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In (No) Particular Order: The High Court of England and Wales on the Sequence of Applications

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Insolvency-related claims arising from contracts containing arbitration clauses continue to culminate in intriguing cases before the England and Wales High Court (a previous post on the Blog analysed the *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company) [2020] EWHC 2483 (Comm)*). In a recent case titled *The Deposit Guarantee Fund for Individuals v. Bank Frick & Co AG and Eastmond Sales LLP*, the England and Wales High Court discussed the implications of the order in which the respondent sought to pursue a Summary Judgment Application ('SJ Application') and a Stay Application. In this blog post, we summarise this case, and we shed light on its ramifications.

Background and Issues before the Court

PJSC National Credit Bank ('PJSC'), a Ukrainian company, concluded in total six pledge agreements with the Liechtenstein company Bank Frick & Co A.G. ('Frick') in the 2013-2014 period. Under these agreements, PJSC pledged funds as security for several loans Frick had made to three UK incorporated entities. In 2015, the debtors failed to meet their debt obligations and, as a result, Frick turned to PJSC and sought the funds that PJSC had pledged as security. After making a payment to Frick in the amount of US$25.8 million, PJSC's assets were severely depleted, and this led to the insolvency proceedings in which the claimant in this case – The Deposit Guarantee Fund for Individuals – was appointed as PJSC's liquidator.

The claimant brought the case before the England and Wales High Court, alleging that the pledge agreements, along with the accompanying loan agreements, constituted part of a sophisticated money-laundering scheme. Frick and one of the UK incorporated entities that had obtained a loan from Frick – Eastmond Sales LLP – were named as defendants.

Frick challenged the jurisdiction of the court (the second defendant did not respond to the claim) based on the existence of an arbitration clause in all of the pledge agreements. To this end, Frick submitted the Stay Application, asking that the Court refer the parties to arbitration in accordance with s9 of the Arbitration Act 1996 which provides as follows:

> (1) A party to an arbitration agreement against whom legal proceedings are brought

> (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

Frick also sought, in the event that its Stay Application was unsuccessful, a Summary Judgment in its favour.

After the opposing sides corresponded with each other in relation to the upcoming hearings, Frick asked the claimant to agree to two things. First, Frick opined that the SJ Application was not a substantive step in the proceedings based on which an inference could be made that Frick was submitting itself to the jurisdiction of the Court. Second, Frick was of the view that its SJ Application ought to be listed for a hearing before the Stay Application, following from its position that there was no substantive aspect to its SJ Application. The claimant, however, strongly opposed both of Frick's suggestions.

In essence, then, the Court was asked to tackle the following two issues:

> (1) whether by pursuing the determination of the SJ Application before the determination of the Stay Application, Frick is taking a step in the proceedings to answer the substantive claim;
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> (2) if not, whether, as a matter of case management, the SJ Application should be listed before the Stay Application.

Decision

a) Frick's SJ Application not a "step in the proceedings to answer the substantive claim"

Both the claimant and the defendant relied upon *Capital Trust Investments Ltd v Radio Design TJ AB [2002] EWCA Civ 135, [2002] CLC 787* to support their respective positions. It was common ground between the parties, referring to *Capital Trust Investments*, that the following are not a "step in the proceedings" under s9 of the Arbitration Act 1996:

> (1) an application for strike out or summary judgment which is made expressly conditionally on a Stay Application not succeeding;
>
> (2) seeking a hearing and making of submissions at the hearing of such an application.

However, the claimant argued that "a defendant could only avoid making an election to waive its objection to the jurisdiction, if it did not seek the determination of the summary judgment application before the stay application." This required the Stay Application to be determined before the SJ Application.

The Court, following the rationale in *Capital Trust Investments*, held that the SJ Application was expressly conditional on the outcome of the Stay Application and would have had effect "only in the event that the Stay Application is unsuccessful" regardless of the order in which the two applications were listed. Accordingly, the Court concluded that Frick had not waived its objection to the jurisdiction, nor made a "step in the proceedings to answer the substantive claim."

b) Stay Application to be heard ahead of the SJ Application

With regard to the issue concerning the sequence of the hearing of the applications, the Court noted that irrespective of the order in which the Stay Application and the SJ Application were to be heard, there was a risk of unnecessarily incurred costs.

The Court further noted, on the basis of a rather superficial overview of the Stay Application, that it could not decide whether the latter was more complex and time-consuming than the SJ Application.

Moreover, unlike *Capital Trust Investments*, the case at hand had "no common issue which favours the two applications being heard together."

Finally, the Court concluded that, as the SJ Application was expressly predicated on the outcome of the Stay Application, as a "matter of logic", "it should be heard first unless there are clear countervailing case management considerations to the contrary," which in the present case were not present.

Concluding Remarks

The Court reached a practically reasonable and legally sound solution, taking into account the complexity and the length of the issues at hand, the associated time and the risk of incurring unnecessary costs. The judgment confirms the proactive case management approach of the English courts aiming to ensure time and cost-efficiency. Further, the judgment continues the line set in previous case law, thus confirming the consistent positive attitude of the English courts towards arbitration.

From a practical perspective, the judgment provides handy case management directions to defendants seeking to challenge the jurisdiction of courts in favour of arbitration.

First, it suggests that a defendant who is applying for a stay of court proceedings in favour of arbitration is also entitled to apply for a summary judgment, as long as the summary judgment application is made expressly conditional on the outcome of the application to stay. The defendant need not fear that they are taking a substantive step in the proceedings before the court so long the conditionality element between the application to stay and the summary judgment application is present.

Second, the judgment further demonstrates that in such a case scenario, to ensure a practical outcome, it only makes sense for the court to hear a stay application ahead of a summary judgment application. The court rightfully observed that, given that the summary judgment application is conditional on the stay application being unsuccessful, the logic dictates that the latter be listed first, and not the former. There were certainly no compelling reasons whatsoever to take the upside-down approach.

Although the Court in the case at hand only focused on the case management considerations, it would certainly not be far-fetched to say that, overall, the judgment results in a pro-arbitration outcome. If the Court were to first hear the arguments on the SJ Application, it would potentially be treading on the territory reserved for the arbitrators, provided that the Stay Application turns out to be successful. So, all in all, it would be safe to say that the England and Wales High Court got it right, yet again!

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