THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0169

IN THE MATTER OF:	The *International Business Companies (Amendment and Consolidation) Act CAP 149 of the 2009 Revised Edition of the Laws of St. Vincent and the Grenadines*
AND	In the Matter of the Companies ACT Chapter 143
AND	In the Matter of Genesis Investment Funds Limited (In Liquidation)

BETWEEN:

KONINKLIJKE KPN N.V.	CLAIMANTS
AND	
KPN B.V.	
AND	
GENESIS INVESTMENTS FUNDS LIMITED (IN LIQUIDATION)	DEFENDANTS
AND	
GUNTER BAUER (LIQUIDATOR)	

Appearances:

Mr. Stanley John Q.C. with Ms. Keisal Peters for the Applicants

Mr. Duane Daniel and Ms. Jenell Gibson for the Defendants

2019: January 24

JUDGMENT ON WRITTEN SUBMISSIONS

[1] Byer, J.: By Notice of Application filed on 7 November 2018, the Defendants to this action sought the determination by the court as to whether the question of the recognition and/or enforceability of the Arbitral Award made on January 9, 2015 should be tried as a separate issue and that this issue shall be disposed of before the other substantive issues in these proceedings.

[2] This court agreed that the issue was one to be dealt with preliminarily and the parties were ordered to file submissions on the issue. This judgment is therefore based on the submissions as filed.

[3] The nub of this application was encapsulated by the grounds of the application and in particular paragraph 5 thereof which stated in part that in addressing its mind to whether the arbitral award was in fact enforceable, this court needed to consider that the Claimants had not, in their reliefs, sought a declaration that the Arbitral Award made on January 9, 2015 is recognized and enforced in St. Vincent and the Grenadines nor did they seek an order of the Court in the terms of the award pursuant to the Arbitration (New York Convention Awards and Agreements) Act, CAP 119 section 4 and the Arbitration Act, CAP 17, section 20.

[4] Bearing this ground in mind, it is clear that the context of these proceedings must be given.

Background

[5] By Fixed Date Claim filed on 24 November 2017 the claimants' filed claim against the First defendant, which was incorporated as an International Business Company (IBC) in accordance with the International Business Companies Act 1996 on 12 May 2005 with Registration No 12168 IBC 2005 and its Liquidator the Second Defendant, pursuant to section 125(5) of the Bankruptcy and Insolvency Act and/or section 453 of the Companies Act and section 165(1) of the International Business Companies (Amendment and Consolidation) Act Chapter 149 ("the IBC Act") for the following reliefs:-

1) That the Claim of Debt received on 24 November 2017 by the Second defendant on behalf of the claimants be and is hereby allowed as proved for or that the Second defendant be ordered to make a determination that the said claims are proved for or disallowed.

2) That the value of the claimants' said claim representing this debt as at 30 September 2017 shall be the sum of USD 4,906,414.86 plus interest at the rate of three percent (3%) per annum until the date of full payment.

3) That the Second defendant Mr. Gunter Bauer be removed from office as the Liquidator of the First Defendant Genesis Investment Funds Limited (In Liquidation) and that *[Mr. Peter Alexander, Chartered Accountants of Sergeant-Jack Drive, Arnos Vale, St. Vincent and the Grenadines or Stanley DeFreitas Chartered Accountant of Suite 200, Griffith Corporate Centre, Beachmont, Kingstown St. Vincent and the Grenadines or Mark McDonald and David Holukoff, Grant Thornton (British Virgin Islands) Limited]* be appointed under section 165 of the IBC Act to be the liquidator of the First defendant.

[6] In coming to this point the claimants averred that their entitlement had arisen from a claim that the Second claimant had against another Dutch entity called 6GMobile B.V. ("6GM"). This arose from 6GM's failure to meet its contractual obligations towards the Second claimant.

[7] As security for the fulfillment of its obligations towards the Second claimant, 6GM and the Second claimant on the 18 November 2010 entered into what purported to be an escrow agreement providing for the deposit by 6GM of 35,552 of its class A non-voting participating preference shares in the capital of the First defendant.

[8] The claimant's alleged, that the First defendant confirmed via a written statement dated 5 November 2010 that it was holding a total number of 187,769 of these class A non-voting participating preference shares in the capital of the First defendant which were to be transferred from 6GM to the Second claimant.

[9] Following 6GM's failure to meet its obligations under the escrow agreement the shares were then transferred from 6GM to the Second claimant.

[10] Consequent upon 6GM's continued failure to fulfill its obligations under its agreement with the Second claimant, it transferred a further 37,246 class A non-voting participating preference shares in the capital of the First defendant, this time to the First claimant.

[11] The claimants therefore together alleged that they had acquired a total number of 72,798 class A non-voting participating preference shares in the capital of the First defendant from 6GM.

[12] On 16 March 2011, the claimants submitted a redemption request of USD 1,935,806 (35,552 shares) to the First defendant, followed by a second redemption request of USD 2,028,045 (37,246 shares) in April 2011.

[13] The defendants having failed to adhere to the redemption requests, the claimants announced to the First defendant on 28 January 2013 that they would initiate arbitration proceedings in order to enforce their rights.

[14] In response to this, the First defendant in two letters dated 31 January 2013 and 19 February 2013 respectively, claimed to have cancelled the claimants' shares and to have suspended the redemption. This allegation was brought to the attention of the Claimants' Dutch lawyers several months later on 15 June 2013.

[15] On 17 September 2013 Claimants filed a request for arbitration against the First defendant and Mr. Martin Wiebecke was appointed as sole arbitrator ("Arbitrator") sitting in London, England.

[16] The Arbitrator found that he had jurisdiction and rejected all arguments raised on behalf of the defendants and made an award in favour of the claimants.

[17] The arbitral award dated 9 January 2015, which the Arbitrator rendered in favour of the claimants, ordered the First defendant to meet its obligations toward the claimants under the Genesis Technology Fund Offering Memorandum dated 1 December 2006 by:-

(i) Executing the claimants' redemption requests at net asset value, plus interest at 3% per annum.

(ii) In the alternative, the First Defendant was ordered to pay to the Claimants USD 3,963,851.10 as damages, EUR 39,056.58 as legal and other costs and EUR 89,146.63 for the fees and expenses of the Arbitrator.

[18] On 31 December 2013 – during the above described arbitration proceedings against the First defendant – the First defendant and its sub funds went into voluntary liquidation pursuant to section 167(4) of the IBC Act.

[19] The Plan of Dissolution dated 16 December 2013 filed with the Financial Services Authority ("Plan of Dissolution") to voluntarily wind-up the First defendant and which is required under section 167(2) of the IBC Act was to be authorised by a resolution of members, (the holders of the outstanding shares of a class or series of shares entitled to vote on the Plan of Dissolution as provided for by the By-Laws *section 7.1 and section 24.7*), however it was stated in the Minutes of the Board of Directors (a copy of which was also filed), as having been authorised by a sole shareholder. It expressly stated that the estimated time required to wind up and dissolve the First defendant was eighteen (18) months from 30 December 2013 and that *"… the company is, and will continue to be able to discharge or pay or provide for the payment of all claims, debts, liabilities and obligations in full…"*.

[20] Notwithstanding the undertaking, the voluntary winding-up was still subsisting as at the date the proceedings were instituted.

[21] On 1 September 2017 the claimants served a statutory demand ("Statutory Demand") on the First defendant at its Registered Office situate at Trust House, 112 Bonadie Street, Kingstown, St Vincent and the Grenadines.

[22] The First defendant acknowledged receipt of the Statutory Demand via a letter dated 21 September 2017 from its then solicitors Delany Law by which it asserted, *inter alia,* that (i) following the redemption requests by the claimants there were no transfers made by the First defendant, (ii) the First defendant initiated criminal proceedings in 2016 against an alleged fraudulent share swap, resulting in those shares being declared void as of January/February 2013, and (iii) the First defendant asked that there be an abandonment of the Statutory Demand with immediate effect until the facts in dispute are settled.

[23] Subsequently, the claimants sought to prove the debt by causing a Claim of Debt and Proof of Debt supported by affidavit, each dated 20 September 2017, to be served on the Second defendant on 2 October 2017 via courier mail.

[24] The Claimant's claim therefore in this court's mind, in seeking to have the claim of debt and proof of debt be allowed, and for payment of debt of USD$4M plus (the figure granted by the arbitrator) is in fact relying on the arbitral award made in their favour.

[25] The issues for the court therefore on the application are thusly two-fold. 1) that the claimants having failed to plead any relief seeking enforcement or recognition of the arbitral award (the award) they could not seek to rely on the same in terms of the general substantive relief sought and 2) that in any case, the Respondent having raised several issues with regard to the award itself claimed, that it offended many if not all of the grounds against enforcement pursuant to the Arbitration (New York Convention Awards and Agreement) Act CAP 119 of the Laws of St Vincent and the Grenadines, and as such, this award was not a proper one to be enforced in this jurisdiction.

