

JERSEY / JUDGMENT

Crociani -v- Crociani [2013]

JRC 080 (19 April 2013)

[2013] JRC 080

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judgment

the commissioner: 1. I sat on th April, 2013, to give directions in relation to two summonses issued by the defendants, the first (by way of amended summons) seeking a stay of the proceedings brought by the plaintiffs on the grounds of forum non conveniens and the second seeking an extension of time for the filing of their answer to 42 days after the Court ruling on their application for a stay or any appeal of that

ruling.

2. By their Order of Justice dated 18 th January, 2013, and by way of summary (adopting the same definitions), the plaintiffs seek:- (i) Equitable compensation for certain distributions made out of the Grand Trust between December 2007 and March 2011. (ii) The setting aside of the transfer of the Miami Apartments to the Fortunate Trust. (iii) The setting aside of the 2010 Appointment by which certain assets were appointed out of the Grand Trust to the Fortunate Trust. (iv) The setting aside of the 2012 Retirement by which the first, second and third defendants as trustees of the Grand Trust purported to retire as trustees in favour of the fourth defendant, changing the governing law of the Grand Trust from Jersey (which had been the governing law since 2 nd October, 2007,) to Mauritius. (v) The setting aside of the Agate Appointment, dated 2 nd August, 2012, by which the property that was the subject of the 2010 Appointment, to the extent that such appointment was invalid (and thus the property continued to vest in the Grand Trust), was appointed to the Agate Trust. (vi) The appointment of new trustees in place of the existing trustees of the Grand Trust. (vii) Such further orders, declarations, accounts and inquiries as may be necessary to reconstitute the trust fund of the Grand Trust and to place it under the control of such new trustees. 3. A letter before action (before this Court) dated 3 rd July, 2012, was sent by Bedell Cristin, acting for the plaintiffs, to Ogier, acting I believe for all the defendants, outlining the claims in so far as they related to the 2010 Appointment and the 2012 Retirement. 4. It was following that letter that the Agate Appointment was entered into. Mourant Ozannes, now acting for all of the defendants, wrote a very detailed response by letter dated 17 th August, 2012, repudiating in robust terms the claims of the plaintiffs. No question was raised in that letter about the suitability of this Court as the forum for the claims. Indeed, quoting from

paragraph 36 of the letter:- "36 All of the Grand Trustees, directors of corporate trustees, the individual professional and Madame Crociani herself, were of one mind and entirely comfortable with the decision reached. They have made it clear that if litigation cannot be avoided, they are all willing and able to explain themselves to the Royal Court."

Furthermore, at paragraph 37 of the letter, the first plaintiff was warned that if she persisted with the claims, she would be subpoenaed by the defendants to attend before this Court to be cross-examined. 5. The Order of Justice was served in Jersey upon the third defendant, which is, of course, incorporated in the Island and placed on the pending list on the 1 st February, 2013. No application was made to serve the proceedings on the other defendants out of the jurisdiction because by email dated 31 st January, 2013, Mourant Ozannes confirmed that they were instructed to accept service on their behalf, which they duly did. 6. By the same email Mourant Ozannes sought an extension of time for the filing of an answer, in particular because English Counsel who had been assisting the defendants was unavailable for the whole of February 2013. The plaintiffs agreed to an extension of time to 29 th March, 2013, and a consent order was issued to that effect on 4 th March, 2013. 7. On 1 st March, 2013, Carey Olsen gave Bedell Cristin notice that they had been instructed to act for the defendants in place of Mourant Ozannes; indeed, Mr MacRae informed me that the whole of the defendants' team including their English Counsel had been changed. He did not inform me of the reason for that change (as he was entitled to do) but said it was for "solid

reasons

". At the same time, and out of an abundance of caution, Carey Olsen issued a summons under Rule 6/7 of the Royal Court Rules, disputing the jurisdiction of the Court, which Rule requires an application to be made within 28 days after the return date. 8. On 8 th March, 2013, the 29 th May, 2013, was fixed for the hearing of the defendants' summons. At the date fix, Mr MacRae informed Ms McNulty of Bedell Cristin that any necessary amendment to the form of the summons would be attended to before the directions hearing that had also been fixed before me for 16 th April, 2013. By an amended summons dated th April, 2013, the defendants abandoned any challenge to the jurisdiction of the Court under Rule 6/7, seeking instead a stay of the proceedings on the grounds of forum non conveniens. I will refer to this as "the Forum Challenge Hearing". 9. Mr MacRae explained to me at the directions hearing that Carey Olsen have had some difficulty in getting up to speed in what is a complicated and wide-ranging dispute. They did not receive the bulk of the papers from Mourant Ozannes until 4 th April, 2013, and did not get access to all the papers until 9 th April, 2013. Some nine boxes of files had been received from Mourant Ozannes and fifteen boxes of files from McFarlanes, all of which had to be copied. The handover conference from the old legal team to the new legal team took place only last Friday. 10. However, these difficulties have not prevented the defendants from applying on the 22 nd March, 2013, to the Supreme Court of Mauritius for declarations as to the validity of the 2012 Retirement, the 2010 Appointment and the Agate Appointment. Those proceedings have been served upon the first plaintiff by way of substituted service upon Bedell Cristin. 11. It is against that background that I come to the two summonses issued by the defendants. There were in reality two issues put

before me, firstly, whether pending the hearing of the Forum Challenge Hearing, the defendants should be required to file an answer (and over what time period) and secondly, whether there should be sequential filing of affidavits and skeleton arguments in relation to the Forum Challenge Hearing or whether there should be a mutual exchange of the same. 12. Mr MacRae's objection to an answer being filed was based partly on principle and partly on practical issues. The practical issues I have referred to above and I accept it would be a very heavy burden for the defendants to prepare a full (as opposed to a holding) answer and at the same time to prepare for the forum challenge hearing, some six weeks away. 13. He submitted that as a matter of principle if it was found that this litigation should not be pursued in Jersey (in favour he indicated of Mauritius certainly he said for the bulk of the issues) and the stay granted, then the defendants would have been forced wholly unnecessarily to suffer the inconvenience and considerable expense of preparing a substantial response to proceedings which, he said, should never have been brought in this jurisdiction. 14. Picking up that last point, I do not think it is open to the defendants to say that these proceedings should never have been brought in this jurisdiction. The plaintiffs were plainly entitled to action the third defendant, which is the Jersey based institutional former trustee, but in any event, all of the defendants on advice accepted service of the proceedings in this jurisdiction. Even so, it will be open to the Court at the Forum Challenge Hearing to stay the Jersey proceedings in favour of those in Mauritius. 15. Mr MacRae went on to submit that for the defendants to engage with the substantive merits of the plaintiffs' claims in Jersey before the determination of their application for a stay would be to cause the defendants to suffer exactly the mischief which their application for a stay is intended to avoid. Furthermore, that mischief is exactly that from which they sought to be protected by Clause 12 of the trust agreement of the Grand Trust, pursuant to which Mauritius is now the exclusive jurisdiction to determine claims such as those brought by the plaintiffs. The defendants, he said, ought not to be troubled by different jurisdictions and to require the preparation of the answer before the outcome of the Forum Challenge Hearing would, at least in part, therefore pre-judge its outcome. The only pleading that was required by the Court for the purposes of the Forum Challenge Hearing was, he said, the Order of Justice and how the defendants might plead to the same was irrelevant to whether or not there are other more appropriate jurisdictions which should determine those claims. In any event, he said, the parties' essential positions were sufficiently clear from the pre-action correspondence and the plaintiffs would suffer no prejudice at the Forum Challenge Hearing if the defendants are granted the relief they seek. 16. There was no direct authority on the point cited to me. Mr MacRae referred me to the decision of the Singapore Court of Appeal in *Carona Holdings PTE Limited and Others-v-Go Go Delicacy PTE Limited*

[2008] SGCA 34, which concerned a contractual dispute in which it had been agreed that any dispute would be resolved by arbitration. In that case, default judgment and stay applications had been issued with the default judgment application, curiously, being heard first, with judgment being granted. It was held on appeal that where a stay application and default judgment applications were concurrently pending, they should be heard together with the merits of the stay application being heard first, in order to minimise duplicity in arguments and save costs. Quoting from the headnote:- "Ordinarily,

a defendant should not be asked or compelled to file its defence while its stay application was pending". 17. Mr Robinson submitted that the Court at the Forum Challenge Hearing could only properly consider the legal and practical issues of the case if it is aware of all of the issues and the parties' respective arguments as properly defined in the pleadings. He referred, by way of analogy, to the English case of *Kuwait Airways-v-Iraqi Airways Co and Others*

- [1995] 3 All ER 694, where the House of Lords was tasked with considering whether the proceedings related to issues not justiciable in the English courts. Lord Goff said that only by seeing that the issues raised in the claim and the defence to that claim could he see whether the facts of the case raised the question of justiciability. Without an answer, it was not possible to know with any precision what issues were being raised relevant to the application. 18. Mr MacRae was concerned with whether the filing of an answer might prejudice the defendants in the Forum Challenge Hearing. In *Leeds United-v-Weston and Levi*
- [2011] JRC 185, it was alleged that the filing of an answer precluded the defendants in that case from seeking a stay on the grounds of *forum non conveniens*. After a careful consideration of the authorities, Birt, Bailiff concluded that it did not do so:- "35 (vi) There appears to me to be no reason in principle for preventing a person who has filed an answer or otherwise participated in proceedings before this Court from applying for a stay. Such an application does not challenge the jurisdiction of this Court. It accepts that this Court has jurisdiction but merely seeks to assert that the case may be tried more appropriately in the courts of some other jurisdiction. Whilst participation in the proceedings in this jurisdiction is likely to be very relevant to the exercise of a discretion to stay, it does not seem necessary that it should prevent the making of such an application altogether. What the Court is concerned with is where the case should be tried in the interests of justice. The interests of justice may still point in favour of another jurisdiction even if an answer has been filed. 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 *Mansour*, there comes a point when it is simply too late to allow a defendant to switch jurisdiction." Mr Robinson confirmed, in any event, that if the Court were to order the defendants to file an answer, that would not be used against the defendants at the Forum Challenge Hearing and any equivalent hearing in Mauritius. He did not accept that the filing of an answer would be a waste of costs because in the event of a transfer, that work could be used in the Mauritius proceedings. 19. However he submitted that there was real prejudice to the plaintiffs in the defendants being granted the relief they sought. Assuming the Forum Challenge Hearing went ahead

on 29 th May, 2013, it would be a month or so before any judgment would be issued and it would be unlikely that any appeal could be dealt with before the end of the year. That would mean the plaintiffs' claim in Jersey would not have progressed for a year and that, in his submission, constituted real prejudice. 20. The facts of this case cannot be equated with a straightforward contractual dispute where the two contracting parties had agreed to arbitration, as in *Carona*. The bulk of the causes of action in this case arose during the time when the proper law of the Grand Trust was Jersey and they are being pursued against, inter alia, the Jersey based institutional trustee at the relevant time. It is not established by authority that as a matter of principle an answer must be filed before a Court can entertain an argument on *forum non conveniens* nor is it established that the filing of an application challenging jurisdiction on the grounds of *forum non conveniens* will lead to an immediate *de facto* stay of the substantive proceedings. Whether an answer should be filed is a case management decision to be taken on the facts of the particular case. The Court would be concerned to minimise duplicity in arguments and save costs, but it would also take into account the previous conduct of the proceedings by the parties and be concerned over delay. In complicated cases, the filing of an answer would no doubt be of assistance to the Court in considering such an application. 21. It is helpful at this stage to address the real difficulties I perceive in the Forum Challenge Hearing proceeding on 29 th May, 2013. Mr MacRae submitted that mutual exchange of evidence and skeleton arguments with authorities would be fair and appropriate. I disagree. Whilst I can appreciate that in, say, an application to the Court for directions, mutual exchanges of evidence and arguments are workable, we are concerned here with hostile litigation. Having accepted service of the proceedings in Jersey, the onus will, I believe, be upon the defendants to make their case for the alternative jurisdiction (see *Jaiswall-v-Jaiswall*

[2007] JLR 305 at paragraph 70 and *Leeds United-v-Weston*

[2011] JRC 185 , paragraph 39). The plaintiffs need to see that case before they can reasonably be expected to respond to it. A mutual exchange would leave the defendants having to guess the case to which they are required to respond. The point to me is fundamental and it is my decision, therefore, that for the purposes of the Forum Challenge Hearing, there will be sequential filing. 22. This leads to a serious practical issue. Without going into detail, it is quite clear to me and indeed was, I believe, to the parties, that, by reference to the calendar, there will simply not be sufficient time for sequential filing to take place in time for 29 th May, 2013, in a manner that is fair to the parties and in particular to the defendants, bearing in mind that apart from the third defendant, all of the parties are out of the jurisdiction. 23. I therefore conclude that the 29 th May, 2013, date for the Forum Challenge Hearing is unworkable and should be vacated. The parties will attend upon the Bailiff's Judicial Secretary to fix new dates. Whilst the duration of the hearing is a matter for counsel, I question whether the day and a half currently reserved will be enough and I invite counsel to consider whether two days might be more appropriate. Once that new date is fixed, I invite counsel to agree upon the sequential filing of affidavits, skeleton arguments and authorities using the draft directions supplied to me at the hearing by Mr

Robinson as a template. That should then be submitted to the Court for a consent order to be issued. If agreement cannot be reached, then the defendants, whose application this is, must apply for further directions. 24. That leads me to the issue of the answer. I need to balance the potential prejudice to the defendants in having to file a full answer to the Order of Justice against the potential prejudice to the plaintiffs in their claim being very substantially delayed. I take into account the following:- (i) By Mourant Ozanne's letter of 17 th August, 2012, (written in response to a letter before action by a very experienced trust litigation lawyer assisted by leading counsel) no question was raised by the defendants as to the appropriateness of this jurisdiction for the determination of the plaintiffs' claims - indeed, as referred to above, it seems to me that this jurisdiction was positively accepted as appropriate by the defendants and their advisers. (ii) Service of the proceedings was accepted by Mourant Ozannes on behalf of all of the defendants in January 2013, from which it is reasonable to infer that at that later stage, this jurisdiction was accepted by the defendants on advice as the appropriate jurisdiction for the determination of these claims. (iii) That once the proceedings had been issued, the defendants sought and the plaintiffs agreed to, an extension of time for the filing of an answer on or before 29 th March, 2013, (a not inconsiderable extension) and a consent order was issued to that effect. (iv) Having accepted this jurisdiction and obtained an extension of time for the filing of an answer, the defendants then changed the whole of their legal team and embarked upon a quite different strategy (I do not use that term in any disparaging way), which involved challenging this Court as the appropriate forum and invoking the jurisdiction of the courts of Mauritius. Nothing had happened in the meantime to make Jersey less appropriate as the forum as had occurred in Leeds-v-Weston . 25. In the light of this, I take the view that until such time as the Forum Challenge Hearing takes place, there should be (subject to on-going review) no interruption of the proper progress of the substantive case to trial. A full answer should therefore be filed. It would be filed for the purposes of the main proceedings but it will incidentally be of benefit to the Court dealing with the Forum Challenge Hearing. However, I should make it clear that the on-going progress of this case will not prejudice the position of the defendants in the Forum Challenge Hearing when that takes place. 26. Mr Robinson suggested that the defendants should have four weeks for the filing of their answer, namely to 14 th May, 2013, but notwithstanding the defendants being in default of the consent order, in view of the change in their legal team and need for that team to assimilate fully the very voluminous documentation they have received, I do not regard this as sufficient and will therefore allow the defendants until close of business on 29 th May, 2013, to file a full answer. 27. In summary, I make the following case management orders:- (i) Leave is given to the defendants to amend their summons dated 8 th March, 2013. (ii) The 29 th May, 2013, dates will be vacated. (iii) New dates will be fixed for the Forum Challenge Hearing and a timetable for sequential filing agreed. (iv) The defendants will file a full answer on or before 29 th May, 2013. Authorities Carona Holdings PTE Limited and Others-v-Go Go Delicacy PTE Limited [2008] SGCA 34. Kuwait Airways-v-Iraqi Airways Co and Others [1995] 3 All ER 694. Leeds United-v-Weston and Levi

[2011] JRC 185 . Jaiswall-v-Jaiswall

[2007] JLR 305 . Page Last Updated: 16 Sep 2016 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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