



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
(COMMERCIAL COURT)**

2017: No. 63

BETWEEN:

THE SEVENTH SENSE STAR LIMITED

Plaintiff

- and -

AZZAM FAISAL KHOUJ

First Defendant

- and -

AMEEN AHMED A. MANSOURI

Second Defendant

RULING

Joint Expert Report, Rules of the Supreme Court Order 1A Overriding Objective

Date of Hearing: 26 March 2021

Date of Ruling: 19 April 2021

Appearances: **Steven White, Appleby (Bermuda) Limited for the Plaintiff**
 Sam Stevens, Carey Olsen Bermuda Limited for the Defendants

RULING of Mussenden J

Introduction

1. By a summons dated 23 March 2021 the Plaintiff seeks the determination of the Court in respect of an order for directions in relation to a joint expert report (“**JER**”). The parties seek to rely on expert evidence in relation to an application to set-aside judgment due to be set down for hearing. The Summons is supported by the First Affidavit of John McSweeney sworn on 22 March 2021 along with Exhibit “JTM-1”.
2. The Plaintiff is a Bermuda exempt company incorporated on 1 December 2006 (“**the Company**”). It entered liquidation on 27 December 2011.
3. The Defendants are two of the former directors of the Company.
4. The other director is Dr. Ahmed Hafiz.

Background

5. Mr. McSweeney’s evidence is that the Plaintiff’s claim is for recovery of the proceeds of sale of a Gulfstream V private jet owned by the Company, which had been purchased in November 2007 for \$38,000,000. The private jet was sold by the Defendants for \$17,100,000 while the Company was in liquidation. The proceeds of sale were not returned to the insolvent estate by the Defendants, which was in breach of express instructions to do so from the liquidator.
6. In December 2017 proceedings were commenced by a Writ of Summons in this matter. The Plaintiff submits that in December 2017 there was personal service by the Plaintiff’s Saudi counsel on the Defendants in Saudi Arabia. The Defendants dispute that this service

took place. No Memorandum of Appearance was entered by the Defendants, and accordingly on 22 February 2018 Default Judgment was entered in the sum of \$17,100,000 plus statutory interest.

7. Thereafter, in 2018 and 2019 the Defendants were served with the Default Judgment and Dr. Hafiz took steps to seek enforcement of it in Saudi Arabia in early 2019. On 15 May 2019, the Defendants commenced their applications to set aside service of the Writ of Summons and the Default Judgment. The basis of the application was an allegation that the Plaintiff's Saudi lawyer had fabricated his sworn evidence of service of the Writ of Summons. The Defendants relied upon bare denials of service.
8. Mr. McSweeney provided a broad overview of the rules of service of documents outside of Bermuda, namely Rules of the Supreme Court ("**RSC**") Order 11, rules 5(2) and (3) which provide that where service takes place abroad, it may be affected by personal service, or alternatively, in accordance with the law of the country where service is to take place. He set out four permissible methods for the service of a Bermuda writ outside the jurisdiction. Mr. McSweeney stated that the Plaintiff's case is that the Defendants were personally served in Saudi Arabia, and that this was permissible as such service was not contrary to the laws of Saudi Arabia.
9. The Defendants allege that service had not been carried out in accordance with Saudi law, that is, through diplomatic means or by a request of the Bermuda Court, and was therefore invalid.
10. By an Order dated 7 July 2020, the parties agreed by consent to exchange expert reports within 28 days of the order and that a joint consultation should take place within 28 days after the exchange of expert reports. The respective experts were asked to provide their expert opinion on the following issues:
 - a. Plaintiff's Expert (Mr. Alissa) – (a) "Whether personal service of foreign originating process, effected on a party resident in the kingdom of Saudi Arabia, as occurred in this case, is contrary to the law of the Kingdom of Saudi Arabia?"; and

(b) Are you aware of any specific requirements for service of foreign originating process on an individual resident in the Kingdom of Saudi Arabia as a matter of public policy or law?";

- b. Defendant's expert (Mr. AlAmr) – "Whether a personal service of foreign court proceedings on a Saudi national, resident in the Kingdom of Saudi Arabia, is considered valid under Saudi Law?"
11. Mr. McSweeney also states that discussions to settle the JER took place between the experts from September 2020 to February 2021 without agreement. The Plaintiff's expert favours a short report setting out succinctly the issues agreed and the disagreed and the brief reasons why. The Plaintiff asserts that the Defendants' expert favours a lengthy reiteration of each expert's views with further reasoning set out.

