Neutral Citation Number: [2024] EWHC 1562 (KB)

Case No: KB 2022 005169

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2024

Before :

MASTER SULLIVAN

- -

Between :

TRADIN ORGANIC AGRICULTURE BV	**Claimant**
- and -	
GOLD GRAIN GIDA TARIM ÜRÜNLERI SANAYI VE TICARET ANONIM SIRKETI	**Defendant**

- -
- -

Simon Gilson (instructed by **Macfarlanes LLP**) for the **Claimant**
Rumen Cholakov (instructed by **Gibson & Co Solicitors Ltd**) for the **Defendant**

Hearing dates: 25 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER SULLIVAN

Master Sullivan :

1. Gold Grain, a Turkish company, is a supplier of organic foods. It entered into a series of agreements with Tradin, a Dutch company, for the supply of organic foods. Disputes arose between the parties in respect of a number of the agreements in around 2021. In 2022, a pre-action disclosure application was made by Gold Grain against Tradin, and granted in November 2022 in the Netherlands.

2. In December 2022 Tradin's solicitors, Macfarlanes, wrote to Gold Grain's lawyers in the Dutch litigation sending a letter of claim and asking whether they would accept service of a claim in England and Wales. They replied that Gold Grain disputed the claim, that they disputed England and Wales had jurisdiction and that Gold Grain had not authorised English solicitors to accept service.

3. On 30 December 2022 Tradin issued the present proceedings against Gold Grain for a sum equivalent to just over £1 million. Gold Grain then issued proceedings in the Netherlands in February 2023 in the sum of just shy of €50 million.

4. The claim form and associated documents in this claim were served in Turkey on 2 May 2023. The deadline for filing an acknowledgement of service was 23 May 2023. Neither an acknowledgement of service nor a defence was filed or served.

5. On 15 September 2023 Tradin applied for default judgment. It informed Gold Grain's solicitors in the Netherlands that it had done so on 18 September 2023. Default judgment was ordered on 16 November 2023.

6. Gold Grain made an application on 14 December 2023 to set aside default judgment, and/or that the default judgement be set aside and the claim struck out. This is my decision in respect of that application.

The agreements between the parties

7. On 31 October 2019 Tradin and Gold Grain entered into a five-year exclusive supplier agreement ("ESA"). Tradin made Gold Grain their exclusive supplier of certain products from certain areas. Tradin then entered into a series of loan agreements with Gold Grain, the first to finance the purchase of a processing facility (the Mersin facility) and then five pre-finance loan agreements ("the loan agreements"). The repayments for the loan agreements were made by way of the goods supplied with a backstop that all the sums would be payable within 12 months of the date of the agreement. The goods were supplied under a series of purchase agreements.

8. The ESA was governed by English law. There is no jurisdiction clause. The Mersin agreement was governed by Swiss law and was subject to an arbitration agreement. The purchase agreements contained a Dutch choice of law clause.

9. The loan agreements contained the following clauses:

> "**Governing law: Submission to Jurisdiction**
>
> (a) This loan agreement and the obligations of the Borrower [Gold Grain] shall be governed by and construed in accordance

> with the governing jurisdiction of law in English law with the exclusion of the Vienna Sales Convention…
>
> (b) The Borrower also agrees not to bring any action or other proceeding with respect to this loan agreement or with respect to any of its obligations in any other court unless such courts determine that they do not have jurisdiction in the matter"

10. After disputes arose between the parties, there was a meeting on 15 September 2021 where Gold Grain submits they agreed to settle all outstanding sums under the pre-finance agreements. It is said the terms of the agreement are set out in an email from Mr Kouw to Mr Kaymaz on that date.

11. The claim in this action is for the sums outstanding from the last three loan agreements which is said to amount to the equivalent of just over £1 million as at December 2022 plus contractual interest.

The claim in the Netherlands

12. The claim in the Netherlands by Gold Grain against Tradin is for breach of the ESA. The claim is that the exclusivity clause was breached by Tradin and the contract wrongfully terminated. In that claim, Gold Grain offered to set off any liability under the loan agreements against such damages but Gold Grain says Tradin has pleaded against the set off, relying on the current proceedings. Tradi has brought a counter claim for delivery of products by Gold Grain in breach of the purchase contracts which were agreed between the parties for particular shipments.

The basis of the application

13. The application to set aside judgment in default is brought on three grounds: (i) service was defective because the particulars of claim were not verified by a statement of truth, (ii) Gold Grain has a real prospect of success in challenging the jurisdiction of the English court or alternatively, without prejudice to the jurisdictional challenge, that there is a real prospect of success in defending the quantum of the claim, and (iii) Tradin failed to satisfy the duty of full and frank disclosure in their application for default judgment.

14. The application is made under CPR 13.2, which is non discretionary, on the basis that the claim was not properly served and under CPR 13.3, a discretionary rule, on the basis the Defendant has a real prospect of successfully defending the claim and the court should exercise its discretion to set aside. For such an application to be successful, the application must have been made promptly and the Defendant must also satisfy the court that relief from sanctions should also be given and the *Denton* factors must be considered.

Service of the claim

15. The claim form and attached documents were sent via the Foreign Process Section in accordance with the Hague Convention to an electronic messaging service operated by the Turkish government for, inter alia, communications with companies, called UETS. On 30 May 2023, Tradin informed Gold Grain's Dutch lawyers that they were

serving the claim via the Hague Convention process. The documents appear to have been sent to the UETS mailbox on 27 April 2023. Tradin was unaware that had in fact occurred and made an application for extension of time for service. They wrote on 20 June 2023 to Gold Grain at their address in Turkey enclosing the application and the order of 14th June 2023 extending time. It confirmed that Macfarlanes had taken steps to serve the claim in accordance with Hague Convention process.

16. According to the witness statement of Ms Gibson on behalf of Gold Grain, as a result of that, Gold Grain checked the UETS inbox and came across the documents which had been sent for Hague Convention service. Tradin was informed by the Foreign Process Section in August 2023 that the documents had in fact been served on 2 May 2023.

17. The documents served included the claim form and particulars of claim in English and Turkish. When received in the UETS inbox, it seems pages 1, 3 and 5 of the particulars of claim appeared followed by pages 4 then page 2 later in the bundle of documents. The statement of truth was on page 5. Gold Grain therefore argues that service was invalid as not all pages of the particulars of claim were verified by a statement of truth and therefore the judgment was wrongly entered.

18. I do not accept that service was invalidated by reason of the order of the pages. The particulars of claim was internally numbered, both by paragraph numbers and pagination. The last page of it, page 5, was signed and so verified with a statement of truth. Whatever the reason for the jumbled pages, that does not mean it is not a particulars of claim verified by a statement of truth. Whilst I am sure it was annoying and may have been difficult to sort out, all pages were served. In my judgment the jumbling of the pages does not invalidate the service on 3 May 2023 and the application under CPR 13.2 fails.

Real prospect of defending the claim.

19. Gold Grain's position is primarily that they have a real prospect of arguing that the claim should be stayed either on forum non conveniens grounds or through case management powers due to the parallel proceedings in the Netherlands.

20. In respect of the forum grounds, the argument is that the choice of law clause is choice of governing law not a choice of jurisdiction clause. Clause (b), set out at paragraph 8 above, is confusing and contains a double negative such that it is not possible to understand what the parties intended from the paragraph alone. Even if it does connote forum, it is not an exclusive clause. If it is not an exclusive jurisdiction clause, it is governed by common law. Whilst the English courts will give effect to an agreement to submit to their jurisdiction, the court has a discretion. It is submitted that in this case, the claim proceeding in the Netherlands is inextricably linked to these proceedings which, it is said, gives rise to risks of inconsistent judgments and England is not the proper forum as none of the parties have any connection to England. These arguments mean a forum non conveniens challenge has a real prosect of success or alternatively that the court should grant a stay under its case management powers.

21. It is submitted that the loan agreements were part of interrelated transactions. The parties had agreed that Gold Grain would repay the loan agreements through the

delivery of goods and not in cash. What sums are outstanding therefore must depend on the determination of what goods were delivered and whether they were of acceptable quality. It is submitted that this is put in issue by the counterclaim, which raises the issue of the quality of the goods supplied under the purchase agreements and is the subject of Dutch law, and which will be explored in that claim. Further, Tradin have pleaded that there can be no set off against sums owed under the purchase agreements. In summary, as the proceedings in the Netherlands are more advanced, and have overlapping issues, there is a real prospect of success in arguing that England does not have jurisdiction or that a stay should be ordered. In oral submissions the point was also made that the defence to the counterclaim in the Netherlands states that the sums claimed in the English claim include goods rejected by Tradin due to quality issues (according to a document in the defence to counterclaim, that is just under €300,000 of the €1,162,389 claimed in the claim form).

22. Further, there is a dispute in the Dutch claim as to what, if anything the agreement was in September 2021 in respect of the loan agreement amount and that would be relevant to the claim in England.

23. Alternatively, and only if the submission in respect of jurisdiction fails, it is submitted there is a real prospect of defending the claim, if only on the quantum.

24. Tradin, in response, submits that by making the application to set aside default judgment under CPR 13 and not making an application to dispute jurisdiction under CPR 11, Gold Grain has submitted to the jurisdiction of the English courts. It is accepted by Tradin that an application to set aside default judgment is not always inconsistent with an intention to challenge jurisdiction, but in the circumstances of this case where Gold Grain has not served an Acknowledgement of Service nor made an application for relief from sanctions, that amounts to submission to the jurisdiction.

25. In any event, any jurisdiction challenge has no real prospect of success. The jurisdiction challenge is bound to fail in the absence of an application for relief from sanctions for the failure to file the acknowledgment of service and application to challenge jurisdiction or any evidence that such an application would have a real prospect of success.

26. On the substantive jurisdiction issues, there is no real prospect of success, the title before the relevant clauses in the loan agreements in issue is "Governing law: Submission to Jurisdiction". It is clear this is a jurisdiction as well as a governing law clause. The drafting is infelicitous but the meaning is clear. It is an asymmetric exclusive jurisdiction clause in favour of English courts.

27. Thirdly, the English claim is a claim under loan agreements; re-payment was to be by way of goods or cash. Some payment was made by way of goods in the first agreement and not in respect of the second and third agreements. The Dutch proceedings do not include a claim on the loan agreements. The claim is under the ESA and the counterclaim is for delivery of defective products under the purchase agreements. That does not relate to the amounts due from Gold Grain pursuant to the loan agreements. The set off argument is a legal one; it is either right or wrong. It gives rise to no inconsistency. There is no risk of conflicting judgments. If there is any overlap it is on the very margins. Any arguments about whether goods should or

should not have been taken as payment for the loan amounts should have been made in a defence to this action. The issues about any agreement in September 2021 is pleaded in the Dutch claim but is not a necessary part of either side's claim in that case.

28. In my judgment, there is no real prospect of success in the argument that the England is not the proper forum or that proceedings should be stayed on jurisdiction grounds. However, I do not accept Gold Grain has, by making the application under CPR 13 to set aside judgment in default, submitted to the jurisdiction. The arguments have been around service and jurisdiction. There has been no significant argument on the merits of any defence, save as a secondary position. Whilst it would have been better to also make an application to file an acknowledgement of service and application to contest jurisdiction out of time, in reality the same arguments would have been raised.

29. I do however accept that I should bear in mind the authorities on late application to challenge the jurisdiction in considering whether there is a real prospect of a jurisdiction challenge succeeding (Taylor & Anr v Giovani Developers Ltd v Anr [2015] EWHC 328 (Comm)). Such an application would have to request relief from sanctions. A Defendant should not be in a better position because it makes an application to set aside default judgment rather than an application to extend time for making an application to challenge jurisdiction.

30. I will deal with the substantive jurisdiction arguments first before turning to consider relief from sanctions. I do not accept that clause (b) of the loan agreement is incomprehensible without extrinsic evidence of intent. It is clear that it is an asymmetric jurisdiction clause. It is not simply a choice of law clause, that is clear from the signpost in the title and from the fact there are two separate paragraphs. In that context, the meaning of the clause is clear. It is arguable that is it non exclusive, but it seems to me that does not mean the forum argument has a real prospect of success. Although the loan agreements are part of a series of transactions with different governing law clauses, I accept they are stand alone loan agreements with defined payment terms that do not require interpretation of the other contracts.

31. I do not accept that there is sufficient risk of inconsistent or overlapping judgments, nor that the location of any witnesses or formation of contract means that England is not the appropriate forum or that a stay should be granted. The parties have contracted for England to be the jurisdiction. I accept that any overlap in the proceedings is at the margins – there might be a defence on quantum but there would be no need to investigate issues centrally involved in the Dutch claims in the manner suggested by Gold Grain. The claim is for sums due under a loan. The defective produce claim is not the same as the loan claim.

32. I also, in looking at whether a jurisdiction claim would have real prospects of success, have to consider there is a real prospect of success that relief from sanctions would be given. No such application has been made and no evidence has been given as to the reason for the default, nor has any evidence been put forward that such an application would have a real prospect of success. On the facts of this case, the considerations to be taken into account for such relief will be the same as those in the application to set aside judgment and I consider that below.

33. Gold Grain does make a back up application on the merits if I find that there is no real prospect of success in respect of jurisdiction. I can see that there may be arguments about both the sums which appear to have been deducted from the value of the shipments and the potential agreement in September 2021, that there is very little evidence and they are mentioned in passing. In my judgment however, taking into account I have to consider what evidence might be available in the future there is, just, a real prospect of success in those arguments as to quantum.

Promptness

34. An application to set aside judgment in default must be made promptly. In this case the date from the default judgment to the date of the application to set aside was between around 16 November when default judgment was given and 17 December. That is a prompt application in my judgment.

