

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 180

BETWEEN:

ASHLEY DAWSON-DAMER

Plaintiff

-and-

LYNDHURST LIMITED

Defendant

Before:

Hon. Chief Justice Hargun

Appearances:

**Mr Scott Pearman, Conyers Dill & Pearman Limited,
for the Plaintiff**

**Mr Keith Robinson, Carey Olsen Bermuda Limited, for
the Defendant**

Date of Hearing:

2 October 2019

Date of Ruling:

18 October 2019

RULING

Introduction

1. On 2 October 2019 I heard two applications in relation to this matter. The first application made by Lyndhurst Limited, (the “Defendant”), sought an order that the Statement of Claim dated 3 May 2019 be struck out on the basis that the pleading disclosed no reasonable cause of action; it was scandalous, frivolous or vexatious; and/or otherwise an abuse of the process of the Court.

2. The second application was made by Ashley Dawson-Damer, (the “Plaintiff”), for an order that these proceedings be stayed generally pending the outcome in proceedings which are currently before the Supreme Court of The Bahamas (claim number 2015/CLE/00341) (the “Bahamian proceedings”) and that either party be at liberty to apply to restore these proceedings.

Procedural Background

3. The background to the underlying claim and the reasons for commencing the Bermuda proceedings are set out in my Judgment of 6 February 2019 (the “February Judgment”), at paragraphs 3 to 7:

“ 3. The Applicant is a discretionary beneficiary of the Settlement which is governed by the laws of The Bahamas.

4. In 2006 and 2009, the trustee of the Settlement, Grampian, a Bahamian private trust company, made two appointments in the aggregate sum of US \$402 million (“the Appointments”) (representing approximately 98% of the assets of the Settlement) onto inter alia The Bermuda Trusts of which the Respondent is the trustee.

5. In March 2015, the Applicant commenced proceedings in the Supreme Court of The Bahamas against Grampian seeking to set aside the Appointments. The Respondent was added as a defendant to the Bahamian proceedings in July 2018. In the Bahamian proceedings the Applicant seeks inter alia (1) declarations that the 2006 Appointments and/or the 2009 Appointment are void, or alternatively voidable; (2) an order setting aside the 2006 Appointments and/or the 2009 Appointment; and (3) an order requiring the re-vesting of assets subject to the 2006 Appointments and/or 2009 Appointment (or the traceable proceeds thereof) to the Settlement. The Respondent has elected not to submit to the jurisdiction of the Bahamian courts and has refused to participate in the Bahamian proceedings.

6. *In the Bahamian proceedings the Applicant asserts that when exercising its power to make the 2006 Appointments and/or the 2009 Appointment, Grampian failed to exercise its discretion fairly, properly, reasonably or even-handedly. In particular, it is alleged inter alia that (1) Grampian unfairly discriminated against the Applicant by adopting a policy that she will not benefit under the Settlement and took that policy into account when considering how to exercise its fiduciary discretionary powers under the Settlement; (2) Grampian failed to give any or any proper consideration whether provision ought to be made for the Applicant from the Settlement whether at that time or in the future; (3) Grampian failed to take into account the Applicant's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were made; (4) Grampian purportedly decided by 2004 that the Applicant would not benefit from the Settlement (despite her remaining a beneficiary) and thereby wrongfully closed its mind to the interests of the Applicant and the question of whether she should benefit from any exercise of discretion under the Settlement thereby effectively (and improperly) limiting the scope of the powers conferred on Grampian; and (5) alternatively, Grampian exercised its powers for the ulterior and improper purpose of excluding the Applicant from benefiting from the vast bulk of the trust fund, having determined not to exercise its power to exclude the Applicant from the class of beneficiaries on the grounds that it would be provocative to do so.*

7. *The Applicant contends that if she succeeds in a claim in the Bahamian proceedings, the assets representing the traceable proceeds of those Appointments will be held by the Respondent on bare trust for Grampian as trustee of the Settlement. In these circumstances the Applicant has sought an undertaking from the Respondent that the Respondent will not dissipate the Assets pending the resolution of the Bahamian proceedings. The parties have engaged in lengthy correspondence in relation to the issue of the undertaking by the Respondent. The Respondent has confirmed that it has made no distributions to the beneficiaries of the Bermuda Trusts and whilst it has no present intention of making any distributions to the beneficiaries, it does not consider it appropriate to give the undertaking sought. In the circumstances*

the Applicant has commenced these proceedings seeking a preservation order from the Court.”

4. It is relevant to note that the Bermuda proceedings, as originally commenced, only sought a preservation order seeking to preserve the disputed assets and did not plead any underlying claims against the Defendant. The Defendant resisted the grant of an injunction, inter-alia, on the ground that the Court could only grant such an injunction in support of an underlying cause of action and if the underlying cause of action was pending in a foreign court, the judgment of that foreign court would be unenforceable in Bermuda. Given that the Defendant was not subject to the jurisdiction of the Bahamian Court in the international sense, the Defendant argued, that any Bahamian judgment would not be enforceable against it in Bermuda. I accepted that submission in my earlier decision dated 6 February 2019.
5. I also accepted the Plaintiff’s submission that this jurisdictional objection could be overcome if the Plaintiff commenced proceedings in the Bermuda Courts asserting the underlying claims against the Defendant. Accordingly, the Plaintiff filed the Specially Endorsed Writ of Summons dated 3 May 2019, which is now the subject matter of the present challenge.

The application to strike out the pleadings

6. The core of the Statement of Claim filed in the Bermuda proceedings is at paragraphs 10-12:

“10. At appendix 1 to this statement of case, Ashley appends the amended writ of summons and amended Statement of Claim filed in the Bahamian Claim.

11. The facts and matters stated in the said Statement of Claim are repeated herein mutatis mutandis.

12. In the premises, the 2006 Appointments are void, or alternatively are voidable and are liable to be set aside.”

7. The application to strike out the Statement of Claim is supported by the affidavit of Henry James Tucker sworn on 26 June 2019. In that affidavit, Mr Tucker asserts at paragraph 9 that the Bahamian Statement of Claim is limited to claims under Bahamian law and makes no reference to a cause of action under Bermuda law. Accordingly, on its face, Mr Tucker asserts, the Statement of Claim does not refer to any presently enforceable legal obligation owed by the Defendant to the Plaintiff as a matter of Bermuda law, since it merely incorporates the Bahamian claim which is a claim made pursuant to the law of The Bahamas.
8. Mr Robinson, who appeared at the hearing on behalf of the Defendant, said that he was no longer maintaining that the Statement of Claim filed in the Bermuda proceedings by the Plaintiff did not disclose a cause of action or that it should otherwise be struck out. He accepted that it was, after some deliberation, possible to work out the claims asserted in the Bermuda proceedings by reference to the annexed Statement of Claim filed in the Bahamian proceedings. Mr Robinson contended that it was an abuse of process to draft a Statement of Claim which incorporated a Statement of Claim filed in another jurisdiction and expected the reader to make sense of the two documents by making the “*necessary adjustments*”.
9. I consider there is force in Mr Robinson’s submission in this regard. This is a substantial claim where the Plaintiff contends in the Bermuda proceedings that the 2006 Appointments of assets, with an approximate value of \$290 million, were improperly made with the result that this Court should make an order setting aside the Appointments. Having regard to the value of the claim being pursued, it is not realistic to argue that the device of annexing the Bahamian statement of claim to the Bermuda Statement of Claim was reasonably deployed in order to save time and cost.
10. RSC Order 18 rule 6(2) requires that every pleading must, if necessary, be divided into paragraphs numbered consecutively, each allegation being so far as convenient contained in a separate paragraph. One of the purposes of this rule is so that the factual and legal case made by the plaintiff, the case advanced by the defendant and the plaintiff’s response to that case, can be easily understood by the

parties and the court. This rule is frustrated if the material allegations of the Statement of Claim are to be found in pleadings filed in this Court and separate pleadings filed in a foreign court.

11. In the circumstances, I order that the Plaintiff should file a Statement of Claim in the Bermuda proceedings which does not deploy the device of simply annexing the Bahamian Statement of Claim. I order that the Plaintiff should be required to file the Amended Statement of Claim within six weeks of the expiry of the temporary stay of the Bermuda proceedings (see below).

The application for a stay of the Bermuda proceedings

12. The Plaintiff contends that this is an appropriate case where the Court should stay the Bermuda proceedings pending the determination of the Bahamian proceedings. The Bahamian proceedings are well advanced having been commenced in September 2015. The trial of the Bahamian proceedings is expected to take place in early 2020.
13. It is said on behalf of the Plaintiff, that the Bahamian proceedings are concerned to identify the proper trusts on which the disputed assets are held. The Plaintiff argues that this is a threshold question which is bound to be determined in the Bahamian proceedings following the trial early next year. The Bermuda proceedings, on the other hand, are predominantly concerned with the consequent issue of what should be done with the disputed assets *after* the determination of the threshold question. In the circumstances, the Plaintiff argues, it makes eminently good sense that there should be a temporary stay of the Bermuda proceedings to allow the Bahamian Court to determine the issues pending in the Bahamian proceedings. The Plaintiff accepts that the Bahamian judgment may not be enforceable in Bermuda or give rise to *issue estoppel* given that the Bahamian Court does not possess jurisdiction in the international sense over the Defendant. Nevertheless, the Plaintiff argues, the Bahamian judgment may, as a practical matter, render the Bermuda proceedings unnecessary.

