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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT
COMMERCIAL COURT (QBD)
[2020] EWHC 2657 (Comm)



No.LM-2019-000075

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 16 July 2020

Before:

HIS HONOUR JUDGE PELLING QC
Sitting as a judge of the High Court

B E T W E E N :

FFINAL 09 AG

Claimant

- and -

FLOREAT MERCHANT BANKING LIMITED

Defendants

MS E. HITCHENS appeared on behalf of the Claimant.

MR R. BHATT appeared on behalf of the Defendant.

J U D G M E N T

JUDGE PELLING

[Note from transcriber: this Judgment was prepared without access to case papers]

1 This is the hearing of the claimant's application for summary judgment for the sum of CHF325,000 or restitution in an equivalent amount, together with interest and costs. The defendant opposes the application in its entirety.

2 The principles applicable to an application of this sort are now well established. I respectfully adopt the summary of applicable principles set out in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) para.15):

"i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success ...

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...

iii) In reaching its conclusion the court must not conduct a 'mini-trial ...

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the

court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ..."

- 3 To these general principles, I would add this: summary judgment and strike out applications are not an appropriate forum for the determination of issues of law that are not short, straightforward, clear or obvious, or otherwise where the issues (be they of law or fact) that arise require detailed argument and mature consideration: see *AK Investments CJSC v Kyrgyz Mobil Tel Ltd.* [2012] 1 WLR 1804, per Lord Collins at para.84. It is also inappropriate to resolve issues of law in a developing area: see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, per Lord Browne-Wilkinson at pp.741 to 742. In cases where the law is developing, complex, or its applicability has not been fully worked out in the authorities, it is much more appropriate for the issues to go to a full trial where findings of fact can be made and the application of existing law and any incremental developments in the law which are accepted as appropriate can then be applied to the facts as found.
- 4 I now turn to the facts of this case. I start by identifying the principal actors in the dispute. The claimant is a Swiss-registered corporation. At all material times it has been beneficially owned by Mr Nuth. At all material times down to 24 March 2015 its sole director was a Dr Treu. It appears to be common ground, or in any event it is to be assumed for the purposes of the present application, that the defendant will prove at trial that Dr Treu controlled other Swiss-registered entities, of which two were Floreat Family Offices Services AG ("Services") and Floreat Trustees AG ("Trustees"). As I explain below, it is the defendant's case that the true principals to the transaction the subject of the claim were Trustees and the defendant, not the claimant and the defendant, and that as between Trustees and the claimant, the sums claimed have been accounted for.
- 5 I now turn to the defendant. It is an English-registered company. At all material times it has been controlled by three directors, two of whom are Mr Hussam Otaibi ("HO"), and Mr Mutaz Otaibi ("MO"). As the defendant asserts - and again it is to be assumed for present purposes that it will prove at trial - that there was a close working relationship between the defendant and Messrs Otaibi on the one hand, and Dr Treu and his various companies on the other at all material times down to the making in 2016 of a settlement agreement by which there was a reconciliation of their respective financial affairs and a parting of the ways. As I explain in detail later, the claimant's case is that the payments the subject of these proceedings were loans by the claimant to the defendant. As I have said already, the defendant's case is that the true principals to the transactions were Trustees on the one hand and the defendant on the other. There is no direct documentation in the form of a loan agreement or an exchange of letters or emails containing or evidencing the loan for which the claimant contends. On the other hand, there is some contemporaneous accounting material (to which I turn below) which suggests the true principals may have been Trustees and the defendant, but that the money that the claimant paid was either routed through the claimant's accounts on behalf of Trustees, or paid on its behalf, or otherwise accounted for between them.
- 6 In those circumstances, it is likely that the nature and extent of the relationship between Messrs Otaibi and the defendants on the one hand, and Dr Treu and the entities controlled by him on the other, will provide important context against which the documentation to which I have referred, and any other documentation that emerges in the course of disclosure,

can be interpreted or understood. In my view, it is close to impossible for a court safely to draw an inference from the material currently available that the defendant does not have a realistically arguable defence to the claim on the basis it asserts. In my judgment, one very clear reason why that is so is because the material currently available does not permit any safe conclusions to be drawn as to the context against which the obviously incomplete material available can be assessed and the appropriate inferences drawn.

