Case No: BL-2021-000590
Neutral Citation Number: [2022] EWHC 2860 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
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Fetter Lane
London EC4A 1NL

Wednesday 12 October 2022

BEFORE:

DEPUTY MASTER HANSEN

BETWEEN:

RASMALA TRADE FINANCE FUND

Claimant

- and -

TRAFIGURA PTE LIMITED

Defendant

MR S GOLDSTONE and **MR K WANDOWICZ** appeared on behalf of the Claimant

MR N KITCHENER, KC and **MS E JONES** appeared on behalf of the Defendant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. THE DEPUTY MASTER: I have before me today an application by the claimant (Rasmala) to make the amendments shown in paragraph 38 of the draft re-amended particulars of claim and a cross-application by the defendant (Trafigura) to strike out various parts of Rasmala's pleaded case, in particular paragraph 38 but also schedule 2 as referenced in paragraph 38 and paragraphs 26 to 30 of the reply, which are in materially the same terms as paragraph 38.

2. These proceedings concern five payments made by Rasmala to Trafigura ("the Rasmala Payments"). The payments were made in connection with Trafigura's sales of coal to its former trading partner, Farlin Energy and Commodities FZE ("Farlin"). Rasmala is a trade financier based in the United Arab Emirates. Trafigura trades in commodities, including coal, and is based in Singapore.

3. Rasmala brings this claim as a result of Trafigura's alleged complicity in a fraud perpetrated by Farlin against it. Rasmala contends that, in 2017/2018, Farlin defrauded it into advancing five payments totalling $22 million secured against specific shipments of coal in circumstances where, in reality, Farlin was insolvent and using the money to pay down historic liabilities.

4. Trafigura had done business with Farlin since 2015. Farlin was an established coal trader at the time. Trafigura entered into various contracts for the sale and delivery of coal in bulk to Farlin. Farlin's purchases from Trafigura were paid for by letters of credit or by telegraphic transfers financed by arrangements between Farlin and various financiers. Trafigura generally had no direct contact with Farlin's financiers but communicated to and through Farlin, its direct counterparty. This was the case with Rasmala. There is no evidence, so far as I am aware, that Rasmala ever contacted Trafigura or vice versa.

5. Farlin had an open credit limit with Trafigura of $10 million. As a matter of internal accounting, Trafigura allocated telegraphic transfer payments made by or on behalf of Farlin to Farlin's oldest debts outstanding under the credit limit. Trafigura maintain that this allocation was done by Trafigura with Farlin's knowledge and agreement and that Trafigura did not have any reason to believe that this allocation of funds had any impact on Farlin's financiers or would be of particular concern to them.

6. Farlin ceased trading towards the end of 2018, owing Trafigura approximately $12 million. As I have indicated, the present claim is concerned with five payments totalling $22 million made between August 2017 and March 2018 by telegraphic transfer to Trafigura's account with Deutsche Bank in London. Trafigura believed that each of these payments had been made by Rasmala on behalf of Farlin in payment of Farlin's outstanding debts to Trafigura. That belief was based on statements to that effect from Farlin and on various contemporaneous documents, including various agreements (referred to as tripartite agreements) which Trafigura understood had been reviewed and signed by Farlin and Rasmala. In fact, those documents were not genuine and Rasmala says that Farlin forged its signatures on the tripartite agreements, the purpose of that forgery being to deceive Trafigura as to the basis of the Rasmala Payments. On that basis, Rasmala claims it was the victim of a fraud by Farlin.

7. The background to Rasmala's dealings with Farlin is as follows. Rasmala entered into a Murabaha facility agreement ("MFA") with Farlin in July 2017, pursuant to which Rasmala would lend Farlin up to $20 million for the purchase of commodities. It is said that, under the terms of the facility agreement, Farlin would present Rasmala with certain documents relating to a proposed purchase (such as the contract and invoice) and Rasmala would purchase the commodities by transferring the purchase price directly to the seller. In return for financing Farlin's purchase, Rasmala says it was to receive an assignment of the monies due to Farlin from the onward sale of the commodities. Trafigura denies any knowledge of the existence or terms of the MFA or any assignment agreement at the time of the five payments. Thus, Rasmala's essential complaint is that Farlin tricked it into financing fictitious contracts for the sale of non-existent shipments of coal on the basis of forged documents. Those facts are, in my judgment, important to have in mind when considering the applications before the court.

8. Specifically, Rasmala alleges that, in advance of each of the five payments, Farlin submitted a bogus financing request and a fabricated contract to give the impression that the sum sought from Rasmala was required to finance coal to be purchased from Trafigura. Trafigura has now seen these contracts following pre-action correspondence and it is common ground that they do not correspond to genuine contracts between Trafigura and Farlin. In those circumstances, Rasmala alleges it was induced by fraud

to advance each of these five payments to Trafigura and/or that it made them in the mistaken belief that it was obliged to do so under the terms of the facility agreement.

9. The obvious defendant to these allegations, it might be thought, is Farlin. However, by these proceedings, Rasmala seeks to recover the five payments from Trafigura, alleging that Trafigura had actual or constructive knowledge of the Farlin fraud, as I have described it. Rasmala puts the claim against Trafigura in two different ways:

> (1) It alleges that the five payments were impressed with a constructive trust in Rasmala's favour, of which Trafigura was the trustee.
>
> (2) It alleges that Trafigura has been unjustly enriched by the Rasmala Payments at Rasmala's expense.

Rasmala alleges it is entitled, under either claim, to repayment of the entirety of the sums paid out.

10. By its proposed amendment, Rasmala seeks to amend its claim to include what are said to be similar fact allegations concerning Trafigura's involvement in frauds on other financiers. The proposed amendments concern five payments made to Trafigura between December 2017 and June 2018 by three foreign banks: National Bank of Fujairah ("NBF"), FIM Bank Plc ("FIM") and IIG Bank (Malta) Limited ("IIG"). The payments in question were as follows:

> (i) a payment of $3.9 million by IIG in December 2017;
>
> (ii) a payment of $3.08 million by FIM in April 2018;
>
> (iii) a payment of $5.36 million by FIM in May 2018;
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> (iv) a payment of $1.52 million by FIM in May 2018; and
>
> (v) a payment of $3.92 million by NBF in June 2018.

In my judgment, it is critical to the outcome of these applications that the terms of these payments were wholly different to the terms of the Rasmala Payments.

11. Each of the financing banks asked Trafigura for, and was given, a formal written undertaking to deliver certain documents, including, critically, a full set of original bills of lading, following receipt of payment from the banks. In each case, the banks appear to have received the formal undertaking that they had asked for. Those undertakings were received prior to payment and were the security on the basis of which the payment was made. There appears to be no dispute that each of the banks received the bills of lading in respect of the relevant payment, with one exception where the bank in question received alternative bills of lading about which it did not complain. Despite the fact that the banks received the security they asked for, Rasmala alleges that these payments were procured fraudulently by Farlin.

12. I should read from paragraph 38, which is the critical paragraph in the re-amended particulars. I propose to read out only the introduction but the remainder should be taken as incorporated by reference. Paragraph 38 in fact extends over ten or so pages. Just to put this in context, the context in the pleading is the state of Trafigura's knowledge in relation to the Rasmala Payments. Paragraph 38.1 says this:

> During the period in question, Trafigura, acting via Mr Gupta, Mr Gokhale and Mr Jasani, systematically applied financiers' advances (including, insofar as Rasmala is currently aware, advances by each of NBF, FIM, and IIG Bank (Malta) Limited ('IIG')) against Farlin's historic debts rather than against the fresh, assignable, shipments which the financiers believed they were funding. In essence, Trafigura was maintaining, for its insolvent customer, a Ponzi scheme whereby new advances, procured fraudulently, were used to pay off old debts that Farlin could not have properly or honestly serviced. In paragraph 49 of its Defence, Trafigura complains that the foregoing allegations are inadequate. In answer to that complaint, Rasmala pleads the best particulars it currently can as to Trafigura's practices, but Rasmala must and does reserve the right to amend and/or plead further herein following disclosure by Trafigura.

Then what follows are, as I say, ten pages odd of particulars in relation to those other transactions involving the three banks identified and Farlin and Trafigura which are said to be similar fact evidence of Trafigura's practices.

13. The claimant wishes to plead out the detail of effectively five separate frauds, or alleged frauds, perpetrated by Farlin on three foreign banks in which funds were paid to Trafigura and allocated by Trafigura to historic debts as opposed to the specific shipments which the financier thought it was financing. It seeks to plead this material out on the basis that it is similar fact evidence probative of Trafigura's knowledge generally and specifically in relation to the Rasmala Payments. Paragraph 38 ends with the averment that:

> "Rasmala will rely on the foregoing as evidence of Trafigura's actual knowledge that the Payments were sought by Farlin in order to maintain a credit line with Trafigura, alternatively that Trafigura wilfully turned a blind eye to the obvious likelihood that Farlin was deceiving financiers into advancing sums to be allocated other than against the liabilities which the financiers believed they were financing".

14. In considering the two applications before me, there was a broad measure of agreement as to the approach that I should take. It is common ground that similar fact evidence in civil proceedings *is* admissible in appropriate circumstances. At the pleading stage, the question is whether the facts pleaded, if proved, would be admissible (see eg *Sheeran & Ors v Chokri & Ors* [2019] EWHC 3584 (Ch) at [21]). This involves the application of a two-stage test (see *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 at [3]-[6]). The first stage is whether the facts, assuming them to be true, are potentially probative or disprobative of some matter which requires proof in the proceedings. The second stage is separate and involves considering the potential significance of the facts and matters relevant to the overriding objective, such as:

> (i) whether the trial would be distorted and the attention of the decision-maker distracted;
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> (ii) whether the probative value of the facts outweighs the potential for causing unfair prejudice; and
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> (iii) whether there would be a substantial burden on the resisting party.

(See also in this connection *JP Morgan Chase Bank & Ors v Springwell Navigation Corporation* [2005] EWCA Civ 1602 at [76]-[82].)

15. In addition, in so far as paragraph 38 includes an allegation of fraud, as it clearly does, the special rules that apply to pleading fraud apply. They are helpfully set out in paragraph 40 of the defendant's skeleton and I regard them as uncontroversial and do not propose to repeat them here although I have them very much in mind.

16. The defendant resists the proposed amendments on four grounds:

> (i) on the basis that they do not advance a properly-pleaded case that Farlin perpetrated a fraud on the banks, of which Trafigura was on notice;
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> (ii) they are not supported by any or any credible evidence which establishes a sufficiently arguable case that the allegations are correct;
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> (iii) they are not relevant to any issues in the proceedings; and
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> (iv) they would, if permitted, distort the entire proceedings and impose an unfair and prejudicial burden on Trafigura.

17. I will consider each of those grounds in due course, but it is instructive, in my view, to begin the analysis by comparing the Rasmala Payments to the payments which are the subject of the proposed amendment. I have touched on this already above. The Rasmala Payments are alleged to have been made in respect of fictitious shipments of coal based on forged documents. There was no coal, there were no shipments and the underlying documents were forgeries. By contrast, the payments I am now concerned with were made in respect of cargoes that existed and were shipped. The payments were necessary in order to finance those cargoes and Trafigura formally undertook to provide the banks with security over those cargoes. The complaint is that, in its own accounting books, Trafigura allocated these payments to earlier accruing debts that formed part of the credit limit rather than to the debts referable directly to the new

shipments being financed by the bank. I interpose and repeat the point I made earlier that in fact this was part of Trafigura's normal internal accounting processes.

18. Turning then to the merits of the application and cross-application, my conclusions are as follows. I regard the evidence of these five transactions as dissimilar fact evidence, not similar fact evidence. In one sense, that is sufficient, in my view, to refuse the application to amend and accede to the strikeout application. Other than in the most general sense, it seems to me that these two groups of payments arose and were made in wholly different circumstances and I have outlined the obvious differences above. Any similarity was tangential in the extreme, in my view, and the only similarity that Mr Goldstone could point to was the fact that these monies were allocated ultimately to historic debts rather than to the specific shipments. That is not, in my judgment, sufficient to bring all this material into this trial. It is not a licence for an open-season approach to evidence of this kind.

19. In any event, there are in fact other compelling reasons for taking the course that I propose to take of at least equal, if not greater, force. Whilst I am prepared to accept (just) at this interim stage, bearing in mind what Nugee J said in the *Sheeran* case about being careful not to rush to judgment at the pleading stage, that the amendment does advance a properly-pleaded case with a sufficient evidential foundation that Farlin perpetrated a fraud on the banks, I am not persuaded that there is a sufficient evidential foundation to allege knowledge of that fraud on the part of Trafigura.

20. In so far as Farlin is alleged to have made dishonest representations to the banks, there is no allegation that anyone at Trafigura knew about the alleged representations. I agree with the defendant's submission that no primary facts are pleaded from which it could be properly inferred that Trafigura had reason to believe Farlin was deceiving the banks by agreeing that the non-party payments should be allocated to Farlin's older debts. In particular, I agree with the passage in the defendant's skeleton argument which reads as follows:

> "Mr Bitcon suggests that '*good practice*' required the individuals at Trafigura to seek the Banks' agreement to apply the Pleaded Non-Party Payments to

shipments other than those referenced in Trafigura's undertakings. It is unclear what is meant by 'good practice', or in what industry this practice is said to exist. Trafigura was a seller of commodities and typically had no direct relationship with any of Farlin's financiers. It is not obvious why 'good practice' would require Trafigura to make contact with its counterparty's financier. The individuals at Trafigura are not, and were not, aware of any such 'good practice': Summerfield 2, §5. There is, in any event, no suggestion that non-compliance with any such 'good practice' would have been dishonest".

21. Further, I am in agreement with the defendant's submission that the pleaded facts do not support the allegation of a Ponzi scheme. In the context of real contracts, real shipments, real coal and real security, I do not consider this allegation to be properly arguable. Mr Goldstone rightly reminded me that I should not get too hung up on one word, but this is a very serious allegation to make and requires a sufficient evidential foundation, which I consider to be fundamentally lacking.

22. The banks in question asked Trafigura for security. Trafigura undertook to provide that security and did so. The banks were provided with the critical documents of title, namely the original bills of lading. They therefore bargained for security and got what they bargained for. They thought they were undertaking secured lending and they were. They were financing specific shipments because they were getting title to the goods in question. The fact that, in their internal books of account, they allocated those monies to historic debts of Farlin is not, in my judgment, indicative of fraud, still less a Ponzi scheme.

23. In addition, and for substantially the same reasons as I have already set out above, I am singularly unpersuaded that the proposed amendments are really probative of what Rasmala seeks to, and needs to, prove in relation to the Rasmala Payments. We come back to the similarity or lack of it as between the Rasmala Payments and the non-party payments. In any event, Trafigura's alleged knowledge of Farlin deceiving other financiers about the allocation of their payments, even if proved, has little or no bearing, in my judgment, on whether Trafigura knew of the Farlin fraud perpetrated on Rasmala, which, as is apparent from what I have said already, is or was a fundamentally different fraud.

24. Having said all of that, even if I were wrong about all the other factors militating in favour of strikeout and against allowing permission to amend, there is a further factor which on its own would, in my judgment, be decisive and militates very clearly against allowing these amendments. That is the case management dimension.

25. To establish that the banks were defrauded by Farlin and that Trafigura was on notice of the fraud, Rasmala needs to plead and prove the state of mind of Farlin, Trafigura and the three banks concerned. They are all foreign banks, as indeed are the parties to this litigation. Of those players, the only party before the court is Trafigura. There is no suggestion that Farlin or any of the banks is or will be participating in the proceedings, and Rasmala accepts that it does not have first-hand knowledge of the state of mind of the relevant individuals at the banks. In those circumstances, and having regard not only to the fact that the parties and the three banks are based abroad but also to the nature of the non-party payment allegations, it is quite clear to me that the burden on the parties and the court of trying not one case but four or six (depending on how you treat the similar fact evidence) cannot be underestimated.

26. I can see fundamental problems in fairly trying these new allegations in these circumstances. It seems likely, for example, that the alleged victims of the fraud will not themselves be participating. I find it difficult to envisage a fair trial of these allegations in those circumstances. In addition, the delay and additional expense will be very considerable. This application has already delayed matters by about a year. The pleadings are not closed even now as a result. I can readily anticipate a contested request for further information in relation to these new allegations if I accede to the amendment application. Equally, I can readily anticipate hotly-contested extended disclosure applications, including potentially multiple disclosure guidance hearings. There will also be a need for expert evidence on the practice referred to by Mr Bitcon, to which I referred earlier. The list goes on.

27. This is not imaginary prejudice or contrived prejudice on the part of the Defendant for forensic purposes; it is real and obvious and the unfairness or potential for unfairness is palpable and real. In my judgment, these amendments, if allowed, will distract the parties and the judge from what ought to be front and centre in this case, namely the Rasmala Payments. The authorities to which I have referred support a careful,

proportionate and properly-calibrated approach to allowing in similar fact evidence of this kind. Every case is different and fact-sensitive, but I am clear that this is not a case where it would be appropriate to permit these amendments. To do so would distort and overburden the trial for no good reason.

28. As was said in the *Springwell* case, to which I referred earlier, at paragraph 81:

> "All this threatens either to overburden the trial or, if steps are taken that are directed simply to avoiding that burden, to deprive Chase of effective scrutiny of the case put against it. Neither outcome is acceptable. There is in the end an unavoidable choice to be made between trying one case -- the present case -- and trying three."

Those comments are, it seems to me, particularly apposite in the present case and I have come to the clear conclusion that the only appropriate choice is to confine the claimant to the one case as presently pleaded and not allow a further three or five (depending on how you count) to be added to the pleading.

29. For those reasons, I dismiss the application to amend and accede to the application to strike out.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge