In The Supreme Court of Bermuda

CIVIL JURISDICTION

2004: No. 171

IN THE MATTER OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF AN APPLICATION BY OIL BASINS LIMITED FOR INTERPLEADER RELIEF AGAINST THE CLAIMS OF CONTICOMMERCE S.A. AND FOUNDATION ANORA IN RELATION TO ROYALTY CERTIFICATED NUMBER A47, A48, A49, A50, A54, A85, A91, B27, AND B28

BETWEEN:

OIL BASINS LIMITED

Plaintiff

-v-

CONTICOMMERCE S.A.

First Defendant

-and-

FONDATION ANORA

Second Defendant

RULING

(In Chambers)

Date of Hearing: January 20, 2012
Date of Ruling: January 31, 2012

Mr. Alex Potts, Conyers Dill & Pearman, for the First Defendant ("Conticommerce")
Ms. Juliana Snelling, Mello Jones & Martin, for the Second Defendant ("Anora")

Introductory

1. By an Originating Summons issued on May 25, 2004, the Plaintiff ("OBL"), a Bermuda company, commenced an interpleader action in relation to the Defendants' competing claims to certain royalty certificates. It sought directions as to what to do with royalty payments received by it for the account of the true owner of the certificates. Conticommerce (based in the Canton of Fribourg, Switzerland) claimed the monies as registered owner of the certificates. Anora (a Liechtenstein foundation) sought the monies as an assignee of Conticommerce.

2. The Chief Justice granted the Plaintiff leave to serve out of the jurisdiction on May 25, 2004. He also made an interim order directing the Plaintiff to pay the disputed royalty receipts into an interest bearing account in a local bank until further order.

3. By Summons dated July 7, 2004, Anora applied to stay the present proceedings on the grounds that Swiss proceedings (in the Canton of Fribourg-"the Swiss Proceedings") were pending in relation to the royalty entitlement dispute. It sought a direction either that royalty payments be retained by the Plaintiff or returned by the Plaintiff pending the determination of the Swiss Proceedings.

4. By Summons dated August 26, 2004, Conticommerce applied for a stay pending the determination of the Swiss Proceedings and, in addition, of proceedings commenced by Mr. Cesar de Balmaseda Arias-Davila against Anora in Liechtenstein ("the Liechtenstein Proceedings"). Over seven years later, it appears that the Liechtenstein Proceedings are nearing an end and the Swiss Proceedings may soon substantively begin.

5. At the hearing of these Summonses on September 9, 2004 before me, Conticommerce sought an Order broadly in terms of Anora's Summons together with general liberty to apply to vary and set aside the stay. Anora agreed and asked that its Summons be adjourned *sine die*. I granted the relief sought.

6. The present application was made by Summons dated September 27, 2011 issued by Anora, and seeks the following Order upon Anora undertaking to inform the Plaintiff's attorneys of the status of the Swiss and Liechtenstein Proceedings:

> "*(1) commencing January 1st , 2009 and continuing until further Order, the amount of royalty payments that have been paid during each quarter into the escrow account in respect of the above mentioned Royalty Certificates (stating such amounts in the currency in which they are being paid);*
>
> *(2) in respect of each of the dates December 31st , 2009 and December 31st , 2010 and each December 31st date thereafter until further Order, the accrued balance standing in the escrow account and the annual interest earned in each such calendar year (in each case stating such amounts in the currency in which the payments are being made);*
>
> *(3) the name of the Bank where the escrow account is being held and the account name and the balance of the escrow account as of the date of the Order made herein;*
>
> *(4) forthwith, if the quarterly payments should cease for whatever reason, providing the reason for same if known…*"

7. With the Plaintiff attending the hearing through Counsel but taking no position on the application, the relief sought by Anora was vigorously opposed by Conticommerce on jurisdictional and discretionary grounds. These objections encouraged Anora to issue a second Summons seeking to set aside the stay for the purposes of seeking the same relief by way of an accounting or enquiry pursuant to Order 43 rule 2.

