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Africa Edge S.a.r.l. v Incat Equipment Rental Ltd, Haden and Luba Freeport Ltd

Jurisdiction:	Jersey
Judge:	McNeill JA
Judgment Date:	27 November 2008
Neutral Citation:	[2008] JCA 205
Reported In:	[2008] JCA 205
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Text

[2008] JCA 205

COURT OF APPEAL

Before:

Dame Heather Steel, **President;**

James W. McNeill, **Esq., Q.C.; and**

Miss Clare Montgomery, **Q.C**.

Between
Africa Edge S.a.r.l.
Appellant/Plaintiff
and
Incat Equipment Rental Limited
First Respondents/First Defendant

and

John Keith Haden
Second Respondent/ Second Defendant

and

Luba Freeport Limited
Party Cited

Advocate S. J. Young **for the Appellant**.

Advocate J. Harvey-Hills **for the Respondents**.

Authorities

Apricus Investments and Others v CIS Emerging Growth Limited [2003] JRC 151.

Gidrxslme Shipping Co. Limited v. Tantomar-Transportes Maritimos LDA [1994] 4 All ER 507, [1995] 1 WLR 299.

United Capital Corporation Limited v. Bender and Others [2006] JLR 269.

Dicey & Morris (14th — 2006 — Edition) 14–021.

Showlag v Mansour [1991] JLR 367.

Nouvion v Freeman (1890) L.R. 15 App. Cas. 1.

Goldtron Limited v Most Investment Limited [2002] JLR 424.

Schnabel v Lui [2002] NSWSC 15.

Arbitration (Jersey) Law 1998.

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

In re Esteem Settlement [2003] JLR 188.

Appeal against the order of the Royal Court on 10th October, 2008.

McNeill JA
Introduction

1 This is an appeal, with leave from the Court below, against an order made by the Royal Court on 10 October 2008 whereby it was adjudged and ordered that injunctions in an

Order of Justice dated 7 July 2008 be widened and whereby it was further ordered that the Defendants give disclosure of their assets worldwide. The Appellants contend that the order of 10 October 2008 should be set aside.

Parties

2 The Plaintiff and Respondent (to whom I shall refer as “Africa Edge”) is a Luxembourg company carrying on business as a debt management fund. The First Applicant (hereinafter “Incat”) is a Jersey company. The Second Applicant (hereinafter “Mr. Haden”) is a director of Incat and a resident of Jersey. The Party Cited (hereinafter “Luba”) is a Jersey company against which Incat and others (together “the Incat Group”) have taken proceedings in Jersey (hereinafter “the Luba Proceedings”).

Salient History

3 In view of the limited nature of the issues brought before this court on appeal, it is possible to rehearse the salient history from that set out by the learned Deputy Bailiff below. In September 2002 Banque Belgolaise took judgment against the Appellants in the Court of First Instance of Brussels. There is no contention other than that the present Appellants appeared and submitted to the jurisdiction of that Court. The claim related to a loan to the First Appellant, guaranteed by the Second Appellant. In September 2002 judgment was given, of consent, against both Appellants for various sums. Some five years later, in about May 2007, Banque Belgolaise assigned benefit of the Belgian judgment to the present Respondent and substantial sums remain owing. In July 2008, after Africa Edge had obtained in Belgium a *saisie conservatoire* on the claims by Incat against Luba, Mr Haden commenced proceedings there for a ruling that, notwithstanding the Judgment sum, only US$1M was due, suspended pending determination of the claims against Luba.

4 In July 2008 Africa Edge issued an Order of Justice against both Defendants in this jurisdiction. This sought to enforce the Belgian judgment at common law. There are no Reciprocal Enforcement provisions applicable to Belgium. It also sought injunctions and disclosure orders limited to Jersey assets. In late July the Appellants swore affidavits bearing to disclose Jersey assets. That of Mr Haden disclosed a car, a certain shareholding and a bank current account containing no monies. Shortly thereafter Mr Haden swore a further affidavit seeking to explain that a modest credit balance on the current account had not been disclosed because he considered the monies already committed. In or about late September, Africa Edge had become aware that, in the Luba Proceedings, Mr Haden had claimed to be the beneficial owner of the Incat Group of companies. Mr Haden then swore another affidavit indicating, by implication, that he was a member of the class of discretionary beneficiaries of two, fully discretionary Guernsey trusts, the trustees of which held the shares of the Group's ultimate holding company.

The Proceedings Below

5 At the hearing below, the present Respondent had applied for amendment of the original Order of Justice by including a worldwide freezing order and worldwide disclosure requirements. The application was made *ex parte* but on notice. The learned Deputy Bailiff was not convinced that the circumstances before him justified the grant of a worldwide injunction on an *ex parte* basis.

6 On the other hand, in the whole circumstances, he considered that, in order to protect the position in Jersey, it was reasonable and proportionate to extend the injunction so as to ensure firstly that Mr. Haden did not dispose of any of his interest in the trusts and, secondly, that full information about the trusts was forthcoming. In the view of the learned Deputy Bailiff, the disclosure made by the Second Appellant, in particular in response to the original disclosure order, was less than perfect. In the view of the Deputy Bailiff, it was clear that there were no funds in Jersey which could provide living and legal expenses for the Second Appellant; but it was clear that there were funds to support him, perhaps in the Incat Group or perhaps elsewhere. He therefore granted an injunction and order to address both of those aspects.

7 In considering that part of the application which sought worldwide disclosure, the learned Deputy Bailiff was referred to a number of cases including *Apricus Investments and Others v CIS Emerging Growth Limited* [2003] JRC 151 and *Gidrxslme Shipping Co. Limited v. Tantomar-Transportes Maritimos LDA* [1994] 4 All ER 507, [1995] 1 WLR 299.

8 Having referred to the judgment of Colman J in *Gidrxslme Shipping*, at page 519, indicating the different position which had to be addressed when judgment had already been obtained as opposed to that in applications made before judgment, the learned Deputy Bailiff said this:-

> ***"9 I consider that this case is akin to a post-judgment or post-award case.*** It is true of course that there is no judgment in Jersey as yet, but there was a judgment in Belgium as long ago as 2002, to which both defendants submitted. It is therefore a case where, applying normal principles of private international law, one would expect that judgment to be capable of enforcement in this jurisdiction without reinvestigation of the merits. I am told that some application has been made in Belgium to set aside or challenge the judgment, but for the moment it seems to me the Court must proceed on the basis there is a valid judgment .
>
> ***10. Accordingly I do consider that this is a case where the sort of principles that I have just described in the Gidrxslme case are applicable. In my judgement, given the history of this matter, given the fact that the Belgium 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 Colman 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."

The Grounds of Appeal

9 For the Appellants, Advocate Young accepted that, the order below being discretionary, an appellate court can interfere only:–

This is the approach accepted in this jurisdiction on such matters: see *United Capital Corporation Limited v. Bender and Others* [2006] JLR 269, 276 (Beloff JA).

(i) where the judge at first instance has misdirected himself with regard to the principles in accordance with which his discretion has to be exercised;

(ii) where he has taken into account matters which he ought not to have done, or has failed to take into account matters which he ought to have done; or

(iii) where the decision below is plainly wrong.

10 In his first ground of appeal, Advocate Young suggested that there was both a taking into consideration of irrelevant matters and a failure to take into consideration relevant matters. As to the first of these, he submitted that the learned Deputy Bailiff had failed to take into consideration the challenge to the Belgian Judgment currently ongoing before the Court of First Instance in Brussels.

11 Plainly this is not so. In paragraph 9 the learned Deputy Bailiff specifically referred to the ongoing challenge to the judgment in Belgium and continued "but for the moment it seems to me that the Court must proceed on the basis there is a valid judgment." The learned Deputy Bailiff accordingly took that matter into account, reasoned with it and reached a view as to how to proceed in light of it. He may not have given the matter as much weight as the Appellants would have liked, but it cannot be said that he did not take it into account. Further, on the position as I understand it, set out at paragraph 3 above, the judgment itself, which was of consent, is not under challenge. Rather, the Appellants have raised issues in Belgium as to the amounts presently outstanding.

12 As to the taking into account of irrelevant considerations, it was submitted that the exercise of discretion was flawed in that the learned Deputy Bailiff appeared to take into consideration allegations by Africa Edge that Mr. Haden had failed to make proper disclosure when ordered to do so. Advocate Young sought to emphasise that Mr. Haden had given full disclosure and explained certain misunderstandings with regard to the disclosure earlier given.

13 Again, this submission is not well founded. It was not being suggested that a consideration of this nature (failure to make proper disclosure) could not, in principle, be a relevant consideration for a court in determining whether to make further disclosure orders. What the learned Deputy Bailiff said, in paragraph 4, was that, in the circumstances, Mr. Haden's response to the original disclosure order was " *less than perfect*". Before this court, it was accepted, as it had to be, that Mr. Haden had made unduly brief – and, in certain respects – erroneous disclosures, although he had sought to explain how those had occurred through misunderstanding or a desire for later clarification.

14 Such misunderstandings or later clarifications are exactly the sort of matters which set warning bells ringing where there has been an order for disclosure. In my view it cannot be said that to take into consideration such matters is to take into consideration matters which are irrelevant.

15 In his second ground of appeal, Advocate Young suggested that the decision was plainly wrong. In oral argument this appeared as his principal complaint. The Deputy Bailiff had taken the view that it was proper, on an *ex parte* basis, to widen the then current injunctions and it was accepted that the Deputy Bailiff had correctly identified the principles applicable, namely those set out in *Apricus Investments and Others v CIS Emerging Growth Limited* [2003] JRC 151. However it was contended that the learned Deputy Bailiff was plainly wrong in applying those principles appropriate to a post-judgment or post-award case to a case where no such judgment or award had been taken in Jersey.

16 In Advocate Young's submissions, the facts that (a) the Jersey proceedings were in their infancy and would be defended and (b) that the current Belgian proceedings might result in the 2002 apparent judgment debt being altered significantly, indicated that Africa Edge did not have a final and conclusive judgment upon which to seek their orders and that the granting of such orders as were made below was done at a wholly inappropriate time. He referred us to Dicey & Morris (14th — 2006 — Edition) 14–021; *Showlag v Mansour* [1991] JLR 367; and *Nouvion v Freeman* (1890) L.R. 15 App. Cas. 1.

17 In response, Advocate Harvey-Hills addressed us also by particular reference to Dicey & Morris 14; *Showlag v Mansour*; and *Nouvion v Freeman*. In addition he referred us to *Goldtron Limited v Most Investment Limited* [2002] JLR 424 and to *Schnabel v Lui* [2002] NSWSC 15. All authorities, together with the Arbitration (Jersey) Law 1998 and the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, pointed in the same policy direction, namely that, leaving aside occasions where a determination was vitiated, even a right of appeal did not prevent the decision of the lower court, where *res judicata*, from being a final and conclusive judgment. The Belgian judgment was final and conclusive, even although there were proceedings being commenced which might seek to identify that not the whole amount of the 2002 judgment amount was still outstanding. He accepted that some US$2M or thereby had to be taken into account, but not that there was any clear case that only US$1M was currently outstanding. The orders were reasonable and proportionate, particularly as regards trust related issues: see *In re Esteem Settlement* [2003] JLR 188, at

paragraphs 96 and 111.

18 The test of " *plainly wrong*" is a high one and, in my opinion, it is not made out here. The learned Deputy Bailiff made it perfectly clear in paragraph 8 of his judgment that he was aware of the differences to be addressed as between post-judgment and pre-judgment situations. In considering this matter he specifically had in mind the views of Colman J set out at pages 519 and 521 of *Gidrxslme Shipping*.

19 Having properly identified the principles and the distinctions the learned Deputy Bailiff noted that Jersey was the home jurisdiction so far as the debtor was concerned and, as often, the appropriate court to make a worldwide disclosure order because it had jurisdiction over the person of that defendant.

20 Then, in the passage quoted in paragraph 8 above, the learned Deputy Bailiff again makes it perfectly clear that in his view, although there was, as yet, no judgment in Jersey, the judgment in Belgium was such as to be expected to be capable of enforcement in this jurisdiction without reinvestigation of merits. He concluded by taking into account the current application in Belgium (to which he referred as an application to set aside or challenge), with which I have already dealt.

21 It has to be remembered that the making of such orders are matters of discretion and that the ground of appeal here is that the exercise was " *plainly wrong*". The present proceedings in Belgium do not take the 2002 judgment out of the category of final and conclusive. The present Jersey proceedings clearly are not. The issue, accordingly, is whether it was " *plainly wrong*" to proceed upon the basis that the present circumstances were sufficiently akin to a post-judgment or post-award case to apply the principles undoubtedly applicable to such situations. For my own part, I consider that the learned Deputy Bailiff's views were expressed with reason, logic and sound legal analysis. In my opinion it cannot be said that his determination, applying normal principles of private international law, was plainly wrong. It seems to me that, having regard to the nature of the application before the learned Deputy Bailiff, it was well within the range of options open to him to proceed upon the basis that the protective mechanisms potentially available to Africa Edge should, in these particular circumstances, include those available to someone who held a final and conclusive judgment.

22 For all these reasons I would refuse the appeal.