22 October 2018

Iranian Offshore Engineering and Construction Company v Dean Investment Holdings S.A. & Others
[2018] EWHC 2759 (Comm)

BEFORE: MR JUSTICE ANDREW BAKER

CASE SUMMARY

The evidential assumption of English law applied to claims which were in principle governed by Iranian law. It was for the defendants to plead a case denying the appropriateness of such a rule by reference to matters particular to the claims in question.

The issue which fell to be decided by Andrew Baker J at a pre-trial review was whether an order should be given confirming that the so-called evidential assumption of English law would apply at trial. The evidential assumption is set out in Rule 25(2) of *Dicey, Morris & Collins, "The Conflict of Laws"* (15th Ed):

> "25(1): In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
>
> 25(2): In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

The underlying claim concerned an alleged fraud under which payments were made, supposedly for the purchase of a mobile offshore drilling rig. The pleaded claim against the fifth and sixth defendants was that they (a) knowingly received funds in breach of fiduciary duties owed to the claimant; (b) dishonestly assisted in breaches of fiduciary duties owed by other defendants; and (c) conspired with other defendants to injure the claimant by unlawful means.

The claims were pleaded without any reference to applicable law. In their Defence, the fifth and sixth defendants averred that the claims arose from acts committed in Iran and the UAE, causing damage in Iran (with the result that the applicable law was Iranian law). They reserved the right to amend generally upon receipt of advice on Iranian law. However, they did not plead a case as to the content of Iranian law or the consequences that flowed from the claims being governed by Iranian Law. None of the parties sought permission for expert evidence on Iranian law.

The commentary on Rule 25(2) in Dicey makes clear that there are cases where the application of English law is too strained or artificial to be appropriate (paragraph 9-026). Dicey concludes that in cases where it would be wholly artificial to apply rules of English law to a claim governed by foreign law, a court may simply regard a party who has pleaded but failed to prove foreign law as having failed to establish its case (paragraph 9-030). The fifth and sixth defendants sought to argue that, because the claims were governed by Iranian Law under English conflict of laws rules (namely, the Rome II Regulation), it was inappropriate to apply English law by default. The claimant was required to plead and prove the principles of Iranian law governing its claim, which it had failed to do.

The claimant accepted in principle that Iranian law governed the claims, but contended English law applied by default in accordance with Rule 25(2), because no party had pleaded any Iranian Law. The claimant sought an order, either by way of a case management ruling (pursuant to the court's inherent power to identify issues to be determined at trial) or a determinative ruling, that Rule 25(2) applied without qualification or exception.[1]

The Judge held that it was appropriate to grant the relief sought by the Claimant, subject to one proviso. He reasoned as follows:

(i) It is not necessary for a claimant to plead the existence of, or intention to rely on, Rule 25(2). It goes without saying that it will apply, unless it is demonstrated there is a reason it should not apply.

(ii) It follows that a plea as to applicable law is not a material averment a claimant is required to make (provided the matters as pleaded do not involve or imply advancing a case as to the content of foreign law).

(iii) A claimant might of necessity plead a matter of foreign law, but for which it would fail to disclose a cause of action (for example, a negligence claim for bad advice relating to US tax liabilities). Equally, a claimant might choose to base its claim on a system of foreign law.

(iv) Where a claimant does not need or choose to plead a matter of foreign law, a contention that it is inappropriate to determine the claim by reference to English law (so that the claim should fail come what may), is a reasoned denial of liability. As determination of claims under English law is the default rule in English proceedings, the denial must necessarily be founded upon matters particular to the claim in question.

(v) In line with CPR 16.5(2)(a), it is for the defendant to set out the matters particular to the claim which are said to render it inappropriate to be judged by reference to English law. Such matters may (but will not necessarily) include relevant propositions of foreign law.

Applying this analysis, Andrew Baker J held that none of the matters as pleaded by the claimant involved or implied advancing a case as to the content of Iranian law. Further, the fifth and sixth defendants had not pleaded a case denying the appropriateness of Rule 25(2). It was not sufficient that they had pleaded Iranian law was the applicable law. Without more, this did not render it artificial to judge the claims by reference to English law. The fact that the defendants had reserved their right to amend, pending advice on Iranian law, demonstrated that their averment as to applicable law was immaterial unless and until they pleaded a case as to the content of Iranian law. Case management had proceeded on this basis. In theory specific detail as to the content of Iranian law could create a case for disapplying Rule 25(2), however no such detail was pleaded by the defendants. Accordingly, there was no issue between the parties as to the applicability of Rule 25(2) and no basis for the court to disapply the rule of its own motion.

In reaching this conclusion Andrew Baker J relied on dicta of Arden LJ (as she was) in *OPO v MLA [2014] EWCA Civ 1277* and *Brownlie v Four Seasons Holdings Inc [2015] EWCA Civ 665*. As for the authorities relied on by the defendants, the Judge found that obiter remarks in *Global Multimedia International Ltd v Ara Media Services et al. [2006] EWHC 3107 (Ch)* confused (a) the need to plead (and prove) propositions of foreign law, if relied on; and (b) the need to rely on foreign law in the first

[1] The claimant also sought to rely on an estoppel. The Judge was unable to discern how an estoppel might arise if otherwise it was not appropriate to make an order. Therefore, the estoppel issue was not considered further.

place. Further, obiter comments in *Belhaj et al. v Straw et al. [2014] EWCA Civ 1394* did not lay down a general rule that, where a claim is governed by foreign law, the claimant must plead a case as to the content of that law.

The Judge made clear that his decision was subject to one proviso. He recognised there was no absolute rule precluding a party from relying on an unpleaded case or bringing an application to amend its case. Whilst the Judge ruled out the court disapplying Rule 25(2) of its own motion, he was not prepared to preclude the claimant from making applications having this effect. The Judge recognised it was very unlikely such an application would succeed in the present case (because of likely unfairness to the claimant). However, there was no developed evidence before him on this point and so he was not able to reach such a conclusion.

The judgement focused on the pleaded case of the fifth and sixth defendants, however the Judge found no reason to reach a different conclusion in relation to the other defendants.