



Neutral Citation Number: [2023] EWHC 959 (Comm)

Case No: FL-2021-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 24 April 2023

Before :

Hon Mr. Justice Butcher

Between :

Dexia Crediop S.p.A.

Claimant

- and -

Provincia di Brescia

Defendant

Richard Power (instructed by **Bonelli Erede Lombardi Pappalardo LLP**) for the **Claimant**

The **Defendant** did not appear and was not represented

Hearing date: 24th April 2023

APPROVED JUDGMENT

The Hon. Mr Justice Butcher

Monday, 24 April 2023 (11:14 am)

MR. JUSTICE BUTCHER:

1. This is the hearing of an application made by the Defendant, Provincia di Brescia ('Brescia'), dated 19 November 2021, for an order that the English Court does not have jurisdiction or should decline jurisdiction over the Claimant's, that is to say Dexia Crediop SPA's ('Dexia'), claims to declarations 20 to 29 as set out in the Claim Form.
2. Brescia's application notice is in the following terms:

"The Provincia di Brescia intends to apply for an order... that the English Court does not have jurisdiction, alternatively should decline to exercise any jurisdiction it may have, in respect of the claimant's claims in relation to an Italian law settlement agreement executed between Italian parties in Italy on 18 September 2017 and without prejudice to the defendant's jurisdiction challenge that the court gives case management directions, including a case management stay... because for the reasons set out in the evidence filed in support of this application notice (1) the English Court does not have jurisdiction over and/or England is not the proper place in which to bring the part of the claim that relates to the alleged entry, validity, enforceability, effect, terms and/or performance of the settlement agreement and (2) without prejudice to the defendant's jurisdiction challenge it is just and convenient to stay the balance of the claim and the defendant seeks various case management directions as set out in the draft order attached."
3. That is Brescia's application. However, on 4 April 2023, Brescia informed Dexia, and thereafter the court, that it would not be attending this hearing and would not be participating in the proceedings, on the basis, as it was said, that Brescia is no longer able to fund the legal costs of this matter.

4. The application to which I have referred has not, however, formally been withdrawn, and in those circumstances Dexia seeks an order that the application now be dismissed with costs. The matter has accordingly been argued before me, but with only Dexia being represented or making submissions.

Background.

5. These proceedings concern two swap transactions entered into by Dexia and Brescia on 28 June 2006 and 20 December 2006, which may be called "the swaps". Prior to the entry into of the swaps, Dexia and Deutsche Bank had entered into a mandate with Brescia to assist it in the "organisation of operation for active liability management".
6. The swaps are subject to an ISDA Master Agreement, which contains at Section 13 an English jurisdiction clause. That clause is in the following terms:

"13. Governing law and jurisdiction

(a) Governing Law. This Agreement will be governed by and construed in accordance with the law specified in the Schedule. [which in this case was English law]

(b) Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement ('Proceedings') each party irrevocably:-- (1) submits to the jurisdiction of the English Courts if this agreement is expressed to be governed by English law ... and (2) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum, and further waives the right to object with respect to such Proceedings that such court does not have any jurisdiction over such party.

Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this agreement is expressed to be governed by English law, the contracting states as defined in section 1.3 of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force) nor will

the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction."

7. That clause, as will be apparent, provides for the jurisdiction of the English courts when, as here, the agreement is expressed to be governed by English law, with respect to any suit, action or proceedings relating to the agreement.
8. Further, on its face, the clause provides by 13(B)(2) that Brescia irrevocably waived arguments regarding England's not being the forum conveniens for any such dispute. Dexia says that on the basis of that clause, the English courts have and should exercise jurisdiction over the matter. Dexia's contention is that these proceedings fall squarely within that jurisdiction clause, on the basis that in them it seeks various declarations regarding the swaps.

The Subject matter of the current application

9. By its application Brescia accepted that the English Court has jurisdiction to hear and determine Dexia's claims for declarations 1 to 19, but it disputed the court's jurisdiction to determine the claims for declarations 20 to 29. Those disputed declarations refer to a settlement agreement between the parties, which was concluded in September 2017, one of whose provisions confirmed (or as Brescia would say, purported to confirm) the validity of the swaps. The settlement agreement brought an end to existing English and Italian proceedings between the parties which concerned the swaps.
10. Dexia says that it has brought these proceedings now because Brescia has sought to challenge the validity of the settlement agreement and of the swaps in a new claim issued in Italy. In that new claim Brescia seeks an order that the swaps are unenforceable and/or damages in respect of the payments due thereunder.
11. The settlement agreement, to which I have referred, does not itself have a jurisdiction clause. Instead its clause 9 provides as follows:

"9.1. This agreement and all contractual and non-contractual obligations arising therefrom shall be governed by and interpreted in accordance with Italian law.

9.2. However, it is understood that the swaps and the ISDA agreement relating to them are subject to English law and the exclusive jurisdiction of the English courts as contractually provided for."

