

Anne Marie Heinrichs v Pantrust International SA

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Clyde-Smith
Judgment Date:	07 February 2018
Neutral Citation:	[2018] JRC 32
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Text

[2018] JRC 32

Royal Court

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner sitting alone.

In the Matter of the Brazilian Trust

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984

Between
(1) Anne Marie Heinrichs
(2) Werner Corneluis Heinrichs
(3) G.B. Trustees Limited
Representors
and

(1) Pantrust International SA
(2) Richard George de Winton Wigley
(3) James Richard de Winton Wigley
Respondents

and

Jersey Home Loans Limited
Party Cited

Advocate S. M. Baker for the First and Second Representors.

Advocate E. B. Drummond for the Party-Cited.

Authorities

Jomair Leasing v Hourigan [\[2011\] JRC 042](#).

Gridrxsime Shipping Co-Limited v Tantomar – Transportes Maritimos LDA [1994] 1 WLR 299.

Bankers Trust v Shapira [\[1980\] 1 WLR 1274](#).

Banco Nacional v Empresa [\[2008\] 1 WLR 1936](#).

Practice Direction RC15/04 Freezing Order.

Royal Court Rules 2004.

Royal Court of Jersey 15/04 Freezing Order.

Trust — application by the First and Second Representors to re-amend the representation and for orders for disclosure.

THE COMMISSIONER:

- 1 In this case the first and second representors who I will refer to as the “representors” seek consent to amend the representation in case number 2015/362 to bring in Jersey Home Loans Limited, (“Jersey Home Loans”) as a party cited, for the purpose of obtaining orders for disclosure of information about Jersey based assets against which the representors may wish to enforce their judgment for costs against the third respondent, now taxed in the total sum of £275,763.12.
- 2 Jersey Home Loans questioned the use of this procedure when separate proceedings by way of Order of Justice against the third respondent, with it being cited as a party cited,

might have been more appropriate. Whether or not that is the case, no point has been taken on this by Jersey Home Loans. The only issue between representors and Jersey Home Loans is whether the representors should give Jersey Home Loans an undertaking in damages.

- 3 Advocate Baker referred to the case of *Jomair Leasing v Hourigan* [2011] JRC 042 where the court's jurisdiction to order disclosure to aid enforcement of a judgment is set out. At paragraph 9, the court referred to the judgment of Coleman J in *Gridrxsime Shipping Co-Limited v Tantomar – Transportes Maritimos LDA* [1994] 1 WLR 299 where he said:-

“...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” .

At the end of the judgment in *Jomair* the court appears to have only ordered the plaintiff to pay the reasonable costs of the parties cited in complying with the disclosure order

- 4 Undertakings in damages were given, said Advocate Baker, where freezing orders or other injunctions were imposed on a party cited. No injunctions were being sought here against Jersey Home Loans and it was wrong, he said, to place the burden of an undertaking on representors who the court should be assisting in the enforcement of their judgment. A practice of requiring undertakings from plaintiffs seeking to enforce judgments might he said, well deter them from attempting to do so. In any event he could not conceptualise any circumstances in which damage to Jersey Home Loans might arise. It was fully protected by the Order of the Court requiring disclosure.
- 5 Advocate Drummond pointed out that in *Jomair Leasing*, paragraph 4 of the judgment, makes it clear that an undertaking in damages would already have been given to the parties cited in that case and so the point was not in issue.
- 6 He referred to the judgment of Lord Denning in *Bankers Trust v Shapira* [1980] 1 WLR 1274, a case involving pre-judgment disclosure to enable the plaintiffs to trace funds, where he said at page 1282:

“So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff *must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents, once seen, must be used solely for the purpose of following and tracing the money; and not for any other purpose.*” (My emphasis)

- 7 Advocate Drummond pointed out that there were 3 elements therefore to this, firstly the giving of an undertaking in damages, secondly the payment of all and any expenses and thirdly the use to which the documents disclosed were put.

- 8 Advocate Drummond then referred to the English Court of Appeal judgment in the case of *Banco Nacional v Empresa* [2008] 1 WLR 1936 a case concerning post-judgment enforcement, where Tuckey LJ said this at paragraph 41:

“41. Standard forms containing the undertaking were attached to a Practice Direction first issued in 1994 and the wording has remained unchanged ever since. It now appears in the Practice Direction (Interim Injunctions) supplementing CPR Pt 25 and in the Admiralty & Commercial Courts Guide, 7th ed (2006), p 154. The practice has been to require the undertaking both before and after judgment. This can obviously be justified because the need to protect innocent third parties does not change when judgment is given. The judgment will of course make the judgment creditor's claim much more certain, but it is unlikely to affect any loss caused to third parties from the fact that the judgment debtor's assets have been frozen. The need for the undertaking does not therefore change and so far as that undertaking is concerned we can see no good reason for distinguishing between the situation before and after judgment.”

He then went on to say at paragraph 42:

“42. We accept that there is an element of uncertainty about the effect of any undertaking although the position of the applicant is protected to the extent that the third party must prove causation and satisfy the judge that it is right that he should be compensated. Such uncertainty as there is and the fact that an unscrupulous judgment debtor may be able to exploit the position does not in our judgment outweigh the need for the court to protect innocent third parties” .

- 9 The judgment debtors assets had been frozen in that case but Advocate Drummond emphasised the need of the court to protect innocent third parties. As he said, the purpose of the undertaking is to provide a legal mechanism by which a party cited can seek recompense if loss has been suffered without having to scratch around for a cause of action against the judgment creditor. Even with the mechanism in place the party cited must prove causation and that it is right that it be compensated.
- 10 Advocate Drummond said that in his experience respondents in third party disclosure orders were always given an undertaking in damages reflected, he said, in the English Law template produced by Practical Law for Norwich Pharmacal Orders. He makes the point that respondents to such orders are not thought sufficiently protected simply by the fact that they are acting out of compulsion of a court order; undertakings in damages are required in addition.

Decision

- 11 There is no specific authority on whether in a case of post-judgment enforcement innocent third parties who are ordered to provide information to the judgment creditor should be protected by both an order for costs and an undertaking in damages, but as a matter of logic I can see no difference in the court's approach to the position of innocent third parties pre or post-judgment.
- 12 It is not in doubt that in the exercise of its inherent jurisdiction the court may require an undertaking in damages as a condition precedent to order disclosure whether pre or post-judgment.
- 13 I agree with Advocate Baker that judgment creditors should have all the information they need to enforce their judgments, but that has to be weighed against the need for the court to protect innocent third parties; and in my view where there is an element of uncertainty it is the judgment creditor who should take the risk not the innocent third party.
- 14 Jersey Home Loans are not being asked simply to provide an account balance, but quoting from the order being sought.
- "2. A statement showing the full payment history of the loan*
- 3. Such other information at Jersey Home Loans has about the remitting banks in which the payments on a loan have been made, including:*
- a. the bank account number(s),*
- b. the name(s) on the account(s); and*
- c. all other identifying information thereof."*
- 15 No immediate burden is placed upon the representors by giving an undertaking. The undertaking simply provides a mechanism by which Jersey Home Loans can seek recompense for any loss it may suffer, but it must first prove causation and that it should be compensated.
- 16 The representors who know far more about this matter than Jersey Home Loans say there is no risk to Jersey Home Loans in complying with the Order, in which case the undertaking will never be called upon, but if there is a risk, then fairness in my view dictates that the representors should bear it, not Jersey Home Loans who are innocent third parties.
- 17 It is not possible for the court to say that there is no risk and is not reasonable to expect the assessment or the judgment creditor as to the risks involved to be accepted by Jersey Home Loans.
- 18 I am therefore going to allow the amendments to the representation and make the order

sought for disclosure, but conditional upon the representors giving this undertaking. ***“If the court later finds that this order has caused Jersey Home Loans loss and decides that Jersey Home Loans should be compensated for that loss by the first and second representors, the first and second representors will comply with any order this court may make as to damages.”***

- 19 Finally in relation to costs, the representors seek to restrict the costs of Jersey Home Loans to providing the information sought. That means that Jersey Home Loans would have to bear the costs of the advice it is sought in relation to the summons and the argument as to the provision of an undertaking in which it has been successful.
- 20 In my view there are two parts to this, firstly the costs of the summons itself and secondly the cost of complying with a disclosure order if made. As to the former I have not heard submissions but Jersey Home Loans should at least have its costs taxed on the standard basis having succeeded in the argument in relation to the undertaking. As to the latter Practice Direction RC15/04 Freezing Order provides for an undertaking by a plaintiff to pay ***“the reasonable costs”*** of the party cited incurred as a result of the order, which in my view should extend to all reasonable legal and administrative costs in complying.
- 21 The use of the expression “reasonable costs” pre-dates the current taxation regime under part 12 of the Royal Court Rules 2004 but in my view it equates to indemnity costs as defined in rule 12/5, namely ***“all costs except in so far as they are unreasonable in amount or have been unreasonably incurred with any doubt being resolved in favour of the receiving party.”***
- 22 I will therefore order, as I am in a position to do so, that the representors do pay firstly the legal costs of Jersey Home Loans of and incidental to the summons, on the standard basis leaving over any application there may be to pay those costs on the indemnity basis, and secondly the legal and administration costs of Jersey Home Loans in complying with the Order for disclosure to be assessed on the indemnity basis.