OUTER HOUSE, COURT OF SESSION

[2025] CSOH 16

CA96/23

OPINION OF LORD BRAID

In the cause

FERIT SAMURAY

Pursuer

against

MAXIM ASANOV

Defender

Pursuer: K Young; MBM Commercial LLP
Defender: Jones, KC, Solicitor Advocate; Brodies

7 February 2025

Introduction

[1] Monitox Ltd is a company registered in Scotland of which both parties were directors, and which is authorised by the Financial Conduct Authority (FCA) to act as an Electronic Money Institution. In 2021/2022, the defender, who was the 100% shareholder in Monitox, agreed to sell his shareholding to the pursuer. Pending approval of the pursuer as a shareholder by the FCA, the pursuer agreed to lend the sum of €700,000 to the defender, secured by a pledge of the defender's shares. In this commercial action, the pursuer seeks repayment of that loan. The defender disputes the jurisdiction of this court.

[2] The parties entered into a series of agreements regulating the foregoing transactions, the relevant ones for present purposes being two agreements both entered into on 21 July 2022, respectively a Share Pledge and Loan Agreement (SPLA), and a Share Purchase Agreement (SPA), each agreement referring to the other. It is not unkind to describe the agreements as confusingly worded and, to an extent, contradictory, at least in part down to an imperfect grasp of English and an apparent belief by the parties' advisers that there is only one legal system within the UK, but it is uncontroversial that the parties' intention was that the SPLA was to govern the relationship between the parties until such time as the pursuer was approved by the FCA as the 100% shareholder in Monitox, whereupon the pledge of the shares to the pursuer would be converted into ownership. The precise meaning of the agreements may yet require to be the subject of judicial determination by this court: at this stage, the controversial clauses are those concerning jurisdiction.

[3] The pursuer founds jurisdiction on clause 16 of the SPLA, which provides (references to the Lender and Borrower being references to the pursuer and defender respectively):

> "16 GOVERNING LAW AND DISPUTE RESOLUTION
>
> Each party agrees that this Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed by the laws of The United Kingdom.
>
> For the purpose of any proceedings which the Lender may take in or before the courts of The United Kingdom the Borrower hereby submits to the non-exclusive jurisdiction of such courts and hereby irrevocably agrees and approves the Lender may at its option sue the Borrower in any other courts having jurisdiction in this matter."

[4] For his part, the defender points to clause 14 of the SPA, which provides:

> "14 GOVERNING LAW AND DISPUTE RESOLUTION
>
> 14.1 Each Party agrees that this Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed by the laws of the Republic of Cyprus.

> 14.2 Each Party irrevocably agrees that any dispute, controversy or claim arising out of or in connection with this Agreement or its violation, termination or invalidity shall be finally resolved in Courts of the Republic of Cyprus."

[5] The action called before me for a debate on the defender's plea of no jurisdiction. The issue which arises for determination at this stage is how the foregoing clauses fall to be construed, and which of them applies to the dispute which has arisen between the parties. If clause 16 of the SPLA applies, the defender accepts that this court has jurisdiction. However, if clause 14 of the SPA applies, the defender wishes the action sisted in order that the dispute between the parties be resolved (or, at least, partially resolved) in Cyprus. It should be noted that although the pursuer was, at the time the agreements were entered into, resident in Cyprus, neither party is currently resident either in Cyprus or in Scotland, and, but for the jurisdiction clauses, the courts of neither country would have jurisdiction. Further, although the defender's position is that this action should be sisted pending the resolution of proceedings in Cyprus, it was not suggested that such proceedings are presently underway.

The agreements

[6] To set the competing arguments in context, it is helpful to take notice of several other clauses of the two agreements in question.

The SPA

[7] The preamble states at recital (C) that: "The [SPLA] shall be signed simultaneously with this Agreement and all agreements mentioned therein...are drafted and signed in accordance with this Agreement".

[8] Clause 2.1 (under the heading "Conditions") provides:

> "On or before the 1st of August 2022 (Monday) and after the signing of this Agreement, the Seller and/or any other authorised representative of the Seller, shall take all reasonable steps, including but not limited complete (*sic*) and submit the relevant forms to the FCA, so as to inform the FCA about the 33% (thirty three percent) acquisition of the Total Shares, by the Purchaser."

[9] Clause 2.3[1] provides:

> "Completion is subject to and conditional upon the conditions precedent set out in 0 being satisfied (or waived by the Purchaser in accordance with clause 2.6) by the Longstop Date."

(The Longstop Date is defined earlier in the SPA as meaning 90 days from the signing of the SPA, or such other later date as might be agreed. Neither party offers to prove that a later date was agreed.)

