Neutral Citation Number: [2022] EWHC 343 (Comm)

Case No: CL-2019-000723

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice

Rolls Building, Fetter Lane, London EC4A 1NL

Date: 15/02/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) **VALE S.A.**

(2) **VALE HOLDINGS B.V.** **Clai**

(3) **VALE INTERNATIONAL S.A.**

- and -

(1) **BENJAMIN STEINMETZ**

(2) **DAG LARS CRAMER**

(3) **MARCUS SRUIK**

(4) **AHSER AVIDAN**

Defen

(5) **JOSEPH TCHELET**

(6) **DAVID CLARK**

(7) **THE BALDA FOUNDATION**

(8) **NYSCO MANAGEMENT CORPORATION**

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Sonia Tolaney QC, Sebastian Isaac, Adam Rushworth and James Ruddell (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimants**

Justin Fenwick QC and Lucy Colter (instructed by **Asserson Law Offices**) for the **First Defendant**

Robert Weekes and Shane Sibbel (instructed by **Covington & Burling LLP**) for the **Second Defendant**

David Lowe and Warren Fitt (instructed by **Wallace LLP**) for the **Third to Fifth Defendants**

Matthew Bradley (instructed by **Peters and Peters Solicitors LLP**) for the **Sixth Defendant**

Ruth den Besten (instructed by **PCB Byrne LLP**) for the **Seventh and Eighth Defendants**

Hearing dates: 26, 27, 31 January, 1, 2, 7, 8, 9, 10, 11, 14, 15 February 2022

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Approved Judgment

I direct that copies of this version as released to the parties and published by Bailii may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

1.
This short judgment is a perfected and slightly expanded version of the reasons I gave in court for dismissing all of the claimants' claims herein, as I did, on Day 12 (counting sitting days only) of a trial scheduled to run until 8 April 2022.

2.
On the previous day, Monday 14 February 2022, I was due to take oral argument in the morning as to whether certain lines of defence outlined in the defendants' written openings for trial were available to them on the pleadings, before resuming in the afternoon the taking of evidence from the claimants' factual witnesses. However, as I discussed that morning with counsel, perhaps without spelling it out as clearly as we might have done for any wider public interested in the case, the claimants' stance as regards whether the claims they had brought could be pursued in the face of the time bar or limitation defences that were raised had altered after reviewing the matter over the course of the preceding weekend (or it may be at the back end of the previous week as well), in the light of the proceedings at trial up to that point.

3.
Mr Fenwick QC did not accept that a reappraisal of the question of time bar on the claimants' side was the sole or main reason for the claimants' desire no longer to pursue their claims. He suggested that there was cause to think that other factors may have been at work, including whether the claimants could show that what they alleged had been fraudulent misrepresentations had played a part in inducing the conclusion of the joint venture between Vale and BSGR that gave rise to the claims made, and the disclosure of documents by the claimants, which continued during the trial, relating to that question of inducement and to the question of what the claimants learned or could with reasonable diligence have learned in or by mid-2013 (in circumstances where this Claim was commenced on 4 December 2019). Mr Fenwick QC suggested that the court would be entitled to pursue such matters, if concerned about them, of its own motion even though they had no bearing on the disposal of the claimants' claims.

4.
I took the view, however, without intending by doing so to indicate or imply any view either way as to the merits of the wider concerns expressed by Mr Fenwick QC, that there was no pressing need for the court to pursue such matters of its own accord. If and to the extent that those concerns, or other wider matters, are thought to give any party, on further consideration, a basis for returning to court to

seek further relief, either arising out of the termination of these proceedings or of some other kind (for example, as was hinted at by Mr Fenwick and also by Ms den Besten, revisiting in some way the LCIA arbitration award in this matter), then the party or parties in question can bring forward such application or claim as may be appropriate and the concerns can be ventilated to whatever extent may be required.

5.
Those wider concerns did not touch the disposal of the claimants' claims because, whether or not there were other factors also influencing the claimants' willingness to pursue their claims further at trial, the upshot was that on 14 February 2022 the claimants filed an application notice seeking permission to discontinue. Permission was required to discontinue because of CPR 38.2(2)(a), since there was a freezing order in place and there were also various undertakings extant, including from the second defendant's wife. Now in many cases, where either a consensual settlement has been reached, or it may be a range of more or less complex reasons affecting only the claimant have come into play, a claimant seeking late in the day permission to discontinue, where permission is required or sought even if not required, may do so without conceding anything as to the merits of the claims that are to be dropped. In the present case, however, the application to discontinue was put squarely on the basis of an unequivocal acceptance that the claimants' claims herein were brought outside the limitation period, so as to be time barred, such that, as the application notice went on to say, it would be inappropriate for the claimants to continue the Claim to judgment. That I labelled, in my Order dated 14 February 2022 discharging the freezing order (but not the claimants' undertakings within it) and certain related undertakings given to the court by the second defendant's wife, "the Claimants' Admission".

6.
In circumstances where that admission, stated as I have indicated in unqualified and unequivocal terms, was sufficient in itself to entitle the defendants to final judgment, dismissing all the claims pursued against them, and in circumstances where, as it seemed to me, there is at least a potential benefit to the defendants in having, on the face of the court record, a dismissal of the claims as opposed to a discontinuance, in my judgment the appropriate disposal of the matter was the final dismissal of the claims on the basis of the Claimants' Admission.

7.
Whereas one of the potential benefits for defendants of a dismissal as opposed to a discontinuance is that dismissal creates finality in this court in a way that, at least in theory, a discontinuance might not, I did not order dismissal on the basis that there was any suggestion before me, or so far as I could see any prospect, of the claimants in fact seeking to resurrect their claims, at all events in this court. However, I accepted submissions variously made by the defendants that to whatever extent it might make a difference in other jurisdictions that the court here has on the basis of the Claimants' Admission dismissed the claims rather than given permission for the claimants to discontinue or withdraw the claims, the justice of the matter was that the defendants should have that benefit.

8.
It seemed to me also that, although this was not the subject of any specific evidence, it was inherently a plausible proposition (raised by Mr Weekes and adopted by a number of the other defendants) that in the defendants' dealings with third parties, including in their banking relationships, for example, it may be of indirect benefit that they are in a position to show that the claims were dismissed and not merely discontinued.

9.
So for those reasons, the substantive order was that upon the basis of the Claimants' Admission, all the claims against all the defendants in this court should be, and they were therefore, dismissed, and I proceeded to deal with various consequential matters.

10.
For this written judgment, I would add that I had in mind also that:

i)
If on some short point that became apparent early in a long trial, the court determined (effectively as a preliminary issue within the trial) that all the claims were time barred, then no question of discontinuance would arise, and the defendant would be entitled to judgment dismissing the claims.

ii)
If in such a case the claimants sought to avoid a dismissal by filing notice of discontinuance (if they could do so without permission) before dismissal of their claims had been uttered by the court, the notice would be apt to be set aside as an abuse so that the court could proceed to order dismissal instead upon the basis of its determination of the time bar issue.

iii)
The defendants in the present case ought not to be treated as less entitled to a dismissal by reason that the claimants had not found themselves on the losing side of an early determination by the court of the question of time bar, but rather had capitulated on that question. I should perhaps make clear that I had not been asked to consider deciding the question of time bar as a preliminary point within the trial and had no intention of proposing that I might do so.

11.
Having added that, I should say that the claimants advanced no submission against their claims being dismissed rather than discontinued. There was no reason to suppose that in proposing that they be allowed to discontinue the claimants were seeking to avoid a dismissal if that were judged to be the more appropriate form of disposal in the light of the Claimants' Admission. Although therefore my decision to dismiss the claims involved, formally, a refusal of the application for permission to discontinue them, that is not to be taken as any criticism of the claimants or their legal representatives.