

20 June 2019

MAGDEEV v TSVETKOV & OTHERS

[2019] EWHC 1557 (Comm)

BEFORE: MR JUSTICE PICKEN

CASE SUMMARY

In a judgment disposing of an application for strike out/summary judgment, Picken J considered three main issues. First, the Defendant's conspiracy claim against the First Additional Party was pleaded on the basis that the relevant loss was the Defendant's potential liability to the Claimant. Since the Defendant was entitled to rely on an absolute defence of circuity/set-off against the Claimant, the Defendant had no realistic prospect of establishing loss against the First Additional Party. Second, when the outcome of a strike out/summary judgment application depends on a decision from which an appeal is pending, the court has a case management discretion to exercise in deciding whether it will strike out the claim, permit the claim to continue or stay the proceedings. In the circumstances of this case, Picken J concluded that the appropriate course was to strike out the claim. Third, there is a distinction between the costs of wasted staff/managerial time spent in investigating a tort (which are recoverable as damages) and litigation costs i.e., the costs of anything which might properly be regarded as preparation for litigation (which are not recoverable as damages).

Background

Mr Magdeev, Mr Tsvetkov and Mr Gaynulin were international businessmen. Mr Tsvetkov traded in Graff Diamonds through a Cypriot company ('EKLG') and a company incorporated in Dubai ('EK Diamonds').

By a written agreement dated 9 October 2014, Mr Magdeev had advanced a loan of €10m to EK Diamonds. Mr Tsvetkov was the guarantor of that loan. By a separate agreement dated 21 August 2015, Mr Magdeev lent a further €5m to Mr Tsvetkov. Mr Magdeev brought proceedings against Mr Tsvetkov to recover the loans ('the Primary Claim').

In response, Mr Tsvetkov brought a counterclaim against Mr Magdeev ('the Counterclaim') and an additional claim against Mr Gaynulin ('the Conspiracy Claim'). Both claims alleged that Mr Magdeev and Mr Gaynulin had conspired to injure Mr Tsvetkov by asset-stripping EKLG and EK Diamonds. As a result, it was said, Mr Tsvetkov had suffered loss equivalent to his liability to Mr Magdeev pursuant to the Primary Claim.

Mr Gaynulin applied to have the additional claim against him struck out, alternatively for summary judgment to be granted in his favour, on the basis that: (a) the Conspiracy Claim against him is self-defeating; (b) it is barred by the principle of reflective loss; and (c) it is factually incoherent.

Mr Gaynulin's application came up before Picken J in May 2019.

Is the Conspiracy Claim self-defeating?

On behalf of Mr Tsvetkov, it was argued that the Conspiracy Claim is self-defeating. The loss that Mr Tsvetkov allegedly suffered was his liability to Mr Magdeev pursuant to the Primary Claim ('Primary

Loss'). However, assuming the truth of Mr Tsvetkov's factual allegations (as the Court must do in an application for strike out/summary judgment), it was clear that Mr Magdeev would not be able to obtain a valuable judgment against Mr Tsvetkov. This is because, if the allegations underlying the Conspiracy Claim are established, Mr Tsvetkov will have an absolute defence of set-off/circuity of action in response to the Primary Claim. As a result, it was argued that Mr Tsvetkov has not suffered any loss that he could seek to recover from Mr Gaynulin.

Picken J accepted this analysis. He observed that in Mr Tsvetkov's pleaded case, the loss that he was alleged to have suffered was formulated as the amount of his liability to Mr Magdeev under the Primary Claim. It was common ground that Mr Tsvetkov would be entitled to rely on the defence of set-off/circuity of action to resist judgment being entered against him in these circumstances. Therefore, Picken J said, "*if Mr Tsvetkov is under no liability to Mr Magdeev, it must follow that Mr Tsvetkov has not suffered any loss from Mr Gaynulin*" (at [36]).

