

JERSEY / JUDGMENT

Dalemont -v- Senatorov [2013]

JRC 061 (20 March 2013)

[2013] JRC 061

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judgment

the deputy bailiff: 1. I sat as a single judge on 26 th February, 2013, when Advocate Baker appeared for the plaintiff and Advocate Le Maistre for the first and third defendants to consider directions in relation to the hearing of the action commenced by the plaintiff against the defendants. On that day I made a number of procedural orders which are not relevant for the purposes of this judgment. However, what was clear was that for the first time the question of the first defendant's availability to give evidence in person was raised. I was informed by Advocate Le Maistre that the first defendant was still subject to an order which effectively kept him in Russia. This travel ban had been renewed for six months on 17 th October, 2012, and the plaintiff would have to apply to lift the order. 2. Having made a number of orders on that date, I adjourned the directions hearing until th March, 2013, indicating that I wanted to be informed of the arrangements which might be made in order that the first defendant could come to Court to give evidence, and in order that sundry other outstanding matters, not relevant for the purposes of this judgment, could be determined. 3. On 7 th March, Advocate Baker appeared for the plaintiff and Advocate Purkis for the first and third defendants. The procedural directions were generally agreed, but there remained an issue as to the attendance of the first defendant in Jersey. I was informed by Advocate Baker that the parties had not agreed on lifting the travel ban. The first defendant is subject to a judgment in Russia and in Jersey, and, so Advocate Baker submitted, because he had not paid his debts and structured his affairs the way he had, he had forced the plaintiff to commence several sets of proceedings. It was said that the travel ban ensured that the Russian Court could do justice, and the Jersey Court should act to ensure that the Russian Court order was respected. The first defendant had not promised to return to Russia and/or wind up the second defendant if he did not do so. It was said that given modern technology, there was every reason why he could give his evidence by television link and equally could give instructions to his lawyers. It was pointed out that the first defendant's track record of compliance with Jersey Court orders has not been good. In addition, Mr Baker put before me a letter dated 7 th March, 2013, from the plaintiff addressed to the Royal Court. In that letter, the plaintiff indicated that whilst it might in theory be possible to make an approach to the marshal of law, the Court Bailiff in Russia, for the travel ban to be lifted, temporary lifting or variation of a travel ban was as far as the plaintiff was concerned unknown to Russian Law, and the letter concluded "given that the

reasons for imposing the travel ban, uncertainty and making any approach to the marshal of law and the risk that if lifted or varied the ban may not be re-imposed, Dalemont is very reluctant to make an approach to the marshal of law to lift or vary the ban to allow Mr Senatorov to travel to attend Jersey to give evidence in person". 4. Mr Baker agreed that the Court had power to direct the plaintiff to apply to the Russian Court to have the travel ban lifted. 5. Having heard Advocate Purkis, who indicated that she needed time to take instructions on what if any security could be offered to ensure that the first defendant returned to Russia after the hearing in Jersey, I resolved to put the matter off until 14 th March, 2013. I informed Advocate Purkis that I wanted some indication from her as to what security the first defendant was prepared to offer to the plaintiff to ensure his return to Russia after this case, and what undertakings could be offered to the Royal Court to ensure a re-instatement of the travel ban, subject to the discretion of the Russian judicial authorities, at that time. 6. I indicated to Advocate Baker that I required from the plaintiff some hard indications of what prejudice it suffered under Russian law in the enforcement of Russian judgments in Russia if the first defendant was not in the country. 7. That was the background to the hearing which took place on 14 th March, following which I reserved my decision the judgment for which is now delivered. The issue was whether or not any order should be made against the plaintiff requiring it to make an appropriate application to the Russian Court for the lifting of the travel ban so that the first defendant could attend in Jersey to give evidence in person. 8. On 14 th March, Advocate Redgrave appeared for the plaintiff and Advocate Purkis for the first defendant. I was shown an application to the Court Marshal of the Cross District Department of Court Marshals for Special Enforcement Proceedings of Federal Marshals Service Directorate of Russia for the City of Moscow. The request referred to the joint enforcement procedure instituted on the basis of Russian Court judgments, and indicated that between 8 th April and 26 th April, 2013, there would be a hearing in the Royal Court of Jersey where the first defendant must be present. The plaintiff asked for notification of the possibility of a temporary lifting of the ban instituted against the first defendant to restrict him from travelling outside Russia. 9. I was shown a response from the Court Marshal which contained this language:- "Up until now [the first defendant] has not performed the court's decision, and also he is abstaining from presenting himself to the Court Marshal. Based on this there was issued a decree on temporary restriction of the right of the debtor [the first defendant] to travel beyond the territory of Russia in accordance with Art. 67 FZ "on enforcement procedure". Nevertheless, as it follows from the reply of OAO "Aeroflot" dd. 08. 10. 12 no. 901-1627 [the first defendant] in contradiction with the mention of restriction has on a number of occasions left the territory of Russia, and this means that the debtor [the first defendant] is abstaining from the restriction instituted by the decree of the Court Marshal. Based on the above I do not consider it possible to cancel the restriction for [the first defendant] to leave the territory of Russia. Apart from that there are no provisions in the FZ "on enforcement procedure" to temporary (for a definite period of time) lift the restriction to leave the territory of Russia." 10. The submissions of the plaintiff are that it would be unreasonable to require it to lift the travel ban for these reasons:- (i) The travel ban is a recognised part of the enforcement machinery in Russia. It was not imposed in order to inhibit the first defendant's defence of the Jersey proceedings, but was rather imposed with a view to facilitating the enforcement of the Russian judgments. The plaintiff should not be deprived of a

