Neutral Citation Number: [2020] EWHC 94 (Comm)

Case No: CL-2019-000477

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

MR. JUSTICE TEARE

- -

Between :

IVY TECHNOLOGY LIMITED	**Claimant**
- and -	
(1) BARRY MARTIN	**Defendants**
(2) PAUL BELL	
(3) AXL MEDIA LIMITED	

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Dominic Happe (instructed by **Malvern Law Limited**) for the **Claimant**
Adam Solomon QC and David Lascelles (instructed by **Hill Dickinson LLP**) for the **Second Defendant**

Hearing date: 17 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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The Honourable Mr Justice Teare

Mr. Justice Teare :

1. This is an application by the Claimant to amend its Particulars of Claim to add additional claims against the Second Defendant, Mr. Bell. The claim relates to a share sale agreement and claims were originally brought against the First Defendant, Mr. Martin, for breach of the agreement and against the Second Defendant, Mr. Bell, for the torts of conspiracy and of inducing that breach. In essence, the Claimant now wishes to allege that the Second Defendant was party to the agreement as the undisclosed or disclosed principal of the First Defendant and so is also liable for the alleged breach of the agreement. The most substantial issue debated was whether that amended plea had a real prospect of success. It was submitted on behalf of the Claimant that it did, so that permission to amend should be granted, and on behalf of the Second Defendant that it did not, so that permission to amend should be refused. In addition certain other points were also debated.

2. This matter has already been before the court in the context of an application for a Freezing Order. Such an order was granted by Knowles J. *ex parte* on 29 July 2019 but, so far as concerns the Second Defendant, was set aside on the return date by Mr. Andrew Henshaw QC, as he then was, on 26 September 2019. Whilst Mr. Henshaw QC held that that there was an arguable claim against the Second Defendant in tort, he held that the Claimant had not established the necessary risk of a dissipation such as to justify the continuation of the freezing order.

3. The underlying claim concerns an agreement dated 4 April 2019 for the sale of shares in 5 companies which comprised an online gambling operation trading as "21Bet". In essence the Claimant complains of misrepresentations which induced the making of the agreement and of warranties which were broken. Various remedies, including damages and rescission are claimed.

4. By the amendment for which permission is sought the Claimant wishes to allege that the agreement to sell the shares in 21Bet was made by the First Defendant on his own behalf and on behalf of the Second Defendant so that the latter is also liable to pay damages for breach and to repay sums paid under the agreement.

5. There is evidence that the shares in the companies comprising the business known as 21Bet were owned as to 50% by the First Defendant and as to 50% by the Second Defendant. Precisely how the shares were held is not, at this early stage in the proceedings, known. A Due Diligence Questionnaire which was answered, I was told, by Mr Martin stated as follows:

> "Officially all the relevant entities are owned by Richard Hogg but the true ownership is Mr. B. Martin & Mr. P. Bell 50-50 ownership."

6. I was told that Mr. Hogg was the registered owner of the shares in the companies. Mr. Bell himself has said in a witness statement prepared for the return date of the freezing order application:

> "I was the beneficial owner of 50% of the shares in the Business alongside Mr. Martin, who managed the business on a day to day

> basis. I had limited involvement in the management and direction of the Business."

7. Notwithstanding this "equal" beneficial ownership of the shares in the companies forming the 21Bet business, Mr. Bell was not named as a party to the share sale agreement. The parties to the agreement were stated to be the Claimant, Ivy, the 5 companies and Mr. Martin who was described as the "Shareholder". The recitals to the agreement (which were stated by clause 1.2 to be an integral part of the agreement) said in terms that:

> "The Shareholder is the beneficial owner of the entire share capital of [4 companies] his shares being held by nominees….
>
> No person other than the Shareholder is entitled to any right in and to [the 4 companies]"

8. The shares in the fifth company were stated to be held by one of the 4 companies.

9. There was no evidence as to why Mr. Martin was described as the beneficial owner of the shares when in fact, as is common ground, and was known to the Claimant, the shares were beneficially owned 50/50 by Mr. Martin and Mr. Bell. Also unknown are the details of the agreement between Mr. Bell, Mr. Martin and Mr. Hogg. No written agreement has yet emerged. It may be, as indicated in a Letter of Intent dated 4 January 2019 and issued by another proposed purchaser of the 21Bet business, that there was a "verbal agreement" between those three gentlemen but, if so, the terms of that oral agreement are not in evidence.

10. The case which the Claimant, Ivy, now wishes to advance is that Mr. Martin entered into the agreement not only on his own behalf but also on behalf of Mr. Bell. In circumstances where Ivy wished to buy the shares in the 5 companies comprising the 21Bet business and where those shares were beneficially owned by Mr. Martin and Mr. Bell that would appear to be a not unrealistic allegation. In order to be able to transfer the full beneficial ownership of the shares to Ivy Mr. Martin would have required the consent of Mr. Bell to the transaction. The identity of Mr. Bell as a 50% beneficial owner had been disclosed by Mr. Martin in response to the due diligence questionnaire and to that extent Mr. Bell was a disclosed principal of Mr. Martin. Thus the circumstances of the case strongly suggest that Ivy was willing to contract with Mr. Martin on the basis that he both acted for himself and for Mr. Bell. Equally, in circumstances where Mr. Bell no doubt required payment for his shares, it is likely that Mr. Martin had authority from Mr. Bell to act on his behalf (and on this application no issue was raised as to there being such agency).

Exclusion of Mr. Bell's liability

11. However, a person not named as a party to an agreement cannot be sued upon it as a disclosed (or undisclosed) principal if the terms of the agreement expressly or by implication exclude his liability to be sued; see *Playboy Club London Ltd. v Banca Nazionale del Lavoro SPA* [2018] UKSC 43 at paragraph 12 per Lord Sumption. The question raised by counsel for Mr. Bell is whether the terms of the Agreement in this case exclude expressly or by implication the liability of Mr. Bell to be sued as a disclosed (or undisclosed) principal.

12. This question can obviously arise in many different contexts; see, for example. *Ferryways NV v Associated British Ports* [2008] EWHC 225 (Comm), *Aspen Underwriting Limited v Credit Europe Bank* [2017] EWHC 1094 (Comm) and [2018] EWCA Civ 2590 and *Filatona v Navigator* [2019] EWHC 173 (Comm). But it is not always easy to answer. Thus, in *Kaefer Aislamientos SA v AMS Drilling Mexico* [2019] EWCA Civ 10, Green LJ said at paragraph 114:

> "…it might be putting the proposition too highly to say that the mere specification of parties in a contract serves to oust the doctrine of undisclosed principal since, if it were true, then every contract with named parties would serve to prevent a finding that there were undisclosed principals which would defeat the principle itself. ……..For my part I do not think that the entire agreement clause in the terms and conditions necessarily serve to exclude *altogether* the possibility that there might be undisclosed principals. The language used is not wholly unequivocal and the parties could, had they wished, have expressly stated that the parties thereto were the *only* parties that could sue and/or be sued. But they did not. On the other hand, I do consider that it is a cogent indication that the alleged agents (the first and second defendants) did not intend to act on behalf of an undisclosed third party principal and that this was also the view of the claimant. It is evidence that can go into the mix."

13. The reference made by Green LJ to the entire agreement being "evidence that can go into the mix" suggests that the answer to this question is not just a question of construing the contract but is also a question of examining all the circumstances of the case (see also paragraph 113 where Green LJ refers to the express identification of the parties in the relevant agreement being "a (powerful) part of the evidential mix but was not dispositive").

14. That being so it seems to me that the court should be wary of deciding this question at this early stage in the proceedings. In circumstances where Mr. Martin and Mr. Bell were 50/50 beneficial owners of the shares and yet the parties contracted on the basis that Mr. Martin was the beneficial owner of all the shares it is likely that there must have been some discussion between the parties as to why the parties were to contract on the basis they did and why this was acceptable to Ivy (who wished to buy all the shares) and to Mr. Bell (who must have wished to be paid for his shares). On this topic there are likely to have been discussions which "crossed the line" as opposed to merely subjective thoughts on either side. Neither Ivy nor Mr. Bell have adduced evidence as to such discussions but it is likely that there were such discussions.

15. In *Elite Property Holdings v Barclays Bank* [2019] EWCA Civ 204 Asplin LJ summarised the principles to be applied when considering amendments, at paragraph 41:

> "For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect

> where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.
> "

16. These principles had been more fully explained by Lewison J. (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15 in the context of applications for summary judgment:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

17. I consider that at trial there can reasonably be expected to be evidence explaining why the parties chose to contract with each other on terms which did not accord with the reality as known to the parties. Such evidence, along with the terms of the agreement, would be part of the "the evidential mix" which would be relevant to a determination of the question whether the ability of Ivy to sue Mr. Bell (and indeed the ability of Mr. Bell to sue Ivy in the event of non-payment) was excluded by the terms of the Agreement.

18. I therefore consider that it is appropriate for the court to decline to resolve the question now when reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

19. In case this approach (based upon my understanding of Green LJ's reference to the "evidential mix") is wrong and the matter is a pure question of construction I have also considered whether it is appropriate to "grasp the nettle and decide it". I have concluded that that would not be appropriate. The question of construction must be determined in the light of the factual matrix or background known to both parties. That factual matrix or background would include the reason why the parties chose to contract in the terms they did. For the reasons which I have already given it is likely that there were discussions which "crossed the line", knowledge of which would or might put the terms agreed in "another light".

20. Counsel for Mr. Bell relied upon the description of the parties to the agreement and upon the entire agreement clause (see the opening of the agreement, the definition of "party" in clause 1.1.33 and the entire agreement clause in clause 15.1). Counsel also relied upon clause 9.6 which imposed upon Mr. Martin as the shareholder a non-compete, non-interference and non-solicitation obligation. However, none of these stated in terms that *only* the named parties could sue or be sued upon the agreement.

21. Counsel for Mr. Bell also relied upon the recitals which stated in terms that Mr. Martin was the beneficial owner of the entire shared capital, the warranty in clause 7.3 that Mr. Martin was the "sole and exclusive" owner of the shares and clause 15.12 which stated:

> "Nothing in the Agreement, express or implied, is intended to confer upon any third party other than the Parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provide for in this Agreement."

22. I accept that the recitals, warranty and clause 15.12 are cogent, indeed very cogent, indications that third parties were not intended to have any rights or liabilities under the agreement. However, in circumstances where it is likely that there was some reason, known to Ivy, Mr. Martin and Mr. Bell, why Mr. Bell's interest in the shares being sold was not mentioned on the face of the agreement, it is possible that the proper construction of the agreement in the light of that reason would not be such as to prevent Mr. Bell, as the disclosed beneficial owner of 50% of the shares, from having rights or liabilities under the agreement. It may prove to be unrealistic to describe Mr. Bell as a third party within the meaning of clause 15.12 of the agreement, notwithstanding the recitals which were an integral part of the agreement.

23. For these reasons, although Mr. Bell may well prevail at trial, I consider that the new claims sought to be introduced by amendment cannot be said to be fanciful but, rather, have a real prospect of success and carry some degree of conviction.

24. I would in any event be most reluctant to seek to give a definitive ruling on the true construction of the agreement in circumstances where the court knows nothing of the reasons why Mr. Bell's interest did not appear in the agreement and where, to the knowledge of all parties, he was the beneficial owner of 50% of the shares in question. Without knowing those reasons I could not be sure of reaching the right conclusion at this time.

Estoppel

25. Counsel for Mr. Bell submitted that the statement in the agreement that Mr. Martin was the beneficial owner of the entire shareholding in the 21Bet business gave rise to an estoppel, even though in fact it was untrue; see *Peekay v Australia and New Zealand Banking Group* [2006]2 Lloyd's Reports 511 at paragraph 56 and *Richards v Wood & Wood* [2014] EWCA Civ 327 at paragraph 16.

26. However, just as the true construction of the agreement ought not to be finally decided until trial so the true meaning of the statement as to beneficial ownership in the recitals to the agreement ought not to be decided until trial.

Election

27. Counsel for Mr. Bell also submitted that, Ivy having issued proceedings on the basis that Mr. Martin was its counterparty, Ivy had elected to proceed against Mr. Martin and could not thereafter sue Mr. Bell as the disclosed (or undisclosed) principal of Mr. Martin. The role of election in this context is recognised by the authorities (see *Clarkson Booker Ltd. v Andjel* [1964] 2 QB 775, *Chestertons v Barone* [1987] 1 Estates Gazette

15 and *Playboy Club London Limited v Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041 at paragraph 12). However, as has been observed by the editors of *Bowstead on Agency* at paragraph 8-120 there are few cases where the defence has succeeded and, where it has, the success is explicable on the grounds of estoppel.

28. What is clear from the decision and reasoning of the Court of Appeal in *Clarkson Booker Ltd. v Andjel* is that whilst the institution of proceedings against an agent is at least strong evidence of an election, that evidence may be rebutted. The question is one of fact and it must be shown that the decision to institute proceedings against the agent was a "truly unequivocal act", which "involves looking closely at the context in which the decision was taken, for any conclusion must be based on a review of all the relevant circumstances" (see pp. 791-3 per Willmer LJ. Russell LJ at p. 795 said that what must be shown is that "the plaintiff has settled to a choice involving abandonment of his option to enforce his right against one party").

29. Counsel for Mr. Bell submitted that in the present case there was a clear case of election arising from these matters: the commencement of proceedings against Mr. Martin as the sole contracting party with the benefit of legal advice, the application for a freezing order on the basis that Mr. Martin was the sole contracting party with the benefit of legal advice and the absence of any explanation for the change of Ivy's position. However, the argument based upon election had not been articulated before it appeared in counsel's skeleton argument and in those circumstances Ivy had not had the opportunity to adduce evidence on the issue. It is likely that Ivy would have some evidence to adduce on the question whether, by instituting proceedings against Mr. Martin and seeking a freezing order against him on the basis that he was party to the agreement, Ivy had settled on a choice which involved abandoning its (assumed contractual) right against Mr. Bell. It must be remembered that this is a case where on any view Mr. Martin was party to the agreement in his own right by reason of his 50% beneficial ownership of the shares in question. The question of election must therefore be resolved at trial.

