IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE No. 159 of 2016 (IMJ)

BETWEEN

MIDTOWN ACQUISITIONS LP

Plaintiff

AND

ESSAR GLOBAL FUND LIMITED

Defendant

IN CHAMBERS

Appearances:	**Mr. J Eldridge and Mr. P Smith of Maples and Calder for the Plaintiff** **Mr. U Payne and Mr. P Murphy of Ogier on behalf of the Defendant**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**24 August 2017**
Draft Judgment Circulated:	**22 November 2017**
Judgment Delivered:	**27 November 2017**

HEADNOTE

Summary Judgment application in relation to foreign judgment - application to re-open and provide new evidence - Defendant putting forward defence, in particular fraud, in varying ways in different jurisdictions - Court's power to change its decision after judgment handed down but order not yet sealed.

JUDGMENT

Introduction

1. This is the application of the Plaintiff, Midtown Acquisitions, L.P. ("**Midtown**"), to re-open its summary judgment application made by summons dated 26 October 2016 and to introduce additional evidence, including the Fifth and Sixth Affidavits of Benjamin

Finestone, sworn respectively on 4 May 2017 and 23 June 2017. The application is opposed by the Defendant Essar Global Fund Limited ("**EGFL**").

2. The summary judgment application came on for hearing before me on 10 January 2017, and my written judgment ("**the Judgment**") was delivered on 2 May 2017. I refused the summary judgment application. The order that follows from the Judgment has not yet been sealed, and Midtown's Counsel, Mr. Eldridge, submits that accordingly, the Court has jurisdiction to re-open the application, which Midtown seeks on the basis of material developments following the delivery of the Judgment.

Background

3. Midtown sought summary judgment to enforce the judgment of the New York Supreme Court in the amount of US$171,769,169.00 dated 25 August 2016 ("**New York Judgment**").

4. At paragraphs 58 and 59 of the Judgment, I gave the essence of my reasons for refusing the summary judgment application, as follows:

> *"58. In my judgment, EGFL does have a real prospect of succeeding on a defence that the Confession Judgment was obtained by 'fraud, misrepresentation or other misconduct' as construed under New York law, enforcement of the Confession Judgment would be contrary to public policy or that the Confession Judgment was obtained in breach of the principles of natural justice. I do not wish to go into this in great detail, but some of my reasons for so holding are that, although the Affirmation in support of the Confession Judgment referred to certain terms of a Term Sheet, the Term Sheet was not attached or disclosed to the New York Court. Also, EGFL assert that the affirmation is based on a default under the guaranty that predated the Term Sheet after the parties had entered into, and EGFL had performed, under the Term Sheet, and which settled and compromised the pre-existing default under the guaranty.*

GRAND COURT · CAYMAN ISLANDS ·

> 59. *Further EGFL claim that both the Confession of Judgment and the Affirmation in Support of the Entry of Judgment were filed without any advance or other notification to it."*

5. As I pointed out at paragraphs 45 and 46 of the Judgment, at the hearing Counsel had alerted me to the fact that there were applications pending in New York to vacate the judgment. However, I had not at that time been informed that there were other applications pending in the High Court of England and Wales ("**English High Court**") and in the Dubai International Financial Centre Court ("**DIFC Court**") seeking recognition and enforcement of the New York Judgment. I was made aware of those proceedings simply by being sent the judgments of those Courts by Counsel for Midtown, sometime after I had reserved judgment. There was not at that time any attempt to introduce further evidence. It appears to me that Counsel for Midtown did not then appreciate the difference between putting before the Court new material in the form of evidence, as opposed to making available to the Court decisions of Courts in other Jurisdictions.

6. After I handed down the Judgment, Midtown requested a hearing to address the appropriate orders to be made consequent on the Judgment which determined that Midtown's summary judgment application should be refused on the basis that there were issues to be tried. A hearing was scheduled for 8 May 2017. However, at the hearing, Mr. Payne, Counsel for EGFL, sought an adjournment in order to respond to Finestone 5 and this was granted.

7. Midtown subsequently filed its application to re-open the summary judgment application, on 23 June 2017 and this is now the application to be addressed by this Court. In addition to Finestone 5 and 6, Midtown has now filed Finestone 7 – 10 (inclusive), sworn respectively, on 14 July, 15 August, 16 August, and 18 August 2017.

8. EGFL has filed the second affidavit of Mr Meister, sworn 6 July 2017.

Midtown's application

Developments in the New York proceedings

9. Midtown considers that one of the most important developments is that, on 18 May 2017, the New York Court dismissed EGFL's motions effectively on procedural grounds: that Court found that the 5015 Motion was not the correct procedure to set aside a judgment said to have been wrongfully obtained; and in any event it was not supported by admissible evidence. The 317/3218 Motion was denied because it was "*duplicative*". The Defendant has not commenced a "*plenary*" action, and has instead embarked on an appeal of the dismissal of the 5015 and 317/3218 Motions.

10. The New York Court, the duty Judge of the Appellate Division of the Supreme Court of the State of New York, and the Appellate Division of the Supreme Court of the State of New York have each denied EGFL's applications for a stay pending appeal.

11. On 11 August 2017, the New York Court ordered EGFL to produce certain documents that will facilitate the enforcement of the New York Judgment.

EGFL's Different Stances in Different Jurisdictions

12. Whilst EGFL pursued the public policy defence before this Court, it did not do so before the English High Court. Nor did EGFL pursue this defence before the DIFC Court.

13. Whilst EGFL pursued its natural justice defence before this Court, it has not done so on appeal in either England or Dubai.

14. Whilst, in relation to the defence of fraud, EGFL maintained an allegation of conscious and deliberate deception before this Court, it appears not to have done so before the English and Dubai Courts.

15. Midtown has also sought to have evidence of its enforcement efforts in BVI, Delaware, and Mauritius put before the Court. However, to my mind, that is not relevant for this issue now before me.

16. At paragraph 37 of its written skeleton argument, Midtown submits that the fact that the case has been advanced differently in these different jurisdictions is concerning. Further, that this only came to light after the January hearing and is new evidence that this Court can properly take into account.

17. The submission continues by claiming that this Court was updated as to those developments while it reserved judgment but, in the event, declined to grant summary judgment. I must confess I find this latter submission strange. To my mind simply sending to this Court judgments of other Courts, without seeking to adduce any new evidence, did not update this Court on anything except what the Judges in those different Courts had ruled. That those Courts made the rulings they did based upon the evidence and arguments advanced before them I had no doubt. That is precisely why, at paragraph 63 of my earlier Judgment, I made the point that I had to make my ruling on the law and facts and cases as presented to me. Judgments of other Courts are not evidence, and nor do the contents of Judgments become evidence in a case before another Judge, as far as I know.

18. Perhaps Midtown's Attorneys should have filed their application to re-open the hearing before I had ruled, rather than simply forwarding on to me decisions in other Courts in respect of applications of which I had not even been made aware at the hearing before me. As far as I knew at the hearing before me, the only proceedings of concern were those taking place in New York.

19. Be that as it may, Midtown also submits that even if the Court is not minded to reconsider the decision to grant summary judgment, the different way in which the defence has been advanced is highly relevant to this Court's exercise of its wide discretion to impose conditions, because it demonstrates that the defence is plainly "*shadowy*". Furthermore,

the Court had already expressed concerned about the fact that by EGFL's own admission it has failed to make any other payments - see paragraph 60 of the Judgment. When all of these factors are taken together, it was submitted that there are ample reasons for imposing a condition on leave to defend, requiring that EGFL make a payment into Court of US$99 .9 million, the amount indisputably owed at the time of the hearing.

EGFL's Submissions

20. It would appear that the parties agree upon the principles upon which the Court may exercise its discretion to receive new evidence after judgment has been given but before an order has been drawn up. They also agree upon the principles of law regarding the discretion that a Judge has to change a decision before the Order is drawn up. I discuss the relevant law below.

21. EGFL submits that the evidence which Midtown wishes to have admitted would probably not have an important effect on the result of the case, but if the Court determines otherwise, it would in any event not be sufficient to allow Midtown's application for summary judgment to succeed.

22. Mr. Payne referred to paragraphs 58 and 59 of my Judgment, and said at paragraph 15 of his submissions:

> *"15. The Factual Determinations were the basis for the Legal Determinations which led the Court to conclude that EGFL does have a real prospect of successfully defending the Plaintiff's claim."*

23. It was submitted that the additional evidence about proceedings other than in New York is irrelevant.

24. As regards the evidence concerning the updates in the New York Proceedings, Counsel submitted that what has happened in New York has no bearing on the *"Factual*

Determinations" because the New York Courts have not yet made any determination in relation to the question whether Midtown's misconduct, fraud or misrepresentation caused the confession of judgment to be wrongly entered, having been so entered without the Term Sheet being made available to the New York Court. Meister 2 also makes this point.

The Law

The Applicable Principles: Jurisdiction to Re-Open or change decision

25. The principles applicable to the consideration whether to revisit a decision, where a decision had been delivered but an order had not yet been sealed, were helpfully discussed in the decision of the UK Supreme Court, cited by Mr. Eldridge, in ***In re L (Children)*** [2013] UKSC 8, neatly summarised in the Headnote, as follows:

    1. The power of a judge to reverse his or her decision at any time before the order was drawn up and perfected by being sealed by the court was not limited to exceptional circumstances.
    2. The overriding objective in the exercise of the power was to deal with the case in question justly.
    3. Relevant factors to consider would include, on the one hand, a party having already acted upon the decision to his detriment and, on the other, the existence of a mistake by the court, a failure to draw the court's attention to a plainly relevant fact or point of law, or the discovery of new facts after judgment had been given.
    4. Justice might require the revisiting of a decision for no more reason than the judge having had a carefully considered change of mind, since every case would depend upon its particular circumstances.
    5. The need for the power to be exercised judicially and not capriciously required that consideration be given to offering the parties the opportunity of addressing the judge on whether he should change his decision, and the longer the interval since the first decision the more likely it was that it would not be fair to do otherwise.

Jurisdiction to Re-Open and Allow New Evidence

26. In ***Attorney General v Bridger*** [2015] 1 CILR 206, Williams J and in the recent decision of Segal J in ***In the Matter of Shanda Games Limited*** FSD 14 OF 2016, (Unreported, 27 July 2017), the principles involved in applications to re-open a trial on the basis of new evidence were discussed. In ***Bridger*** the application was made after the hearing had been completed but judgment had been reserved. In ***Shanda Games***, the application was made after a draft judgment was handed down. However, it seems to me that the principles applicable to the ***Shanda Games*** situation, would be substantially the same as when a judgment has been handed down but before the order is sealed, as was the case in ***Charlesworth v Relay Roads Ltd.*** [2001] 1 WLR 230.

27. From the above authorities, (in particular paragraph 33 and 34 of ***Shanda Games***) the following principles can be gleaned:

    1. The Court does have jurisdiction to admit new evidence and order a further hearing (and thereby re-open the trial or hearing) after a Judgment has been handed down.
    2. The principle to be applied generally is the overriding objective of dealing with cases justly and proportionately, including on the issue of costs. This also involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute.
    3. In cases involving an application to call new evidence and have a new trial, the Court should take into account the well-known test propounded in ***Ladd v Marshall*** [1954] 3 All E.R. 745. In the case of applications before the trial Judge rather than the Court of Appeal, the ***Ladd v Marshall*** factors should be applied more leniently.
    4. As stated at paragraph 8-02 of James, *Expert Evidence Law and Practice* (4^{th} Ed, 2015) (quoted in ***Shanda Games***), the ***Ladd v Marshall*** principles remain persuasive (but not determinative) in this field but the trial judge enjoys a greater discretion to let in fresh

evidence prior to the final order being drawn up since the trial judge is better equipped than the appellate court to know what effect such fresh evidence would have on his original decision.

5. Notwithstanding that, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a judgment has been given against him, it would generally require powerful factors in the applicant's favour before the Court would be prepared to accede to an application where the applicant could not satisfy the three requirements in ***Ladd v Marshall.*** (Neuberger J (as he then was) page 238 ***Charlesworth*** E-H).
6. Almost inevitably, each case will have particular features which the Court will think it right to take into account when deciding how to dispose of the application before it.
7. When applying the overriding objective in the context of applications to admit new evidence after trial after Judgment has been handed down, there is a balance to be struck between the interests in having the true facts considered, and the need to have finality in litigation.

28. The three conditions spelt out in ***Ladd v Marshall*** for admitting new evidence are as follows:

1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.
3. The evidence must be such that it is apparently credible, although it need not be incontrovertible.

DISCUSSION AND ANALYSIS

29. In my judgment, all three criteria set out in ***Ladd v Marshall*** are met in this case. The evidence about what has transpired in other Courts after the hearing date in January, and evidence in relation to the shifts in position of EGFL could not have been obtained for use at the hearing. Some of it could have been obtained after the hearing but before delivery of the Judgment, but the circumstances are not straightforward. The evidence is credible, and would have an important influence on the result of the case.

30. In my judgment, it is also appropriate for me to reconsider my decision in light of the new material, as well as, I must say, my greater appreciation of what the case is that has been advanced by EGFL in England and in Dubai, as opposed to what has been advanced (or at least originally so advanced) before the New York and Cayman Court.

31. I had raised with Mr. Eldridge whether he should not instead have simply made a new application for summary judgment supported by the new basis and evidence that exists. See the Note in 1999 Supreme Court Practice, O.14/1/9A. However, at the end of the day, it was felt that there was no appreciable difference between that and reopening the application heard in January 2017.

The Shifting Case on Fraud

32. When I heard this matter in January, EGFL's case was without a doubt argued on the basis that there was fraud. Counsel for EGFL agreed that there had to be conscious and deliberate deception. It was argued that there had been conscious and deliberate deception of the New York Court in order to get the Judgment entered. Further, that the New York Court had been deceived or "*duped*" and that Midtown had been guilty of deceitful conduct.

33. At paragraph 19 of Meister 1, the allegation of fraud was made (along with misrepresentation and/or misconduct) and it was said that this was detailed in the New York Motion. In the Memorandum of Law in Support of the Motion to Vacate the

Judgment, exhibited to Meister 1, in the conclusion it is stated, for example, that *"Midtown Acquisitions **purposely concealed** the Term Sheet from the Court and **falsely** stated that the Confession of Judgment was unconditional, and further **falsely** stated that EGFL was in default when, in truth, EGFL was not. All of this was **an effort** to **induce** the Clerk of the Court to enter the Judgment."*
(My emphasis)

34. Reference was also made to the affidavit of Andrew Wright, Senior Legal Counsel for Essar Capital (UK) Limited and exhibits, in particular paragraph 20 of the affidavit and corresponding email exhibit. Paragraph 20 indicated that a representative of a management group that had acted for Midtown during the discussions, had emailed a representative of EGFL on 26 June 2016, stating:

> *"I want to make sure we are on track for the June 30 payment. This buys EGFL 60 days of relief to work on all the other fronts".*

35. That evidence was referred to by Mr. Payne as showing that as far as EGFL was concerned, the payments did buy EGFL room to arrange liquidity and that this was further evidence that Midtown knew that if the payments were made, Midtown had no right to file the Confession of Judgment and that Midtown had done so with conscious and deliberate deception of the New York Court.

36. However, it now appears clearly to me from paragraphs 65 and 66 of the judgment of Teare J (this specific passage or its significance was not brought to my attention when the judgment of Teare J was simply sent to me by Counsel for Midtown after I had reserved), that EGFL has indicated that there is no allegation of dishonest conduct made against Midtown or its lawyers. That is completely at variance with the case as argued and advanced before me on behalf of EGFL; and it would seem, what was argued in the New York Court. Those paragraphs of the Teare Judgment state:

> *"65. I consider that if conscious and deliberate dishonesty is required when seeking to impeach an English judgment the same is required when seeking to impeach a foreign judgment.*

66. *Since Mr. Wolfson [Leading Counsel for EGFL] expressly disavowed any allegation of dishonesty on the part of the Claimant or its New York lawyer it follows that the defence based upon the fraud exception has no prospect of success."*

(My emphasis)

37. In addition, I make reference to paragraphs 56 and 63 of the Judgment of Field J in the DIFC Court. The learned Judge there stated:

> *"56. EGFL shies away from alleging that the deception of the Court was dishonest. The deception was not innocent but neither was it dishonest. Mr. Montagu-Smith for Midtown submits that the fraud contemplated in Rule 50 involves conduct of a dishonest character.*
>
> ...
>
> *63. In my judgment, neither of the two authorities relied on by Mr. Ghaffar comes close to establishing that the non-dishonest misleading of the foreign court is sufficient to establish a defence to the enforcement of a foreign judgment. On the contrary, they are consistent only with an approach that requires that the foreign court be misled or deceived with a dishonest intention, this being the hallmark of the common law conception of fraud referred to in the judgments in* ***Abouloff*** *and* ***Vadala v Lawes****"*

(My emphasis)

38. Then, in Chambers before me in August, (because I quite obviously had to know), I asked Counsel for EGFL what exactly is his client's position regarding fraud. His response was that EGFL has disavowed any allegation of dishonesty in the other jurisdictions (and it would seem the fraud defence has been abandoned). However, he stated that this does not mean that his client is not still saying that there has been misrepresentation or misconduct in what took place, particularly in so far as Midtown failed to bring the Term Sheet to the attention of the New York Court. Counsel maintained that his client still wishes to rely upon the defences of public policy and natural justice in this jurisdiction.

39. As regards the question of whether, if conditional leave to defend were to be granted, the condition sought by Midtown should be imposed, Counsel suggested that this Court had already found the other defences arguable and that the defences are far from shadowy.

RESOLUTION

40. This is quite an extraordinary situation. EGFL appears to have very shifting positions on its defences. Indeed, the main plank of the defence was fraud. However, it has now been conceded before me that EGFL makes no allegation of dishonesty against Midtown or its New York lawyer. So, it is this Court that has been misled, albeit perhaps unwittingly.

41. In the circumstances, it is now plain that EGFL has no real prospect of succeeding before this Court on a defence of fraud impeaching the New York Judgment. That defence was entirely frivolous, or at any rate, unsustainable and without conviction.

42. The difficulty as I see it is that although the defences of public policy and natural justice were also raised, the plinth and central focus of the defence was the fraud allegation. That has now fallen by the wayside. In any event, my view that EGFL had a real prospect of succeeding on a defence based on public policy or breach of natural justice was hinged heavily on the fraud allegation. It is also of concern that EGFL has not ultimately pursued the defences relying on natural justice or public policy in either England or Dubai. That does appear to suggest strongly that these are not genuine or bona fide defences and/or they lack conviction.

43. Mr. Payne submitted that this Court had made Factual Determinations. That is not a correct characterisation of what I had decided in my earlier Judgment at paragraphs 58 and 59. What I had held at that time and on the evidence before me, which I thought included allegations of conscious and deliberate deception and dishonesty, was that EGFL had real prospects of impeaching the New York Judgment. However, that has all changed with the shifting positions of EGFL.

44. In my judgment, absent a fraud allegation, the defences of enforcement of the New York Judgment being contrary to public policy or in breach of natural justice fall away. The tumbling of the fraud defence has a domino effect on the other defences.

45. In my judgment, on the new evidence and materials before me, and having had a chance to look more closely at what EGFL is really asserting, EGFL has no real prospect of succeeding in a defence impeaching the New York Judgment on any ground.

46. I am therefore minded to grant summary judgment as sought by Midtown in its Summons dated 26 October 2016. The issue of contractual or alternatively statutory interest is to be set down for assessment at a convenient date, with skeleton arguments and bundles to be filed pursuant to the FSD Guide.

47. If I am wrong on the summary judgment issue, then it is plain that any defence EGFL has is shadowy. It would clearly be appropriate for EGFL to be required to make the payment into Court requested by Midtown as a condition of leave to defend. However, in all the circumstances, I am now satisfied that, instead, there should be summary judgment for Midtown in the sum of US $171,769,169.00, with interest to be assessed.

48. Midtown is entitled to its costs, to be taxed if not agreed.

49. For completeness, I should just state that in any event, I would not now be minded to grant any stay of execution pending the determination of any appeals in New York, since the Courts there have denied applications by EGFL for a stay at all junctures.

GRAND COURT · CAYMAN ISLANDS ·

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT