

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCV 2018/0091

BETWEEN:

TRIDENT TRUST COMPANY (SOUTH DAKOTA) INC.

Claimant

and

[1] SPINSTAR HOLDINGS LTD

Defendant/Applicant

[2] ARIAS FABREGA & FABREGA TRUST CO BVI LIMITED

Defendant

Appearances:

Mr. Richard Evans and with him Ms. Allana-J Joseph of Conyers for the Claimants

Mr. Paul Dennis QC and with him Ms. Nadine Whyte of O'Neal Webster for the

Respondent.

2018: October 18,

November 9

JUDGMENT

- [1] ADDERLEY, J. (AG.): This was an application by the first defendant, Spinstar Holdings Limited, for an order that the claim be transferred from the Supreme Court to the **Commercial Division of the Supreme Court sitting in the Virgin Islands (“the Commercial Court”)**.
- [2] In an oral judgment delivered on 9 November 2018 I acceded to the application and promised to give my reasons later. These are my reasons.
- [3] Although the matter was not argued in detail before Ellis J, she was right. Her first impression was that the claim was a commercial one and ought to be continued in the Commercial Court. This is evident from reading the transcripts of the Supreme Court hearings before her dated Tuesday 3 July, 2018.
- [4] CPR 69A applies to claims in the Commercial Court. **‘Commercial claim’ is defined as ‘any claim or application ‘arising out of the transaction of trade and commerce’ and includes a non-exhaustive list including claims related to:**
- (a) the law of business contract and companies;
 - (b) partnerships;
 - (c) the law of insolvency;
 - (d) the law of trusts
 - (e) the carriage of goods by sea, air or pipeline;
 - (f) the exploitation of oil and gas reserves;
 - (g) the insurance and re-insurance;
 - (h) banking and financial services;
 - (i) collective investment schemes;
 - (j) the operation of markets and exchanges;
 - (k) mercantile agency and usages;
 - (l) arbitration;

[5] Under rule 69A.2(1) the commercial list is a list for claims commenced or proceeding in the Commercial Division, and a judge assigned to the Commercial Division shall be in charge of the commercial list.

[6] **In its ordinary meaning 'trade' refers to the exchange of goods and services from one party to another for consideration in money or money's worth. Commerce includes a whole myriad of legal and economic activities surrounding trade either by way of setting an environment for trade to take place, preparatory to, or facilitating trade including the goods and services rendered in respect of such facilitation. Trade and commerce are what grow the GDP of a country.**

[7] In *Alexey Bobrov v Lenta Ltd* (BVIHC(COM) 214 of 2011) Bannister J in consideration whether a claim qualified for the Commercial Court stated at [14]

"I must say that I do not find the construction of CPR 69A.1(2) easy, since it claims "arising out of the transaction of trade or [sic] 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. "

[8] This was perhaps to take too narrow a view of trade and commerce. However, in *The Financial Services Commission and A Company* (BVIHC(COM) 318 of 2012) that definition was widened somewhat where he stated:

"the subsection [69A.1(2)] does not refer to 'a' transaction of trade and commerce. It refers to a claim arising out of 'the transaction of trade or commerce – i.e. the conduct generally of mercantile affairs. If the transaction of trade or commerce gives rise to a claim or application, that claim or application, it seems to me, is properly to be regarded as having arisen out of the transaction of trade and commerce."

I share his view that the section refers to the conduct generally of mercantile affairs.

[9] Intuitively, we know that some claims are prima facie not appropriate for the commercial court, for example, personal injury claims, child abduction cases, asset confiscation cases, matrimonial matters, and the like.

- [10] In the instant case the trade is in trust services. A trust company is exchanging trust services for a consideration paid to the trust company by the users of those trust services. Legal services are a part of commerce facilitating the trade in trust services. This case **dealing with the rectification of the company's register therefore arises out of the** transaction of trade and commerce.
- [11] It is particularly appropriate for the Commercial Court because the claim is for rectification **of a company's register**. It should be recalled that the Privy Council case of Nilon¹ referred to by Mr Dennis QC, was concerned with the rectification of a share register and was itself an appeal from the Commercial Court of the BVI. As explained by Mr Evans, the underlying subject matter to this claim for rectification is a dispute over whether the proposed new trustee has a right to be registered, and whether or not the beneficiary will or will not be liable for increased income tax in the United States. The subject matter of taxation is itself an important part of commerce. So there is no doubt that the subject matter of this case falls within the definition of a commercial claim.
- [12] **On its face it is a simple application by the claimant/respondent ("Trident") before the High Court to rectify the register of members of the first defendant/applicant ("Spinstar") by replacing the current trustee listed in the register, Poalin Trust Services Ltd. ("Poalin"), with Trident or its nominee, KSB Investments LLC.** The trust, called the KSB Trust, was established on 17 July 1997 and has as its beneficiary a minor. The settlor appointed Poalin (formerly Bank Hapolim) as trustee.
- [13] All of the transfer documents necessary for the change have been prepared and executed. They came about by an order of the District Court of Israel, the seat of the governing law of the trust, made in December 2017 at proceedings at which an application was made for permission to convert the trust from an Israeli Trust to a United States Trust, and to change the trustees. The application was filed by Poalin purportedly under the advice of **the beneficiary's legal guardian** on the legal advice of her attorney that a US domestic trust would avoid serious income tax consequences for the beneficiary.

¹Nilon Limited and another v Royal Westminister Investments S.A. and others [2015] UKPC 2

- [14] Spinstar was not made a party to the Israeli proceedings nor was it informed of them at the time. It has declined to give effect to the transfers because it would result, in its opinion, in material and prohibited changes to the terms and objectives of the original KSB Trust.
- [15] In an effort to prevent what it says, could result in serious harm to the assets of the KSB Trust and to the interest of the beneficiary, in June this year four out of six members of the board of Spinstar initiated proceedings in the Tel Aviv District Court against Poalin seeking orders to have the Israeli judgment vacated and to annul the order and consequential actions taken pursuant to the order made December last. It awaits the outcome of those proceedings before taking any action.

The Commercial Claim

- [16] The purpose of establishing the Commercial Court was to facilitate the more efficient and timely disposal of high value oftentimes complex commercial claims involving national as well as international litigants. It enhances **the country's** competitiveness in the ease of doing business. This was not to be achieved on the criterion of whether the commercial judge had greater competence or expertise than the High Court judge, as alluded to with disapproval by Mr Dennis, QC, although that may be the case in some instances. It was hoped to be achieved by the specialization in the issues, brought about by the frequency, volume and variety of similar claims and applications arising before the Court, the discrete jurisprudence which has developed and continues to develop around these cases, the special rules of the Commercial Court which facilitate timely listings, accommodation of urgent matters by dealing with matters on paper or via Certificates of Urgency sometimes at odd hours, days and diverse places, and the culture of timely judgments. Furthermore, commercial courts around the world, including that of the BVI, have become part of a network which has developed and continues to develop special protocols for judicial cooperation in multi-jurisdictional litigation, including court to court communication, cooperation on enforcement, and other matters especially pertinent to commercial courts. It is therefore because of a combination of factors that the commercial judge is usually better placed to achieve the overriding objectives of the commercial court. Once a matter makes the commercial list, all of the benefits of the commercial court are available to the

- parties in expeditiously advancing their litigation. That is what attracts litigants to commercial courts the world over, and it is why litigants agree to pay a higher schedule of fees.
- [17] By CPR 69A.1(3) in order to qualify as a commercial claim, the claim or value of the subject matter to which the claim relates must be at least \$500,000. Trident has valued the trust assets as being in excess of US\$80 million.
- [18] It seems to me that once the applicant has established that the claim is a commercial claim of the requisite monetary value then *prima facie* it is entitled to have its claim before the commercial court. The burden then shifts to the defendant to persuade the court to exercise its discretion not to transfer the commercial matter to the commercial court. This could be, for example, because the rules do not seem to contemplate the claim.
- [19] The commercial judge has an overarching discretion to transfer a commercial claim to the commercial court.
- [20] The applicant has supported its application by affidavit as required by rule 69A.4(5) and has established its *prima facie* right to have the claim transferred to the commercial list. The respondent has not filed any evidence in opposition to the application. The court therefore has no evidence to consider on which to exercise its discretion in favour of the respondent. On the consideration of the respondent's submissions of law the opposition to application fails.
- [21] The English cases of *Natl Amusements (UK) Ltd and others v White City (Shepherds Bushuch) Limited Partnership and another* [2009] EWCH 2524 (TCC), and *Southern Rock Insurance Co Ltd v Brightside Group Ltd and another* [2015] EWCH 757 relied on by the Mr Dennis, QC have very little applicability in the BVI. In England transfers from the commercial court are governed by the general rule relating to transfers to or from specialists courts contained in CPR 30.5(3)². That rule states: "*An application for the*

² The English Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on 26 April 1999.

transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list.” CPR 30.3 (2)(a) through (h) set out the matters to which the court must have regard in exercising its discretion. On reading the cases carefully it is clear that in those two cases the court was simply having regard to the matters mandated by their rules. It would be incorrect to take them as authority of general applicability outside of England, or in any jurisdiction whose rules do not have similar provisions.

[22] In the BVI, for example, it is quite different. There are no such mandatory provisions. What, in my judgment, is clear under CPR 69A is that commercial claims (as defined in the rule) which meet the monetary threshold, are intended to be added to the commercial list. In fact under CPR 69A.1(4) if the commercial judge considers the claim to be of a commercial nature and warrants being placed on the commercial list, he has a discretion to admit a claim to the commercial list even if it does not satisfy the monetary threshold of the \$500,000. Under CPR 69A.4(3) he has the power to order a claim to be transferred to any other list on the grounds that he is not satisfied that the claim is a commercial claim.

[23] For all of the above reasons I accede to the application and dismiss the objection. I order that the matter be transferred to the Commercial Court. I also note that since it is a commercial claim the difference in fees pertaining to commercial claims must be paid to the Supreme Court Registry and I order that the claimant pay it forthwith.

[24] Costs in the sum US\$ 39,000.00 is to be paid by the respondent to the applicant within 14 days.

Hon. K Neville Adderley
Commercial Court Judge (AG)

By the Court

Registrar