7 The claimant's pleaded case, as set out in para.2 of the particulars of claim, is:

"In April to May 2013 the claimant transferred to the defendant the total sum of CHF325,000. This sum was paid by four separate bank transfers from the claimant's Swiss bank account with UBS ... to the defendant's Swiss bank account with UBS ... as follows: (1) CHF50,000 on 29 April 2013, (2) CHF100,000 on 29 April 2013, (3) CHF100,000 on 29 April 2013, (4) CHF75,000 on 30 May 2013, together referred to as the 'debt'."

8 The claimant's primary case is that the four payments together constituted a "*cash loan*" from the claimant as lender to the defendant as borrower. As I have said, there is no loan agreement relied on, nor any exchange of correspondence or emails between the claimant and the defendant or their respective controlling individuals that relate to these payments. The claimant's only pleaded basis for treating these claims as loans are: (a) in relation to the whole of the total claim, an email of 13 October 2013 from HO to MO and Dr Treu, and (b) in relation to the CHF75,000 payment, that is the last of the four payments identified in para.2 of the particulars of claim, the terms of a debit advice sent to the claimant by its bank.

9 I turn to the debit advice first. It is addressed to the claimant by its bankers UBS. It refers to the defendant as "*beneficiary*" and contains the statement "*text: loan*". The claimant's case is that this information can only have come from instructions given to the bank by either Dr Treu or someone acting on his behalf as controller of the claimant. Had this been the only material available in relation to this payment, I would have considered it sufficient to establish the payment as being a loan and to be recoverable essentially as alleged by the claimant. However, as I explain below, it is not the only material available.

10 I now turn to the email of 13 October 2013. The claimant relies only on part of the email and maintains that it is to be inferred from the part on which it relies that the email is an admission or acknowledgement that the payments it seeks to recover in these proceedings were all loans. It is necessary that I set out the email in full, together with one line of the schedule attached to the email. The email, as I have said, was sent by HO. It is dated 13 October 2013, and was sent to MO and Dr Treu. Its subject matter is described as being "*old matters private and confidential*", and the attached schedule is described as "*confidential numbers: XIFX*". The text of the email is as follows:

"Mutaz

Flor and I have been trying to get the numbers from the past, prior to December 2012, finalised. I would like you to take the lead on this matter so we can put an agreement between me and Flor to carve out the past 50/50 liabilities, then transfer the shares of the current structures.

Flor, the only way to close in the matter is to simplify the process as below:

(1) get the exact real revenue that Floreat Family Office generated from 2008 to 2012;

(2) get the exact cost that the Floreat Family Office has spent;

(3) the difference between revenue and costs as financed by third parties including me and you;
(4) define the real investments that were made from funds allocated by me;
(5) where the payments for Paradise and Paddle A(?) shareholding were paid from;
(6) get the balance, then put an agreement between the two of us.
To be clear, the period December 2012 until now, the liabilities would be divided per the new shareholding as all the funds are being counted as loans to the company. We need to put a deadline to this matter. I will set up a time in the diary for us to review progress on a weekly basis."

- 11 The schedule has five columns headed respectively "*Lender*", "*Borrower*", "*Subject*", "*Currency*", and "*Amount*". The penultimate line within the schedule refers to the sum of CHF325,000, and in relation to that sum describes the claimant as lender, the defendant as borrower, and the subject as "*cash loan*".
- 12 It is apparent that the email is concerned with treating various liabilities as loans to a company presumably for the purpose of treating the loans as shareholder investment, although I am bound to say the email makes little sense without seeing all the surrounding documentation in order to understand the context in which it came to be sent. That said, on the face of it, the schedule characterises the whole of the sum claimed as being a loan from the claimant to the defendant. However, there is no evidence that this characterisation was correct as a matter of fact, or anything other than part of a negotiation then taking place between the principals, being the sender and recipients of the email. As I will explain in a moment, accounting material coming from the claimant's side of the bargain to the defendant's suggests that the analysis of the schedule was not accepted to be correct and ultimately was not adopted in the reconciliation that the defendant alleges followed.
- 13 Returning now to the narrative relevant to the claim, the claimant submits that on this material I should conclude that the payments were loans repayable on demand. Repayment was demanded by the claimant's Swiss lawyer on 4 March 2017 and by its English solicitors on 18 April 2017. In those circumstances, the claimant maintains I should enter judgment for the sums claimed. In my judgment, there are real difficulties about this submission. First, as I have explained, I consider that it would be unsafe to draw any inference from the terms of the email. It is plain that at trial, following disclosure, it should be possible to understand the context in which the email came to be written and, critically, what happened after it was sent. Given the other material to which I refer in a moment, it is realistically arguable that the position was in truth not as assumed or proposed in the email.
- 14 Before turning to the accounting material that suggests the funds claimed by the claimant were liabilities that existed between the claimant and Trustees, it is necessary that I refer to a side issue. It is pleaded in the defendant's amended defence in these terms at paras.15 to 21:

"The transfer of the debt to the defendant.

15. As far as the Otaibis were aware, Dr Treu had obtained a personal loan of approximately CHF250,000 from a Mr Mutschler which was due to be repaid on 2 May 2013.

16. On 27 April 2013 Dr Treu asked Mutaz Otaibi to assist him in administering various payments from the bank account belonging to Floreat Trustees AG ('Trustees') which Mutaz Otaibi had access to. This included

administering a payment from Trustees to Dr Treu, for Dr Treu to repay the loan to Mr Mutschler. Dr Treu was due to go on holiday on 28 April 2013 and therefore Mutaz Otaibi agreed to assist.

17. On 28 April 2013 Dr Treu informed Mutaz Otaibi that he had put in place a number of payments to be made into Trustees' account for onward payment. This included the transfer to be made from Trustees to Dr Treu in order for Dr Treu to repay the loan to Mr Mutschler.

18. On 29 April 2013 Mutaz Otaibi discovered that CHF250,000 had been transferred into the defendant's bank account by Dr Treu from the claimant. Mutaz Otaibi believed this to have been an error as the transfer ought to have been to Trustees' account for onward payment to Dr Treu."

Interposing for a moment, the onward payment to Dr Treu may have been a typographical error and should be a reference to Mr Mutschler but it does not matter for present purposes. Continuing with the pleading:

"19. In light of the mistaken payment into the defendant's bank account on 30 April 2013, Mutaz Otaibi asked Dr Treu for Mr Mutschler's account details. Mutaz Otaibi did not want the loan to be paid from the defendant's bank account and informed Dr Treu that the payment needed to be made from Trustees. Mutaz Otaibi asked Dr Treu to affect another transfer from the claimant to Trustees for onward transmission to Mr Mutschler.

20. Dr Treu did not affect the further transfer from the claimant to Trustees and as such, on the same date, Mutaz Otaibi transferred the CHF250,000 to Dr Treu's personal account for Dr Treu to administer the repayment to Mr Mutschler himself. For the avoidance of doubt, Mutaz Otaibi did not have access to the claimant's bank account.

21. In the circumstances, CHF250,000 has been repaid to Dr Treu."

15 The first point that emerges from this is that, if correct, the three payments totalling CHF250,000 was not a loan to the defendant. The second point that arises is that the defendant appears to allege the payment was made by mistake. In such circumstances it is submitted by the claimant that on that basis it has a restitution claim to which there can be no answer. The defendant says it has a change of position defence available to it, based on the repayment to Dr Treu. The defendant maintains that that is unarguable because the repayment to Dr Treu was not a repayment to the claimant. Ms Hitchens maintains that the change of position defence is unarguable following Niru Battery Manufacturing Company v Milestone Trading Ltd. [2002] EWHC 1425 (Comm), per Moore-Bick J (as he then was) at paras.134 to 135 where, having considered the decision of the House of Lords in Lipkin Gorman, the judge said this:

"In the light of these observations, and having regard to the nature of principles underlying the right to restitution in the case of a mistaken payment and the defence of change of position, I do not think that dishonesty in the sense identified in Twinsectra Ltd v Yardley is the sole criterion of the right to invoke the defence of change of position. I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have

to be worked out through the cases. In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made. Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. This applies as much to a banker who receives a payment for the account of his customer as to any other person ... Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake but cannot be sure. In such cases good faith may well dictate that an enquiry be made of the payer. The nature and extent of the enquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making enquiries of the person from whom he received it."

- 16 Ms Hitchens relies on the statement that where a recipient knows the money to have been paid by mistake, the recipient must return it to the payer and no change of position defence can arise in relation to dealings other than a payment back to the payer. Ms Hitchens submits that the payment to Dr Treu was not a payment to the claimant. That is so. But in making that submission, Ms Hitchens ignores the assertion by the defendant in para.13 of the amended defence that MO believed that Dr Treu was the sole beneficial owner of the claimant in the period down to March 2015. He repeats that point in para.8 of his witness statement. There is no evidence to contrary effect, and he is entitled to say that his actions in causing CHF250,000 to be repaid to Dr Treu was consistent with him believing that to be the position.
- 17 The change of position defence is one that is classically an area of developing law. It is arguable, as Ms Hitchens argues, that a change of position defence should not be available to a person who knows that money has been paid by mistake by a company, even one wholly owned by an individual, even though the whole sum has been repaid to the individual thought to be the sole beneficial owner of the company concerned. But Moore-Bick J's judgment suggests the position may be more nuanced than that. As he said, the meaning of good faith in the change of position defence context has to be worked out through the cases and, applying the principles I referred to earlier, that is not something that should be attempted otherwise than after a trial when all the relevant factual findings have been made, where the relevant disclosure is to hand, and the context in which the payment came to be made and returned can be fully understood. As Moore-Bick J observed at para.135 of his judgment:

"The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made."

- 18 It may be that the assertion that MO did not have access to the claimant's bank account, for example, will face critical scrutiny at trial. However, that is an issue for trial, not this application. I should add for completeness that the fact that the payment of CHF250,000 is supported by the defendant's financial controller at the time, Mr Murfitt, in his witness statement, that is not something that can be challenged, much less resolved at a hearing of this sort.
- 19 Now I turn to the accounting material relied upon by the defendant as showing that the funds the subject of the claim belonged beneficially to Trustees, not the claimant, and that Trustees have discharged that liability. But for this material, it is probable that I would have considered the claimant entitled to recover judgment for CHF75,000 on this application. As it is, the material creates a realistically arguable defence for the defendant as to the whole of the sums claimed.
- 20 Mr Murfitt is a chartered accountant employed by a firm of chartered accountants who oversee the defendant's accounts department as a financial controller. It would be entirely inappropriate for me to reject his evidence at a hearing of this sort.
- 21 He says that in 2014 the Otaibis and Dr Treu decided to reconcile their respective financial liabilities for the purpose of preparing accounts for their respective entities for the year ending 2013. He describes the exercise in para.9 of his witness statement as "*a complicated and time-consuming exercise*", involving analysing payments between the various entities, including the claimant and Trustees, amongst others, and the defendant. He says that a Mr D'Agostino was engaged as an accountant for the entities controlled by Dr Treu. By an email of 29 May 2014, Dr Treu emailed ledgers for transactions between the Swiss entities and the defendant. One was a ledger for Trustees' account with the defendant. It refers to each of the four payments the subject of these proceedings as being a transfer to the defendant via the claimant. The effect of the document therefore is to suggest that the true accounting parties to the transaction are not the claimant and the defendant, but Trustees and the defendant, though how that came to be is not explained on the face of the documentation. As Mr Murfitt puts it at para.14 of his witness statement:

"The effect of the document is either that the payment to the defendant was by the claimant on behalf of Trustees, or that it was intended to be by the claimant to Trustees for onward payment to the defendant."

Either way, it is at least realistically arguable that the payments are to be accounted for between Trustees and the defendant, not the claimant and the defendant.

- 22 Ms Hitchens makes a number of forensic points about this. She points to the fact that it is obviously entirely inconsistent with the claim that CHF250,000 were paid back to Dr Treu. It is said that if Dr Treu received the Swiss francs as alleged, he should have accounted for it, and plainly has not. That may suggest errors, or worse, in Dr Treu's management of his companies and those that he controlled on behalf of others. However, that cannot be resolved on an application of this sort. It is clear that Mr Murfitt, on behalf of the defendant, acted on the documentation provided by Dr Treu, because in his accounting for the defendant he treated the payment as one due to Trustees: see para.15 of his witness statement and p.4 of the exhibit thereto. It is true to say that he ought to have taken account of the payment made to Dr Treu, and by not doing so, on the face of it, credit has been given twice for that sum. He was aware of the payment in para.17 of his witness statement and treated it as a payment made to Dr Treu rather than either to the claimant or Trustees. He

says he became aware of what happened at a later stage and that when he did do so, he made the appropriate changes to the accounting detail: see para.20 of his statement.

- 23 It may be that this seems improbable and that examination and cross-examination with the aid of disclosure will undermine the explanations offered, but it is wrong and inappropriate to reject the evidence of an independent professional at this stage, without it being tested in cross-examination, and without being able to reach final conclusions as to what is asserted. It would not be possible even to attempt to undertake such a task without embarking on a mini-trial, which is precisely the impermissible way in which applications of this sort should be determined, applying the principles referred to earlier.
- 24 In the result, I am satisfied that the defendant has demonstrated that it has a realistically arguable defence and therefore the application for summary judgment fails and is dismissed.
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CERTIFICATE

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**** This transcript has been approved by the Judge ****