14. The Defendant argues that to grant a stay of the Bermuda proceedings to allow the Bahamian proceedings would in effect fundamentally undermine the Court's earlier decision which held that an injunction would not lie in Bermuda in respect of foreign substantive proceedings where the foreign court had no jurisdiction over the Bermuda Defendant in the international sense.
15. In the written submissions, the Plaintiff argues that the Court is entitled to stay the Bermuda proceedings on *forum conveniens* grounds having regard to the judgment of Lord Goff in *Spiliada* [1987] AC 460 at 476C: the Court must be "*satisfied that there is some other available forum, having competent jurisdiction, which is appropriate forum for the trial of the action*". As I pointed out during argument it is difficult to see how it is possible to grant a stay on the basis of *forum conveniens* given that the Bahamian Court is not a court "*having competent jurisdiction*" over the Defendant in the Bermuda proceedings.
16. The Plaintiff also seeks a stay on case management grounds arguing that the continuation of the Bermuda proceedings without a stay would be wholly contrary to the Overriding Objective. The Plaintiff argues that this is primarily a matter of "*saving expense*" (r. 1(2) (b)); "*dealing with cases in ways which are proportionate*" (r. 1(2) (c)); dealing with cases "*expeditiously and fairly*" (r. 1(2) (d)); and the allocation of "*the court's resources*" (r. 1(2) (e)).
17. The Defendant accepts that the Court has the power to stay proceedings before it on case management grounds relying upon the judgment of Kawaley J in *Ribaroff v Williams and Ors* [2014] Bda LR 12 at [13]: "*The essence of modern judicial case management, applying the principles embodied in Order 1A of the Rules to application and interpretation of other Rules, is pragmatism and bring tailor-made decision-making to bear which takes into account particular factual and legal circumstances of each case*".
18. The Defendant also accepts that the Court has, as a matter of principle, the power to stay proceedings pending the outcome of proceedings in a foreign court or tribunal. However, the Defendant contends, relying upon the observations of Lord Bingham in *Reichold Norway ASA v Goldman Sachs International* [2000] 1 WLR

173, that such a stay should only be granted in exceptional and compelling circumstances and it would not be granted to stifle the Plaintiff's claim indefinitely.

19. Counsel for the Plaintiff relies upon *H.M. Attorney General v Arthur Anderson & Co (United Kingdom) and Others* [1989] ECC 224, where the plaintiff had commenced proceedings in the Courts of New York and also in England in order to preserve the limitation period. In the plaintiff's application for a stay of the English proceedings, Mustill LJ stated that the test for granting such a stay was: "*Does justice require the English proceedings to be stayed pending the decision of the New York Court?*"

20. Counsel for the Plaintiff also produced the subsequent decision of Field J in *The Insurance Company of the State of Pennsylvania v Equitas Insurance Limited* [2013] EWHC 3713, where it was held that since the decision in *Arthur Andersen*, the approach of the Courts at first instance to applications for a stay of proceedings brought by the party who started the proceedings has been that such an application will only be granted in special or rare circumstances. Field J relied upon the decision of Neuberger J in *Ledra Fisheries Ltd v Turner* [2003] EWHC 1049, where the learned judge said [13]:

"... It appears to me that, where the claimant has brought a claim against the same defendants for essentially the same relief arising out of the same facts in two jurisdictions, then, absent special circumstances, it would be wrong for the Court to grant a stay of one set of proceedings at the instigation of the claimant, the very person who has brought both sets of proceedings."

21. The Court retains a wide discretion in relation to case management decisions. However, it seems to me, where the plaintiff has commenced multiple proceedings against the same defendants in different jurisdictions, the test for the issue whether the court should grant a stay at the instance of the plaintiff is correctly stated by Neuberger J in *Ledra*.

