Neutral Citation Number: **[2023] EWHC 2584 (Comm)**

Case No: **CL-2023-000118**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **13 October 2023**

Before :

Mr Justice Andrew Baker

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Between :

Banco de Sabadell S.A	**Claimant**
- and -	
Cerberus Global NPL Associates, L.L.C & ors.	**Defendants**
- and -	
Promontoria Holding 266 B.V.	**Third Party**

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James Collins KC (instructed by **PCB Byrne LLP**) for the **Claimant**
Andrew Scott KC and Gayatri Sarathy (instructed by **Kirkland & Ellis International LLP**) for the **the Defendants**
Alex Barden (instructed by **Latham & Watkins**) for the **Third Party**

Hearing date: **13 October 2023**

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RULING

(Approved Transcript)

Mr Justice Andrew Baker **Friday, 13 October 2023**

(**12:37** pm)

Ruling by **MR JUSTICE ANDREW BAKER**

1. I am grateful for counsel's submissions on an important threshold question in relation to the case management of this litigation for the setting of any directions through to and including a trial. That threshold issue is, what is the nature or extent of the issues as to fact raised by the pleadings in respect of which the parties may wish to provide or receive disclosure and may wish to consider adducing factual witness evidence at a trial.

2. The contracts in question are governed by Spanish law. There is a pleaded case in the Particulars of Claim, responded to in the Defence, as to principles of Spanish law relevant to the interpretation or construction of commercial contracts. There is a substantial degree of common ground in relation to those pleadings in formulating propositions in the English language as to the effect of Spanish law; but there are differences and it will probably therefore be necessary for there to be evidence of Spanish law, in some appropriate form, to inform the court so as to resolve those differences. The exact form that expert evidence should take is not a matter that we have yet discussed this morning.

3. That, however, namely the fact that there may be some differences as to the precise nature or scope of potentially relevant doctrines of Spanish law, is not a proxy for the pleading of cases, if any, as to matters of extrinsic fact that it will be said, properly applying that Spanish law, have a bearing on the meaning and effect of the contracts properly construed.

4. In that regard, the claimant has correctly pleaded its case in the Particulars of Claim, and that is in paragraph 8. It is limited to a plea of certain elements of conduct, which the claimant will assert are admissible as a matter of Spanish law as evidence of the intention of the parties.

5. Paragraph 8.1 pleads matters of fact concerning interest, which are in substance admitted. There is in that regard a case pleaded in response as to the objective purport of the basic admitted facts. The reply in relation to that raises a discrete factual question as to whether the

satisfaction or not of the Relevant Thresholds, as they are called in the contracts, should be regarded as within the claimant's control.

6. I have no doubt at all that Model B Extended Disclosure is apt and sufficient for the purposes of tackling that issue, it may be with room for some limited factual witness evidence, although even that may be coloured by the helpful indication that Mr Scott KC has given that the specific factual case on the point pleaded in paragraph 18.3 of the Reply may be capable of a formal admission. That is a matter which he and those instructing him will consider further after this hearing.

7. Paragraph 8.2 of the Particulars of Claim pleads the payment by the Investor (the Third Party) of portions of deferred purchase price ('DPP') that on both sides' case fell due between the maturity date and the extended maturity date as a result of REOs becoming registered. The facts in that regard are admitted. It is not obvious why the performance of an obligation which on both sides' cases arose between the Maturity Date and the Extended Maturity Date might assist on the contentious issues, but if and to the extent that it does, that, as it seems to me, is matter for argument.

8. At paragraph 8.3, there is a plea that the Investor's annual accounts confirmed that the DPP would be payable in full, in other words a plea in effect of an acknowledgement, it is said, of a liability or anticipated liability which it will be said is consistent only with, or more with, the claimant's case. The responsive plea to that is to put -- I do not mean this pejoratively -- a different spin, or a different interpretation, on what is said in the annual accounts. Evidently, then, both sides already have the relevant document, that is to say the accounts in question; their purport is a matter for argument.

9. Paragraph 8.4 pleads signed letters, agreeing terms for the repurchase of certain REOs by the Sellers and it is asserted that the terms of those repurchases were consistent only with a mutual recognition that a portion of the DPP was referable to them and would be paid. Again,

the responsive plea is a contrary case as to the objective import of the letters, and evidently both sides (or indeed all three sides, if that is the right way to describe it) already have the relevant documents, namely the signed letters; their purport is a matter for argument.

10. Finally, at paragraph 8.5 it is pleaded that between late 2021 and early November 2022 there were negotiations about the date of payment of the DPP, because it is said the Investor sought additional time to pay; and the plea is that a premise of those negotiations was that the amount payable by the Investor on the Extended Maturity Date would be the entire DPP. The responsive case is to admit that there was inter partes correspondence in that period on the matters that are now raised in the litigation. A contrary case is pleaded as to the import of those discussions or negotiations, if that is the correct terminology. Both sides will no doubt have the correspondence. The Particulars of Claim, I acknowledge, are not explicitly limited to written negotiations, but in the absence of any particularised case of material oral communications, I do not regard that plea, and the basis upon which it has been responded to, as sufficient foundation on the pleadings as they stand for proposing that search-based Extended Disclosure or extensive factual witness evidence is going to be required or justified.

