

JERSEY / JUDGMENT

Dalemont -v- Senatorov and Others

[2012] JRC 014 (12 January 2012)

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judgment

the deputy bailiff: 1. This is a judgment on the application by summons of the first defendant heard before the Court on the 5th and 6th January. The summons sought an order for variation of ex parte orders contained in the plaintiff's order of justice details of which are set out below. The Parties 2. The plaintiff is registered in Cyprus. The first defendant is a Russian national. The second defendant is a Jersey foundation. The third defendant is incorporated in the British Virgin Islands (B. V. I.). The fourth defendant is incorporated in Cyprus. The Claim 3. The plaintiff's claim is that it received an assignment of rights from a Russian private bank enabling it to sue the first defendant under personal guarantees which had been given to that bank. In May 2010 the plaintiff obtained two judgments in Russia against the first defendant in the aggregate sum of US\$ 44,342,706.71 plus 80,000 Russian rubles (the "Russian judgments"). The Russian judgments were unsuccessfully appealed by the first defendant in September and November 2010. The plaintiff asserts that it has received some assets from the first defendant but the sum outstanding under the judgments is US\$42,970,516.56. An application is pending seeking leave to appeal out of time against one of the judgments. I do not regard that as material today. 4. For the purposes of this judgment it is unnecessary to do more than quickly summarise the nature of the plaintiff's claims. That summary is that the plaintiff seeks orders enabling it to pierce the corporate veil of the second defendant so that the Russian judgments can be enforced against the assets of the second defendant, which include the shares in the fourth defendant and a whole raft of underlying companies incorporated in the B. V. I. and Cyprus which are alleged to hold valuable real estate assets. The alternative basis of claim is a Pauline action by which the plaintiff asserts that it can look through a series of transactions which it is said were made with the intention and purpose of defeating the plaintiff's ability to enforce the Russian judgments against the first defendant. The result if the plaintiff succeeds is that the shares in the B. V. I. companies would be returned to the ownership of the third defendant, which is asserted to hold those shares on trust absolutely for the first defendant. In either case, enforcement is sought against shares in one or more B. V. I. companies which, it is claimed, are in reality, beneficially owned by the first defendant, though ostensibly beneficially owned by the second defendant and where legal title is currently vested in the fourth defendant. 5. Before turning to the injunctions, it is appropriate to note that the substantive relief which the plaintiff claims in the order of justice is a judgment

against the first defendant for US\$44,342,706.71 plus 80,000 Russian rubles; a declaration that the assets of the second defendant are the property of the first defendant; or alternatively that the transactions to which I have referred are void and should be set aside such that the ownership of the shares by the fourth defendant in the subsidiary companies be transferred back to the third defendant. The relief claimed goes beyond that asserted by the first defendant as described in paragraph 11(iii) below.

The Injunctions 6. The order of justice contains interim injunctions which were obtained *ex parte* by the plaintiff. In broad summary, they restrain the first and second defendant from removing from the Island of Jersey, disposing of or dealing with or diminishing the value of any of their assets whether jointly or solely owned including the shares in the fourth defendant or any shares belonging to the fourth defendant. The injunctions also include a requirement for each defendant to make disclosure of his or its worldwide assets, whether solely or jointly owned, giving the value, location and details of all such assets. The *ex parte* order required the information to be confirmed by affidavit and delivered to the plaintiff's advocate within ten working days of service. By paragraph 7 of the orders obtained *ex parte*, the plaintiff was given leave to serve the first, third and fourth defendants out of the jurisdiction. The affidavit sworn in support of the order for service asserted a strong arguable case that the claim fell within Rule 7(b) and (c) of the Service of Process (Jersey) Rules 1994 (the "1994 Rules"). No challenge to the order for service out of the jurisdiction has been made although the defendants have asserted that they reserve all their rights in this respect.

Other Proceedings 7. The proceedings in Jersey are not the only proceedings which involve one or more of these parties in relation to essentially the same substratum of case. There are apparently some proceedings in the Russian courts as a result of which injunctions have been obtained by the plaintiff over the entities allegedly ultimately owned by the first defendant. There is an application pending, to be heard on 18 th January, which will determine whether those injunctions will be maintained. It appears to be common ground under Russian law that it is not permissible to enforce a judgment against assets other than those held in the legal name of the individual judgment debtor.

8. There are also proceedings current in Cyprus between the plaintiff and the first defendant as a result of which a Receiver has been appointed in Cyprus to manage the affairs of the Cyprus companies which are ultimately owned by the fourth defendant. The second, third and fourth defendants do not appear to be parties to the Cyprus proceedings, which seem to have been taken pursuant to the treaty signed between the Republic of Cyprus and the Union of the Soviet Socialist Republic on 14 th November, 1986, for legal assistance in civil and criminal matters. There are also proceedings before the courts of the B. V. I. between the plaintiff in these proceedings and the first and third defendants in these proceedings; to which B. V. I. process appears also to be joined a number of B. V. I. companies which are allegedly owned by the fourth defendant in the Jersey proceedings.

9. In addition to the injunctions which are under attack in Russia and those which are obtained in Jersey, injunctions have been obtained in the B. V. I. and in effect Cyprus by the appointment of an Interim Receiver and the contention from the defendants is that the worldwide assets have therefore been locked down and the plaintiff is protected in that respect while the injunctions continue, pending resolution as to whether it is actually entitled to claim against the underlying assets.

The Application 10. It is against that background that the application is made by the first defendant for amendment of the interim orders so as to limit his

obligation of disclosure of his assets to assets in Jersey and to discharge him from any obligation to provide any information relating to companies ultimately owned by the fourth defendant. The first defendant also seeks an order extending the time for disclosure to 13 th January. 11. The first defendant's submissions in support of the application to vary the disclosure order really amounted to these:- (i) A worldwide disclosure order ought not to have been made against a defendant who is not resident in the jurisdiction, where the application was not limited to seeking information about assets in the jurisdiction and where there was no worldwide Mareva injunction to be policed. (ii) It was contended that the Court did not have jurisdiction to make the orders against the first defendant, or alternatively if it did have that jurisdiction that it ought not to be exercised because the first defendant was not resident in Jersey, the matter was a Russian matter and the Jersey Court was therefore not the court of primary jurisdiction, and indeed that the jurisdiction of the Royal Court only arose, if it arose at all, because the second defendant was a Jersey foundation. (iii) The disclosure order against the first defendant was not necessary to enforce any judgment which might be obtained against the second or fourth defendants, because even if the plaintiff were to be successful all along the line, it could not enforce judgment against assets not belonging to the second defendant because the claim was a look through claim or alternatively a Pauline claim only. Jurisdiction 12. I take this issue first. The essence of Advocate Thompson's argument in relation to jurisdiction was that the Court only had a territorial jurisdiction over the first defendant if the matter - the making of disclosure - fell within the 1994 Rules. It was said that the Court could not make an order under Rule 7(b) because the injunction required an affidavit to be sworn, and, as the first defendant was resident in Russia, that was a requirement that the affidavit be sworn outside the jurisdiction. He relied upon Krohn GmbH-v-Varna Shipyard and Others

[1997] JLR 194 where an order obtained ex parte for disclosure was set aside by the defendant when challenged. 13. The facts of that case were that the plaintiff, an Austrian company, had entered into a ship building agreement with the defendant, expressed to be subject to English law. A dispute arose which was referred to arbitration and an award was made in favour of the plaintiff. An order made in a German court in favour of the plaintiff freezing the proceeds of sale appears to have been breached by the transfer of the monies to a Jersey bank account. The sole purpose of the proceedings in Jersey was for a Mareva injunction coupled with disclosure. 14. In my judgment this objection fails. The Varna Shipyard case concerned proceedings which were limited to freezing and disclosure orders in Jersey. The current proceedings are not so limited. Apart from the orders which are sought for look through and or setting aside as part of the Pauline action, the plaintiff claims judgment in Jersey against the first defendant for the amount due under the Russian judgments. In other words the plaintiff is suing on the Russian judgments for a judgment in Jersey. The substantive action is therefore quite different from the proceedings in the Varna Shipyard case. 15. The first defendant accepts for the time being that he is a necessary and proper party to a claim against the second defendant and indeed there is an obvious connection between the claim for judgment against the first defendant and the relief sought against the second defendant. The second defendant is

unquestionably resident in Jersey as a Jersey foundation and the Court's jurisdiction is therefore established. Given that for the time being at any rate the first defendant must be regarded as properly before the Royal Court, there seems to me to be no reason at all why the Court should not be able to exercise, in theory, the fullest jurisdiction against him. 16. It was contended that the Court cannot exercise jurisdiction, even if the first defendant is properly served, if the substance of the jurisdiction amounted to an extraterritorial jurisdiction against a non resident. The basis of that contention was that the English case of *Gidrxsline Shipping Co. Limited-v-Tantomar-Transportes Maritimos LDA*

- [1995] 1 WLR 299, properly construed, showed that there was a need for an English arbitration award to be converted into an English judgment for the Court to have jurisdiction to order, in an appropriate case, that the judgment debtor/arbitration respondent should disclose assets, outside as well as inside the jurisdiction. Hence it is said in these proceedings that there is no Jersey judgment or arbitral award and the Tantomar rationale does not apply. The Tantomar decision was quoted with approval by Bailhache, Bailiff in the case of *Apricus Investments and others-v-CIS Emerging Growth Limited*
- [2003] JRC 151 . The Tantomar decision received attention in more detail by Birt, Deputy Bailiff, in *Africa Edge SARL-v-Incat Equipment Rental Limited and Another*
- [2008] JRC 175 . In this latter case, the plaintiff had issued an order of justice against both defendants, seeking to enforce a Belgium judgment against them. Both defendants were Jersey residents. Birt, DB whose decision was affirmed on appeal noted that the court had adopted the principles set out in the judgment of Coleman J in the Tantomar case and that the Court's approach was different post judgment to pre judgment. At paragraph 8, Birt, DB quoted this passage in the Tantomar judgment which had been cited in the Apricus case as well:- "Where, by contrast, one has the position that a judgment has already been obtained or an award made and where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and, independently of the injunction, as a power in support of the execution of the judgment or award. It follows that whereas it may on the facts of the case in question be inappropriate to extend the Mareva injunction to assets outside the jurisdiction - and it is clear from the two authorities cited that such extensions are likely to be rarely justified - very different considerations may apply to disclosure orders in aid of execution. That being so, there is, in my judgment, a very firm jurisdictional basis for an order, made post-judgment or post-award, which includes both a Mareva injunction confined to assets within the jurisdiction and a disclosure order in respect of worldwide assets. In my judgment, quite different considerations apply in the case of a post-judgment or post-award disclosure order. In such cases it is just and convenient that the judgment or award creditor should normally have all the information he needs to execute the judgment or award anywhere in the world." And he then continued:- "In my judgment, this is particularly applicable where the judgment debtor is a resident of Jersey, in other words this is the home jurisdiction so far as the debtor is

concerned and it is therefore, in my judgment, very often the appropriate court to make a worldwide disclosure order because it has in personam jurisdiction over that defendant."

17. This last sentence illustrates that the Court is always concerned to ensure that it is able to enforce the orders which it makes. 18. After referring to the fact that, applying normal principles of private international law, one would expect to be able to enforce a foreign judgment in this jurisdiction without reinvestigation of the merits, Birt, DB continued:-

"Accordingly I do consider that this is a case where the sort of principles that I have just described in the *Gidrxsime* case are applicable. In my judgment, given the history of this matter, given the fact that the Belgian judgment has been outstanding so long but that payment has not been made, and given the inadequate disclosures initially made, it is proper to require the defendants to give disclosure of their worldwide assets, even in advance of any decision on whether a worldwide freezing order should be given. It seems to me that in a post judgment case it is right, as Coleman J said, that a creditor should normally have all the information he needs to execute the judgment or award anywhere in the world. The disclosure of the information will then enable the Plaintiff, if so advised, to institute proceedings where there are other assets." 19. The instant case is of course not a case of obtaining information from the first defendant for policing a worldwide injunction, but it is a post judgment case, as the first defendant has accepted. It appears to me that the reference to the *Tantomar* decision as being "particularly applicable" in paragraph 8 indicates that there are other circumstances where it might well be applicable as well, and the further reference to principle in paragraph 10 where one is dealing with a post judgment case, as is the current one, indicates that this is just such a case where a jurisdiction arises. 20. Furthermore, it is not as if the order for worldwide disclosure could be ignored by the first defendant with impunity. If the order were made and the first defendant refused to comply with it, one consequence might be to disbar the first defendant from defending the present proceedings. 21. In other words, it appears to me that the first defendant is properly before the Court and indeed there is no argument at present that he is not. In theory there is jurisdiction to make an order against a party properly before the Court and the only question then is a matter of discretion as to whether such order should be made. Exercise of Discretion 22. Advocate Thompson urged me that this was a matter where the greatest caution should be exercised. To make an order for worldwide disclosure of assets would be an exorbitant exercise of discretion. The dangers of conflict with Russian law were significant and the information was not needed to police the Jersey injunctions or to enforce substantive relief in Jersey. The order was proposed to be made in respect of a non Jersey resident, a non Jersey entity and non Jersey assets. Furthermore on the plaintiff's own case, the value of the assets in the subordinate companies of the fourth defendant was some US\$48 million and therefore within 10% of the value of the plaintiff's claim. 23. For the plaintiff, Advocate Baker contended that there was a strong case that the judgment debtor under the Russian judgments had tried to hide his assets through a Jersey foundation. He had chosen to structure his affairs using the foundation and underlying companies which had been described. No one had attacked the chronology of events which revealed transfers being

made shortly after the Russian judgment was obtained. Whilst residence in Jersey was one factor it was not a conclusive factor and in this case it should be given relatively little weight. He said the first defendant's position was essentially that the plaintiff could not have access to these assets. The plaintiff would be driven to running a series of novel arguments in Jersey and the first defendant would take every point that he could to defeat the claim. He accepted it might well be easier for the plaintiff if the defendant had other assets, and therefore justice and convenience required that worldwide disclosure should be made thus releasing the plaintiff from the obligation of continuing difficult and contested proceedings in novel areas of law, if in fact there were other assets. Advocate Baker contended that the Russian courts could not possibly be offended because the Royal Court of Jersey was exercising its powers to supplement enforcement of a judgment of the Russian court. It may be that under Russian law it was not possible to procure a worldwide disclosure order, but Jersey was not under the same inhibitions. Making an order of this kind would not offend the Russian court but would enforce and respect the Russian judgment. There was nothing exorbitant in his view about exercising a discretion so that Jersey as a jurisdiction was making plain that the use of the Island's financial services to hide assets so as to defeat judgment creditors was not to be encouraged. 24. I have found that the jurisdiction to make a worldwide disclosure order exists in the current circumstances where a non resident is properly before the Court and the question then arises as to whether it should be exercised. The objections which have been put up by the first defendant have led me to wonder whether, if the discretion were not to be exercised in this case, there were any circumstances when it might be exercised - because in my judgment:- (i) The so far uncontested chronology (and of course no findings are yet made) suggests a course of conduct that make it just that the plaintiff have the benefit of the disclosure order to enable it to enforce existing judgment debts; and (ii) the point made by Advocate Baker that in a post judgment case, the use of the Island's financial services to hide assets so as to defeat a judgment creditor is as a matter of policy something to be discouraged, is a strong one. The reality is that assets can be and are sometimes moved around the world with speed and secrecy, and the courts should endeavour to ensure judgment debtors cannot escape those judgments with impunity. 25. In exercising my discretion I have also had regard to comments of the Privy Council in the case of *A K Investment CJSC-v-Kyrgyz Mobil Tel Limited and Others*

[2011] 4 AER 1027. In that case, a challenge was made to service of process in the Isle of Man out of the jurisdiction given that, as the Privy Council held, there could be no doubt that Kyrgyzstan was the natural forum for the relevant claims under Kyrgyz law. Delivering the judgment of the Board, Lord Collins said this at paragraph 6:- "But the practical reality of the matter is that if the KFG companies are confined to their remedies against the appellants in Kyrgyzstan they will not in fact be able to pursue any of their claims there. Consequently, although this is in form a case about the appropriate forum, in reality it is a case in which, if the Isle of Man is not the appropriate forum, the KFG companies will have no practical remedy at all." 26. Thus the Privy Council in that case was concerned that if

the order for service out of the jurisdiction was set aside, there was a real risk that the KFG companies would not obtain substantial justice in Kyrgyzstan. Given that the agreed position between the plaintiff and the first defendant in the present proceedings appears to be that the Russian judgments cannot be enforced in Russia except against assets in the legal ownership of the first defendant, the consequence would be that the plaintiff could not obtain substantial justice against the first defendant notwithstanding the Russian judgments merely because the first defendant had

- if he had as the plaintiff claims - put his assets in the hands of a Jersey foundation. Although the present application is not a challenge to service out of the jurisdiction as it was in the A K Investment CJSC case, the underlying rationale for exercising a discretion not to disturb the order for service out applies equally in my judgment to the exercise of a discretion on grounds of justice and convenience to require the first defendant to make worldwide disclosure of his assets in Jersey, because otherwise there is a risk that the plaintiff will not get substantial justice elsewhere. 27. For all these reasons I rule that the Court has jurisdiction to make the order for worldwide disclosure of assets by a non resident defendant, in an appropriate case, and that in the present circumstances where one is dealing with a post judgment case it is right to exercise the discretion to maintain the order which was obtained by the plaintiff ex parte against the first defendant. 28. In the circumstances the first part of the first defendant's summons is dismissed. Authorities Service of Process (Jersey) Rules 1994. Krohn GmbH-v-Varna Shipyard and Others

[1997] JLR 194 . Gidrxslne Shipping Co. Limited-v-Tantomar-Transportes Maritimos LDA [1995] 1 WLR 299. Apricus Investments and others-v-CIS Emerging Growth Limited

[2003] JRC 151 . Africa Edge SARL-v-Incat Equipment Rental Limited and Another

[2008] JRC 175 . A K Investment CJSC-v-Kyrgyz Mobil Tel Limited and Others [2011] 4 AER 1027 .
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