UCC v Bender and Others

Jurisdiction:	Jersey
Judge:	H.W.B. Page
Judgment Date:	04 January 2007
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Text

[2007] JRC 10

ROYAL COURT

(Samedi Division)

Before:

H.W.B. Page, **Esq., Q.C., Commissioner, sitting alone**.

Between
United Capital Corporation
Plaintiff
and
(1) John Felix Bender
(2) John Koonmen
(3) SGI Trust Jersey Limited
(4) Johan Hendrik Laurentius Bartolomeus Wijsmuller
(5) Bluebird Limited
(6) Dovetail Limited

Defendants

and

(1) Kleinwort Benson (Channel Island) Limited
(2) UBS A G (Jersey)
(3) Standard Bank Jersey Limited
(4) Whitmill Trust Company Limited
Parties cited

Advocate S.M. Baker **for the Second Defendant**.

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

Mr. B. Wijsmuller **appears on his own behalf**.

Authorities

Armco Inc. v. Donoghue [1998] JLR Notes-12a .

REASON FOR INTERIM RULING OF THE 20 th DECEMBER, 2006.

COMMISSIONER:

1 Mr. Koonmen is the Second Defendant to the claim brought by United Capital Corporation ("UCC") in these proceedings. He seeks a variation of the terms of a Mareva injunction under which his assets are currently frozen so as to be permitted more liberal access to those funds for three purposes: for legal expenses, for what he refers to as "living expenses" (which, as I shall explain, is something of a misnomer) and for a proposed wedding celebration. Following a hearing of this application on 20 th December 2006 I made an interim order allowing Mr. Koonmen an additional £250,000, subject to certain conditions, pending further consideration of the matter to 17 th January 2007 when the Court is due to hear an application by him for security for costs. I now give my reasons for that interim ruling.

2 Under the terms of the pre-existing order, as varied in August 2005, Mr. Koonmen was allowed up to £25,000 a month for legal expenses, and up to £10,000 a month for living expenses; and under a further consent variation in July 2006 he was allowed a lump sum payment of £145,287 in order to meet the fess of Mourants, who at that stage were still representing him.

3 In his current application Mr. Koonmen now asks to be allowed (i) £120,000 a month for legal expenses; (ii) £20,000 a month for "living expenses"; (iii) a one-off payment of

£179,712 representing accumulated legal-expenses to which (he claims) he was entitled under earlier dispensations but which were never actually paid; and (iv) £250,000 for a wedding celebration that he would like to hold.

4 Advocate Baker on behalf of Mr. Koonmen and Advocate Young for UCC, while at odds as regards the merits of the application, were at one in agreeing that the relevant principles applicable to an application such as this - where the frozen funds are not indisputably those of the defendant himself but are the subject of a proprietary claim by the plaintiff — were laid down by the Court of Appeal in *Armco Inc. v. Donoghue* 24 th September 1998, [1998] JLR Notes-12a in a series of six points as follows (though the list was said not to be exhaustive): (i) Only in an exceptional case, in which the merits can be gone into for the purpose of satisfying a court that the proprietary claim is well founded at an interlocutory stage, should a defendant not be free to draw on the enjoined funds to finance his defence. (ii) In non-exceptional cases in which a proprietary claim is made, a careful judgment has to be made as to whether the injustice of permitting the use by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence. (iii) A defendant should not be allowed to draw on a fund which may belong to a plaintiff for the purpose of paying the defendant's legal costs until he has satisfied the burden of showing that he has no funds of his own available for that purpose. (iv) The court will look to the reality of what would occur if no order were made. If the costs would in practice be paid by a third party, then the court will take this into account. (v) The court will not normally concern itself with the quantum of the individual items of costs, although it may well fix a limit to the overall amount to be allowed for this purpose pending further application to the court: it will not act as a form of provisional taxing body for the purposes of scrutinizing the defendant's legal fees. (vi) The court may impose safeguards, e.g. an undertaking by the defendant that he will make good, out of the funds to which the plaintiff has no proprietary claim, any sums spent on costs which are subsequently found to have come out of property to which the plaintiff has a good proprietary claim."

5 Mr. Koonmen's application was supported by an affidavit from Mr. Koonmen himself (his sixth) and a further affidavit from Mr. Stephen Platt, a senior consultant in Bakerplatt, sworn on 23 rd November 2006 in support of an application by Mr. Koonmen for security for costs from UCC. The latter, while certainly relevant to the Mareva variation application, introduced a complicating factor in that Mr. Koonmen's security for costs application was not listed to be heard until 17 th January 2007 and no evidence in response had been filed by UCC at the stage of the December hearing.

