

JERSEY / JUDGMENT

Consolidated Resources -v- Global Gold [2017] JRC 151 (18 September 2017)

[2017] JRC 151

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judgment

the MASTER:

Introduction

1. This judgment represents my detailed written reasons for making an unless order in relation to an application by the second and third defendants to dismiss the plaintiff's amended order of justice as an abuse of process or alternatively for want of prosecution. 2. The present proceedings were commenced by an order of justice which contained injunctions signed on 10 th March, 2014. 3. On 5 th June, 2014, the Royal Court in a judgment reported at Consolidated Resources-v-Global Gold and Others

[2014] JRC 124 refused to discharge the injunctions. 4. On 18 th June, 2014, reported at Consolidated Resources Armenia-v-Global Gold and Others

[2014] JRC 132 , the Royal Court then rejected an application by the plaintiff for judgment in default. Paragraph 32 of this judgment stated as follows:- "32. I take the view that a fair trial of the claim against the joint venture company in these circumstances is not possible. Justice demands that the status quo in relation to the subject matter of the dispute, which is essentially between the shareholders Consolidated Resources and Global Gold, be maintained pending the Court determining the relief sought by Consolidated Resources under either Article 143 or 155 of the Companies Law, assuming a stay is not granted in the meantime." 5. The second and third defendants then sought to stay the proceedings in favour of arbitration. 6. The application to the Royal Court was initially unsuccessful (see Consolidated Resources Armenia-v-Global Gold and Others

[2014] JRC 169) but the Royal Court's decision was overturned on appeal (see Consolidated Resources Armenia-v-Global Gold and Others

[2015] JCA 061). 7. The background of this dispute is most conveniently summarised in the Court of Appeal judgment at paragraphs 4 to 54 which I adopt. The effect of the Court of Appeal judgment was that it found that the joint venture agreement was at the commercial centre of the joint venture between the parties. As the dispute resolution provision in the joint

venture was extremely widely drafted, the draft claims for unfair prejudice, a just and equitable winding-up and an account of monies advanced was subject to this provision. In accordance with the mandatory provisions of Article 5 of the Arbitration (Jersey) Law 1998 these claims were therefore stayed by the Court of Appeal. The remaining claims being a claim for \$1.6 million under a Note Instrument and a related claim under a guarantee were expressly subject to the exclusive jurisdiction of the Royal Court. These claims however were stayed under the inherent jurisdiction of the Royal Court by the Court of Appeal because the Court of Appeal found they were bound up with the dispute between shareholders and should not proceed until that dispute had been resolved. The Court of Appeal at paragraphs 155 to 157 in relation to what it had described as the 'remaining' claims stated as follows:- "155. This leaves us with the question whether the remaining claims should be stayed as well. These are the claims against the Company on the Notes and against Global Gold on the Guarantee. Finally there are the claims against Mr Krikorian. 156. There is no doubt that the Court has inherent jurisdiction to stay proceedings, where the ends of justice so require. In the present case the Royal Court has, by a judgment given on 18 June, 2014, concluded that the claims against the Company are bound up with the dispute between its shareholders, Consolidated and Global Gold, and that Consolidated should not be able to proceed for the time being against the Company on its claim on the Notes without the shareholder dispute being resolved. We have been told that the claim against Global Gold on the Guarantee is intimately bound up with the claim against the Company on the Notes, and are of the view that that claim should be treated in the same way. 157. In the case of Mr Krikorian we think, provisionally, that the proceedings should be stayed pending the arbitration between Consolidated and Global Gold. There is no independent basis of claim properly put forward against him, so far as we can see; indeed it is not clear why he has been joined as a party at all. We will hear further argument on the disposition of the case on giving this judgment. Our present view, however, is that should the time come when Consolidated considers that the stay should be lifted, so far as concerns Mr Krikorian alone, any application should be made to the Royal Court, which may then decide whether the stay should be continued, varied or lifted in the circumstances then obtaining." 8. The Court of Appeal judgment was appealed to the Privy Council by way of a notice of appeal filed by the plaintiff in August, 2015. 9. On 18 th November, 2015, the Royal Court set aside the injunctions granted in its judgment reported at Consolidated Resources Armenia-v-Global Gold and Others

[2015] JRC 233A on the application of the second and third defendants. 10. On 13 th September, 2016, the Judicial Committee of the Privy Council dismissed the plaintiff's notice of appeal. By this time the plaintiff had sought to withdraw its appeal to the Privy Council "without prejudice to and reserving all rights of including to preserve any rights the appellant to file future applications and reconsider the claims voluntarily dismissed". The Privy Council noted in paragraph 4 of its reasons for dismissal that it was "unsatisfactory for an appeal to be withdrawn on the basis that it can be revived at a future date." 11. The order of the Judicial Committee of the Privy Council was registered in Royal Court on 4 th November,

2016. 12. No steps had been taken since by the plaintiff, save that it terminated the retainer of its then legal advisers on 16 th February, 2017. 13. In a letter dated 7 th September, 2017, addressed to the Judicial Greffe the plaintiff set out its position in relation to its unfair prejudice claims as follows;- "For the avoidance of doubt, the Plaintiff has withdrawn its pursuit of the unfair prejudice claim and has made it clear as evidenced by the substance of the Second and Third Defendants Application that it has no intention of pursuing a lengthy and costly arbitration in New York related to the withdrawn unfair prejudice claim when no arbitration clause is applicable owing to a completed and terminated joint venture agreement. [Emphasis Added] Instead, the Plaintiff fully intends to pursue a judgment for default four years ago of the repayment of the secured convertible notes by the First Defendant which is the natural right of the Plaintiff as a subscriber to the convertible notes. For convenience of reference, the convertible notes provision for the Governing Law and Jurisdiction agreed by the Plaintiff and the First Defendant (and signed by the Third Defendant and further guaranteed by the Second Defendant) is as follows:

12. GOVERNING LAW AND JURISDICTION 12.1 This Instrument and any non-contractual obligations arising out of or in connection with it shall be governed by Jersey law. 12.2 The Jersey courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this Instrument and/or the Notes (including a dispute relating to any non-contractual obligations arising out of or in connection with this Instrument and/or the Notes) and the Company and the Noteholders submit to the exclusive jurisdiction of the Jersey courts. 12.3 The Company and the Noteholders waive any objection to the Jersey courts on grounds that they are an inconvenient or inappropriate forum to settle any such dispute." The submissions 14. Shortly before the hearing Mr Joseph Borkowski writing as Chairman and Sole Director of the plaintiff asked for an adjournment on the basis that he wanted time to find more representation. 15. I indicated in response that if Mr Borkowski wanted to apply for an adjournment, the application should be made at the commencement of the hearing fixed to determine the second and third defendants' summons. I was not prepared to make such a determination on the papers without hearing from the second and third defendants. After acknowledgement of my reply no further communication was received from Mr Borkowski and he did not appear. I should add, for the sake of completeness, that the second and third defendants dispute Mr Borkowski's ability to represent the plaintiff. 16. Advocate Swart argued that what had occurred here, firstly was an abuse of process (see *Bowen v Noel Invs.*

- [1990] JLR 184) because the processes of the Court had not been used bona fide . The plaintiff had started proceedings which had been stayed, all rights of appeal had been exhausted and yet the plaintiff had not pursued any arbitration. Indeed, for the first time it had now made it clear that it wished to abandon its unfair prejudice and winding up claims. This had only been prompted by the second and third defendants' summons. In the interim it had done nothing since the Court of Appeal hearing to pursue any appeal to the Privy Council other than filing a notice of appeal; the only other step it had taken was to oppose the application to discharge the injunctions. 17. The above matters also amounted to a

want of prosecution. There was clearly delay which was inordinate and where there was no excuse for the delay. 18. The plaintiff's approach was also causing prejudice to the second and third defendants. 19. Firstly, there were outstanding costs orders following the taxation process which had not been met by the plaintiff in respect of the unsuccessful application for a default judgment and the appeal as well as an outstanding payment on account of costs following the injunctions being lifted in November 2015. The sums totalled £14,121.51, £130,658.08 and £15,000. None of these sums had been paid. 20. Secondly, the fact that there was still live proceedings was causing prejudice to the defendants for the reasons set out at paragraphs 19 to 21 of the eleventh affidavit of the second defendant. This affidavit had been served on the plaintiff in advance of the hearing and no response had been filed to it. Decision 21. In relation to the application that an abuse of process had occurred, I was satisfied that the actions of the plaintiff in this case, in taking no further steps following the Court of Appeal's decision, amounted to an abuse of process. 22. Furthermore, I was also satisfied that there had been a want of prosecution. The relevant test for want of prosecution was considered by the Royal Court in *B v M-R*

[2007] JLR Note 48 as follows:- "Alternatively, when considering whether to dismiss an action for want of prosecution under its inherent jurisdiction; under r.6/25(1) of the Rules (no further steps taken for five years after the action was adjourned sine die); or under r.6/25(2) (trial not completed within three years after the matter had been set down on the hearing list), the court should consider (i) whether there has been inordinate delay; (ii) whether that delay is excusable; and (iii) if so, whether such delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to or has caused serious prejudice to the defendant (*Kinsella v. Lido Bay Hotel (Jersey) Ltd.*, 2001 JLR 247 , considered). The different tests are appropriate because in the case of dismissal under the court's inherent jurisdiction or under r.6/25, a plaintiff has not disobeyed any Rules and had merely allowed his action to drift for a long period. A stricter test is appropriate on an application to dismiss under r.6/26(13), as a plaintiff has failed to comply with the requirement in r.6/26(1) that he should issue a summons for directions." 23. In this case, there has been delay and no steps have been taken by the plaintiff other than resisting the lifting of the injunctions since it filed its notice of appeal in August, 2015. The delay is at least inordinate since the plaintiff indicated that it was withdrawing its appeal to the Privy Council in August, 2016. There was also no excuse for the inordinate delay. The evidence that the second and third defendants will suffer prejudice is also unchallenged. In particular, there is prejudice due to costs orders not having been paid. 24. The difficult question is whether the above conclusions should lead to an automatic dismissal of the plaintiff's claims as set out in the amended order of justice. 25. To strike out a claim must be proportionate to the breach involved and is also a remedy of the last resort. The Court has to consider whether what sanctions should be applied to enable justice to be done between the parties (see *Viera v Kordas*

[2014] JRC 042) at paragraph 19 as follows:- "19. We come now to the question as to what sanction should be applied in the light of the first two findings. Having regard to the Article 6 Convention rights of the parties, we note and accept the proposition that we should not apply the most severe sanction of striking out the plaintiff's claim if there are other sanctions which could be applied which would enable justice to be done between the parties. Illustrations of the type of sanctions - costs orders, orders that no interest be due on any sum awarded and so on - are canvassed in some of the other cases. On the other hand, if the court were to be of the view that it is now no longer possible to have a fair trial of the action, then there would undoubtedly be prejudice to the defendant, and it would not be right to allow the action to proceed." 26. The view I reached was that I should allow the plaintiff an opportunity to make an application to the Royal Court to withdraw the claims covered by the arbitration agreement, leaving only the remaining claims as referred to above and to apply for the stay to be discharged as a consequence. However, any such application had to be issued within 28 days. At the same time prior to expiry of the 28 days, the costs assessed as being due to the second and third defendants from the plaintiff must be paid to Dickinson Gleeson for the second and third defendants. The fact the plaintiff might argue it could ultimately recover such costs from the first defendant was not a basis to keep the second and third defendants out of monies due pursuant to costs orders in their favour. 27. In other words the plaintiff was given one final chance to pursue the more limited claim it now says it wishes to pursue. If the plaintiff did not however comply with the orders I made, I also ordered that its order of justice and amended order of justice would be struck out automatically without any further order. I regarded such a consequence as fair given that I have found that an abuse of process had occurred and that there had been a want of prosecution. 28. Finally, the second and third defendants were granted their costs of the application on an indemnity basis because there had had been both an abuse of process and a want of prosecution which had not been justified. Authorities Consolidated Resources-v-Global Gold and Others

[2014] JRC 124 . Consolidated Resources Armenia-v-Global Gold and Others

[2014] JRC 132 . Consolidated Resources Armenia-v-Global Gold and Others

[2014] JRC 169 . Consolidated Resources Armenia-v-Global Gold and Others

[2015] JCA 061 . Arbitration (Jersey) Law 1998. Consolidated Resources Armenia-v-Global Gold and Others

[2015] JRC 233A . Bowen v Noel Invs .

[1990] JLR 184 . B v M-R

[2007] JLR Note 48 . Viera v Kordas

[2014] JRC 042 . Page Last Updated: 22 Sep 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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