



Neutral Citation Number: [2020] EWHC 2411 (Ch)

Case No: HC-2017-001598

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building,
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 23/07/2020

Before :

THE HON. MR JUSTICE FANCOURT

Between :

(1) MARK BYERS

Claimants

(2) HUGH DICKSON

**(AS JOINT OFFICIAL LIQUIDATORS OF
SAAD INVESTMENTS COMPANY LIMITED)
SAAD INVESTMENTS COMPANY LIMITED (IN
LIQUIDATION)**

- and -

Defendant

SAMBA FINANCIAL GROUP

Stephen Smith QC, Adam Cloherty and Timothy Sherwin (instructed by **Morrison & Foerster (UK) LLP**) for the **Claimants**
Andrew Onslow QC, Alan Roxburgh, Edward Harrison and Sarah Tulip (instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing date: 23 July 2020

Approved Judgment

MR JUSTICE FANCOURT:

1. This is my judgment on an application made by the Claimants by notice dated 9 July 2020 to strike out certain passages in the 10th and 11th expert reports of Mr Andreas Haberbeck, which were served as the expert evidence relied upon by the defendants on the issues of Saudi Arabian law.
2. On 24 April 2020 I made an order, the effect of which was to identify certain live issues for trial, and the relevant issue for the purposes of this application is the following:

"If Saudi Arabian law is the governing law of the September Transfer, whether its effect is to extinguish the Third Claimant's rights in the Disputed Securities, as defined in the Claimant's Amended Particulars of Claim, even if the Defendant had knowledge of the Third Claimant's interest."

3. The expert evidence permitted is relevant to that issue only.
4. One of the issues that I decided could not proceed to be tried was the question of whether, assuming that the Claimants otherwise succeeded in their claim, the claim should be dismissed on the ground that it would be contrary to public policy and international comity to grant the relief sought by the Claimants. That issue was premised on the argument that enforcement of the rights, or the existence of the rights asserted by SICL, were unlawful under Saudi Arabian law and therefore the English court, applying the *lex fori*, should not seek to uphold or enforce those rights.
5. In my judgment handed down on 8 April 2020, when I decided which issues should be permitted to proceed to trial, I dealt with the issue of illegality and explained that it involved two separate questions, first the illegality of the Six Transactions under the law of Saudi Arabia, and second a question of policy for the *lex fori*. In relation to both issues, I held that the determination of the question would be likely to depend on particular facts relating to the Six Transactions.
6. The ruling that I made in relation to the unlawfulness issue was in the context of deciding which issues could fairly be tried notwithstanding that no disclosure had been given, or only very limited disclosure had been given, by the Defendant.
7. In my judgment in relation to the illegality issue I said as follows:

"Resolution of the position under Saudi Arabian law is likely to depend on establishing the circumstances in which the Six Transactions were entered into. The bank also contends that Mr Al-Sanea must have known at the time of the illegality of what was being done and that his knowledge is to be imputed to SICL. That is denied by the Claimants.

"I have already held that the Bank is likely to have disclosable documents relating to the circumstances in which the Six Transactions were made and the relationship at the time between Mr Al-Sanea and SICL. Those documents could well be material to establishing the above matters."

8. Then, in the following paragraph, I explained that a particular point made by the Defendant was not an answer to the Claimants' case that the circumstances in which the Six Transactions were effected do not amount to unlawful fronting under Saudi Arabian law and said:

"...the question of illegality under Saudi Arabian law is to be tried and in my judgment may depend on the particular facts surrounding the creation of the trusts".

