

JERSEY / JUDGMENT

Ogden -v- Voice Commerce Group Limited [2015] JRC 041 (20 February 2015)

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judgment

the commissioner: 1. On 19 th January, 2015, I discharged an interim injunction that had been obtained by the plaintiff ("Mr Ogden") ex parte against the defendant ("Voice Commerce") and declined to re-impose it. 2. Voice Commerce is the holding company of the Voice Commerce Group which is a financial services group delivering a range of payment services. The business was founded by Mr Ogden, but in 2011, an investment fund now managed by Pollen Street Capital Limited, known as the Special Opportunities Fund, became the largest shareholder, currently holding approximately 81% of the issued share capital. 3. Following that investment, Mr Ogden continued as chief executive officer and as a minority shareholder (with others). He was replaced as chief executive officer in December 2012, but continued on as a director and chairman. He also provided consultancy services through his company, Ogden Research Limited. 4. According to the affidavit sworn by Michael James Peter England, a director of Voice Commerce, Mr Ogden's employment with Voice Commerce came to an end on 30 th April, 2013, (from which point ITIS payments to the Jersey tax authorities ceased) and his directorship and consultancy arrangements were terminated in early 2014. That led to Mr Ogden consulting Wiggin LLP over certain contractual claims he maintained against Voice Commerce, which included a claim that he was still employed by Voice Commerce. That in turn led to Mr Michael Leftley of Addleshaw Goddard, acting for Voice Commerce, writing to Mr Marcus Rowland of Wiggin LLP on 6 th June, 2014, in the following terms:- "I write further to our exchange of emails on the 23 May 2014. I hadn't appreciated prior to that exchange that your client seriously contended that he continues to be employed by my client. As you know my client's position is as set out in previous correspondence between our respective firms, in particular, my Firm's letter of the 19th March. My client's position is that your client ceased to be an employee of my client company on the 30th April 2013, however, given that your client seeks to maintain a fiction that he remains employed, I confirm on behalf of my client that, to the extent that an employment relationship exists between your client and my client whether under the terms of the service agreement dated 4 November 2011 or otherwise, it is terminated with immediate effect. Given that your client's employment has now come to an end even on his analysis could you please ensure that he amends his linked-in profile to reflect this." 5. Article 47.1 of the articles of association of Voice Commerce provides for the compulsory transfer of shares held by former employees either directly or indirectly

through corporate vehicles controlled by them at a price to be agreed, or failing agreement, to be fixed either by the auditors, or if they decline to act, by an experienced valuer nominated by the Institute for the time being of Chartered Accountants in England and Wales on the application of Voice Commerce. 6. By letter dated 19 th June, 2014, Voice Commerce gave Mr Ogden formal notice of the implementation of these compulsory transfer provisions in relation to his minority shareholding (held through corporate vehicles controlled by him) on the basis that he was a former employee. The price per share was not agreed with Mr Ogden within the fourteen days prescribed. The auditors declined to act and accordingly, Mr Iain Potter BSc ACA of Matson, Driscoll & Damico UK LLP was nominated by the Institute of Chartered Accountants in England and Wales to value the shares. Mr Ogden has actively engaged with the valuation process and has communicated extensively with Mr Potter. At no stage in this process (bar the issuing of these proceedings) did Mr Ogden dispute the fact that he was a former employee. 7. Not only that but in September 2014, Mr Ogden filed a claim for unfair dismissal with the Huntingdon Employment Tribunal. His claim form as signed and submitted by him confirmed that his employment ended on 6 th June, 2014, and claimed that he was unfairly dismissed and that he was owed notice pay, holiday pay, salary pay and other payments. In addition, he sought the return to his position within Voice Commerce. 8. Mr Ogden withdrew his claim before the Huntington Employment Tribunal by letter dated 9 th November, 2014, on the basis that he had been advised to pursue his various claims against Voice Commerce through the civil courts, rather than the Employment Tribunal. 9. Mr Potter provided his determination of the price of Mr Ogden's shares on 25 th November, 2014, and following the procedures set out in Article 47, they were offered to and accepted by an employee and by the trustee of Voice Commerce Group Limited Employment Benefit Trust II. Formal notice of the sale was given to Mr Ogden by letter dated 2 nd January, 2015, the articles providing that the sale must be completed within seven days. 10. Mr Ogden was out of the country at the time he received this notice with his son, who was participating in a skiing championship. From that location, and apparently being unable to get representation in the Island, he communicated directly with the Royal Court and submitted an Order of Justice and supporting affidavit. The Order of Justice is short and I can therefore set it out in full:- "1. The Claimant seeks an interim injunction that the defendant be restrained until further order of the Court from transferring or making any change to the share register of Voice Commerce Group in relation to shares owned by Ogden Research Limited and Intertrader Limited. 2. On 4 November 2011 Jonathan Nicholas Ogden (Nick Ogden) executed a Service Agreement and an Investment Agreement with the Voice Commerce Group, as an Executive employee of the company and a Board Director. These agreements are appended to the affidavit. 3. The Defendant now seeks to take back the share capital owned by Intertrader Limited and Ogden Research Limited, two Jersey companies owned and controlled by Nick Ogden as per the compulsory transfer notice appended to this order of justice and the accompanying affidavit. 4. The Plaintiff states that, contrary to the position of the Defendant the articles of association cannot be used to take back his share capital as he remains an employee of the company. 5. The Claimant undertakes to deliver a sworn affidavit in relation to this matter. 6. Claimant undertakes to comply with any Order that the Court may make as to damages if the Court later finds out that this Order has caused loss to the Defendant and decides that the Defendant should be compensated for that loss