Discretion and relief from sanctions

35. CPR 13.3 requires the court to take into account all the circumstances of the case in order to determine whether to exercise its discretion in setting a judgment aside. I must also consider the well known three stage relief from sanctions test in Denton.

36. In looking at delay, I must look not just at the delay from the default judgment, but from the time the claim was served. It was served on 3 May 2023, and Gold Grain was notified it had been served via their Dutch lawyers at the end of May 2023 but I have evidence that in fact it came to Gold Grain's attention in June 2023. I will treat the relevant period of delay as from mid June 2023 when Gold Grain say they opened the email containing the claim, and the date of the application. That is a period of around 6 months. Although the Tradin makes the point that no such application has in fact been made so the delay is longer, for the purposes of this application it makes no difference to my conclusion.

37. I pause here to deal with the reason for that delay which I have to take specifically into account in the relief from sanctions application. No application for relief from sanctions was made and the three stage test is not dealt with in the evidence in support. That is despite Tradin's witness evidence clearly and correctly pointing out that it would be necessary to do so.

38. The skeleton argument of Mr Cholakov states that the reason for the breach of the rules is best explained by the fact of parallel proceedings in the Netherlands and it is coloured by the state of the documents served upon Gold Grain and the fact they are a foreign defendant. It is said where the issues Tradin seeks to have determined in these proceedings were already before the Dutch courts, it is not surprising no steps were taken by Gold Grain in England.

39. In my judgment, there is no good reason for the delay in filing the acknowledgement of service, application to contest jurisdiction, or a defence. There is no evidence as to why Gold Grain did not respond to the claim once it knew about the claim, nor once it knew judgment in default was being sought. There is no evidence as to why the application to contest jurisdiction was not made. The explanation in the skeleton is not evidence, and in any event would not amount to a good reason. The fact

proceedings are ongoing in another jurisdiction, or that pages of a document have become out of order is not a good reason to ignore proceedings in this jurisdiction.

40. In fact, all the indications are that the claim was deliberately ignored. Gold Grain was asked to agree to service on its solicitors acting in the Dutch action. They refused. They are of course entitled to do so, but it does not indicate that this is a Defendant who is seeking to assist the court in resolving the dispute and is engaging in the litigation. They were told of the efforts to effect service, and provided with the application and order for an extension of time to do so. They in fact received the documents. The conclusion is reinforced by the fact that although the solicitor acting for Gold Grain in the Netherlands was informed that the application for default judgment had been made, nothing was done until after the default judgment. The attitude of non engagement appears to have persisted in that the solicitors for Gold Grain in this application have refused to accept service of documents on them and they have refused to provide an address for service in England for the purpose of the application.

41. The delay is significant. It is delay of such an extent and with no reason (let alone a good reason) having been advanced such that there is no real prospect that relief would be given in any application to contest jurisdiction out of time. Even if there was a real prospect of arguing the jurisdiction points, I would not grant relief from sanctions in the set aside application.

42. The prejudice to Gold Grain if the application is not granted is submitted to be very severe as there would be a gross injustice and a risk that Tradin would recover twice for the same loss. It is said the prejudice to Tradin would only be the loss of the time it has taken for the application to set aside. I do not accept any prejudice to Gold Grain is as great as submitted and in any event it is outweighed by the other matters in this claim that I have dealt with.

43. It appears to have been an active choice for Gold Grain not to respond to the claim. There are rightly consequences to such an approach and in this case I see no reason to grant Gold Grain relief from them.

Full and frank disclosures

44. Gold Grain argues that Tradin failed to give full and frank disclosure in their application for judgment in default and on that ground judgment should be set aside. The material non disclosure alleged is that in applying for default judgment on a without notice basis, the witness statement in support was not full and frank when it said “I am aware that the Claimant and Defendant are engaged in other litigation in the Netherlands”. That is misleading as it suggests that the Dutch litigation is unrelated.

45. In my judgment, as Tradin submitted, the witness statement in support has to give full and frank disclosure on matters material to the decision the court is to make. In an application for default judgment in a case where service has taken place out of the jurisdiction (and where the claim is not obviously wholly without merit), that involves matters relating to service and any response to service. There is no suggestion of a material non-disclosure in respect of those matters.

46. I ask myself whether default judgment would not have been given if the full factual matrix of all the contracts had been set out and that there was a claim and counterclaim in the Netherlands. The answer is no. Gold Grain had not sought to dispute jurisdiction or the claim on its merits. The claim was properly served. The claimant is entitled to default judgment.

47. In all the circumstances, the application is dismissed.