

JERSEY / JUDGMENT

UCC v Bender and Ors 4-May-2006

[2006] JRC 068A (04 May 2006)

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judgment

the deputy bailiff: 1. On 27 th April I sat to hear an urgent application by the plaintiff for an injunction - (i) restraining the second defendant ("Mr Koonman") from proceeding with or seeking to enforce an application brought by him before the United States District Court Southern District of New York (the "District Court") pursuant to 28 USC s1782 of the US Federal Code to subpoena Mr and Mrs Silverman to produce certain documents and also to subpoena them to testify at the taking of a deposition on 4 th or 5 th May; and (ii) requiring Mr Koonmen immediately to apply to the District Court to discontinue his application and to set aside the orders of the District Court requiring Mr and Mrs Silverman to produce documents on or about 27 th April and to be deposed on or about 4 th th May. 2. I announced my decision to grant the injunction at the conclusion of the hearing and now give brief reasons for that decision. Factual background 3. The factual background appears from the judgments dated 16 th January 2006 (on whether Jersey was the appropriate forum for trial of the plaintiff's claim against, inter alia, Mr Bender and Mr Koonmen) and 10 th March 2006 (ruling that the freezing injunctions over the defendants' assets should be maintained). In essence, the plaintiff is the assignee of Mr Silverman and seeks to recover 25% of what are known as the Amber profits (being profits arising out of the management of the Amber funds). Mr Silverman's share is said to arise out of an oral agreement made in New York between Mr Silverman and the first defendant, Mr Bender. Appeals against both judgments are due to come before the Court of Appeal at its sitting in the week commencing 15 th May. 4. Mr Silverman resides in the State of New York as does his former wife, Mrs Silverman. They are divorced. On 9 th or 11 th April (the exact date is not clear) on the application of Mr Koonmen, the District Court made an order under s1782 that Mr and Mrs Silverman do produce a wide variety of documents by 27 th April and that they be deposed on 4 th and 5 th May. The documents required to be disclosed essentially covered any documents concerning the alleged agreement, the Amber fund, the claim in respect of the Amber fees, Mr Silverman's financial position and any documents from the divorce between Mr and Mrs Silverman (including their oral testimony) which concerned in any way Mr Silverman's claim in respect of the Amber fees. I was informed that Mr Silverman was served with this order on 20 th April and Mrs Silverman on 25 th April. As already stated, they had to produce the documents by 27 th April. It was in those circumstances that the plaintiff applied for an injunction as a matter of

urgency. The applicable principles 5. I was referred to one previous case in Jersey where this issue has arisen, namely *American Endeavour Fund Limited v Trueger*

[1997] JLR 18 . In that case the Royal Court, in a judgment delivered by Commissioner Le Cras, adopted the principles laid down by the House of Lords in the leading English case of *South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provinciën NV*

[1987] AC 24. I propose therefore to turn to that case. 6. In *South Carolina* , the defendant in proceedings before the English High Court sought to use s1782 to obtain discovery of documents from a third party in the US. The judge at first instance and the Court of Appeal granted an injunction to restrain this. In the Court of Appeal the position was expressed trenchantly by Griffiths LJ in the following passage

[1985] 2 All ER 1046 at 0152 - "Once the parties have chosen or accepted the court in which their dispute is to be tried they must abide by the procedure of that country and that court must be master of its own procedure. Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever jurisdiction his opponent may find a procedural advantage, it may impose intolerable burdens, and encourage the worst and most oppressive form of procedural forum shopping. We should set out face against any such situation developing. Severe dislocation to the timetable of the English litigation is a readily foreseeable consequence of unrestrained access to foreign procedural remedies. This is likely to cause hardship or inconvenience not only to the other party to that litigation but will also affect other litigants whose cases are listed on forecasts dependent on litigation being conducted in accordance with our own rules of procedure. As the judge said, the court will lose control of its own proceedings. Furthermore, one party might be able to gain a very unfair advantage in the English procedure if he were able to take the deposition of and cross-examine a witness whom he would never call on his own behalf at the trial, for example the employees or business associates of his opponent. I think counsel for the defendants recognised this when he said he would be content to accept the stay in respect of his application to take the depositions of the witnesses from *PGA and Arthur Campbell-Husted and Co*. I am therefore satisfied that as a matter of principle the court must have an inherent jurisdiction to make any necessary order to ensure that the litigation is conducted in accordance with its own procedures." 7. This approach was not upheld by the House of Lords. Although two of their lordships expressed reservations about the exact formulation by the majority of the circumstances in which injunctions can be granted generally, the House was unanimous in holding that an injunction should not be granted in that case. Lord Brandon, for the majority, held that the court should only restrain a party from prosecuting an application under s1782 where the party is acting in a manner which is unconscionable. At page 495 he said - "It is difficult, and probably unwise, to seek to define the expression 'unconscionable conduct' in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court." He went on to hold that the

defendant's conduct in starting the US proceedings with a view to using that jurisdiction's pre-trial procedure did not amount to unconscionable conduct which interfered with the English court's control of its own process because in civil proceedings the court did not, in general, exercise any control of the manner in which a party obtained the evidence needed to support his case and the defendants were doing no more than adhering to the principle that it was up to a party to obtain by his own means the evidence he needed to present his case provided such means were lawful in the country in which they were used. 8. I was referred to three subsequent cases where the principles in South Carolina have been applied. In *Bankers Trust International plc v P T Dharmala Sakti Sejahtera*

- [1996] CLC 252 *Mance J* was faced with an application by the defendant to the US District Court under s1782 for discovery of certain documents in the possession of the plaintiff, its parent and an associated company relating to its transactions with other clients. There was an allegation by the defendant that the plaintiff had been fraudulent. *Mance J* noted a number of differences between his case and that of South Carolina - (i) The application in South Carolina was against a third party whereas the application in his case was in respect of the plaintiff and its related companies. (ii) The application in the present case had been made after the trial had been heard in England and judgment reserved. In South Carolina the application had been made at an early stage in the proceedings. (iii) Many of the documents had been the subject of specific applications for discovery in the English proceedings which applications had been largely unsuccessful. In the circumstances the judge had little difficulty in concluding that the defendant's conduct was unconscionable and he granted an injunction restraining it from proceeding before the US District Court. 9. In *Omega Group Holdings Limited v Kozeny*

- [2002] CLC 132, the defendant obtained an order from the US District Court under s1782 authorising him to take depositions from the employees and former employees of the plaintiff and from investors in the scheme which was the subject of the litigation in England. The judge applied the principles of South Carolina although pointing out that that case had not been concerned with the provision of depositions, only with the discovery of documents. He posed the question of principle as to whether, given the intention on the part of the plaintiff to call the relevant witnesses to give oral evidence at the trial in England, it was unconscionable for the defendant to pursue the s1782 application in the US. He concluded that the answer to that question was 'yes', essentially on the ground that the witnesses would be subject to unwarranted double cross-examination and the trial would suffer from unnecessary duplication. There was also a risk that a witness, once deposed in the US, might be discouraged from attending the trial in England. The balance of convenience was in favour of an injunction. If the witnesses did give evidence in England, the defendant had nothing to gain from the US pre-trial depositions. If, on the other hand, the witnesses did not produce a witness statement in the English proceedings, the defendant could apply to lift the injunction. The risk of a last minute failure by a witness to appear did not outweigh the factors which led to the conclusion that pursuit of the s1782 application was unconscionable. 10. In *Nokia*

Corporation v Interdigital Technology Corporation

[2004] EWHC 2920 (Pat) , Pumfrey J refused to grant an injunction restraining the plaintiff from obtaining discovery and depositions from a third party in the US. He held that the information sought might be relevant to the English proceedings and that the application to the US court did not amount to an abuse of the English process and would not cause any unfair prejudice to the defendant in the English proceedings. 11. In *American Endeavour* (*supra*) the plaintiff obtained an order from the US District Court allowing it to take depositions from officers of a US bank which was not a party to the Jersey proceedings but which allegedly possessed information crucial to the plaintiff's case (which alleged fraud against the defendants). The Royal Court held that it was not unconscionable and refused to grant an injunction restraining the plaintiff. The Court took account of the fact that witnesses would have to give evidence twice but, unlike the judge in *Omega* (which judgment was of course not available at that time) did not feel that this was sufficient to render the taking of the depositions unconscionable on the facts of that case. 12. Both parties have put in written skeleton arguments and supplemented these orally. I do not propose to summarise their arguments. Suffice it to say that Mr Temple said that the principles in *South Carolina* should lead me to conclude that Mr Koonmen should be free to pursue any remedies available to him in New York. In particular, the documents and the depositions were required as a matter of urgency because, if they produced any useful material, Mr Koonmen would wish to use such material in the proceedings before the Court of Appeal on 15 th May with a view to showing that the Royal Court was wrong to conclude (in relation to both the forum issue and the injunction issue) that the plaintiff had shown that it had a good arguable case. Mr Young, on the other hand, submitted that the discovery aspect of the s1782 application was unnecessary because virtually all the documents would be discoverable in the Jersey proceedings in the ordinary way and that the taking of depositions was unreasonable for the reasons given by the judge in the *Omega* case. In particular, the plaintiff was bound to call Mr Silverman as it could not succeed without his evidence. Furthermore there was a real risk of the Jersey Court's timetable being disrupted and delayed if Mr Koonmen sought at the last moment to adduce new evidence in the hearing before the Court of Appeal.

Conclusion

13. This Court is not bound to follow *South Carolina* . Some might argue that there is much to be said for the approach of the Court of Appeal in that case. Given that, in the *American Endeavour* case, counsel appear to have conceded that the *South Carolina* guidelines should be followed, that case is not to be taken as authoritative on whether the law of Jersey should follow the law of England on this point. Neither counsel in this case submitted that the *South Carolina* principles were not applicable and accordingly I have proceeded on the basis that they are. Nevertheless, without wishing to give any indication as to the likely outcome (because the matter would have to be the subject of argument) it seems to me at least to be open in a future case for an argument to be made that the courts in Jersey should not follow

(either at all or in its entirety) the approach of the House of Lords in South Carolina. 14. However, I must consider whether Mr Koonmen's conduct in pursuing the application under s1782 at this stage and in this manner is unconscionable in the sense that it interferes with the due process of this Court. Whilst the other cases to which I have been referred are useful in extracting the principles and in seeing how they have been applied in other situations, the decision in this case is a matter of judicial discretion having regard to the particular facts of this case. 15. I have no hesitation in concluding that Mr Koomen's conduct in this case is unconscionable and that an injunction should be granted. My reasons for so concluding are essentially as follows - (i) The proceedings in Jersey started in May 2005. There have been various procedural disputes. In particular, there have been challenges as to service, injunctions and jurisdiction. The Royal Court has now ruled on these matters but it has taken some time. When giving leave to the defendants to appeal against my decision in relation to the injunctions, I made it clear that I was anxious that all matters should be dealt with at the sitting of the Court of Appeal on 15th May so that a decision could finally be taken on whether the plaintiff's claim could be pursued in Jersey and the other matters. (ii) The Court of Appeal is largely comprised of visiting judges and accordingly sits on pre-determined dates. The next sitting of the Court of Appeal after May is in July. I am advised that this sitting is already substantially full. Although it is possible to arrange for urgent sittings of the Court of Appeal between the pre-arranged sittings, this is not straightforward and is only done where the urgency of the case requires it. I think it unlikely that this particular case would be urgent enough to require a special sitting. (iii) In my judgment, there is an important public interest in ensuring, so far as practical, that the appeals are fully disposed of at the May sitting of the Court of Appeal. It would not reflect well on the administration of justice in Jersey if the appeal was put off (possibly until September) with the result that it would have taken well over a year from the commencement of the proceedings for the courts of this jurisdiction to decide the important preliminary issue of whether the case should be tried here. (iv) Mr Temple made it clear that the reason for pressing ahead with the discovery and depositions in New York at this stage was to see if anything emerged which might cast doubt on the strength of Mr Silverman's claim to a 25% share and, if it did, to apply to use that material before the Court of Appeal with a view to showing that the plaintiff did not have a good arguable case as the Royal Court had held. It seems to me inevitable that, if any material is discovered which Mr Koonmen wishes to use before the Court of Appeal, an affidavit will have to be prepared producing such material. This is bound to be done late in the day given the imminence of the Court of Appeal hearing. If the Court of Appeal were to grant leave for such further evidence to be adduced, the opportunity would presumably have to be given to the plaintiff to file evidence in reply. In my judgment, all this leads to the conclusion that, if the obtaining of discovery and depositions in New York proceeds, there is a substantial risk that the Court of Appeal hearing in May will have to be adjourned and it may well not be possible to hear such appeal until September. (v) In my judgment, this would undoubtedly be something which 'interferes with the due process of the court'. The courts of Jersey have set an appropriate timetable for the efficient dispatch of business and this would be interfered with because of Mr

Koonmen's decision to seek a remedy from the District Court. Mr Temple argued that Mr Koonmen should be allowed to obtain and use any material which might assist him before the Court of Appeal. The fact is that the hearing before the Court of Appeal is merely one on forum and it is inevitable that, at the stage when a forum issue is decided, a court does not have the full evidential picture. In my judgment, the importance of Mr Koonmen having as much information as possible before the Court of Appeal is greatly outweighed by the requirements of the proper and expeditious dispatch of the business of the Jersey courts. (vi) The foregoing reasons apply equally to discovery and to the taking of depositions. In relation to discovery I also consider it relevant that, unlike in South Carolina and American Endeavour, discovery is sought of material which, on the face of it, would appear to be equally discoverable under Jersey procedure. If the Court of Appeal allows the appeal on the forum issue, the proceedings in Jersey will come to an end and the matter will be academic. If, on the other hand, the Court of Appeal agrees that Jersey is the appropriate forum, the process of discovery will take place in the reasonably near future following close of pleadings. At that stage, Mr Koonmen is therefore likely to obtain all or most of the material which he seeks from the US District Court. It seems to me to be oppressive and an interference with the due process of this Court for a party to insist on accelerating discovery in this manner. It would of course be different if discovery was sought in the US from a third party to the proceedings (who could not be forced to make discovery in the Jersey proceedings) or if documents were sought which went beyond those discoverable in the Jersey proceedings. In those circumstances I can well understand that an application of the South Carolina principles would be likely to lead to the conclusion that such discovery should be allowed to proceed in the US. But I do not understand that to be the position here. I agree that Mr Silverman is not technically a party to the Jersey proceedings but the plaintiff is suing his assignee and the claim is founded on Mr Silverman's agreement with Mr Bender. It seems inevitable that all documents in the possession of Mr Silverman which are material to the issues in the case will be discoverable by the plaintiff. If, following discovery in Jersey, Mr Koonmen believes that there are further documents in the possession of Mr or Mrs Silverman which have not been discovered I would certainly be willing to give sympathetic consideration at that stage to a variation of the injunction so as to allow him to reactivate the proceedings in the District Court with a view to obtaining discovery of such additional material. (vii) As to the order of the District Court authorising the taking of depositions, I consider that this raises additional

issues.

Essentially for the reasons given in the Omega case I consider that in most cases it will be oppressive and unfair for a person who is to give evidence in Jersey to be subject to an additional cross-examination under the US deposition procedure, particularly as this is likely to occur at an early stage of the proceedings, often when the person to be deposed will not have had an opportunity of seeing all the documents which will have become available by the time of the trial in Jersey, nor will he have had the time to prepare which would be available to him in Jersey. The

structure of litigation in this jurisdiction is that a witness gives evidence once and he gives this at trial rather than at an earlier stage. I consider it to be an interference with the due process of the Court to force a witness additionally to give evidence about the case and be cross-examined about it at a much earlier stage by way of deposition. This can be seen in the present case. Mr Silverman's evidence will be absolutely critical to the plaintiff's case. He is bound to give evidence and Mr Koonmen will therefore have the opportunity of cross-examining him at that stage. It seems to me quite unfair to allow Mr Silverman to be cross-examined at an early stage before he has necessarily seen all the material documents and on only fourteen days' notice. (viii) I agree that the position is not quite so clear in relation to Mrs Silverman. Should it become clear at a subsequent stage that she is not giving evidence at trial I would give further consideration as to whether Mr Koonmen should be entitled to depose her on the basis that this would not be an interference with the due process of this Court. 16. For these reasons I granted the plaintiff's application for an injunction in the terms of the draft order submitted to me which, for the sake of completeness, I set out below - "(i). Pursuant to an application brought by the Second Defendant before the United States District Court Southern District of New York (the "District Court") pursuant to 28 USC s1782 of the US Federal Code (the "Application") by which it is sought against Linda R. Silverman of 530 Park Avenue, Apt. 13D, New York, N. Y.10021 and Joel S. Silverman of 721 Fifth Avenue, New York N. Y. (together the "Parties") to: (a) subpoena the Parties to produce and permit inspection of documents as set out in Exhibit A to the Subpoena issued pursuant to the Application and annexed hereto as Exhibit A on or about 27 April 2006; (b) subpoena the Parties to appear at the offices of Baach Robinson & Lewis, PLLC, 430 Park Avenue, 10 th Floor, New York N. Y. in order to testify at the taking of a deposition in the Application on or about 4 or 5 May 2006; the Second Defendant hereby be immediately restrained, until further order of this Court, by himself, his servants or agents or otherwise howsoever from proceeding with or seeking to enforce the Application or commencing or continuing any further application for any similar order. (ii) The Second Defendant hereby immediately apply to the District Court to discontinue the Application and to set aside its orders requiring the Parties (a) to produce documents on or about 27 April 2006 and (b) to be deposed on or about 4 and 5 May 2006." Authorities American Endeavour Fund Limited v Truger

[1997] JLR 18 . South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provinciën NV
[1987] AC 24. Bankers Trust International plc v P T Dharmala Sakti Sejahtera [1996] CLC
252. Omega Group Holdings Limited v Kozeny

[2002] CLC 132. Nokia Corporation v Interdigital Technology Corporation

[2004] EWHC 2920 (Pat) . Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers |
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