legitimate enforcement procedure which was available under Russian law. (ii) It was clear a temporary lifting of the ban was not possible, and there was no certainty that if the ban were lifted, a new ban could be imposed. The first defendant had not given any undertaking to support an application to impose a new ban. (iii) In any event the breaches by the first defendant of the existing ban showed that he had no respect for the Russian legal process. 11. It was said that the Royal Court should not lightly interfere with the litigation process in Russia. There was no strong prejudice to the first defendant if he was not present in Jersey for the hearing. The litigation in Jersey was about a judgment already taken by the plaintiff against the first defendant. In the context of these enforcement proceedings in Jersey, his case could only be that he did not have an interest in whether the plaintiff succeeded or not, because, on his case, the assets are no longer his and therefore the plaintiff's judgments could not be enforced against them. 12. Advocate Redgrave submitted that not only was no real prejudice caused to the first defendant but indeed that if anything the prejudice was on the side of the plaintiff. The plaintiff would be prejudiced by not being able to cross-examine the first defendant before the Royal Court, and the implication of that inhibition was that the plaintiff would find it more difficult to undermine the first defendant's credibility. 13. As to whether the first defendant was currently suffering any difficulty in defending the proceedings, the submission of Advocate Redgrave was that nothing which arose in the course of the proceedings needed to be dealt with immediately. He had been able to give instructions so far, and he could easily give instructions by satellite link during the course of the hearing as there would be a sufficiently high quality transmission. The fact is that he has not had to appear in person before either the BVI and Cyprus courts but was nonetheless able to direct the process in those courts without being present; Advocate Redgrave nonetheless accepted he was not required to give evidence before those courts. 14. Both the plaintiff and the first defendant accepted before me that the question for me was an exercise of discretion weighing the requirements of convenience and prejudice. Advocate Purkis submitted that no prejudice had been identified save the loss of the Russian remedy. I pressed Advocate Purkis on whether her client would agree to give an undertaking to the Royal Court to support the re-imposition of the travel ban, subject to preservation of a right of appeal he had in Russia against the imposition of that ban. Advocate Purkis said that she would like to be able to give that undertaking but she was not instructed at that time to give it and indeed the first defendant was anxious that he should not prejudice his appeal rights in relation to the Russian travel ban, where an appeal was apparently currently pending. 15. Her instructions were that her client's preference was to attend in person. Accordingly she has not made application to call him using a video link. Discussion 16. The first point to note is that the request which was put to the Court Marshal in Russia by the plaintiff was limited to the question as to whether it would be possible to lift the travel ban on a temporary basis. It is self-evident that that is not the same question as a question which asks whether it would be possible to re-instate the travel ban once it has been lifted. The fact is that at present we do not know what the answer to that second question might be. 17. It had been submitted by Advocate Redgrave that the provisions of Clause 2.3 of the Order of the Federal Bailiffs Service Moscow Department dated 20 th January, 2009, No. 36 which are in the terms set out below had not been met:- "Upon a citizen debtor performing the obligations imposed on him/her by the Court, or upon agreement between the debtor and the creditor

confirmed by the creditor's application, the bailiff shall within 24 hours deliver a decree lifting the temporary restriction." 18. It was submitted that the reference to an agreement between the debtor and the creditor can only mean an agreement as to settlement of the debt, and did not extend to agreement that even though the debt had not been paid, the creditor and the debtor had nonetheless agreed the travel ban could be lifted. 19. I entirely accept that the expert evidence on Russian law is not as detailed as one might wish, but I struggle to accept the contention of Advocate Redgrave that this is the proper construction of the Russian court's approach. I put to Advocate Redgrave the possibility that a defendant who was the subject of a travel ban had a dying mother resident abroad whom he wished to visit. It must surely be within the contemplation of a humane system of law which, absent evidence to the contrary I assume to exist in Russia, that it might be possible for a plaintiff, despite a debt outstanding to him remaining due for payment, to agree that a travel ban which had been imposed at his request should be lifted to enable the defendant to visit a dying mother. There would be no doubt many other circumstances where it would be obviously right that a travel ban might be lifted and then later re-instated. I reject Advocate Redgrave's submission that this is the effect of Russian law, and I am particularly content to reject it given that as a matter of ordinary language, it seems to me that the bailiff is required to lift the temporary restriction if either the citizen debtor has performed the obligations or there has been an agreement between the debtor and the creditor, confirmed by the creditor, that the travel ban might be lifted. 20. I acknowledge I do not know for certain whether the Russian court might or might not re-instate the travel ban if it is lifted at the plaintiff's request. However, I approach this matter upon the basis that until advised otherwise, I would assume the Russian court would approach this issue on a reasonable basis, namely that if the plaintiff has agreed to the lifting of the travel ban for the purposes only of the first defendant appearing before this Court in order to give evidence, because this Court has so required it, an application by the plaintiff to re-impose the travel ban once these proceedings are over can reasonably be expected to be successful, subject of course to any ordinary rights of appeal which may exist in Russia and which the first defendant might wish to take up. 21. On that approach, I consider it right therefore to direct the plaintiff to apply forthwith to the Russian marshal to have the travel ban lifted to enable the first defendant to come to Jersey to give evidence. 22. I now go on to consider how I would have exercised my discretion, had it been clear that the travel ban might not be re-imposed, bearing in mind that what I have to consider is the requirement to do justice in this Court. 23. The only prejudice which the plaintiff has identified is the loss of the travel ban in Russia. The prejudice which the first defendant identifies is that he cannot personally come to the Royal Court of Jersey to give his evidence before us, and equally that he cannot as easily organise his defence to cope with matters which might arise in the course of the hearing. In relation to that prejudice, the plaintiff asserts that there is ample authority to the effect that justice can be done quite as easily without a person physically being present if appropriate satellite link arrangements have been made. In Jersey this matter was considered in the Federal Republic of Brazil and Another-v-Durant International Corporation and Others

[2011] JRC 237, where Page, Commissioner, having reviewed the decision in *Ithaca [Custodians] Limited-v-Perry Corporation*

[2003] 2 NZLR 216, a case in the High Court in New Zealand, said this:- "21. I accept... that in an ideal world every witness would be examined and cross-examined in person in court. But Mr Steenson overstates, I think, the extent to which the appearance of witnesses via video link is likely to prove a substantial impediment to effective cross-examination of them or to operate to the defendant's disadvantage. The observations of each of the members of the House of Lords in Polanski are notable as I see it for three things. First, in making it abundantly clear that they saw nothing inherently unfair in permitting evidence to be given by video link; secondly, in unhesitatingly accepting (with slightly varying nuances of wording) the views of two very experienced trial judges that it is perfectly possible for cross-examination to be conducted via video link, in most cases at least, with little impairment of effectiveness; and thirdly for their readiness to regard the possibility of taking evidence in this way as a positive and welcome benefit of developments in technology... Polanski was, moreover, a case in which the evidence in issue was that of the Plaintiff himself and which credibility was likely to be very much an issue. 22. At a more fundamental level the observations of Baroness Hale in Polanski at paragraph 80 are, I suggest very much in point:- "The Civil Evidence Act 1995 and the Civil Procedure Rules 1998 are part of a new approach to civil litigation in this country. The Court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. The court is to be trusted to evaluate the weight of the relevant evidence for itself. The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone." The English CPR regime is not, of course, part of the Royal Court Rules and there has been no wholesale adoption in this jurisdiction of an equivalent set of practices and procedures, it being for the court to consider, as and when particular problems arise, whether and to what extent current practice of the English courts may be a useful indicator of the course that the Jersey courts should follow. But there are important parallels between the English Civil Evidence Act 1995 and the Civil Evidence (Jersey) Law 2003 as regards hearsay evidence; and the general philosophical approach described by Baroness Hale is one that now informs the Royal Court's approach to civil litigation here every bit as much as in High Court in England. 23. For my own part, I accept that in practice receiving the evidence of a witness via video link introduces an additional layer of logistics that is less than ideal and carries with it a degree of risk of technical hitches of one kind or another. And the fact that interpreters will be required will also mean that the process of giving evidence will be more protracted than it might otherwise be. But arranging for witnesses to take long-haul flights is itself an exercise liable to unexpected disruption by weather, labour disputes and mechanical failure. And interpreters would still be necessary if the witnesses were to attend in Jersey. As to whether, in practice, the exercise of cross-examination or the courts ability to judge a witnesses demeanour is or is not impaired by practical difficulties is something which must be left for the court itself to judge and, if necessary, to make

