BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO: BVIHC 214 of 2011

BETWEEN:

ALEXEY BOBROV

Claimant/Respondent

and

LENTA LTD

Defendant/Applicant

JUDGMENT

[2012: 31 January]

(Application to transfer claim to commercial list pursuant to CPR 69A.4(4) – whether claim a commercial claim within the meaning of CPR 69A.1(2) – whether Court supplied with evidence enabling it to exercise discretion whether or not to transfer – whether Court fees paid in accordance with Commercial Claims (Fees) Order, 2011 – whether proceedings to be stayed pending payment of correct fees)

[1] **Bannister J [ag]:** This is my decision on a paper application brought by the defendant company ('Lenta') for the transfer of these proceedings from the High Court to the commercial list. The application is opposed by the Claimant ('Mr Bobrov'). Lenta is a well known BVI registered company which holds the entire issued share capital of a Russian company, Lenta LLC, which carries on a large and very well known hypermarket business in that country.

[2] Mr Bobrov issued his claim out of the High Court Registry on 8 September 2011. The statement of claim which accompanied it alleges that he was an employee of Lenta LLC between April 2006 and November 2009. He pleads that at an unspecified date before June 2007 Lenta's members 'authorised the reservation' of 5.6% of its authorised but unissued share capital for the purposes of what is described as a management options program. He then alleges that a unanimous resolution was passed at a meeting of Lenta's board held on 8 June 2007 approving a stock option program

for senior executives of Lenta LLC which had been approved by the board's remuneration committee and that he was among those eligible to participate. It is said that the program was to begin no later than 30 June 2007. Mr Bobrov then says that he communicated what is described as his acceptance of the program by accepting the post of General Director/CEO of Lenta LLC during 2008. He says he accepted that position on the basis that the grant of stock options was part of the remuneration for the position.

[3] Something appears to have gone wrong with the drafting or grammar of paragraph 7 of the statement of claim, but as I understand it it is intended to allege that in June 2009 Mr Bobrov proffered a form of draft stock option agreement to Lenta's board for approval at a meeting to be held in that month. The pleading is silent as to what happened at that meeting, or whether, even, it took place.

[4] Mr Bobrov then alleges that Lenta's board resolved on 17 December 2009 (after, it would appear, that he had ceased to be an employee of Lenta LLC[1]) that '[Mr Bobrov] was awarded shares in the stock option program in the amount of 0.5% with a purchase price of USD 2.5 million and a strike price of USD 500 million.' It was also resolved that contracts be signed with, among others, Mr Bobrov. These resolutions are alleged in the statement of claim to have amounted to an acceptance of the proposals put forward by Mr Bobrov in June 2009 and (again, something appears to have gone wrong with the grammar of paragraph 10 of the statement of claim) to have brought into being a binding agreement between Lenta and Mr Bobrov on those terms. It was further resolved on 17 December 2009 that Lenta's registered agent be instructed to update its share register accordingly. Alternatively, it is said that the resolution of 17 December 2009 amounted to an offer which was accepted by Mr Bobrov on 21 December 2010.

[5] Mr Bobrov relies in addition, or in the alternative, upon a common understanding between himself and Lenta that he was entitled to a share option or that the board resolutions which he pleads encouraged him to believe to his detriment that he was so entitled. He says that he relied upon this common understanding by accepting the position of CEO of Lenta LLC in 2008 and that there are references in his contract of employment which support such understanding.

[1] assuming, that is, that paragraph 4 of the statement of claim is intended to be an exhaustive account of Mr Bobrov's employment with Lenta LLC

[6] The statement of claim then seeks to pre-empt two anticipated defences to this claim based upon certain provisions of Lenta's Articles of Association, which I do not need to rehearse for the purposes of this decision.

[7] In paragraph 14 Mr Bobrov complains that Lenta has failed to execute a written agreement reflecting the grant of the option and goes on to allege that Lenta repudiated its agreement in a letter from its Chairman dated 10 March 2010 stating that it had resolved on 25 January 2011 to revoke its previous resolutions to grant share options to Mr Bobrov.

[8] Mr Bobrov claims a declaration that he is entitled to the pleaded option and an order for specific performance of the alleged agreement to grant it. There are claims for alternative forms of relief which I do not need to mention.

[9] On 10 October 2011 Lenta applied under CPR 9.7 to have the claim stayed or struck out on grounds of *forum non conveniens*. That application was subsequently supported by an affidavit from Mr John Oliver, Chairman of Lenta's board of directors, sworn on 1 December 2011. In that affidavit Mr Oliver says that if Mr Bobrov has a claim at all, which he does not accept, it must be a claim arising out of his employment by Lenta LLC. He goes on to say that none of the events relied upon by Mr Bobrov occurred in the BVI; and that any claim by Mr Bobrov must be a claim governed by Russian law which should be adjudicated by the Russian Courts. He says that Mr Bobrov was employed by Lenta LLC under Russian law contracts of employment and that the Russian Courts are the most convenient forum for trying those issues. Finally, he says that there are likely to be Russian speaking witnesses for whom a trial in Russia would be more convenient.

[10] On 28 November 2011 Kelvin John J gave directions for the hearing of Lenta's forum application. Mr Bobrov filed an undated affidavit in opposition to Lenta's application on 3 January 2012. On 10 January 2012 Walkers, for Lenta, wrote to McW Todman & Co, for Mr Bobrov, seeking their agreement to a transfer of the proceedings from the High Court to the Commercial Court. That agreement was not forthcoming and on 19 January 2012 Walkers issued their application for transfer under CPR 69A.4(4). The application was expressed to be supported by the same affidavit of Mr Oliver which I have partially summarized above.

The parties' contentions

[11] Mr Carrington, for Mr Bobrov, submits that Lenta's application is misconceived, because it purports to be made pursuant to CPR 69A.4(4) and such an application must be made before the first case management conference. He submits that the hearing before Kelvin John J on 28 November 2011 was a case management conference. The application is therefore too late. The reference in CPR 69A.4(4) to the first case management conference must, in my judgment, be to case management conferences as provided for in CPR 27, which are case management conferences to be fixed after the filing of a defence. In the present case, Lenta is applying for an order whose effect, if granted, would be that there will never be a defence in the BVI proceedings and no case management conference, either. It is, with respect, eccentric to suggest that a directions hearing on an application to stay or strike out on forum grounds should be treated as a case management conference for the purposes of CPR 69A.4(4). There is nothing in this point.

[12] Next, Mr Carrington says that an application under CPR 69A4.(4) must be supported by an affidavit. The short answer to this point is that the application is supported by Mr Oliver's affidavit of 1 December 2011 (which Mr Carrington relies upon in his opposition to the transfer application). It is true to say that that affidavit does not address the issue of transfer, but that is a separate point to which I shall return later. It does not follow, however, that the application does not comply with CPR 69A.4(5).

[13] On the substance of the matter, Mr Clifton, for Lenta, submits, first, that the claim has an admitted value in excess of US$500,000, and thus satisfies CPR 69A.2(3). Mr Carrington, for Mr Bobrov, says that there is no cogent evidence for this contention beyond Mr Oliver's statement that the shares in Lenta have a current value substantially in excess of US$500 million (giving the option shares a value in excess of US$2.5 million). It would, however, be absurd for Mr Bobrov to be seeking to establish a right to an option at a price of US$2.5 million unless the option shares are worth more than that amount. Those shares are, in my view, 'the subject matter of the claim' for the purposes of CPR 69A.2(3). The evidence of value seems to me to be cogent enough. With respect to him, I do not think that there is anything in Mr Carrington's point.

[14] Next, Mr Clifton says that the claim should be placed on the commercial list because it relates to 'the law of business contracts and companies' within the meaning of CPR 69A.1(2)(a). Mr

Carrington says that the claims set out in sub-paragraphs (a) to (l) of CPR 69A.1(2) are mere illustrations of what he calls the 'governing provision' of sub-rule 69A.1(2) itself, which refers to 'any claim or application arising out of the transaction of trade and commerce.' Mr Carrington says that Mr Bobrov's claim does not arise out of the transaction of trade or commerce, but is a claim under his employment contract. I must say that I do not find the construction of CPR 69A.1(2) easy, since claims 'arising out of the transaction of trade or commerce' are said to include 'the law of insolvency' and 'the law of trusts', the former of which may be, but is not necessarily engaged by the transaction of trade or commerce and the latter of which will be so engaged only very rarely.

[15] Be that as it may, it seems to me that the answer to Mr Carrington's submission is that the claim in the present case plainly arises out of the transaction of trade and commerce. Lenta LLC is a vast commercial enterprise. In order to carry on that commercial enterprise, it must act through agents, such as General Directors/CEO's. The terms upon which such agents are appointed are a necessary part of the transaction of commerce. The fact that a dispute about the terms upon which such persons are appointed is not specifically listed in CPR 69A.1(2) is irrelevant, since the list is not expressed to be exclusive. The claim is, therefore, a commercial claim within the meaning of CPR 69A.1(2).

Discretion

[16] Before I can exercise the discretion given to me by CPR 69A.4(4) I must be supplied with material upon which I can make a judgment. It seems clear enough from CPR 69.4(5) that that material must be contained in a supporting affidavit. There is nothing in Mr Oliver's affidavit of 1 December 2011 which assists me in coming to a conclusion whether the overriding objective will be better served by leaving the case where it is or by transferring it to the commercial list. It is true to say that Mr Bobrov, for his part, has put in no evidence to show why the overriding objective would be better served by leaving the claim where it is, but in my view the onus is on the applicant, Lenta, to provide evidence upon the basis of which I should exercise my discretion in its favour. There being no such evidence, this application must be refused.

Footnote

[17] Since, as I have held, this is a commercial claim within the meaning of CPR 69A.1(2) and since it was issued after 17 February 2011, the fees payable are those set out in The Commercial Claims (Fees) Order, 2011 ('the Fees Order') (see paragraph 2 of the Fees Order). It appears from my perusal of the documents that (with the exception of the fee paid upon Lenta's application of 19 January 2012) neither party[2] has to date paid fees at the appropriate rate. I therefore propose making an order in my capacity as a Judge of the High Court staying all further proceedings in this matter until the difference between the fees set out in the Fees Order and the fees actually paid to date has been paid to the Commercial Court Registry. I also propose to order that the file be lodged with that Registry in order that any future fees incurred will be paid at Commercial Court rates. Pursuant to CPR 26.2(2) the parties have until 4 pm on Wednesday 8 February 2012 to lodge written representations about these proposed orders. I will give a final decision on them after having taken any such representations into consideration.

Costs

[18] All questions of costs are adjourned generally with permission to apply.

Commercial Court Judge

31 January 2012

[2] I may be mistaken as to the fee paid on Mr Bobrov's affidavit filed on 3 January 2012, the fee stamp upon which I do not find easy to understand