

Commercial Court takes strict view on late amendments to statement of case

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In the matter of *Quah Su-Ling v Goldman Sachs International ("GS")* [2015] EWHC 759 (Comm) the Commercial Court has made a strong statement that only in the most exceptional of circumstances will a party be permitted to make late amendments to its statement of case.

Background

The Claimant was a Singaporean national of some substance. She took out an on demand loan from GS to fund the purchase of shares. Security for the loan was given, inter alia, in the form of shares in 3 companies.

On 2 October 2013, at 8.45am GS gave the Claimant oral notice that it required immediate repayment of the full facility. At 9.20am the Claimant requested time to pay, which GS refused. At 11.47am, GS made a written demand for payment, with payment demanded by 1.30pm, failing which it would close out the account and terminate the facility. The Claimant did not satisfy the demand. At 1.37pm GS issued notice of default and over the course of the next 3 weeks sold all of the assets put up for security. The sale of large tranches of shares in the 3 companies caused the share price to collapse and left a substantial shortfall in the amount that remained due and owing under the loan facility.

The Claimant sued GS, alleging that it had failed to use reasonable efforts to obtain the best price for the shares, that GS should have sold them by way of private placement and that had it done so, full value would have been realised for the shares.

Procedural History

Proceedings were issued in November 2013. The case was pleaded through December 2014 to February 2015. There was a CMC held in March 2014 and directions were given to trial. Standard disclosure was given in May 2014. Witness Statements were exchanged in August 2014 and experts reports were to be exchanged in October 2014. Trial was fixed to commence in March 2015. It is important to note that it was recognised at an early stage in the proceedings that the Claimant would need to rely on expert evidence to prove certain important aspects of her case.

The Claimants attempt to amend

In February 2015, the Claimant notified GS that she intended to make fundamental amendments to her case such that she was abandoning large parts of her original claim. In essence the Claimant's new case was that GS had failed to give her reasonable time to effect the mechanics of payment before issuing a default notice (48 hours being required), that GS should have immediately and aggressively sold the shares, so that the shares were sold before the share price collapsed and that GS had knowledge that the price of the shares were over-stated and about to undergo a significant market correction, and that GS had a duty to tell her and had they done so she would have immediately given instructions to sell the shares aggressively.

The application

In making her application to amend, the Claimant accepted that if it were granted, she would pay the costs of the amendment and the costs of the action thrown away by the amendment, and the adjournment on an indemnity basis and that permission should be conditional upon her paying 40% of those costs on account. She accepted that the amendments were sought to have been made very late, but submitted that the only prejudice to GS was in costs, which she was proposing to compensate for.

However, as the Court made clear, costs are not the only issue to be considered. The principles are as follows:

- Whether to allow an amendment is a matter for the discretion of the Court where a balance must be struck between injustice to the applicant and injustice to the respondent and other litigants in general;
- Where very late amendments are made the general approach is that there is a heavy burden on the applicant to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it;

- Where a trial date has been fixed, the parties and the Court have a legitimate expectation that it will be kept;
- Lateness is a relative concept which depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing and a fair appreciation of the consequences of it;
- It is no longer sufficient simply to argue that the only prejudice lies in costs;
- The application must have a good explanation for the delay in raising the new case; and
- Parties can no longer expect indulgence if they fail to comply with procedural obligations.

The Court found that the Claimant had failed to comply with procedural obligations (in relation to expert evidence), had not acted expeditiously in the preparation for trial, had not adequately explained the reasons for her delay in raising her new case and, importantly, that on analysis, her new case was not sufficiently strong to justify permission be granted.

The Court specifically addressed the issue of prejudice. It made it plain that prejudice in terms of costs is no longer a determinative factor. GS would suffer prejudice through the loss of the trial date and that there would be disruption for other court users. However, of more substance, the Court found that GS stood to be prejudiced in its ability to recover from the Claimant both the balance of the loan monies owed and costs of proceedings as the Claimant was the subject of a number of other claims in other jurisdictions and had indicated that if her claim were to fail that she would have no option but apply for bankruptcy. Where liability to GS was to crystallise substantially later, there was a real risk that the claims of other creditors would deplete the assets available to GS.

Conclusion

At first glance, this may seem like a harsh decision. However, on analysis, it is the correct one. There is and should be a very heavy burden on a party that seeks to make amendments to their statement of case at a late stage. It is important that the Court recognises that prejudice to the other party does not just sound in costs. It is also important for the proper administration of justice that parties to litigation are held to account for their behaviour throughout the life of a claim, and that delay and disregard to directions are weighed in the balance.

There will always be legitimate reasons why some amendments are made late, but it is an unfortunate fact that often late amendments result from inadequate consideration of the claim at an early stage. A strict approach by the Court will go some way to ensure litigants are better served by their advisors by analysing the facts and legal issues with their clients and advisors should not shy away from challenging their client's evidence.

Authors



Jonathan Brogden

London - Walbrook

jbrogden@dacbeachcroft.com