In The Supreme Court of Bermuda

COMMERCIAL COURT
2006 No. 182

BETWEEN:

(1) SANTEL LIMITED

(2) AVENUE LIMITED

(3) JANOW PROPERTIES LIMITED

(4) ALFA TELECOM LIMITED

(5) ALFA CAPITAL MARKETS (USA) INC

(6) MIKHAIL FRIDMAN

(7) PYOTR AVEN

Plaintiffs

-and-

IPOC INTERNATIONAL GROWTH FUND LIMITED

Defendant

RULING

Date of Strike-out Hearing: December 11-12, 2006
Date of Strike-out Ruling: December 12, 2006
Date of Reasons for Decision: December 15, 2006
Date of Leave to Appeal Hearing: February 22, 2007
Date of Leave to Appeal Ruling: February 26, 2007

Mr. David Kessaram, Cox Hallett & Wilkinson, for the Plaintiff;
Mr. Mark Diel, Marshall Diel & Myers, for the Defendant.

Introductory

1. The present application for leave to appeal is made supported by some 55 grounds of appeal. The present action, which I ordered to be struck-out over two months ago, forms part of a wider litigation which has occupied substantial portions of Court time since June last year. Although costs appear to be of little consequence to the parties, Mr. Diel for the Defendant requested the Court, if it was minded to grant leave at all, to at least indicate which grounds were considered to be meritorious, to avoid overburdening the Court of Appeal. This suggestion, despite the obvious benefits which would potentially accrue to the Defendant if it was taken up, was eminently sensible in an objective sense, particularly in light of the Overriding Objective.

2. I also felt it appropriate to reserve my decision on the grant of leave in order to consider whether, in light of the complaint that insufficient reasons were given for one aspect of my decision, I should in fact give reasons and refuse leave. This is a practice with which I was previously unfamiliar, but which was commended to me by Mr. Diel, with reference to *English-v-Emery Reimbold & Strick Ltd.* [2002] 1 WLR 2409. This case was placed before the Court by Mr. Kessaram. This issue was one of some delicacy, because the application for leave to appeal was based on Reasons for Decision given three days after the strike-out decision itself. If reasons were now to be given, care would have to be taken that such reasons fairly reflected the substance of the decision actually made on December 12, 2006, as opposed to reasoning reflecting points not actually considered before the strike-out decision.

3. Neither of these two ticklish issues was foreshadowed in the materials filed in advance of the leave hearing, which as understandable as they only clearly emerged as a result of the course of oral argument. And for the reasons set out below, I have considered it appropriate to supplement the reasons given for striking-out the damages claims asserted by all Plaintiffs. I have not, on the other hand, taken up the invitation to comment extensively on the merits of each individual ground appeal since, as regards Plaintiffs 4-7, I have found that leave ought properly be granted on at least two of what appear to be 55 grounds of appeal. And the hearing of the appeal in the present action may very well clarify the law to be applied by this Court in respect of substantially similar claims in 2006: 181.

Principles applicable to the grant of leave

4. The simple test is that leave should be granted for an objectively arguable ground of appeal, and it is only proper in the strike-out context to refuse leave to a plaintiff whose claim has been struck-out if this Court concludes that it is not properly arguable that its decision is wrong in law or principle. It is not inconsistent with this Court concluding with great conviction that a claim is plainly bad for leave to be granted on the basis that, in objective terms, the legal basis of the strike-out decision is arguably wrong. The position here is to be contrasted with a decision as to whether or not the refusal of a stay should itself be stayed pending appeal.

5. At page 2419 of the report of *English-v-Emery Reimbold & Strick Ltd.* [2002] 1 WLR 2409, the English Court of Appeal (Lord Phillips, Latham and Arden LJJ) held as follows:

> " ***24*** *We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational*

decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a rehearing will involve a hideous waste of costs.

25 *Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent."*

Plaintiffs 1-3

6. In the present action, Plaintiffs 1-3 asserted (a) a claim for an anti-suit injunction restraining IPOC from pursuing the new York Proceedings on grounds of unconscionability, and (b) a claim for an anti-suit injunction in respect of any proceedings by IPOC anywhere based on a claim to the MegaFon Stake or damages or restitution for the same (Generally Indorsed Writ, Indorsement of Claim, paragraph 2/ Statement of Claim paragraph 4 of prayer for relief. In addition, the first three Plaintiffs claimed (c) damages for the torts of defamation and malicious falsehood and abuse of civil process in respect of (i) the New York Proceedings (Generally Indorsed Writ, Indorsement of Claim, paragraph3, and (ii) the Bahamas Proceedings, the BVI Proceedings and the Russian Proceedings (Statement of Claim, paragraph 96(d)(2)).

7. The abuse of process plea made in the Statement of Claim's summary paragraph is that "*in issuing, pursuing and publicizing the proceedings, IPOC has …maliciously abused the civil processes of the jurisdictions concerned*."

8. The decision made as regards these Plaintiffs was set out in my Judgment as follows:

"*23. A preliminary issue, which need only be mentioned shortly, was whether the 1st to 3rd Plaintiffs have any standing to either (a) oppose the discharge of the June 20, 2006 Injunction, or (b) maintain the present action, in light of the Defendant's unequivocal indication that it seeks no relief against them in the New York Proceedings. It seemed to me to be plain and obvious from the outset, that the injunction in their favour had to be discharged and their claims as Plaintiffs in the present action were liable to be struck out as bound to fail. I initially felt that the Defendant should give an undertaking not to pursue them or enforce any New York judgment against their assets as a condition of their claim being stayed and the ex parte injunction granted to them being discharged.*

24. On reflection, I determined that any such undertaking, designed to procure compliance with the First Injunction ought properly to be given in 2006: 181 in which the First Injunction was obtained, a point with which Mr. Diel sensibly agreed. The undertaking was duly offered before I ruled on the application, so the 1st to 3rd Plaintiffs' case fell to be struck-out on

the grounds that it was unarguably wholly misconceived, and bound to fail."

9. The factual basis of the decision to strike-out the claims of Plaintiffs 1-3 altogether lies in the uncontestable fact that (a) these Plaintiffs claim substantially similar injunctive relief against IPOC in 2006: 181 (prayer for relief, paragraphs 3-4), and (b) virtually identical relief by way of damages for defamation and abuse of process of the various foreign courts (Statement of Claim, paragraph 94 (d)(1),(2)). I was able to take judicial notice of these matters of record of which Counsel on both sides were fully aware. The Plaintiffs' claims in the present action were plainly frivolous in that (a) the undertakings offered by IPOC made it obvious that the New York Proceedings did not entitle them to injunctive relief and (b) the overlapping claims made in 2006:181 made their claims in the present action duplicative. This waswhy I decided to strike-out the Plaintiffs' 1-3 claim altogether, and require IPOC's undertaking neither to seek relief nor to enforce any New York judgment against them or their assets to be given in the still subsisting action they had previously commenced. In the earlier action, which was not presently being struck-out (and which I envisaged might well be kept alive for this purpose, even if it was otherwise disposed of), the Plaintiffs would be able to seek-if required- appropriate relief for breach of the undertakings. And, having regard to the fact that seemingly identical damages claims would still subsist in the same earlier action, the duplicative claims in the current action could be struck-out as a matter of procedural discipline without any reasoned analysis of the merits of the claims in jurisdictional or other terms.

10. This factual basis was referred to in abbreviated form earlier in my Judgment at paragraph 5 where I stated:

> "*…I dismissed the action brought by the 1st to 3rd Plaintiffs, subject to the proviso that the Defendant should give an undertaking in Commercial Court 2006: 181 not to seek any relief against them in the New York Proceedings or to enforce any judgment obtained in the New York Proceedings against them or their assets without leave of this Court. Once this undertaking was offered, consistent with the position made clear by IPOC in open correspondence several months ago, it was clear that these Plaintiffs' case was liable to be struck-out on the grounds that it was frivolous and/or bound to fail. Mr. Kessaram was bound to concede that the present action was, as regards the first three Plaintiffs, somewhat duplicative of 2006: 181."*

11. I do not believe that there is substance to the Plaintiffs' complaint that insufficient reasons are given in my Reasons for Decision for the dismissal of the abuse of process claim, as asserted by Plaintiffs 1-3 (paragraph 59, draft Notice of Appeal, which does not distinguish between Plaintiffs 1-3 and 4-7). The reasons are self-evident when the Judgment is read in conjunction with the hearing transcript and the relevant pleadings in both actions. However, in case I am wrong, I have set out in paragraph 9 above additional reasons for this aspect of the strike-out decision.

Plaintiffs 4-7: Ground 59 of Draft Notice of Appeal-insufficient reasons

12. The Plaintiffs complaint that insufficient reasons have been given for the striking out of its abuse of process claim is in my view valid. I will accordingly give very short reasons for this decision.

13. In paragraph 96(2)(d) of the Statement of Claim, it was alleged (with reference to proceedings in the Bahamas, BVI, Russia and New York, that "*in issuing, pursuing and publicizing the proceedings, IPOC has …maliciously abused the civil processes* **of the jurisdictions concerned…**" [emphasis added] .This paragraph is referred to in paragraph 13 of my Reasons for Decision, together with the unconscionability plea in paragraph 96(c). Immediately after this, I observed in paragraph 13: "*On the face of the pleading, the entire purpose of the action is to have the Bermuda Court determine the propriety of proceedings*

(1) "*I also dismissed the action as regards the remaining Plaintiffs ("the Relevant Plaintiffs"), on the grounds that this Court does not possess sufficient interest in the matters complained of to grant the relief sought and/or that Bermuda was not the appropriate forum. Alternatively, I struck-out their claims on the grounds that it was plain and obvious that their claims would fail on the same jurisdictional grounds."*

14. IPOC, in its written submissions, contended that the action was liable to be dismissed and/or struck-out on forum grounds, and relied on the sufficient interest jurisdictional test solely as regards the application for injunctive relief. It relied on the forum argument in relation to the abuse of process claim, in addition to other legal arguments, including the point that the cause of action could not relate to the abuse of the process of the foreign court. The Plaintiffs pleaded case on abuse of process was the bizarre[1] averment that "*the processes of the* [foreign] *courts concerned" had been abused*". I concluded that it was appropriate to either dismiss this claim on forum non conveniens grounds and/or to strike-out the claim on the grounds that it was plain and obvious that Bermuda was not the appropriate forum to determine whether or not the process of three foreign jurisdictions had been abused by IPOC, in circumstances where none of the proceedings in question had been found to be abusive by the relevant courts.

15. No complaint is seemingly made about the lack of reasons for the striking-out of the defamation claim, but any such complaint would be equally valid. As the two claims are closely connected, I will set out my reasons for striking-out both claims. All that was directly said in my judgment in regard to this claim was the following:

(2) "The only cause of action set out in the Generally Indorsed Writ is the tort of abuse of process, although the permanent injunctive relief is implicitly based on equitable unconscionability grounds. This is fleshed out in the summary paragraph 96 of the Statement of Claim, from which it is apparent that it is alleged (a) that the Bahamian, BVI and New York Proceedings are frivolous, vexatious and unconscionable (paragraph 96(c)), and (b) defamatory and an abuse of the process of the respective courts (paragraph 96(d)). On the face of the pleading, the entire purpose of the action is to have the Bermuda Court determine the propriety of proceedings in, principally New York, but two other jurisdictions as well."

16. Paragraph 96(d) of the Statement of Claim provided as follows:

"*In issuing, pursuing and publicising the proceedings IPOC has:*

(1) maliciously and falsely defamed, denigrated and embarrassed the Plaintiffs as members of or persons associated with the Alfa group of companies, in a manner designed to cause them commercial or political disadvantage;

(2)maliciously abused the civil processes of the jurisdictions concerned."

17. I took the view that adjudication of the defamation claim would, like the abuse of process claim, require the Bermuda court to determine whether the four sets of foreign proceedings complained of, but principally the New York Proceedings which clearly were pivotal to the Plaintiffs' case, were brought in bad faith. I accepted the evidence of former Chief Judge Mukasey that this claim (like all the other claims)

[1] In the course of the leave to appeal hearing, I grappled with the notion that a Bermuda court could determine as a matter of Bermuda law that the tort of abuse of process was constituted by abusing the process of the foreign court. My original decision was, on reflection, based on the pleaded case, which implied that the law of each foreign jurisdiction would apply to the claim.

could be raised before the New York Court, an assertion which could not credibly be disputed.

18. The only answer to IPOC's case that the entire action should be dismissed on forum grounds was the contention that Bermuda was the natural or most convenient forum for the adjudication of the damages claims. But the Plaintiffs did not advance a plausible case as to why Bermuda was a convenient forum to determine whether the filing, pursuit and publication of the New York and other proceedings was tortious. Indeed, they appeared to misinterpret IPOC's submissions and evidence in this regard altogether. In paragraph 123 of their Written Submissions, it was asserted that "*IPOC does not identify any other suitable forum for these proceedings.*" IPOC's New York law expert evidence expressly asserted the relief the Plaintiffs were seeking in the present action could be obtained from the New York Court.

19. Yet paragraph 103 of the Defendant's Written Submissions listed seven factors taken from the Dobie Affidavit in support of the contention that Bermuda was not an appropriate forum. These factors included the contention that the alleged acts which formed the basis of the damages claim took place in New York. It is true that IPOC also suggested that the abuse of process claim did not disclose a reasonable cause of action on a variety of legal grounds, but I did not find it necessary to consider these additional grounds, which appeared to me to fortify the Defendant's forum argument.

20. Having regard to(a) the fact that the New York Proceedings and their publication were clearly the focal point of the Plaintiffs' damages claims-no such claims had been asserted prior to the commencement of the proceedings in New York, (b) the fact that both damages claims (like the injunctive claims) asserted that the New York Proceedings had been improperly brought and (c) the view I took of the tenuous connections between these claims (substantially involving an adjudication of whether the New York Proceedings had been brought in bad faith) and Bermuda, I considered it was plain and obvious that these claims should be struck-out or dismissed on forum grounds.

21. In reaching this conclusion, I considered that I was able (if not required), as regards the damages claims (unlike the anti-suit injunction claims), to take into account the fact that similar relief could be obtained in New York. For these purposes, even though the distinction in conceptual terms may be somewhat artificial, I found that the single forum principles, which made the availability of relief in a competing forum irrelevant, did not come into play. As I observed in paragraphs 53 and 54 of my Reasons for Decision:

> "*53. The demands of comity, which gives rise to a need to exercise caution about interfering with the processes of a foreign court, mitigates strongly against this Court exercising its discretion in favour of assuming jurisdiction, in all the circumstances of the present case. The District Court for the Southern District of New York is, I also find, more than ably equipped to deal with complex commercial cases with an international character. This Court, it is a matter of record, cooperates closely with the United States Bankruptcy Court in that same District, on a regular basis. Purely incidentally, I take judicial notice of the fact that the same New York Court which is seized of the New York Proceedings is currently trying (and has recently tried) a criminal case involving a multi-million dollar theft of Bermuda Government money.*
>
> *54. But even if there were concerns about the ability of the Plaintiffs to obtain relief in New York which might be available here, and the possibility that they might be exposed to a level of damages not possible here, such concerns would be wholly irrelevant absent other cogent connecting jurisdictional factors making Bermuda either (a) the natural forum for the resolution of the dispute itself, or (b) the natural forum for determining whether or not the New York Proceedings are frivolous and/or an abuse of the New York Court's process: Airbus Industrie G.I.E v. Patel [1999] 1 A.C. 119; Shell International Petroleum Co. Ltd.-v-Coral Oil Co. Ltd. [1999] 2 Lloyd's Rep*

606. But such considerations do not properly fall for consideration in a single forum case; because the Plaintiffs contend that the case should not be tried at all, not that another forum is more appropriate or natural."

22. The strike-out application required this Court to decide not whether the New York Proceedings were unconscionable, but whether the Plaintiffs' tort claims could more conveniently be tried in Bermuda than in New York. Although the abuse of process claim (like the anti-suit injunction claim) depended on allegations that the commencement of the proceedings in, principally, New York was wrongful, the defamation claim would subsist even if the commencement of the proceedings by itself was not actionable, because it also relied upon the publicity allegedly given by IPOC to the proceedings.

23. I would, having given the above reasons, refuse leave to appeal in respect of the complaint that insufficient reasons were given for this aspect of the strike-out decision.

Plaintiffs 4-7: Other grounds

24. In addition to the ground set out in paragraph 59, the draft Notice of Appeal contains 54 other grounds. Many of the paragraphs of what is merely a draft Notice contain averments more in the form of legal argument than substantive grounds of appeal. It seems to me that three complaints of substance are made: (a) the Court applied the wrong test on strike-out; (b) the Court applied the wrong test on the grant of anti-suit injunctions in single forum cases, and (c) the Court was wrong to conclude that it lacked sufficient interest to grant the relief sought.

25. I do not consider the first complaint, which suggests that the Judgment failed to have regard to the possibility that the strength of the Plaintiffs' case could only be assessed after discovery, to be arguable. The jurisdictional basis of the strike-out decision was grounded on core facts which could hardly be said to be subject to further development. The Plaintiffs at trial would still be asking this Court to determine, primarily, that the New York Proceedings brought against defendants with no material Bermuda connections were improperly commenced. But this conclusion is rendered academic by the view I take of the other two broad grounds of appeal to the extent that they are asserted on behalf of Plaintiffs 4-7.

26. As I have indicated above, the proper test is whether I consider it is arguable that I have erred in law or in principle in reaching the impugned decision. Having regard to the factual complexity of the present case and the comparative paucity of case law on single forum cases (which, as regards the anti-suit injunction claims at least[2], the present case by common accord is), I am bound to conclude that the Plaintiffs have some prospects of success on appeal, as regards the legal approach that I adopted in reaching the jurisdictional findings which underpinned the strike-out decision. The assertions that I applied the wrong test as to anti-suit injunctions and erred in law in concluding that on the facts there was insufficient interest for this Court to grant relief are not so hopeless as to justify striking-out the Notice of Appeal itself.

Conclusion

27. For the above reasons, I would refuse leave to appeal to Plaintiffs 1-3 altogether, and grant Plaintiffs 4-7 leave to appeal generally, save that I would as a matter of formality refuse leave to appeal on the grounds that insufficient reasons are given for the decision to strike-out the tort claim(s), having given further reasons above. I would also order that the costs of the present application should be in the appeal.

Dated this 26th day of February, 2007

KAWALEY J.

[2] As regards the damages claims, as pointed out above, there were two competing forums.