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UCC v Bender

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| Jurisdiction: | Jersey |
| Judge: | Deputy Bailiff |
| Judgment Date: | 15 September 2006 |
| Neutral Citation: | [2006] JRC 130 |
| Reported In: | [2006] JRC 130 |
| Court: | Royal Court |
| Date: | 15 September 2006 |

vLex Document Id: VLEX-793570957

Link: <https://justis.vlex.com/vid/ucc-v-bender-793570957>

Text

[2006] JRC 130

ROYAL COURT

(Samedi Division)

Before:

M. C. St J. Birt, **Esq.**, Deputy Bailiff **with** Jurats Le Breton **and** Clapham.

In the matter of a representation by the plaintiff alleging contempt of court on the part of the
first defendant

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

Advocate S. J. Young for the Plaintiff.

The First Defendant did not appear and was not represented.

No Authorities

Deputy Bailiff

- 1 This is a representation brought in the course of the above proceedings alleging that the first defendant has been guilty of contempt of court in refusing to comply with an injunction issued by the Court. We announced our decision at the conclusion of the hearing on 7th September and now give our reasons.

Factual background

- 2 The full background to the proceedings is set out in the judgment of the Court of Appeal dated 14th July 2006 ([2006 JCA094](#)). We do not propose to repeat that background and we adopt the same expressions as are used in that judgment. Suffice it to say that the UCC sues as assignee of Mr Silverman. It is alleged that Mr Silverman and Mr Bender orally agreed in 1996 to share the management and performance fees derived from the management of the Amber funds ("the Amber fees") as to 75% to Mr Bender and 25% to Mr Silverman. The Amber fees were paid to the corporate investment manager of the Amber funds, first AIA Cayman and subsequently AIA Anguilla. In March 1999 Mr Bender brought in Mr Koonmen to join him in managing the Amber funds. Mr Koonmen alleged that it was orally agreed between him and Mr Bender that they would share the Amber fees equally between them.
- 3 Subsequently the Amber Employee Benefit Trust ("AEBT") was established under the law of Anguilla. Thereafter AIA Cayman and subsequently AIA Anguilla transferred the bulk of the Amber fees to AEBT. The Amber funds were liquidated in October 2000 and the proceeds returned to investors. According to the Order of Justice, the Amber fees for 1998 to 2000 totalled some US\$184 million with the result that Mr Silverman's 25% share came to some US\$46 million.
- 4 In 2001 a dispute arose between Mr Bender and Mr Koonmen. Mr Koonmen alleged that he had not received the 50% share of the Amber fees to which he was entitled. He began proceedings in Jersey against Mr Bender, Sinel Trust Anguilla Limited ("STAL") as trustee of AEBT, Mr Wijsmuller and others. Those proceedings were settled and a written

settlement agreement was executed on 12th August 2003. In very broad terms there was a division of the Amber fees between Mr Koonmen and Mr Bender with US\$10 million being paid for the benefit of certain colleagues of Mr Koonmen in Japan. In essence approximately US\$62 million was paid out of AEBT to the Gemstone A Trust for the benefit of Mr Koonmen and a broadly similar amount was paid to the Bender Family Trust of which Reserve Trust Company Limited ("RTC"), an Anguillan company was trustee. This remained the position until shortly prior to the institution of the present proceedings.

The alleged contempt

- 5 On 16th May 2005 the plaintiff issued an order of justice against various defendants including Mr Bender. It raised a number of proprietary and personal claims which it is not necessary to summarise but in essence the order of justice claimed the sum of US\$97 million in respect of Mr Silverman's share of the Amber fees. The order of justice contained Mareva injunctions and associated disclosure orders.
- 6 The order of justice was amended on 5th August 2005 and again there were freezing injunctions and associated disclosure orders. On 25th August 2005 the Bailiff granted a stay on the disclosure order against Mr Bender pending resolution of his summons seeking a stay of the proceedings on the basis, *inter alia*, that Jersey was not the appropriate forum.
- 7 Following dismissal of that summons the Deputy Bailiff removed the stay on the disclosure order on 26th March 2006 and ordered that Mr Bender must comply with the disclosure order contained in the amended order of justice by 31st March 2006.
- 8 The relevant disclosure order contained in the amended order of justice was as follows:-

"4. The disclosure of information by the defendant.

(1) The Defendant shall within 7 working days of service hereof upon him:

(i) inform the Plaintiff's Advocate in writing of the Assets in the Island of Jersey and elsewhere how so ever held, giving the value, location and details of the same. The information must be confirmed in an Affidavit which must be provided to the Plaintiff's Advocate within 10 working days of service of this Order of Justice upon the Defendant;

(ii) disclose to the Plaintiff's Advocate the total of all Amber Funds managed, profits and fees including the details of all payment instructions in relation to the same for the period 1999 and 2000 and any subsequent years that the Amber Funds operated (including any other funds produced as part of the Amber Funds strategy as managed and/or advised by the first and/or second and/or third and/or fourth Defendants);

(iii) disclose to the Plaintiff's Advocate the details including address, sort code, account numbers and any other information relating to the identity of any recipient of any profits, Management Fee or Performance Fee earned by the Ambers Funds from 1 January 1998 to the date of this Order."

The expression 'Assets' was defined elsewhere in the order of justice to mean "Any and all monies, securities or other assets, real or moveable belonging to or in which the first and/or second defendants have or may have direct or indirect interest whether legal or beneficial whether held by or for them or by controlled directly or indirectly by them wheresoever situate."

- 9 On 31st March 2006 Messrs Maurant du Feu & Jeune, Mr Bender's advocates, sent a letter to Advocate Young purporting to provide disclosure of Mr Bender's 'Assets' as required by the order of justice. By reference to a family tree of companies provided by the plaintiff, the letter confirmed that, except as stated in the letter, all the various companies shown were owned by RTC as trustee of either the Bender Family Trust or the Purple Quartz Trust and that Mr Bender was a beneficiary of both trusts. The letter gave information concerning certain 'Assets' but went on to say this:-

"Transfer of Assets

Between 5 and 16 May 2005, the First Defendant estimates that approximately US\$60 million of Assets (in which he was or may have been beneficially interested) owned by entities under RTC were transferred to Costa Rica. These Assets were made up of approximately US\$55 million in cash or short term deposits plus interest, and represented the vast majority of Amber profits distributed to the Bender Family Trust in accordance with the Settlement Agreement of 2003, which was approved by the Court of Anguilla.

The reasons for this transfer of Assets and such details of such Assets transferred as the First Defendant is able to provide will be provided in the First Defendant's Affidavit sworn in support of his disclosure of assets."

- 10 On 3rd April an un-sworn affidavit of Mr Bender was received confirming that the contents of the letter from Maurant du Feu & Jeune were correct. However it went on to say that, due to the commitment of senior members of his legal team on other matters, it had not proved possible to deal with the transfer of assets in the affidavit through no fault of his or of theirs. He said that he would deal with the issue in a separate affidavit which would be served on or before Friday 7th April 2006.
- 11 We should add that this and subsequent affidavits were initially filed un-sworn but we were informed by Mr Young that sworn copies of all affidavits had subsequently been filed and accordingly nothing turns on that. We will refer simply to affidavits.

- 12 Mr Bender's sixth affidavit was in fact provided on 11th April 2006. It goes into some detail

concerning the reasons for the transfer. In essence Mr Bender asserts that the transfer was not made to defeat the plaintiff's claim but was done in order to protect the trust assets from Advocate Sinel, whom Mr Bender did not trust at all. He was most concerned at the dispute which had developed and had resulted in litigation between Advocate Sinel and Mr Wijsmuller as owners of SGI and STAL. He exhibited an e-mail which he had sent to his fellow directors of RTC on 17th March 2005 expressing concern about what he termed the irrational behaviour of Advocate Sinel and stating that he felt very strongly that RTC should immediately remove all business from SGI and STAL. This was a reference to the fact that SGI continued at that stage to administer the affairs of RTC as trustee of the Bender Family Trust pursuant to an administration agreement. In compliance with Mr Bender's e-mail, Mr Wijsmuller, on behalf of RTC, wrote to SGI on 23rd March 2005 terminating the administration agreement.

- 13 Mr Bender went on in his affidavit to say that, as a result of further information which Mr Wijsmuller gave him on 5th May concerning actions taken by Advocate Sinel, he sent a further e-mail to two directors of Whitmill Trust Company (a company of which Mr Wijsmuller's brother was a director) stating that he had decided that maintaining assets in Jersey was unwise and that accordingly would they please arrange to have all the assets in Jersey transferred to a new Whitmill client account in Switzerland as quickly as possible.
- 14 Mr Bender goes on in his affidavit to say that on 13th May 2005 he was informed by Mr Wijsmuller that Advocate Sinel had apparently succeeded in getting certain accounts of the Gemstone Trusts transferred from the control of STAL to SGI and he states that this event was crucial in the decision to transfer the RTC assets as quickly as possible. For him its implications appeared terrifying and "we" (this would appear to a reference to him and Mr Wijsmuller) instructed the first reasonable trustee they could find on short notice and implemented the transfer as soon as possible.
- 15 His only comments concerning what had actually happened to the transferred assets are to be found in paragraphs 17, 18 and 19 of the sixth affidavit which we set out in full as follows:-

"17. On 16 May 2005 I asked Juan Alvarez (a lawyer in Costa Rica whose business address is Parque Impresario Forum, Edificio E, Primer Piso, Santa Ana, Costa Rica and who has acted for the Reserve since its inception) to take control of the RTC Assets and to take all actions he considered appropriate to declare new trust over the RTC Assets. To the best of my knowledge and belief, he did declare new trusts but he informed me (without any waiver of privilege) that I would not be a beneficiary of the new trusts. I am not an expert on Costa Rican law but my understanding is that the reason for this was that Costa Rica law forbids "self dealing" by a fiduciary and I was a director of RTC. I cannot be absolutely certain that Juan Alvarez is the new Trustee of the RTC Assets but I believe him to be so. I am not a beneficiary of the new trusts but I understand that their primary purpose is to provide for the Reserve and other charitable causes. I would add that although I was a potential beneficiary of the trusts

administered by RTC, their primary purpose was also to benefit the Reserve (hence the name Reserve Trust Company). In fact, I did not receive any distributions from the RTC administered trusts. I am informed by Juan Alvarez that I cannot require him to provide details of the new trusts. I do not have copies of the new trust investments nor do I have any signing power over the new trusts. I do know that Mr Alvarez continues to represent the Reserve as my duties as the on-site manager of the Reserve require me to speak with him on a regular basis.

18. I also cannot give an exact value of the assets transferred because there were no up to date statements for the accounts involved. Despite the exorbitant fees charged by SGI for administration services, RTC had no financial statements for the year ended 31 December 2004 and many of the statements from 2003 were still in draft form. Due to the events in Anguilla and the proceedings between Philip Sinel and Mr Wijsmuller set out above we did not have files to refer to. I doubt that the new trustee could give an accurate estimate of the former RTC assets for this reason. However, my estimate of the value of the cash and securities transferred from RTC to the new trustee is US\$60 million. Excluding the US\$12 million paid to Purple Quartz Investments Limited ("PQI") for the purchase of BEG Technologies Limited ("BEG") in accordance with the Settlement Agreement of 2003, this accounts for essentially the entire amount allocated to the Bender Family Trust by the Settlement Agreement that was approved by the Anguilla Court (roughly US\$55 million), plus the interest earnings on that sum. I believe that the vast majority (over 90%) of these assets were cash or short term deposits, but I cannot be sure due to my inability to properly access the RTC files.

19. Valuing the reserve is very difficult as the land is protected and established as a reserve by Presidential decree. The most reasonable procedure seems to be valuing it at cost, which was roughly US\$25 million. However, this amount includes substantial expenses for building the Reserve's infrastructure, reforestation, anti-poaching patrols, and other project costs. The Reserve is not owned by me but by a Costa Rican S.A. named Boracayan del Sur S.A."

- 16 Faced with an apparent failure on the part of Mr Bender to comply with the terms of the disclosure injunction in relation to approximately US\$60 million of assets, the plaintiff issued a representation alleging contempt of court on 13th April 2006. The nature of the alleged contempt was summarised in paragraph 14 of the representation as follows:-

"The letter dated 31st March 2006 and the fifth and sixth affidavits of the first defendant are defective and accordingly he is in breach of the express terms of the Disclosure Order in that:

(i) he has failed to disclose the precise nature of the assets held in RTC estimated to have a value of approximately US\$60 million;

(ii) he has failed to disclose the exact location of the assets including

the identity of the bank and/or repository where the assets are held; and the account or account numbers in respect of the same and the signatory and/or signatories on the mandate in respect of the account/s;

(iii) he has failed to disclose the whereabouts and detail of 'other funds produced as part of the Amber strategy' as managed and/or advised by the first and/or second and/or third and/or fourth defendants;

(iv) he has failed to disclose the details including address, sort code and any other information relating to the identity of any recipient of any profits, management fee or performance fee earned by the Amber Funds from 1st January 1998 to 5th August 2005."

