Neutral Citation Number: [2015] EWCA Civ 1212

Case No: A3/2014/2183

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE LEGGATT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PATTEN
and
LORD JUSTICE CHRISTOPHER CLARKE

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Between :

FFI-GLOBAL S.r.l.	**Claimant/ Respondent**
- and -	
(1) OUTEIRO LIMITED **(2) GULIA TALIPOVA**	**Defendants/ Appellants**

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Benjamin Tankel (instructed by **Warren's Law and Advocacy**) for the **Appellants**
Christopher Stirling (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**

Hearing date : 3 November 2015

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Judgment

Lord Justice Patten :

1. This is an appeal by the defendants, Outeiro Limited ("Outeiro") and Ms Gulia Talipova, against an order of Leggatt J dated 13 June 2014 by which he granted summary judgment against Outeiro in the sum of £366,999 for goods ordered and supplied but stayed enforcement of the judgment for any sums in excess of £300,000 pending the trial of Outeiro's counterclaim for damages based on the alleged late delivery and defective condition of the goods.

2. The claimant, FFI-Global S.r.l. ("FFI"), is an Italian clothes manufacturer. The garments it made at the time relevant to this claim included goods under the Marithé+François Girbaud ("MFG") clothing brand for which it had a licence from MFG. These goods were supplied to and retailed through various franchised MFG branded retailers in Europe including Outeiro. Outeiro commenced business in 2012 and during the period relevant to this claim traded from premises in New Bond Street in London.

3. The second defendant, Ms Talipova, is the sole director and shareholder of Outeiro. In addition to the claim against Outeiro for the price of goods supplied, FFI also seeks damages against Ms Talipova for deceit based on alleged representations which she made about Outeiro's ability and intention to pay as a result of which FFI says that it was induced to make deliveries of goods to Outeiro for which no payment has been or is likely to be made.

4. The claim for deceit is based on an e-mail which Ms Talipova sent to FFI on 11 July 2013 and on what is alleged to have been said by her during the course of discussions in September 2013. The July e-mail was sent at a time when Outeiro had already failed to pay for garments from the MFG Summer 2013 Collection the supplies of which had begun in December 2012. Under FFI's standard terms, the goods were required to be paid for in advance of delivery. By July Outeiro had been asked to produce an acceptable payment plan failing which no further deliveries of goods would be made. Some £45,000 was immediately payable. In her e-mail, Ms Talipova stated that Outeiro was making an immediate payment of £20,000 to be followed within the month by further payments of £10,000 and £15,000. It is alleged that she had no intention of making the payments within the timescale stated and that the payments were only made two months later after being chased.

5. The September 2013 discussions took place at a time when, according to FFI, Outeiro owed at least £50,902.36 in respect of clothes from the 2013 Summer Collection. FFI had also delivered almost £200,000 worth of stock from the Winter 2013 Collection and Outeiro was asked to provide post-dated cheques in advance to guarantee further supplies of clothes. Ms Talipova agreed to provide four post-dated cheques of £60,000 and on 30th September 2013 she sent to FFI four such personal cheques, signed by her and dated 20 October 2013, 20 November 2013, 20 December 2013 and 20 January 2014. This is said to have amounted to a representation by her that she intended and believed that FFI would be paid. Further garments were delivered but each of the cheques was dishonoured. FFI alleges that Ms Talipova never intended that the payments would be made and that the promises of payment were made in order to induce further deliveries of the Winter 2013 Collection.

6. The judge held that the claims in deceit raised triable issues which were not suitable for determination on a CPR Part 24 application. But he held that there was no defence to the claim against Outeiro for £366,999 in respect of goods supplied but not paid for. The only issue therefore was whether the whole or part of the judgment should be stayed pending the resolution of Outeiro's counterclaim.

7. Outeiro's pleaded counterclaim consists of the following items:

   (i) £100,000 for loss of profits due to late delivery of the Winter 2013 Collection;

   (ii) £150,000 per annum for future loss of profits by reason of FFI's breach of a 15 year supply agreement;

   (iii) £40,000 in respect of damaged goods; and

   (iv) £500,000 representing the loss of the first and/or second defendants' investment in the business.

8. The judge rejected claims (ii) and (iv) as unsupported by any adequate evidence and struck out item (ii). But he permitted the counterclaim to proceed in respect of items (i) and (iii) although he valued the claims at no more than £66,000. He therefore stayed the enforcement of the judgment in excess of the sum of £300,000.