Jurisdiction of the Court –Order 17 rule 8

<u>Did Anora's application require lifting or varying the stay?</u>

8. Ms. Snelling's primary position was that the terms of the following paragraph of the September 9, 2004 Order gave the Court a broad discretion to vary the terms of the stay without actually lifting it, to seek relief further to the Chief Justice's May 25, 2004 Order:

> "*2. There is general liberty to apply to the Court to vary and set aside the stay ordered pursuant to paragraph 1 above.*"

9. The May 25, 2005 ordered the Plaintiff to pay the royalty monies into an escrow account "*pending the outcome of these proceedings or further order of the Court*".

10. Mr. Potts, without explicitly asserting that the May 25, 2004 Order had itself been stayed by the September 9, 2004 Order, submitted that the stay could only be lifted or the terms of any interlocutory order varied under the liberty to apply clause if there had been a material change of circumstances. Yet it appeared to be common ground on September 9, 2004 that the May 25, 2004 Order continued in effect notwithstanding the subsequent stay. And a review of my notes of the September 9, 2004 hearing indicates that the stay was sought by Conticommerce and Anora on the express basis that the Chief Justice's ex parte May 25, 2004 Order would continue in effect.

11. Accordingly the proper construction of the two Orders is in substance that contended for by Anora from the outset. The Second Defendant's application for further directions pursuant to the May 25, 2004 Order involved no lifting or variation of the stay because the May 25 Order was exempted from the operation of the stay. The escrow arrangement was accordingly ordered to continue "*pending the outcome of these proceedings or further order of the Court*". *Prima facie*, since these words were not expressly modified to delete the words "*or further order of the Court*" at the September 9, 2004 hearing, the May 25 Order was continued on an *inter partes* basis on the express basis that the Court might review the Order prior to the determination of the proceedings.

What is the scope of the Court's jurisdiction to vary an interim order generally?

12. The May 25, 2004 Order, as a result of the September 9, 2004 stay Order, may be viewed as an ordinary *inter partes* interim order preserving property pending trial. The Court manifestly had jurisdiction to make such an order under Order 17 rule 4 as read with Order 17 rule 7 and/or 8 securing the property in dispute pending the trial of the issue: *Supreme Court Practice 1999*, paragraph 17/5/13.

13. The May 25, 2004 Order, initially obtained by the Plaintiff, was continued on an *inter partes* basis in conjunction with the Bermuda interpleader action being stayed pending the trial of the dispute abroad on the joint application of the rival claimants. Mr. Potts was therefore right to submit that (assuming as he did that the present context calls for the application of the general variation principles) a material change of circumstance must be shown to justify either of the disputants seeking to vary the terms of the preservation order before the dispute has been determined. This general principle holds good even where the Court is conferred a statutory power to review its own orders:

> "*13.The difficulty that faced Mr. Margolin in relying on Rule 7.47 is that there are a significant number of authorities, both in the Court of Appeal and at first instance, which establish that the court will not exercise the jurisdiction to review a previous order unless there are either very exceptional circumstances or a material change of circumstances, since the order was made. The power which is included in Rule 7.47 derives from the bankruptcy jurisdiction of the court and has been part of bankruptcy jurisdiction for a very long time. It is recognised to be an exceptional jurisdiction and one that requires to be confined within proper limits.*"[1]

14. As a matter of construction of the two Orders, Ms. Snelling's attempt to rely upon the "liberty to apply" provision in the September 9, 2004 Order does not withstand careful scrutiny. That provision was explicitly drafted with reference to the stay of the interpleader issues pending their determination abroad and referred to in paragraph 1 of the Order. As Conticommerce's counsel submitted: "*Liberty to apply may be given in every order of the Court to enable matters to be dealt with in the working out of an order, but not when it is final*"[2].

15. However, in my judgment the general principles applicable to varying interim orders such as freezing orders do not apply in the present factual and legal context. The escrow monies do not admittedly belong to Conticommerce and they are not being held pending the determination of a personal or proprietary claim on the application of the claimant(s) alone.

Scope of the Court's jurisdiction to vary and/or clarify the terms of an asset preservation order made on the application of a stakeholder who has commenced an interpleader action

16. A more flexible approach should be adopted to an application seeking clarification of the stakeholder/trustee's ancillary duties and powers under the Orders, which is an alternative and (for the reasons set out below) more accurate framing of Anora's application.

17. The initial ex parte Order was made on OBL's application pursuant to the following procedural and jurisdictional rules. An interpleader plaintiff is required to meet the following requirements of Order 17 rule 3:

> "*(4) Subject to paragraph (5), a summons under this rule must be supported by evidence that the applicant*

[1] David Richards, J. in *Damage Control PLC et al-v-Benson* [2008] EWHC 2336 (Ch).
[2] *Supreme Court Practice 1999*, paragraph 17A-16.

(a) claims no interest in the subject-matter in dispute other than for charges or costs,

(b) does not collude with any of the claimants to that subject matter, and

(c) is willing to pay or transfer that subject-matter into court or to dispose of it as the Court may direct." [emphasis added]

18. In addition to dealing with the determination of the dispute between the rival claimants under Order 17 rule 5, the Court is empowered under Order 17 rule 8 to "*make such order as to costs or any other matter as it thinks just"*. The May 25, 2004 Order was made in the exercise of this statutory power. Where an interpleader claimant does not pay the disputed money into court or into a joint account in the names of the claimants' solicitors (as appears to have been the usual practice based on nineteenth century cases), but instead holds the funds under the Court's direction, such claimant is effectively acting as an officer of the Court. According to the Supreme Court Practice 1999 paragraph 17/5/15:

> "*But a claimant who is a receiver appointed by the Court will not be ordered to pay money into Court, but instead to hold the goods as an officer of the Court subject to its further order...*"

19. So OBL is making payments into the escrow account subject to the general direction and supervision of the Court, which must retain a flexible discretionary jurisdiction under Order 17 rule 8, read sensibly in light of the interpleader scheme as a whole, to clarify what the duties of OBL are in relation to the account from time to time by declaration, direction or otherwise. As Ms. Snelling rightly submitted, her opponent's attempts to compare the present application to an application for disclosure in support of a mareva injunction were misconceived.

Jurisdiction of the Court: Order 43 rule 2

20. In light of the findings set out below on Anora's primary jurisdictional ground, no need to consider this alternative ground strictly arises. If I were required to consider the application on the basis of this jurisdictional ground alone, I would conclude that Order 43 rule 2 can only be invoked in support of the adjudication of a substantive claim before the Court.

Factual findings: the proper characterisation of the present application

21. It is true in a technical sense, as Conticommerce's counsel contended, that no material change of circumstances or threat to the escrow assets has occurred which would justify this Court's intervention on these grounds alone. But a review of the undisputed facts only serves to show how artificial this framing of the facts is.

22. Anora's evidence fails in this narrow sense to support a finding that a material change of circumstances has occurred since the Orders were actually made as regards the supply of information about the escrow fund. In paragraph 11 of the First Walch Affirmation sworn in support of Anora's 2004 stay application, complaint is made that for several years (seemingly since 1999) no information had been forthcoming about the amount and location of royalties due to the Foundation. This averment is supported by contemporaneous correspondence. Far from suggesting that the assistance of this Court was required to obtain information about the royalties from the Plaintiff, First Walch emphasised the European location of key assets and witnesses, suggesting that discovery could more effectively be obtained in the Swiss Proceedings.

23. Nor is there any support from the evidence filed in support of the present discovery application for the proposition that the failure to apply for such relief then was because Anora expected the relevant information would be supplied voluntarily by the Plaintiff or its attorneys. According to First Reithner, paragraph 28 et seq, the Plaintiff was first requested to supply information about the status of the escrow account in February 2006. The Plaintiff's attorneys accommodated this request voluntarily until definitively refusing to do so in April 2010. It appears that the Plaintiff's Board subjected the disclosure position to closer scrutiny when it received a request for 2000-2004 information in addition to escrow account balances on October 2, 2009.

24. The current position is that OBL's attorneys are willing to confirm that payments continue to be made into the escrow account (i.e. to confirm their client's compliance with the May 25, 2004 Order as read with the September 9, 2004 Order) but not to provide information about the state of the account without further direction from this Court[3]. There is no credible basis for the suggestion that OBL's compliance with the Order requires careful scrutiny because it is controlled by Mr. Balmeseda. But there is clearly uncertainty on OBL's part as to what information they are obliged to supply to Anora under the Orders. In 2006 the view was taken that they could properly supply quarterly account balances; OBL now takes the position that, absent an express direction from the Court, such information should no longer be supplied.

[3] Appleby letter to Mello Jones & Martin June 28, 2011.

25. In substance, therefore, the Plaintiff is a trustee holding funds for the benefit of the Defendants pursuant to the Orders and a dispute has arisen about the scope of its duties as defined by the Court. Anora is the aggrieved claimant and seeks the Court's clarification of the matter. The question of varying the Orders only arises if the Court first determines that their silence on the issue of information disclosure was at best an oversight or at worst reflected a conscious determination to restrain OBL from informing the claimants about the state of the fund held pursuant to the direction of the Court.

Findings: is the Plaintiff implicitly empowered to inform the Defendants about its compliance with the Orders and/or to furnish them with account balances from time to time under the terms of the Orders when made?

26. In my judgment the May 25, 2004 Order, as continued by the September 9, 2004 Order, can only sensibly be construed as implicitly entitling OBL to both (a) confirm to either claimant that it was continuing to pay the royalty receipts into the escrow account, and (b) to inform either claimant what the account balances were from time to time. The alternative construction, that the Court must be deemed to have authorised OBL to create an escrow account but not empowered OBL to disclose the status of such account to the putative beneficial owners, without seeking express approval from the Court, is an absurd one.

27. Mr. Potts contended that Conticommerce alone as the registered owner of the royalty certificates was entitled to restrain Anora from obtaining confidential information about its assets. This analysis ignores the basis on which the interpleader action was commenced: that OBL was unable to determine the merits of the competing ownership claims. Moreover if this Court had directed without more that the royalty receipts be paid into Court, it seems inconceivable that the Court would not by necessary implication have been empowered to inform either party of the status of the relevant account.

28. Moreover, the Court left open for future determination the question of OBL's costs in relation to maintaining the escrow account. This makes it even more improbable that the Court can be deemed to have intended that OBL should have assumed the potentially significant risk of maintaining the escrow account without affording the respective competing beneficiaries an opportunity to monitor the status of the relevant account, both in terms of (a) the fact that royalty payments were still being deposited, and (b) the relevant account balances.

29. This construction of the Orders is not only consistent with common sense but consistent with the view OBL's attorneys took of the arrangement until anxiety about the position was created by a combination of (a) an overreaching request by Anora for information

beyond the scope of the Orders, and (b) an objection by Conticommerce's principal to any disclosure to Anora at all. If I were wrong in adopting this construction, I would in any event grant a direction in the terms sought by Anora.

Findings: can the Orders, alternatively, be construed as having deliberately failed to authorise disclosure?

30. There is no basis for any suggestion that the failure to expressly deal with disclosure issues was intentional on the part of the Court and the parties. At worst the matter was overlooked, in which case the Court must have the jurisdiction, in the alternative, to address the issue by way of variation of the 2004 Orders.

Undertakings

31. Anora offered an undertaking not to use the information supplied for purposes other than the present proceedings without leave of the Court. Conticommerce rejected this as inadequate and sought fortification.

32. I regard the undertaking offered as entirely reasonable and reject the suggestion that fortification is required. The escrow account is within the jurisdiction of this Court; Anora can only ultimately access the funds (if it prevails in the Swiss Proceedings) by order of this Court. This is sufficient protection for Conticommerce against the somewhat ill-defined risk that Anora will breach its undertaking and use the information obtained to its advantage (or to inflict injury on Conticommerce) outside of Bermuda.

33. The amount of monies held in escrow in Bermuda after the commencement of the Swiss Proceedings is unlikely to be relevant to the merits of the proprietary dispute; however knowledge of the value of the dispute may inform litigation strategy and impact on the chances of settlement of the Swiss and/or Liechtenstein Proceedings. Use of the information supplied by the stakeholder for these limited purposes would in my judgment be permissible without infringing the undertaking proposed; because the royalty receipts are effectively being preserved by this Court in aid of those foreign proceedings.

Conclusion

34. Anora is in substance entitled to the relief it seeks pursuant to its September 27, 2011 Summons. However, the form of the Order should not at this juncture be directing OBL to provide the requested information but, rather, confirming (or declaring or directing) that OBL is entitled under the Orders to supply the relevant information. It is also

appropriate to require Anora to undertake to use the information, unless otherwise granted leave by this Court, only for the purposes of the present proceedings.

35. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the costs of the present application shall be awarded to Anora as against Conticommerce, to be taxed if not agreed on the standard basis.

Dated this 31st day of January, 2012 _____

KAWALEY J