- 17 The representation came before the Court on 4th May at which time Mr Bender was represented by his advocate. The Court ordered that Mr Bender should attend before the Court in person in order to answer the alleged contempt. The date subsequently fixed for that attendance was 31st July.
- 18 On 24th July Mr Bender, through his advocate, applied for an adjournment and filed an eighth (*sic*) affidavit in support. There were two grounds for the application. The first was that Advocate Speck, who had represented him at all the important hearings in the proceedings, was unable to be present on 31st July. The second was that he hoped to obtain further information from RTL and Advocate Sinel which would show the whereabouts of the assets in question in May 2006 and possibly thereafter. The only further information which he provided about the transfer itself was at paragraph 12 of the eighth affidavit which said as follows:-

"12. I was able to state my belief in my Sixth Affidavit that the assets in question are in a trust in Costa Rica because I authorized Mr Alvarez to move the trusts' underlying assets there. This was done by way of a power of attorney. The board of RTCL authorized me to organize the disposal of the assets and gave me a power of attorney to do so under which I in turn authorized Mr Alvarez to act. There is a copy of the power of attorney at page 30 of JFB26. I believe the transfer of assets has happened and that my further enquiries will help me to explain with reasonable precision what can be found out about the whereabouts of the property and how it was moved. I am aware that my explanation as it is may appear to be surprising, but I would ask the court's indulgence to enable me to seek sufficient information to provide a full explanation about what actually happened."

The Court acceded to the Mr Bender's application and 7th September at 2.00 p.m. was fixed for the adjourned hearing. On the morning of 7th September the Court received two documents. One was an e-mail from Advocate Speck stating that he had just been notified that Mr Bender had withdrawn his firm's instructions and accordingly he would not be

attending at the hearing that afternoon. The second was an e-mailed letter from Mr Bender. It confirmed that neither he nor any advocate on his behalf would be attending the hearing and that he had withdrawn instructions from Mourant du Feu & Jeune. The explanation which he gave was that there had been 'without prejudice' negotiations and that, as his resources for legal representation were severely limited due to the freezing injunction, he had committed his available resources towards the negotiations rather than preparation for the contempt hearing. He had thought that the negotiations were likely to be successful and had accordingly thought that the contempt hearing would not proceed. He asserted that the plaintiff had, at the eleventh hour, acted in a manner to derail the negotiations. He submitted that it would be unjust for the Court to find him in contempt or to impose any sanction without giving him a fair opportunity to give a full explanation of all the settlement correspondence.

- 19 The Court duly convened at 2.00 p.m. and as foreshadowed in the letters, neither Mr Bender nor any legal representatives on his part were present.

Decision

- 20 The first decision for the Court was whether it should proceed in Mr Bender's absence. We decided that we should. Contempt of court is a serious matter which should be dealt with as promptly as possible. A representation was presented as long ago as 13th April 2006 and the Court had given Mr Bender ample time to consider the position by fixing the hearing for 31st July. At his request the Court had granted a further adjournment to 7th September. There seems no good reason why he should not have been ready to proceed on that date. Even assuming that without prejudice negotiations had taken place as he describes, we do not consider that this prevented Mr Bender from preparing for the contempt hearing. He asserts in his letter that his resources for legal representation are severely limited due to the injunction (although that does allow for some payment for legal expenses) and that he simply did not have enough money to deal with both the settlement issues and preparation for the contempt hearing. The Court was not impressed with that argument. On his own admission he was a beneficiary of the Bender Family Trust with assets of some US\$60 million until May 2005. If he has really given all this money away so that he no longer has access to it for any purpose, even legal advice, he has only himself to blame. In fact, as set out below, the Court considers it extremely unlikely that this is what has occurred. He was advised by Mourant du Feu & Jeune until the morning of 7th September and must have been aware of the likely consequences of not appearing to face the allegation of contempt. In the circumstances it was entirely his choice to dispense with legal representation and not to appear and we see no injustice in proceeding in his absence in such circumstances.
- 21 However the fact that Mr Bender is not present does not of course mean that the contempt of court is proved. Far from it. We must consider whether the evidence relied upon by the plaintiff satisfies us to the criminal standard of proof (i.e. beyond reasonable doubt) that Mr Bender has breached the injunction by deliberately refusing to disclose the value, location and details of the assets which have been transferred. We have considered carefully the

evidence before us, including Mr Bender's affidavits and explanations but we have no hesitation in finding Mr Bender to be in breach of the injunction. Our reasons briefly are as follows:-

- (i) It is clear from Mr Bender's own evidence and the contemporaneous e-mails that he was the driving force behind the Bender Family Trust. His fellows directors of RTC could be expected to fall in with his wishes and he had an active involvement in the matter; for example his e-mail of 5th May refers to the fact that the assets include US Treasury Bonds so the new account will have to be able to receive these.
- (ii) We are in no doubt that it was his decision to move the assets as is shown by the various e-mails. RTC fell in with his suggestion and indeed granted him a power of attorney to act for RTC in respect of the transfers. Thus the power of attorney exhibited to Mr Bender's eighth affidavit authorises Mr Bender "..... to complete all arrangements and to execute all documentation necessary to achieve a transfer of assets from the Bender Family Trust and Purple Quartz Trust into the Bender 2005 Family Trust and the 2005 Purple Quartz Trust respectively". Interestingly the power of attorney does not contain a power of delegation although Mr Bender asserts that he in fact delegated everything to Mr Alvarez.
- (iii) The idea that Mr Bender should transfer US\$60 million to a trust from which he cannot benefit and the suggestion that he is unable even to ascertain what has happened to that sum is, in the absence of a compelling explanation from him, incapable of belief. We note that Mr Alvarez is a lawyer who has acted for Mr Bender in the past and we do not accept that, although Mr Bender orchestrated the transfer of the US\$60 million pursuant to the power of attorney, he does not know what has happened to it and he is not able to ascertain its whereabouts so as to comply with the disclosure order.

22 We therefore find that Mr Bender is wilfully in breach of paragraph (1) of the injunction and he is accordingly therefore in contempt of court. In the circumstances we do not need to consider whether he is also in breach of the other paragraphs of the injunction.

23 The question then arises as to what sanction, if any, should be imposed for such contempt. An order for disclosure in support of a Mareva injunction is an important aspect of such an injunction and allows it to be policed. A combination of the injunction and the disclosure order is intended to ensure that a plaintiff's success in an action is not rendered nugatory because there are no longer any assets available to meet any judgment. Mr Young submits that this is particularly so in this case because, although substantial assets of Mr Koonmen's trust (Gemstone) have been restrained, there are comparatively few assets of Mr Bender's within the jurisdiction and Mr Koonmen and the other defendants may have possible lines of defence open to them which are not open to Mr Bender (as the person with whom Mr Silverman (according to him) made the original agreement to share the Amber fees).

- 24 In our judgment it would not be right to allow Mr Bender to continue to defend the case to trial so long as he remains in contempt of court. To allow him to do so would in effect enable him to flout the Court's order and would run the risk of injustice to the plaintiff to which we have referred in the preceding paragraph. We do not consider that a prohibition on Mr Bender taking any further steps in the proceedings until he has purged his contempt would work undue hardship upon him. He can, on our finding, purge his contempt at any time by coming before the Court in order to explain the position and provide the information required by the disclosure order; alternatively convincing the Court that he really cannot provide such information.
- 25 Mr Young submitted that we should in addition strike out the answer. This would enable the plaintiff almost immediately to obtain judgment in default and would result in a judgment against Mr Bender. We are not willing to take such a step at this stage. The order which we propose to make debarring Mr Bender from taking any further steps to defend the action until he purges his contempt gives him time to consider his position matter further before one gets to a stage where the plaintiff might be able to obtain judgment.
- 26 Mr Young submitted that we should also remove the provision allowing for legal expenses to be payable out of those funds of Mr Bender which are restrained. We agree to that suggestion. On our finding, Mr Bender has access to approximately US\$60 million of assets which are not enjoined and he can therefore fund his case from those assets rather than from the limited assets which remain available to satisfy any judgment which the plaintiff may ultimately obtain.
- 27 Finally as to costs, the plaintiff has clearly been put to substantial costs by reason of the defendant's contempt. In the circumstances I see no reason why the plaintiff should be out of pocket and I order Mr Bender to pay the costs incurred in connection with this representation on an indemnity basis.