Indeed, even if Mr Tsvetkov were successful in formally establishing Mr Tsvetkov's liability in respect of the Primary Claim, in view of the defence of set-off/circuity, he would not be able to obtain a monetary judgment against Mr Tsvetkov (at [38]). As Picken J put it, "*as between Mr Magdeev and Mr Tsvetkov, the Primary Claim and Mr Tsvetkov's counterclaim will, in effect, cancel each other out such that, in overall terms, the quantum of Mr Tsvetkov's liability to Mr Magdeev would be nil*". It follows that there is no loss in respect of Mr Tsvetkov can seek to recover damages from Mr Gaynulin.

Mr Tsvetkov also relied on the fall-back argument that, regardless of the possibility of recovering damages from Mr Gaynulin, the claim against him ought to be allowed to continue for three ancillary reasons: (a) continuing the claim against Mr Gaynulin would enhance the prospects of proving the conspiracy; (b) Mr Tsvetkov would have another party from whom he could recover costs if successful; (c) if successful, it would provide vindication to Mr Tsvetkov.

To substantiate the contention that continuing the claim against Mr Gaynulin would improve the prospects of proving conspiracy, Mr Tsvetkov relied on the possibility of obtaining disclosure from Mr Gaynulin and on the fact that Mr Gaynulin would be available for cross-examination. Picken J was not persuaded that either of these were good reasons to allow the claim against Mr Gaynulin to proceed to trial. Relying on the decision of the Court of Appeal in *Unilever plc v Cefaro Proprietaries Ltd* [1994] FSR 135, he said, "*[b]oth purposes are ancillary consequences of joinder; they cannot, in and of themselves, serve as justification for naming of parties as defendants who would not otherwise be joined to the proceedings*" (at [43]).

Picken J was not impressed by the argument that the claim against Mr Gaynulin should be allowed to continue so that Mr Tsvetkov would have another party from whom he could seek to recover costs. As highlighted above, it was common ground that Mr Tsvetkov had not suffered any recoverable loss. As a result, even if he were successful, he would only be entitled to nominal damages. In these circumstances, Picken J was of the view that Mr Tsvetkov may not be considered a 'successful party' for the purposes of costs (at [44]).

Picken J also rejected Mr Tsvetkov's contention that his claim ought to be allowed to proceed to trial in the interests of vindication. He pointed out that even if the Conspiracy Claim against Mr Gaynulin were struck out, the conspiracy allegations would still be tried against Mr Magdeev. Thus, if Mr Tsvetkov is able to establish the conspiracy against Mr Magdeev, he will be able to obtain vindication irrespective of whether Mr Gaynulin is also a defendant in the proceedings (at [46]).

Reflective loss

The second ground of Mr Gaynulin's application was that the Conspiracy Claim against him was barred by the principle of reflective loss.

Having decided that insofar as the Conspiracy Claim relied on Primary Loss it had no realistic prospect of success, Picken J's focus at this stage was on three other heads of loss that Mr Tsvetkov sought to add by way of amendment: (a) loss consisting in Mr Tsvetkov being unable to earn salary or other income from his employment or other role within the Graff business ('Employment Loss'); (b) Mr Tsvetkov had assumed EKLK's obligation to repay a sum of €4 million to an investor, Mr Mikhail Turetskiy. This gave rise to a liability of €4 million owed by EKLK to Mr Tsvetkov. Mr Tsvetkov alleged that he suffered loss consisting in not being paid this amount by EKLK ('Turetskiy Loss'); and (c) loss consisting of the costs and expenses incurred by Mr Tsvetkov in investigating the alleged conspiracy ('Investigation Loss').

Employment Loss and Turetskiy Loss

It was common ground that the current law on reflective loss is set out in the Court of Appeal's decision in *Marex Financial Ltd v Sevilleja* [2018] EWCA Civ 1468. On the basis of *Marex*, it was also largely uncontroversial that the Employment Loss and Turetskiy Loss were barred by the principle of reflective loss. However, an appeal from *Marex* was pending before the Supreme Court. On behalf of Mr Tsvetkov, it was argued that it would be inappropriate to strike out Mr Tsvetkov's claim before the appeal is decided.