The Plaintiff's Position

12. Counsel for the Plaintiff submits that the Court is being asked to exercise its case management powers, in furtherance of the overriding objective in RSC Order 1A, rule 1 to facilitate the conclusion of the JER in an 'expeditious, fair and cost effective manner'. In that regard, the Plaintiff wishes to obtain directions on both the form of the JER and the issue(s) which will be the subject matter of the JER. He submits that a JER is intended to concisely identify the issues agreed and disagreed, and brief reasons why. Counsel for the Plaintiff has filed a draft Order with a schedule containing three questions which address specific issues.
13. Counsel for the Plaintiff advanced several reasons why the Court should give further directions to enable a JER being produced. First, both experts have already produced reports which demonstrate that there is a great deal of commonality: (a) they agree that there are no express mandatory provisions in Saudi Arabian law governing the service of foreign originating process on an individual resident in the Kingdom of Saudi Arabia or stipulating that it must be through official channels; (b) the exception is where there are

judicial co-operation treaties in place between Saudi Arabia and some GCC countries as a result of regional multilateral treaties; where specific requirements are set out in any treaties, they must be observed; and (c) Bermuda is not a party to any regional multilateral or bilateral treaties.

14. Second, the experts disagree with the contention by Mr. AlAmr that the judicial treaties apply indirectly to Bermuda and therefore that local Saudi rules on service should have been followed. The Plaintiff concedes that it does not contend that it has complied with the Saudi civil procedure rules for service in domestic proceedings. Its case is that it did not need to, as those rules were not applicable to service of a Bermuda writ. In respect of the JER, counsel for the Defendant submits that the way instructing counsel posed the question to Mr. AlAmr, that they misunderstood both the RSC Order 11 and the Plaintiff's case on service, namely service by private means, without the use of official channels. Thus, the different approach of the experts has made it difficult for the experts to agree the terms of the JER as they have approached the issues from different angles.
15. Third, the current impasse can be resolved by the Court giving further directions and using the schedule of questions, specifically as stated by McSweeney, "Whether personal service of a Bermuda writ in Saudi Arabia is contrary to the law of the Kingdom of Saudi Arabia?"
16. Fourth, Counsel submitted that a schedule is frequently used in Bermuda cases and that a JER is supposed to be succinct and clear in form, in other words, to distil the issues which the Court will need to decide and make clear the issues which are agreed.
17. Fifth, in oral submission, counsel for the Plaintiff submitted that the hearing would be a challenge to the Court in respect of videolink, the cross-examination of the experts, translators and requiring a listing of two days, all with costs.

The Defendants' Position

18. Counsel for the Defendants now wish to dispense with the JER for several reasons with their primary concern being to have the hearing on the merits of the parties' applications as

quickly, efficiently and as inexpensively as possible. First, the Defendants do not accept the contention that the appointed experts have approached their task from different perspectives. Additionally, counsel for the Defendants took significant issue with Mr. McSweeney's affidavit as to the meaning and effect of the relevant provisions of RSC Order 11.

