



In The Supreme Court of Bermuda

CIVIL JURISDICTION COMMERCIAL LIST

No 103 of 2012

BETWEEN:-

**(1) JOLIET 2010 LIMITED
(2) TEODORO 29 CORP**

Plaintiffs

-v-

**(1) GOJI LIMITED
(2) ERAN BEN-SHMUEL
(3) ALEXANDER BILCHINSKY**

Defendants

RULING

Date of hearing: 6th November 2012

Date of ruling: 5th December 2012

Mr Ben Adamson, Conyers, Dill & Pearman, for the Plaintiffs

Mr Nathaniel Turner, Attride-Stirling & Woloniecki, for the First Defendant

Mr Timothy Marshall, Marshall Diel & Myers Limited, for the Second and Third Defendants

Introduction

1. By a notice of motion dated 27th September 2012 the Plaintiffs seek an order for committal against the Second and Third Defendants, who have allegedly breached the terms of an ex parte anti-suit injunction made against them.
2. The Second and Third Defendants have commenced proceedings in Israel (“the Israeli proceedings”) in which they seek relief against, among others, the First Plaintiff (“Joliet”) and the First Defendant (“Goji”).
3. The following provisions of the statement of claim in the Israeli proceedings are relevant. I shall refer to the Second and Third Defendants in their role as plaintiffs in the Israeli proceedings as “the Israeli Plaintiffs” and the defendants in the Israeli proceedings as “the Israeli Defendants”.
 - (1) Paragraph 159 seeks a declaration that the Israeli Plaintiffs are entitled to all the shares and rights in Goji.
 - (2) Paragraph 163 seeks in the alternative a declaration that the Israeli Plaintiffs are entitled to a share of, among others, Goji at a rate that the Court will determine.
 - (3) Paragraph 164 seeks an order that the Israeli Plaintiffs be entitled to be represented on the board of directors of, among others, Goji, proportionate to their shares in the Company, and an order for the correction of the documents of incorporation of, among others, Goji, insofar as necessary.
 - (4) Paragraph 165 seeks relief that includes an order for the dismissal of one of the Israeli Defendants from Goji’s board of directors.
 - (5) Paragraph 167 seeks an order for the termination or “*voidness*” of transactions with interested parties performed by or on behalf of the said Israeli Defendant with the Company which benefit him at the expense of the other shareholders, or alternatively compensation of the Israeli Plaintiffs and/or the Company.

4. The Plaintiffs are both shareholders in Goji, which is a company that has been continued in Bermuda. Neither Plaintiff has any presence in Israel. They contend that the Israeli Court does not have competent jurisdiction over either them or Goji.
5. On 26th March 2012, on an ex parte application before Kawaley J (as he then was), the Plaintiffs obtained (i) leave to serve a specially endorsed writ out of the jurisdiction on the Second and Third Defendants and (ii) an interim anti-suit injunction against them (“the Injunction”).
6. The Injunction provides that:-

“Until after final judgment in this action or further order of this court the Defendants or any of them must not whether by their servants, agents or any other person howsoever proceed or continue to proceed with or assist or participate in the conduct of any Shareholder Action in [the Israeli proceedings]. A Shareholder Action for the purposes of this paragraph means the pursuit of one or more of the following remedies:

 - 1.1 Declarations as to the ownership of Goji’s share capital;*
 - 1.2 Alteration of and/or appointment to Goji’s board of directors;*
 - 1.3 Amendments to Goji’s bye-laws and/or memorandum of association;*
 - 1.4 Annulments of contracts entered by Goji with third parties save such contracts as are governed by Israeli law and/or expressly subject to the jurisdiction of the Israeli Courts;*
 - 1.5 Claims for compensation to Goji for breach of fiduciary duties.”*
7. I am satisfied that the paragraphs from the Israeli statement of claim that are summarised above contain claims that are Shareholder Actions.
8. The Plaintiffs did not obtain express leave to serve the Second and Third Defendants with the Injunction, as opposed to the writ, out of the jurisdiction. But I am satisfied that the Plaintiffs had implied leave as

Schedule 2 to the Injunction contained an undertaking that as soon as practicable the Plaintiffs would serve the Defendants with a copy.

9. In May 2012 the Second and Third Defendants were personally served with the Injunction. By a summons dated 15th June 2012 (“the Summons”) they applied, inter alia, to set it aside.
10. I heard this application on 6th November 2012, but have delayed ruling upon it until after the Summons was heard. One of the issues arising on the Summons was whether the Court has jurisdiction over the Second and Third Defendants.
11. The Summons was heard by me on 15th and 16th November 2012. I gave a reserved judgment on 5th December 2012 in which I ruled that the Court does have jurisdiction over the Second and Third Plaintiffs. There is therefore no jurisdictional bar to the committal application.
12. The background to this matter is set out in more detail my judgment of 5th December 2012. I need not repeat it.

The law

13. The relevant principles are not in dispute:
 - (1) For a contempt to be established it has to be shown that the conduct which breached the undertaking was intentional or deliberate and that the alleged contemnor had knowledge of the facts which made his conduct a breach. It is unnecessary to establish that the alleged contemnor appreciated that his conduct was a breach of the undertaking. See the decision of the High Court of England and Wales in Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc [2009] EWHC 1445 at paragraph 14.
 - (2) No order or undertaking will be enforced by committal unless its terms are clear, certain and unambiguous. See Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc at paragraph 18.

- (3) An order made by a court of competent jurisdiction must be obeyed unless and until it has been set aside by the court. See the decision of the Privy Council in Isaacs v Robertson [1985] 1 AC 97 at 101 G – H.
- (4) The standard of proof required at committal proceedings is the criminal standard, ie beyond a reasonable doubt. See the decision of the Court of Appeal of England and Wales in Dean v Dean [1987] 1 FLR 517. I shall apply that standard throughout this judgment.

Alleged contempts

14. The Plaintiffs allege that the Second and Third Defendants are in breach of the Injunction in that after being served with it they have taken steps that involved proceeding or continuing to proceed with or assisting in or participating in the conduct of the Shareholder Actions.
 - (1) On 10th September 2012 the Israeli Plaintiffs filed a motion in the Israeli proceedings (“the First Motion”). This asked the Israeli Court to decide an earlier motion filed on 3rd November 2011 in which the Plaintiffs had asked the Court for a ruling that various overseas Defendants in the Israeli proceedings, including Joliet and Goji, had been properly served (“the Service Motion”).
 - (2) On 11th September 2012 the Israeli Plaintiffs filed a further motion in the Israeli proceedings (“the Second Motion”). This asked the Israeli Court to “*schedule a hearing regarding*” a motion filed on 15th March 2012 that sought temporary injunctions against all the Israeli Defendants, including orders prohibiting them from dealing with any shares in Goji (“the Motion for Temporary Injunctions”).
15. The First Defendant adopts the Plaintiffs’ submissions.
16. The Second and Third Defendants deny that they are in breach of the Injunction.

Evidence

17. I have had the benefit of affidavit evidence from two Israeli lawyers with intimate knowledge of the Israeli proceedings: Yariv Kesner (“Mr Kesner”), who acts for the Israeli Plaintiffs in those proceedings, and Dr Avigdor Klagsbald (“Dr Klagsbald”), who acts for some of the defendants in the Israeli proceedings, but not for Joliet or Goji.

The First Motion

18. The background to the first motion is as follows. On 5th April 2012 the Israeli Court, with the consent of the Israeli Plaintiffs and some of the Israeli Defendants, but not Joliet or Goji, ordered a stay of the Israeli proceedings so that the parties could try to resolve their disputes through mediation.
19. The Israeli Court ruled that, as requested by those parties, it would not at this stage rule on the Service Motion or the Motion for Temporary Injunctions. The Court directed that the parties should notify it by 31st May 2012 if the mediation was successful, and that, *“if necessary, they will plead for another deliberation and if one should take place, its matter will be the temporary injunction”*.
20. By 5th April 2012 most of the material that went before the Israeli Court with respect to the Service Motion had already been filed, although some material was filed after that date.
21. The mediation was not concluded by 31st May 2012. It ended on 10th September 2012 but without success. Mr Kesner filed a Notice that day informing the Court of the outcome. He also filed the First Motion.
22. It is common ground that the purpose of the Service Motion was to ascertain whether Joliet and Goji, among others, had been properly served.
23. The Plaintiffs contend that the Service Motion was a step in the Shareholder Actions as it would have put the Second and Third Defendants, in their capacity as Israeli Plaintiffs, in a position to pursue the Shareholder Actions

against Joliet and Goji. It would have done so, the Plaintiffs submit, and was therefore a step in the Shareholder Actions, irrespective of whether the Israeli Defendants intended to pursue the Shareholder Actions, as opposed to other relief sought in the Israeli proceedings, against those companies. The Plaintiffs therefore submit that the test for whether the Service Motion was a step in the Shareholder Actions is an objective one.

24. However the Plaintiffs further submit that I can be satisfied that the Israeli Plaintiffs did intend to pursue the Shareholder Actions against Joliet and Goji. Otherwise, the Plaintiffs ask rhetorically, why bother to serve them?
25. The Plaintiffs submit that, as the Service Motion was a step in the Shareholder Actions, the First Motion, too, involved participation in the Shareholder Actions and was therefore in breach of the Injunction.
26. The Second and Third Defendants, on the other hand, submit that the Service Motion was not in breach of the injunction. This is because, they submit, the First Motion was filed with the intention of pursuing other remedies against Goji and Joliet and not the Shareholder Actions. They therefore submit that the test for whether the Service Motion was a step in the Shareholder Actions is a subjective one.
27. They refer me to paragraph 27 of Mr Kesner's Third Affidavit, dated 26th October 2012, which states that they, "*do not propose to seek to pursue any alleged 'Shareholder Action' in Israel pending the outcome of the jurisdiction application.*"
28. There is force in both positions. However I am satisfied that the objective approach is the one that the Court intended. Otherwise the Injunction would have no teeth: the Israeli Plaintiffs could pursue the Shareholder Actions in the Israeli proceedings with impunity on the pretext that the steps that they were taking, while consistent with pursuit of the Shareholder Actions, were solely directed towards other remedies.
29. I am therefore satisfied that, by issuing the First Motion, the Second and Third Defendants were acting in breach of the Injunction. However I am not

satisfied that in so doing they intended to pursue the Shareholder Actions against Joliet or Goji.

30. That qualification is important. As noted above, no order or undertaking will be enforced by committal unless its terms are clear, certain and unambiguous. There is an ambiguity on the face of the Injunction as to whether the obligations that it imposes should be interpreted subjectively or objectively. That ambiguity has been clarified by this ruling: they should be interpreted objectively. But the correct interpretation of the Injunction was not free from ambiguity when the Second and Third Defendants issued the First Motion.
31. In the circumstances, although I find that the Injunction has been breached, I am not satisfied that the breach was a contempt.

The Second Motion

32. It is not in dispute that the relief sought on the Motion for Temporary Injunctions would be a step in the Shareholder Actions. It follows that any step to progress the hearing of that Motion is prohibited by the Injunction.
33. The Plaintiffs submit that the request for a hearing in the Second Motion means a request for a substantive hearing at which the Motion for Temporary Injunctions will be decided. They rely on the analysis in Dr Klagsbald's Second and Third Affidavits dated 28th September 2012 and 1st November 2012. I agree that such a request would be in breach of the Injunction.
34. Mr Kesner, at paragraph 17 of his Third Affidavit, states that this is not what is sought by the Second Motion, which according to him is merely a request to, "*schedule a discussion ... in relation to the March 2012 Temporary Injunction Motion in accordance with the Israel Court's directions at the 5 April 2012 Hearing*".
35. Translated into the language of Bermuda court procedure, I understand Mr Kesner to be saying that the Israeli Plaintiffs are merely seeking to have the

matter listed for mention. That would not breach the Injunction, and might well be a sensible thing to do.

36. I can understand the scepticism of the Plaintiffs and Dr Klagsbald. Nevertheless, it is for them to disprove Mr Kesner's sworn evidence as to his intention when filing the motion. They have not done so to my satisfaction. Mr Kesner is an attorney from a respected jurisdiction and I accept his word.
37. In the circumstances I find that as to the Second Motion, also, the allegation of contempt has not been proved.
38. I shall hear the parties as to costs.

Dated this 5th day of December 2012 _____

Hellman J