by the Claimant. AND THE CLAIMANT CLAIMS 1. The interim injunction." 11. His affidavit in support (at that stage unsworn) complained that the value fixed for the sale of his shares was unreasonably low, and in particular, lower than an offer he had received from a private equity group. He said this in relation to his status as an employee:- "... 3. On a date, which has yet to be clarified by the company, I was removed from the Board of Directors of the Voice Commerce Group. However, at no stage has my employment or service agreement with the company been terminated, either verbally or in writing. As such and until formally resolved following the correct legal process, I therefore consider that I remain as an employee of the Voice Commerce Group, and, as indicated at tab 6, was considered to be a 'good' employee of the company by a fellow Director. ... 9. Further, with regards to the compulsory notice dated 2 January 2015, it the company cannot rely on the articles of association to force the sale of my shares under article 47. This is because I do not meet the conditions applicable under 47.1, due to still being an employee of the company. For the absolute avoidance of doubt I have never received any written notice or communication regarding the termination of my service agreement. As such, a compulsory transfer is not a mechanism available to the company for relieving me of my shares." 12. The only documents appended to his affidavit were a copy of the investment agreement by which the Special Opportunities Fund had become an investor in 2011, the service agreement dated 4 th November, 2011, the notices of the 19 th June, 2014, and 2 nd January, 2015, and an exchange over his proposed sale of his shares to this private equity group. In that exchange, Voice Commerce pointed out that any transfer to the private equity group had to be made in accordance with Article 45.1 of the articles of association, which required certain prior written consents. My understanding is that no such transfer process had been commenced by Mr Ogden. 13. The Order of Justice was signed and the interim injunction granted ex parte on 9 th January, 2015, and served upon Voice Commerce. Voice Commerce then issued a summons dated 14 th January, 2015, to have the interim injunction discharged. Application for discharge 14. The application to discharge the injunction was made on the ground that Mr Ogden was in breach of his duty of full and frank disclosure. That duty was summarised by Bingham J in *Siporex Trade SA v Comdel Commodities Limited*

[1986] 2 Lloyds Report at 437 (cited with approval in *Goldtron Ltd v Most Investments Limited*

[2002] JLR 424):- "The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the Court may discharge the injunction even if

after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure." 15. That duty applies to a litigant in person in the same way as it does to a professionally represented litigant, although as the Court said in *Syvret (as Executor of the Estate of D. M. Benest) v S D Benest and J Y Benest*

[2010] JLR Note 48 , it may view a breach of that duty, particularly an unwitting breach, by a litigant in person with more understanding than it would a breach by a professionally represented litigant. 16. Mr Mackereth submitted that the non-disclosure in this case was as serious as it could be. Voice Commerce was exercising its rights under the articles of association to have Mr Ogden's shares as a former employee transferred and the sole ground put forward by Mr Ogden for justifying an interim injunction preventing that transfer was that he was still an employee of Voice Commerce. That assertion could not stand in the face of the letter from Addleshaw Goddard of 6 th June, 2014, his claim for unfair dismissal as a former employee to the Huntingdon Employment Tribunal and his participation in the valuation process commenced by Voice Commerce under Article 47.1. None of that was disclosed to the Court. 17. In his second affidavit issued in response to Voice Commerce's application to discharge the interim injunctions and in his submissions to me, Mr Ogden argued that certain actions of Voice Commerce over recent months made him believe that notwithstanding the above he was still being held out by Voice Commerce as an employee. He relied on three matters in particular:- (i) In November 2014, he received a notice from the States of Jersey of a business licence being granted under the Control of Housing and Work (Jersey) Law , superseding a licence granted on 27 th July, 2010. The notification was addressed to Mr J N Ogden & Mrs J E Ogden, Voice Commerce Group Technology Limited, 1 Hastings Road, St Helier JE1 4HE, Mr Ogden's home address. Mr Ogden had no involvement in the application for this licence and had no idea why it had been issued to a company, which I presume to be within the Voice Commerce Group. In any event he found it of significance that this notice had been addressed to him. The only inference I could draw from this is that Mr and Mrs Ogden remained the contact address within the records of the relevant department. (ii) He had apparently been left as a signatory on a bank mandate for an account Voice Commerce had with Royal Bank of Scotland in Jersey, which the bank had closed in December 2014. (iii) He continued to receive postal communications from suppliers to Voice Commerce which he had to forward on on a weekly basis, and he said he remained as the main contact with one of its largest suppliers, Verizon. 18. Relying on these matters, Mr Ogden said that Voice Commerce was continuing to hold him out as an employee - indeed, at one point, he said, Voice Commerce was holding out "the fiction" that he was still an employee. Decision 19. I accepted that this was a serious case of non-disclosure. Indeed, it went further than that in that Mr Ogden made the positive assertion that he was an employee of Voice Commerce, an assertion that simply could not stand in the face of his own conduct, in particular in applying to the Huntingdon Employment Tribunal for unfair dismissal as a former employee. He conceded before me that at no stage after receiving the notice of 19 th June,

2014, that Voice Commerce was implementing the compulsory transfer of his shares pursuant to Article 47.1 of the articles of association on the basis that he was a former employee, had he or his advisers gone back to Voice Commerce denying that status. On the contrary, he had participated in the valuation process on the basis that he was a former employee. It was clear that it was the result of that process that he wanted to challenge. 20. In my view, the interim injunction would never have been granted if full disclosure had been made by Mr Ogden and it was therefore discharged. 21. In terms of the possible re-imposition of the interim injunction, Mr Ogden had set out in his second affidavit a number of complaints about the conduct of Voice Commerce and in his own submissions he informed me that he was bringing these proceedings so that:- (i) The Court could determine the precise date that his employment had terminated. He said he would not be arguing for any particular date, and would accept whatever date the Court found. (ii) The Court could decide what sums were due to him under the service agreement. (iii) The Court could appoint a truly independent valuer to value the shares for the benefit of all the minority shareholders. 22. Applying the principles laid down by the House of Lords in *American Cyanamid Co v Ethicon Limited*

[1975] AC 396 ,

[1975] 1 All ER 504 , (1975) 75 R. P. C. 513, 119 Sol Jo 136 as summarised by the Court in *Alpha Print Limited v Alphagraphics Printshops of the Future (United Kingdom) Limited and Caxton Connections Limited*

[1989] JLR 152 , I concluded that there was no serious issue to be tried in relation to Mr Ogden's employment. As to the other matters, no foundation had been laid to enable me to conclude that a serious issue arose to be tried; certainly, no issue arose in the face of the Order of Justice which was expressly limited to his status as an employee. In any event, the investment agreement, consultancy agreement and service agreement were all subject to English law and the parties had agreed to submit to the jurisdiction of the English courts. I therefore concluded there were no grounds for the re-imposition of the interim injunction. 23. As the only relief sought by the Order of Justice was an interim injunction and that had now been discharged and not re-imposed, there was no issue left before the Court and I therefore dismissed the Order of Justice with costs to be left over. Authorities *Siporex Trade SA v Comdel Commodities Limited* [1986] 2 Lloyd's Report at 437. *Goldtron Ltd v Most Investments Limited*

[2002] JLR 424 . *Syvret (as Executor of the Estate of D. M. Benest) v S D Benest and J Y Benest*

[2010] JLR Note 48 . *Control of Housing and Work (Jersey) Law 2012. American Cyanamid Co v Ethicon Limited*

[1975] AC 396 ,

[1975] 1 All ER 504 , (1975) 75 R. P. C. 513, 119 Sol Jo 136. *Alpha Print Limited v Alphagraphics Printshops of the Future (United Kingdom) Limited and Caxton Connections Limited*

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