allowance for accordingly." 24. The decision of Commissioner Page went before the Court of Appeal on different grounds and nothing said in the Court of Appeal judgment affects the analysis which the Commissioner set out, and with which I agree. The real question which the court must consider in relation to issues of this kind is whether or not it is necessary for the witness to appear personally before the court to give evidence in order for the court to do justice in the case before it. In identifying whether it is necessary to have the witness appear personally, the court will consider a range of factors including:- (i) The identity of the witness giving evidence; (ii) The relevance of the evidence which is given to the case; (iii) The reasons why the witness would find it difficult to appear in court personally; (iv) How the case would proceed in his absence. It seems to me that these considerations will generally be sufficient to enable the court to decide upon an application for calling evidence by video link, but for the avoidance of doubt, I accept that there may in other cases be relevant circumstances which need to be taken into account in relation to the issue to be determined. The real question is a case management decision for the trial judge as to how he can best deliver justice in the case which is before him. I therefore consider these issues in the instant case. The identity of the witness 25. What is unusual about the present case is that the circumstances are the reverse of those one would normally expect. Usually a party wants to come to court and only makes an application for his or her evidence to be taken by video link where he or she is unable to get to court to give evidence or has witnesses who cannot come. This is not the case here, where it is the plaintiff who, by its own action abroad has created a set of circumstances that prevent the first defendant from coming to Jersey to give evidence in person. It seems to me that unless there were some special circumstances which made this a necessary outcome, this is quite unfair. The first defendant is convened before a foreign court, and surely is entitled to contend that he should be able to come to court personally to defend himself. It is a completely different situation from that which applied in *Polanski-v-Condé Nast*

[2005] UKHL10

[2005] 1 AER 945, where the applicant to have his evidence taken by video link was the plaintiff who had engaged the jurisdiction of the court in the first place, and was himself prepared to accept any prejudice that arose from not giving evidence personally but having his evidence taken by video link. For my part, whilst I accept entirely the submission that it is absolutely possible to deliver justice by taking evidence by satellite link, it is preferable where the evidence is directly relevant to an important issue in the case to have the witness appear personally if possible. Indeed, Commissioner Page agreed as much in the extract which has been cited above. No-one contends justice cannot be done with evidence by video link, but equally nobody seriously contends that a court is better able to deliver justice if the critical evidence is given by witnesses before it in person. In the present case, the fact that it is the plaintiff trying to prevent the first defendant from giving evidence in person where it has convened the first defendant before the court in the first place is given particular emphasis. Relevance of the First Defendant's evidence to

the case 26. I reject Advocate Redgrave's submission that this litigation is about a judgment already taken by the plaintiff against the first defendant, and as he asserts that he no longer owns the assets, he does not have an interest in whether the plaintiff succeeds or not. The contentions which the first defendant wishes to advance on the pleadings are that although he has an indirect interest as a potential object of the foundation, the second defendant, it is not possible as a matter of law to look through the arrangements by which the second defendant was established; and furthermore that in the context of the Pauline action, the transfers made by the third defendant were not made with a view to defeating creditors, but instead were made for legitimate business reasons which the first defendant considered. That defence may also be relevant to the "look through" arguments. 27. The evidence of the first defendant is obviously crucial to the contentions which the first defendant wishes to advance. Mr Redgrave said that it was the plaintiff who suffered the prejudice because he would not be able to cross-examine the first defendant in person; but he did nonetheless accept, as he had to, that the plaintiff's position would really be that the court was entitled to place heavy reliance upon the timing sequences between the judgment taken in Russia and the transfers of assets made by the third defendant and establishment of the second defendant. In a sense, this was to contend that the timing looked so bad for the first defendant that it required explanation. In those circumstances the prejudice seems to me to lie much more on the first defendant than on the plaintiff if he is not able to give evidence in person. Reasons why the First Defendant cannot appear 28. These seem to me to be entirely reasons which are in the control of the plaintiff. The travel ban is part of the enforcement process in Russia. It is a matter therefore for the plaintiff to indicate whether it wants the travel ban in place or not. I cannot accept, without clear evidence to the contrary and there is none, that a Russian court has any interest of its own in stopping the first defendant from leaving the country. It is merely giving effect to an enforcement process which is available to the plaintiff, which has obtained the Russian judgments. Furthermore I cannot help noting that it is not an apparently successful enforcement mechanism, because the first defendant had the Russian judgments taken against him several years ago, and the travel ban has not obviously assisted the plaintiff in the slightest in enforcing those judgments so far. The fact that the inhibition arises as a result of the plaintiff's own application to the Russian courts seems to me to be a relevant factor in the exercise of my discretion. How the case will proceed in the First Defendant's absence 29. I have no doubt that arrangements can be made for satellite links and an interpreter, because indeed this has been done previously. There were occasional technical hitches in the transmission on the last occasion, but the arrangements were adequate albeit not perfect. I do not regard the fact that technical arrangements have to be made for a satellite link and an interpreter as preventing justice being done in this case, but I do not consider that it is the desirable way to proceed. 30. Weighing these various factors, I have no doubt at all as to how I should exercise my discretion. The only prejudice to the plaintiff lies in the possibility of losing a Russian enforcement remedy which has so far been of little apparent use to it. The prejudice to the first defendant is not only that he is deprived of the ability of coming to

