Existence of counterclaim is no bar to summary judgment

07/12/2015

Commercial analysis: Christopher Stirling, barrister at Field Court Chambers, considers the Court of Appeal's decision in FFI-Global S.r.l v Outeiro Ltd. The case serves as a useful reminder for a number of practice points.

Original news

FFI-Global S.r.l v Outeiro Ltd and another [2015] EWCA Civ 1212, [2015] All ER (D) 245 (Nov)

The Court of Appeal, Civil Division, dismissed the defendants' appeal against an order by which the judge granted summary judgment against the first defendant in the sum of £366,999 for goods ordered and supplied, but stayed enforcement of the judgment for any sums in excess of £300,000 pending the trial of the first defendant's counterclaim for damages based on the alleged late delivery and defective condition of the goods.

What was the case about?

This was an appeal against the grant of summary judgment pursuant to the Civil Procedure Rules 1998, (CPR), SI 1998/3132, Pt 24. The case was a sale of goods claim for the price of goods delivered but not paid for. The claimant was an Italian manufacturer producing designer goods for the brand MFG under licence. The defendants were:

- a company operating a London boutique as a franchise for MFG, and
- that company's director and principal shareholder

The company was pursued in contract and the director/shareholder in deceit in respect of representations as to payments that were not forthcoming. Summary judgment was applied for against both defendants. At first instance Leggatt J gave summary judgment for the full amount claimed against the company, £366,999 on the basis there was no real dispute this sum was due. In respect of the company's counterclaim he stayed enforcement of the judgment for sums in excess of £300,000 on the basis the company had arguable counterclaims for faulty goods and late delivery but that the sums claimed under these heads were implausibly large and would not in any event exceed £66,000. He rejected as fanciful and unsupported by any evidence a further substantial aspect of the counterclaim that the company had a 15 year supply agreement in respect of which it was entitled to damages for breach. The judge refused summary judgment on the deceit claim against the director/shareholder. The company and the director/shareholder appealed. There was no cross appeal against the refusal of summary judgement on the deceit claims.

What were the main issues?

The appeal was brought on four grounds by both the company and the director/shareholder:

- that even though summary judgment was refused on the fraud claims that summary judgment against the company and in particular the rejection of the 15 year supply term as fanciful would nonetheless prejudice the director/shareholders case on the deceit allegations. Moreover that the judge at the trial in investigating the fraud claim may reach a conclusion contrary to the summary judgment finding on the 15 year supply agreement. That accordingly this was 'some other compelling reason' the matter should be allowed to proceed to trial under CPR 24. This aspect of the appeal was brought expressly on behalf of the director/shareholder rather than the company
- that there was the possibility that further disclosure of documents would support the company's case on the 15 year supply agreement and that it was precipitate to grant summary judgment prior to the disclosure process
- that in rejecting the 15 year supply agreement the judge had conducted an impermissible mini-trial
- that the judge had wrongly refused to give credit for the company's right to return up to 20% of goods delivered

What did the court decide?

The court rejected the appeal in its entirety finding:

- that the issues in the deceit claim were wholly discrete as they went to the state of mind of the director/shareholder when she made the representations as to payments not as to the objective legal merits of any possible defence the company may have. The mere fact that the director/shareholder faced a deceit claim was not sufficient to preserve the company's defence that was otherwise legally hopeless. There was no risk of inconsistent findings as the judge would have no reason to re-examine the legal merits of the 15 year supply agreement claim when considering the director/shareholders state of mind when making the representations as to payment
- there were no reasonable grounds for believing that documents would emerge in disclosure that would support the case for a 15 year supply agreement. There was no suggestion that the company had actually entered into such a written agreement with the supplier. There had been such an agreement between the company and previous suppliers. The company alleged that these agreements had been assigned to the current supplier. However mere assignment would not suffice to bind the supplier. There would have to be a novation agreement incorporating the supplier, the previous suppliers and the company. There was no suggestion by the company itself that it had been party to such a novation and this was not something which was likely to emerge on disclosure
- the judge had not conducted an impermissible mini-trial. There had simply been no evidence to support the alleged 15 year supply agreement. The only contemporaneous documentary evidence pointed against it. Moreover, although an oral agreement to this effect was pleaded by the company, their written evidence on the summary judgment application did not support this. The highest the company could put its case was that it had been told by a third party that such a 15 year supply agreement would be agreed by the company. The judge had been perfectly entitled to find the company's argument as to a 15 year supply agreement hopeless
- the point in relation to the right of return while appearing in the company's defence had not been part of its counterclaim. Moreover it had not been argued below as a reason to limit the summary judgement award. It was far too late to raise this matter for the first time on appeal

What is the impact for commercial lawyers?

While not necessarily raising any wholly novel points this case nevertheless reminds practitioners of a number of important practice points:

- that the mere existence of an arguable counterclaim is no bar to summary judgment on the claim. If the judge takes the view the amount of the arguable counterclaim is limited he can give judgment on the main claim and simply reduce the amount of the judgment that is immediately enforceable by the maximum he thinks the counterclaim will be worth
- equally where there is a hopeless element to a counterclaim this can be dismissed in isolation of the rest at the summary judgment stage
- a judge is entitled to be robust in dismissing wholly implausible counterclaims where the evidence adduced, does not support them. A mere dismissal of a hopeless claim on a disputed factual basis does not constitute an impermissible mini-trial
- while stopping a case pre-disclosure may be precipitate in some cases there has to be some reasonable grounds for believing something may emerge in disclosure which would throw a different light on the case. The hope or belief that 'something might turn up', where there are no reasonable grounds to believe this is likely, is insufficient to resist summary judgment
- an otherwise hopeless case by one defendant will not be preserved from summary judgment under 'some other compelling reason' where there remains a trial against another defendant arising out of substantially the same facts, even where the case against the other defendant alleges fraud, unless there is a real overlap of the issues to be decided at the subsequent trial. The risk of prejudice to the other defendant must be real and not merely speculative
- finally, and although not part of the reported judgment, the result of the director/shareholder joining herself to

the appeal was that she rendered herself personally liable on a joint and several basis with the company for the costs of the appeal. Her written submissions that she should not have to pay the costs or only have to pay a reduced amount of costs was rejected by the Court of Appeal

Christopher Stirling is a barrister at Field Court Chambers. Christopher practices in the fields of matrimonial finance, commercial law, property law and probate and inheritance.

Interviewed by Lucy Karsten.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor