

JERSEY / JUDGMENT

Dalemont -v- Senatorov [2012]

JRC 044A (28 February 2012)

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judgment

the Deputy bailiff: 1. On 23 rd February I heard an application by the first and third defendants for an extension of time to dispute the jurisdiction of the Royal Court in the present case, and an application pursuant to Rule 6/7(4)(f) of the Royal Court Rules that the Court declare it does not have jurisdiction over the first or third defendants with regard to the subject matter of this claim or the relief or remedy sought by the plaintiff's Order of Justice and an order dismissing the claims against the first and third defendants accordingly. I refused the second application and reserved reasons. I now deliver those reasons. 2. Rule 6/7(4)(f) describes one of the applications contemplated in Rule 6/7(3) by which a party can dispute the jurisdiction of the Court. The application in Sub Rule (4)(f) refers to an order "declaring that in the circumstances of the case the Court has no jurisdiction over that party in respect of the subject matter of the claim or the relief or remedy sought in the proceedings." 3. The factual background to these proceedings is set out in detail in my judgment on 12 th January, 2012, refusing an application of the first defendant for a variation of the ex parte orders contained in the plaintiff's Order of Justice, and it is otiose to repeat that background here. 4. However it would be right to recognise that from the moment of his first appearance before the Court, the first defendant has through his lawyers reserved all his rights in relation to a possible challenge to the jurisdiction, and also that on 12 th January, before time had expired to issue such a challenge, the first defendant applied through Advocate Thompson for an extension of time on the basis that Russian law was relevant and the Russian courts might not recognise the title of the legal owner if that was affected by the decision of the foreign court. At that time, Advocate Thompson indicated that it was hoped to obtain an opinion from a Russian law expert to put before the Court but it was not currently available. In refusing the application from extension of time to challenge the jurisdiction of the Court, I then indicated that if there was a basis for such an application under Russian law at a future date, the first defendant could bring back that application seeking an extension of time after time had expired. In effect that is what has now happened, and some evidence of Russian law has been put before me. 5. Although the plaintiff resisted any extension of time being given, I am satisfied that the first defendant has acted in accordance with the timetable which was envisaged when the application for an extension of time was first made, and that he has acted with appropriate dispatch on this particular matter. Accordingly, I grant an extension of time to the first and third

defendants to challenge the jurisdiction of the Court and I now turn to the substance of that application. 6. Rule 6/7(4)(f) is substantially the same as Order 12 Rule 8(1)(g) of the Rules of the Supreme Court 1999 . The commentary in relation to that rule provides little which is of assistance. It certainly appears that the main thrust of any such application would relate more to the question of setting aside service than anything else, although clearly the Court always does have an inherent jurisdiction to determine that it will not exercise the jurisdiction which it does have in the particular circumstances of a case. 7. In putting forward his application, Advocate Thompson accepted that the plaintiff had obtained validly an order for service out of the jurisdiction in accordance with the Service of Process Rules 1994 and that the first and third defendants therefore had been properly served. The argument that he wished to advance was not that the Court has no jurisdiction as a result of improper service, but rather that the Court should in all the circumstances not accept the jurisdiction which it did have. Neither counsel was able to assist with any authority either locally or in England as to how the Court should approach this question of whether or not to accept jurisdiction. 8. I start there in relation to the argument because as regards the law of conflicts of laws, the Royal Court of Jersey generally follows the courts of England and Wales, save to the extent that those courts are obliged by conventions or treaties to which the United Kingdom is a party but which have not been ratified by the United Kingdom on account of Jersey. Accordingly, the Brussels and Lugano conventions on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters respectively, and which have an impact on these issues in the United Kingdom courts are not to be taken into account in relation to the private international law principles which are to be applied in Jersey. 9. The starting point for the question of jurisdiction seems to me to be that set out in Dicey, Morris and Collins on the Conflict of Laws (2006 Edition) at Rule 22:- "(1) Subject to Clause (2), the court has jurisdiction to entertain a claim in personam if, and only if, the defendant is served with process in England or abroad in the circumstances authorised by, and in the manner prescribed by, statute or statutory order". 10. Paragraph (2) of Rule 22 refers to the Brussels and Lugano conventions and has no application here. In our case therefore the concession by Advocate Thompson that there is no challenge to the order for service out of the jurisdiction pursuant to the Service of Process Rules (1994) suggests that the Court does indeed have jurisdiction to entertain these claims in personam against the first defendant. 11. I accept, nonetheless, that the Court has an inherent jurisdiction not to accept or exercise its jurisdiction over a party properly served. That seems to me to be a matter of discretion having regard to Sub Rule (4)(f) and all the circumstances of the particular case. 12. Sub Rule (4)(f) requires one to identify the subject matter of the claim and/or the relief or remedy sought in the proceedings. For the first and third defendants, Advocate Thompson submitted that the subject matter of the claim was enforcement of Russian judgment debts against assets based in Russia and in particular Russian land. He submitted the real subject matter of the claim was the underlying value of the land and he relied on an affidavit sworn in support of the interim injunctions obtained by the plaintiff ex parte in this case to show that the plaintiff was concerned with underlying asset values. 13. In my judgement, it is important to distinguish between the result of the remedy or relief granted and the nature of the claim itself. This is particularly relevant when I come to look at the expert evidence of Professor Maggs , an expert in Russian law, because his evidence needs to be viewed

against the relief which the plaintiff seeks and the assertions which the plaintiff makes. It seems to me to be clear from the Order of Justice that the subject matter of the claim is three-fold:- (i) There is an application for judgment against the first defendant based upon the sums due under some Russian judgments; (ii) There is an application for a declaration that the assets of the second defendant are in fact the property of the first defendant. If that declaration is made and the judgment against the first defendant is given, then naturally the Viscount can be instructed to enforce the judgment against those assets. (iii) There is an application for an order that certain share transactions by which the third defendant transferred the ownership of shares in 18 BVI companies to the second defendant, which subsequently transferred them to the fourth defendant be set aside. The result of such an order would be to leave the third defendant as owner of those companies and as the third defendant is asserted to belong absolutely to the first defendant, then the judgment debt can be enforced against the first defendant's shares in the third defendant. 14. Of course, if the relief in paragraph (ii) is granted, the result of that relief, if the judgment under paragraph (i) is granted, is that the Viscount can be instructed to enforce the judgment against those assets. Similarly, if the relief in paragraph (iii) is granted, then the Viscount can be instructed to enforce the judgment against the first defendant's shares in the third defendant, which would have a greater value as a result. Thus I distinguish between the relief claimed and the results which flow from that relief for the purposes of considering this application. 15. In my judgment therefore on a proper construction of the Order of Justice the subject matter of the claim is not a series of orders which will result in the transfer of Russian land from the first defendant to the plaintiff, but rather a series of orders that would result in the transfer of particular shares in non-Russian companies to or for the benefit of the first defendant. 16. I would be quite prepared to accept that if the subject matter of the claim was an order that one or more defendants transfer title to land in Russia to or for the benefit of the plaintiff, that would be an application to the Royal Court for the exercise of an extra territorial jurisdiction which, to put it at its lowest, would require very careful examination indeed. However, in my judgment, that is not what this Order of Justice seeks. The starting premise of the first and third defendants submissions in relation to this summons is therefore wrong. 17. I now turn to the expert evidence of Professor Maggs in relation to Russian law to see if there are any other reasons emerging from that evidence which would go to the exercise of discretion not to accept jurisdiction in this case. 18. The structure of Professor Maggs' opinion is that he addresses numbers of questions which have been put to him. Some of those questions do not seem to me to be relevant questions given the nature of the claim in Jersey. Accordingly, for example, at paragraph 12 he begins to address the question as to whether, given the corporate separation between the first defendant and the Russian companies and the Russian real estate against which the plaintiff is seeking to levy execution in order to enforce the Russian judgments, Russian law recognises at any level the first defendant's alleged ownership of the real estate? As I have found that is not the subject matter of the claim in Jersey, he therefore addresses there a question which is not in point. 19. If the plaintiff were to be successful in its application in Jersey, it could well end up with ownership of the shares in the fourth defendant which owns subsidiary companies including, ultimately, Russian companies which own Russian land or merely asking the Viscount to realise the benefit of the shares to discharge the judgment. In either event, those shares might

be placed on the market for sale. They have a value. There seems no reason to believe that such a market would have to exist in Russia, and the Russian courts might have nothing to do with the realisation of value in order to ensure the judgment debt due to the plaintiff was satisfied. That is a first and substantial objection to the argument that the Royal Court should not exercise jurisdiction because ultimately this case will have to go back to Russia in any event. The second, and in my judgment equally conclusive objection to the first and third defendants' submissions is that the proceedings in Jersey will determine title to the shares in the fourth defendant and the 18 BVI companies which own Cyprus companies which own Russian companies which own Russian real estate. An objection based on Russian law to resolution of arguments as to title to shares in BVI companies seems to me to be ill-founded. 20. In his affidavit, Professor Maggs holds out at least the possibility that sooner or later a Russian court might have to adjudicate upon attacks made by existing officers of Russian companies if the plaintiff, being successful in the Jersey proceedings, were able to have new directors appointed throughout the structure. The argument therefore runs that the Russian court has exclusive competence over such actions and that the Royal Court should now recognise that at this stage and therefore not accept jurisdiction. Stripped down to its essentials, the argument is that because there may be challenges to the exercise of the powers of the directors which would take place in the Russian courts and not elsewhere, it follows that the issue of title to the shares should not be litigated in Jersey because it is that title which would be considered in relation to the subsequent exercise of their powers. I reject that argument. It seems to me, although Professor Maggs barely touches on the point, that it is obvious that any court, including a Russian court, would need to know who owned the relevant shares. There is no reason for a Russian court to exercise exclusive jurisdiction over the determination of ownership of shares in Cyprus or BVI companies. 21. Advocate Thompson placed heavy reliance on the decision of the Supreme Court of the Russian Federation of March 30 th 2010, to which Professor Maggs referred in his opinion. That was apparently a case in which P sought to establish his or her right to inherit real estate that had belonged to A in Russia on the basis that a foreign court had established that A was P's parent. Apparently P's sole purpose in bringing the foreign paternity suit was to inherit a specific parcel of real estate in Russia. Another claimant to the real estate, M, objected, and pointed out that she had not been given notice of the foreign paternity suit nor had she had a chance to appear in that suit. It was not in dispute that the real purpose of the foreign paternity suit was to assert title to Russian land. The Supreme Court found that the foreign judgment affecting title to real estate in Russia was not enforceable. 22. It seems to me that that is a completely different kind of case from the present one, where the title to Russian real estate is not going to be affected by the order of the Royal Court assuming the plaintiff to be successful. Title to Russian land will still be held by the Russian companies. The shares in the Russian companies will still be owned by the Cyprus companies. The shares in the Cyprus companies will still be owned by the BVI companies. All that will have changed is that there will have been a declaration affecting the ownership of the shares in one or more BVI companies. The *lex situs* arguments, with which any jurisdiction would be sympathetic were title to land in that jurisdiction directly under consideration, simply do not apply. 23. Advocate Thompson also placed heavy reliance on paragraphs 31 and 38 of Professor Maggs opinion. I have read that opinion carefully and in my judgment what is said is that the Russian courts might

assert exclusive jurisdiction over matters which were of particularly Russian concern - the transfer of title to Russian land, the liquidation of Russian companies, the dismissal of the Chief Executives of those companies, presumably if they were Russian Chief Executives. Even Professor Maggs however does not assert that the Russian courts would exercise jurisdiction, yet alone exclusive jurisdiction over the appointment of new directors, which seems to me to be unsurprising, because the appointment of directors by its nature is a matter for the shareholders of the companies in question. 24. Advocate Thompson submitted that there was no point in the proceedings in Jersey because it would be necessary to go back to Russia for these points to be considered there. I reject that submission. The matter may never go back to a Russian court; but even if it did, it seems to me that the Russian court will be assisted by any finding as to the ownership of the shares in companies higher up the structure, which are indeed not even Russian companies. 25. The first ground of the first and third defendant's application was that the Russian courts have exclusive jurisdiction and there were attempts to levy execution of Russian assets by way of enforcement of Russian judgments. In my judgment this ground fails for the reasons I have given, but put in a nutshell because the proceedings before the Royal Court of Jersey do not seek to levy execution over Russian assets by way of enforcement of Russian judgments. What they do seek is the obtaining of judgment in Jersey, a consequence of which would be enforcement over non Russian assets. 26. The second and third grounds of the application were that the plaintiff had brought enforcement proceedings in Russia, and should not be permitted to commence duplicative but inconsistent parallel proceedings in Jersey. I will come shortly to the question of inconsistent proceedings but insofar as the rest of these two grounds is concerned, it appears to me that the plaintiff is entitled to seek to enforce its judgment against the first defendant however it can. I see no equity in a judgment debtor having the right to resist enforcement of the judgment debt against him by putting the creditor to the trouble of suing him in only one jurisdiction at a time, or in some particular order. The fact is that a judgment debtor should pay his judgment debt. There is no justice in allowing him to put the creditor through convoluted legal and jurisdictional hurdles in order to recover money which is due. 27. Of course if it could genuinely be said that enforcement proceedings were duplicative there might be more equity in the debtor's position. Not much, but more. However, for the reasons I have given, I do not regard these as duplicative proceedings. I have been shown a judgment dated 31 st January, 2012, of the Meshchansky District Court of Moscow, from which it appears that orders have been made permitting enforcement of the plaintiff's judgments against particular Russian assets. It also appears that during the hearing the first defendant did not dispute that the entities apparently owning the assets in Russia owned them on his behalf. Given that the evidence before me is that Russian law does not recognise the difference between legal and beneficial interests, this might be thought to be surprising. At all events, the District Court accepted that the ownership of the assets by the first defendant was proved and accordingly made orders for enforcement against those particular assets. I am told that an appeal is being brought by the first defendant against that order and both the plaintiff and first defendant seemed to think that that appeal might well have a realistic chance of success. In those circumstances the proceedings in Russia do not seem to me to be duplicative of the proceedings in Jersey. Both sets of proceedings ultimately have as their object the enforcement of the judgment debt, but the

substance of the enforcement is different. In Moscow, enforcement is sought directly against Russian assets. That does seem to me to be naturally a matter for the Russian courts. In Jersey, enforcement is sought against the shares in BVI companies where a Jersey foundation is either the owner of the company at the top of the structure, or has made transfers of those BVI companies to another company where the validity of the transfers is in dispute. The substance of the enforcement proceedings is therefore different. 28. Next is said that the Russian proceedings are inconsistent with the Jersey proceedings. In Jersey both parties assert that it is impossible to enforce in Russia a judgment against a beneficial interest in property because Russian law does not recognise beneficial interests. In Moscow, the plaintiff appears to be asserting that it can do just that, and indeed it appears from the judgment of 31 st January, 2012, that it has been successful in first instance. I do not consider the lack of consistency to be a reason for this Court not to accept jurisdiction over the matters which clearly fall within its jurisdiction. Of course, if enforcement directly against the ultimate Russian assets is permitted by the Russian courts, there may be no need for complex Jersey proceedings. At some point, therefore, it may be appropriate for one of the parties to the Jersey proceedings to seek a stay of those proceedings pending the outcome in Russia. That is not directly before me now in relation to the present application, and given that there seems to be a view that the Russian courts will deal with the appeal against the District Court's judgment in relatively short order, I do not feel that I have enough information at present in any event to direct a stay of proceedings now. That of course is a matter where, if there is further information at a later stage, such an application can be brought back. 29. For these reasons, I reject the arguments under grounds (b) and (c) of the amended summons. 30. The last ground submitted by the first and third defendants suggest that even if the Royal Court accepted jurisdiction, the ultimate goal of selling Russian assets or winding up Russian companies would not be successful. That is an argument I am not prepared to entertain at this stage. It requires assumptions to be made as to whether there will be proceedings in the Russian courts at some stage following any successful applications by the plaintiff in Jersey, if there are any, and it requires conjecture as to what factors might be relevant to the Russian courts consideration of the relevant issues. For my part, I see no reason why the Royal Court should not exercise jurisdiction at this stage in relation to the matters which are clearly matters which can and should be adjudicated here, namely title to the shares in the relevant BVI companies, where the ultimate ostensible owner is a Jersey foundation. 31. Finally I turn to the argument of Mr Thompson that the Pauline action is not properly pleaded. Advocate Thompson submits that the plaintiff's claim is that it is a creditor of the first defendant. A Pauline action requires, he says, a transfer of assets by the first defendant to defeat his creditors, if it is to be successful. There is no claim that one can pierce the corporate veil of the third defendant, and therefore its assets remain its assets even if the shares in the third defendant belong to the first defendant absolutely. Advocate Thompson submits therefore that the pleaded case against the third defendant in respect of the Pauline action cannot succeed because it lacks the material allegation that the corporate veil of the third defendant can be pierced. 32. I am not willing to refuse jurisdiction on this ground because, if this were a strike out application, the application would be unsuccessful subject to a direction to the plaintiff to amend its pleading so as to meet the objection. In this case the plaintiff has indicated through its counsel that it will be reviewing its pleading. I can see that

there is some technical merit in the objections raised by Advocate Thompson. If the plaintiff omits to bring forward an amendment which tackles the technical objectives, it will be open to the first and third defendants to come back on a strike out application. 33. For all these reasons, the summons of the first and third defendants is refused. Authorities Royal Court Rules 2004. Rules of the Supreme Court 1999. Service of Process Rules 1994. Conflict of Laws (2006 Edition). Page Last Updated: 25 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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