[10] Clause 13.3 provides:

> "**Entire Agreement**
>
> (a) This Agreement constitutes the entire agreement between the Parties and replaces any and all previous and preliminary agreements, arrangements or covenants between the Parties, whether written or oral, relating to its subject matter.
>
> (b) By entering into this Agreement, the Parties acknowledge that they do not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not expressly set forth in this Agreement.
>
> (c) Nothing in this clause 13.3 operates to limit or exclude any liability for fraud."

The SPLA

[11] Clause 1 includes the following definition:

> "In this Agreement unless the context otherwise requires:-
> ...

[1] The SPA contains two clauses numbered 2.3. This is the second one, being that referred to in the summons.

Event of Default: means any Event of Default including but not limited to any situation whereby [Monitox Ltd] is deemed insolvent, liquidated or the license revoked by the Financial Conduct Authority, or it cannot be utilized for any reason and/or any breach by the Borrower of any one or more the provisions of this Agreement (all *sic*)."

[12] Clause 3.1 provides:

"The Borrower is a legal and/or ultimate beneficial owner of 318.500 (three hundred eighteen thousand five hundred) ordinary shares in the Company, which the Lender intents to acquire in the following manner: (a) the 91% (forty one percent) will be by way of pledge through this Agreement and simoltanosly with the Share Purcahse Agreement (all *sic*)".

[13] Clause 3.2 provides:

"The Lender grants to the Borrower a secured loan facility of the Loan Amount on the terms, and subject to the conditions, of this agreement. The Borrower shall grant the security to the Lender in accordance with Clause 3 pending the approval of the Lender as a shareholder of the Company by the Financial Conduct Authority and in accordance with the Share Purchase Agreement, attached hereto as Appendix A and which forms an integral part of this Agreement."

[14] Clause 3.3 provides:

"The Borrower shall complete and submit all relevant forms and applications to the Financial Conduct Authority, in order to appoint the Lender as a 33% (thirty-three percent) shareholder to the Company, on or before the 01st of August 2022, pursuant to clause 2.1 of the Share Purchase Agreement dated 21st July 2022. In the event that the Lender is not approved by the Financial Conduct Authority for any reason, the Lender shall have the right to appoint another person of his choice, who will qualify for this position, in order to act on his behalf."

[15] Clause 9, under the heading "Default", and insofar as material, provides:

"9.1 On the occurrence of an Event of Default the security hereby constituted shall become immediately enforceable and all powers conferred by this Agreement or any applicable law shall be immediately exercisable upon such occurrence and at any time thereafter and without prejudice to the generality of the foregoing the Lender (and without any obligation to give any notice to the Borrower) may:-

a) solely and exclusively exercise all or any of the voting and other rights and/or consensual powers pertaining or attaching to all or any part of the Pledge Shares in such manner as the Lender may, in its absolute discretion, think fit; AND/OR

b) receive, collect, recover, sue for and if necessary use the name of the Borrower for the recovery of and retain all the Loan amount and further any dividends, interest or other moneys, distributions of profits, bonus shares or assets, due or receivable or payable on or accruing on or in respect of the Company;

…

e) proceed to protect and enforce its rights by civil action or by other appropriate proceedings either for the sale of the Charged Assets in satisfaction of the moneys secured hereby or in aid of the exercise of any contractual power contained herein or to enforce any other right, power or remedy at law or in equity"

[16] Clause 15.3 provides:

"**Entire Agreement**

This Agreement constitutes the entire agreement between the Parties and replaces any and all previous and preliminary agreements, arrangements or covenants between the Parties, whether written or oral, relating to its subject matter.

By entering into this Agreement, the Parties acknowledge that they do not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not expressly set forth in this Agreement."

The pleadings (insofar as material to jurisdiction)

[17] After averring the background to the agreements, the pursuer avers, at article 4 of condescendence, that the defender was obliged, in terms of clause 3.3 of the SPLA, to submit all relevant forms and applications to the FCA, in order to appoint the pursuer as a 33% shareholder in the company, on or before 1 August 2022. In article 5, he avers that pursuant to clause 2.3 of the SPA it was a contractual requirement that FCA approval for the transfer to the pursuer of 91% of the total Monitox share capital was obtained within 90 days of the date of execution of the SPA, ie, by 19 October 2022; and that this did not happen. He then avers, in article 6, that the defender was in breach of clause 4.3 of the SPA by demanding an additional £1,000,000 for the purchase price of the shares; and, in article 7, that the demand for an increased purchase price resulted in the Longstop Date passing without the shares in

Monitox being transferred to the pursuer, the consequence of which was that the SPA terminated on or around 19 October 2022 without the 91% of Monitox shares being transferred to the pursuer. These averments are drawn together in article 8, where the pursuer avers that the SPA was an integral part of the SPLA; that the breach of clause 4.3 of the SPA amounted to an Event of Default as defined in clause 1 of the SPLA; that the purpose of the agreement and the preceding SPL has failed entirely; that the defender is in breach of clause 3.1(a) of the SPLA, and in breach of clause 3.3 of the SPLA by failing to submit the papers specified in that clause to the FLA by 1 August 2022; that pursuant to clause 9.1(b) of the SPLA, the pursuer is entitled to recover the full loan amount of €700,000; and that the action is brought pursuant to the SPLA, not the SPA.

[18] In article 9 the pursuer avers that if there was no Event of Default entitling the pursuer to recover the SPLA loan sum from the defender, it was an implied term of the SPLA that the pursuer would be entitled to repayment of the loan if the Longstop Date passed without the shares in Monitox being transferred to him, or if the defender was in breach of clause 4.3 of the SPA; that the pursuer only agreed to provide the SPLA loan to the defender on the basis that the shares would be transferred to him by 19 October 2022, pursuant to the terms of the SPA and for the agreed purchase price of €750,000; and that any disputes arising in relation to the repayment of the €700,000 loan are issues pertinent to the provisions of the SPLA and not the SPA.

[19] The defender denies (*inter alia*): that he breached the terms of either the SPA or the SPLA; that the action is brought pursuant to the SPLA; and that breach of the SPA amounted to breach of the SPLA. For the purposes of the debate, the pursuer's averments, at least insofar as they are averments of fact, must be assumed to be true.

Submissions

Defender

[20] The solicitor advocate for the defender submitted that clause 14 of the SPA conferred exclusive jurisdiction on the courts of the Republic of Cyprus to resolve any disputes arising out of the SPA. Clause 3.2 of the SPLA, read fairly, did not take the dispute outwith the ambit of clause 14. The pursuer had, in his pleadings, put a putative dispute of the SPA in issue. That must be resolved in the appropriate forum, which was Cyprus, before the pursuer could proceed to enforce his rights in Scotland in respect of any consequential breach of the SPLA. Since clause 14 was an exclusive jurisdiction provision, and clause 16 was not, it followed that the present proceedings must be sisted or dismissed pending resolution of proceedings in Cyprus, pursuant to article 6 of the Hague Convention 2005. The defender recognised that depending on the outcome of those proceedings, the jurisdiction of this court might revive, and so moved for sist rather than dismissal. In response to the pursuer's arguments, clause 16 did not become redundant on the defender's construction, because this court would retain jurisdiction if the Event of Default relied upon did not require the pursuer to establish a breach of the SPA, such as the insolvency of Monitox. It was of no great moment which agreement had been signed first. Recital B of the SPA created the fiction that the agreements were signed simultaneously. Nor could one take a great deal from the fact that the SPA was said to form an integral part of the SPLA, or that it appeared as appendix A to the SPLA. The purpose of the SPLA was to cover the period of time pending approval of the pursuer as a shareholder, with no express or implied intention by the parties that one agreement should have priority over the other. As regards *Fiona Trust and Holding Corporation* v *Privalov* [2007] UKHL 40, [2007] 4 All ER 951, the circumstances were different from those here. The defender acknowledged that if his

argument were correct, the consequence would be that the dispute would potentially require to be resolved in two courts, but that was down to the manner in which the pursuer had pled the case.

Pursuer

[21] Counsel for the pursuer submitted that since there was no doubt that clause 16 of the SPLA conferred jurisdiction on this court, the narrow question was whether the action arose out of the SPLA, which should be answered in the affirmative. The parties plainly intended that the SPA would form an appendix to the SPLA, not the other way around: that was evident from the terms of clause 3.2 which provided that the SPA formed an integral part of the SPLA. The pursuer plainly sought repayment of the loan advanced under the SPLA, under and in terms of the SPLA, and he specifically sued under clause 9.1(b) of that agreement. Article 8 of condescendence made clear that the pursuer asserted not simply a breach of the SPA but a breach of the SPLA in its own right. The SPA formed no more than the commercial background to the SPLA. It was plain that the parties intended that if there was a dispute arising from the SPLA, then jurisdiction would be determined by clause 16. The parties had also agreed that the SPLA would represent the entire agreement between the parties. As a matter of logic the SPA must be a previous and/or preliminary agreement, since it must have existed prior to the SPLA in order to be incorporated into the SPLA. Clause 16 therefore prevailed over conflicting clauses in previous or preliminary agreements (such as clause 14 of the SPA). Under reference to *Fiona Trust*, above, Lord Hoffman at [13], and Lord Hope at [26] to [28], the construction of the agreements should start from the assumption that rational businessmen were likely to have intended any dispute arising out of their relationship to be decided by the same tribunal; the agreements should be construed

in accordance with that assumption unless the language made it clear (which in this case it did not) that different tribunals were to decide different parts of the same dispute. While that case concerned an arbitration clause, there was no reason to consider that the same reasoning should not hold in relation to choice of law clauses.