Picken J noted that, in these circumstances, the court had a case management discretion to exercise in deciding whether to strike out the claim, permit the claim to continue, or stay the proceedings (at [78]). He exercised his discretion by striking out the Employment Loss and Turetskiy Loss. He held that it would be appropriate to do so for five main reasons.

First, on the basis of the current law, the Employment Loss and Turetskiy Loss are unsustainable. The attempt to resist strike out/summary judgment by reference to the pending appeal assumes that the Supreme Court will change the law in such a manner as to make the Employment Loss and Turetskiy Loss legally sustainable. Indeed, as Picken J pointed out, in order for the Employment Loss and Turetskiy losses to have a realistic prospect of success, not only would the Supreme Court have to change the law, it would have to do so on a basis that is wider than what is necessary to dispose of the appeal before it (at [86] and [73]).

Second, it would not be right to require Mr Gaynulin to incur further costs in defending these claims in circumstances where, on the basis of the law as it currently stands, Mr Gaynulin should not have to defend them at all (at [87]).

Third, unless the Supreme Court were to hand down a judgment overruling *Marex* before the trial of this action, it is very likely that, in addition to his own costs, Mr Tsvetkov will himself be liable to bear Mr Gaynulin's costs of defending the claims against him. Therefore, it is not to Mr Tsvetkov's benefit either for these claims to be allowed to continue in the hope that the law will change in his favour (at [88]).

Fourth, ancillary considerations such as wanting to obtain disclosure or cross-examine witnesses are not, in and of themselves, good reasons for allowing the proceedings to continue against Mr Gaynulin (at [89]).

Fifth, the potential prejudice that may be caused to Mr Tsvetkov from his claims being struck out could be prevented by granting him liberty to apply if there is a material change in the law. That is, if the Supreme Court judgment in *Marex* were to become available before the trial and it were to change the law in a way that renders the claim against Mr Gaynulin legally sustainable, it would be open for Mr Tsvetkov to seek to have his claims based on Employment Loss and Turetskiy Loss reinstated (at [90]).

Investigation Loss

Under this head, Mr Tsvetkov's claim was for a sum of £79,000 that he had paid to English solicitors as the costs and expenses of investigating the conspiracy. On behalf of Mr Gaynulin, it was argued that these were not recoverable as damages; they were simply the legal costs of the Conspiracy Claim.

By reference to a number of authorities including *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2010] 1 All ER (Comm) and *Tate & Lyle Food and Distribution Limited v Greater London Council* [1982] 1 WLR 149, Picken J pointed out that the authorities drew a distinction between the costs of wasted staff/managerial time spent in investigating and/or mitigating a tort (which are recoverable as damages) and litigation costs i.e., the costs of anything which might properly be regarded as preparation for litigation (which are not recoverable as damages) (at [111]).

Picken J was persuaded that the sum of £79,000 fell in the latter category. These were costs and expenses incurred by Mr Tsvetkov in paying his solicitors on the record to carry out preparatory work in respect of pending English proceedings. Therefore, he held that Mr Tsvetkov did not have a realistic prospect of recovering this head of loss as damages.

Is the Conspiracy Claim factually incoherent?

In the light of the conclusions that were reached on grounds one and two, the third ground did not strictly arise for determination. Nevertheless, Picken J held that he would not have been persuaded to strike out the Counterclaim or to grant summary judgment on the basis of ground three.

He pointed out that there were limitations on the level of factual granularity into which a court could delve into while deciding applications for strike out/summary judgment (at [120]). At this preliminary stage, Picken J was reluctant to conclude that there was no realistic prospect of the trial judge making factual findings that would enable them to conclude, coherently, that Mr Tsvetkov's claim against Mr Gaynulin was entitled to succeed.

For these reasons, Picken J held that Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin ought to be struck out. Insofar as the Conspiracy Claim relied on Employment Loss and Turetskiy Loss, he granted Mr Tsvetkov liberty to apply if the Supreme Court were to hand down its judgment on the *Marex* appeal before the trial of this action and that judgment were to change the law so as to render Mr Tsvetkov's claim legally sustainable.

NOTE: *This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>*