12. It is Dexia's case that the declarations to which Brescia object all relate to the swaps and to the ISDA Master Agreement and therefore fall within the scope of the jurisdiction clause in the Master Agreement. By contrast, Brescia has contended that the declarations relating to the settlement agreement fall outside the ISDA Master Agreement jurisdiction clause and should be litigated in Italy.

The relevant question

13. On the basis of the argument before me, I consider that the relevant question which I have to address is which party has the better of the argument and, specifically, which party has the better of the argument that the disputed declarations are ones which relate to the swaps and the ISDA Master Agreement and thus fall within the scope of the jurisdiction clause in the ISDA Master Agreement.

Deutsche Bank v Brescia

14. That issue is effectively the same as the one which was considered and decided by Robin Knowles J in Deutsche Bank v Brescia [2022] EWHC 2859 (Comm). Those proceedings were brought by Deutsche Bank in relation to two swap transactions which were entered into by Brescia at the same time as the swaps with which this action is concerned. Deutsche Bank there sought many of the same declarations as are sought in these proceedings and Brescia there contended that the jurisdiction clause contained in the ISDA master agreement between Deutsche Bank and Brescia, which was identical in scope to that in this case, did not apply to

the declarations which were sought in relation to a settlement agreement which was in substantially the same terms as that of the settlement agreement relevant here.

15. Robin Knowles J, having heard full and, as he said, high quality arguments on both sides in that case, rejected Brescia's contention. He said in paragraph 29 of his judgment:

"The court... in the event, has not found it difficult to decide that Deutsche Bank has the better of the argument."

16. He then went on to consider the arguments which had been addressed to him in some detail.

He said this at paragraphs 45-49:

"[45] All of these points can be made on one side of the argument, but fundamentally it is for me to construe the ISDA master agreement. The relevant provision in the ISDA master agreement is in very wide terms. ... Arguments about how easy it would be to extend it or to restate it or to reiterate it do not carry, to my mind, great strength."

[46] By its plain words the English jurisdiction clause in the ISDA master agreement was always wide enough to capture any disputes about the transactions, including into the future. By expressly recording at the time of the settlement agreement in the terms that they did at clause 11 [which was in the same terms as clause 9 of the settlement agreement here], the parties, to my mind, left no room for Brescia's argument that the settlement agreement trumps the English jurisdiction clause.

[47] Taking some points in a little more detail, in the present case there is one jurisdiction clause of relevance between two agreements, the ISDA master agreement and the settlement agreement. The text of the settlement agreement, as I have indicated, expressly reiterates the scope and application of the English jurisdiction clause in the context of its application to future disputes arising in relation to the transactions. The transactions were still live. The language of the ISDA master agreement containing the words 'relating to' is amply broad enough for application consistent with the position argued by Deutsche Bank.

[48] There is in the present case no competing jurisdiction clause. The master agreement and the settlement agreement are between the same parties. They address well enough the same subject matter. They are interdependent. The only way that I consider clause 11.2 [in that case] to be properly understood is as making plain that the parties were seeking to preserve, not exclude or undo, the effect of the English jurisdiction clause. The choice of Italian law to govern the settlement agreement does not point to Italian jurisdiction on the facts of the case. The parties here did not assign jurisdiction over their disputes based on applicable law but rather by reference to the legal relationship to which they related.

[49] In all the circumstances, the answer to the construction issue in my judgment is that the English jurisdiction clause applies to all disputes in connection with the settlement agreement that relate to the transactions. It is plain to me that that means that the English jurisdiction clause covers the full field of the current proceedings. Read properly, all of the declarations that are sought by Deutsche Bank have at their heart the transactions."

The Jurisdiction Clause in the Present Case

17. In my judgment, the fact of Robin Knowles J's decision and the reasons which he gave for it demonstrate that Dexia has in the present case the better of the argument, at least in relation to most of the disputed declarations. Specifically, in relation to declarations 20 to 23, which are either identical with or materially the same as declarations which were sought by Deutsche Bank in Deutsche Bank v Brescia, while they refer, in terms, to the validity of the settlement agreement, it seems to me that Dexia has the better of the argument that they relate to the swaps because the settlement agreement upon which Dexia intends to rely confirmed the validity of the swaps and in order to challenge their validity Brescia would need to impugn the settlement agreement.
18. As to declarations 24 and 25, they seek to record the terms and/or effect of the settlement agreement. While certain of the declarations refer to the mandate, as I see it the declarations

are not in relation to the mandate as such, which has an exclusive Italian jurisdiction clause, but to the settlement agreement and what was recorded in it. Those declarations relate to the swaps because they seek to address points which might be raised to challenge the validity of the swaps or the validity of the settlement agreement which confirmed the validity of the swaps.

19. Declarations 27 and 28, which refer to the fact that the new Italian claim was, as Dexia contends, brought in breach of the settlement agreement and the swaps also relate to the swaps because the purpose of the new Italian claim is, as I see it, to challenge their validity.
20. Brescia does raise a specific objection in relation to declarations 26 and 29 on the basis that, as currently drafted, they do trespass on the question of whether Dexia is liable for breach of the mandate, which has an exclusive Italian jurisdiction clause. There seems to me to be some force in that. Dexia has, however, undertaken to amend the Claim Form so that declaration 26 starts with the words "for the purpose of any issue concerning the entry into, validity, enforceability, interpretation or performance of the Transactions..."; and replaces the words "... and the Claimant is not liable in respect of any Dispute (as defined in the Settlement Agreement)" with "... and the Claimant has not caused and/or is not liable to the Defendant (whether in or pursuant to contract, tort, statute or otherwise) in respect of any loss or damage arising out or in connection with the Transactions which may have been suffered or incurred by the Defendant." Further declaration 29 will be amended to replace the words "any Dispute" with "the Transactions".
21. With those amendments I consider that Dexia has the better of the argument that the claim for those declarations fall within the scope of the jurisdiction clause in the swaps and that there is no reason for them, as amended, to be treated differently from the others.

Forum non Conveniens

22. As to Brescia's contention that England is not the forum conveniens for the adjudication of the disputed declarations, I consider that it is not open to Brescia to challenge English jurisdiction on such grounds given that I have found that the declarations relate to the swaps and given Brescia's irrevocable waiver of such points pursuant to section 13(B)(2) of the ISDA Master Agreement. That provides, as I have already said, that Brescia irrevocably waives any objection it may have at any time to the laying of venue of any proceedings brought in England and waives any claim that such proceedings have been brought in an inconvenient forum.

Service

23. Brescia has also raised a contention that there was no valid service on it of the Claim Form. In my judgment, on the basis of the material and arguments which have been put before me on this occasion, that is unfounded. If, as I have held, the relevant claims are ones which relate to the swaps then the mechanisms for service set out in the ISDA Master Agreement are applicable. That ISDA Master Agreement provides by section 12A that any notice or other communication in respect of the agreement may be given by inter alia fax or certified or registered mail or email to the addresses which are set out in the Schedule; and at section 13C that the parties irrevocably consent to service of process given in the manner provided for notices in section 12 of the agreement.

24. The evidence before me is that Dexia served Brescia in accordance with the notice provisions of the ISDA Master Agreement. It is, in particular, that Pinsent Masons, Dexia's then solicitors, sent the Claim Form and related forms via email and fax on 15 September 2021 to the email and fax addresses provided for Brescia in the ISDA Master Agreement. The email address indicated for Brescia in the ISDA Master Agreement did not work and Dexia received a bounceback. Dexia then emailed certain head officers of Brescia, including its President, later on the same day. In addition, service was also effected by post in Italy

directly to Brescia at its registered office (which was identified in the Schedule to the ISDA Master Agreement) on 27 September 2021.

25. The relevant question is, as it seems to me, whether Brescia has been validly served as a matter of English law pursuant to CPR rule 6.11, which provides:

"The claim form may be served by a method specified in a contract where a claim relates solely to that contract."

26. In the present case the claim is brought in respect of the ISDA Master Agreement. It appears to me that there was good service for the purpose of CPR rule 6.11 by reason of the steps taken to serve in accordance with the provisions of the ISDA Master Agreement to which I have already referred.

27. CPR rule 6.11(2) provides that where in accordance with the contract the claim form is to be served out of the jurisdiction it may be served without permission under CPR rule 6.32 or rule 6.33. Here, no permission was required since, as provided for by rule 6.33(2B)(b), the contract contained a term to the effect that the court shall have jurisdiction to determine the claim.

28. In those circumstances I consider that Brescia has been validly served in accordance with CPR rule 6.11.

Case Management Stay

29. Brescia also seeks in its application notice a stay of the current proceedings, on case management grounds. In my judgment there should be no such case management stay. If there is, as it appears clear that there is, a jurisdiction clause which applies at the least to declarations 1 to 19, then that jurisdiction clause and its effect should not be circumvented by way of a case management stay.

Abuse of Process

30. Brescia also takes the point or has intimated that it wishes to take the point that the present proceedings are an abuse of process in that declarations concerning the validity of the swaps were sought in the previous English claims and that, as part of the settlement agreement, Dexia agreed to discontinue that claim and to file a consent order with the court which provided for the claim to be dismissed.
31. I do not consider that an argument that the current proceedings are an abuse of process is sufficiently clearly correct for it to have any bearing on the jurisdictional issue with which I am concerned today. It appears to me that it is rather a contention on the merits which can be pursued by Brescia, if so advised, in due course in these proceedings. I will not say any more about it.

Conclusion

32. The result, therefore, is that I consider that Brescia's application challenging the jurisdiction of the court or seeking an order that, if there is jurisdiction, it should not be exercised should be dismissed.