

JERSEY / JUDGMENT

Abraham -v- Perry

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[2005]JRC150A royal court (Samedi Division) 31st October 2005 Before: M.C. St. J. Birt, Esq., Deputy Bailiff, and Jurats Bullen and Morgan. Between Roger Abraham Plaintiff And Michael Perry Defendant Application by the Defendant to set aside the order of the Master of the Royal Court of 13th June, 2005, regarding the service of proceedings. Advocate A. Hoy for the Plaintiff. Michael Perry in Person

judgment

the deputy bailiff: 1. The matter before us today is a summons by the defendant, Mr Perry, seeking to set aside an order for substituted service made upon him by the Master and for a declaration that the proceedings have not been duly served upon him. 2. The factual background is as follows. In April 2000, the Plaintiff, Mr Abraham, and Mr Perry entered into an agreement concerning the proposed development of land in the Algarve in Portugal. Differences arose between them and in January 2001, Mr Perry commenced proceedings in Jersey by Order of Justice against Mr Abraham. 3. The proceedings were brought in Jersey because Mr Perry was asking for an order of specific performance of the agreement in the form of an order that Mr Abraham should transfer 50% of the shares in a Jersey company which owned some of the land in question. 4. On 2nd July 2003, the Royal Court gave judgment in Mr Perry's favour and ordered Mr Abraham to transfer 50% of the shares to Mr Perry. Mr Abraham appealed. In the meantime Mr Perry had instituted further proceedings, by Order of Justice, against Mr Abraham and obtained an interim world-wide freezing injunction in those proceedings. 5. On 4th December 2003 by their respective lawyers, namely Advocate Le Cocq of Ogier and Le Masurier for Mr Perry and Advocate Hoy of Voisin and Co for Mr Abraham, the parties entered into a written agreement to settle the appeal and all outstanding matters between them. In very broad outline, it was agreed that the necessary steps would be taken to procure that all the relevant land was vested in the Jersey company and Mr Perry would buy out Mr Abraham's 50% interest in the company at an agreed price. The settlement agreement required certain actions to be taken by both parties. 6. Sadly, differences then arose between the parties in relation to putting the settlement agreement into effect. Mr Abraham alleged that Mr Perry had not done what was required of him under the settlement agreement and launched the present proceedings against Mr Perry seeking specific performance of the settlement agreement, alternatively damages for breach of that agreement. 7. On the 11th April, 2005 Voisin and Co wrote to Ogier and Le Masurier asking them to agree to accept service of this new Order of Justice in order to avoid unnecessary costs, but on 15th April, Ogier and Le Masurier said that they were not instructed to accept service. 8. On the 14th April, 2005 the Master granted leave to serve Mr Perry out of the jurisdiction. The application for leave

to serve out of the jurisdiction was supported by an affidavit sworn by Advocate Hoy. Both Mr Perry and Mr Abraham had at all material times lived in Quinta do Lago in the Algarve in Portugal. 9. Advocate Hoy relied upon Rule 7 (d) (i) of the Service of Process (Jersey) Rules 1994, namely that the action was to enforce a contract made in Jersey. He might also have relied upon Rule 7 (d) (iii) and (iv) because the settlement agreement was expressed by its terms to be governed by Jersey law and the parties expressly submitted to the jurisdiction of the Jersey Courts.

10. In his affidavit Advocate Hoy suggested that service should be by registered post with a return date 22nd April, but the order of the Master required personal service on the Defendant, Mr Perry, with a return date of 29th April. As we shall see, Mr Perry was not in fact served with that Order of Justice.
11. On 9th June, 2005, Advocate Hoy swore a further affidavit in support of an application for substituted service upon Messrs. Ogier and Le Masurier. He disclosed that the Order of Justice was in slightly different form to the previous version because by then Mr Perry had taken certain further steps in performance of the settlement agreement. Most significantly he had by then, on 21st April, paid the sum of £1.2 million. However it was alleged that certain matters were still outstanding and that Mr Perry was in breach of Clause 4(b) of the agreement.
12. On 13th June, 2005 the Master made an order for substituted service by serving the proceedings on Ogier and Le Masurier as advocates to the Defendant. That was duly done by the Viscount's department on 14th June, with a return date for 24th June. On that date the matter was placed on the pending list and the summons which we are dealing with today was subsequently issued.
13. We turn now to consider Mr Perry's submissions. Under Rule 5(10) of the Royal Court Rules, where a document is required to be served personally and where it appears to the Court on an ex-parte application that it is impracticable for any reason to serve the document personally, the Court may make an order for substituted service. In his affidavit in support of the application for substituted service Advocate Hoy had said merely this: "Despite endeavours the Plaintiff has been unable to serve the Defendant. The Defendant has places of residence in Portugal and the United Kingdom. The Defendant was not in residence in Portugal at the time the Plaintiff endeavoured to effect service of the summons and Order of Justice."
14. In support of this short assertion he exhibited an exchange of e-mails between the proposed process server (who was Mr Abraham's Portuguese lawyer), Voisin and Co and Mr Abraham, dated variously between 15th and 26th April. These e-mails show that the process server was planning to fly down to the Algarve on 19th April in order to serve Mr Perry.

15. On 18th April, Mr Abraham sent an e-mail stating that he believed Mr Perry had left the Algarve, so that the process server would not be able to serve the summons on him in Portugal in the next few days. The next day Mr Abraham sent a further e-mail saying that, as Mr Perry appeared to be away, it was not worth the expense of the process server coming down that day to serve the proceedings. We should add that the process server was based in Lisbon.
16. On 26th April, Mr Abraham sent a further e-mail saying: "Where exactly do we stand with our summons against Perry? What, if anything, can we do to serve it if he is still absent from the Algarve and how long have we got before we have to go back to Court to renew it?"
17. That was the only information before the Master on 13th June when he considered the Plaintiff's application for substituted service. Advocate Hoy was of course able to point out that Ogier and Le Masurier were still representing Mr Perry in relation to the settlement agreement because there was ongoing correspondence and discussion between his firm and theirs as to what needed to be done to complete performance of the settlement agreement. It was in those circumstances that the Master made the order for substituted service to which we have referred.
18. For today's hearing Mr Abraham has sworn an affidavit explaining in a little more detail what had occurred in April. He says that on 18th April, at the suggestion of the process server, he had driven over to Mr Perry's home to see if he was in residence. He found the gates locked, no cars in the drive and no obvious sign of occupation. He therefore instructed his Portuguese lawyer not to come down from Lisbon to serve the proceedings. He also touches upon further alleged attempts in June but as this matter was not relied upon before the Master, we do not propose to refer to it further. We should add of course that the additional detail given by Mr Abraham was not before the Master.
19. Mr Perry states that he continues to live at his address in the Algarve. He accepts that he was away from 14th to 26th April, when he was at his address in Devon which he asserts is known to both Mr Abraham and Voisin and Co. He submits that no proper effort was made to serve him; no enquiry was made at the security gate of the estate in Quinta do Lago where he lives. They, he says are always aware of his contact details and of the date upon which he is returning. He says it was not impracticable to serve the Order of Justice personally upon him in Portugal. It may not have been possible to serve him on those particular days when he was away, but he could easily have been served upon his return.
20. He says therefore that the order for substituted service was incorrectly made and should be set aside. He has referred to paragraph 65/4/9 of the Supreme Court Practice 1999 Edition, Volume 1. which gives advice as to the steps which should be taken to serve personally before an application for substituted service is made. This includes two calls at the defendant's address, with the second being made by appointment by letter sent by ordinary post, giving at least two clear days notice of the proposed date of service. Mr Hoy accepts that this was not done in this case.

21. The word “impracticable” in the relevant rule does not mean impossible. Furthermore we do not consider that it is not necessarily obligatory in every case for a plaintiff to take all the steps to effect personal service which are referred to in the White Book. However the Rule does require it to be impractical to serve the document personally and there must therefore be material before the Master from which he can properly conclude that reasonable efforts have been made to effect personal service and that it can therefore properly be said to be impractical to achieve such personal service.
22. We are in no doubt that there was insufficient evidence before the Master to satisfy that test. The sole evidence was that Mr Abraham had e-mailed the process server telling her not to come down on 18th April, because Mr Perry appeared to be away. There was no evidence before the Master of what enquiries had been made, of where Mr Perry might be, of when he might be back and of other material matters. In fact, as we know, he was only away for two weeks and could easily have been served upon his return.
23. In our judgment therefore, there was insufficient evidence to justify finding that it was impracticable. The question remains as to what should be done now. Rule 10(6) of the Royal Court rules provides as follows: “Subject to Rule 10 (7) non compliance with rules of Court or with any rule of practice for the time being in force shall not render any Proceeding void unless the Court so directs. But the Proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and on such terms as the Court shall think fit.”
24. That is a Rule which gives the Court a wide discretion to overlook technicalities and other breaches of the Rules if it is considered to be in the interests of justice to do so. Mr Perry is fully aware of the Order of Justice. He was represented at the time by advocates in Jersey who were actively engaged on his part in seeking to put the settlement agreement into effect and resolve all outstanding matters. He was served via them. On the face of it there might seem to be little point in wasting time and expense in ordering the Plaintiff to serve the Order of Justice on Mr Perry in Portugal when he is already fully aware of it and is here.
25. As we say Rule 10 (6) gives the Court power to rectify such matters and to deem service to have occurred notwithstanding any technical deficiencies. In normal circumstances we might well have made an order deeming service to have occurred in this case on 14th June and simply penalising the plaintiff in costs. However we do not consider that to be the appropriate course in this case. The Order of Justice alleges a breach of paragraph 4 (a) of the settlement agreement. That relates to an outstanding payment of £2.5 million. However, it is accepted that that payment was actually made on 15th July, i.e. after the Order of Justice was issued. According to Mr Perry, he has now fully complied with the settlement agreement.
26. Mr Hoy accepts that the position is now very different to what it was when the Order of Justice was drafted and he further accepts that the Order of Justice would therefore have to be substantially amended. But he asserts that there are still two matters outstanding. First

there is an escrow account of 30,000 Euro and the parties have not yet agreed on how this sum is to be disposed of. Secondly, Mr Abraham alleges that he is entitled to interest upon the payments made by Mr Perry because these payments were made later than was contemplated under the agreement. However, neither of these two matters is articulated in the current Order of Justice. Mr Hoy says that we should simply direct that the Order of Justice be amended and that we should not require that it be served on the Defendant in Portugal.

27. In our judgment, whilst still arising out of the settlement agreement, the whole nature of Mr Abraham's alleged claims has changed from that contained in the existing Order of Justice. Furthermore it is clear from what we have been told that discussion has not yet really taken place to any great extent on these two matters. We believe it would be beneficial for both parties if there were time for reflection and discussion before the issue of any further proceedings. These two parties have been embroiled in expensive litigation for some time and it would seem to be in both their interests to bring it to a conclusion without the need for further proceedings.
28. We do not consider therefore that we should exercise our discretion under Rule 10
- (6) to remedy the defects in service which have occurred. We think the parties should endeavour to settle this matter by discussion. If that proves impossible, Mr Abraham will need to issue a new Order of Justice setting out the facts and allegations in the appropriate level of detail in relation to the outstanding matters. That would need to be personally served on Mr Perry in Portugal in the ordinary way. Mr Perry has made it clear that he has not been trying to avoid service and we would expect service to be affected on him in Portugal by prior arrangement. The result of this is that we set aside the Master's order of 13th June, 2005 and declare that the proceedings have not been validly served upon the Defendant. (Discussion on costs followed.)
29. It seems to me that the right order is costs on the standard basis against the plaintiff. I so order. *Authorities Ashbourne Marketing Limited -v- Alfred Mosca and Yankee Exports* [1999]JRC23. *Virani -v- Virani* [2000] JLR203. *Koonmen -v- Bender and Seven Others* [2002]JLR407. *Supreme Court Practice 1999 Ed'n, Volume 1*

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