IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2004: 51

BETWEEN:

FIRST ATLANTIC COMMERCE LIMITED

Plaintiff

-and-

THE BANK OF BERMUDA LIMITED

Defendant

RULING

Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, for the Plaintiff
Mr. Andrew Martin & Ms. Venous Memari, Mello Jones & Martin,
For the Defendant

Introductory

1. On September 20, 2006, this Court granted leave to both parties to file amended pleadings (essentially by consent), made orders relating further and better particulars and discovery after hearing argument, and (also essentially by consent) ordered that three issues of contractual construction should be tried as Phase I of a two-part trial, with the balance of issues being tried in Phase II. Directions were ordered in relation to the filing of evidence in relation to Phase I of the trial of the present action.

2. The issues ordered to be tried first were all points of construction, the parties being agreed, that their early resolution might either obviate the need for a further trial or save costs in any event. Since that Order was made, and the amended pleadings were filed, further disputes have arisen in relation to the adequacy of the pleadings, discovery, the scope of the issues to be determined in Phase I, and the desirability of having a split trial at all. In addition, the Defendant has foreshadowed making an application to seek some form of security for costs against the Bermudian Plaintiff, under the Court's inherent jurisdiction, on the grounds that the Plaintiff's solvency admittedly depends upon uncertain financial support from its parent company.

3. The present conundrum, which illustrates that case management can be something of a trial and error process, essentially flows from the fact that the parties and the Court believed that it was possible on September 20, 2006 to (a) comprehend the

parties' respective pleaded cases to be finalized in amendments not yet filed, and (b) accordingly decide the order in which particular issues should be tried. This belief was, with hindsight, misconceived, in part because the Plaintiff's Counsel had, comparatively recently, been instructed, and was probably not in a position to fully articulate what form his proposed amendments would precisely take. Counsel were properly seeking to assist the Court to achieve the Overriding Objective by reaching an agreement on September 20, 2006, but, on reflection, I ought to have declined to decide on a split trial until the pleadings were fully settled on both sides.

4. The initial pre-trial directions have clearly unravelled to the extent that each side has cast serious doubt on the appropriateness of the Phase I trial as defined in the September 20, 2006 Order. Careful consideration must accordingly be given to how the preset action should proceed, bearing in mind that its contours are somewhat elastic, and that its legal contents are by no means lacking in complexity.

5. Certain minor disputes were resolved in the course of argument. It was agreed that the trial date fixed by the Plaintiff for a debt inconvenient to the Defendant's Counsel should be vacated, and the court so ordered. Mr. Woloniecki also clarified the Plaintiff's case as to why no Class A dividends were said to be payable by his client to the Bank. This was on the basis that the restructuring was liable to be set aside on the grounds of duress, as presently pleaded, and no plea of rescission would be made. The Plaintiff's Counsel also confirmed that no accounts in addition to those expressly pleaded were said to have been migrated into the segregated cell structure established after the conclusion of the contract in controversy. These clarifications obviated the need for further and better particulars to be considered.

6. This left the following issues to be determined: (a) the Plaintiff should be granted leave to re-re-re-amend its Statement of Claim, (b) whether the Defendant should be ordered to disclose certain employee files, and (c) should there be a split trial as previously ordered at all, or should the scope of the issues to be tried be redefined? After a half-day hearing on Tuesday of this week, I reserved judgment to carefully consider the way forward in this matter.

Application for leave to further amend

7. The Plaintiff seeks leave to re-re-re-amend paragraph 29A(ii),(iii) of the Statement of Claim in two respects. Firstly, to correct a plea that it learned certain information from the Bank, and to state instead that it learned the relevant matters from another source. And, secondly, the Plaintiff seeks to refine its case as to why it contends the E-Commerce Agreement was only a temporary measure. Instead of asserting that it was intended to operate until a certain exclusivity agreement was terminated, it is intended to assert that it was intended to operate until the segregated account private act was passed.

8. It is already pleaded, arguably untenably, that the mutual intentions of the parties are relied upon as part of the factual matrix, so the further amendments sought cannot in my view be objected to on this ground. Mr. Woloniecki appeared to resile from seeking to rely in any way on facts which post-dated the E-commerce Agreement as part of its factual matrix. In my view the amendments proposed should be allowed, and any legal controversy over what evidence is admissible as part of the factual matrix should be resolved at trial.

Application for disclosure of employee records

9. The Plaintiff seeks disclosure of the personnel records relating to employees who worked in the Department which was allegedly purged because of systemic failures. The allegations made by the Plaintiff have been denied by the Defendant.

10. The records sought clearly relate to facts in issue in the present action and Mr. Martin conceded that this Court had the power to order their disclosure. I so order.

Should there be a split trial and, if so, in relation to what issues?

11. The Plaintiff contends that the Court should stand by the approach taken on September 20, 2006 and proceed with a two-phased approach to the trial, but supplement the issues originally defined. The Defendant contends that the pleadings subsequently filed by the Plaintiff means that the construction points will no longer be determinative, and only one trial now makes sense.

12. Having regard to the Overriding Objective in Order 1A of the Rules, the Court is not constrained to resolve this controversy on the basis of the arguments advanced by the parties. This Court is under a positive duty to actively consider how this litigation should be managed with a view to saving time and costs. The parties do not have an unfettered right to have their day in Court; the right to a fair hearing implies a hearing that is fair to both sides and resolves serious issues in an efficient manner.

13. The Plaintiff's primary claim is that the parties participated in credit card processing under a February 18, 1999 E-commerce Agreement. The fundamental dispute is which party bears the losses which occurred. It is alleged that the Bank was obliged to process charge-back transactions within 180 days (because the Card Associations' Rules are incorporated into the contract) or, alternatively, (according to the October 2006 amendment to the Statement of Claim) within a reasonable time. The Plaintiff contends that the parties expressly agreed that the Bank would not exercise its rights of set-off against the Plaintiff's accounts, in the event of a deficiency in the sub-merchant accounts. Accordingly, the Defendant and not the Plaintiff was liable for the relevant shortfall in the sub-merchant accounts. This is the construction point.

14. Irrespective of how this issue is resolved, it is now clear (in part from amendments to pleadings made and discovery given after September 20, 2006), that each party has an alternative estoppel argument. The Defendant will seek to establish that the Plaintiff is estopped from advancing this argument because it is inconsistent with the position it took (a) in four affidavits filed in legal proceedings in Nevis, and (b) in a Declaration tendered to the United States Federal Trade Commission. However, it was always the Bank's case that the Plaintiff was estopped from asserting that the Bank was liable for the shortfall as a result of the refinancing granted in respect of the loss. In September, I rejected the Defendant's request that this issue be tried as part of Phase I.

15. The Plaintiff from the outset had asserted the alternative pleas that (a) the burden was on the Defendant to justify each charge-back debit, that (b) in excess of $2 million was debited in breach of contract and (c) that substantial loss was occasioned by the Defendant's negligence. In addition, as a result of post-September, 2006 amendments, the Plaintiff also contends that (c) the parties agreed that all sub-merchant accounts should be transferred into segregated cell accounts, (d) documentation was completed effectively transferring two sub-merchant accounts into segregated accounts, and accordingly that (e) the Defendant is estopped from making any claim against the Plaintiff in respect of any overdrawn sub-merchant account. On the face of the latter pleas, it only seems plausible that an estoppel plea might succeed in respect of the two accounts said to have been legally transferred, rather than as regards the sub-merchant accounts as a whole. In addition, the Plaintiff seeks to set aside the refinancing agreement on the grounds that it was procured by duress, an adroit riposte to the Defendant's plea that the refinancing arrangements constitute an equitable bar to the Plaintiff's present claims.

16. In my view Mr. Martin is clearly right in his submission that the construction points ordered to be tried on September 20, 2006 in Phase I, even if expanded to include the first and last of the three additional issues posited by Mr. Woloniecki,

would neither be determinative nor result in an obvious saving of costs if tried as a preliminary issue. The range of alternative issues which would fall to be determined irrespective of how the construction point is resolved is far greater than appeared to be the case in September 20, 2006.