Issue #1: Failure to plead relief to recognize/enforce the award by the Claimants

[26] The gravamen of the submission by the Defendants on this issue is that the provisions of the CPR 2000 make it clear that pleadings must specify the relief sought.[1] The reliance on the generalized pleading of "further and other relief" in this regard, they submitted, would not be of assistance to the claimant in that that pleading would only encompass prayers that are raised on the pleadings themselves. They relied on the learning contained in the case of Kirin-Amgen Inc v. Transkaryotic Therapies Inc and Ors (No.3)[2] in which the Court in examining whether the

[1] Rule 8.6 (1) (b)
[2] [2002] IP & T 331

claimant who had not pleaded specific reliance on a particular claim under a claim for infringement, stated that there was a need to still rely on specific pleadings despite the new regime under the new civil proceedings rules. In that regard, they relied on the learning in the text of ***Daniell's Chancery Practice*** and said this *"…such relief must be consistent with that specifically claimed, as well as with the case raised by the pleadings; for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the claim he has made, and take another judgment." "With regard to the nature of the general or other relief which a plaintiff may have, it would appear that if the statement of claim contains allegations offering issues on facts that are material, the plaintiff is entitled to the relief which those facts will sustain; but he cannot desert specific relief claimed, and ask specific relief of another description, unless the facts and circumstances alleged on the pleadings, will consistently with the rules of the Court, maintain that relief." "…it is not enough for the plaintiff to allege that the defendant has committed breaches of trust, he must give particulars of the breaches. It is not the practice of the Court where one breach is proved to direct a roving inquiry whether there are any other breaches of trust. The plaintiff is not entitled to relief at the trial except in regard to that which is alleged in the pleadings and proved."*

[27] Additionally the court went on to say: *"In summary, it appears to me that where there is a claim for 'further or other relief', then, unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. Firstly, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise".*

[28] In having made reference to these statements, the Defendants submitted that these statements of law were extremely relevant in the case at bar. When a claimant seeks to rely on an arbitral award, the law makes it clear that there are in fact two variant procedures for enforcement or recognition of the same. The claimant in that regard must choose to either enforce it at common law or seek to rely on relevant appropriate statutory provisions. Depending on the manner utilized, the requisite burden of proof shifts between the claimant to the defendant and therefore informed how a party to the proceedings would frame and prosecute their claim.[3]

[29] So even though pleadings reveal a viable claim in general terms, where the case of a party ultimately requires an election as to what is being sought and there is failure to do so, on the basis of the submissions of the defendant, the court is unable to exercise any discretion to determine what is in fact included in the general prayer "further and other relief".

[3] Paragraph 17 of the Defendant's submissions filed on the 23/11/18.

[30] The claimants in response to this submission advance to the court that their claim as filed by way of the Fixed Date Claim form filed herein, makes it clear what they are seeking on behalf of their client.

[31] The claimant's submit that it is clear on their pleadings that they have sought enforcement of the award by including the prayer for the value of the claim to be admitted or failing that for the debt due by virtue of the redemption of its shares to be admitted as proved.[4]

[32] Having made this submission they further rely on the case of Bertha Francis v First Caribbean International Bank (Barbados) Ltd[5] in which among other things the Learned Judge said at paragraph 21 "*It would seem therefore that while the best practice would be to set out all the remedies that are being claimed against the Defendant, failure to specify a particular remedy will not limit any power of the court to grant such a remedy if the Claimant is entitled to it*" and also at paragraph 24 *"to assist a Claimant, it must be implicit, as a matter of obviousness and common sense, that the remedy there referred to must be a remedy which is justified by virtue of the allegations made in the body of the pleading upon which the relief claimed is effectively contingent. He was of the view that it would be only in the most exceptional case will the court admit, without requiring an amendment, a claim based on an implied allegation."* This gives support, they submit, to the contention that there is a discretion that resides with the court to make an order or declarations with respect to *all* remedies that arise on the pleadings. In any event the Claimant submitted that these proceedings not being ruled by the provisions of CPR but rather the insolvency rules of the UK, that this defect in form is of no moment and cannot result in the proceedings/claim being invalidated.[6]

[33] Finally on this issue, the claimants submitted that even if the Defendants contentions may in fact be correct, and that the "court considers that an amendment to the prayer for relief in the statement of claim are warranted…" the door is not closed for the claimant to make such an application.

Court**'s Analysis** and Considerations

[34] In determining this issue it is clear that the pleadings relied on by the claimant must be examined.

[35] Even though the claimant purported to convince the court that any absence of the specific relief to enforce was not fatal to the claim, as the claim sought prayers that did not solely hinge on the

[4] Paragraph 4 of Claimant's submissions filed 3/12/18
[5] Claim No 0583/1998 per Mason J
[6] Paragraph 5.8 Claimant's submissions in response filed 3/12/18

award being either recognized or enforced, the specific inclusion in the submissions that the claim "was for enforcement" belied this suggestion.[7]

[36] This court agrees with the submissions of the defendant, that it would appear that the claimants have confused and interchanged two different concepts being the enforceability of the award as opposed to the recognition of the award.

