Byers v Samba

This is a case which might be seen as less helpful to asset-chasing in cross-border insolvencies. I appeared for Samba, a Saudi bank, in the case, with the great Stephen Smith QC acting for the claimant liquidators.

This was yet another round in the litigation stemming from the 2009 collapse of Maan Al Sanea's Saudi-based empire. Pre-collapse MAS had essentially declared trusts of shares in 5 Saudi Banks in favour of SICL, his main operating company. SICL was registered in the Cayman Islands, but its centre of operations was Saudi Arabia, MAS was resident there, the Saudi Banks (which included Samba) are all incorporated and based in Saudi and, as we will see, the relevant transfers all took place in Saudi Arabia. The shares all remained registered in MAS's name. The shares in 4 of the banks were quoted and traded on the Saudi Arabian stock exchange, the Tadawul; the other bank remained a private company.

MAS had large personal debts to Samba, and was also the guarantor of a loan made by Samba to SICL.

Provisional liquidators were appointed by the Cayman Court in July 2009.

On 16 September 2009 MAS transferred the shares to Samba in part discharge of his large debts.

There then followed many years of litigation, with (to say the least) ups and downs for both parties:

- The Liquidators began proceedings in England in 2013, claiming that the transfers were void under s.127 Insolvency Act 1986.
- Samba obtained a stay on *forum non conveniens* grounds, with the arguments all ranging around the accepted fact that Saudi Arabian law does not recognise the common law trust. That was reversed by the Court of Appeal. The appeal to the Supreme Court then took a very unusual course. The case had been proceeding so far on the basis that there had at least been a "disposition" within the meaning of s.127, but the Supreme Court unanimously decided that there had not been, because on SICL's case it was never divested of its claimed beneficial interest.
- That did not bring the claim to an end, because (as the SC pointed out) there potentially remained available to the Liquidators a claim against Samba for knowing receipt of trust assets.
- So the JOLs/SICL applied to amend the 2013 claim, and later in 2017 also issued new, protective, claim form – the primary limitation period having expired.
- Samba opposed the amendments before Birss J. and applied to strike out the 2017 claim, on the grounds of what would become 4 separate lines of defence: the transactions alleged to create the trusts were governed by Saudi law, not Cayman Islands law; ditto the claim; and, even if the trusts and the claim were governed by English law, SICL's beneficial interest was

"extinguished" on the transfers to Samba, because under the lex situs (Saudi Arabian law) Samba obtained indefeasible title to the shares; and the 2013 claim was statute-barred, because the amended claim was not based on the same or substantially the same facts as the original s.127 claim. The 5th main line of defence was that Samba had not known of any breach of trust and the transfer to Samba was not "unconscionable".

- Birss J. allowed all the amendments, and declined to strike out the 2017 action. But the CA gave Samba permission to appeal on limitation. Samba succeeded on that point, so that the 3013 action came to an end.
- The 2017 claim came to trial in October 2020, but in a much revised and reduced form. That is because in April 2020 Samba had been debarred from advancing any defence reliant on disputed fact. That is turn was because Samba had declined to give disclosure of its documents, or at any rate the vast bulk of them; that in turn because its Saudi Arabian regulator, the Saudi Arabian Monetary Agency had declined to consent to Samba doing so.
- This meant that Samba was barred from advancing 4 of its 5 main defences: the governing law of the trusts, the governing law of the claim, that its receipt was not unconscionable, and limitation (because it could not challenge the JOLs' contention under Limitation Act s.32 that neither they nor SICL had discovered or

could with reasonable diligence have discovered the key facts until 2011 or later).

- That left only 3 issues:
    - In a claim for knowing receipt of trust assets, when both the trust and the cause of action are governed by Cayman (i.e. English) law, does the extinction or non-recognition under the lex situs of the claimant's beneficial interest defeat the claim?
    - If so, under Saudi Arabian law, was SICL's beneficial interest extinguished on the September 2009 transfer to Samba?
    - If not, what was the claim worth: in particular, in valuing the shares, was credit to be given for the "block discount" that would have applied on a sale of such large volumes of shares on the particular valuation dates (agreed to be the date of the transfer and the date of judgment)?

Fancourt J. decided all 3 issues in Samba's favour. He gave permission to appeal only on the first, although the JOLs are likely to apply to the CA for a wider permission. The real interest of the case lies in the first issue. For the present, I make only 3 points:

1. The question of whether an English law claim for knowing receipt under an English law trust will be defeated by the operation of the lex situs has long been a subject of some controversy. You will find

all the key materials and arguments marshalled in the Judgment. Overall, the Judgment essentially vindicates the long-held view of Peter Millett, expressed as Millett J., then Millett LJ and then (extra-judicially) as Lord Millett, most characteristically in *MacMillan v Bishopsgate* in 1995, in fact approvingly referenced by Lord Mance in *Samba* in the Supreme Court.

2. The unusual history of the case had the advantage of making that issue something of an exam question, because it enabled it to be isolated, without questions of governing law of claim or trust, or annoying things like the facts, interfering in what required pure legal analysis from first principles.
3. In a similar vein, the case was not complicated by an additional or alternative claim for dishonest assistance in a breach of trust. I am not suggesting that such a claim was open to the JOLs; but if it was – and again assuming an English/Cayman cause of action and law of the trusts – the lex situs defence would not have assisted Samba, because the focus would have been on the breach of trust by MAS, and whether Samba had dishonestly assisted in it, not on the effect of the transfer itself.

There is a great deal more in the case that will be of interest to those practising in this field, and the CA will almost certainly be required to pronounce on at least the lex situs question at some point next year. I cannot leave the subject without, Oscar-like, paying tribute to the whole Samba litigation team, especially Dan Smith and his team at

Latham & Watkins and the remarkable legal and other skills of the barristers involved, the amazing Alan Roxburgh (the architect of all the lex situs issues), Ed Harrison and Sarah Tulip.