19. Second, contrary to all hope and expectation, the joint expert consultation process has been ongoing since the autumn of last year, and a great deal of time and money has been spent without a meaningful end product. He states that there are multiple reasons for this, including long delays by both experts in responding to the other's communications and a general lack of familiarity and comfort with the joint exercise upon which the experts have embarked.
20. Third, the Defendants are now reluctant to incur further time and cost forcing the experts to continue the consultation process. This is primarily because they do not have confidence, based on the problems and major delays experienced to date, that the process is likely to lead to the production of a JER on which the experts can in fact agree and sign off. Further, there was no rule on JER, that it is by consent of the parties and the Defendants would not have given their consent if they knew the cost or trouble that would be incurred in producing a JER.
21. Fourth, the Defendants do not agree that instructing the experts to address an answer to a re-formulated question in a JER is procedurally appropriate, or indeed likely to lead to a significant truncation of the as-yet incomplete process. The experts have already filed their independent reports addressing the short questions they were asked. These reports are not voluminous, nor are the points addressed in those reports particularly wide-ranging or difficult to follow.
22. Fifth, in light of the above circumstances, the Defendants' position is to proceed as follows:
 - (a) dispense with the expert consultation process;
 - (b) ask the Registry to list the hearing of this matter for 1 full day on the first available date; and
 - (c) agree that both experts will be made available for cross examination on the contents of their respective reports at the

hearing. The Defendants' expert has confirmed that he is willing to attend the hearing to be examined. In following this process, counsel for the Defendants submits that how the Court should interpret and apply each expert's written and oral evidence would then be a matter for submission by the parties, and the Court will be well able to decide which expert opinion it prefers.

Discussion

23. I am of the view that the parties should no longer seek to produce a JER for several reasons. First, I am guided by the RSC Order 1A, rule 1 the Overriding Objective, particularly in saving expense and ensuring that the case is dealt with expeditiously and fairly. Counsel for the Plaintiff cites the principles of the English CPR Practice Direction 35 – Experts and Assessors as a strong guide for this Court, namely to narrow the issues and to identify the extent of agreement and disagreement along with reasons for such disagreement. However, in light of the time and effort incurred already to produce a JER, I find the balance weighs more with saving expense and expedition than incurring further costs and time in continuing efforts to produce a JER.
24. Second, the Defendants no longer wish to engage in the process as there has been a considerable amount of time and costs already incurred by producing the expert report for each party and also in respect of the efforts to produce a JER. I am obliged to accept this submission as a valid submission taking into account that they no longer consent to the JER.
25. Third, both parties appear to be standing their ground on the questions posed to their respective experts. No doubt, as experienced counsel in these matters they have each given careful consideration to the RSC Order 11 about service out and then drafted the questions as they have seen fit to advance their case in the application to set aside judgment. In my view, I should decline to choose, formulate or rewrite the questions for a JER as that is not the Court's role. In due course, the Court will be called upon to consider the issue of effective service and the expert evidence presented to the Court in support. On that point,

I have had submissions on the meaning of RSC Order 11 along with supporting authorities as a basis for determining a proper question for the expert. In the present application about the order for directions in respect of the JER, I make no determination at this point on the application of RSC Order 11 in this case.

26. Fourth, I find favour in the Defendant's submission on the way forward. Both sides have produced expert reports but cannot agree a JER. I note counsel for the Plaintiff says that there is much commonality in the reports which are not voluminous. In my view, at the hearing, the experts can be cross-examined on their reports including on the areas of and reasons for disagreement and counsel can make submissions on such evidence.

27. Fifth, I am of the view that the Court can accommodate the evidence of the experts by audio-visual link so Counsel should agree appropriate arrangements for such appearances by the Zoom platform. In respect of translation, if it necessary then Counsel should agree reasonable arrangements for a translator. Also, the Court can accommodate a two-day hearing.

Conclusion

28. For the reasons above, in respect of the draft order filed with the Summons,

- a. I decline to grant the order in paragraph 1;
- b. In respect of paragraph 2, the parties should submit agreed dates within 14 days for a two-day hearing in June, July and August 2021;
- c. An order should be added for the experts to appear for examination, with translator(s) if necessary, by a video-link platform, preferably Zoom which is used by the Court.
- d. An order should be added for liberty to apply.

Dated 19th April 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**