IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION

2006 No. 39A

IN THE MATTER OF THE EVIDENCE ACT, 1905 (AS AMENDED)
IN THE MATTER OF ORDER 70 OF THE RULES OF THE SUPREME COURT, 1985
IN THE MATTER OF A CIVIL MATTER NOW PROCEEDING BEFORE THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, ONE OF THE STATES OF THE UNITED STATES OF AMERICA

BETWEEN:

WILLIAM S. SHANAHAN and ANTARES, LLC — Plaintiffs

-And-

MAURICE VALLAT, JAMES COLLINS-TAYLOR
LOUIS BOWEN, ACL NOMINEES LIMITED
ACL HOLDINGS LIMITED and ACL ASIA LIMITED

Defendants

-And-

JAMES COLLINS-TAYLOR, LOUIS BOWEN
ACL NOMINEES LTD. and ACL HOLDINGS LIMITED

3rd Party Plaintiffs

-And-

ROSE-MARIE FOX

3rd Party Defendant

RULING (EX-TEMPORE)

Date of hearing: April 17, 2007

Mr. Andrew Martin, Mello Jones & Martin, for the Plaintiffs
Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for the Defendants and 3rd Party Plaintiffs

Introductory

1. The Defendants applied by Summons dated 15 January 2007 to set aside an Ex Parte Order made on 9 February 2006 giving effect to a request for judicial assistance, a Letter of Request itself dated 9 February 2006 according to their Summons. The Plaintiffs in response applied by Summons dated 16 January 2007 to strike out the Summons on the grounds that it is an abuse of the process of the Court.

2. The Plaintiffs' Summons was directed to be heard before the Defendants' Summons and that hearing is taking place today. The Plaintiffs' Summons was supported by the First Affidavit of Sudwiti Chanda and that Affidavit sets out the background to this matter, which is in essence that the Plaintiffs have initiated a lawsuit in the United States District Court for the Southern District of New York. In this suit the Plaintiffs claim that they were fraudulently induced to make their investments by certain financial statements concerning a company known in abbreviated form as "Phoenix". They allege that the financial statements which they relied on were compiled and provided by various defendants, who were collectively referred to as the "ACL Defendants" and one Maurice Vallat.

3. In pursuit of this suit, the Plaintiffs obtained in 2005 an Order from the United States District Court permitting them to apply to the Bermuda Court for evidence to be taken on commission in Bermuda from one witness, a lawyer who was resident in Bermuda. The Defendants, it is accepted, were aware of the May 2005 Order of the U.S. Court and in fact took no issue with that Order, presumably taking the view that any Bermuda law issues should be dealt with in Bermuda.

4. The matter initially came before me on a standard application for an Order to be granted on an ex parte basis for the taking of the evidence on commission, and for the appointment of an examiner for this purpose. That application was made by an Ex Parte Summons which was issued on the 2 February 2006 and heard in Chambers on 9 February 2006. The application was granted following a short hearing in reliance on the Affidavit of David John Addington, sworn on 2 February 2006, which exhibited as "DGA-1", a copy of a Request for International Judicial Assistance, pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

5. The 2 February 2006 application, according to the evidence of Sudwiti Chanda, which in this respect was not challenged, was on a date uncertain served on Counsel for the ACL Defendants. Notwithstanding any uncertainty as to precisely when the Order first came to the attention of the Defendants who now seek to set it aside, it seems clear from the Defendants' own evidence, and in particular the First Affidavit of James Collins-Taylor, which sets out a chronology of the history of the matter, that as early as April 2006 the Defendants participated in an examination hearing before Mr. Justin Williams, the examiner appointed on 9 February 2006.

Findings: manner in which Defendants responded to 9 February 2006 Order

6. In my view, it is settled practice and accords with general principles, that where a party wishes to challenge an ex parte order, they should do so as promptly as possible, and in any event, before the matters contemplated by the ex parte order have been completely or

substantially put into force or carried out. In this particular case, not only did the Defendants participate in the examination hearing which took place in the second quarter of 2006. They did not even bother to instruct local counsel until in or about July 2006.

7. By the time they had done this, it is a matter of record that on 28 June 2006 the Registrar of this Court certified that certain examination documentation, in particular a deposition and related documentation taken by Justin Williams on 20-21 April 2006, should be forwarded to the United States Court. It is essentially common ground that the Letter of Request contemplated that there would be two bodies of evidence taken. The first body of evidence was to be documentary evidence, and the second body of evidence was to be oral testimony. It seems clear that oral testimony, save perhaps supplementary oral testimony relating to documents to which a privilege dispute is outstanding, has now been completed.

8. The Defendants not only waited until July to retain Bermuda counsel, but they did so against a background in which the witness, who is the person most directly affected by this application, was represented by Bermuda counsel and elected not to make any application to set aside or to vary the Ex Parte Order of 9 February 2006. So the present application is not only an application that is very late, being filed and issued almost twelve months after the Order was made. It is also an application which is made in circumstances that would (were the application to be entertained and acceded to) frustrate the object of international comity and judicial cooperation, which underlies the present application.

9. The applicable rules, in my view, clearly envisage that, having regard to applicable case law[1], requests for evidence to be taken on commission will generally be granted, save where there are compelling reasons not to do so. In circumstances where an order is made, the key time that is brought into play within which an application may properly be made to set aside the initial order, save for exceptional circumstances, is the time period between the making of the order and the commencement of the examination proceedings. In my view, any application made after the examination proceedings have commenced on their merits is analogous to an application being made to set aside leave to obtain or seek judicial review in circumstances where the substantive hearing has already commenced or been substantially completed.

10. In this regard, I find to be highly persuasive the passage found at paragraph 32/6/30 of the 1999 White Book Vol. 1, which comments on the equivalent of Order 32 Rule 6 of our rules. Rule 6 embodies the fundamental rule of practice that a party affected by an ex parte order may apply to the Court to discharge it, inasmuch as he has not had an opportunity of being heard:

> "*An application under Order 32 Rule 6 should be made timely. An application to set aside ex parte leave to bring proceedings for judicial review should be made before the hearing of the substantive application for judicial review (R –v- Derbyshire County Council ex parte Noble, 1989 COD 285.)*"

11. Mr. Turner made sterling efforts to argue that the delay in the present case was not sufficiently egregious to justify characterizing the present application that his clients make as an abuse of process. He did so in reliance on case law dealing with applications to strike out for want of

[1] *Netbank-v-Commercial Money Center*[2004] Bda LR 46 at pages 14-15.

prosecution. Those applications, in my view, are governed by different principles. Here, the central complaint, which is in fact set out in the First Affidavit of Sudwiti Chanda, is that the objections that the Defendants raise, if genuine, could have and should have been raised at the outset of this process, namely, in May 2005, but they were not. The ACL Defendants could have retained Bermuda counsel at any time during this process to provide advice on the fundamental jurisdictional issues which they now raise, but they did not seek such counsel until six months ago. Bermudian counsel did not apply to Court in respect of these basic objections until a further six months had passed, on 15 January 2007, well after this entire proceeding was under way and, in fact, was nearly complete.

12. The Defendants have filed affidavit evidence both in support of their present application and in response to the evidence of Sudwiti Chanda. It is noteworthy that neither the evidence filed in support of their application nor the evidence filed in response to the strike-out application sets out any explanation whatsoever for the failure complained of to retain counsel and pursue the present application in a timely manner. In those circumstances, Mr. Turner was left with the thankless task of seeking to justify the delay on the basis of legal argument in circumstances where cogent and concrete evidence was really required to justify an application that was made in extraordinary circumstances.

13. It is initially difficult to determine whether this is an application that is made in bad faith or is made in good faith based on a belated enlightenment as to the true Bermuda law position. But one gets a clear sense of what the true position is when one notes the fact that no evidence has been tendered to explain the delay, nor indeed to suggest that there has been any innocent oversight on the Defendants' part. One gets a further sense of why the application is made at the present time when one looks at the evidence filed in support of the present application, in particular the First Affidavit of James Collins-Taylor, because this Affidavit seems to clearly suggest that the Defendants were content not to challenge the 9 February 2006 Order between April 2006 (when the examination process started in Bermuda) and January 2007 (when they discovered that the examination proceedings and the dispute as to privilege were not proceeding as they would like it). Their evidence suggests that they, at this belated stage, felt compelled to make an application to the Court for reasons that, in substantial part, go beyond a genuine attempt to resolve the jurisdictional questions which the Defendants' application seeks to have resolved.

14. It seems to me that it is well recognized, both as a matter of Bermuda and United States law, that, to use Mr. Martin's colloquial term, you cannot "suck and blow" at the same time. If in fact the Defendants did not take a conscious decision not to challenge or at least consider challenging the Ex Parte Order of 9 February 2006, it is nevertheless inconceivable that they, as clearly sophisticated litigants, would not have instructed Bermuda counsel as soon as reasonably practicable after May 2005. It was from this date that the Defendants knew that evidence was going to be sought in Bermuda. They ought to have instructed Bermudian counsel with a view to determining what their legal rights were, and what was the appropriate procedure to follow in terms of challenging any ex parte order which might be made for the taking of evidence on commission in Bermuda.

15. It is inconceivable that if the Defendants had retained Bermuda counsel at an appropriate time, such counsel would have advised them that it was appropriate to (a) leave the Ex Parte Order intact, (b) participate in the examination proceedings, and (c) only file an application to set

aside the Ex Parte Order after the examination proceedings were substantially complete. When they did retain Bermuda counsel, it was by this stage already too late for a plausible application to set aside the Ex Parte Order to be made. Because by this stage the oral testimony aspects of the Letter of Request had already been completed with the relevant deposition forwarded to the U.S. Court. And the position that this Court would have been left in would have been to effectively re-visit an Order which had been substantially complied with.[2]

16. And this, in my view, would in any event have constituted an abuse of the process of this Court.

Should the application be dismissed on abuse of process grounds?

17. For these reasons I conclude that the Plaintiffs' strike-out application should be acceded to and the Defendants' Summons to set aside the 9 February 2007 Order should be dismissed on the grounds of an abuse of process, in the sense that it represents, in all the circumstances, a misuse of the machinery of this Court.

18. In the course of the hearing an interesting point arose relating to the *locus standi* of the Defendants to make the present application. It emerged that in all cases before the Court at the commencement of this hearing, both local and foreign, only the witnesses had elected to make the relevant application. But Mr. Turner, when given the challenge of investigating this matter further, was able to come up with a somewhat obscure but illuminating authority referred to in Hollander and Evans, *'Documentary Evidence'*, 7th edition, (London: Sweet & Maxwell, 2000) and referred to in footnote 20 at page 53. Mr. Martin conceded that the case of *Boeing Company –v- PPG Industries Inc* [1988] 3 All ER 839, was authority for the proposition that, in certain circumstances at least, the Defendant in the foreign proceedings may have *locus standi* to apply to set aside an ex parte order made directly against third party witnesses.

19. In light of this authority, the Plaintiffs' Counsel withdrew his *locus standi* objection but, unfortunately for the Defendants, in my view the abandonment of the *locus standi* argument only fortifies the view that a party who wishes to apply to set aside an ex parte order and who has the right to do so, must do so in a timely manner. And in circumstances where they are unable to explain why they have not applied to set aside the order in an appropriately timely manner, the inevitable conclusion will be that in circumstances similar to those before the Court at present, an application that is made inexcusably late will be liable to be struck out on abuse of process grounds.

20. In this regard, I should also note that it seems to me that the Overriding Objective requires the Court to look at the question of abuse of process in a practical way, and not to be as much driven (as perhaps courts were in the past) by notions of allowing a litigant to have their day in court, irrespective of the merits of their claim, particularly in regard to interlocutory applications[3]. The Overriding Objective in fact obliges the Court to deal with issues that can be dealt with at an early stage and, in my view, this is a case where the timing of the application and

[2] This scenario represented the position the Court was placed in on the present application to set aside the 9 February 2006 Order. The same objections of principle apply to seeking to vary the Order as all of the oral testimony has already been taken and remitted to the US Court.

[3] The Defendants' Summons is essentially an interlocutory one. This decision was entirely without prejudice to the right of the Defendants to seek appropriate relief from this Court in respect of any justiciable issues which arise in the still pending examination proceedings, which is where their true grievances appeared to lie.

the conduct of the Defendants, in particular before they retained local counsel, justifies the Court summarily dismissing the application without regard to the merits that might have otherwise attached to the application had it been made before the commencement of the examination proceedings.

21. The costs of both applications are awarded to the Plaintiffs.

Dated this 17th day of April 2007

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KAWALEY J.