6 It is convenient to take the last two elements of Mr. Koonmen's application first. As regards the application for funding for a wedding celebration, it is sufficient for present to observe that the purpose, amount and lack of particularity of the application, taken together, made it one that hardly justified the serious attention of the Court and was wisely not pursued by Mr. Baker at the December hearing. The matter is not barred altogether, if the application is renewed and further evidence warrants it, but I should not be taken as encouraging the assumption that any such application would be favourably regarded. As regards the

increase sought in "living expenses", as the hearing progressed it became clear that this was limited to the additional costs likely to be incurred by Mr. Koonmen in visiting Europe from his home in Japan increasingly frequently for purposes connected with his defence of the present case. Such costs might therefore, me characterised as a litigation expense rather than a "living expense" in the normal sense of that term. I accept that, in principle, such costs are likely to arise, and that subject to the same considerations as those that arise in connection with Mr. Koonmen's application for an increased legal expenses allowance, are a proper subject of the current application.

7 Turning, then to the matter of legal expenses and addressing, first, the six *Armco* points, the position in summary appears to me to be this: As to (i), this is not an "exceptional case" in the sense in which that term was used by the Court of Appeal: Mr. Young does not argue otherwise. Subject to other considerations of the kind referred to in that case, this court should therefore be ready to allow Mr. Koonmen to draw on the frozen funds to finance his defence. As to (ii), in addressing the particular application in question it is, however, still necessary to weigh the competing considerations there referred to, though once it is accepted that the case is not an "exceptional" one, this second point is likely in most cases to come down to a question of quantum: whether the amount sought can, in all the circumstances, be justified. I return to this exercise later.

8 As to (iii), the matter of Mr. Koonmen's financial resources was the subject of affidavit evidence by him back in early 2006, but Mr. Young rightly submits that there should be further, up-to-date evidence confirming the present position. Also, the information exhibited to Mr. Koonmen's original affidavit on this subject, in the form of a letter from Mourant who were acting for Mr. Koonmen at that time, was to my mind, more cursory than is ideal. I have, accordingly, directed that Mr. Koonmen is to swear a further and more detailed affidavit on this aspect of his application in advance of the adjourned hearing on 17 th January 2007.

9 As to (iv), the potential for third party funding, this is always a difficult matter to assess with confidence. It is plain that Mr. Koonmen has friends, business colleagues or other contacts who have in the past been willing to lend him substantial amounts to fund his legal costs, though little is known of the detail of such arrangements and the identities of the lenders, except in one case, are not disclosed: in this context reference should also be made to paragraph 15 of these Reasons. Short of full documentary disclosure and cross-examination on affidavit, a court can also be left with a degree of unsatisfied curiosity as to how it can be possible to raise such loans without the benefit of freely available assets to pledge as security. On the other hand, Mr. Koonmen swears, in effect, that his potential to raise financial support in this way is more or less exhausted now, with the possible exception of a contribution of US$1 million to what is described as a "fighting fund" held by Anguillan lawyers. Here, too, I have directed that further affidavit evidence should be provided as to the latest information about this particular contribution.

10 As to (v), quantum, this may be so, but when the Mareva-related application coincides with

an application by the same party for security for costs, it is inevitable that the two will be looked at together when it comes to assessing that party's likely future costs. It is not least for this reason that my ruling so far is no more than an interim one and the matter stands adjourned for further consideration at the same time as Mr. Koonmen' s application for security for costs.

11 Finally, as to (vi), safeguards, this will be for consideration at the adjourned hearing.

12 Returning to point (ii), Mr. Young's over-arching attitude to the application is, for the most part, not so much one of opposition in principle as an objection that the existing affidavit material is insufficient to allow the court to conduct the "careful judgment" required by *Armco* let alone to justify an increase in the current allowances of the order sought. In particular he questions the evidentiary justification for the assessment presented on behalf of Mr. Koonmen (a) as to the scale of future costs of his legal team including as it does advocates and lawyers in Jersey with support from a number of English junior counsel together with occasional advice from leading counsel; (b) the inclusion of significant costs for the services of New York attorneys and Professor Clayton of New York University over and above those already incurred; (c) the inclusion of an amount in respect of Mr. Koonmen's legal expenses in connection with litigation in Anguilla concerning the trusteeship of the Gemstone A and Gemstone B Trusts, consisting largely of the fees of Webster Dyrud Mitchell, a local firm of lawyers, and of English Leading Counsel (though on this point, Mr. Young's objection is also one of principle, in that those proceedings are not directly related to those in this court); and (d) the retrospective claim for a one-off payment of £179,712. This, I readily recognise, is no more than the briefest of summaries of a very careful and detailed review by Mr. Young of the case advanced on behalf of Mr. Koonmen.