[37] It is therefore unclear on the pleadings in their present form, what in fact the claimant is seeking in terms of its drafted prayers. The very point that has been raised and I nay say effectively canvassed by the defendants.

[38] When one looks at the statement of claim this is what the claimant says at various points:

At paragraph 16: *"The First Defendant did not file an appeal against the Final Award. Hence the Final Award became final and binding. By virtue of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards of 10th June 1958 the Final Award is prima facie evidence to the matters to which it relates and is enforceable by this Honourable Court save in very exceptional circumstances as prescribed by statute none of which applies in the circumstances of this case."*

At paragraph 31: *"Furthermore by letter dated 9 October 2017 the Claimants notified the FSA ….that the defendants' legal adviser had filed a sworn statement in proceedings in the High Court acknowledging that the First Defendant would be insolvent if the Final Award is enforced against its assets, which is sufficient evidence that the Second Defendant as Liquidator has had ample reason to believe that the First Defendant will not be able to pay or provide for payment of or discharge all claims, debts, liabilities and obligations which are outstanding against it and has failed to give notice to the Registrar of IBCs of this fact pursuant to section 169 of the IBC Act."*

[39] When a close examination is therefore undertaken of the pleadings of the claimant, it appears to this court that the underlying basis of the claimants' relief is the enforcement of the award as opposed to mere recognition. It is the very award itself, that they rely on to advance their claim for the reliefs prayed for in their statement of claim.

[40] As was so eloquently stated by the authors of Redfern and Hunter on International Arbitration[8] on the manifest difference between these fundamentally opposing concepts, "…recognition is used to block any attempt to raise in fresh proceedings issues that have already been decided in the arbitration that gave rise to the award whose recognition is sought. By contrast the purpose of

[7] Paragraph 4.2 Claimant's submissions filed 3/12/18

[8] Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter 6th Ed at paragraph 11.24

enforcement is to act as a sword. Enforcement of an award means applying legal sanctions to compel the party against whom an award was made to carry it out."(My emphasis added).

[41] So even though the relief of the claimants appears to be asking this court to decide on the allowance of their claim of debt/proof of debt, the very legal ground upon seeking to have this proof of debt accepted is the finding of the arbitrator as contained in the award itself. In this court's mind, it is clear therefore that the existence of the award is being used not as a shield but rather as a sword. This is fundamentally enforcement.

[42] That being said, this court must address its mind to the issue as to whether the failure of the claimants to plead that relief specifically is fatal to their case.

[43] In looking at this, I accept that the claimants are aware that it was entirely inappropriate to make what purported to be an application to amend within the confines of their comprehensive submissions. It is now settled law and the CPR 2000 makes it clear when read with Practice Direction 5/2011, that any such application must be in writing and the draft of the amended pleading must form part of the evidence being relied upon for the amendment.

[44] In therefore looking at the totality of this matter, I am satisfied in my mind that any relief seeking enforcement of the award was not one that would or could be appropriately captured by the prayer "further and other relief". This is so even if the nature of the pleadings relied on in the body of the claim ultimately could lead to that inference.

[45] I find that the nature of that relief must be one that must be specifically pleaded. I therefore agree with my sister, Henry J in the Re Alson Connell[9] case in which she stated that "…the court's powers of rectification on such cases [where there was a failure to plead or include the correct statute upon which the application relied] is limited to correction of procedural and compliance breaches not to matter of substance."

[46] I find that this is one such case. The claimants have failed to plead the requisite prayer that supports the inferential relief sought. Having failed to do so, the claimants cannot ask this court to read it into their claim as if they had in fact pleaded it. This court is not prepared to do so.

[47] However as is clear from the authorities that have emanated from this court as to the discretion to grant amendments, it is still not too late in the proceedings for the claimants to make the requisite application seeking the amendment to pray that relief.

[48] Having come to this determination I am also of the mind that the arguments against any enforceability as proffered by the defendants would be premature at this juncture.

[9] SVGHCV2016/0019

[49] The claimants are therefore at liberty to file their application to amend their pleadings. If that application is therefore successful, the matter will proceed to trial and the arguments against the enforceability of the award will be entertained at that time.

THE ORDER OF THE COURT IS THEREFORE AS FOLLOWS:

1. Leave is given to the claimants to file an application seeking leave to amend their Fixed Date Claim form seeking the requisite relief within 10 days of today's date. The Defendants will have seven days to respond to the application.

2. The trial dates of the 26th and 27th February 2019 are vacated.

3. Costs to the defendants on their application, having been partially successful, in the sum of $450.00

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar