Neutral Citation Number: [2018] EWHC 3177 (Ch)

Claim No: FL-2018-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
FINANCIAL LIST

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 21 November 2018

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

Between :

THE BANK OF NEW YORK MELLON, LONDON BRANCH	Claimant
- and –	
ESSAR STEEL INDIA LIMITED	Defendant

- -

- -

Mr Tom Smith, QC and **Mr Andrew Shaw** (instructed by **Reed Smith LLP**) for the **Claimant**
The **Defendant** did not appear and was not represented.

Hearing date: 13 November 2018

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Judgment Approved

Mr Justice Marcus Smith:

A. INTRODUCTION

1. By a Part 8 Claim issued on 23 July 2018, the Claimant sought declarations against the Defendant as to the amounts due and payable in respect of certain US Dollar 0.25% unsecured notes (the "Notes") due in 2018, issued by the Defendant, and constituted under the terms of a trust deed dated 5 December 2003 (the "Trust Deed").

2. The claim is supported by the witness statements of Mr Nicholas Brocklesby, a solicitor and partner in the firm of Reed Smith LLP, the Claimant's solicitors. Mr Brocklesby has adduced two witness statements, the first dated 23 July 2018 ("Brocklesby 1") and the second dated 2 November 2018 ("Brocklesby 2").

3. The Defendant has taken no step in these proceedings, and was not represented before the court.

4. The substantial question before the court is whether the declarations sought by the Claimant should be made. Before that question can be addressed, three anterior questions must be resolved:

   (1) First, I must be satisfied as to the Claimant's standing to bring this claim.

   (2) Secondly, I must be satisfied that the Defendant is properly before the court, so that I can properly determine the substance of the Part 8 Claim.

   (3) Thirdly, I must be satisfied that it is appropriate to make the declarations sought by the Claimant.

5. Only if these three questions are answered in the affirmative, should I proceed to consider the substance of the Part 8 Claim. Accordingly, I proceed to consider these three, anterior questions, in the following paragraphs.

B. DOES THE CLAIMANT HAVE STANDING TO BRING THIS CLAIM?

6. The Trust Deed is governed by and is to be construed in accordance with English law (clause 18.1). The English courts have a non-exclusive jurisdiction (clause 18.2), and the Defendant has irrevocably submitted to the jurisdiction of the English courts (clause 18.2).

7. The Claimant is the trustee ("Trustee") for the Notes under the terms of the Trust Deed. I shall, in this Judgment, refer interchangeably to the "Claimant" and to the "Trustee". The Trust Deed provides:

   (1) In clause 5.1, that "[a]ll moneys received by the Trustee in respect of the [Notes] or amounts payable under this Trust Deed will, despite any appropriation of all or part of them by [the Defendant], be held by the Trustee on trust…". Clause 5 then spells out the terms of the trust, but it is unnecessary to set out these provisions for the purposes of this Judgment.

   (2) Clause 6.1 provides that "the Trustee shall not call the [Notes] due and payable or take any steps to enforce the performance of any provision of this Trust Deed unless

> and until it shall have been so directed by an Extraordinary Resolution and it shall not be obliged to do so unless it is also indemnified to its satisfaction. No Noteholder shall have any rights to institute any proceedings at law and in equity or in insolvency or otherwise directly against the [Defendant] unless the Noteholders have so directed the Trustee by an Extraordinary Resolution and the Trustee, having been indemnified to its satisfaction and so bound to proceed, fails to do so within a reasonable time and such failure is continuing."

8. Although the Noteholders are beneficially interested in the Notes, their interests are held on trust by the Trustee. In the law of trusts, it is axiomatic that the beneficiary under a trust cannot sue in relation to the trust property. It is the trustee who must sue, and he can recover more than merely nominal damages. The trustee will recover for the full beneficial interest and must then account for any recovery to the beneficiaries.

9. In my judgment, this is the legal effect of clause 5.1 of the Trust Deed.

10. Clause 6.1 sets out the circumstances in which the Trustee is able to vindicate the rights in the Notes. Essentially, the Trustee is precluded from acting unless directed by Extraordinary Resolution; and is not obliged to act unless indemnified to its satisfaction. If, having been directed to act, and with the benefit of an appropriate indemnity, the Trustee does not act, then (but only then) may the Noteholders themselves institute proceedings. This may be seen as a codification of what is known as the "*Vandepitte*" procedure,[1] whereby beneficiaries under a trust may – where a trustee wrongfully fails to sue a third party in relation to trust property – take over the trustee's claim.

11. An Extraordinary Resolution sanctioning, authorising, directing, requesting and empowering the Trustee to bring these proceedings was passed at a meeting on 10 April 2018, following a notice of that meeting dated 8 March 2018. As a result, the Trustee was instructed to commence these proceedings.

12. Accordingly, the Trustee has standing to bring this claim as Claimant. Indeed, according to the terms of the Trust Deed set out above, the Trustee is the only person having the standing to bring this claim.

C. IS THE DEFENDANT PROPERLY BEFORE THE COURT?

13. Clause 18.3 of the Trust Deed provides as follows:

> "[The Defendant] irrevocably appoints Law Debenture Corporate Services Limited…to receive, for it and on its behalf, service of process in any Proceedings in England. Such service shall be deemed completed on delivery to such process agent (whether or not it is forwarded to and received by the [Defendant]). If for any reason such process agent ceases to be able to act as such or no longer has an address in England, [the Defendant] irrevocably agrees to promptly appoint a substitute process agent acceptable to the Trustee and shall immediately notify the Trustee of such appointment. Nothing shall affect the right to serve process in any other manner permitted by law."

14. The Claim Form in these proceedings, together with supporting documents, were served on Law Debenture Corporate Services Limited by recorded delivery on 23 July 2018. By an email of the same date, the Claimant's solicitors were informed that "[the Defendant]

[1] See *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] 1 AC 70.

appointed this Corporation in 2003, but the appointment terminated in 2006 and we were not reappointed".[2]

15. In these circumstances, the question arises as to whether service by the Claimant of these proceedings on Law Debenture Corporate Services Limited is good service sufficient to bring the Defendant properly before this court. I shall, in this regard, refer to Law Debenture Corporate Services Limited as the "Service Agent".

16. I have no doubt that service on the Service Agent was good and sufficient service. Clause 18.3 constitutes an irrevocable promise as between the Claimant and the Defendant that service on the Service Agent is good service for the purposes of Proceedings in England, which these proceedings are. Clause 18.3 says nothing about the agency relationship between the Defendant and the Service Agent. Rather it is concerned with a promise between the Claimant and the Defendant. Clause 18.3 operates as an irrevocable promise, by the Defendant to the Claimant, to accept service of Proceedings in England in this way. If the Service Agent is served in accordance with clause 18.3, then the Defendant is precluded from contending that good and sufficient service has not taken place. That is the case, even if the Defendant has withdrawn its authority from the Service Agent to accept service on its behalf.[3]

17. I conclude that the Defendant is properly before the court.

D. IS IT APPROPRIATE TO MAKE THE DECLARATIONS SOUGHT?

18. This is not an application for judgment in default of an acknowledgement of service by the Defendant or of a defence. The hearing before me was the trial of the claim in the absence of the Defendant. Since the Defendant has been properly served, the court may proceed with the trial in the absence of the Defendant and give judgment or make an order against the Defendant: see CPR 39.3.

19. In this case, the only remedy sought by the Claimant is that of a declaration. Specifically, the Claimant invites me to make the following declarations (as set out in the draft order prepared by the Claimant):

> "1. The following amounts are due and payable in respect of the [Notes] issued by the Defendant and constituted under the terms of a Trust Deed dated 5 December 2003 between the Defendant and the Claimant…
>
> (i) principal outstanding in the amount of US$31,580,000 under the [Notes];
>
> (ii) interest at 0.25% per annum (at a daily rate of US$216.301), on the principal amount outstanding from 31 March 2017 up to 2 August 2017, in the amount of US$26,821.32;
>
> (iii) interest at 0.25% per annum (at a daily rate of US$216.301), on the principal amount outstanding from 3 August 2017 to and including the maturity date of the [Notes] of 31 March 2018, in the amount of US$51,912.24;

[2] Brocklesby 1/paras. 8-9.
[3] In *Cargill International Trading Pte Ltd v. Uttam Galva Steels Ltd* [2018] EWHC 974 (Comm) at [27]-[29], Popplewell J reached similar conclusions in relation to a service of suit clause in similar terms.

(ii) interest at 0.25% per annum (at a daily rate of US$216.301), on the principal amount outstanding from 1 April 2018 to and including the 13 November 2018, in the amount of US$49,100.33.

2. The total amount due and payable, in relation to the [Notes] as at 13 November 2018 is US$31,707,833.89."

20. The court's jurisdiction to grant declaratory relief derives from section 19 of the Senior Courts Act 1981. By CPR 40.20 the court may grant declaratory relief, whether or not any other remedy is claimed. However, the 2018 edition of *Civil Procedure* ("*Civil Procedure 2018*") notes at §40.20.2 that claims for declarations alone are unusual, and that generally declarations are sought and granted together with other forms of relief.

21. The power to grant declaratory relief is discretionary.[4] When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration.[5] More specifically:

(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.[6] A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.[7]

(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.[8]

(3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue.[9] In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.[10]

(4) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question", if all parties so wish, even on "private law" issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.[11]

(5) The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have

[4] *Rolls Royce plc v. Unite the Union* [2009] EWCA Civ 387 ("*Rolls Royce*") at [120](1).
[5] *Finance Service Authority v. Rourke* [2002] CP Rep 14.
[6] *Rolls Royce* at [120](2).
[7] *AXA SA v. Genworth Financial International Holdings Inc* [2018] EWHC 2898 (Comm) ("*AXA*") at [31].
[8] *Rolls Royce* at [120](3).
[9] *Rolls Royce* at [120](4); *AXA* at [32].
[10] *Federal-Mogul Asbestos Personal Injury Trust v. Federal-Mogul Ltd* [2014] EWHC 2002 (Comm) at [94]; *AXA* at [32] – [34].
[11] *Rolls Royce* at [120](5).

their arguments put before the court.[12] For this reason, the court ought not to make declarations without trial.[13] In *Wallersteiner v. Moir*, Buckley LJ said this:[14]

> "It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, *a fortiori* they should not be made in default of defence, and *a fortissimo*, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently…"

(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue.[15]

22. I turn, then, to the question of whether the declarations sought by the Claimant should be made. I have come to the conclusion that they should not be. This is for the following reasons:

(1) *Both sides of the argument will not be put.* This is the trial of a Part 8 claim, where I have found the Defendant to be properly before the court. The Defendant has chosen not to engage with these proceedings, although properly served (as I have found). The consequence is that the Defendant's contentions regarding the declarations sought by the Claimant will not be heard by the court. That, I fully accept, is not the Claimant's fault. I also accept that it would be invidious and wrong to allow a defendant's non-participation to prevent the making of declarations. That is particularly so where, as here, the claim is a Part 8 claim, not turning on substantial disputes of fact.[16]

Nevertheless, where the defendant is absent, even if that absence is not the fault of the claimant and might be said to be the fault of the defendant, it is incumbent on the court to approach the factors set out in paragraph 21 above with great care and with something of a conservative mindset against the granting of a declaration, bearing in mind the propositions summarised in paragraph 21(5) above.

(2) *Potential effect on a third party not before the court.* The Defendant is the subject of an insolvency process in India. As to this:

(a) On 4 August 2017, the Claimant received a communication from the Insolvency Resolution Professional appointed in respect of a Corporate Insolvency Resolution Process commenced against the Defendant.[17] According to this communication, this insolvency process had been initiated

[12] *Rolls Royce* at [120](6).
[13] See the authorities cited in *Civil Procedure 2018* at §40.20.3.
[14] [1974] 1 WLR 991 at 1029.
[15] *Rolls Royce* at [120](7).
[16] CPR 8.1(2)(a).
[17] Brocklesby 1/para. 57.

against the Defendant on 2 August 2017 by order of the Indian National Company Law Tribunal. The process, so I am told by Mr Brocklesby, is conducted pursuant to the Insolvency and Bankruptcy Code of the Republic of India 2016.[18]

(b) The Claimant, as Trustee, has been active in this process, submitting a proof of claim[19] and engaging in correspondence with the Insolvency Resolution Professional.[20] It is apparent that there are some disputes regarding the Claimant's claim in this process, regarding the Claimant's standing, as Trustee, to claim and regarding the claim to interest advanced by the Claimant in the course of this process.[21]

(c) The effect of these proceedings on the Insolvency Resolution Professional and the process conducted by him is unclear. There are two possibilities:

(i) Any declaration made by me will be entirely irrelevant in the Indian insolvency process, in which case the utility of making declarations must be questioned: this issue – the utility of the declarations[22] – is considered further below; or

(ii) The declarations I make will have an effect on the Insolvency Resolution Professional and the process conducted by him. There is no evidence of Indian law before me, and it would be speculation as to whether and, if so, how, any declarations I make would be taken into account. But it seems to me that the possibility of the Insolvency Resolution Professional being affected by declarations made in proceedings to which he is not a party is a factor that points clearly against the making of the declarations.

(3) *The existence of a real and present dispute and the potential for interference in a foreign process.* The need for a real and present dispute between the parties, that is resolved by the making of the declaration, is central to the question of whether a declaration should be made.[23] As to this:

(a) It is difficult to identify such a dispute as between the Claimant and the Defendant. Of course, the Defendant is in default under the Notes, but this is not a case where the Defendant would pay if the declarations sought were made. There is no dispute as to the terms of the Notes or the Defendant's obligations thereunder holding up payment that I can see.

(b) Rather, this appears to be a case where the Defendant simply cannot pay. The granting of a declaration setting out what the Defendant owes is not going to alter or resolve this position *quoad* the Defendant.

[18] Brocklesby 1/para. 58.
[19] Brocklesby 1/paras. 61-62.
[20] Brocklesby 1/para. 63.
[21] Brocklesby 1/paras. 64-71.
[22] The utility of the declaration sought is a relevant factor to take into account: see paragraphs 21(1) and (2) above.
[23] See paragraph 21 above.

(c) More to the point, the Defendant is now the subject of an Indian insolvency process. There do appear to be some points of dispute as between the Insolvency Resolution Professional and the Claimant, as Brocklesby 1/para. 64 makes clear.[24] I do not know – there is no evidence before me – whether any declarations in these proceedings will affect the Indian insolvency proceedings. However, if they were to have an effect, it seems to me that the declarations would amount to an improper[25] interference in a foreign process being conducted by a party (the Insolvency Resolution Professional) not before me, who has been unable to make submissions.

Thus, I find that as between the parties before the court, the declarations sought have no clear utility. Moreover, if and to the extent that the declarations sought will have an effect on a foreign process, it seems to me that this is an undesirable side-effect of making the declarations, and a strong indicator that they should not be made. Given the existence of these foreign insolvency proceedings, to the extent that disputes have arisen in those proceedings, they should also be resolved in those proceedings.

E. DISPOSITION

23. For these reasons, therefore, I consider that it would be inappropriate to make the declarations sought by the Claimant and I decline to do so. I should make clear, however, that my refusal has nothing to do with any concern on my part about the substance of the declarations sought or the basis of the Claimant's claim against the Defendant.

[24] "…it is clear that the [Insolvency Resolution Professional] does not accept certain elements of the Trustee's claim".

[25] The point was made before me that there was nothing in the Corporate Insolvency Resolution Process to preclude proceedings such as these. Also, these proceedings have not been recognised in this jurisdiction. I take both of these points, but I do not consider that they are an answer to the fundamental point, namely the risk that the declarations being sought in these proceedings appear to have no point so far as the Defendant is concerned, but may (and I put it no higher than that) have an effect against a third party. That is my reason for the use of the term "improper".