22. In my judgment this case does indeed present special circumstances which warrant the grant of a temporary stay of the Bermuda proceedings so as to allow the Bahamian Court to render its judgment in the proceedings pending before it. My reasons for taking this view are as follows.
23. First, the initial Bermuda proceedings (2018 No.334) were commenced with the sole purpose of obtaining a preservation order requiring the Defendant to preserve the proceeds of the 2006 Appointments. Following *The Siskina* [1979] AC 210 and cases discussed at paragraphs 13-21 of the February Judgment, I ruled that interim relief such as a preservation order could only be granted by the Court if there were underlying causes of action pending in this Court or pending in a foreign court provided that any resulting judgment of that foreign court would be enforceable in this Court. Given that the Bahamian judgment would not be enforceable in Bermuda (as the Bahamian Court lacks jurisdiction over the Bermuda Defendant), the only way a preservation order could be sustained was to commence substantive proceedings in Bermuda. The primary purpose of the Bermuda proceedings is to obtain a preservation order which would be binding on the Bermudian Defendant.
24. Contrary to the submission of the Defendant, the commencement of the substantive proceedings in order to support a claim for an injunction and thereafter to seek to stay the substantive proceedings, is not an abusive exercise of jurisdiction. In transnational disputes it is not uncommon that the injunctive relief may be necessary in a jurisdiction which may not be the most convenient forum for the trial of the action. One such reason is that the defendant and/or the assets are in a jurisdiction other than the most convenient forum. If the procedural rules of that jurisdiction require, as a precondition of granting injunctive relief, that the plaintiff must commence substantive proceedings within the jurisdiction then it is not abusive to file an underlying claim for the limited purpose of meeting that jurisdictional requirement. Furthermore, in my judgment, it is not abusive thereafter to seek to stay such proceedings in appropriate cases.
25. Second, the Bahamian proceedings are well advanced and counsel advises that the trial of the matter is expected in early next year. It is common ground that the

judgment of the Bahamas Court would not be enforceable in Bermuda or capable of constituting *issue estoppel*. However, as a matter of practical reality it is still capable of strongly influencing whether the Bermuda action is pursued. One of the issues the Bahamas Court is bound to decide is whether the 2006 Appointments made by Grampian (the subject matter of the Bermuda action) are void or voidable. In the event the Bahamas Court held that the 2006 Appointments are valid and enforceable, that finding is bound to be material in the Plaintiff's decision whether to continue with the Bermuda proceedings. Whilst that finding would not be binding upon this Court, it is a realistic possibility that nevertheless the Plaintiff in the Bermuda proceedings may decide, in light of the Bahamian Court's finding, not to proceed with the Bermuda proceedings.

26. Third, a finding by the Bahamian Court that the 2006 Appointments made by Grampian were indeed void or voidable also has the potential of significantly affecting the course and scope of the Bermuda proceedings. It is perfectly true that such a finding would not be binding upon the Defendant and would not constitute *issue estoppel*. Nevertheless the Defendant, being a trustee, is bound to consider its actions carefully in light of such a finding by the Bahamian Court. The Defendant may wish to seek further directions from the Bermuda Court and it is possible that the scope of any Bermuda proceedings may be substantially reduced.
27. In the circumstances a temporary stay of the Bermuda proceedings to await the outcome of the Bahamian proceedings has the potential of saving substantial costs and resources of this Court. Having regard to these considerations and in the exercise of case management discretion, I consider that it is appropriate that the Bermuda proceedings should be temporarily stayed pending the trial and judgment of the Bahamian Court. Subject to any further order of this Court, the temporary stay should come to an end after the expiry of 60 days after the delivery of the Bahamian judgment.
28. In my judgment this temporary stay does not cause any substantial disadvantage to the Defendant. As noted in paragraph 7 of the February Judgment, the Defendant has confirmed that it has no present intention of making any

distributions to the beneficiaries. In the event that circumstances change the Defendant is of course at liberty to make the appropriate application to this Court.

Conclusion

29. In relation to the application by the Defendant I decline to strike out or set aside the Statement of Claim. However, I make an order that the Plaintiff should file a Statement of Claim which does not deploy the device of simply annexing the pleading in the Bahamian proceedings. The Amended Statement of Claim should be filed within 30 days after the expiry of the temporary stay.

30. In relation to the application by the Plaintiff, I order that the Bermuda proceedings should be temporarily stayed pending the trial and judgment of the Bahamian Court and subject to any further order of this Court. The temporary stay should come to an end after the expiry of 60 days after the delivery of the Bahamian judgment.

31. I will hear counsel in relation to the issue of costs, if necessary.

Dated 18 October 2019

NARINDER K HARGUN

CHIEF JUSTICE