An English Case on CPR r.6.20(5) and "In Respect of a Contract"

NIGEL PETER ALBON (T/A N A CARRIAGE CO) v (1) NAZA MOTOR TRADING SDN BHD (A company incorporated with limited liability in Malaysia) (2) TAN SRI DATO NASIMUDDIN AMIN [2007] EWHC 9 (Ch)

Summary: the words "in respect of a contract" in the CPR r.6.20(5) did not require that the claim arose under a contract; they required only that the claim related to or was connected with the contract.

The applicants (N and X) applied for an order setting aside an order permitting the respondent (Y) to serve proceedings on them in Malaysia. Y had brought an action against N, a Malaysian company, and X, its main shareholder, arising from three agreements. In respect of the first agreement (the UK agreement), Y sought the recovery of alleged overpayments that he claimed had been made under an oral agreement whereby he would sell cars exported from Malaysia by N and be paid a share of the profits. As to the second agreement (the South African agreement), Y asserted the existence of an oral agreement under which N had agreed to pay him commission on cars sourced by him from South Africa and supplied to N in Malaysia. As to the third agreement (the expenses agreement), Y alleged that he had paid personal expenses of X in London amounting to just less than £200,000. The master acceded to Y's application, made without notice, for an order permitting him to serve proceedings on N and X in Malaysia.

Lightman J. held that (1) The master had been justified in granting Y permission to serve outside the jurisdiction in respect of the UK agreement. Y's claim in restitution was a claim "in respect of a contract" for the purposes of the CPR r.6.20(5). Those words did not require that the claim arose under a contract; they required only that the claim related to or was connected with the contract. Lightman J. stated (para. 26),

> *...in my judgment claims under Gateway 6.20(5) are not confined to claims arising under a contract. It extends to claims made "in respect of a contract" and the formula "in respect of" (tested by reference to English law) is wider than "under a contract": see e.g. Tatum v. Reeve [1893] 1 QB 44. The provision*

in the CPR is in this regard deliberately wider than the provision in its predecessor RSC Order XI. In this regard, unlike Mr Nathan (counsel for the Defendants) I do not think that any assistance is obtained from the decision in Kleinwort Benson v. Glasgow City Council [1991] 1 AC 153 at 162 and 167. In that case the House of Lords was concerned with section 16 and 17 of the Civil Jurisdiction and Judgments Act 1982 which (subject to certain modifications) incorporated the Brussels Convention into the law of the United Kingdom. One modification effected to Title 11 of the Convention was to the following effect:

"5. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; …"

In the context of the formula of words there used, and in particular the reference to the place of performance of the obligation in question, there is postulated the existence of a contract giving rise to an obligation of performance in the country whose courts are to have jurisdiction.

Accordingly the formula of words in CPR 6.20(5) "in respect of a contract" does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract. That is the clear and unambiguous meaning of the words used. No reference is necessary for this purpose to authority and none were cited beyond Tatum v. Reeve supra. If such reference were needed, I would find support in a passage which I found after I had reserved judgment in the judgment of Mann CJ in Trustees Executors and Agency Co Ltd v Reilly [1941] VLR 110 at 111:

Further, there could be no doubt that English law was the law with which the UK agreement was most closely connected. England was Y's habitual residence when he entered into the agreement, and the characteristic performance of the agreement was the provision of his agency services in England in return for which he was to be remunerated. Moreover, there was a serious issue to be tried, and the appropriate forum for the resolution of the disputes relating to the agreement was plainly England. Although there had been a number of defaults in disclosure by Y on the application for permission, that did not justify the setting aside of the master's order. To take that course would be disproportionate and contrary to the overriding objective of dealing with the case justly. Y should, however, face a

sanction in costs for the breaches of his disclosure obligations. (2) On the available evidence, it was clear that South African law was the proper law of the South African agreement.

Further, South Africa was the suitable forum for the resolution of the disputes between the parties. It would therefore be appropriate to set aside the master's order insofar as it related to that agreement. (3) As to the expenses agreement, although the requirements of each of the gateways in the CPR r.6.20 on which Y had relied were satisfied, he had been guilty of non-disclosures that went to the heart of the application, and the master had been sorely misled as to the merits in respect of two critical facts. It would therefore be appropriate to set aside the grant of permission to pursue any claims under the expenses agreement.

See the HMCS website for the full judgment.

Source: Lawtel.