Warranties are not representations of fact

30. In addition to alleging (by way of amendment) that Mr. Bell was the disclosed (or undisclosed) principal of Mr. Martin it was also alleged (in paragraph 3 of the amended Particulars of Claim) that warranties contained in the agreement were relied on as, and were intended to be, representations by Mr. Martin on his own behalf and/or as agent on behalf of Mr. Bell. This proposed amendment is the subject of an objection because the warranties were not representations. Reliance was placed on the decision of Andrew Baker J. in *Idemitsu Kosan v Sumitomo* [2016] EWHC 1090 (Comm) in which the judge held (see paragraphs 14-22) that where a warranty is given the party is making a contractual promise and is not making a statement of fact.

31. The decision of Andrew Baker J. in *Idemitsu Kosan v Sumitomo* was not challenged. Instead reliance was placed by counsel for Ivy on clause 7.28 of the agreement which provided as follows:

> "Notwithstanding Article 7.25, neither this Agreement nor any other agreement , document, certificate ,information or statement furnished to the Purchaser by or on behalf of the Companies and/or the Shareholder in connection with the transactions

> contemplate hereby contain any untrue statement of fact or omit to state a fact (i) necessary in order to make the statements contained herein or therein not misleading, (ii) required for providing a true and accurate status and situation of the Companies, and(iii) related to the transactions contemplated hereby and/or in order to allow the Purchaser to make a decision as to whether to enter into the Agreement."

32. In my judgment this provision does not assist Ivy. The purpose of clause 7.28 is to provide that even though certain statements may be implied for any of the three reasons identified in the clause, nothing contained in the Agreement or in any of the other documents to which reference is made shall be regarded as containing an untrue statement of a fact or an omission to state a fact. The clause does not suggest that where a warranty is given it shall be regarded as the making of a statement of fact.

33. In circumstances where no reason was identified to doubt Andrew Baker J.'s understanding of a warranty it seems to me that Mr. Bell's objection to this aspect of the amendment is sound.

34. The only matter which causes hesitation on my part is that the allegation that the warranties given by Mr. Martin are also to be regarded as representations is in the original pleading and so will, in any event, be advanced against Mr. Martin. If I thought that this allegation made against Mr. Martin might succeed then I think I would be bound to give permission to run the same argument against Mr. Bell. But I have been given no reason for thinking that it will succeed. On the contrary it appears that it will founder upon the analysis of a warranty by Andrew Baker J. in *Idemitsu Kosan v Sumitomo.* There does not appear to be any real prospect that that understanding will not be shared by the trial judge. For this reason I refuse permission to amend on this particular point.

Lack of clarity

35. Two complaints were made under this heading.

36. The first related to the allegation in paragraph 1A of the amended Particulars of Claim that Mr. Bell "was (and was treated by Mr. Martin as) the true or joint owner of the Business and was the person whose decision influenced any sale and/or without whose consent no sale could take place". It was said that it was not clear what was meant by the allegation that Mr. Bell was the true or joint owner.

37. I agree that there is a degree of uncertainty about that allegation. However, its origin must lie in Mr. Martin's reply to the questionnaire to the effect that

> "Officially all the relevant entities are owned by Richard Hogg but the true ownership is Mr. B. Martin & Mr. P. Bell 50-50 ownership."

38. Counsel for Ivy submitted that any uncertainty in the pleading flows from the present uncertainty as to the true nature of Mr. Bell's ownership of the business.

39. It seems to me that this is a fair response and that there are no grounds for refusing permission to amend to make this allegation. However, as and when disclosure is given of documents or information which elucidate the nature of Mr. Bell's ownership it might well be appropriate to amend the allegation accordingly.

40. The second complaint relates to paragraph 2 of the amended Particulars of Claim in which an allegation is made of representations made in the course of negotiations. The particulars given appear to be particulars of 4 representations. However, the second says:

> "The Claimants also refer to the Due Diligence Questionnaire and to the Financial Statements (put together by the First Defendant and his advisors Beavis Morgan) and attached to the Agreement as Schedule 7.26."

41. It is correctly submitted that this fails to identify the representation alleged. Counsel for Ivy accepted this criticism. Either the paragraph should be removed or the representation alleged in the documents to which reference is made should be identified.

42. I invite the parties to agree an order giving effect to my decisions in this judgment.