



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 25

CA99/22

OPINION OF LORD BRAID

In the cause

BOGSIDE INVESTMENTS LIMITED

Pursuer

against

(FIRST) CHRISTOPHER LINFORD SHUTE AND (SECOND) GRAEME PATERSON

Defenders

Pursuer: Dean of Faculty KC; Paterson; Gilson Gray LLP

First Defender: Ower; DAC Beachcroft Scotland LLP

25 April 2023

Introduction

[1] The pursuer sues in this action for damages of just under £5 million, said to be the loss sustained by it as a result of allegedly fraudulent misrepresentations made by the defenders. The pursuer claims that the defenders told them that a company called Obree Global was due to receive \$2.4 billion being held by a New York Law firm and that on the strength of that representation the pursuer made an advance of \$7.5 million, only a small part of which it has been able to recover. It is not in dispute that the \$2.4 billion never existed, although the first defender strenuously denies that he was party to any fraud.

A fuller description of the background is to be found in my Opinion of today's date in the action *Leander CB Consultants Ltd v Bogside Investments Ltd and Alan McCleish*.

The first defender's motion

[2] This action called before me on the first defender's motion to sist the action in terms of section 10(1) of the Arbitration (Scotland) Act 2010, in order that arbitration under clause 25 of the Shareholder Agreement (SHA), entered into by the Shareholders of Obree, might run its course.

Clause 25

[3] Clause 25.1 of the SHA provides that the Agreement is governed by and shall be construed in accordance with the laws of England and Wales (there are no averments as to English law, which is therefore assumed to be the same as Scots law; since the approach to interpretation was not in dispute, nothing turns on this). Clause 25.2 provides:

"In the event of a dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination (a **Dispute**), any party to the dispute (each a **Disputing Party**) may serve a Notice of Dispute...on all the other Disputing Parties..."

There then follows a series of "waterfall" provisions, regulating how the Disputing Parties are to attempt to resolve the dispute, culminating in clause 25.9:

"If the Dispute is not settled by mediation...the Dispute may be exclusively referred to and finally resolved by *ad hoc* arbitration under the Arbitration Law of the DIFC..."

The law

The Arbitration (Scotland) Act 2010

[4] Section 10 of the Arbitration (Scotland) Act provides, insofar as material:

“The court must on an application by a party to legal proceedings concerning any matter under dispute, sist those proceedings in so far as they concern that matter if –

- (a) an arbitration agreement provides that a dispute on the matter is to be resolved by arbitration (immediately or after the exhaustion of other dispute resolution procedures),
- (b) the applicant is a party to the arbitration agreement (or is claiming through or under such a party),
- (c) notice of the application has been given to the other parties to the legal proceedings,
- (d) the applicant has not –
 - (i) taken any step in the legal proceedings to answer any substantive claim against the applicant, or
 - (ii) otherwise acted since bringing the legal proceedings in a manner indicating a desire to have the dispute resolved by the legal proceedings rather than by arbitration...”

[5] Section 1 of the Act sets out its founding principles, including: (a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense; and (b) that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest.

Approach to construction of an arbitration clause

[6] It is uncontroversial that Scots law has long permitted parties to exclude, by agreement, the merits of a dispute from consideration by the court: *Hamlyn & Co v Talisker Distillery* [1894] AC 202, Lord Watson at 214; or, as Lord Dunedin put it in *Sanderson v Armour & Co* 1922 SC (HL) 117, at 126: “[i]f the parties have contracted to arbitrate, to arbitration they must go.” While it is doubtful that the Scottish courts construe arbitration clauses as liberally as do the English Courts (see *Morton v British Polar Engines Ltd* [2021] CSOH 118, and the authorities therein cited at para [18]), both parties were content to argue the present case on the premise of the one-stop approach adopted in England in *Fiona Trust and Holding Corporation v Privalov* [2007 Bus LR 1719]; in other words, that the court should

take as its starting point that there was a presumption that the parties to the SHA, as rational business people, intended all their substantive disputes to be determined by arbitration.

Decision

[7] The first and obvious difficulty for the first defender is that the pursuer is not a party to the SHA. The SHA could not be any clearer that it is Mr McLeish (the second defender in the Leander action) who is party to the SHA. There is a mechanism, in clause 11.4, whereby the pursuer could become party to the agreement, following a share transfer by Mr McLeish with the consent of Obree; but that has not happened. Neither Lord Dunedin's dictum nor the founding principles of the 2010 Act avail the first defender, since the pursuer has not agreed to resolve any disputes by arbitration. If authority is needed for the proposition that an action should not be sisted for arbitration on the motion of one party, where the other party to the proceedings is not party to the arbitration agreement, it may be found in Davidson, *Arbitration*, 2nd Edition, paragraph 5.29; and *City of London v Sancheti* [2009] Bus LR 996, Lawrence Collins LJ at [29].

[8] Counsel for the first defender sought to elide this difficulty by trying to persuade me that I should not follow *Sancheti* because, as she put it, Mr McLeish and the pursuer were one and the same; and that Mr McLeish had made a deliberate decision to avoid the arbitration clause by bringing the action in the name of the pursuer alone rather than in his name or in joint names. The pursuer was nothing more than a corporate wrapper or the corporate manifestation of Mr McLeish.

[9] The short answer to that submission is that, notwithstanding that Mr McLeish is the controlling mind of the pursuer, he and it have separate legal personalities. It is the pursuer's case that it, not Mr McLeish, advanced a loan in reliance on a fraudulent

misrepresentation. No reasons were advanced by counsel for the first defender which would justify lifting the corporate veil. As for the applicability of *Sancheti*, while it concerned the corresponding provision in the Arbitration Act 1996 (section 9), it is difficult to detect any material difference between that provision and section 10. Applying the same logic as Lawrence Collins LJ, section 10 cannot be read as requiring the court to sist where the party not making the motion is not a party to the arbitration agreement.

[10] In any event, even applying the one-stop-shop approach in *Fiona Trust*, clause 25 cannot be construed as covering the pursuer's claim. The relationship among the parties, constituted by the SHA, concerned the operation of the proposed business of Obree. That was the context in which the parties to the SHA agreed to refer any disputes "arising out of or relating to" the SHA to arbitration. In no sense did the alleged fraud arise out of or relate to the SHA. The fraud predated the SHA and indeed was known of by the time the SHA was entered into. Counsel for the first defender sought to turn this to her advantage by arguing, in reliance on certain *dicta* in *Fiona Trust* by Lord Hope and Lord Hoffman, that if parties wished to exclude certain matters from an arbitration clause, they should do so in language which makes it clear; but their lordships had in mind disputes which arose subsequently to the agreement to arbitrate. It is on any approach to construction difficult to read clause 25 as applying to a dispute which had already arisen months prior to the SHA being entered into. In any event, leaving the timing of dispute to one side, clause 25 applies only to disputes arising out of or related to the SHA.

[11] Two cases were referred to for guidance as to when a dispute might (or might not) be connected with an agreement. In *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] 5 CMLR 5, Marcus J considered the circumstances in which a tortious claim (as the pursuer's might be described) might be considered to arise out of a contractual relationship. After

quoting from *Fiona Trust* and recognising the importance of the “one-stop-shop”, he gave (at para [45]) what he described as an extreme hypothetical example of a claim which would not arise out of a contractual relationship between Party A and Party B, namely, where Party B negligently but coincidentally and unrelated to the contract, ran Party A over in the street. He concluded, at para [54] that it was difficult to see how a tortious claim can arise out of a contractual relationship when the only claim in contract that can be said to be related is unarguable.

[12] The second case is *Sea Master v Arab Bank* [2022] EWHC 1953, where Picken J considered various tests or factors which might help to determine whether a claim could be regarded as being connected with or arising out of a contractual relationship, including whether the claim was causatively connected with the relationship; whether the facts overlapped; and whether the same period of time was covered: see paras [111] and [113].

[13] While ultimately each case must turn on its own facts, neither of these cases is of assistance to the first defender. If anything, the facts here are *a fortiori* of the example given by Marcus J in *Microsoft Mobile* since the tortious event occurred before the contractual relationship was created. No contractual claim in relation to the fraud could arise out of the SHA. There is no overlap of facts between the fraud claim and the subsequent SHA. The period of time is different.

[14] For all of these reasons, I conclude that the pursuer’s claim does not fall within the scope of clause 25 of the SHA and the first defender has no entitlement to have the action sisted. Nor, to dispose of a subsidiary argument made by counsel for the first defender, is there any reason to sist the action at common law to await the outcome of any arbitration. While it appears that the first defender has initiated an arbitration process, I was told that there is limited engagement in that by the pursuer and by Mr McLeish. The pursuer is

entitled to make progress with the action and it would not be appropriate to sist it to see what if anything transpires in any arbitration which may or may not take place.

Disposal

[15] The motion to sist is therefore refused. I will put the case out By Order to discuss further procedure.