Case No: HC-2010-000021

Neutral Citation Number: [2017] EWHC 150 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
7 Rolls Building,
Fetter Lane,
London, EC4A 1NL

Date: 02/02/17

Before :

MR JUSTICE WARREN

- -

Between :

JOINT STOCK COMPANY "AEROFLOT – RUSSIAN AIRLINES"	**Claimant**
- and -	
(1) MICHAEL THOMAS LEEDS NICHOLAS STEWART WOOD AND KEVIN JOHN HELLARD (as Trustees of the insolvent estate of Platon Elenin (also known as Boris Abramovich Berezovsky)) **(2) NIKOLAY ALEXEEVITSCH GLUSHKOV** **(3) FORUS HOLDING SA** **(4) FORUS LEASING SA** **(5) FORUS FINANCE LIMITED**	**Defendants**

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Mr Simon Davenport QC and Mr Aidan Casey QC (instructed by **Pinsent Masons**) for the **Claimant**
Mr Francis Tregear QC, Mr Alexander Pelling and Mr Owen Curry (instructed by **Streathers Solicitors LLP**) for the **Third and Fifth Defendants**

Hearing dates: 25 and 26th January 2017

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Judgment

Mr Justice Warren :

Introduction

1. I conducted a pre-trial review in this matter on 25 and 26 January 2017. This judgment is written to deal with one of the issues which arose in the context of that review. It concerns the admissibility in evidence of the conclusions reached by Andrew Smith J as to Russian law in his judgment in *Fiona Trust Holding Corporation & ors v Privalov & ors* [2010] EWHC 3199 ("***Privalov***")

2. Procedurally, the issue arises as follows:

    i) Following various extensions of time, witness statements of fact were due to be exchanged on 23 September 2016. Experts' reports were due to be exchanged on 14 October 2016.

    ii) In the event, the third and fifth defendants did not produce an expert's report on issues of Russian law.

    iii) Instead, on 14 October 2016, Streathers, the solicitors acting for the third and fifth Defendants, wrote to Pinsent Masons, solicitors acting for the Claimant, referring to section 4(2) Civil Evidence Act 1972 ("**CEA**"), requesting them to treat the letter as notice under CPR 33.7 of the intention to put in evidence "findings of the High Court on questions of foreign law". The letter refers to the Judgment of Andrew Smith J in *Privalov*, setting out 22 findings (as they described them) made by him in paragraphs 78 to 139 of his judgment.

3. Pinsent Masons took these points in relation to that purported notice:

    i) It was out of time since CPR 33.7(3) required notices to be given not later than the last date for serving witness statements.

    ii) Section 4(2) CEA applies only to decision and findings which have been given on questions of foreign law. The relevant passages of the judgment in *Privalov* are *obiter* and do not fall within section 4(2).

    iii) The third and fifth defendants had not pleaded an appropriate case of Russian law to enable them to adduce the relevant findings in evidence or such as to enable them to advance a positive case in those respects.

4. As to the first of those, Mr Davenport QC, under some pressure from me, did not pursue the point. I do not need to go into the reasons for that pressure or for his decision not to pursue the point.

Section 4 CEA ("Section 4")

5. Section 4(2) concerns the manner in which foreign law can be proved. Questions of foreign law are treated, in English proceedings, as questions of fact. Such a question might be decided in the context of a particular piece of litigation. But, unlike ordinary disputes of fact falling to be decided between the parties to a particular piece of

litigation, a question of foreign law decided in one case might be relevant to disputes between other litigants in other cases. The policy behind section 4(2) is that where a question of foreign law has been decided (as a question of fact) in one case the decision can be relied on as evidence of the same fact in other cases, subject to the conditions laid down in section 4(2) itself.

6. Section 4 provides relevantly as follows:

> "(2) Where any question as to the law of any country…. outside the United Kingdom…with respect to any matter has been determined….. in any such proceedings as are mentioned in sub-section (4) below [*Privalov* falls within that sub-section], then in any civil proceedings……
>
> (a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country with respect to that matter; and
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> (b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law in that country …. with respect of that matter shall be taken to be in accordance with that finding unless the contrary is proved….
>
> …….
>
> (5) For the purposes of this section a finding or decision on any such questions as is mentioned in subsection (2) above shall be taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if that question had been a question as to the law of England and Wales, could be cited as an authority in legal proceedings in England and Wales."

7. Section 4(2) is, I consider, dealing with the issue at a high level and is not concerned with the facts of, or pleadings in, the case in which the decisions or findings are sought to be relied on. Let me illustrate this by an example. Suppose in the High Court action A v B, the judge has decided, as a necessary part of his overall decision, a point, point X, of Russian law and suppose that the judgment has been reported in the official Law Reports. Section 4(2) clearly applies to make the finding on point X admissible in any other civil proceedings within section 4(2). Section 4(2) is saying that the decision on point X is in principle admissible as evidence that the foreign law is indeed in accordance with that decision.

8. Section 4(2) is not to be read, however, as making admissible, come what may, the decision on point X. Like any other evidence of fact, evidence about a point of foreign law (whether given by an expert or sought to be adduced in reliance on section 4(2)) can be excluded as inadmissible if it is of no relevance to issues between the parties which the court may need to decide. In practice, the evidence which section 4(2) states to be admissible will be excluded if it is not relevant in any way.

The appropriate person to judge whether this sort of evidence should actually be admitted is the trial judge. It will not usually be sensible for the judge on a pre-trial review to enter into what might be a detailed consideration of the pleadings and expert reports already available to decide whether the decision or finding which is *prima facie* admissible under section 4(2) should be excluded, any more than it is usually sensible to embark on a close examination of an expert report to see if parts of it should be excised because not relevant.

9. It follows from that analysis that if the conclusions of Andrew Smith J in *Privalov* are findings made or decisions given for the purposes of section 4(2) then those conclusions are in principle admissible. The extent to which they can be relied on will then be a matter for the trial judge who will be best placed to assess the relevance of those conclusions in the light of the pleadings and in the light of cross-examination of the Claimant's expert.

10. It may, in any case, be that those conclusions can be admitted in evidence as evidence of Russian law. The decision in *Privalov* has been referred to by the Claimant's expert in his report (that expert, it is interesting to note, being one of the experts in *Privalov* itself) so that the decision is already "in play" as Mr Tregear has put it on behalf of the third and fifth Defendants. Even if not admissible under section 4(2), the trial judge will be able to determine the extent to which the conclusions of Andrew Smith J can properly be made use of by Mr Tregear in cross-examination and might consider that he or she can rely on those conclusions if not willing to accept the Claimant's expert's evidence.

11. The real issue, then, is whether the conclusions of Andrew Smith J amount to findings made or decisions given within the meaning of section 4(2). Mr Davenport submits that to fall within section 4(2), the finding or decision relied on must form part of the *ratio decidendi* of the case. That is perhaps a shorthand. Clearly section 4(2) includes a finding or decision which is a necessary part of the reasoning leading to the ultimate decision, whether that forms part of the primary ground for the ultimate decision or part of an alternative ground. What section 4(2) does not include, in his submission, is anything which does not form part of such reasoning or ultimate conclusion, anything which is simply *obiter*.

12. Mr Tregear submits that sections 4(2)(a) and 4(5) are concerned simply with the type of document which is, in principle, available for citation in court. Mr Davenport submits that those sections are concerned with more than that. He contends that section 4(5) demonstrates that those sections are concerned with the sort of findings and decisions which, had the question in issue been a question of the law of England and Wales rather than a foreign law, would have constituted a binding authority on that point of law, rather than being merely an *obiter dictum*.

13. Where a judge expresses a clear conclusion about a point of foreign law which it is not necessary to decide in reaching the ultimate decision in the case, it is, in my view, a perfectly ordinary use of language to describe that conclusion as a finding or decision; it is not a finding or decision which leads to the ultimate decision, but it is a finding or decision nonetheless. It can also be said that the question of foreign law has been determined (within the meaning of the opening words of section 4(2)), albeit, again, not a determination which leads to the ultimate decision. Reading section 4(2) in isolation, I would give the words "has been determined" in the opening

and the words "any findings made or decision given" as encompassing clear conclusions on a question of foreign law notwithstanding that those conclusions do not form part of the reasoning leading to the ultimate conclusion.

14. Section 4(2) cannot, however, be read in isolation; it must be read with section 4(5). This does not mean that the correct approach is to start with the meaning of section 4(2) which I have just described. The correct approach is simply to take the two subsections together: the meaning of one will inform the meaning of the other, especially bearing in mind that section 4(5) is there to define what it means for a decision or finding to be reported or recorded in citable form.

15. The typical case with which section 4(2) is concerned is where a finding has been made or a decision has been given on a question of foreign law which does form part of the reasoning leading to the ultimate decision. Had that finding or decision been one about the law of England and Wales, it would have created a precedent on the point of law in question. It would be binding on a lower court; and a court of co-ordinate jurisdiction ought to follow it unless it considered the finding or decision to be clearly wrong. In contrast, an *obiter* conclusion, however persuasive, is not binding on a lower court and is one which a court of co-ordinate jurisdiction is free not to follow without needing to be satisfied that the conclusion is clearly wrong.

16. Where there has been a finding or decision which would, had the question been one of the law of England and Wales, have created a binding, precedent and so is a finding or decision which clearly falls within section 4(2), the application of section 4(5) is clear. The finding or decision will be an "authority"; and if it is reported or recorded in the type of documents which the courts allow to be used for citation (such as the official Law Reports or an official transcript approved by the judge or, as is typical today in the case of a reserved judgment, a hard copy judgment signed by the Judge and handed down) it will clearly fall within section 4(5) and thus also within section 4(2)(a). In contrast, if there is only a manuscript note of an oral judgment in which the finding or decision was made, that would ordinarily not be the type of document which the courts would allow to be used for the purposes of citation. The note will not fall within section 4(5). The finding or decision might be capable of setting a precedent and being a binding authority, but the note itself is not a document which could be cited. In order to rely on the decision, a litigant would need to produce a document which can be cited, typically by obtaining a transcript of the recording of an oral judgment from an official transcriber, with the transcript then being approved by the Judge.

17. In the context of that sort of case (where the finding or decision would create a precedent if the question had been one of the law of England and Wales), I ask myself what is the purpose of the words "if that question had been a question as to the law of England and Wales" in section 4(5). The answer, it seems to me, is that the draftsman is focusing not simply on the type of document which may be cited in court – an official Law Report in contrast with a manuscript note – but on the need for the report also to be an authority for the point decided or finding made had it been a matter of the law of England and Wales. If the purpose of the subsection is simply to identify the type of document in which the decision or finding needs to be reported or recorded, the words just quoted are irrelevant. See also paragraph 20 below.

18. Far from being irrelevant, however, they are important, as can been seen from the following example. Consider a case which is a purely factual dispute which raises no point of the law of England and Wales but does raise a discrete question of foreign law which it is necessary to decide in order to reach the ultimate decision. A finding or decision given on that question is treated in our courts as a finding of fact. The judgment, resolving the disputed issues of fact including the question of foreign law, would not be an authority for any proposition of the law of England and Wales. Indeed, it ought not (apart from section 4(2)) to be referred to in a subsequent case at all since a finding of fact in one case is not evidence of that fact in another case.

19. Section 4(2), of course, changes that position. Although the issue of foreign law remains one of fact, the finding or decision on that issue is admissible in evidence to prove that fact. But admissibility is subject to the requirement that the finding or decision is contained in the class of document specified in section 4(5), that is to say in a document (typically a judgment) which could have been cited as authority. This must mean, in the example which I am considering, cited as authority for the question of law had it been a question of the law of England and Wales. The only reason why the judgment in this example is admissible is because, on the assumption that the question was one of the law of England and Wales, it is an authority; and the only reason that it is an authority is because it is, on that assumption, an authority for the point of law in issue. Although it does not say so expressly, the words "cited as an authority" in section 4(5) mean, in my view, cited as authority for the finding made or decision given on the assumption that the question had been one of the law of England and Wales.

20. I turn now to the case where a finding made or decision given is not necessary to the ultimate decision (whether as part of the primary ground or as part of an alternative ground). There are, as I see it, only two possible ways in which this sort of finding or decision might be admissible under section 4(2):

    i) The first is that what I have said in paragraphs 17 to 19 above is not a complete analysis; rather, a complete analysis would lead to the conclusion that any document in appropriate form (*eg* an official Law Report) can be "cited as an authority". In other words, section 4(5) is concerned solely with the form of a report or record and not with what the report or record is authority for.

    ii) The second is that an *obiter* decision on a question of foreign law (treating it, for the purposes of section 4(5), as a question of the law of England and Wales) is an "authority" within the meaning of section 4(5).

21. The objections to the first of those possibilities are the same in relation to this type of finding and decision as they are in relation to findings and decisions which, in contrast, do form a necessary part of the ultimate decision. In my judgment, section 4(5) requires that the relevant document could be cited as an authority, not in the sense that it is the sort of document which it is permissible to cite in court, but in the sense that it would be authority for the point of law decided on the counter-factual assumption that the point of law was one of the law of England and Wales.

22. As to the second possibility, my conclusion is that a document of the type envisaged by section 4(5) (for instance, as in the present case, an approved written judgment) is

one which can be "cited as an authority" within the meaning of section 4(5) in circumstances where the finding or decision reported or recorded in that document is expressed as a clear conclusion and not merely as a provisional view. Although such a judgment cannot be cited as a binding precedent, *obiter* conclusions and reasoning can frequently be of enormous assistance to another judge grappling with the same issues. And so, although not a binding authority, such a judgment can properly be described as a persuasive (if it is) authority. Whether it is in fact persuasive will depend on the cogency of the reasoning; a conclusion with no reasoning may carry very little evidential weight if the conclusion is challenged. The judgment of Andrew Smith J in the present case falls within the category of persuasive authority in relation to his conclusions on Russian law, given the detailed and cogent reasoning displayed in it.

23. In my judgment, this conclusion gives proper effect to the policy which I derive from the wording of the CEA. I suggest that, putting it at a high general level, one of the purposes of section 4(2) is to enable a person in a subsequent case to rely on the reasoned conclusions of a judge in an earlier case without the need to commission fresh expert evidence. Although there is a presumption under section 4(2)(b) that, where a finding or decision as to foreign law is adduced in evidence, that law is in accordance with the finding or decision, that is only a presumption. It is open to challenge, as the closing words of paragraph (b) ("unless the contrary is proved") demonstrate.

24. Where a judge has given careful consideration to the question of foreign law, and has given reasons for reaching the decision or finding, I can see no reason in principle why it should make any difference to admissibility whether those conclusions were necessary to the ultimate decision or not. What is important here is not simply the conclusion reached as to foreign law but the reasoning leading to the decision or finding. A party seeking to rebut the presumption will adduce expert evidence to demonstrate why the decision or finding is wrong. If the judge's reasoning in reaching the decision or finding of foreign law is less thorough than it might have been because it was not necessary to the ultimate conclusion, then that weakness will be exposed by the expert evidence.

25. Since I am unable to detect any reason in principle to distinguish cases where the finding or decision is necessary to the ultimate decision and cases where it is not, I consider that a reading of section 4(5) which permits the admission of findings and decisions which were not necessary to the ultimate decision is to be preferred to one which precludes such admission. The words "could be cited as an authority" are wide enough, in my judgment, to include an approved written judgment containing the conclusions sought to be adduced in evidence.

26. In the present case, I have no doubt, adopting that approach, that the conclusions of Andrew Smith J on Russian law were finding or decisions which are admissible. Those findings were, of course, *obiter*, in the sense that he did not, as he put it in [80] of his judgment, "determine any claim by reference to Russian law" in the light of his conclusions about the applicable law and his findings of fact. He went on to say, however, that having heard evidence and submissions, he would state his conclusions about the main issues of Russian law. He then entered into a detailed analysis of the evidence and submissions and reached clear, final, conclusions about the questions of Russian law. This went far beyond any expression of mere provisional views.

Assuming the correctness of my decision concerning the interpretation of sections 4(2) and (5), it is clear that his "conclusions about the main issues of Russian law" are findings or decisions for the purposes of section 4(2) which are reported in citable form within the meaning of section 4(5).

27. As to the third point taken by Pinsent Masons (see paragraph 3 iii) above), I do not consider that this is a matter for the pre-trial review. Mr Davenport has sought to persuade me that the pleaded issues on Russian law are very narrow. I am not sure that they are as narrow as he submits and Mr Tregear has some arguments which suggest that my doubts are well-founded. In any case, it is clear that some, at least, of the conclusions of Andrew Smith J are relevant; and as already noted at paragraph 10 above, *Privalov* is already in play so that it may well be that Mr Tregear will be able to cross-examine the Claimant's expert on a wider rather range of issues of Russian law than Mr Davenport would accept. These aspects of the case are best dealt with by the trial judge.

Disposition

28. I determine that the conclusions of Russian law contained in the judgment of Andrew Smith J in *Privalov* are admissible in evidence under section 4(2) CEA. Whether they should be excluded as irrelevant to pleaded issues or otherwise or whether, in contrast, the third and fifth Defendants should be allowed to deploy them because they are already "in play" are matters for the trial judge.