this court, before whom he has been convened, to explain personally why what was done was done, but also that he will find it more difficult to give instructions in relation to matters which inevitably will crop up from time to time during the hearing and which may require an immediate decision. Most of all, however, it seems to me that the first defendant is legitimately entitled to say to this court that, having been convened before it, he should not be prevented from appearing before this court by the party which has convened him. The interests of justice include the avoidance of any perception that the Court will not act to prevent a party from seeking a judgment against a defendant who is himself prevented by that party from attending to defend himself. 31. It follows that even if the position is that the plaintiff will lose permanently the right to the travel ban on the first defendant in Russia, I consider that to be an appropriate price to pay for continuing the hearing in Jersey on the plaintiff's order of justice, given the pleadings as they now stand. I had considered a further adjournment of the directions hearing pending an application by the first defendant for an adjournment unless the plaintiff applied to lift the travel ban, but on balance I think it is better to make the position clear at this stage. Accordingly I direct the plaintiff that it should apply to the Russian marshal for the immediate discharge of the travel ban. It may protect itself by indicating to the Russian marshal that it only makes the application at the direction of the Royal Court of Jersey for the purposes of the forthcoming hearing, and furthermore that it intends to apply for the re-imposition of the travel ban thereafter. 32. If the plaintiff does not take these steps, within the next four days, giving notice to the first defendant of doing so, the hearing which has been listed for 8th April will be adjourned, and no revised hearing date will be set without a further hearing before me. If the Russian travel ban has at that stage been renewed on the plaintiff's application, it being due to expire towards the end of April this year, that will be a matter which requires explanation at that time. 33. By email dated 13th March, Advocate Purkis offered to Advocate Redgrave the following undertakings on behalf of the first defendant. They are:- (i) Not to travel outside of Russia whensoever or howsoever, other than to travel from Moscow to Jersey for the purposes of attending the trial of these proceedings by any reasonable route leaving no earlier than 48 hours before his arrival in Jersey, such arrival to be no earlier than 6 April, 2013; (ii) To give oral evidence on such dates and at such times as the court may require; (iii) To remain in Jersey during the trial until his departure under paragraph (iv) below; (iv) To travel back from Jersey to Moscow by any reasonable route, leaving Jersey not before he has completed his evidence and no later than 24 hours after the end of the trial (whenever that might be) and arriving in Moscow no later than 48 hours after such departure; (v) Thereafter to remain in Russia for 14 days (being a reasonable time for the plaintiff to reapply for and be granted a fresh travel restriction should it so decide); provided that this undertaking is given without prejudice to the first defendant's rights of appeal (if any) in Russia against the grant of any fresh travel restriction; and if the first defendant's Pending Appeal should succeed, these undertakings shall forthwith lapse and cease to bind him. The judgment now delivered is against the assumption that those undertakings have been given by the first defendant to this Court. 34. There is liberty to apply in relation to

paragraphs 32 and 33 above. Authorities Federal Republic of Brazil and Another-v-Durant International Corporation and Others

[2011] JRC 237 . Ithaca [Custodians] Limited-v-Perry Corporation [2003] 2 NZLR 216. Polanski-v-Condé Nast

[2005] UKHL10 [2005] 1 AER 945. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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