1. **Naibu Global International Company Plc and (2) Naibu (HK) International Investment Ltd v (1) Daniel Stewart & Company Plc and (2) Pinsent Masons LLP**

Chancery Division (Bacon J)

14 October 2020

[2020] EWHC 2719 (Ch)

Solicitor – client – parent company – implied contract – reflective loss – strike out – summary judgment – arbitration – stay – person claiming under or through

Naibu (China) Co Ltd (“NC”) is a Chinese sportswear company established by Mr Huoyan Lin. The second claimant Naibu (HK) International Investment Ltd (“NHK”) is its parent company, and the first claimant Naibu Global International Company Plc (“NJ”) is a Jersey company and the holding company for the second claimant, which was incorporated for the purpose of enabling NC’s business to be floated on the London Alternative Investment Market (“AIM”).

Prior to the incorporation of NJ, the second defendant Pinsent Masons LLP (“PM”), was retained to act as the legal adviser to both NC and NHK. It was envisaged that a new parent company would be incorporated for the purposes of floatation, and that PM would advise that company and its directors. The letters of engagement between PM and NC and NHK incorporated terms confirming that the services are provided only to NC and NHK as customer, limiting third party rights, and also included a Hong Kong arbitration clause.

NJ was subsequently incorporated, and floated on the AIM. However, the alleged disposal of NC’s assets by Mr Lin using NC’s company chop rendered the claimants’ shares in NC valueless. NJ was subsequently delisted. The claimants alleged breaches of duty and/or negligence by the defendants in preparing NJ for its initial public offering on the AIM, and in conducting their due diligence. In particular they alleged that the defendants failed to advise them as to the consequences of Mr Lin holding NC’s chop. NJ argued that PM’s conduct gave rise to an implied retainer between them, and/or PM assumed a duty of care in tort to NJ.

PM applied to stay NHK’s claims pursuant to Section 9 of the Arbitration Act 1996, (which the claimants accepted). PM also applied for NJ’s claim to be struck out, summarily dismissed, and/or alternatively stayed pursuant to Section 9 of the Arbitration Act 1996 as a party claiming “under or through” a party to an arbitration agreement within the meaning of Section 82(2) of the Arbitration Act 1996.

PM argued that they were only retained to act for NHK and NC and that their advice, including that given to NJ was provided under these letters of engagement, and that there was no need to imply a retainer between PM and NJ. They therefore were not in breach of any express contractual duties to NJ, nor could a tortious duty of care arise. They further argued that NJ’s loss was irrecoverable since it was purely reflective of NHK’s loss, and was thus caught by the rule against the recovery of reflective loss. The claimants disputed these applications, and applied to amend their particulars of claim to include additional losses. They further argued that the reflective loss point was raised late, and should not be decided on this application.

**Held:** NJ’s claim partially struck out. The application for a stay of NJ’s claim under Section 9 of the Arbitration Act 1996 was rejected. NJ granted permission to amend its particulars of claims.

1. A court should be slow to find that parties have entered into a contract where the parties could have done so expressly but choose not to do so. Only where the conduct of the parties is consistent with an implied retainer should such a retainer be found (*Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch), and *James-Bowen v Commissioner of Police for the Metropolis* [2016] EWCA Civ 1217 applied). (Para. [26])
2. A retainer may be implied from the conduct of the parties where on an objective consideration of the circumstances an intention to enter into a contract ought fairly and properly to be imputed. The test of such an implication is necessity (*Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, and *Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] 2 Lloyd’s Rep. 249; [2001] P.N.L.R. 39 applied). (Paras. [24]-[25])
3. NJ had a real prospect of success of establishing an implied retainer since PM repeatedly described, or permitted themselves to be described as the solicitors for, or as instructed by NJ. (Paras. [27]-[28], [30]-[35])
4. The claimants did not take the admissibility point on reflective loss when the issue was addressed previously, instead the claimants had submitted that the May 2019 hearing should be adjourned until after the UKSC had given judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2020] 3 W.L.R. 255 (concerning reflective loss), resulting in a delay of over a year to the present judgment. The claimants were therefore estopped from raising the admissibility point, or had waived their rights to do so. (Paras. [39]-[41])
5. For the rule against reflective loss the question is to the nature of the loss: the amount of the company’s losses need not be identical or contiguous to that of the shareholders. Where losses to a company result in a fall in the value of its shares, or in its distributions, these are not losses legally recognised as separate from those sustained by the company, and do not give rise to independent claims on the part of the shareholders (*Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2020] 3 W.L.R. 255 and *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch. 204 applied). (Paras. [45], [51]-[52])
6. NJ’s losses as originally pleaded were entirely composed of the diminution in the value of their shareholding in NHK, and were struck out under the rule against reflective loss. Since the rule is limited to shareholder claims based on the value of their shares, or distributions received as shareholders, NJ was granted permission to amend their particulars of claim to add claims relating to alleged losses concerning the steps taken by NJ to assert control over and to investigate the losses suffered by NHK and NC. (Paras. [44], [48]-[54])
7. NJ’s claim is distinct to NHK’s and is advanced on the basis of duties owed directly to it either under the implied retainer, or under a duty of care in tort. Although these duties are similar to those owed by PM to NHK, NJ is not a person claiming “under or through” a party to an arbitration agreement for the purposes of Section 82(2) of the Arbitration Act 1996 (*Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No.2)* [2005] EWHC 455 (Comm); [2005] 2 Lloyd's Rep. 378 applied). (Paras. [56], [62]-[63])

**Cases referred to in the judgment:**

*Agents Mutual Ltd v Moginnie James Ltd* [2016] EWHC 3384 (Ch)

*Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737

*Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch)

*Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] 2 Lloyd’s Rep. 249; [2001] P.N.L.R. 39

*Easyair Ltd (T/A Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch)

*James-Bowen v Commissioner of Police for the Metropolis* [2016] EWCA Civ 1217

*James-Bowen v Commissioner of Police for the Metropolis* [2018] UKSC 40; [2018] 1 W.L.R. 4021

*Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch. 204

*Schiffahrts–gesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading (The Jay Bola)* [1997] 2 Lloyd’s Rep. 279

*Searles v Cann and Hallett* [1999] P.N.L.R. 494

*Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2020] 3 W.L.R. 255

*Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island) (No. 1)* [1984] 2 Lloyd’s Rep. 408

*Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No. 2)* [2005] EWHC 455 (Comm); [2005] 2 Lloyd’s Rep. 378

*Nicholas Davidson QC* and *Daniel Lewis* (instructed by PGB Gitlin Baker) for the Claimants

*Christopher Smith QC* and *Bibek Mukherjee* (instructed by Clyde & Co LLP) for the Second Defendant

**Bacon J**: