

Borelli v HSBC (CI) Ltd

Jurisdiction:	Jersey
Judge:	Vaughan J. A., Bailiff, Vos J.A.
Judgment Date:	15 November 2007
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Text

[2007] JCA 214

COURT OF APPEAL

Before:

Sir Philip Bailhache, **Kt.** Bailiff, **President**; D. A. J. Vaughan, **Esq.**, C.B.E., **Q.C.**, **and**; G. C. Vos, **Esq.**, **Q.C.**

In the Matter of Kong Wah Holdings Limited

(In Compulsory Liquidation)

And in the Matter of Akai Holdings Limited

(In Compulsory Liquidation)

Between
Cosimo Borrelli
Representor

and
HSBC (CI) Limited
Respondent

Advocate R. J. Michel for the Appellant.

Advocate A. D. Robinson for the Respondent.

Authorities

[*Re Gibson's Settlement Trusts* \[1981\] 1 All ER 233](#)

[*Official Solicitor v Clore* \[1984\] JJ 81](#)

[*Wright v Bennett* \[1948\] 1 KB 601](#)

[*Watkins v Egglshaw* \[2002\] JLR 1](#)

[*Aiden Shipping Co v Interbulk Ltd* \[1986\] 2 All ER 409](#)

[*Hughes v Hannover-Rucksversicherungs AG* \[1997\] BCC 921](#)

Appeal by the Appellant pursuant to the provisions of Article 13(d)(ii) of the Court of Appeal (Jersey) Law 1961, from the Order made by the Royal Court on 15th June, 2007.

Vaughan J. A.

- 1 By order dated 6th June, 2007, the Royal Court, pursuant to a Letter of Request dated 19th March 2007 received from the High Court of Hong Kong and in exercise of its inherent jurisdiction, had recognised the appointment of Mr Cosimo Borrelli as liquidator in relation to the winding up of a number of Hong Kong and British Virgin Island companies and ordered HSBC (CI) Limited (“the Respondent” or “HSBC (CI)”), a company incorporated in and carrying on business in Jersey, to provide information and documentation in relation to those companies. The order was effectively agreed by the parties before the hearing but the outstanding issue which was not agreed related to the costs of the Respondent in relation to the legal fees it incurred in Jersey and Hong Kong relating to the application to be made by the liquidators in Hong Kong.
- 2 With regard to those legal costs, the Royal Court, applying Article 2(1) of the Civil Proceedings (Jersey) Law 1956, held that those costs were allowable being incidental to the proceedings in the Royal Court. In its reasoned decision the Royal Court ordered that:

“the reasonable costs and expenses of the Respondent of and incidental to the order made on the 6th of June 2007 extends to the obtaining of legal

advice both in Jersey and Hong Kong in relation to the Letter of Request and the Section 221 summons.”

- 3 On this appeal the liquidators contend that such order should have excluded the costs of obtaining legal advice in Jersey and in Hong Kong in relation to the application under Section 221 of the Hong Kong Companies Ordinance and the Letter of Request. It is contended that such costs are not, as a matter of law, incidental to the proceedings in the Royal Court. As this is a matter of law it is conceded that leave to appeal is not required.
- 4 Before considering the legal issues raised on this appeal it is necessary to set out in some detail the matters leading up to the application to the Royal Court.
- 5 The companies in question, Akai Holdings Limited and Kong Wah Holdings Limited and other related companies were wound up. The windings-up commenced in Hong Kong on 13th January 2000 and in Bermuda on 28th August 2000. On 8th November 2004 and 7th June 2005 the liquidators wrote to HSBC (CI) informing it that the enquiry into the affairs of the companies had been hampered by woefully inadequate and incomplete accounting records, informing it that the liquidators' enquiries included matters relating to 1996, 1997 and 1998 and that they might require access to some of the files and records held by HSBC (CI) relating to this period, and to require them not to destroy any relevant files and to take positive steps to retain such files for the future. HSBC (CI) for its part invited the liquidator to obtain a Court order. By a letter dated 10th June 2005 Crills, Advocates, acting for the liquidators, wrote to HSBC (CI) informing them that the Hong Kong Courts were in the process of issuing Letters of Request to the Jersey Royal Court.
- 6 Nothing seems to have happened until mid 2006. On 6th July 2006 Walkers (which had merged with Crills) informed HSBC (CI) that the application for a Letter of Request would be made in the next four/six weeks. It informed HSBC (CI) that the application would have to be made *inter partes* and that documentation would have to be served on HSBC (CI) to allow it to appear and address the Court if it so wished. Bedell Cristin was instructed to act on behalf of HSBC (CI) and informed Walkers of their interest on 19th July 2006.
- 7 The relevant order of the Hong Kong High Court was made on 24th November 2006 and was served on HSBC (CI) on 6th December 2006, together with the summons returnable on 20th December 2006. The relevant application included an application pursuant to Section 221, which required the relevant directors and officers of HSBC (CI) to attend and to produce documentation to the Hong Kong Court and to be interrogated. In its letter to Bedell Cristin, the Hong Kong solicitors for the liquidators stated that the order under Section 221 of the Hong Kong Companies Ordinance was required as an originating order so that the Letter of Request could then be issued to enforce the disclosure overseas and that the Section 221 order underpinned the Letter of Request and that the Letter of Request would seek the same disclosure as the Section 221 application. It was stated that they were required procedurally first to obtain the Section 221 Order so that the Hong Kong Court

could then seek the Royal Court's assistance by way of a Letter of Request and that this was their standard practice.

- 8 Freshfields Bruckhaus Deringer ("Freshfields") in Hong Kong were instructed to act on behalf of HSBC (CI) and by letter dated 18th December 2006 they wrote to the Hong Kong solicitors for the liquidators informing them that HSBC (CI) did not intend to submit to the jurisdiction of the Hong Kong Court by responding to the Order and the summons by being represented at the hearing of the summons on 20th December 2006 or otherwise. By letter dated 4th January 2007 Freshfields wrote to the liquidator's Hong Kong solicitors, seeking (*inter alia*) clarification of the contention that the liquidators were required to obtain the Section 221 order and that this was their standard practice. A letter in similar terms, referring to an earlier telephone conversation in December, was written by Bedell Cristin to Walkers on 8th January 2007.
- 9 Walkers by letter dated 16th January 2007 were unable to provide Bedell Cristin with further information as to the claim that there was a need to obtain a Section 221 order. Nor did the liquidators' Hong Kong solicitors do so in their reply to Freshfields dated 17th January 2007, or their letter dated 18th January 2007, to Bedell Cristin.
- 10 On 19th January 2007 Bedell Cristin wrote to the liquidators' Hong Kong solicitors stating that they had been advised by Freshfields that a Section 221 order was unnecessary, and protesting that such an application had made the whole matter unnecessarily complicated and expensive and saying that there could have been no surprise that HSBC (CI) had sought legal advice in Jersey and Hong Kong in relation to this application and that there could be no basis for any refusal to pay HSBC (CI)'s costs in obtaining such advice. On 30th January 2007 Freshfields informed the liquidators' Hong Kong solicitors that there had been no reason advanced for seeking the Section 221 order and again that it was completely unnecessary. On 31st January 2007 Bedell Cristin confirmed that HSBC (CI) would not be attending or making an appearance before the Hong Kong Court.
- 11 At no time, despite many requests, have the liquidators or their legal advisers ever provided any further justification for their contention that a Section 221 order was necessary as a precursor to a Letter of Request. For their part Bedell Cristin have produced an affirmation by Peter Yuen, partner in Freshfields Hong Kong, that such an application was wholly unnecessary and certainly not standard practice.
- 12 It is against that background that the issue of costs can be considered.
- 13 Article 2(1) of the Civil Proceedings (Jersey) Law 1956 provides as follows:

"Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all

proceedings in the Royal Court shall be in the discretion of the Court and the Court shall have full power to determine by whom and to what extent the costs are to be paid.”

- 14 The Royal Court in considering the application of Article 2 to the fact of this matter declared that:

“In my view the Court’s powers in relation to these proceedings are wide enough to extend to costs incurred by the Respondent in relation to the Section 221 summons and that justice here requires that they should be paid by the Liquidator for these reasons:

(i) The Representor knew at an early stage that the Respondent was incorporated and carrying on business in Jersey and required an order from the Courts of Jersey before releasing the information it held .

(ii) The purpose of the application to the Court in Hong Kong was to obtain a Letter of Request to the Courts in Jersey so that such orders could be made by the Court in Jersey .

(iii) The Representor gave no notice to the Respondent that it intended at the same time as applying for a Letter of Request to seek a direct order against the Respondent .

(iv) From the evidence before this Court there was no requirement or justification under Hong Kong Law for a Section 221 summons to be issued. A direct order under that section was in any event unenforceable by the Courts in Hong Kong. Indeed it was because a direct order was unenforceable that a Letter of Request was being sought .

(v) It was reasonable for the Respondent to seek advice on the section 221 summons and to follow that advice by not appearing in the Hong Kong proceedings. Having done so it was not able to seek its costs from the Hong Kong Court.”

- 15 It was in the light of these matters that the Royal Court ordered that the reasonable costs and expenses of the Respondent incidental to the order made on the 6th June 2007 extends to the costs of obtaining legal advice both in Jersey and Hong Kong in relation to the Letter of Request and the Section 221 summons.
- 16 Advocate Michel, who appeared for the liquidator, contended that as a matter of law the order of the Royal Court could not be upheld because the costs of obtaining such legal advice in Jersey and Hong Kong were not “*incidental*” to the proceedings in the Royal Court even though he accepted that the application to be made in Hong Kong Courts upon which the legal advice was sought in Jersey and in Hong Kong was a springboard for the proceedings in the Royal Court. He contended that those costs could only be considered to

be the costs of and incidental to the Hong Kong proceedings, and no order had been made in Hong Kong. In making that contention Advocate Michel relied strongly upon the decision in [Re Gibson's Settlement Trusts \[1981\] 1 All ER 233](#) which was in turn relied upon in this jurisdiction by the Court of Appeal in *Official Solicitor v Clore* [\[1984\] JJ 81](#). In *Gibson*, Sir Robert Megarry, Vice-Chancellor, in a lengthy judgment ruled in particular that the words of “*of and incidental to*” extended rather than restricted the ambit of the cost order, and that proceedings in which the costs are alleged to be incidental are to be clearly identified, in particular (at para 238j – 239a):

“I think that from the setting in which this provision occurs, it is plain enough that the words “costs reasonably incurred” refer to “the costs of and incidental to” the proceedings in question. However reasonably incurred, costs which are neither costs “of” the proceedings nor costs “incidental to” them cannot be awarded under the order for costs. It is thus important to **identify the proceedings**. This involves not only taking the correct stage of the proceedings, as is shown by *Wright v Bennett*, **but also determining the nature of those proceedings**. Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate. In this case, the proceedings consisted of the application by the trustees for the directions of the Court that I have set out.”

- 17 Advocate Michel does not contend that the legal advice is not incidental to the Jersey proceedings because the advice related to matters exterior to Jersey but because he contends that such costs related to the Hong Kong proceedings and not the Jersey proceedings.
- 18 Advocate Robinson, who appeared for the Respondent, also relies upon *Gibson*. In particular he points to the fact that in that case it was made clear that costs can be incidental even though they are anterior to the commencement of the relevant proceedings. Further he relied on the cases referred to in *Gibson* which make it clear that the incidental costs include not only costs which directly and necessarily arise out of the exercise of powers, but also costs which were incurred “*casually [sic] or indirectly*” in the course of the proceedings and also on the cases which show that costs are in “*subordinate conjunction*” with the proceedings in question. Further he relied upon the statement in *Gibson* that “*if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been “reasonably incurred”.*” (page 240d – e)
- 19 Advocate Robinson further relies on the wide discretion given by the words such as “costs of and incidental to” as shown by cases such as *Aiden Shipping Co v Interbulk Ltd* [\[1986\] 2 All ER 409](#), and as applied in Jersey by *Watkins v Egglisshaw* [\[2002\] JLR 1](#). Those cases show that the over-riding objective is to do justice.

- 20 I have no doubt that the Royal Court was correct in finding that the costs of obtaining the advice in relation to the anticipated application to be made by the Liquidator under Section 221 were costs incidental to the proceedings in the Royal Court, and that the reasons advanced by the Royal Court were correct. In so far as the Liquidator might have contended that such an order under Section 221 was required in the Hong Kong Court and that this was “standard procedure”, not only has he failed to advance any argument in support of such a contention, other than the mere repetition of that contention, notwithstanding repeated requests to do so made on behalf of the Respondent, but the only evidence before the Royal Court and before us is that of Peter Yuen, who says exactly the opposite. Indeed it is not easy to see how such an application pursuant to Section 221 could possibly be a necessary prelude to a Letter of Request and in any event, as the Royal Court pointed out, it would be unenforceable unless HSBC (CI) submitted to the jurisdiction in Hong Kong and any order was also enforceable in Jersey.
- 21 In the light of the fact that the liquidator had made it clear to HSBC (CI) that the Hong Kong Section 221 proceedings underpinned the Letter of Request and that they were in effect a necessary precursor to the Jersey proceedings, it was to be expected (as pointed out to the Liquidator’s solicitors) that HSBC (CI) would seek advice to ascertain how it should react to such an application. As pointed out at the time, such an application would inevitably increase the costs and complexities of the procedure of obtaining Letters of Request. Moreover the Section 221 Order would add nothing to the Letter of Request.
- 22 In the light of such matters I have no doubt whatsoever that the costs incurred by way of obtaining legal advice are to be properly classified as incidental to the Jersey proceedings and not to be related to the Hong Kong proceedings. Moreover justice requires that these costs be recovered by HSBC (CI) and it is the Jersey proceedings to which they are in “*subordinate conjunction*”. It is the Jersey proceedings to which they are directed and to which they are causally connected.
- 23 In the decision of 15th June 2007 under appeal the Royal Court further ruled that:
- “However if I am wrong in relation to my power to make such an order or in the manner in which I have exercised that power, the Court is in no doubt that justice demands that the Respondent’s costs be so paid and the Court has, therefore, also ordered that payment of those costs shall be a condition of the orders made in favour of the Representor.”***
- 24 It is not in dispute that a decision as to whether or not to grant assistance pursuant to a Letter of Request is a matter for the Court’s discretion. In an appropriate situation the Court can reject the request for assistance: (*Hughes v Hannover-Rucksversicherungs AG* [1997] BCC 921), and, if it grants such assistance, which it may do in whole or in part, it can impose appropriate terms such as the payment of reasonable expenses or costs.
- 25 Advocate Michel contends that the discretion to order costs in such circumstances is

circumscribed by the restriction in Article 2 of the Civil Proceedings (Jersey) Law 1956 to costs which are “costs of and incidental” to the proceedings in the Royal Court. In the light of the finding of the main issue, I have no doubt that these are “costs of and incidental” to the application but as a matter of law I do not consider that they are necessarily so restricted. I consider that the exercise of the Court's powers under its inherent jurisdiction and in the exercise of its discretion in relation thereto are quite distinct and separate from the jurisdiction conferred by Article 2(1). Provided that the discretion is exercised reasonably and in accordance with law, I do not consider that the exercise can be called into question. Accordingly I consider this route provides an alternative method of reaching exactly the same conclusion as the Royal Court did under Article 2(1).

26 Accordingly I dismiss the appeal.

Bailiff

27 I agree.

Vos J.A.

28 I also agree.