Decision

[22] Read in isolation, both jurisdiction clauses are clear. In clause 16 of the SPLA, the parties agreed that the defender submitted to the (non-exclusive) jurisdiction of (among other courts) this court in relation to any dispute or claim arising out of or in connection with that agreement. In clause 14 of the SPA, they agreed that any dispute, controversy or claim arising out of, or in connection with, that agreement should be finally resolved in Courts of the Republic of Cyprus.

[23] Two questions arise. First, does the present dispute arise out of the SPLA or out of the SPA? If it can be said to arise out of one agreement and not the other, then the jurisdiction clause in the agreement out of which it does arise will apply. Second, in the event and to the extent that the dispute arises out of, or is connected with, both agreements, which clause prevails?

[24] I will begin with two preliminary observations. First, I do not consider the Entire Agreement clause in the SPLA is of any assistance to the pursuer, partly because there is a clause in similar terms in the SPA; partly because, reading both agreements as a whole, the parties clearly intended to be bound by both, as is confirmed by the fact that the SPLA provided that the SPA was to form an integral part of that agreement (which somewhat counters the notion that the SPA was to be superseded by the SPLA); and partly because it is in any event not entirely clear which agreement was signed before the other, in addition to

which the parties adopted the fiction, in the SPA, that both agreements were to be signed simultaneously. It follows that clause 14 cannot simply be swept under the carpet on the basis that it lies within an agreement which has been replaced.

[25] Second, neither party invited me to hold that clauses 14 and 16 are irreconcilable to the extent that they should both be held to be void for uncertainty (*cf EJR Lovelock Ltd* v *Exportles* [1968] 1 Lloyds Rep 163, in which an arbitration clause which provided, in different parts, for disputes to be referred to arbitration in London, and to arbitration in Moscow, was held to be meaningless and one to which the court could not give effect). The defender accepts that this court would have jurisdiction to determine any dispute arising solely out of the SPLA, while the pursuer likewise appears to accept that the Cypriot courts have exclusive jurisdiction to determine a dispute arising solely from the SPA.

[26] Returning, then, to the first of the two questions posed above, although the pursuer avers that the action is brought pursuant to the SPLA, not the SPA, it would be over-simplistic to hold that it lies within the province of the pursuer to determine, by averment, which agreement the action is brought under. That is a matter which must be determined objectively. I have to say that the pursuer's averments about breach are not entirely easy to follow; but he does unequivocally aver that certain things which did or did not occur amounted to a breach of the SPA, thereby, he says, amounting also to an Event of Default under the SPLA. That said, he also avers that the defender was in breach of clause 3.3 of the SPLA, and he is correct in submitting that that clause imposed a stand-alone obligation on the defender to complete and submit all necessary paperwork to the FCA. In other words, whether the defender is in breach of that clause does not require that he also be found to be in breach of the SPA. It is entirely possible that this court will rule, in due course, that on a proper construction of the SPLA, any breach of the SPA did not constitute a

breach of the SPLA, thus rendering the question of whether or not the SPA was breached entirely academic. There was some discussion at the debate as to what should be taken from the words, in that clause, "pursuant to clause 2.1 of the SPA", given that clause 2.1 imposed an obligation only to take all reasonable steps to submit the paperwork, a qualification which is not to be found in clause 3.3. However, on reflection, I have come to the view that that is a question for another day. For present purposes, what is significant is that the SPLA itself imposed an obligation on the defender which he is alleged to have breached.

[27] Further, and significantly, the pursuer is, on any view, seeking repayment of the loan paid to the defender, which is referable only to the SPLA, rather than repayment of the purchase price under the SPA. That is made clear by the pursuer's reliance on clause 9.1 of the SPLA. Even if the Cypriot courts were to rule on the question of whether or not the defender was in breach of the SPA (which would be a relevant consideration if, but only if, this court were to uphold the pursuer's construction of the SPLA), that would not resolve the fundamental question put before this court by the pursuer, which is whether or not he is entitled to repayment of his loan. That is a question which can be determined only by this court.

[28] For all of these reasons, I conclude that the present dispute, and the pursuer's claim, can properly be said to arise out of the SPLA rather than the SPA. As such, this court does have jurisdiction by virtue of clause 16 of the SPLA. However, lest that is wrong, I turn to the second question posed above: in the event, and to the extent, that the agreement can be said to arise out of, or be connected with, both agreements, which clause prevails?

[29] It is worth taking a moment to consider what the position would be if the defender's argument is correct. It necessarily entails a two-stage approach before two different courts, in that whenever a question arose as to whether the SPA had been breached, however

tangential that question might be, and even if it might turn out to be of only academic interest to the issue of whether the SPLA had been breached, the pursuer would require to refer that question to the Cypriot courts for determination before being entitled to proceed with an action to enforce the terms of the SPLA in a different jurisdiction. Where, as here, he was not entitled to enforce the SPLA in the Cypriot courts, he would be powerless to seek any remedy under the SPLA pending a declaratory judgment in Cyprus, no matter how long that took and no matter how at what expense. Not only would that entail both parties being involved in litigation in two separate jurisdictions, thereby requiring to instruct two sets of lawyers with all the expense that would entail, it would necessarily take longer to resolve their dispute than if the jurisdiction of only one court had to be invoked, all of which would be inimical to the business interests of both parties. In the present case, even though the pursuer avers that the defender was in breach of at least one provision of the SPLA entitling him to repayment of the loan, his action would require to remain sisted until a court in Cyprus had ruled on whether the SPA had been breached; at which point it would revive, whatever the outcome of the Cypriot judgment.

[30] I recognise, of course, that it would be open to parties to agree to such a two-stage approach if they wished; on one view, it is not so very different from an agreement in a construction contract to refer a dispute to adjudication before resorting to court action. One does not have to look very far to find cases which have been sisted for years pending resolution of seemingly interminable adjudications. However, adjudication is intended to be a speedy process, and an adjudicator at least has the power to make an executory award, rather than a purely declaratory one. I accept the submission for the pursuer that the approach in *Fiona Trust*, above, dealing with an arbitration clause, is equally applicable here; namely, that in construing the agreements the court should start from the assumption that

the parties intended that any particular dispute should be decided by one tribunal, not two (or, as Lord Glennie put it in *Douglas* v *Glenvarigill Company Ltd* 2009 SCLR 379, at [19], the "commercially sensible notion that there should be 'one-stop adjudication'") clear language being needed if that assumption, or notion, is to be overcome. There is no such language to be found in either the SPA or the SPLA. All the parties have done is to agree that certain disputes (those arising out of the SPA) must be resolved by the Cypriot courts; and that in relation to certain other disputes (those arising out of the SPLA), the "courts of the United Kingdom" are to have jurisdiction. They do not appear to have envisaged the possibility that a dispute could be connected with both agreements, but it does not follow that they must have intended that if any such dispute did arise, a two-stage litigation was required. Putting that another way, in terms of clause 16 of the SPLA, the defender has submitted to the non-exclusive jurisdiction of this court for the purpose of any proceedings arising out of the SPLA. The present action is such a proceeding. I do not read clause 14 as qualifying or restricting the defender's submission to the jurisdiction of this court in a case where the dispute can also be said to be connected with the SPA, and in a case where the Cypriot court is powerless to resolve the entire dispute between the parties.

[31] That is sufficient to resolve the present issue. This court does have jurisdiction to determine the pursuer's claim that the defender is in breach of the SPLA. For completeness, the pursuer has pled a (very brief) *esto* case, in article 11, that in the event that there was no breach of contract, the defender has been unjustly enriched by the payments made to him for the purchase price of the shares in anticipation of the transfer by the defender of 91% of the Monitox shares, which shares have not been transferred to him by the defender. Counsel for the pursuer submitted that even where there was held to be no contractual claim, a claim for restitution may be so closely linked to a pre-existing contractual

relationship as to be regarded as coming within matters relating to a contract: *Hrvatske Sume* v *BP* (2021) C-242/20, [2022] I L Pr 9. I do not consider that this adds anything to the jurisdiction argument, not least as the averments in article 11 appear to relate to the SPA rather than to the SPLA; and the pursuer has no averments that this court would have jurisdiction to determine an unjust enrichment claim arising out of that contract. However, that is not a matter which need be explored further at this stage.

Disposal

[32] I will repel the defender's first plea-in-law (and also the second plea-in-law, *forum non conveniens*, which was not insisted upon), and assign a by order hearing to regulate future procedure, reserving the expenses of the debate meantime.