Neutral Citation Number: [2018] EWHC 1330 (Comm)

Case No: CL-2013-000666

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/05/2018

Before :

MR JUSTICE ROBIN KNOWLES CBE

Between:

SANA HASSIB SABBAGH

Claimant

and

(1) WAEL SAID KHOURY
(2) SAID TOUFIC KHOURY (deceased)
(3) SAMER SAID KHOURY
(4) TOUFIC SAID KHOURY
(5) SAMIR HASSIB SABBAGH
(6) SUHEIL HASSIB SABBAGH
(7) WAHBE ABDULLAH TAMARI
(8) CONSOLIDATED CONTRACTORS GROUP SAL (HOLDING COMPANY)
(9) CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL (OFFSHORE)
(10) HASSIB HOLDING SAL

Defendants

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Laurence Rabinowitz QC, John Wardell QC, Simon Colton QC and James Walmsley (instructed by **Mishcon de Reya LLP**) for the **Claimant**

Philip Edey QC and Andrew Fulton (instructed by **Baker & McKenzie LLP**) for the **Eighth Defendant**

Jessica Hughes (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Fifth, Sixth and Tenth Defendants**

Hearing dates: 27-28 February 2018

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Judgment Approved

Mr Justice Robin Knowles:

Introduction

1. The Claimant ("Sana") and the Fifth and Sixth Defendants ("Samir" and "Suheil") in this litigation are siblings. They are respectively the daughter and two (younger) sons of the late Mr Hassib Sabbagh ("Hassib").

2. Hassib was one of the founders of what became the Consolidated Contractors Company group of companies ("the CCC group"), the largest group of engineering and construction companies in the Middle East. The Eight Defendant ("CCG") is the Lebanese holding and ultimate parent company in the CCC group. The Tenth Defendant ("HH") is a Lebanese company owned and controlled by Samir and Suheil.

3. The First Defendant, Mr Wael Said Khoury ("Wael"), is domiciled in England and Wales. The other Defendants are brought within the jurisdiction of the courts of England & Wales as necessary and proper parties to the litigation against Wael and under Article 6(1) of the Brussels Regulation.

4. The brothers, Samir and Suheil, together with CCG and HH, are also claimants in an arbitration seated in the Lebanon (together "the Arbitration Claimants" in "the Lebanese Arbitration").

5. The Lebanese Arbitration was commenced against Sana after Sana had commenced this litigation. Sana contends that there is no agreement to arbitrate, and has taken no part in the arbitration. The tribunal in the Lebanese Arbitration has ruled that it has jurisdiction. This has been without argument on behalf of Sana.

6. As appears below, the Arbitration Claimants have tried and failed in an attempt to obtain from the courts of this jurisdiction a mandatory stay of the litigation here by reason of the Lebanese Arbitration.

7. Sana now applies for an interim injunction from this court to require the Arbitration Claimants not to prosecute the Lebanese Arbitration, to take steps to stay it, and not to seek recognition or enforcement of any award made in that arbitration. The proposed order would be subject to a permission to apply in material change of circumstances.

The two material claims

8. Two claims are material. They have been described individually as "the asset misappropriation claim" and "the share deprivation claim".

9. In a decision dated 28 July 2017 ([2017] EWCA Civ 1120) the Court of Appeal of England & Wales (Gloster V-P, Patten and Beatson LJJ) summarised these two claims as follows:

> "7. On 29 June 2002 Hassib [Sana's father] suffered a severe stroke which incapacitated him for the rest of his life and, it is alleged, rendered him unable to make any business decisions or to manage his own affairs. In proceedings issued in the High Court on 9 July 2013 [Sana] alleged that the principal defendants conspired from a date shortly after Hassib's stroke to misappropriate assets belonging to Hassib and that since his death in 2010

> they have also conspired to deprive her of her entitlement to the shares in CCG which she claims belonged to Hassib at the date of his death. These two claims have been labelled the asset misappropriation claim and the share deprivation claim and, for convenience, we shall adopt the same terminology.
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> 8. The asset misappropriation claim relates for the most part to dividends from Hassib's shares in CCG which were used either to make investments in other companies and property or to meet expenses such as the running costs of an aircraft. It is not in dispute that before his stroke Hassib used and authorised CCIC [Consolidated Contractors International Company, a company in the CCC group and the Ninth Defendant] to pay family expenses and charitable donations out of his income from dividends and other investments. But the allegation is that, following Hassib's stroke, accumulated dividends and other income were used knowingly by the defendants (other than [the Seventh Defendant] and HH) to make improper or unauthorised investments in their own names and that, when sold, the proceeds of sale from these investments were not accounted for or applied for the benefit of Hassib. To the extent that they would otherwise have formed part of Hassib's estate on death, [Sana] seeks damages for conspiracy based on the value of the misappropriated assets.
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> 9. The share deprivation claim depends on Hassib having retained ownership of shares in CCG at the date of his death. [Sana] relies on a confirmation by the Commercial Registry in Beirut ("the Commercial Registry") dated 16 January 2010 that its register contained an entry which records that, as at 10 May 2009, Hassib continued to hold 399,915 shares in CCG. She alleges that following her father's death, the defendants conspired to deprive her of her entitlement under Lebanese law to a third of this shareholding by unlawfully procuring the transfer of the shares to HH."

10. I am satisfied that the claims pursued in, or the issues truly in dispute in, the Lebanese Arbitration, commenced by the Arbitration Claimants shortly after Sana commenced the present litigation in this jurisdiction, are within the two claims described above. There is ample material to demonstrate this identity of claims or issues, but perhaps the clearest is a passage in a Memorial on Jurisdiction dated 8 October 2015 submitted by three of the Arbitration Claimants. This stated at paragraph 201 that the claims brought by the Arbitration Claimants in the Lebanese Arbitration "correspond in substance" to the share deprivation claim and the asset misappropriation claim.

11. Mr Philip Edey QC (appearing with Mr Andrew Fulton and whose joint argument for CCG represents the position of all the Arbitration Claimants, with Ms Jessica Hughes also appearing) contends that the presence of an allegation of dishonest conspiracy in the litigation in this jurisdiction distinguishes the two claims from the claims also pursued in the Lebanese Arbitration. In my judgment the contention does not, with respect, meet the key point for present purposes which is, as I have said, that the claims pursued in, or the issues truly in dispute in, the Lebanese Arbitration are within the two claims described above.

Article 45 of the Articles of Association of CCG

12. The Arbitration Claimants rely on Article 45 of the Articles of Association of CCG ("the Articles") to give jurisdiction to the Lebanese Arbitration in respect of the two claims.

13. That Article is in these terms:

> "Disputes
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> Every dispute arising during the course of the existence of the company or during its liquidation, whether between shareholders themselves or between shareholders and the company itself, shall be solved through mediation or else through arbitration according to the regulation put in place by the First Board of Directors …, provided that the general shareholders assembly has approved it.
>
> Disputes are divided into two kinds:
>
> A) Individual disputes in which the aggrieved party has the right to file a claim according to the directives of Article 166 of the Trade Act against the company, and which the shareholders are not permitted to halt through the balloting process via the general shareholders assembly for the purpose of releasing from responsibility the members of the Board of Directors
>
> B) Disputes involving the general interests of the company; these cannot be directed against the Board of Directors or against one of its members except in the name of and on behalf of a group of shareholders, and in accordance with a decision from the regular general shareholders assembly."

The decision of the Court of Appeal of England & Wales

14. It was in its decision dated 28 July 2017, from which I have quoted above, that the Court of Appeal of England & Wales addressed, at the request of the Arbitration Claimants, the question whether a mandatory stay of the litigation in favour of the Lebanese Arbitration must be imposed. The Court of Appeal concluded, in favour of Sana, that the answer was no.

15. The reasoning of the Court of Appeal was as follows:

> "<u>Article 45: asset misappropriation claim</u>
>
> 122. It was common ground that the only way by which the claimant could be bound by Article 45, in relation to the asset misappropriation claim, was in her capacity as Hassib's heir. Sana was not, and nor did she claim an entitlement to have been, a shareholder in CCG at any time relevant to this claim.
>
> 123. Moreover, as the judge recorded at [246]-[248], the parties' experts on Lebanese law were in effect agreed that Sana would only be bound insofar as the asset misappropriation claim was based on the contract containing the arbitration clause; that is the articles of association. Therefore, regardless of the scope of Article 45, the claimant would only be bound by it if the asset misappropriation claim was based on CCG's articles of association.
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> 124. In our view the asset misappropriation claim is not based on CCG's articles of association, either when made by Sana in her own right or when

brought in her capacity as Hassib's heir. Accordingly, Sana is not bound by Article 45 and questions of the scope of the clause fall away. As the judge found, the proper characterisation of the asset misappropriation claim, evaluated as a matter of substance and not form, is a claim based on the general Lebanese law concerning an alleged conspiracy to deprive Sana of what is said to have been Hassib's property. The claim is not concerned with breaches of the articles of association, and is essentially no different from a (hypothetical) claim that the defendants conspired to take other property from Hassib which Sana would otherwise have inherited. This is not merely due to the fact that the claim is framed in non-contractual terms, nor is it a matter of clever pleading. The claim is in substance different from a claim based on the articles of association.

125. For these reasons, we also agree with the judge that the claim is not an accounting claim in relation to Hassib's "shareholder account", and that it is not appropriate to siphon off a part of this claim for a mandatory stay. To the extent that there is an accounting exercise, it relates to a quantification of the claim based on the general law. Nor, similarly, is the claimant asserting a right to receive dividends qua shareholder: rather, the claim is that dividends which were declared were improperly diverted away from Hassib (and thus Sana).

126. Finally, in relation to why Sana is not bound by Article 45, it is no answer for the defendants to suggest that the judge overlooked or failed to apply the evidence of Professor Slim to the effect that the asset misappropriation claim could only have been brought as a claim in contract in Lebanon. The obvious and dispositive reason is that the defendants did not challenge on appeal the judge's conclusion that the asset misappropriation claim, as framed as a non-contractual claim, was arguable. This contention therefore simply goes to the merits of the asset misappropriation claim as a matter of Lebanese law. Secondarily, it follows from our conclusion above concerning characterisation that, in fact, the asset misappropriation claim could not have been brought as a contract claim based on rights derived from the articles of association.

127. It follows that it is not necessary to consider whether the asset misappropriation claim falls within the scope of Article 45. However, our view is that, even if the claimant had been bound by the arbitration clause, the asset misappropriation claim would not have been within its scope. This is because the scope of Article 45 is limited by Article 762 of the Lebanese Code of Commerce, which prescribes that arbitration clauses are only valid insofar as they relate the interpretation, enforcement or performance of the contract in question. Moreover, Article 45 is expressly confined to the two kinds of disputes identified as 'A' and 'B', and the asset misappropriation claim does not fall into either category.

Article 45: share deprivation claim

128. The claimant could only be bound by Article 45 if the share deprivation claim was brought as Hassib's heir or if Sana was claiming to be entitled to be recognised as a shareholder.

129. In our view, Sana is again not bound by Article 45. It is clear that she is not claiming as heir: the claim was in no sense inherited from Hassib, and

> indeed Hassib could not have brought the claim which the claimant does bring. The claim is not based on the articles of association, but on the general law. Similarly, we are inclined to accept that Sana is not claiming an entitlement to be recognised as a shareholder, but rather is claiming that the defendants have deprived her of this entitlement. The relationship is tripartite: whilst Hassib would have been bound to arbitrate an assertion that he was entitled to be recognised as shareholder, as against the defendants, this cannot bind *Sana* to arbitrate her claim even if her claim depends in part on the question of Hassib's ownership, since she does not claim on Hassib's behalf.
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> 130. In any event we would also accept that the share deprivation claim is, like the asset misappropriation claim, outside the scope of Article 45 since the arbitration clause is confined to the two specified kinds of disputes."

16. The Arbitration Claimants made an application for permission to appeal to the Supreme Court. In the period since I heard argument in this matter, on 12 March 2018 the Supreme Court of the United Kingdom has refused permission to appeal the decision of the Court of Appeal.

The interim injunction sought

17. The Arbitration Claimants accept (at the level of the Commercial Court, and in my view rightly) that the court has power to grant an interim injunction in the terms sought by Sana.

18. The power is exercisable where it appears to the court just and convenient to do so: see section 37(1) Senior Courts Act 1981 and see Albon v Naza Motor Trading Sdn Bhd [2007] EWCA Civ 1124; [2007] 2 CLC 782 (CA).

19. Where, as here, the injunction sought would restrain participation in an arbitration with a foreign seat, and the foreign seat offered appropriate supervisory jurisdiction, the authorities have referred to the need for exceptional circumstances for (at least where arbitration was agreed) and caution in the exercise of the power: see Claxton Engineering Services Ltd v TXM Olaj-Es Gakutato KTF [2011] EWHC 345 (Comm); [2012] 1 CLC 326 at [24]-[51] per Hamblen J (as he then was) and the cases there cited, and Excalibur Ventures LLC v Texas Keystone Inc & Ors [2011] EWHC 1624 (Comm); [2011] 2 CLC 338 at [53]-[71] per Gloster J (as she then was) and the cases there cited.

20. Specifically, the exercise of the power may be appropriate if continued pursuit of an arbitration would be vexatious and oppressive: see Claxton (above) at [34]-[36]. That may be the case where the court concludes that the parties did not agree to arbitration: see Claxton (above) at [34]-[42].

21. The parties disagree whether, for the purpose of an interim injunction, vexation or oppression has to be established finally (as contended by Mr Edey QC), or whether it must be shown to a high degree of probability. As between the two, in my view principle supports the latter. However, as will be apparent from what follows below, in the present case nothing turns on the difference.

22. I should add that although I am asked to grant an interim injunction, and that the proposed order would be subject to a permission to apply in material change of

circumstances, there may be little if any difference in practice between the material available to me now and the material available at a final hearing. I also appreciate that the consequences of my granting an interim injunction may in practice be final. I approach the matter with these considerations firmly in mind.

The present case

No agreement to arbitrate the two claims

23. It is common ground that Sana is not suing as a shareholder. She cannot therefore be bound by Article 45 on the basis that she is suing as a shareholder.

24. Mr Laurence Rabinowitz QC (appearing with Mr John Wardell QC, Mr Simon Colton QC and Mr James Walmsley on behalf of Sana) contends it is clear that what has been decided by the Court of Appeal, as ratio - that is, essential to its decision in the matter, is that in the two claims Sana is not bound by Article 45 because the claims are not based on the Articles and she is not suing on behalf of Hassib as a shareholder. Mr Rabinowitz QC argues that there is an issue estoppel binding the Arbitration Claimants in this respect.

25. The meaning of issue estoppel can be taken from the statement of Lord Keith of Kinkel in Arnold v National Westminster Bank plc [1991] 2 AC 93 at 105D-E, cited by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46; [2014] AC 160 at [20]:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

Lord Sumption JSC went on, at [22], to conclude that one of the propositions for which Arnold was authority was:

> "… Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. …"

26. Mr Edey QC counters that where there are alternative bases for a decision there may be no issue estoppel. I do not rule out that in some cases the presence of alternative bases may leave argument over the presence or compass of an issue estoppel. However in my judgment in the present case it is plain that the basis for the decision is that identified above, namely that in respect of the two claims Sana is not bound by Article 45 because the claims are not based on the Articles and she is not suing on behalf of Hassib as a shareholder.

27. Mr Rabinowitz QC accepts that paragraphs 127 and 130 of the Court of Appeal's judgment contain conclusions that are obiter – that is, not essential to its decision in the matter. Even as regards the conclusions of the Court of Appeal that are obiter, for my part, and for the purposes of the matters before me for decision on this application, I respectfully consider the conclusions to be correct, for the reasons given by the Court of Appeal.

28. Mr Edey QC argued that the injunction sought would leave unresolved "the question of who are the rightful shareholders in CCG". However that is not an issue between the Arbitration Claimants and Sana because Sana is not claiming a right to be a shareholder, and this was made clear to the Court of Appeal. The question identified by Mr Edey QC cannot therefore be a reason for the Lebanese Arbitration.

29. Thus the parties did not agree to arbitration in respect of the two claims. The reasoning of the Court of Appeal shows why a conclusion of the tribunal in the Lebanese Arbitration that it has jurisdiction is wrong. The Arbitration Claimants do not accept that, but they should. They have deployed their argument about Article 45 and it has been shown to fail.

The Lebanese Court

30. Mr Edey QC argues that the fact that the Court of Appeal of England & Wales has addressed the points of Lebanese law that it has does not justify the English Court precluding, by the discretionary injunction now sought, the possibility of the Lebanese Court looking at the matter in its supervisory role as the court of the seat of the Lebanese Arbitration.

31. In my view the correct way to look at the matter is to treat the conclusions of the Court of Appeal as conclusions that a Lebanese Court would have reached had it looked at the matter. What matters is not which court decided them but that they are correct conclusions of Lebanese law. And those conclusions are to the effect that, in respect of the two claims, there should be no arbitration including so as to engage the supervisory jurisdiction of a court.

32. I have said why the question of further recourse to the Lebanese Court does not assist. I add that on the expert evidence of Mr Samir S. Chebli (submitted by Sana, and which I find to be cogent and accept) there is no application that can be made at this stage to the Lebanese Court.

Delay

33. Delay by an applicant is an important consideration in this area of the court's jurisdiction: see the discussion of delay in Ecobank Transnational Incorporated v Tanoh [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360; [2016] 1 WLR 2231. It is said that there has been delay by Sana. I am not satisfied that there has been.

34. Certainly the chronology of events does not in the present case cause me to consider the interim injunction in the terms sought to be any less just and convenient. Indeed the point at which there is now clarity, available to all parties and after argument from all parties rather than one (however diligently that one sought to put both sides of the argument before the tribunal in the Lebanese Arbitration), is the decision of the Court of Appeal, on 28 July 2017.

35. It is sufficiently clear for the purpose of an interim injunction that, whatever their approach before, at that point all parties should have accepted that the Lebanese Arbitration should not continue. It is from that point that continuation by the Arbitration Claimants attracts the sense of abuse of the court's process that the authorities show is part of the way in which the terms vexation and oppression are used in the present context.

36. I find no delay past that point which is to be held against Sana. She invited undertakings on 2 August 2017 and issued an application for an interim injunction on 7 August 2017. The issue of the present application for an interim injunction followed on 15 September 2017 following an order made by consent by Popplewell J on 9 August 2017.

Other impact on the Arbitration Claimants

37. It is quite correct that the Lebanese Arbitration was commenced over 3 years ago. Having issued an award on its jurisdiction the tribunal is said to be close to an award on merits. Substantial legal costs have been spent by the Arbitration Claimants in the Lebanese Arbitration.

38. But these points must be seen in context. Sana's position has been transparent both in the proceedings here and in her refusal to engage in the Lebanese Arbitration. It is said that Sana's concern is really with any enforcement of an arbitration award rather than with the arbitration itself, but in my view she is concerned with both. The two should be seen as part of a single path that the Arbitration Claimants are, wrongly, trying to insist on. Now the Court of Appeal has reached the decision it has, why make things worse by delaying the consequences of that decision until the stage when enforcement of an arbitration award is attempted?

Other cases

39. Mr Edey QC skilfully drew attention to the differences between this case and other cases. This was of assistance, but ultimately each case will turn on its facts and circumstances.

40. If I may take three examples. First, in contrast to the facts and circumstances in Claxton (above) Mr Edey QC points out that Sana does not have the benefit of an exclusive jurisdiction clause in her favour, both to show there was no agreement to arbitrate and also to show that the courts of this country had jurisdiction. That is true, but it does not decide the question of vexation or oppression.

41. Then in Claxton there had been a prior decision that the English Court would decide the question of the arbitration tribunal's jurisdiction. That is not the case here, as Mr Edey QC highlights, but the reasoning that decides that question has nonetheless been set out by the Court of Appeal.

42. And third, Mr Edey QC emphasised that in Excalibur (above) there had been a finding that England & Wales was the natural forum for the dispute. That is true, but in the present case jurisdiction in England & Wales has been properly established in relation to the two claims, and the Lebanese Arbitration has (for the reasons given) no jurisdiction. I am prepared to regard that as sufficient in the context of the present case and believe that this respects the sense in which "natural forum" was identified as a condition by Rix LJ when dealing with anti-suit (rather than anti-arbitration) injunctive relief in Glencore International v Exter Shipping [2002] EWCA Civ 528; [2002] CLC 1090 at [42]-[43]; see also Albon (above) per Longmore LJ at [7].

43. The differences to which Mr Edey QC drew attention did not reveal a difference that went to principle. Ultimately the question remains the one I have sought to address.

Conclusion

44. In my judgment, in the present case it is vexatious and oppressive for the Arbitration Claimants, in the face of the decision and reasoning of the Court of Appeal, to press on with the Lebanese Arbitration against Sana with a view to obtaining an award against her which they will then try to enforce or have recognised against her.

45. Their proposed conduct produces uncertainty, and charts a course to wasted resources and delay, and this when it is plain now that the Arbitration Claimants have fought and lost on their contention that Sana is bound by Article 45.

46. I have no hesitation in concluding that it is just and convenient to grant an interim injunction in the terms sought. Indeed it is, in my judgment and fully respecting the caution required in this area of the court's jurisdiction, a plain and compelling case for the exercise of my discretion.

47. I fully appreciate the significance of a court that is not the supervisory court granting an injunction to prevent parties prosecuting a foreign arbitration. But in the present case those parties caused the question whether the arbitration clause bound Sana to be put to the courts of England & Wales, argued that question before those courts, and received an answer that Sana was not bound. They are bound by that answer and its consequences, and it is just that they should be held to that answer and its consequences.

48. The consequences include that there is no relevant agreement to arbitrate. The injunction seeks to prevent conduct by the parties based on the asserted validity of an arbitration when there is no valid arbitration. The parties have not "unquestionably agreed" to arbitration under "an agreement providing for arbitration with its seat in a foreign jurisdiction" so as the engage the question of infringement of principles of the law of international arbitration agreed under the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958) and recognised in the Arbitration Act 1996 as that question was engaged in Weissfisch v Julius [2006] EWCA Civ 218; [2006] 1 Lloyd's Rep 716 at 722 (CA) at [33] (per Lord Phillips LCJ).

49. I acknowledge that in the present case the arbitrators in the foreign arbitration have themselves reached a conclusion on the question of whether there is an agreement to arbitrate so as to give them jurisdiction. But such a conclusion would always be subject to any conclusion reached on subsequent judicial consideration. In the present case there has been that subsequent judicial consideration. It has not been by a supervisory court but it has been by a court properly fulfilling its role in litigation properly before it, and in addressing a question put to it and argued before it by the parties who contended that there was an agreement to arbitrate.

50. This is an exceptional case in many respects, and on a close appreciation of its circumstances I hope it will be understood that it is not one that involves any undue assertion of the jurisdiction of the courts of England & Wales.

Other matters

51. Sana says additionally she does not have confidence in the arbitration tribunal, or the Lebanese supervisory court. In the event she did not ask that I make findings on this aspect. The Arbitration Claimants challenge her points and their foundation. I do not

need to go into the material on the points or on this aspect of the matter. It is appropriate that I should not do so where the outcome would not be altered.