse of the process of the court.

Conclusion

29. The application to set aside the permission for service out is dismissed but the Claimant must pay the costs of the application on the indemnity basis in circumstances where there was a failure to give full and full frank disclosure when seeking that permission.