

JERSEY / JUDGMENT

UCC v Bender 23-Oct-2006 [2006]

JRC 150A (23 October 2006)

[2006] JRC 150A

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judgment

the deputy bailiff: 1. This application arises out of a complicated case. UCC is bringing a claim against, amongst others, Mr Bender and Mr Koonmen in respect of something called the Amber Agreement, which was alleged to have been made between Mr Bender and Mr Silverman. It is complicated by the fact that there is also something known as the Settlement Agreement whereby Mr Bender and Mr Koonmen agreed to indemnify each other equally in respect of any claim brought by Mr Silverman, which is the claim in fact being brought by the Plaintiff as Mr Silverman's assignee. So clearly negotiations to settle this matter with one defendant only would be complicated. 2. What is said in this case by the applicant, Mr Koonmen, is that, during the course of some without prejudice negotiations between Mr Forsyth on behalf of UCC and Mr Bender, Mr Forsyth committed a contempt of Court and/or an attempt to pervert the course of justice by trying to persuade Mr Bender not to give evidence for Mr Koonmen. 3. I have been taken in some detail through the emails. These were negotiations aimed at settling the matter as between the Plaintiff and Mr Bender. They were conducted over a few days in August of this year directly between Mr Forsyth and Mr Koonmen, who are clearly both experienced businessmen. I do not propose to recite them again. Suffice it to say that the critical one from Mr Baker's point of view is an email of 16 th August from Mr Forsyth to Mr Bender, in which he indicates that the Plaintiff would be willing to settle for a payment of \$[x] million by Mr Bender, provided that it could continue the action against Mr Koonmen and some of the other defendants. The email contained this passage:- "Your exit (and Bart's too) can be achieved very simply by your payment of the \$[x]m I am seeking, together with an undertaking that you will take no further part in the proceedings. This would obviously mean your not in the future acting as a witness in any shape or form." It is that which Mr Baker relies upon. 4. It is, however, fair to point out that in the very same email, Mr Forsyth says:- "Rather than you and I now getting bogged down in the detailed mechanics of any settlement when we are broadly moving in the same direction, I think it would be sensible for Simon Young to discuss the mechanics of any settlement with your advisers on a without prejudice basis." 5. Mr Young is entitled to submit, as he does, that that is certainly quite a strong indication that Mr Forsyth did not think he was doing anything wrong, because he was happy to see the proposals, including the suggestion about Mr Bender not giving evidence, being put to Mr Young and the other lawyers. 6. The email in response on 18 th August from Mr Bender

said that he could not agree not to give evidence or testimony. That was sent on a Friday evening and

- that, of course, would be Costa Rican time no doubt - the following Monday Mr Forsyth replied saying that he fully understood why Mr Bender may have to give testimony or evidence, although pointing out the problem was Mr Bender's not Mr Forsyth's. He clearly accepted it because he referred to his original proposal about either giving evidence for UCC or staying neutral and then accepted that Mr Bender was now unable to do either of these. So it was a suggestion which, in effect, lasted over a weekend. 7. The discussions then continued, but thereafter they were entirely on the basis that nothing further was said about Mr Bender not giving evidence and, indeed, it was reconfirmed in an email of 23 rd August from Mr Forsyth to Mr Bender:- "If you choose to give evidence, that is up to you." 8. I fully accept Mr Baker's assertion that, of course, if a party to a case attempts to persuade a witness to the case not to give evidence for reward (or for other reasons such as threats), that is likely to be a contempt of court or an attempt to pervert the course of justice, or both; it does not have to be successful. Accordingly, Mr Young's submission that this was not successful is not determinative of the matter at all. 9. But I do think one has to have regard to the context in which this suggestion appeared. These were negotiations between the parties; they were rapidly moving negotiations, and it is clear the parties were attempting to deal with this very complicated matter of how to settle with Mr Bender without at the same time settling with Mr Koonmen, given the difficulties of the Settlement Agreement and the indemnity thereunder. 10. I asked Mr Baker during the course of his submission why, if he felt that this was a contempt of court or an attempt to pervert the course of justice he did not simply report the matter to the Attorney General himself on behalf of his client. His reply was I think quite correct, namely, that a referral from this Court would carry more weight. 11. I think it is for that reason that the Court must be careful in making referrals and should only do so where there is a clear and strong case such that the Court feels strongly about the matter and thinks that it should be looked into. I think that the Attorney General would pay great weight to the Court's views and, therefore, the Court must be selective in those matters which it refers. 12. I also have to bear in mind in this case that this is hard fought litigation over a very substantial quantity of money where allegations of contempt have been raised on both sides already and where we now have another one. One cannot exclude the possibility that this is all seen as being part of some important tactical battle. The Court must be careful not to lend itself to that sort of battle. 13. I think it is quite possible that the email of th August does technically amount to a contempt of court or an attempt to pervert the course of justice. Whether it does or not in the circumstances I cannot possibly say; it would require detailed investigation and consideration. 14. But my view is that this is not a sufficiently clear case where I should add the Court's imprimatur to the allegation. It remains wholly open to Mr Koonmen, through Mr Baker, to make a complaint to the Attorney General who can then look into it and if he decides, first, that there is the evidence and, secondly, that the public interest requires it, he can prosecute and that matter can proceed. I do not think that this is one of those cases where it is so clear that the Court

should add its weight to the allegation and, therefore, I do not propose to refer it to the Attorney General. But I make it clear that Mr Koonmen remains fully at liberty to bring the matter to the Attorney General's attention should he think fit. 15. In view of the fact that Mr Forsyth brought this matter on himself, I make no order as to costs. No Authorities Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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