ENGLISH COURT OF APPEAL PROVIDES GUIDANCE ON "GOOD ARGUABLE CASE" TEST

KAEFER Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10

Introduction

In a decision handed down on 17 January 2019 in *KAEFER Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, the English Court of Appeal gave guidance on the application of the "good arguable case" test in respect of the English Court exercising civil jurisdiction.

Background

The claimant commenced proceedings against the four defendants ((i) AMS Drilling Mexico SA de CV; (ii) Atlantic Marine Services BV; (iii) Atlantic Tiburon 1 Pte Limited ("AT1"): and (iv) and Ezion Holdings Limited ("Ezion")) for sums alleged to be due under a contract for works performed by the appellant to the accommodation areas of a cantilever jack-up rig.

AT1 and Ezion challenged jurisdiction arguing that they did not act as undisclosed principals, and neither were therefore party to the contract under which the claim was made (which contained an English exclusive jurisdiction clause).

At first instance, the Court held that the Claimant had not established that the Court had jurisdiction against AT1 and Ezion. While there was a "good arguable case" that AT1 was an undisclosed principal to the contract, the Judge found that "AT1 has the better of the argument that it was not an undisclosed principal" and accordingly the claim for jurisdiction against AT1 failed. As between the Claimant and Ezion the Judge did not conclude that an even arguable case arose.

The Claimant appealed against the Judge's decision on six grounds, which the Court of Appeal grouped together as follows:

- First, the Judge, having found that the appellant had a good arguable case that AT1 was an undisclosed principal, erred in proceeding to apply a second test based upon plausibility and/or

who had the "better argument ". This "gloss" on the good arguable case test is neither justified in law or policy.

- Second, even if the "better argument" test was applicable in principle it should not have been applied in the present case where the evidence was incomplete and contradictory and where crucial evidence was in the hands of the Defendants who had chosen not to reveal the "full picture" and failed to provide disclosure notwithstanding requests for documents.
- Third, in any event on the evidence before the Court the Judge erred in finding that AT1 had the better of the argument.
- Fourth, the Judge erred in failing to find that there was a good arguable case that Ezion was an undisclosed principal.
- Finally, there is a Respondent's Notice which, inter alia, raises a point about the significance of the entire agreement clause in the terms and conditions and whether the Judge was correct to essentially treat this as neutral in the weighing of the scales of good arguability.

Decision

The Court of Appeal (Davis LJ; Asplin LJ; Green LJ) dismissed the application.

Green LJ, giving the main judgment of the Court, observed that in reaching his decision, the Judge had – incorrectly - applied a two-part test, first asking whether the Claimant had demonstrated a good arguable case (seemingly equating this test with that for summary judgment), and, second, asking whether the Claimant had "the better and more plausible" argument.

Considering the appropriate test to be applied, Green LJ used as his starting point the decisions of the Supreme Court in *Brownlie v Four Seasons Holdings International* [2017] UKSC 80 ("Brownlie"), and, *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 ("Goldman Sachs"). In Brownlie, Green LJ observed that the common ground in the judgments was that "(i) observations about the test for jurisdiction were obiter ; (ii) the pre-existing test was the test laid down in Canada Trust ; (iii) any court determining jurisdiction must take into account the limitations inherent in the fact that a jurisdiction dispute is an interim hearing often in the absence of full evidence." In Goldman Sachs, the Supreme Court (Lord Sumption giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Mance agreed, and referring to Brownlie) set out the test as follows:

(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;

(ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but

(iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

However, Goldman Sachs had not set out how the test worked in practice. Green LJ held:

Limb 1: the reference to "a plausible evidential basis" in limb (i) is a reference to an evidential basis showing that the Claimant has the better argument – not a “much” better case, simply a “better” case. In expressing a view on jurisdiction, the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits

Limb 2: recognising that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence, this is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence".

Limb 3: intended to address the issue where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument. This limb introduces a test combining good arguable case and plausibility of evidence, which is a more flexible test which is not necessarily conditional upon relative merits.

Davis LJ stated that he agreed with the conclusions of Green LJ, for the reasons which he gave in his judgment, and concluded that it was sufficiently clear that the ultimate test is one of good arguable case. The court could perfectly properly apply the yardstick of "having the better of the argument" which overall, conferred a desirable degree of flexibility in the evaluation of the court.