13 As regards future costs, the first two of these heads cannot be satisfactorily addressed other than in conjunction with Mr. Koonmen's application for security for costs. Mr. Baker objected that Mr. Young had had more than sufficient notice of the current application to have put in any response to Mr. Platt's affidavit that he might have wished to; but, irrespective of how it came about, the fact of the matter is that the two applications were fixed for the Court's consideration on different dates and while there may be some force in Mr. Baker's complaint, I do not think Mr. Young can be held wholly responsible for this state of affairs.

14 While reserving final judgment until the adjourned hearing on 17 th January it may, however, be helpful if I record my current impression on certain aspects of Mr. Koonmen's application for an increased allowance in respect of *future* costs:- (i) The litigation plainly involves issues of considerable complexity and substantial amounts of money, and the documentation is likely to be extensive. (ii) Whatever the reasons for change of legal representation may be (of which I know nothing), Bakerplatt only took over responsibility for the litigation on behalf of Mr. Koonmen in August last year and have had little option (as it seems to me) but to assemble and put to work a considerable team in order to have any hope of being ready for trial by July this year. (iii) Given that Mr. Bender has been barred -

at least for the moment — from defending the proceedings as a result of his contempt of court, it seems a not unfair point for Mr. Koonmen to make, as he does, that a greater burden is likely to fall on him in the defence of the proceedings than would have been the case had Mr. Bender still been actively involved. Much of the responsibility for discovery that would have been borne by the Third Defendant were it not in liquidation will also have to be shouldered by Mr. Koonmen. (iv) As a basis for the projection of future costs paragraphs 32 to 37 of Mr. Koonmen's own affidavit, while not wholly without value, is unsatisfactory in a number of respects, not least in its reliance in part on what seems to have been no more than a ball-park estimate of costs by the Deputy Bailiff back in March 2006 on the assumption that the case might well not be concluded for two years, and in part of a somewhat tenuous extrapolation of future expenditure from past costs. Mr. Young was, among other things, justifiably critical, as it seemed to me, of the calculation of average monthly expenditure contained in the table at page 1 of JK-6. (The approach adopted in Mr. Platt's affidavit is, I recognise, different.) (v) The evidence in support of the claim for the future costs of New York attorneys is currently fairly cursory. (vi) Even less substantial is the evidence in support of projected future costs in the Anguillan proceedings. There also remains here, for further consideration the question of how far it is right to allow any of the frozen funds to be used to meet Mr. Koonmen's expenses of that litigation.

15 As regards the one-of claim for £179,712, this figure is arrived by taking the aggregate of all maximum monthly allowances for legal fees that Mr. Koonmen might have been entitled to from the date of the original freezing order in May 2005 until May 2006, that is £325,000, and deducting the only payment actually made, namely the £147,287 lump-sum payment to Mourants in July 2006. The resulting balance is now claimed, in effect, retrospectively. Mr. Baker suggests that the reason why such earlier entitlements remained unpaid was because of obstruction by UCC, an allegation denied by Mr. Young who asserts that it was not until the summer of 2006 that any application for funds under this head was made. But there is little purpose in spending time trying to get to the bottom of this particular dispute: the fact that, for one reason or another, Mr. Koonmen never had the benefit of the full permitted allowance for legal expenses (legal expenses, that is, related to the present proceedings, I think) is a sufficient starting point for present purposes. And immediate instinct suggests that a court should be slow to deny Mr. Koonmen the benefit of what an earlier court thought appropriate. On the other hand, it is by no means clear to what extent this application represents a genuine *current need* - given that all Mr. Koonmen's legal costs for the relevant period were, in the event, funded in one way or another, including to a very large extent by loans from third parties either directly or via "the fighting fund" (see Exhibit JK-6). Mr. Koonmen's affidavit omits to say in terms to what purpose, exactly, he would now intend to apply these particular funds were he to be allowed them. He speaks, in this context, of having incurred "massive debts to pay for these proceedings which would have been smaller had I been paid as provided by the first variation" (paragraph 7) but says nothing of the periods for which the loans were granted, their present status, or of any immediate demand or other requirement for repayment of any of them, or any proposal to do so. As matters stand at the moment, therefore, I am not persuaded that it would be appropriate to accede to this aspect of Mr. Koonmen's application. I shall, however, reserve the matter for further consideration and final decision on 17 th January.

16 For these reasons, and given the evident need for at least an early interim decision, it appeared to me right to allow Mr. Koonmen an additional £250,000 immediately on the terms specified in my Order of 20 th December 2006.