11. When one turns to the Defence, beyond the matters that I have already summarised arising responsively to the claimant's pleading, at paragraphs 16 and 17, the defendants for their part plead extrinsic matters, asserted to be either admissible or admissible if the claimant is correct as to the extent of admissible extrinsic material.

12. Paragraph 16.1 pleads facts concerning other agreements. The facts in that regard are then essentially admitted, but issue is joined in the Reply as to the import of those facts. That does not give rise to any need for witness evidence and Model B would be ample for Extended Disclosure.

13. At Paragraph 16.2, there is a plea of the claimant's efforts to register the unregistered REOs being a matter from which it is to be inferred that there was an understanding that the

defendants' position on the disputed issues was likely to be correct. As a matter of the facts arising, there is an admission, as one would imagine, that the claimant indeed made efforts to register the unregistered REOs. Issue is joined as to the import of that; and similarly to the other matters I have been identifying, as it seems to me and as things stand, that does not give rise to any additional need for witness evidence, and Model B would be ample for any Extended Disclosure process.

14. Finally, in paragraph 16, it is pleaded that the Investor paid the entire DPP under one of the three arrangements under which the issue that is contentious in these proceedings did not arise. The facts in that regard are admitted. The import is denied on the ground, so it is asserted it might be thought, provisionally, with some force, that that performance of what on both sides' case would be the contractual obligation in those circumstances, is neutral on the contested matters. However that may be, if that allegation is pressed, it does not seem to me to give rise to any need for disclosure, as the facts in question are now admitted, or for that matter witness evidence.
15. Then at paragraph 17 the defendants invoke Spanish law principles, if they require them, of contra proferentem and in favor debitoris. Issue is joined in relation to contra proferentem in a way that gives rise to a factual question as to whether the claimant should be regarded as the proferens, the essence of which, and I do not mean by putting it this way to trample over any detail or subtlety there, but the essence of which is whether this will be regarded as a case in which the claimant put forward contract wording and should therefore properly be regarded as the proferens or whether it is more complex than that, because even if it may be that detailed wording was first produced by the claimant’s advisers, it was the subject of sufficiently detailed and extensive mutual negotiation that it should not be properly regarded as wording where either side as distinct from the other was the proferens.
16. Again, as matters stand, I am not persuaded that there are on the face of the pleadings significant issues of fact concerning how the contracts were negotiated such as would require search-based

Extended Disclosure and I provisionally, but relatively firmly, doubt that once Model B disclosure were given in relation to the drafting and negotiation process, there will be a need for witness evidence to describe to the court that which either will or will not, as the case may be, be evident from the documents as to the extent to which the drafting was indeed the subject of detailed discussion and negotiation.

17. There is within the defendants' allegations in the Defence a reference to a common intention said to be evident from the material relied on, on which it is right to say, as Mr Collins KC emphasised, that issue is joined by the Reply. But in my view there is no present plea that the private (uncommunicated) intention on one or other side is relevant under Spanish law, or any plea of such an intention, such as might perhaps give rise to a need for more extensive Extended Disclosure or factual witness evidence at trial.

18. For those reasons, and as things stand on the pleadings, I am not persuaded that this is a case that requires anything beyond Model B Extended Disclosure in relation to the issues that arise on the pleadings; and I consider that there may be room to direct that, again, at least as things now stand on the pleadings, any factual witness evidence be confined to particular, tightly defined issues.

19. Mr Collins KC, very fairly, has indicated that if that be the conclusion of the court on the pleadings as they stand, anxious consideration may be given on his side to whether there was in reality an intention to raise wider ranging and different matters of fact and, if so, whether a proposal will be made to do so by way of amendment to the Particulars of Claim.

20. I have made clear in the course of dialogue that if, on the back of the ruling I have now given as to the extent of the disclosure and, probably, witness evidence that I consider is reasonably required as things stand, I proceed today to set a timetable and other directions for a trial of a certain length and scope and timeframe, then so long as any proposed amended Particulars of Claim is put into circulation reasonably promptly following this hearing, I would not expect it to

be suggested that it would be a reason to object to the proposed amendments that if they were allowed the court might find itself having to revisit those case management decisions. That is because, other things being equal, in the face of Mr Collins' indication, I would be tempted to adjourn the balance of the CMC for it to be re-listed, still this term, but were I to do that I would be very concerned that come a second hearing of this CMC on an adjourned date in, say, early December, the opportunity that presently exists, if matters do not materially develop, for a trial of this matter in only about a year's time may well have been lost.

21. Therefore I am minded, as it stands, and subject to any further observations of counsel, to give directions through to the sort of trial that I have been indicating in the course of dialogue and that the defendants have indicated they had in mind, a listing window for which is currently available in late October 2024. But as I have indicated that must be on the basis that if fairness proves to require that the claimant be allowed to plead a range of additional or different matters of fact which turn out to be contentious and the issues arising upon which turn out to require disclosure, witness evidence and/or length and nature of trial to be revisited, then so be it, that trial date, though it may be ordered today, will have to be lost.