Case No: 2015 Folio 215/Folio 213

2016 EWHC 346 (Comm)

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

The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 29 January 2016

BEFORE:

MR JUSTICE BLAIR

BETWEEN:

Case No: 2015-215/CL-2015-000059

GOLDMAN SACHS INTERNATIONAL

Claimant/Applicant

- and -

NOVO BANCO, S.A.

Defendant/Respondent

-and-

Case No: 2015-213/CL-2015-000139

1) GUARDIANS OF NEW ZEALAND SUPERANNUATION AS MANAGER AND ADMINISTRATOR OF THE NEW ZEALAND SUPERANNUATION FUND
2) ANDORRA GESTIÓ AGRICOL REIG, S.A.U.S.G.O.I.C.
3) APWIA FUND SPC LTD
4) OLIFANT FUND, LTD
5) FYI LTD
6) FFI FUND LTD
7) ELLIOTT INTERNATIONAL, L.P.
8) THE LIVERPOOL LIMITED PARTNERSHIP
9) KARRICK LIMITED
10) GL EUROPE LUXEMBOURG S.Á.R.L.
11) SILVER POINT LUXEMBOURG PLATFORM S.A.R.L.
12) TDC PENSIONSKASSE

Claimants/Applicants

-and-

NOVO BANCO, S.A.

Defendant/Respondent

MR TOM ADAM QC & MR MAX SCHAEFER (instructed by **Bird & Bird LLP**) appeared on behalf of the Claimant/Applicant in Claim 2015-15

MR TOM SMITH QC & MR ADAM SHER (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the Claimants/Applicants in Claim 2015-213

MR JONATHAN MARK PHILLIPS (instructed by **Pinsent Masons LLP**) appeared on behalf of the Defendant/Respondent in Claims 2015-213 and 2015-215

Friday, 29 January 2016

Mr Justice Blair:

1. This case concerns the failure of a Portuguese bank called Banco Espírito Santo, S.A. (BES). The Banco de Portugal, which is Portugal's central bank, set up a bridge bank, which is the defendant, Novo Banco, S.A. (Novo Banco) as part of its resolution measures. The issue in these proceedings is whether amounts advanced under a facility have been transferred to Novo Banco, or whether they remain with BES. I am told that the amounts advanced are some US$830 million.

2. The issue for decision is the position as regards the proceedings pending the hearing of an appeal. The facts are as follows.

3. The facility was subject to English law and jurisdiction. Novo Banco challenged jurisdiction, but on 7 August 2015 Hamblen J ruled that the English court has jurisdiction.

4. On 29 October 2015, Longmore LJ gave Novo Banco permission to appeal.

5. On 11 December 2015, the matter came before Longmore LJ, who had earlier fixed the hearing of the appeal for 26 to 27 July 2016.

6. He made it clear that the parties should try to agree directions along the lines I had ordered in similar circumstances in *Barclays Bank plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri ("ENPAM")* [2015] EWHC 2857 (Comm). The effect of that order was that steps up to the close of pleadings be taken pending the application for permission to appeal. This was to minimise delay afterwards should the appeal be unsuccessful.

7. In the meantime, Longmore LJ ordered that there be remitted to the commercial court for determination the following issues:

> "a. where a party to an application to dispute jurisdiction has permission to appeal against a decision dismissing its jurisdictional challenge, whether the English Court has jurisdiction to make case management directions to take effect pending such appeal
>
> b. if so, whether that power should be exercised in this case and in what way."

8. The parties were not able to agree.

9. When the issue ordered by Longmore LJ came before me on 22 January 2016, Novo Banco accepted, rightly in my view, that there was jurisdiction to make such an order. This point is therefore common ground.

10. However, Novo Banco submits that in principle, it is wrong to do so when there is a pending appeal as to jurisdiction, and wrong to do so in this case.

11. The claimants/respondents (that is Goldman Sachs International and various funds which have interests in the debt) say that directions should be given similar to those given in *Barclays v ENPAM*. It is their application for such directions which has in effect caused this hearing.

12. On 22 January 2016, I indicated that I would not be prepared to order a case management conference to be fixed prior to the hearing of the appeal in July, although I would order it to come on shortly after the resolution of the appeal if unsuccessful. Counsel for Novo Banco then suggested that a compromise might be possible on the basis that its pleadings were served in draft.

13. It seemed that the parties would be able to agree the terms of such an order. Unfortunately, that has not been possible and the case comes back before me this morning.

14. The way the court has approached the matter is as follows.

15. When a party unsuccessfully challenges the court's jurisdiction but wishes to appeal, the appropriate procedure is set out in *Deutsche Bank v Petromena* [2015] EWCA Civ 226 at [35] and [52]:

> " … The correct course for a defendant who has failed in a jurisdiction challenge and who wishes to appeal is to ask for an extension of time for filing the acknowledgment of service sufficient to enable his application for permission to appeal, or his appeal, to be determined. It is quite unrealistic to suppose that a sensible claimant, or if not the court, would refuse such an extension when the effect of such a refusal would be to render the appeal nugatory. … ." (Floyd LJ)
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> "The course to be followed by a defendant, who wishes to appeal from a judge's decision that the English court has jurisdiction to try a claim and does not wish a judgment in default to be entered while it is appealing, is to ask the judge to extend the time for acknowledgment of service pending an appeal or (if she refuses permission to appeal) pending an application for permission to this court and thereafter, if permission is given, the appeal." (Longmore LJ)

16. Such an order was made by Hamblen J in this case, extending Novo Banco's time for filing an acknowledgment of service until 16 October 2015. That was subsequently extended by agreement between the parties and further extended until after the appeal when permission to appeal was granted by Longmore LJ.

17. Often, perhaps usually, there will be no question of requiring the parties to do anything in the proceedings until the permission question or the jurisdiction appeal itself is disposed of. It may be a waste of time and money. But the appeal stage inevitably takes time, and there will be some commercial cases where it makes sense that the action does not (to use the phrase used by the claimants) "go into stasis".

18. The present case, in my judgment, is one of them. It raises an important question as to the resolution of a bank. It is an important case to the parties, to the Portuguese public, and to the wider European banking community.

19. Depending on the outcome of the jurisdiction appeal, it will be determined by the courts here, the courts in Portugal (where there are also proceedings), or both. It is obviously in everyone's interests that the matter progresses speedily in the courts.

20. So far as these proceedings are concerned, it seems sensible that they should move forward promptly if the appeal is dismissed. The best way of ensuring that is at least to see that the pleadings are completed by then. The transcript shows that this was the view of Longmore LJ at the hearing on 11 December 2015, provided the court had jurisdiction to make such an order, and, as noted, it is common ground and accepted that it does have jurisdiction.

21. There are two important caveats. One is that nothing should prejudice the defendant's position if the appeal is successful. The other is that the defendant should not have to bear costs that will have been wasted on the pleadings stage if the appeal is successful.

22. As to the first, any such prejudice seems unlikely. As it was put in *Deutsche Bahn v Morgan Advanced Materials* [2013] EWCA 1484 at [28]:

> "That leaves only the question whether it is arguable that by taking steps in the proceedings, so far as concerns the claims of the UK Claimants alone, at the express direction of the Tribunal, the non-UK Defendants will be found to have 'entered an appearance' thereby investing the Tribunal with jurisdiction pursuant to Article 24 of the Regulation so far as concerns the claims against them by the non-UK Claimants. The Tribunal thought this risk fanciful in the light of the decision of the ECJ in Case 150/80, *Elefanten Schuh GmbH v Jaqumain* [1981] ECR 1671 and of this court in *Harada Limited v Turner* [2003] EWCA Civ 1695. So do I. As the Tribunal observed at paragraph 66(3) of its Ruling it is permissible in terms of Article 24 of the Regulation to contest jurisdiction whilst at the same time contesting the merits, provided that the intention to contest jurisdiction is evinced at the outset. The non-UK Defendants are being required to deal with the merits of the claim of the UK Claimants. I do not regard it as seriously arguable that by so doing they will be submitting to the jurisdiction of the Tribunal in respect of claims by the non-UK Claimants, a fortiori where the jurisdiction of the Tribunal to entertain those claims is sought to be established on a different basis and where the non-UK Defendants have maintained a clear and consistent challenge to that jurisdiction from the outset. I would refuse permission to appeal on this ground also." (Tomlinson LJ)

23. However, it would be entirely reasonable in my view for a party challenging jurisdiction to insist on the inclusion of a term in the order to the effect that the steps in question are not to be taken as a submission to the jurisdiction, together with an

undertaking by the claimants not to take any such point, including if desired a reference to successors and assignees.

24. As to wasted costs should the appeal be successful, the order can specify that the claimants/respondents must indemnify the appellant against these costs. I say "indemnify" advisedly. There is no warrant for the appellant being out of pocket on a standard costs basis. The indemnity can be supported by security if necessary, but no one suggests that it is necessary here. Further, as I said at the earlier hearing, there must be no question of the respondents seeking to set the costs off against the debt.

25. Such an order has the merit of saving time if the appeal is unsuccessful, whilst fully indemnifying the appellant if the appeal is successful. There seems no good reason (and it is accepted that there is no jurisdictional reason) why this should not be put in place in an appropriate case.

26. Of course, the appellant may be able to point to prejudice other than costs. Prejudice as always is an open-ended concept. Here, Novo Banco says through counsel that filing a defence, even in draft, may be misunderstood. It may in some way be misunderstood as prejudging the appeal. As counsel for Novo Banco accepts, such an objection would be entirely without substance.

27. However, the answer was suggested by him at the last hearing. He suggested that the defendant's defence and the claimant's reply should be treated as drafts. That would prevent any possible misunderstanding of the position. By agreement between the parties or order of the court, they would be treated in the same way as pleadings without being filed as such.

28. I made it clear that I considered this to be a good idea and asked that the parties agreed. However, they have not been able to do so, and I make it clear that I make no criticism of any of them in that regard. I have now to rule on the matter.

29. There was an issue as to the status of the drafts.

30. Goldman Sachs International maintain that it would not be appropriate, as Novo Banco now asks at this hearing, for the defence and reply to be treated as disclosed documents—that is subject to the implied undertaking of confidentiality which applies to disclosed documents. This is because of regulatory information barriers within the bank applicable under European financial regulation, and I am told that this applies to some of the other claimants. It was also said that to treat draft pleadings as confidential could itself give rise to all kinds of misapprehensions.

31. Novo Banco did not really dispute this, but did raise in a general way the impact of the publication of the defence, even as a matter of perception, on the resolution/sale process. The claimants reply that it is fanciful to suppose that prospective buyers will not fully investigate the position as to this debt.

32. Nevertheless, it is an important point, and to meet it, Novo Banco will have liberty to apply to the court in the same way as it would under CPR 5.4C(4), which gives wide powers to order confidentiality.

33. Finally, I should mention that the proposal is that the draft defence is served by 24 March 2016 and the reply by 27 May 2016. These are generous dates. They take account of the hearing of the appeal on jurisdiction in July. It gives everyone ample time within the framework of the upcoming appeal hearing to put their cases into writing, albeit without serving them formally or filing them with the court.

34. Balancing the interests of the parties, and fully safeguarding the position of Novo Banco as I have described, I conclude that it is right to make the order that I have indicated. Not only is Novo Banco not prejudiced in any way, but if it wins its appeal, it will get repaid everything it has spent in dealing with the draft pleadings.

35. That is the court's ruling and the parties can now draw up the order accordingly.
