

JERSEY / JUDGMENT

Campbell -v- Campbell and Others

[2016] JRC 070 (23 March 2016)

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judgment

the commissioner: 1. In a judgment dated 7 th November, 2014, reported at Campbell-v-Campbell

[2014] (2) JLR 465 ("the forum judgment") this Court rejected an application by the First Defendant to stay the proceedings on the ground of forum non conveniens . The First Defendant now brings a further application to stay the proceedings on the same ground on the basis that this Court was misled or was under a misapprehension in reaching its conclusion in the forum judgment, alternatively there has been a material change of circumstances since then. 2. The hearing of the First Defendant's application took place on 1 st March. On 3 rd March, I announced my decision, which was to reject the application for a stay of the proceedings as a whole but to grant a limited stay in respect of one aspect of the proceedings. 3. What follows constitutes my reasons for reaching that conclusion.

Background

4. The background is set out in the forum judgment, to which reference can be made. A very brief summary is as follows. 5. The Plaintiff and the First Defendant are brothers. They have been referred to throughout as 'Richard' and 'Robert' respectively and I shall continue to do likewise. 6. Richard has brought proceedings against Robert in this jurisdiction. His allegations are set out in a re-amended Order of Justice ("ROJ"). In essence, Richard's case is that he and Robert are equal owners of a jewellery manufacturing, retail and wholesale business. This is carried out through a number of entities in a number of jurisdictions which are listed in the ROJ. The jewellery business a whole and these various entities are referred to as 'the Business'. 7. The litigation in Jersey does not on its face relate to the Business. It relates to ownership of the shares of the Second Defendant (" Longton "), a company incorporated in Jersey, together with a loan ("the Longton loan") ostensibly made by Robert to Longton . Longton's sole asset is a valuable property in London ("the London Property") from which one of the entities comprised in the Business operates. 8. Richard claims at paragraph 22 of the ROJ that an oral agreement was reached between Robert and Richard (together with their mother LC where relevant) that the London Property would be purchased by Longton and that Longton would be owned equally by Richard and Robert, so

they would be entitled to benefit equally from any revenues derived from the ownership, occupation and use of the London Property or upon any sale of it. The investment was to be treated as separate from the Business. In order to assist with the funding of the purchase of the London Property by Longton, Robert and Richard would each contribute some of their own money, would borrow money from LC and would also take money out of the Business as necessary. Longton would also borrow money from a bank to assist with the purchase. The London Property would be occupied by one of the entities in the Business which would pay market rental, thereby enabling the bank loan to be serviced and LC to be repaid in due course. On that basis Richard claims to be entitled to 50% of the shares in Longton and 50% of the benefit of the Longton loan (which is in Robert's name) as to both capital and interest. I shall refer to this first head of claim brought on the basis of a specific oral agreement as "the Primary Claim". 9. On close analysis, the ROJ contains a second head of claim at paragraph 54(j) as follows:- "(j) Further or alternatively, in the event that the Court determines that Richard is not entitled to a 50% interest in Longton (and the London Property) or the Longton Loan and/or any subsequent loan and/or any loan(s) entered into between Robert and Longton and/or any interest paid by Longton to Robert:- (i) Robert and Richard are respectively entitled to interests in Longton and/or its shares and/or its assets (and the London Property) and the Longton Loan and/or any subsequent loan and/or any loan(s) entered into between Robert and Longton and any interest payable pursuant thereto, taking account of their respective shares in the Business and the monies transferred from the Business and the amounts transferred from their own funds to Robert and/or Longton for use in connection with the (sic) Longton and/or the London Property, the extent of which is liable to be determined by the Court and Richard seeks orders providing for the transfer to Richard (or his nominees) of such shares and/or interest in Longton, such proportions of the Longton Loan and/or any subsequent loan and/or any loan(s) entered into between Robert and Longton and interest due in connection therewith as the Court may determine that Richard is entitled to; or (ii) Alternatively, Robert and/or Longton have been unjustly enriched at Richard's expense by the use of money including without limitation Richard's share of monies transferred out of the Business and used in relation to Longton and the London Property and Richard is entitled to receive restitution from Robert and/or Longton and/or on account of the net revenues and/or profits made by Robert and/or Longton from the use of the aforesaid monies...." I shall refer to this alternative basis of claim as "the Secondary Claim". 10. The proceedings were commenced by Richard in January 2014. Prior to filing an answer Robert applied to stay the proceedings on the grounds of forum non conveniens. That is the matter which came before me in 2014 and which resulted in the forum judgment. 11. The forum judgment summarised the arguments put forward by Robert on the point which has now arisen as follows:- "49. I would summarise the arguments of Advocate Jowitt on behalf of Robert as follows:- (vii) The strongest reason for considering England to be the appropriate forum, submitted Advocate Jowitt, was the fact the proceedings would be taken there in any event and it was necessary to avoid the risk of conflicting decisions. This was because Robert had given notice of dissolution of Lucie Campbell LP and there was a dispute as to the parties' shares in the

partnership and what assets were constituted in the partnership. Thus ownership of RCJL, Milling Lock, Azure Gold and LCC would fall to be considered in any such English proceedings. Whilst it was accepted by Robert that it had always been intended that ownership of Longton (and therefore the London Property) was to be outside Lucie Campbell LP and the assets in dispute (i.e. the shares in Longton and the Longton Loan) were therefore undoubtedly not part of that partnership, nevertheless the overall relationship between Robert and Richard would fall to be considered in dissolution proceedings in England and it would be far more effective and economical for the dispute in relation to Longton and the Longton Loan to be considered as part of those proceedings, so as to avoid duplication of costs and the risk of inconsistent decisions. In essence, Robert and Richard were in dispute over almost everything and one court should hear that dispute and resolve ownership of all the assets in which they had interests. This would avoid having more sets of lawyers than was necessary. At present Robert was having to instruct lawyers in both England and Jersey." 12. The arguments put forward on behalf of Richard were summarised as follows:- "50. I would summarise Advocate Dickinson's arguments as follows:- (viii) Conversely, there were not many links with England. No proceedings had in fact been issued in England by Robert despite the fact that Robert was seeking to persuade the Court that England was the jurisdiction to resolve all matters in dispute between them. Robert had resolutely refused or failed to state exactly what his case was in relation to the assets but had merely contented himself with denying Richard's claim. In the circumstances he could not properly say that he was raising issues which would need to be resolved in England. Lucie Campbell LP produced regular accounts showing the assets of that partnership and that Richard and Robert were equal partners. The one thing which was agreed by both parties was that ownership of Longton (and therefore ultimately the London Property) was to be outside Lucie Campbell LP. On Richard's case it was also outside the business. It was hard to see therefore why the two matters needed to be tried together. In any event, given that a number of the companies referred to earlier was situated outside England in Thailand, BVI or the US, it was hard to see why England was the appropriate forum... (ix) Given the separation of ownership of Longton and the Longton Loan from Lucie Campbell LP and, on Richard's case, the business, there was no risk of inconsistent judgments and the issues could and should be tried separately." 13. At paragraph 51 of the forum judgment, I summarised my reasons for preferring the arguments of Advocate Dickinson. The relevant parts read as follows:- "51. In my judgment, Advocate Dickinson's submissions are to be preferred largely for the reasons which he gives. I would summarise my reasons briefly as follows:- (v) It seems to me that Advocate Jowitt's strongest point was the suggestion that Richard and Robert will be litigating about everything and that it would be best for there to be one compendium piece of litigation which would resolve everything and which would be in England because of the dissolution of Lucie Campbell LP in that jurisdiction. However I do not consider on analysis that that point has the force with which Advocate Jowitt sought to imbue it. One of the few matters which seems to be agreed between Richard and Robert is that ownership of Longton was to be quite separate from Lucie Campbell LP. The resolution of any dispute over the dissolution of that partnership

and which assets are comprised in it will therefore not assist in the resolution of the present dispute. As to the other assets said by Richard to be comprised in the business as listed at (ii) - (v) at paragraph 6 above, none of them is situated in England.... Furthermore the shape of any dispute over these other assets is unclear. Despite invitations to do so, Robert has not stated his position in relation to these other assets. (vi) Nor do I see a risk of inconsistent decisions. If the Longton dispute is resolved here, it will not be litigated anywhere else... (vii) On the case as pleaded at present, ownership of Longton and the Longton loan would appear to be a self-contained dispute and will turn simply on what was or was not agreed between Robert and Richard in relation to Longton and the Longton loan..." Material events since the forum judgment 14. The forum judgment was issued on 7 th November, 2014. The ROJ was filed on 11 th November, 2014, but for present purposes made no material amendments to the existing pleading. 15. Robert filed his answer on 3 rd December, 2014, which disclosed his position for the first time. He pleaded at paragraph 7 that the shares in Longton formed part of the Business and that, pursuant to an oral agreement ("the verbal agreement") the Business was owned as to 51% by Robert and 49% by Richard. 16. As to the Longton loan, Robert pleaded at paragraph 44 of the answer that Richard had no interest in the Longton loan. It had been funded by monies loaned by LC and Azure Gold (a company in the Business) to Robert and he was liable to repay both LC and Azure Gold. 17. At paragraph 45 of the answer, Robert pleaded an alternative defence in relation to the Longton loan. He said that if, which was denied, Richard proved that he did have an interest in the Longton loan, the extent of that interest would be the same as the interest which he had in the Business i.e. on Robert's case, it would be limited to 49%. 18. It can be seen therefore that, in order to decide on Robert's alternative defence, it would be necessary for the Court to decide on what percentage of the Business was owned by each of Richard and Robert. 19. In May 2015, noting that the difference between the parties in relation to the ownership of Longton was only 1%, Robert conceded the 1% and on 22 nd June, 2015, a consent order was made in these proceedings declaring that Richard and Robert each owned 50% of the shares in Longton . 20. In the meantime, Richard's English solicitors had written on 30 th April, 2015, demanding that, given that Robert admitted that Richard was entitled to 49% of the Business, he should transfer a 49% shareholding in each of the relevant entities comprising the Business to Richard. A positive response was not received; indeed Richard's solicitors replied to the effect that they did not consider that the English court had jurisdiction over the issues raised in the letter from Richard's solicitors. 21. Accordingly, on 26 th May, 2015, Richard issued proceedings in the High Court in London seeking a declaration as to the beneficial ownership of the various entities in the Business. Thus, at the heart of the English proceedings is the question of the ownership of the Business. 22. Both the English proceedings and the Jersey proceedings have since progressed with various interlocutory steps being taken. 23. On 12 th November, 2015, there was a case management conference in the English proceedings. I was informed that Richard drew to the Court's attention on that occasion that the issue as to ownership of the Business was before both the English court and this Court and that it would be preferable for all matters to be resolved by this Court. However, I understand that the English court did not accept this and directions to take the

matter to trial were made. A trial date for the English proceedings has now been fixed for five days commencing on 31 st October, 2016. 24. Meanwhile, in the Jersey proceedings, the Master heard two procedural summonses and made various orders on 3 rd December, 2015. In particular, he held that the basis upon which a constructive trust claim arose was not clear to him and he therefore ordered Richard to file a Statement of Case that addressed the issue (see para 101 of the Master's judgment reported at Campbell-v-Campbell and Longton

[2015] JRC 249). 25. By letter dated 22 nd December, 2015, from the firm of Taylor Wessing , solicitors to Robert in England wrote to Advocate Dickinson. The relevant parts of that letter read:- "We are, as ever, concerned to ensure that this case is conducted proportionately. With this in mind, we have obtained our client's instructions to discontinue his alternative defence in relation to the interest payments and loan capital. We attach a copy of our amendments to the Answer accordingly. You will note that this requires a deletion at paragraph 45 and part of paragraph 47. We agree that the usual rule as to costs should apply to these amendments. ... Given that we have withdrawn the alternative case, we will not (for the avoidance of doubt) be dealing with the issue of the oral agreement made between our clients as to the respective ownership in the business in the second affidavit of Robert Campbell due on 22nd January...." 26. In other words, by this letter Robert sought to withdrew the alternative claim in his answer (summarised at paras 17 and 18 above) although making it clear that this was purely on commercial grounds (because of the negligible 1% value of the alternative case). He maintains his positive case in the English proceedings that the Business was owned 49%/51% in Robert's favour. This withdrawal was subsequently accepted by the Master on 28 th January, 2016. 27. On 31 st December, 2015, Richard filed the statement of case which had been ordered by the Master on 3 rd December. This elaborated on the Secondary Claim and clarified that it was directly linked to Richard's share of the Business, which he contended was 50%. 28. This statement of case lead to Robert issuing the present summons seeking a stay of the proceedings in Jersey on the basis of a change in circumstances. Robert also sought a stay of some of the procedural directions which the Master had made with a view to ensuring that the proceedings were ready for trial by 31 st May, 2016. That latter application came before the Master and was the subject of a judgment dated 11 th February, 2016, Campbell-v-Campbell and Others

[2016] JRC 041 . For reasons set out in that judgment, the Master rejected Robert's application to stay the orders generally but he granted a limited stay so that the parties did not have to file evidence in respect of the issue of ownership of the Business pending my decision on the renewed forum challenge. He also varied the timetable for the filing of witness evidence, schedules of loss and any expert evidence from an accountant that any party intended to rely on but made it clear that, if I were to reject the renewed forum challenge, his orders were intended to ensure that the matter was ready for trial on the listed date of 31 st May. A renewed application 29. As already stated, Robert is applying for me to stay these proceedings on the ground that England is the more appropriate forum. That is of course the very application which he made previously and which I rejected in the forum

judgment.

Is he entitled to make a second application to like effect? 30. In *Federal Republic of Brazil v Durant International Corporation*

[2012] JCA 025 the Court of Appeal set out the circumstances in which the Royal Court can revisit an interlocutory decision which it has already made. At paragraph 11 of his judgment, McNeill JA quoted with approval the observation of Patten J at paragraph 7 of his judgment in *Lloyds Investment (Scandinavia) Limited v Ager-Hanssen*

[2003] EWHC 1740 (Ch) :- "... it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ." 31. Thus, in order to enable me to revisit my decision in the forum judgment, Advocate Jowitt has to show that there has either been some material change of circumstances or that I was misled in some way, whether innocently or otherwise, as to the correct position before me at the time of the original forum challenge. 32. The initial emphasis of Advocate Jowitt's submission was that there had been a material change of circumstances consequent on the filing of Richard's Statement of Case because it was now clear for the first time that the Secondary Claim required the Court to determine the percentage ownership of the Business whereas previously that had not been understood to be the case. 33. I accept that the pleading of the Secondary Claim in the ROJ is not very clear. At paragraph 53 of his latest judgment, the Master described the reference to "taking account of their respective shares in the business" in paragraph 54(j)(i) of the ROJ as being ".. somewhat elliptical and not easy to identify in a lengthy pleading". I respectfully agree and I also agree that the position has become clear following filing of the Statement of Case. 34. Nevertheless, I do not think that there has in fact been a change in the nature of the Secondary Claim. Para 54(j)(i) of the ROJ asserts that Robert and Richard are respectively entitled to interests in the Longton loan "... taking account of their respective shares in the Business and the monies transferred from the Business...". Similarly at paragraph 54(j)(ii), the claim to unjust enrichment is pleaded by reference to "... Richard's share of monies transferred out of the Business...". On close analysis the claim therefore raises the issue of the percentage of the Business owned by Richard as that is necessary in order to determine his share of monies transferred from the Business to fund the Longton loan. 35. However it is clear that the Secondary Claim and its consequence (in terms of the Court needing to determine

ownership of the Business) was not drawn to my attention at the time of the forum

judgment.

Thus it is clear from the description of the nature of the claim at paragraphs 10 and 44 of the forum judgment that the Court was focussing entirely on the Primary Claim i.e. the alleged oral agreement between Richard and Robert. Furthermore, Richard's arguments emphasised that his case was that the dispute over Longton and the Longton loan was separate from the question of ownership of the Business. My impression of the case was summarised in the extract from paragraph 51(vii) quoted above, namely that, on the cases pleaded at present, ownership of Longton and the Longton loan appeared to be a self-contained dispute. 36. Assistance as to what was being said on behalf of Richard at that time can also be gained from certain exchanges which took place following circulation of the draft forum judgment in accordance with the usual practice. Paragraph 51(v) of the draft judgment contained the following wording:- "... one of the few matters which seems to be agreed between Richard and Robert is that ownership of Longton was to be quite separate from the partnership and the rest of the business. Thus, resolution of the present dispute will not depend on the outcome of disputes concerning the partnership or the business or which assets are or not within the business." 37. Following circulation of the draft judgment, Advocate Jowitt submitted (correctly) that this did not accurately reflect his submission and I accordingly amended the wording in the final version. However, Advocate Dickinson, having seen Advocate Jowitt's comment on the draft judgment, replied by e-mail:- "In our view this statement is both correct and well founded and we have no issue with it." That was therefore a specific confirmation that resolution of the dispute over Longton and the Longton loan would not depend on the outcome of a dispute as to ownership of the Business. In retrospect, that was quite inconsistent with the Secondary Claim. 38. Unsurprisingly I explored with Advocate Dickinson during the present hearing how this state of affairs had come to pass. Advocate Dickinson was suitably apologetic and acknowledged that the statement was incorrect, although it had been made with the approval of the English QC who was advising Richard. He said that Richard's advisers were in a difficult position because Robert was still refusing at that point to disclose any detail of his case. More particularly, they were concentrating on the Primary Claim, which was separate and did not involve ascertaining ownership of the Business. They had rather lost sight of the Secondary Claim. 39. In my judgment, the connection between the Secondary Claim and ownership of the Business should have been drawn to my attention. Although the ROC (or its predecessor in similar terms) was of course available to me, the reference to the Secondary Claim was, as the Master said, not easy to identify in a lengthy pleading; indeed it is clear that Robert's advocate had not identified it either, as otherwise he would have no doubt used the existence of the Secondary Claim in support of his argument on forum. 40. I conclude therefore that I was misled on this aspect at the time of the forum judgment. However I accept without reservation that this was due to inadvertence and not to any intention to mislead the Court. I can fully understand that Advocate Dickinson's concentration was on the Primary Claim because that was his client's main case. In relation to the Primary Claim it was correct to say that this was separate from ownership of the Business. 41.

Nevertheless, this means that it is open to me to reconsider the issue of forum and to exercise my discretion afresh. That will however be done in the context of the situation as it now is rather than the situation as it was in November 2014. Discussion 42. The test for deciding on the appropriate forum is well established and was described at paragraphs 46-47 of the forum

judgment.

I do not repeat it here. Advocate Jowitt conceded (correctly) that the burden lies on him to show that England is clearly or distinctly more appropriate as the forum than Jersey. 43. A difference between the situation in November 2014 and now which immediately springs to mind is the time during which Robert as defendant has engaged in the present proceedings. As this Court said in *Leeds United Football Club Limited v Weston*

[2011] JLR 749 at paragraph 36:- "36. I find, therefore, that the defendants are not precluded from bringing this application by virtue of their having participated to date as described earlier. However, that is not to say that delay in making an application for a stay is not relevant; on the contrary, it may well be an extremely significant factor. The more a defendant has participated in proceedings, the longer he has allowed them to proceed without challenge and the greater the expense incurred in the course of those proceedings, the less likely it is that the court will agree that the proceedings should be stayed in favour of allowing proceedings in some other jurisdiction. As in *M ansour* , there comes a point when it is simply too late to allow a defendant to switch jurisdictions." I accept that Robert did not allow the proceedings to continue 'without challenge' in that he applied for a stay back in 2014. Nevertheless, the principle described in the passage above seems to me to be of relevance to the present application. 44. To like effect was the observation of the Court of Appeal at paragraph 14 of its judgment in the same case at *Leeds-v-Weston and Levi*

[2012] JCA 083 :- "In our judgment, it would be inconsistent with the purpose identified by Lord Summer in the passage just cited if, by reference to such matters as the degree of a party's participation in the proceedings or the timing of the challenge, the court were to be disabled from considering what the interests of justice require in a particular case. Factors such as these may be relevant in determining how best the ends of justice may be served, but they cannot operate as an absolute bar to an application for a stay." 45. Advocate Jowitt submitted that, in the light of the circumstances as they now are, England was clearly the more appropriate forum for resolution of the dispute over the Longton loan. I would summarise his submissions as follows:- (i) It had become clear since filing of the Statement of Case that, in order to determine the Secondary Claim, the Court would have to hear evidence on and determine the issue of the percentage ownership of the Business by Richard and Robert respectively. (ii) That issue was at the heart of the English proceedings which were concerned with and would rule upon the ownership of the Business as a whole at the trial commencing on 31 st October, 2016. (iii) This was a significant change of circumstance since the forum judgment. At that stage there had been no English proceedings, merely the possibility of such. Furthermore the issue of

ownership, whilst being fundamental in the English proceedings, was merely tangential in the present proceedings. Thus, if the Primary Claim were to succeed, the issue might never arise and even if the Secondary Claim fell for consideration, ownership of the Business was but a part of it. (iv) There was now a risk of conflicting judgments, four months apart, in parallel proceedings in both Jersey and England. However, the English proceedings could not be stayed pending the outcome of the present proceedings because this Court might never have to decide the ownership issue if, for example, it found for Richard on the Primary Claim. (v) Litigating the case in Jersey would mean that there continued to be a duplication of costs with two sets of solicitors on each side. If the proceedings were moved as a whole to England, then only the English lawyers would be involved. The cost of Jersey lawyers would be saved. (vi) The amount at stake in England was substantial because the Business was a valuable asset. It was therefore proportionate to investigate fully the issue of ownership. Conversely, given the fact that LC had to be repaid in any event (and on Robert's case so did Azure Gold), the amount at stake in the Jersey proceedings now that ownership of Longton had been resolved, was comparatively modest. (vii) It was accepted that the issue over the Longton loan was not currently before the English court. The pleadings would therefore have to be amended to include this. However it would not be a complicated matter because the pleadings from the present litigation could simply be lifted and transplanted into the English pleadings. Robert gave a formal undertaking through Advocate Jowitt that he would consent to the Longton loan issue being added to the English proceedings. (viii) It would not add greatly to the costs of the English proceedings to add the Longton loan issue. It was a comparatively narrow issue. In particular, the question of the provenance of the funds used for the Longton loan was already before the English court indirectly because the taking of an account had been ordered, which would provide a detailed record of where money from any entity in the Business had gone. (ix) As to the suggestion that there could be a partial stay simply of the ownership issue, Advocate Jowitt submitted that this would not save costs because there would still be two sets of lawyers involved for each side. (x) The issue of the ownership of the Business had no connection with Jersey and none of the witnesses who could speak to the agreement as to ownership of the Business were resident in Jersey. The usual factors as to residence of the parties, availability of witnesses etc. now pointed in favour of England. 46. I have carefully considered Advocate Jowitt's submissions which were put most persuasively. However, I do not accept that there should be a complete stay so that the whole issue of the Longton loan is heard in England. I would summarise my reasons for so concluding as follows:- (i) The proceedings have been in existence in this jurisdiction since January 2014 and the trial is fixed for 5 ½ days commencing 31 st May, 2016. It is therefore very late in the day to draw stumps and move the entire contest to another jurisdiction. Good reason has to be shown for such a course. (ii) Robert admits that the reason for suggesting that this course of action is now appropriate is that, following the filing of the Statement of Case on 31 st December, it has become clear that the issue of ownership of the Business will now be litigated both in Jersey and England. However, Robert was quite content for this to be the position from May 2015 to December

2015 without any objection. That is because Robert's alternative defence in his answer (filed in December 2014) required the Court to consider the ownership of the Business because the alternative defence contended that the Longton loan was held in the same proportions as the Business. Thus, nothing has really changed as a result of the filing of the Statement of Case. It is true that Robert has now withdrawn his alternative defence, but that does not alter the fact that ownership of the Business has been in issue in both Jersey and England since the English proceedings were instituted in May 2015. Robert appears to have been content to have the issue of ownership arise in both jurisdictions for so long as he was raising it but to object to this position when it is only Richard who is doing so. (iii) In the context of an application to stay proceedings late in the day when the trial date is approaching, it seems to me that the dictum of Lord Griffiths in *Ketteman v Hansel Properties Limited*

[1987] AC 189 at 220, (which was referred to with approval by our Court of Appeal in *Rahman v Chase Bank (CI) Trust Co Limited*

[1994] JLR 186 at 194) is very relevant. Lord Griffiths said this:- "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to innumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other." Both those cases were of course concerned with amendment to the pleadings, but it seems to me that Lord Griffiths' observation is equally applicable to an application to stay proceedings in one jurisdiction at a late stage. The parties will no doubt have made arrangements to keep their diaries free and travel to Jersey in May. Their expectations will be that the matter is to be resolved then. In my view this is a relevant factor to be weighed in the balance. (iv) The issue of the Longton loan is not currently before the English court. I acknowledge that Robert has undertaken to agree to the issue being added to those proceedings and I can therefore be confident that this will occur should I agree to stay the Jersey proceedings. However, there would need to be an amendment of pleadings by all parties so as to include the issue, discovery would need to be amended to cover the issue and the English lawyers would need to familiarise themselves with the issue in circumstances where they may not necessarily be totally familiar with it at present. Whilst it may well be possible to take all the necessary steps in time to maintain the trial date in October, given the tortuous history of pleadings and interlocutory steps in Jersey, there must be a risk that the addition of the Longton loan issue will cause delay which results in the loss of the current English trial date. (v) The degree to which, if a stay is refused, there will be parallel proceedings in two jurisdictions considering the same issue is limited. The Primary Claim turns on whether the Court accepts Richard's case that the parties reached

an oral agreement that the benefit of the Longton loan should be shared equally or Robert's case that he alone is entitled to the loan. This is quite separate from the English proceedings which have to consider the ownership of the Business and where, as just stated, the issue of the Longton loan does not arise. It is only in relation to the Secondary Claim but there may be some overlap. Even there it is limited. It seems to me that, speaking very broadly, the Court will have to address at least the following three areas when considering the Secondary Claim:- (a) the provenance of the monies used to fund the Longton loan; (b) whether the circumstances of the case give rise to a constructive trust (defined in the ROJ to include a resulting trust - which seems the most obvious candidate - or an implied trust) such that Robert holds the benefit of the Longton loan (and interest) on trust for Richard and himself in proportions calculated by reference to the monies deemed to be contributed directly or indirectly on behalf of Richard and Robert respectively; and (c) to the extent that the provenance of the monies in (a) is found to be the Business, whether such monies are to be attributed to Richard and Robert equally or in the proportions 49% to Richard and 51% to Robert. This will depend entirely on the outcome of the dispute as to whether the Business is owned equally (as Richard contends) or 49-51% (as Robert contends). It seems to me that it is only in relation to (c) that there is a direct overlap with the English proceedings. There may be some overlap to (a) in that the English court has ordered the taking of an account in relation to the Business and this is likely to cover payments out of the Business used to fund the Longton loan. However, the focus of the taking of any account in England will be very different and in any event, the parties have already had to give discovery and provide their evidence on issue (a) in Jersey. (vi) I was informed that the Longton issue is not one with which Richard's English solicitors have had to deal and accordingly costs would be incurred in the time spent in their familiarising themselves with the position. Furthermore, the costs already incurred with Jersey advocates would be wasted. (vii) I have considered the other points made by Advocate Jowitt as listed in the preceding paragraph but, looking at the matter in the round, he has failed to persuade me that England is clearly the more appropriate jurisdiction in which the Longton dispute should be determined. On the contrary I consider that, subject to the point I am about to make, it is in the interests of justice that the May trial date in this jurisdiction be maintained and that the Longton loan issue be wholly or very substantially resolved on that occasion. 47. I am however persuaded that there should be a partial stay on one issue. I accept that it would not be ideal for this Court, should it become necessary, to resolve the issue of ownership of the Business as part of the Secondary Claim. That issue is in this jurisdiction very much a tangential issue. It will only arise if the Primary Claim fails. Furthermore, the amount at stake in this jurisdiction is very much less than the substantial amounts at stake in the English proceedings where ownership of the Business (a substantial enterprise) is in play. It seems to me to be undesirable that the parties should be put to the trouble and expense of producing all their evidence and generally putting their best foot forward on the Business ownership issue in Jersey when it may not even be necessary because it is only relevant to the Secondary Claim. Far better that this issue should be resolved in the

English proceedings where ownership of the Business is a key issue. 48. Accordingly I propose to stay determination of issue (c) (as listed above) in the Jersey proceedings. It does not seem to me that this will cause any material prejudice to these proceedings. This Court will proceed in May to hear all the relevant evidence on the Primary Claim and on issues (a) and (b) (together with any other relevant issues) in the Secondary Claim. If the Court finds in favour of Richard on the Primary Claim, all well and good; it will be able to make a final

determination.

If it has to move on to the Secondary Claim and determines that there is a trust of the Longton loan which is in proportion to the amounts contributed to the loan, it will be able to determine the amount of funds contributed from the various sources, including from the Business. It will therefore be able to determine the proportions of the loan attributable to Richard and Robert respectively where that money does not originate from the Business. Where it finds that loan money did originate from the Business, then the proportions of that money attributable to Richard and Robert respectively will depend upon what determination the English court makes as to their respective ownership of the Business, a determination which would then become res judicata between the parties and accordingly would be binding upon them in the Jersey proceedings. Following resolution of the English proceedings, the matter could then, if necessary, revert to Jersey for a very short hearing to reflect the outcome of the English proceedings in the final order made in the Jersey proceedings. 49. There was some discussion before me as to whether, in the event of this Court finding for Richard on the Secondary Claim (with the question of the proportion of the funds coming from the Business which should be attributed to each party being the sole outstanding issue), the Court could make an interim order which attributed 49% of the money from the Business to Richard on the basis that that was the minimum to which he would be entitled. This would leave outstanding only the question of whether there should in due course be an additional 1% of the monies deriving from the Business to be attributed to Richard. Advocate Jowitt questioned whether it would be possible to make an interim order in this way. It seems to me that that would be a matter for this Court to decide in May should that situation arise. 50. In summary, it seems to me that this is the best way forward in the interests of justice. It will enable the hearing in May to proceed. The parties are virtually ready for that and the Master has made it clear that any outstanding steps can be achieved in time for the May hearing. It will resolve matters should the Primary Claim succeed. If the Court has to move on to the Secondary Claim, the trial will resolve everything except for the proportion of money coming from the Business which should to be attributed to Richard. That issue will be litigated in England in October and following the outcome of the English proceedings, this Court will be able to adopt the finding of the English court as res judicata. Adopting this course of action will avoid the delay, disruption and prejudice of staying the Jersey proceedings at this late stage and moving them entirely to England. Conversely, it will also avoid the need for the parties to call witnesses and generally litigate over the ownership issue when that is more properly subject to the English proceedings. 51. For these reasons, I dismiss the application for a general

stay but I stay the determination of issue (c) of the Secondary Claim until determination of Business ownership issue in the English proceedings or until further order. Authorities Campbell-v-Campbell

[2014] (2) JLR 465. Campbell-v-Campbell and Longton

[2015] JRC 249 . Campbell-v-Campbell and Others

[2016] JRC 041 . Federal Republic of Brazil v Durant International Corporation

[2012] JCA 025 . Lloyds Investment (Scandinavia) Limited v Ager-Hanssen

[2003] EWHC 1740 . Leeds United Football Club Limited v Weston

[2011] JLR 749 . Leeds-v-Weston and Levi

[2012] JCA 083 . Ketteman v Hansel Properties Limited [1987] AC 189 at 220. Rahman v Chase Bank (CI) Trust Co Limited

[1994] JLR 186 . Page Last Updated: 13 Apr 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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