9. There is no appeal against the judge's assessment of the value of items (i) and (iii) although the final quantification of those parts of the counterclaim will obviously be a matter for the trial. Nor is there a challenge to his refusal to make any allowance for item (iv) in the stay which he granted. Instead, the appeal is brought on four grounds, three of which relate in different ways to the judge's rejection of item (ii) of the counterclaim and the fourth of which is a separate but related point that the judge, in calculating the amount of the stay, should have given Outeiro credit for its right to return 20% of the stock supplied. This is said to equate to £39,974 for the Summer 2013 Collection and to £56,010 for the Winter 2013 Collection with the result that he should have stayed enforcement of the judgment in excess of the sum of £270,715.

<u>The 15 year supply agreement: grounds 1-3</u>

10. Item (ii) of Outeiro's counterclaim is based on the allegation contained in paragraphs 5-9 of the defence that FFI was contractually bound to supply Outeiro with MFG branded goods for a period of 15 years subject to Outeiro's right to terminate the agreement on notice prior to the expiry of the tenth year of the term. The supply agreement is also said to have contained provisions under which payment for the Summer 2013 Collection would be made in four equal instalments on 15 April, May, June and July 2013 (rather than in advance of delivery) and for the first two years or four seasons of the contract Outeiro was to be entitled to return up to 20% of the orders delivered for each season.

11. These terms are based on supply agreements dated 1 February 2012 which Outeiro entered into with two previous nominated suppliers of MFG branded goods, GIR + A&F and Cravatatakiller ("the former suppliers"). In paragraphs 8 and 9 of the defence it is alleged that the 2012 supply agreements were assigned to FFI or alternatively that it was mutually agreed between a representative of FFI (Mr Anupam

Kothari) and Ms Talipova that MFG goods would be supplied by FFI on the same terms.

12. FFI's case is that both GIR + A&F and Cravatatakiller entered into insolvency proceedings in June 2012 leaving Outeiro and other MFG approved retailers without a source of supply of clothes to sell in their shops. FFI proceeded to acquire the existing order books from the liquidators of the two former suppliers and also obtained a licence from MFG to manufacture clothes under their brand name. It accepts that it did enter into written long-term supply agreements with some MFG retailers in France but it denies that there was any assignment or novation as such of the existing supply agreements with Outeiro and further denies that it would have agreed to enter into a 15 year supply agreement on the basis of an oral agreement. Its positive case is that the goods it manufactured under the MFG brand were supplied to Outeiro on the terms of various delivery confirmations signed by Ms Talipova. These required payment in advance.

13. The defendants accept that there is no documentary evidence to support the alleged assignment and they do not contend that Ms Talipova entered into a new written supply agreement for a period of 15 years. The way that Ms Talipova put it in her evidence was that in late 2011 she negotiated Outeiro's MFG franchise with Mr Laurent Frerebaut, the managing director of MFG. The contractual structure was a franchise agreement between Outeiro and MFG and the two 15 year supply agreements with GIR + A&F and Cravatatakiller. These included the right to return 20% of the stock supplied.

14. In May 2012 Ms Talipova learnt that MFG was itself in Chapter 11 bankruptcy but that a new investor, later identified as Mr Kothari, would be taking over the company and all production and distribution. Mr Kothari is the owner of FFI but not its CEO. The CEO was M. Enrico Zanini and the sales director, a Ms Deborah Scalcon. Ms Talipova says that she met Mr Kothari in August 2012 when he outlined his plans for the expansion of MFG but by this time FFI was already supplying goods to Outeiro and there is nothing in Ms Talipova's witness statement to suggest that any new supply agreement had been entered into with FFI on the terms alleged. What Ms Talipova says is that she relied on the terms which had been agreed with M. Frerebaut back in 2011 and assumed that FFI was bound to honour the agreement she had made with MFG.

15. In fact, as she explains in paragraph 29 of her statement, Mr Kothari made it clear to her in an exchange of e-mails in September 2012 that the goods had been supplied to Outeiro not on the terms of the original supply agreements with the former suppliers but on the terms of the delivery invoices which required payment in advance. He also denied that Outeiro had any right to return stock. She goes on to say that M. Frerebaut assured her that he would sort things out with Mr Kothari and later told her that Mr Kothari had agreed to honour the original franchise agreement. But she does not suggest that she had any further direct communication with Mr Kothari on the subject and an e-mail sent to her by Mr Kothari on 17 September 2012 is not consistent with her allegation that FFI would continue to be bound by the terms of the original supply agreements. In the e-mail Mr Kothari says that there is no delivery on a sale or return basis of garments purchased from FFI and that she must not confuse the FFI terms which are for immediate payment with what she may have agreed with

M. Frerebaut in respect of goods supplied by Cravatatakiller. A payment term of 125 days would be, he said, "mission impossible".

16. I should mention for completeness that the judge also had witness statements from Ms Scalcon, who is now the CEO of FFI, and from Mr Kothari. Ms Scalcon says that FFI did not enter into any new long-term supply agreement with Outeiro or take over the original supply contracts with the former suppliers because they had doubts about Outeiro's reliability and did not want to make their relationship with the company any more complicated. The first orders by Outeiro from the Winter 2012 Collection were placed in July 2012 and the clothes were delivered between 13 and 16 July. The invoices were paid between 3 and 12 August 2012. In October 2012 Outeiro placed an order for about £200,000 worth of garments from the Summer 2013 Collection and Ms Talipova signed the order confirmations which provided for payment to be made in advance. It was when payment was not made that Outeiro proposed the payment plan which FFI agreed to in order to assist what was a start-up business.

17. Ms Scalcon went on to explain that the payment plan was revised and updated during 2013 to deal with further orders from Outeiro from the Summer 2013 Collection and then from the Winter 2013 Collection. In each case goods were ordered but FFI did not receive payment in full and agreed to payment by instalments. The order confirmations were signed by Ms Talipova and all contained the standard term that the goods should be paid for in advance. It was against this background that on 11 July 2013, when Outeiro had ordered £220,299 worth of garments from the Summer 2013 Collection but paid for only £81,218 of them, that Ms Talipova sent the e-mail about the post-dated cheques which forms part of the claim against her in deceit.

18. Mr Kothari also denies ever having agreed on behalf of FFI to supply goods under the terms of the original 15 year supply agreements.

19. The judge was right in my view to identify that the defendants have no evidence to support the pleaded allegation of the assignment of the earlier supply agreements nor do they allege in terms that they were parties to a novation of these agreements which would have been necessary in order for FFI to become liable under them. The only evidence which Ms Talipova provides is that she assumed from the fact that FFI acquired MFG's business that it would continue to be bound by the original franchise and supply agreements. The alternative pleaded case that Mr Kothari agreed with Ms Talipova that FFI would trade with Outeiro on those terms is not supported by Ms Talipova's statement which does not allege any direct agreement between them on those terms.

20. In these circumstances the judge was in my view fully entitled to take the view that there was no triable issue as to the terms upon which the goods were supplied to Outeiro by FFI. In any event, even if the course of dealings between the parties is sufficient to establish an argument that Outeiro was to have a credit period in respect of the goods supplied, that has long passed. The first three grounds of appeal turn, however, not on what terms were agreed for payment but on whether FFI had in some way contracted to maintain supplies for a 15 year period so that Outeiro has a claim in damages for the profits it would otherwise have earned during that time.

21. Mr Tankel, on behalf of the defendants, submits that the judge's rejection of item (ii) of the counterclaim as no more than assertion and as inconsistent with the

documentary evidence such as the e-mail I have referred to gives rise to the risk that the Court at the trial of the claim in deceit may reach a conclusion which is inconsistent with the basis of the summary judgment and that a trial of the claim in deceit may be adversely and unfairly affected by Leggatt J's conclusion that this part of the cross-claim was, to use Mr Tankel's word, bogus. In these circumstances, the judge should have found that there was a compelling reason to give leave to defend in respect of the contractual claim so that all matters could be disposed of at a single trial or at least to have allowed the counterclaim under item (ii) to proceed.

22. Allied to this is ground 2 which is that the judge should have given adequate weight to the fact that, with the benefit of full disclosure, a different picture may emerge. FFI has produced the contractual documentation relating to its agreements with Wurzburg Holdings SA (the owner of MFG) and the agreement dated 2 July 2012 between FFI and the liquidator of GIR + A&F. There is also in evidence a copy of an agreement between the judicial administrator of Cravatatakiller and a company linked to FFI called Eldo under which the order book was acquired by Eldo for the Autumn/Winter 2012/2013 season. Mr Tankel accepts that these do not amount to a novation of the original supply agreements to FFI but the papers, he says, indicate that the arrangements were more complicated than the judge perhaps believed. The judge is also said (and this is ground 3) to have acted impermissibly by conducting a mini trial and ignoring the scale of the contest about disputed issues of fact and the possibility that a fuller investigation at trial might produce a different result on liability. As Mummery LJ said in *The Bolton Pharmaceutical Company 100 Ltd v Doncaster Pharmaceuticals Group Ltd.& Ors* [2006] EWCA Civ 661 at [17] – [18]:

> "17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.
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> 18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

23. Mr Tankel submits that this is a classic case in which there are reasonable grounds to think that further light would be shed on relevant events by disclosure. The allegation that Outeiro had the benefit of a long-term supply agreement with FFI is supported by what Ms Talipova was told by M. Frerebaut about FFI's involvement not changing anything and that Mr Kothari would ensure compliance by FFI with the original agreements. There is also the evidence of Ms Scalcon that FFI did enter into long-term supply agreements with other MFG retailers.

