In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2015: No. 16

BETWEEN:

THE MAJURO INVESTMENT CORPORATION
(a company incorporated in the Marshall Islands)

Plaintiff

-v-

(1) VASILE TIMIS (also known as FRANK TIMIS)
(2) DERMOT COUGHLAN
(3) CRAIG COUGHLAN
(4) EDEN DERVAN (also known as ADEN DERVAN)
(5) GLOBAL IRON ORE, LIMITED (a company incorporated in Cyprus, in Liquidation)
(6) FERRERO LAW FIRM
(7) AFRICAN MINERALS LIMITED (a company incorporated in Bermuda, in Administration)
(8) TONKOLILI IRON ORE (SL) LIMITED (a company incorporated in Sierra Leone)

Defendants

RULING ON APPLICATION TO SET ASIDE SERVICE

(in Chambers)

Date of hearing: November 6, 2015
Date of Ruling: December 7, 2015

Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan Limited, for the Plaintiff ("P")
Mr. Steven White, Cox Hallett Wilkinson Limited, for the 6th Defendant ("D6")

Introductory

1. On January 15, 2015, P issued a Generally Endorsed Writ of Summons accompanied by a 'Particulars of Claim'. P claimed equitable compensation or damages in the amount of $50.5 million from, *inter alia*, the first Defendant ("D1"). From paragraph 1 of P's pleading, it was clear that P brought the claim as a shareholder of the 7th Defendant ("D7"), a Bermudian company, and its subsidiary the 8th Defendant ("D8"), a Sierra Leonean company, on behalf of D7 and D8. The final paragraph of the pleading averred as follows:

> "*81. No relief is sought against* [D7] *and* [D8]*, who have been joined as Defendants solely for the purposes of their being parties to any order made in respect of this claim.*"

2. On the same date as the Writ was issued, P issued an Ex Parte Summons seeking injunctive relief against the Fifth and Sixth Defendant ("D5" and D6") and directions for service on the Defendants generally outside of the jurisdiction. This Ex Parte Summons was heard before Hellman J in Chambers on January 21, 2015. He granted both the injunctive relief sought against D5 and D6, which P's counsel addressed first in oral argument ("the Injunction"); Hellman J also granted leave to serve out against, *inter alia*, D6.

3. On page 27 of a Skeleton Argument which ran to just over 33 pages, P's case for obtaining leave to serve all foreign Defendants out of the jurisdiction was set out in a single paragraph in the following terms:

> "*86. The Company is located within this jurisdiction and accordingly the claim can be served upon it without permission. Each of the other Defendants, all of whom are located outside of the jurisdiction, are necessary and/or proper parties to the claim. They are necessary and proper parties for the reasons already set out in* [Mr Memarian's] *affidavit. Thus the requirements of* RSC Ord.11, r.1(1)(c) *are fulfilled in respect of each of the Defendants located outside of the jurisdiction. The requirements of RSC Ord.11, r.4(1) have been set out by* [Mr Memarian] *in* [his] *affidavit.*"

4. In paragraph 5 of the 2nd Memarian Affidavit, it was averred that:

> *"5.3 There is a "real issue" between the Sixth and Seventh Defendants since in order for effective relief to be obtained in respect of sums over which the Plaintiff claims that the Seventh Defendant has a proprietary interest, the Sixth Defendant must be a party to these proceedings as the legal holder of those funds.*"

5. By Notice of Motion dated June 9, 2015, D6 applied for an Order either striking out or staying the present proceedings on jurisdictional grounds.

Findings: merits of application to set aside service and discharge the Injunction

6. The sole jurisdictional ground relied upon by P as against all foreign Defendants including D6 was the 'necessary and proper party' ground under Order 11 rule 1(1)(c). In my Ruling of December 4, 2015 on D1's application to set aside the January 21, 2015 Ex Parte Order granting leave to serve out, I set aside the said Order as regards D1 and dismissed the claim against him. The central foundation of this decision was that the inability of P to open a jurisdictional gateway for its claim could not be cured by the substitution of D7 as Plaintiff. Accordingly, there was no rational basis to postpone dismissing the proceedings with a view to awaiting the occurrence of a contingency which was unlikely to ever occur.

7. Mr White adopted the arguments made by Mr Potts in support of D1's application to set aside service of the Writ on him. He also demonstrated that Lord Collins' statements on the 'necessary and proper party' jurisdictional gateway in the Privy Council decision in *Altimo Holdings and Investment Ltd-v-Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at 1822-1823 had been approved in two subsequent cases. Firstly, they were approved by Walker J in *Standard Bank Plc-v-Just Group LLC* [2014] EWHC 2687 (Comm). Secondly, Lord Collins' remarks were reaffirmed by Lord Collins himself on behalf of the Privy Council in a judgment handed down on January 21, 2015, the same day the impugned Orders were made: *Nilon Ltd-v-Royal Westminster Investments SA* [2015] UKPC 2 (at paragraph 15).

8. The *Nilon* case also confirms that the claim against the anchor defendant must itself be a viable one in substantive and not simply abstract terms. As Lord Collins observed:

> "*53... Although in general it is not objectionable to bring a viable claim against D1, who is within the jurisdiction, with the principal object of joining D2, who is outside the jurisdiction, as a necessary/proper party, the combination of the motive and the artificiality of the rectification proceedings, and the fact that they are dependant on a trial of the underlying*

facts, means that the appropriate order in these circumstances is not to stay or adjourn the rectification application, but to strike it out."

9. It follows that, for the reasons set out in my said December 4, 2015 Ruling, service against D6 is also liable to be set aside.

10. Mr Duncan accepted that for standing reasons, P itself could no longer maintain the present action against D6 or at all. However, he invited the Court to stay the present proceedings rather than dismissing them at this stage to preserve the benefit of the Injunction granted against D6 for the benefit of D7's creditors. The rationale for this submission was, however, closely linked to P's rejected contention that D7 could pursue the same claim and viably pass through the same jurisdictional gateway.

11. By letter to the Court dated November 5, 2015, the UK Joint Administrators of D7 (who have had notice of the present proceedings since April 2, 2015 at least) invited the Court to keep the injunction in place pending an assessment by them of whether or not they wish to intervene in the present proceedings. This request was unsurprisingly endorsed by P with great enthusiasm.

12. Accordingly, the primary outstanding issue to be determined solely for the purposes of D6's application is whether the present proceedings should be stayed, with the injunction granted by Hellman J kept in place, notwithstanding the fact that:

    (a) the action against D6 is liable to be dismissed on jurisdictional grounds; and

    (b) there is no basis for believing that D7, acting by its Joint Administrators, would have any or any better jurisdictional standing to pursue similar claims.

Findings: should the action be dismissed or stayed?

13. Mr Duncan succeeded in arousing the anxiety of the Court about the prospect of dismissing the present proceedings and discharging the injunction in circumstances where the frozen monies are said to be the proceeds of a fraud. However, the crucial question remained what jurisdiction the Court possessed to keep an injunction in place which ought not to have been granted in the hope that, at some uncertain future date, the Joint Administrators might take some ill-defined steps, probably abroad, to secure the assets for the benefit of D7's creditors.

14. D6, a Swiss law firm constrained by strict confidentiality laws, is believed to have received $30.5 million from D7 which it holds to the order of D5, which is in liquidation in Cyprus. P asserts that D2, a director of D5, is still purporting to have

authority to give instructions on behalf of D5, despite its being in liquidation. The Injunction was sought and obtained on the basis of fears that D4 and D5 will give instructions to D6 aimed at putting the monies beyond the reach of D7. It is accordingly presently unclear that the monies are effectively under the control of the Cypriot liquidator.

15. Mr White made the important principled submission that the fact that keeping the injunction in place might well be in general terms desirable did not confer jurisdiction to do so. He cited the following observations of Neuberger J (as he then was), in *Gill et al-v-Flightwise Travel Service* [2003] EWHC 3082 (Ch):

> "*[56] I can see the attraction (and it is an attraction I have fallen for myself) in saying "that there is no problem in granting the injunction, because, although there is not much evidence to support dissipation and not much evidence to support the claim, it is surely safer to grant it because there may be an unfair dissipation if the court does not grant it, and no prejudice will be caused to the respondent?" To my mind that is a tempting and attractive line but it is an wholly inappropriate line to adopt.*"

16. D6 was served and injuncted under the Court's 'Chabra' jurisdiction to freeze assets held on constructive trust for D7 in support enforcement of a judgment P hoped to obtain against, primarily, D 1and D2 in the present action. Such an injunction can only be granted if there is a good arguable case on the merits of the substantive claim. There will be no merits at all to the substantive claim where the injunction is sought from a court which does not have jurisdiction over the substantive defendants. This conclusion is supported by another authority D6's counsel relied upon, *Linsen International Ltd-v-Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm). In that case, Flaux J held as follows:

> "*5. To justify obtaining or continuing a freezing injunction, a claimant has to show a good arguable case on the merits. In* ***Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen")*** *[1983] 2 Lloyd's 600 at 605, Mustill J (as he then was) described a good arguable case for these purposes as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success". As the editors of the Civil Procedure 2011 volume 2 at paragraph 15-23 observe, this is the test of "good arguable case" which has been habitually applied subsequently in freezing injunction cases…*
>
> *9… However, the insuperable problem which the claimants face is that the third defendant is resident in Indonesia and all the other proposed additional defendants are also resident outside the jurisdiction. To found jurisdiction against*

any of them before this court, the claimants would have to show a good arguable case for service out of the jurisdiction under one of the gateways in paragraph 3.1 of Practice Direction 6B to the Civil Procedure Rules. This the claimants simply cannot do.

*10. It follows that the court has no jurisdiction to grant a **Chabra** injunction against any of the third to thirteenth defendants and that the freezing injunction granted by HHJ Mackie QC on 9 June 2011 must be discharged. This judgment now provides the detailed reasons for that conclusion.*

11. Before setting out those detailed reasons, I should mention one development. At the hearing on 19 July 2011, I refused the claimants permission to appeal my rulings and also refused to continue the injunctions granted by HHJ Mackie QC. I indicated however that I would continue the injunction against the third defendant for 14 days to enable the claimants (if so minded) to make an application to the Court of Appeal to extend the injunction against that defendant pending the determination of any application to the Court of Appeal for permission to appeal.

12. On 2 August 2011, the claimants applied in writing to the Court of Appeal for permission to appeal my rulings and for renewal of the injunctions in the meantime. On the direction of Lord Neuberger MR those applications were heard by the Court of Appeal (Lord Neuberger MR and Stanley Burnton LJ) on 11 August 2011. The Court of Appeal refused permission to appeal and declined to renew the injunctions granted by HHJ Mackie QC."

17. The first three paragraphs quoted unequivocally support a finding that the present proceedings should be dismissed against D6 and the injunction discharged.

Findings: should the dismissal of the proceedings and the discharge of the injunction be postponed to allow D7's Joint Administrators an opportunity to seek alternative conservatory relief in respect of the frozen funds?

18. The last two paragraphs in the passages quoted from Flaux J's judgment in *Linsen International Ltd-v-Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 are indirectly relevant to a point I raised from the Bench in the course of the hearing. Does this Court possess the inherent jurisdiction and/or case management power to postpone discharging an injunction found to be liable to be discharged with a view to affording the Joint Administrators an opportunity to consider, and if thought fit, take steps of their own to preserve the presently frozen assets? Mr Duncan encouraged me to answer this question in the affirmative. Mr White submitted that there was no sufficient basis for exercising any discretionary power which I might have in this regard in favour of postponing discharging the injunction.

19. Such conservatory action would, in light of my present findings, probably have to be through either (a) entirely fresh proceedings, possibly commenced in England and Wales, or (b) by means of some form of international insolvency recognition proceeding. The Injunction was obtained on the basis of the risk that D3 or D4 (resident in Ontario, Canada and Dubai, respectively) would instruct D6 to dissipate

the assets ignoring the authority of D6's Cypriot liquidator. The said liquidator may or may not raise a competing claim.

20. While I am satisfied that this Court does possess the inherent jurisdiction to postpone discharging the injunction, it is impossible to ignore the fact that affected parties (D7's Joint Administrators and D8's liquidator) have had notice of the present proceedings for more than six months which is, to some extent at least, a reasonable time to consider where their preferred commercial interests lie. This Court's primary duty is to do justice to the parties before the Court, and those who appear interested in exercising a right to appear before the Court, not to cater to the whims and fancies of those too reticent to formally participate.

21. However the present case is far from straightforward, the key players straddle multiple jurisdictions and it is well known that administrators and liquidators are often hampered from making full and prompt enquiries by funding challenges. Further, D6 has refused to comply with the disclosure obligations of the injunction under Swiss confidentiality constraints which it is contended impede D6 from giving any indication to whose order the frozen funds are held and, implicitly, even impeded D6 from making out any positive case of prejudice in opposition to a postponement of the discharge of the January 21, 2015 injunction.

22. No matter how unattractive I find D6's position to be and how attracted I am to the call to assist a foreign insolvency proceeding, I must remind myself of the cautionary observations of Neuberger J (as he then was) in *Gill et al-v-Flightwise Travel Service* [2003] EWHC 3082. Prejudice need not be shown to justify discharging an improperly granted injunction; vague notions of achieving a just result cannot justify continuing an injunction made without a sound jurisdictional foundation.

23. At the end of the hearing of D6's application, in the presence of Ms Faiella who had a watching brief on the Joint Administrators' behalf, I intimated that the likely outcome of the present application was that the proceedings would be dismissed. I encouraged the Joint Administrators to expedite their ongoing assessment of whether or not they wished to intervene in the present proceedings in any way. In addition, I indicated that judgment would likely be delivered in early December. There is no indication of any intervention on their part.

24. In these circumstances, there is no compelling or good reason for the unspecified and open-ended request from a non-party that the Injunction be kept in place to be permitted to trump D6's clear-cut legal right to have an Order improperly made against it discharged.

25. I do find, however, that P ought to be afforded an opportunity to consider its appeal rights and to seek a continuation of the injunction pending appeal. In practical terms that may ultimately entail an application to a single judge of the Court of Appeal. Due to the approaching holiday season, I will suspend the operation of my Order discharging the injunction and dismissing the proceedings for 28 days.

Conclusion

26. The claim against D6 is dismissed and the Order granting leave to serve out together with the injunction granted on January 21, 2015 are set aside. The Order drawn up to give effect to the present judgment shall be suspended for 28 days from the date hereof.

27. I will hear counsel if necessary on the precise terms of the final Order. Unless either party applies by letter to the Registrar on or before January 28, 2016 to be heard as to costs, the costs of the present application shall be awarded to D6 to be taxed if not agreed.

Dated this 7th day of December, 2015 _____
IAN RC KAWALEY CJ