



Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
NEUTRAL CITATION NUMBER [2023] EWHC 1300(Ch)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 May 2023

Before :

THE HONOURABLE MR JUSTICE TROWER

Between :

JSC COMMERCIAL BANK PRIVATBANK

Claimant

- and -

- (1) IGOR VALERYEVICH KOLOMOISKY**
- (2) GENNADIY BORISOVICH BOGOLYUBOV**
- (3) TEAMTREND LIMITED**
- (4) TRADE POINT AGRO LIMITED**
- (5) COLLYER LIMITED**
- (6) ROSSYN INVESTING CORP**
- (7) MILBERT VENTURES INC**
- (8) ZAO UKRTRANSITSERVICE LTD**

Defendants

Approved Ruling

Mr Justice Trower:

1. The Third to Eighth defendants ('Ds3-8') seek to amend their Re-Re-Re-Amended defence pursuant to CPR 17.1(2). The proposed amendments are said by Ds3-8 to flow primarily from the permission granted by paragraph 10 of the order dated 30 March 2023 which permitted the First Defendant to amend his defence to incorporate arguments based on the recoverability, currency and quantum of the Bank's loss. The relevant parts of that Order provide as follows:

“10. The First Defendant has permission to amend his Re-Re-Re-Re-Re-Amended Defence in the form of the D1 Draft Amended Defence (without the words “*in particular and without limitation*” in paragraph 83G).
[...]

17. If either the Second Defendant or Third to Eighth Defendants intend to seek permission to amend his/their Defence to adopt any of the matters raised by the First Defendant in the amendments for which permission is granted by this Order, he/they must produce a draft amended Defence to the Bank by 4.30pm on 6 April 2023. If the Bank does not consent to the draft amendments, the Second Defendant or Third to Eighth Defendants (as the case may be) shall be required to make an application for permission to amend which application may be determined by the judge on the papers.
2. In the event, Ds3-8 sought to adopt a number of the matters raised by the First Defendant and sought the Bank's consent to amend their statement of case accordingly. An initial draft defence was provided to the Bank on 5 April 2023 (before the 6 April deadline), followed by a further amended version on 11 April 2023 (after the deadline). The Bank consented to the majority of the proposed amendments, including all of those submitted after the 6 April deadline (subject to an order for costs of and occasioned by the amendments). The Bank did not, however, consent to any amendments relating to Ds3-8's defences to the unjust enrichment claim (which were submitted before the 6 April deadline).
3. Both parties agree that the application should be resolved on the papers and, to that end, have set out their positions in writing. In reaching my decision, I have considered Ds3-8's written submissions as set out in Section 10 of their Application Notice dated 10 May 2023 and their letter to the court dated 17 May 2023. I have also considered Hogan Lovells' letters dated 18 April, 3 May and 16 May 2023, which explain the Bank's opposition to the application. Both parties referred to passages from the expert evidence which I have also considered.
4. The relevant legal principles can be stated succinctly. The starting point is CPR 17.3 which confers on the court a broad discretionary power to grant permission to amend, to be exercised having regard to the overriding objective in accordance with the court's duty under CPR 1.2(a). In exercising that discretion, the court will have regard to a variety of factors including the timing and history of the proposed amendments including in particular whether they could have been advanced earlier, their particularity and/or clarity, prejudice to the opposing party if the amendments are allowed and prejudice to the amending party if they are not.

5. So far as the merits are concerned, an amendment will not be allowed if it raises a case which does not have a real prospect of success, by which is meant that the claim is not merely arguable – it must carry some degree of conviction and be realistic as opposed to fanciful (per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at [92]). The pleading must also be coherent and properly particularised, and permission will be refused if the proposed amendments are unsupported by evidence which establishes a sufficiently arguable case: *Kawasaki Kisen Kaisha Ltd v James Kimball Ltd* [2021] EWCA Civ 33 at [17].
6. In the present case, two principal categories of amendment are opposed. The first, set out in paragraphs 55(4), 56A(3) and 58 (2nd sentence) of the draft, seek to plead that the Unreturned Prepayments received by Ds3-8 were not, in fact, that which was lost by the Bank. The basis for the plea is that they were made in UAH, whereas the Bank's loss was felt in US\$. The second, set out in paragraphs 58 (3rd sentence and subparagraphs) and 59A (in part), seek to plead that any liability in unjust enrichment should be capped at the value of the Relevant Drawdowns in respect of which the Bank can evidence their loss.
7. The Bank's opposition to the amendments is twofold. First, it submits that the amendments are unsupported by existing evidence on Ukrainian, English and Cypriot law, and therefore says they have no real prospect of success. Secondly, it submits that the amendments raise an entirely new argument which could, and should, have been raised at an earlier stage in the proceedings. In particular, the Bank says that any argument that Ds3-8's liability to give restitution should be capped at the value of loss (rather than what Ds3-8 gained), is a novel point, and goes beyond what was permitted by the directions given at the second PTR on 30 March 2023.
8. In support of their application, Ds3-8 say the proposed amendments are entirely consistent with their case as currently pleaded, and in fact do no more than expand upon their current pleadings to incorporate defences raised by the First Defendant.
9. The starting point for Ds3-8's position is that the Bank's unjust enrichment claim is indirect at what they call a basic level, in the sense that Ds3-8 did not receive directly from the Bank. They also submit that it is indirect in a more fundamental sense because it is not said that there is any form of quasi proprietary claim to specific property paid away by the Bank. The way that the case is put is not that the enrichment was direct, but rather that the relevant drawdowns caused the Unreturned Prepayments (para 58A of the Re-Re-Re-Re Amended PoC). The case is therefore one which recognises that there is what Ds3-8 call a 'mismatch' between the property lost by the Bank and the property received by Ds3-8.
10. In (e.g.) paragraphs 52(1) and 55(3) of their defence as pleaded, Ds3-8 have consistently denied that any of the Unreturned Payments received from the Ukrainian Borrowers were the same as that which the Borrowers received from the Bank and to that extent did not come at the expense of the Bank. Paragraphs 34(2) and 56A(2) similarly deny that any enrichment was at the Bank's expense because of the principles under the Civil Code of Ukraine to the effect that the increase in the amount received by the acquirer must be a direct consequence of a simultaneous corresponding reduction of the property of the victim. Paragraph 59A also makes clear that Ds3-8 would seek to limit their liability by reference to the source of the

Relevant Prepayments. In all these respects, their existing case already puts defences concerning the quantum and recoverability of loss on the unjust enrichment claim.

11. In these circumstances, I consider that Ds3-8 are correct to characterise the proposed amendments to which the Bank does not consent as a further development of the argument that there is a mismatch between what the Bank lost and what Ds3-8 received. I agree that this gives rise to a new issue, but I do not accept that the amendments would prejudice the Bank's trial preparation nor give rise to factual issues, which the Bank was not already required to address at trial, being matters already raised by the First Defendant.
12. I must also consider the impact upon Ds3-8 if I were to refuse this application. In that respect, I agree with Ds3-8 that they have the potential to be severely prejudiced if prevented from pleading the proposed amendments. Clearly, if successful on the point at trial, the difference between liability to give restitution for what the Bank lost (i.e., the value of the Relevant Drawdowns, considering the First Defendant's newly pleaded case as to the currency in which this value should be quantified), rather than what Ds3-8 received (i.e., the Unreturned Prepayments, denominated in US\$) will be considerable.
13. However, that does not answer the Bank's submission that the proposed amendments should be refused on the basis that they are unsupported by the evidence and therefore that they are not arguable with a sufficient degree of conviction. I do not agree.
14. In my view Ds3-8 are entitled to point to a number of passages in the Joint Report, Nahnybida 3 and 4 and Beketov 9 as support for the proposition that, where there is a mismatch between the property lost to the claimant and that received by the Defendant, there will be no liability beyond the value of what was lost. Those passages are set out in paragraph 14 of Section 10 to the application notice. The Bank submits that this evidence is directed at the connectivity between the enrichment and the loss for the purposes of satisfying the "at the expense of" element of the Civil Code and does not address the different question of whether the liability of an unjustly enriched defendant can be capped by reference to the claimant's loss.
15. I do not agree that the evidence is necessarily so circumscribed. On further testing at trial, that may turn out to be the case, but in my view, the experts' evidence is capable of supporting what amounts to a specific application of a more general rule. Whether it does in fact do so is not a matter to be decided at this stage. In other words, I think that the point is arguable with a degree of conviction, but whether it is right is a matter for the trial, to be determined after the evidence has been heard and tested.
16. Similar arguments are made by Ds3-8 with respect to Cypriot law, i.e., that liability is at least arguably curtailed to what the claimant lost, irrespective of the quantum of the defendant's gain. I think that the way in which this issue is dealt with in the joint report leaves the point open to argument, because the received advantage referred to in Subject 4(a) point 1(i) is expressed to be linked to compensation for loss sustained. In my view, whether that has the consequence sought to be pleaded by Ds3-8 is also arguable and is not a question to be determined at this stage.
17. As to English law, Ds3-8 submit that, even if the Cypriot law of unjust enrichment is the same as English law (which they deny) they can rely on the UKSC decision in

ITC v HMRC [2018] 1 AC 275 and a passage from *Goff & Jones: The Law of Unjust Enrichment (10th Edition:2022)* as support for the proposition that, to the extent that there is no loss corresponding to the gain, there can be no basis for restitution. The Bank does not agree that either is authority for such a proposition, and points instead to the decision of Vos J in *Littlewoods Retail Ltd v RCC* [2010] EWHC 1071 (Ch) and of Warren J in *Amin v Amin* [2010] EWHC 528 (Ch) as clear statements that unjust enrichment in English law does not limit recovery to the loss it has suffered.

18. Despite what was said in those two cases, I am not convinced that the law on this point is yet settled. My present view is that, even if English law were to be applicable as a matter of Cypriot law (which Ds3-8 do not accept) they are right to say that this point is not yet settled certainly at appellate level. That being so, I think it would be wrong to refuse the application to amend on that basis.
19. Taking into account all of these points, I have decided that the factors I identified earlier in this ruling point to the grant of permission to amend in the form sought by Ds3-8. The parties should agree and submit for approval an order reflecting the terms of this ruling.