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ENGLISH HIGH COURT CONSIDERS STAY OF ARBITRATION IN CONTEXT OF ALLEGED CARTEL DISPUTE

Microsoft Mobile Oy (Ltd) v Sony Europe Limited and others [2017] EWHC 374 (Ch)

Introduction

On 28 February 2017 in *Microsoft Mobile Oy (Ltd) v Sony Europe Limited and others* [2017] EWHC 374 (Ch), the English High Court (Marcus Smith J) handed down a decision in which he found that the arbitration clause did cover the disputes between the parties and thus stayed proceedings against Sony Europe pursuant to section 9 of the Arbitration Act 1996; and set aside an order for service out of the jurisdiction against the other defendants, including Sony Corporation.

Background

This case arose due to the alleged cartel behaviour in the market for lithium ion batteries between four (originally six) defendants: Sony Europe Ltd (the First Defendant); Sony Corporation (the parent company of Sony Europe); LG Chem Limited; and Samsung SDI Co Limited. Microsoft brought proceedings in its own right and as assignee of the rights of Nokia, alleging that between August 1999 and May 2011, these companies entered into agreements, arrangements, and/or concerted practices by which they exchanged commercially sensitive information, agreed to fix prices, agreed to restrict output, agreed to limit technological development, agreed to share or allocate markets, and engaged in bid rigging.

Microsoft was assignee of a contract for the sale of batteries which Nokia had signed with the Sony Europe. That contract contained an arbitration clause. The court was required to consider whether this arbitration clause extended to claims in tort (as the causes of action pleaded by Microsoft were entirely tortious in nature).

The case concerned two applications: a stay of proceedings against Sony Europe pursuant to section 9 of the Arbitration Act 1996; and an objection to the court's jurisdiction on the basis that Microsoft Mobile had no arguable case

that fit within the Gateways of Practice Direction 6B, or alternatively that England and Wales was not the proper forum.

Judgment

Marcus Smith J granted the stay of proceedings against Sony Europe, and set aside both the order for service out of the jurisdiction and the service of those proceedings out of jurisdiction.

Stay in favour of arbitration.

Marcus Smith J held that the arbitration clause did apply to the tortious conduct of the first defendant, and he therefore granted a stay of proceedings under section 9 of the Arbitration Act 1996.

As a matter of construction, Marcus Smith J held it was necessary to consider whether any contractual claims arising out of the PPA would be sufficiently closely related to the tortious claims actually advanced by the Claimant so as to render rational businessmen likely to have intended such a dispute to be decided (like a contractual dispute) by arbitration. The learned judge concluded that they were for various reasons, including that it would be "extraordinary" if a claimant could circumvent an arbitration clause by not pleading a contractual claim but instead pleading "a "parallel" claim in tort arising out of exactly the same facts and with a scope defined by that contract".

Marcus Smith J held that the risk that the first defendant be subject to arbitration would cause a fragmentation of claims against the other defendants and risk of irreconcilable decisions from other jurisdictions and tribunals was not sufficient to prevent the engagement of the arbitration clause.

Set aside of order for service out of the jurisdiction

Under Practice Direction 6B, process may be served on a non-domiciled co-defendant if (1) there is a serious issue to be tried; (2) the claimant has a good arguable case under one of the gateways; and (3) England is the proper forum in which to bring proceedings. Taking each of these in turn:

<u>Serious issue</u>

Serious issue to be tried is interpreted to mean that the claimant has a reasonable prospect of success. For the purposes of this application, the parties agreed that the Court should proceed on the basis that this requirement was met. Accordingly, Justice Smith was not required to consider this element in detail.

Gateways

Microsoft sought to rely on Gateway 3 (necessary and proper party) and/or Gateway 9 (tort claims)

- Under Gateway 3, two conditions must be fulfilled: that a claimant show there is a real issue of fact or law to be tried by the court, and that a co-defendant is a necessary or proper party to the proceedings. In Marcus Smith J's view, the claimant did not satisfy this Gateway. Although the defendants would have been "proper" parties under Gateway 3 (although not "necessary" parties), the claimant could not show that there was a real issue of fact or law to be tried by the court. As the arbitration clause was wide enough to cover the claim of the first defendant, there was no real issue between Microsoft Mobile and Sony Europe for the court to try. This was the preserve of the arbitrator.

- Under Gateway 9, damage must have been sustained in the jurisdiction or damage must have resulted from actions taken within the jurisdiction. It was conceded that all cartel behaviour took place in Asia, mainly in Korea and Japan. Microsoft contended that Nokia (and Microsoft as successor in title) sustained damage within England due to the 12.1 million sales it completed in England, and that was sufficient in a case where there was no one single 'home' for the damage suffered by the global group. Marcus Smith J rejected this assertion due to quantum. Under *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391, the damaged sustained within the jurisdiction must be significant relative to the damage sustained outside the jurisdiction. Though Nokia purchased 12.1 million units during the relevant period, this was out of *three billion* units it purchased globally, or less than one half of one percent, constituting a tiny proportion of its sales of phones with lithium ion batteries. Microsoft could not even show that it was a Nokia unit within the UK that had purchased the 12.1 million units, nor that it was Nokia that purchased the batteries directly. For these reasons, Microsoft failed to demonstrate that significant damage was sustained within England and Wales.

Proper forum

Finally, a claimant must show that England is the proper forum in which to bring proceedings. Marcus Smith J held that in light of his findings on other points (as set out above), the case against England as the proper forum against the other defendants was compelling and one sided, taking into account that proceedings had been brought against the first defendant; the place of the tort was not England and Wales; the language and location of the parties' witnesses and documents, along with the applicable law, pointed away from England and Wales; and no point had been taken about the non-availability of a foreign forum.

However, Marcus Smith J held that had he been wrong on the application of the arbitration clause or on its relevance to the application of Gateway (3), or come to a different decision on the Section 9 stay, his conclusion on whether England was the proper forum would have been different particularly taking into account Sony Europe's financial resources and ability to bring in the other defendants by way of Part 20 of the CPR.