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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2022] EWHC 377 (Comm)



No. LM-2022-000013

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 8 February 2022

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the High Court)

B E T W E E N :

DENISOV

Claimant

- and -

DELVECCHIO & Ors.

Defendants

MR M. McGHEE (Counsel) appeared on behalf of the Claimant.

THE DEFENDANTS were not present and were not represented.

J U D G M E N T

(via Microsoft Teams)

JUDGE PELLING:

- 1 This is an application for permission to serve proceedings on the first to third defendants out of the jurisdiction. As is well-established, if permission is to be obtained, three conditions have to be satisfied, being those summarised by Lord Collin JSC *AK Investment CJSC v Kyrgyz Mobil Telephones Limited* [2011] UKPC 7; [2012] 1 WLR 1804, principally at para.71, where he identified the three requirements as being, first, that the claimant must satisfy the court that there is in relation to the foreign defendant a serious issue to be tried on the merits where the test is broadly that to be applied in a summary judgment case, namely whether there is a real as opposed to a fanciful prospect of success. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim passes through one of the gateways” identified in practice direction 6B at paragraph 3.1. The requirement for good arguable case for gateway purposes to be shown factually is in most cases satisfied where there is a plausible evidential basis for the claim sufficient to pass through the relevant gateway - see *Brownlie v Four Seasons Holdings* [2018] 1 WLR 192 per Lord Sumption JSC at paragraph 7. Finally, the claimant must satisfy the court that, in all the circumstances, England and Wales is clearly and distinctly the most appropriate forum for the dispute to be resolved and that, in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.
- 2 The real issues that arise in this case are (a) whether one of the relevant gateways is available as against each of the defendants and (b) whether England is clearly and distinctly the most appropriate forum for this dispute to be determined. It is now necessary that I say something about the nature of this claim.
- 3 The claim is one which is founded on an alleged fraud. In summary, the claimant wished to purchase some property in Sardinia. The claimant instructed the first defendant, an Italian lawyer working in Italy and living in San Marino, to conduct the negotiations and advise him in relation to the purchase. The second defendant was a business adviser in whom the claimant at that stage reposed trust in relation to his business affairs generally.
- 4 Inevitably, the factual issues that arise are complex and this application is not the occasion to explore them in any great detail. In summary, however, the claimant alleges that the first and second defendants informed him that the purchase price for the Sardinian property was to be €8.85 million, the vendor required the transaction to be structured so that €2.85 million of the €8.85 million was to be paid offshore from Italy and €2.85 million should be paid to a third party entity to act, in effect, as stakeholder in order to facilitate that requirement. .
- 5 The third party entity identified was a US registered corporation called Golden Paradise Garden LLC referred to in these proceedings as “GPG”. The ostensible role of GPG was to hold the €2.85 million, in effect, as a stakeholder and to pay over that sum to the vendor on completion, less any fees to be deducted from that sum in favour of GPG for its services. In fact, at least realistically arguably, the true purchase price appears to have been € 6 million and, at least realistically arguably on the evidence currently available, €2.85 million was not paid to the vendor either on completion or at all but to or largely to the second defendant who controlled GPG. I should add that the third defendant is a corporate vehicle controlled by the first defendant, and the first defendant appears to have received the fees which were agreed expressly between the first defendant and the claimant as due in respect of the transaction.
- 6 The other point I should make is that these events took place in 2012 and thus would, on the face of it, be statute barred at any rate as a matter of English law. However, the alleged fraud

is alleged by the claimant to have come to light in 2020 as the result of an investigation into other matters concerning the second defendant and, therefore, if and to the extent that this case is to be litigated in England, the claimant relies upon s.32 of the Limitation Act 1980 as an answer to any suggestion that the claim is statute barred.

- 7 There is very little that connects this dispute with England. The vendor was, as I have said, Italian. The property, the subject of the index transaction, was located in Italy. The claimant is Russian and lives in Russia. The first and second defendants each live in San Marino. The first defendant is a Russian national, and the funds belonging to the claimant that were used to fund both the purchase and the transfer of the €2.85 million came from a Swiss bank account controlled by the claimant and were credited to another Swiss bank account controlled directly or indirectly by the second defendant.
- 8 The sole connection with England is that the account to which the €2.85 million was credited by the claimant in compliance with the advice and directions given to him by the first and/or second defendants was a Barclays bank account opened in the name of GPG. The evidence which is available in relation to that account, as I understand it, has largely emerged as a result of a *Norwich Pharmacal* order made against Barclays Bank following the discovery of the alleged fraud.
- 9 The case which the claimant advances in relation to the transfer of the funds to London, is that the second defendant advised him to make the payments to the Barclays Bank account in London and then authorised the payments that were made out of that account, the vast majority of which were credited to a Swiss bank account referred to in these proceedings as “the BSI account” and bank charges paid out of monies in that account to Barclays.
- 10 The Barclays account was opened at the Knightsbridge branch of Barclays on 18 July 2011 or thereabouts, because that was the date when an application was made to open the account. The Barclays customer was identified in the application to open the account as being GPG, but the account itself was opened by an intermediary called Intrust Limited. Intrust Limited is not a party to these proceedings and it is accepted, at any rate, for present purposes that that is a *bona fide* business operating in London against whom no allegations or criticism are or can be made. In summary the Barclays bank account was opened by Intrust Limited in the name and on behalf of GPG.
- 11 The points relied upon by the claimant in relation to this account is that, in the same application form filed with Barclays to open the account and under the heading “*Source of funds: Please state in detail where the initial and future expected assets/payments into the account will be received from.*” Intrust said this: “*Business activity by BO in the field of luxury goods, fashion, perfume and cosmetics. BO nationality, Bulgarian. BO country of residence, Italy.*” It is submitted on behalf of the claimant, first of all, that “BO” means beneficial owner, a proposition I accept and, secondly, that, if the description is read as a whole, it plainly is identifying as the beneficial owner the second defendant, since he is a Bulgarian national who is resident, in fact, in San Marino, but whose business activity is otherwise accurately described. I accept that this analysis is realistically arguable.
- 12 The other points that emerge in relation to this application form submitted to Barclays include that, in the summary of details relating to the nature of business and maturity of business, it was said in this document that GPG:

“... will act as intermediary for the purchase and sale of real estate and other luxury goods, such as cars, on behalf of its clients. The company will receive

commission fees from its clients for the services it provides in locating either purchase or the sale of the goods. The commission fee will be payable under an agreement and the issuing of an invoice by [GPG] to its client ...”

- 13 On the face of it, therefore, the bank account was controlled in England by Intrust Limited, but, in reality, Intrust Limited acted on the instructions of the beneficial owner. Whilst the description contained in the application for the opening of the bank account might be described as ambiguous in some respects, for example, in referring to the place of residence of the beneficial owner as Italy rather than San Marino, there is other evidence which demonstrates that, in fact, the second defendant was involved in relation to this account. Firstly there are the emails identified by counsel in the course of his submissions in support of this application, which include emails passing between the first and second defendants in relation to sums which were to be credited to the account by the two individuals who were identified as being the initial source of funds to be credited to the Barclays account. Secondly, the best evidence in relation to this issue is a US Corporation income tax return for GPG which identifies as the person controlling the company as the second defendant (see the second page of that document). In those circumstances, I am satisfied to the relevant standard that GPG was controlled beneficially by the second defendant and that therefore the activities of Intrust in this jurisdiction were likely to have been the result of instructions given, either directly or indirectly, by the second defendant.
- 14 It is against that background that I now turn to the issues which arise on this application. In summary, the claimant alleges that the first and second defendants are liable in deceit for fraudulently misrepresenting the sale price in the way I have described. Secondly, he alleges that the sum received by GPG was paid by reason of the deceit and/or a unilateral mistake brought about by the first and second defendants’ misrepresentations and, therefore, the sum paid into the Barclays bank account was impressed with a constructive trust at the moment it arrived in that account. Thirdly, the second defendant is alleged to have dishonestly assisted GPG’s breach of constructive trust by directing GPG to dissipate or spend the funds impressed with the constructive trust credited to the Barclays bank account by causing it to be paid to the Swiss bank account that I have referred to and/or to be used in London for the purposes of meeting bank charges and the like. It is alleged finally by the claimant that all of the defendants, together with GPG, were parties to an unlawful means conspiracy, and it is against that background that the relevant issues that I identified at the start of this judgment have to be resolved.
- 15 I am satisfied on the basis of the material I have summarised that there is in relation to the foreign defendant a serious issue to be tried on the merits.
- 16 I turn next to the gateways issue, As I have said already, a real difficulty in this case is whether or not one or more of the gateways can be made available against each of the defendants on the facts as I have summarised them. Assuming that difficulty can be overcome, the other difficulty is whether it can be said that England is clearly and distinctly the appropriate place for the determination of this dispute.
- 17 Turning first to the gateway issue, the claimant’s case on gateways is that primary jurisdiction is established against the second defendant under subparagraph (15) within para.3.1 of practice direction 6B because the second defendant is alleged and there is a realistically arguable case that the second defendant is liable in dishonest assistance in a breach of a constructive trust. From there, it is said that all other defendants can then properly be brought into these proceedings by reference to para.3.1(3) of practice direction 6B; that is to say on the basis that they are necessary or proper parties to the claim brought against the second

defendant. The claimant recognises that, if the claim against the second defendant does not pass through the constructive trust gateway, then that claim must fail and, therefore, the jurisdiction claim fails as well.

- 18 I start, therefore, by referring to subparagraph (15) of para.3.1 within practice direction 6B. It provides a gateway in respect of a:

“... claim made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction.”

- 19 So far as “*assets within the jurisdiction*” is concerned, it seems to me this gateway, to that extent, is not available if the existence of assets within the jurisdiction is to be tested as at the date when the application for permission to serve out is made because, as I have explained, all of the assets that were credited to the Barclays bank account have now been credited to a bank account in Switzerland inferentially controlled by the second defendant or otherwise paid out to *bona fide* parties, such as Barclays, in discharge of fees properly due to them. If that were the only basis upon which this gateway was relied upon, I would have very real difficulty in concluding that the gateway applied. However, it is submitted by Mr McGhee on behalf of the claimant that the gateway is also available against a defendant where the claim arises out of historical acts committed or events occurring within the jurisdiction. I accept that that construction is at least a realistically arguable one, and indeed is in all probability correct. Thus, the question becomes whether there is a realistically arguable basis for claiming, as against the second defendant, that the second defendant committed acts or was involved in events occurring within the jurisdiction in relation to the issues that I have described.
- 20 It is necessary then to consider the particulars of claim and, in particular, the allegations which are made as against the second defendant in this regard. The relevant allegations are pleaded at para.74 of the particulars of claim in these terms:

“As to the defendants’ assistance in the fraud and subsequent breaches of trust, the best particulars that the claimant is presently able to give are as follows:

- (a) The second defendant directed or by his instructions permitted or otherwise caused GPG to make payments to the BSI account and to pay bank charges and Intrust Limited out of the monies in GPG’s account with Barclays UK PLC. These monies were held on constructive trust by GPG for the claimant.
 - (b) The second defendant accordingly assisted GPG’s breach of trust. Without prejudice to the burden of proof, it is denied, if alleged, that the second defendant’s actions were limited to carrying out his constitutional role in respect of GPG on a *bona fide* basis.”
- 21 The first issue, therefore, that I have to resolve on this application is whether or not, on those facts, the gateway is available as against the second defendant. I have some very real doubts about whether a constructive trust ever arose because the funds were held originally in a Swiss bank account by the claimant and were paid by the claimant voluntarily from his Swiss bank account to GPG’s Barclays bank account. The claimant submits that in circumstances where the transfer of the funds was obtained by fraud, the funds were impressed with the constructive trust, at any rate, as soon as they were credited to the Barclays bank account

because, the claimant submits, that is the effect of what has occurred factually when applying the decision in *Halley v The Law Society* [2003] EWCA Civ 97, at paras.42 to 56.

- 22 Given that the fraud leading to this voluntary transfer took place outside England and Wales I have real doubts about that. On balance, I am prepared to accept for the purposes of this application and applying the test that has to be applied that the sums credited to the Barclays account were realistically arguably impressed with a Quistclose type trust when they were credited to the Barclays account by which either the money had to be used for the purpose for which it was transferred (payment to the vendor of the Sardinian property on completion) and was held on a resulting or constructive trust requiring it to be returned to the claimant unless and until used for that purpose. I accept that the activities in London that are pleaded as against the second defendant involved actions taken by Intrust acting on the instructions of GPG which in reality could act only by the second defendant in respect of funds that were the subject of a constructive or resulting trust. GPG was the trustee and the activities of the second defendant plainly dishonestly assisted GPG to breach its duties as a constructive or resulting trustee of the funds credited to the Barclays account. Whilst those instructions could only have come from outside the jurisdiction to Intrust, the relevant acts were committed and the relevant events occurred within this jurisdiction. Thus, I am satisfied that subparagraph (15) is available as a gateway in relation to the second defendant. I should add this.
- 23 Returning then to the way in which the claim is put against the first and third defendants, I am satisfied that it will be appropriate to join both the first and third defendants as necessary or proper parties on the basis that there is a realistically arguable case on the merits as against each of those defendants for the reasons set out in the evidence in support of the application, and that each of the first and third defendants on the allegations which are made by the claimant would be proper parties to any proceedings in England against the second defendant.
- 24 The final issue which arises, therefore, is whether or not this case is one which satisfies the third requirement identified at the start of this judgment, namely whether England and Wales is clearly and distinctly the most appropriate forum for this dispute. This is in practice the main mechanism by which the potentially wide terms in which the gateways are expressed are controlled to exclude cases where there is no substantial connection between the wrong doing and this jurisdiction and so are not suitable for trial here.
- 25 As I have already explained, this is a case where there is virtually no connection with the English jurisdiction, other than in relation to the crediting of the €2.85 million to the Barclays bank account and its dissipation therefrom back to Switzerland and into an account apparently controlled by the second defendant.
- 26 As I have already said, the claimant is a Russian national. The first defendant is an Italian national resident in San Marino. The second defendant is resident in San Marino as well. The funds which are the subject of this claim came originally from sums credited to a Swiss bank account in the name of the claimant. The sums, having been paid into the Barclays bank account, as I have said, were then transferred back to a Swiss bank account, and GPG, although now no longer an extant entity, was a United States corporation. As I have said, the only connections with England are that Intrust was the entity that opened the account in the name of GPG and the €2.85 million passed through that account on its way from and to Switzerland. In those circumstances, the question which arises is whether England is clearly and distinctly the place where these proceedings should be determined.
- 27 The claimant submits that, upon proper analysis, the case can most suitably be tried in the interests of all parties and for the ends of justice in England, because any other alternative will

involve a mixture of different relevant jurisdictions, none of which provides a coherent answer to how the claim is to be resolved. Thus, it is said that Russia is the domicile of the claimant, San Marino is the domicile of the first and second defendants, Italy is the corporate domicile of the third defendant and, to the extent it is relevant, New York was the domicile of GPG.

- 28 I asked counsel whether or not the proper law of the various courses of action were likely to provide some assistance in relation to an analysis for where *forum conveniens* naturally lies. His submissions were, first, that, unless and until someone asserts that the proper law of any particular transaction is a law other than England, I should proceed on the basis that English law applies. I agree with that, though I consider it unrealistic to suppose that, if permission to continue these proceedings and serve them out of the jurisdiction on the first and second defendants, in particular was granted -- that the issue concerning proper law will simply be ignored. The reality is that the false representations on which the claimant relies were made either in San Marino or Italy or possibly Russia, and were received by the claimant and acted upon in Russia or possibly and arguably Switzerland, from where the funds were transferred to the Barclays account in England. Therefore, in relation to the allegations of unlawful means, conspiracy and deceit, it is highly likely that the proper law applicable to them will not be the law of England and Wales. That points away from England as being the appropriate forum.
- 29 So far as domicile is concerned, it is realistically accepted that the principal defendants in this litigation are the first and second defendants. Each of those individuals are located in San Marino. Whilst it is true to say the third defendant is a corporation incorporated in accordance with the laws of Italy, there is no evidence relied upon by the claimant which suggests that, if proceedings were commenced against the first and second defendants in San Marino, the third defendant could not be joined into those proceedings in San Marino. Nonetheless, it is said that England should be regarded as the proper place for litigating this claim, because this is the place where the claimant's funds were transferred pursuant to the fraud and from which they were dissipated in breach of trust and the jurisdiction where the Barclays account signatory was based.
- 30 So far as that last point is concerned, Intrust, as I have said, are accepted to be a legitimate and *bona fide* business operating in the financial sector in London and against whom no allegations are made. Although it is true to say that Intrust was the entity that applied for the Barclays account to be opened and was the only signatory on that account, there is no dispute on the facts of this case that it acted throughout as the bare agent of GPG nominally and, in reality, the second defendant. Thus, the involvement of Intrust, as it seems to me, is entirely immaterial.
- 31 As I have already said, none of the assets that were credited to the Barclays account remain in England. They have either been expended in the *bona fide* discharge of charges due to Barclays or Intrust or have been transferred back to Switzerland and credited to an account apparently controlled ultimately by the second defendant. It was clearly the intention from the outset that the funds would be transferred away once credited to the Barclays account, which was and could only have been intended to be a conduit.
- 32 It is not suggested that any of the personal causes of action on which reliance is placed in these proceedings would not be available against the first and second defendants in San Marino and, in those circumstances, the question which remains is whether, as I indicated at the outset, it can be said that England is clearly and distinctly the most appropriate forum for this dispute. As I have said, the claimant has no connection with the English jurisdiction at

all. He is Russian and lives in Russia. Both of the individual defendants, who must be the primary targets in respect of this claim in respect of the primary causes of action, which are deceit and conspiracy, are resident in San Marino. The claim of knowing assistance (even if not technically available other than in England and Wales) adds nothing to the other causes of action because it is a personal claim in respect of which equitable damages would be sought.

- 33 In those circumstances, it seems to me that England cannot be clearly and distinctly the most appropriate forum for this dispute because there is no real connection with this jurisdiction, other than the happenstance that the funding was transferred ultimately to the second defendant via a conduit bank account in London. The individual defendants who are personally liable on the facts alleged by the claimant are both located in San Marino, and there is no reason why they cannot be sued there. Nor is it suggested that there is no good reason why they cannot be sued there or that if they were sued there the third defendant could not be joined to those proceedings. In any event the risk of litigation in two or more different jurisdictions concerning the same subject matter is no longer to be regarded as a trump card when considering the forum issue. In my judgment, to conclude that England is clearly and distinctly the most appropriate forum for the determination of this dispute is to ignore the very real and substantial connections that exist between the principal defendants and San Marino and seeks to rely upon what, as I have described already, is happenstance, namely the presence in the English jurisdiction of the account through which the €2.85 million was paid. There is not basis for suggesting that this jurisdiction is clearly more appropriate than San Marino in the circumstances. The principal defendants live there. They do not live in England. Their primary language is Italian. The claimant is not resident in England. English is not his primary language. None of the activity that really matters and which is alleged to have constituted the fraud the subject of the claimant's claim occurred here.
- 34 In my judgment therefore, even though it is realistically arguable that the claimant has available to him a claim against the second defendant that can pass through gateway 15, it is plain that this claim ought not to be permitted to proceed in England on *forum conveniens* grounds, because it cannot be said that England and Wales is clearly and distinctly the most appropriate forum for the dispute or that, in all the circumstances, the court ought to exercise its discretion to permit service out of the jurisdiction on two individual defendants who have no connection whatsoever with the English jurisdiction and, in those circumstances, this application fails.

LATER

- 35 There is an application for permission to appeal. The test has to be satisfied if an application is to succeed is that it must be demonstrated that there is a realistic prospect of the Court of Appeal coming to a different conclusion. Since the issues with which I am concerned are discretionary, there is a particularly high threshold that has to be satisfied before permission can be granted.
- 36 The sole point which was relied upon in challenging my conclusion concerning *forum conveniens* was that I paid insufficient attention to the fact that the fraudsters, or perhaps I should say alleged fraudsters, chose to set up the Barclays bank account in London and, therefore, to that extent, elected to use England as a mechanism by which or a conduit through which the fraud was conducted.
- 37 In my judgment, that factor is close to immaterial to the issues which arise when considering *forum conveniens*. The question which arises when considering *forum conveniens* is an entirely practical question which focuses on whether England and Wales is clearly and

distinctly the most appropriate forum for the dispute. Whether the fraudsters chose to use London or not is, in my judgment, at best of marginal importance, having regard to the other factors which I have identified. As I explained in the substantive judgment, this dispute has no connection at all with England, other than that the Barclays bank account was used as a conduit for the transfer of the fraudulently obtained funds. The first and second defendants are the principal defendants. They live in San Marino. The claimant has no connection with the English jurisdiction for the reasons I have given and, in those circumstances England and Wales is not clearly and distinctly the most appropriate forum for this dispute and the contrary is not realistically arguable.

CERTIFICATE

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This transcript has been approved by the Judge.