9. I then turned to the issue of illegality under English law in which I reached a similar conclusion in relation to the potential impact of the facts and documents of the Defendant on the resolution of that issue. I have therefore concluded that the illegality issue could not be fairly tried without disclosure of the Bank's documents.
10. It is not the case, as the Defendant now suggests, that I reached my conclusion on the issue of illegality solely on the basis of the fact sensitivity of the English law question. I accept that my subjective intention when handing down my judgment is not the test and that I must approach the matter on the question of a fair reading of my judgment in an objective way. I am satisfied that a fair reading of my judgment reaches the same conclusion in relation to trial of the issue of illegality under Saudi Arabian law and illegality under English law, on the basis that there would be likely to be material documents held by the Bank that had not been disclosed and that therefore those issues could not fairly be tried in the absence of disclosure. It would not have made sense for me to have reached a conclusion only on the English law question and not on the Saudi Arabian law question, since the absent documents were likely to affect both matters, as the documents related to the circumstances in which the Six Transactions were entered into.
11. I am therefore satisfied that I held that there could not be a fair trial without disclosure, and so did not allow the Defendant to pursue that question.
12. The Defendant now wishes to adduce expert evidence on the same question, as part of the issue to be tried that I identified at the start of my judgment. That is on the basis that Mr Haberbeck, their expert witness, says that only the facts pleaded or admitted by the Claimants are relevant to the determination of the issue of illegality under Saudi Arabian law. That assertion is, I am satisfied, contrary to the view that I formed when I gave my judgment.
13. The Defendant says that in order to decide whether the effect of the September Transfer was to extinguish the rights of SICL, it is necessary to consider what those rights are in Saudi Arabian law.

14. That argument has a logical and superficial attraction to it, if considered in isolation, but it also has the effect of changing the issue that I allow the Defendants to defend at trial. The issue was whether the effect of Saudi Arabian law was to extinguish the Third Claimant's rights in the Disputed Securities, even if the Defendant had knowledge of the rights. The issue was not whether the claimants, SICL, had no rights because of the unlawfulness of the Six Transactions as a matter of Saudi Arabian law. The position in that regard emerges clearly from the pleaded Defence. Paragraphs 53 to 56 of the amended defence are in the following terms:

"53. If (which is not admitted) any Relevant Securities were included in the September Transfer ("Disputed Securities"), the effect of the September Transfer on property rights in the Disputed Securities is determined by Saudi Arabian law as the lex situs of the disputed Securities ...

"54. Accordingly, if, contrary to Samba's case, SICL had an equitable interest in the Disputed Securities under common law trusts, Saudi Arabian law determines whether SICL's equitable interest was extinguished or overridden by the September Transfer.

"55. Under the law of Saudi Arabia:

"55.1. Title to property is indivisible. Equitable interests separate from the legal title cannot be created and are not recognised.

"55.2. Mr Al-Sanea was the registered legal owner of the Disputed Securities prior to the September Transfer.

"55.3. The September Transfer passed good title to the Disputed Securities to Samba.

"56. In the premises, any equitable interest that SICL may have held in the Disputed Securities was extinguished by the September Transfer (as the Court has already held in these proceedings)."

15. It was in the light of that pleaded case that the Defendant itself originally identified the issue which is now to be tried as one of a number of proposed preliminary issues, and it was in the following terms:

"If Saudi Arabian law governs the effect of the September Transfer on property rights in the Disputed Securities, did the September Transfer extinguish SICL's alleged interest in the

Disputed Securities regardless of whether Samba had knowledge of the alleged trusts?"

16. The existence of property rights is therefore a given for the purposes of the issue that is to be tried. The issue is one of priority as between those rights of SICL and the rights of the Bank as purchaser of the Disputed Securities even if the Bank was aware of those rights.
17. The Defendant's attempt to rely on expert evidence of illegality under Saudi Arabian law turns the issue into a different one, namely whether under Saudi Arabian law SICL had any proprietary rights in the shares. That is not the issue that was directed to be tried.
18. The Defendant has other arguments why as a matter of law SICL's rights were subordinated to those of the Bank, even if the Bank knew of SICL's rights, namely that Saudi Arabian law does not recognise trusts at all and would regard the shares as being owned by Mr Al-Sanea, since they were registered in his name.
19. So the issue that I directed to be tried is not devoid of any content, but the Bank cannot argue that it had priority because the trusts created by the Six Transactions were unlawful under Saudi Arabian law.
20. The effect of the expert evidence adduced by the Defendant to which the Claimants object is to raise the same question of illegality that I have already determined cannot fairly be tried without disclosure; it also gives rise to a substantially different issue from the issue that I directed to be tried. I agree with the Claimants that the parts of Mr Haberbeck's expert reports to which they have objected must be removed from the reports and evidence at trial.
21. I therefore allow the application which has been made.