24. In my view, the judge was fully entitled to regard the defendants' reliance on the 15 year supply agreement as misplaced. The allegation that FFI in some way took over

the original agreements with GIR + A&F and Cravatatakiller faces the difficulty that any novation of those agreements to include FFI would have involved some kind of written agreement to which both Outeiro and the former suppliers would have had to have been party. Ms Talipova does not suggest that there ever was any such agreement any more than she alleges that Outeiro entered into a new written supply agreement with FFI. The only contractual documents in existence are the orders which Ms Talipova signed and which are obviously inconsistent with the terms of supply which she alleges. In these circumstances, there are no reasonable grounds for thinking that full disclosure will produce some kind of novation agreement transferring the burden of the existing supply agreements to FFI.

25. The allegation of an oral agreement by Mr Kothari on behalf of FFI seems to me to be equally hopeless. The evidence to support it comes from what M. Frerebaut is alleged to have said to Mr Talipova. M. Frerebaut, it might be said, had an obvious interest in appeasing Ms Talipova following the insolvency of MFG and did not provide a statement to support her allegations. More pertinently still, Mr Kothari's contemporaneous e-mails to Ms Talipova are, as Mr Tankel I think accepts, inconsistent with what Ms Talipova alleges.

26. In these circumstances, there is no real basis for suggesting that disclosure might show these events in a different light and lead to a different result on liability at trial. All the evidence points in the opposite direction and the judge was entitled, even on a Part 24 application, to regard the allegation that FFI was bound by a 15 year agreement as neither credible nor arguable.

27. I should add in relation to ground 1 that I do not accept that the judge's decision on the 15 year supply issue carries with it the risk that the trial judge will feel constrained by this earlier finding. Leggatt J's decision was based on the evidence, or lack of it, on the Part 24 application. The trial judge will not be concerned with whether there was a 15 year supply agreement between FFI and Outeiro. The relevant issue on the deceit claim is likely to be whether Ms Talipova believed that there was such an agreement. I can see no reason why in trying that issue the judge need feel constrained by what Leggatt J decided about the true contractual position.

Ground 4: the 20% discount

28. In paragraph 34 of its defence, Outeiro has pleaded that it attempted to return 20% of its stock to FFI which it was entitled to do under the supply agreements with GIR + A&F and Cravatatakiller but that FFI has refused to accept the returns. The judge's finding that there was no novation of the original supply agreements means that the defendants must establish that the right to return 20% of the goods was the subject of a separate agreement between FFI and Outeiro. Ms Talipova says in her witness statement that Mr Kothari had confirmed that he would comply with the return arrangements under the earlier supply agreements but later stated that he would only accept the return of entire lines of stock which she says was a practicable impossibility.

29. Mr Kothari denies having agreed to re-instate a general 20% return policy with Outeiro. Ms Scalcon in [37] of her witness statement says that on 16 October 2013 FFI e-mailed Outeiro telling it that it was entitled to return up to £36,000 worth of stock from the Summer 2013 Collection and asking it to identify the items it wished

to return. But it heard no more. The e-mail in question also indicated that "as per your agreement" only full lines would be accepted as returns. Ms Scalcon says the reason why there was no return of stock from the Summer 2013 Collection is likely to be that the goods have been sold and the proceeds retained by Outeiro. Ms Talipova's case is that the stock remains available to be returned.

30. Mr Tankel submits that this dispute is not capable of resolution on a Part 24 application and that the judge should at the very least have reduced the enforceable amount of the judgment by a further £93,984. Mr Stirling, on behalf of FFI, says that the reason the judge made no further reduction to take account of a right to return stock was that the point is not pleaded or relied upon as part of the counterclaim and was not taken or pursued at the hearing of the Part 24 application. As the judge said in his judgment, there was no substantive challenge to the amount claimed and the counterclaim and set-off were based on allegations about late delivery and the defective quality of some of the garments. Mr Stirling also makes the point that there is no detail given by Ms Talipova of FFI's refusal to accept returns of stock and the evidence which does exist indicates that FFI was prepared to accept returns of full lines from the Summer 2013 Collection but that the offer was ignored.

31. In my judgment, there is nothing in this ground of appeal. If the defendants wished to rely upon a refusal to take returns as part of their counterclaim that point should have been properly pleaded and argued before the judge on the basis of the evidence I have referred to. The point was not pursued by the defendants and it is far too late for it to be raised for the first time on an appeal.

32. I would therefore dismiss the appeal.

The Chancellor of the High Court:

33. I agree.

Lord Justice Christopher Clarke :

34. I also agree.