17. It appears to me that there is only one broad issue which is potentially dispositive, which could be tried in the first limb of a two-part trial: whether, as the Defendant contends, the Plaintiff is estopped from asserting that the Bank bears the risk of the relevant losses by reason of (a) the contrary position it has adopted before the courts of Nevis and the United States Federal Trade Commission and/or (b) because of the refinancing arrangement. The essential facts necessary to resolve the first limb of this issue cannot be seriously disputed, in light of the affidavits and declaration recently disclosed by the Plaintiff. The Defendant's other estoppel argument could not meaningfully be resolved without also determining the duress argument, and determining some disputed facts. Even here, it seems to me, the real controversy would be what inferences should be drawn from largely un-controvertible facts. The crucial question would be whether or not, as a matter of law, the largely undisputed facts give rise to an estoppel barring all of the Plaintiff's claims in the present action.

18. The Plaintiff is wholly dependent on financial support from its parent for its ability to continue as a going concern, according to its audited financial statements. It is unwilling to provide any comfort to the Defendant about its ability to comply with any costs which it may be ordered to pay, on the grounds that Order 23 of this Court's Rules only permits security to be ordered against a foreign plaintiff. This position is entirely legitimate according to the presently accepted view of the law, but in my view it also creates cogent grounds for this Court managing the present action in a way which minimizes the risks of wasted and/or irrecoverable costs. Accordingly, I would, subject to hearing Counsel, order that the September 20, 2006 Order herein should be amended as follows :

    (1) (as regards paragraph 7): the full stop at the end of line 4 shall be deleted and replaced with a colon. Subparagraphs (i) to (iii) inclusive shall be deleted, and replaced with the following words : " (i) whether the Plaintiff is estopped from maintaining any claim against the Defendant in respect of losses incurred by the Plaintiff pursuant to the E-commerce Agreement because it has previously represented to the Nevis Court and/or to the United States Federal Trade Commission and/or to the Defendant in the course concluding the refinancing agreement, that it bore the risk of such losses; (ii) if issue (i) would otherwise be answered in the affirmative, whether such conclusion may not validly be reached because the refinancing agreement may not be relied upon on the grounds that it was procured by duress on the Defendant's part. ";
    (2) (as regards paragraph 8): at the end of sub-paragraph (ii) after the word "statements", the following words shall be added: ", unless otherwise agreed."

19. The length of the hearing of a Phase I trial on this alternative issue would in my view not reasonably last longer than the previously ordered inquiry into the construction points, which would have involved expert evidence on credit card-related international banking practices, and a hearing which was estimated to last for five days. If this question is resolved in favour of the Defendant, and in my view it can be resolved without hearing the full compass of evidence relating to the contractual dispute, then it follows that the action will effectively be at an end[1]. If this issue is resolved in favour of the Plaintiff, it will be clear that it is genuinely necessary, absent settlement, to embark upon an adjudication of the substantial contractual dispute. It seems to me that if it is clear that the Bank cannot avail itself of a complete knockout punch, the remaining issues will be more amenable to a potential commercial settlement than they presently are.

[1] It is possible, however, that certain discrete claims (such as the paragraph 29C segregated account claim, would survive such a determination.

20. Counsel are at liberty to apply by letter to the Registrar to be heard on both the contents and form of the proposed Order set out above. Although the Court has more extensive case management powers, the complexities of the present case make it imprudent for the Court to assume that it has a complete grasp of all of the intricacies raised by this case at this early stage. The proposed Order was not directly suggested by or canvassed with counsel, who should have an opportunity to suggest that the proposed course is, for reasons I have overlooked, seriously flawed. Mr. Martin did diplomatically point out that the only alternative issue which could be tried separately was his client's original estoppel point, an option which had not found favour with the Court at the September hearing.

21. Mr. Woloniecki essentially invited the Court to, ostrich like, shy away from acknowledging that the logic for the September 20, 2006 Order had fallen away. It is true that some costs may have been incurred by the Plaintiff in preparing for the initially conceived Phase I trial, but assuming the Plaintiff is not estopped altogether from pursuing the contractual claims, such costs will not have been wasted altogether.

Summary

22. It seems to me that the costs of the directions hearing should, subject to any further argument, be in the cause.

23. However, for the above reasons, I would (a) grant the Plaintiff's application for leave to amend paragraph 29A(ii),(iii), (b) order the Defendant to give discovery of the employee records, and (c) order a phase I trial of the Defendant's estoppel argument and the issues set out above. I will hear Counsel, if required, on the final form of the Order giving effect to (a) and (b), and the form and merits of the Order defining the scope of the new Phase I issues.

Dated this 12th day of January, 2007

KAWALEY J.