Devy v Taylor

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	24 August 2011
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Text

[2011] JRC 165

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, Esq., Deputy Bailiff, **and** Jurats Kerley **and** Nicolle.

Between
Alan Devy
Applicant
and
1. David Graham Taylor
2. Beatrice Taylor
Respondents

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

Advocate L. J. Springate **for the Respondents**.

Authorities

MacKinnon -v- Crill Canavan (No 1) [2006] JLR 499.

Goldtron Limited -v- Most Investments Limited [2002] JLR 424.

Le Gros, Traité du Droit Coutumier de l'île de Jersey.

Clarke -v- Callaghan [2011] JRC 158.

The Bailiff

1 This is an application by the applicant Mr Devy to lift a caveat issued on 11th July, 2011, at the instance of the respondents Mr Taylor and his daughter Miss Taylor. The caveat was applied for in support of an Order of Justice which the respondents proposed to issue against Mr Devy, amongst others.

Factual background

2 In order to consider the various points raised by the parties in connection with the caveat, it is necessary to set out the background to the claim as it appears in the draft Order of Justice.

3 Mr Taylor is an English licensing practitioner. Mrs Jayne Ansell was the inventor of a new head lice lotion which became known as D5D and has since been marketed in the UK under the name “Hedrin”. Mr Taylor asserts that he and Mrs Ansell entered an agreement in June 1999 to develop and launch D5D. Subsequently, Mr Devy was introduced as a possible financier. A joint venture structure was agreed in May 2000. According to the Order of Justice there were to be four participants, all of whom were advised by Mr Homer, the principal of Lincoln Receivables (Jersey) Limited (“Lincoln”). A company called Kerris Pharmaceuticals Limited (“Kerris”) was incorporated in the BVI and the interests of the joint venturers in Kerris were held by four Jersey trusts; Lincoln was the trustee of all four. Mr Taylor's interest was held through the Valetta Trust which was established by Lincoln on 10th May, 2000, and held 18% of the shares in Kerris. Mr Taylor was a beneficiary and so is his daughter Miss Taylor. Mr Devy's interest was held through the Brisbane Trust which owned 24% of Kerris. Mr Homer and Mr Devy were the directors of Kerris and other relevant companies. According to Mr Taylor, he was not kept fully in the picture as to the development of D5D.

4 By December 2002 Kerris was in the final stages of negotiating the terms of a licensing agreement with a company called Thornton & Ross Limited. According to the Order of

Justice Mr Taylor was not kept fully informed as to the true state of the negotiations with Thornton & Ross.

5 In August 2003 Mr Homer, on behalf of Lincoln as trustee of the Valetta Trust, executed a share sale agreement whereby the Valetta Trust sold its interest in Kerris to the Brisbane Trust (of which Lincoln was also the trustee) for the sum of £135,000. Mr Taylor does not dispute that he was aware of and approved the entering into of this share sale agreement. What he alleges is that Mr Devy, Mr Homer and Mrs Ansell conspired to procure his consent to the sale of Valetta's interest in Kerris to the Brisbane Trust at an undervalue. Amongst other things he asserts (paragraph 59 of the Order of Justice) that they concealed, or did not disclose, the true state of negotiations with Thornton & Ross and the agreement reached with Thornton & Ross, and (at para 62) that they falsely represented that Kerris was in serious financial difficulty, that it needed a significant financial injection to meet phase three trial costs which could only be provided by Mr Devy, that Mrs Ansell had sold her interest (held by the Western Trust) to the Brisbane Trust and that, unless he sold out, Mr Devy would take steps which would lead to the Valetta Trust losing its interest in Kerris. The Order of Justice asserts that the true value of Kerris as at August 2003 was between £61.15 million and £148.94 million. This is based upon the expert valuation carried out by a Dr Fishleigh ("the Fishleigh valuation"). This meant that the Valetta Trust's18% interest was worth between £11 million and £26.8 million rather than the £135,000 for which the interest was sold. The Order of Justice alleges conspiracy to defraud as mentioned above. It also alleges a breach of trust by Lincoln as trustee of the Valetta Trust in entering into the share sale agreement as well as claims against Mr Homer, Mr Devy and Mrs Ansell that they dishonestly assisted in the breach of trust by Lincoln and are therefore personally liable for the loss and damage suffered as a result of such breach of trust. As can be seen, the claim is for a minimum of £11 million and a maximum of £26.8 million (subject to credit for the £135,000 already received).

6 The Order of Justice is being brought by IFG Trust (Jersey) Limited, as the new trustee of the Valetta Trust, as well as Mr Taylor and Miss Taylor. As Advocate Springate stated during the hearing, it was necessary for Lincoln to be replaced as trustee by IFG before the proceedings could be issued. The proposed plaintiffs have entered into a litigation funding agreement with Harbour Litigation Investment Fund LLP whereby that company will be responsible for the legal costs incurred by the plaintiffs in bringing forward the Order of Justice and will also be responsible for any awards of costs made against the plaintiffs. IFG, as trustee of the Valetta Trust, has been authorised by the Royal Court in a Beddoes application to enter into the funding agreement and to issue the proceedings. As disclosed to the parties at this hearing, I presided over that application.

7 On 8th July, Messrs Bedell Cristin acting for the respondents, sought to lodge a caveat in respect of the property Le Vouest Farm, St Martin ("the property") which is owned by Mr Devy. The application was supported by an affidavit sworn by Advocate A. D. Robinson of Bedell Cristin. He asserted that the respondents intended to issue proceedings against Lincoln, Mr Homer, Mr Devy and Mrs Ansell in the terms of the attached draft Order of Justice. He said further that, if a caveat was granted, a letter before action would be sent,

with proceedings to be instituted shortly after expiry of the time period stipulated in the letter before action. This was also subject to Lincoln being replaced as trustee of the Valetta Trust by IFG, but that has since taken place.

8 The affidavit went on to say that Lincoln was not thought to have any assets and that Mr Homer and Mrs Ansell were not thought to have any assets within the jurisdiction. The affidavit stated that Mr Devy was resident in the Island and was the owner of the property but the applicants were not aware of any other asset of Mr Devy. The affidavit went on to say that the respondents were concerned that Mr Devy might sell or otherwise dispose of his interest in the property at any time, particularly once notified of the claim. If he did so, the means by which the respondents could enforce any order of the Court within the jurisdiction would be limited, given the financial circumstances of the other proposed defendants. It asserted that the only means by which the respondents might be afforded some security in respect of their claim was for a caveat to be placed on the property. They therefore sought a caveat to protect their rights and maintain the status quo in terms of any equity available in the property.

9 The application for the caveat was granted on 11th July and Mr Devy was duly notified. He subsequently issued the present application on 21st July to lift the caveat.

10 In support of his application, Mr Devy swore an affidavit. He denied any conspiracy to defraud or dishonest assistance of a breach of trust. He asserted furthermore that, even if there was a claim, the Fishleigh valuation bore no relation to the actual value of Kerris. He said that a reasonably accurate estimate of the sum that would have been received by a shareholder of 17% of Kerris to the date of the affidavit, discounted for receipt of £135,000 paid in August 2003, was approximately £355,000. Thus, he asserted, the magnitude of any claim was of a completely different order to that referred to in the draft Order of Justice. We should add that it is not clear why he referred to 17% rather than 18% (being the percentage of shares in Kerris owned by the Valetta Trust) but the difference is not material for present purposes.

11 He said that he had moved to Jersey in 1996 having sold a successful company in the UK. He has an interest in a local business and also has become involved in property development. He is married and has two children at school in Jersey. He asserts that Jersey is his home, he is a man of integrity, he had no need to defraud anyone and in the final analysis the sums of money being suggested by the respondents in the Order of Justice are simply fanciful estimates and completely without foundation. He would have been delighted if Kerris was worth the sums being suggested, but it was not.

12 He states that the imposition of the caveat has caused him and his wife very considerable stress. The property has been for sale for some weeks with Savills and he was concerned that a caveat would blight any prospect of sale of the property. He said that he was selling the property because it was far too large for the family and he wished to move from the east to the west of the Island.

13 A copy of the licensing agreement between Kerris and Thornton & Ross dated 19th December, 2002, (which had been disclosed by Bois Bois to Bedell Cristin on the 15 July, 2011,) was put before the Court by Messrs Bedell Cristin. Mr Devy had exhibited file notes of telephone conversations between Mr Taylor and Mrs Ansell on 19th November and 20th December, 2002, (apparently made by Mr Taylor) together with an e-mail from Mr Taylor to Mrs Ansell on 20th December, 2002. We were informed that these documents were all exhibited to the Fishleigh valuation and Advocate Springate did not contend otherwise.

14 Mr Taylor filed an affidavit in response (although that before the Court was in unsworn form). At paragraph 12 he re-emphasised certain paragraphs of the draft Order of Justice including paragraph 59 to the effect that the other parties concealed from him and did not disclose the true state of negotiations with Thornton & Ross and the agreement reached with Thornton & Ross in 2003. He went on to say that the contents of the Thornton & Ross agreement confirmed that the alleged parlous financial state of Kerris and its desperate need for money was simply untrue. He further pointed out that the terms of the Thornton & Ross agreement were in fact consistent with the assumptions which Dr Fishleigh had made in his valuation and accordingly the Thornton & Ross agreement was consistent with the valuation of the claim as put forward in the Order of Justice.

Discussion

15 On behalf of Mr Devy, Advocate Young submitted that the caveat should be lifted on a number of grounds. However, in view of the decision which we have reached, we propose at this stage to concentrate on only one of them.

16 Advocate Young submitted that there had been a failure by the respondents to make full and frank disclosure when applying *ex parte* for the caveat. He referred to paragraph 59 of the Order of Justice which pleaded that, as part of the conspiracy to defraud, Mr Devy, Mr Homer and Mrs Ansell has concealed, or had not disclosed, the true state of negotiations with Thornton & Ross and the agreement reached with Thornton & Ross. Although his affidavit was produced for the purposes of this hearing – and therefore after the caveat was obtained – the fact that this assertion was a key part of the case was shown by the fact that Mr Taylor specifically re-affirmed the accuracy of paragraph 59 in that affidavit.

17 Yet, said Advocate Young, documents exhibited to the Fishleigh valuation prepared for the respondents and relied upon in support of the Order of Justice, showed that this was simply untrue. First there was a file note of a telephone conversation on 19th November, 2002, between Jayne Ansell and Mr Taylor in which the following is to be found:-

> *"Jayne Ansell called 19/11*
>
> *Update Thornton & Ross offer £1M + 12% royalty*

JA told by Alan not to keep me in the picture but she will anyway (I am not Kerris).”

18 Next there is a further note of a telephone conversation between Mr Taylor and Jayne Ansell on 20th December, 2002, which records as follows:-

“Deal with T & R done.

£100 K to Jersey immediately

T & R have Euro 60/40 split

Jayne putting in £30K

Any money back to pay off loan

Clinical trial not started yet 18 months nothing till mid 04”

19 Finally there is an e-mail the same day from Mr Taylor to Jayne Ansell which starts:-

“Well done on doing the deal with Thornton & Ross.”

It goes on to say:-

“I know £700K is going straight back to pay off loans etc”

20 Advocate Young submitted that these were all documents which came from Mr Taylor and were supplied by him to Dr Fishleigh. They were exhibited to the Fishleigh report which was relied upon in support of the claims contained in the Order of Justice. They were inconsistent with the respondents’ pleaded case. These documents had not been supplied to the Bailiff when the caveat was applied for nor had their existence been referred to. This was a blatant failure of the duty to make full and frank disclosure.

21 Advocate Springate did not accept that there had been a failure to make full and frank disclosure but she was unable to explain how the assertion in the Order of Justice, repeated in Mr Taylor's affidavit, could be reconciled with the three documents referred to above.

22 In *MacKinnon -v- Crill Canavan (No 1)* [2006] JLR 499 the Court made clear that anyone applying *ex parte* for a caveat owes a duty to make full and frank disclosure and that a convenient summary of what this requires can be found in *Goldtron Limited -v- Most Investments Limited* [2002] JLR 424 at paras 14 – 16. We think it worthwhile to repeat those paragraphs in this judgment:-

“The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an

applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied upon before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made if there had been full disclosure."

"14. The essential feature of judicial proceedings is that each party has the opportunity of putting his case. Thus the Court will not generally hear only one side to a dispute. However, on occasions, this is necessary either because of the urgency of the matter or because the very nature of the relief requested requires that it be done in the absence of the other party (e.g. the obtaining of an injunction freezing assets because it is feared that the other side will remove them). Even then, the other side has the right to bring the matter back before the Court at the earliest opportunity for an inter parteshearing. Clearly there is great scope for injustice if orders are made in the absence of one party. If the court 'wrongly' imposes a freezing order on a party's assets because it has been misled by the applicant, serious damage may be caused without that party having had the opportunity to put its case to the Court. Accordingly it is fundamental and of the highest importance that a party applying for ex parte relief must be completely frank with the Court and must put before the Court any matters which militate against the making of the order in question .

"15. In our judgment a short and accurate summary of the duty lying upon the party applying for ex parte relief is to be found in the decision of *Bingham J. in Siporex Trade S.A. -v- Comdel Commodities Limited* (1986) 2 Lloyds L.R. 428 ***at 437*** :

16. We must emphasise the passage concerning the exhibiting of numerous documents. It is not sufficient for a plaintiff to be able to say that, buried somewhere amongst the voluminous exhibits, the point at issue was available to the judge. The duty is much more stringent. All defences actually raised by the defendant or which can reasonably be expected to be raised in due course must be identified and fairly summarised in the affidavit. If the affidavit itself is voluminous, counsel may need to refer the judge to the relevant points. The overriding duty of the applying party and his advocate is to ensure that all actual or possible defences (and other material matters) are brought to the specific attention of the judge so that he may consider them before making his order."

23 In our judgment the respondents failed to make full and frank disclosure. They relied upon the Order of Justice as setting out the claim against Mr Devy and, as pointed out below, they implicitly relied upon the fact that there was an allegation of conspiracy to defraud as supporting their assertion that Mr Devy might dispose of the property once he was aware of the claim. The allegation in paragraph 59 of the Order of Justice to the effect that the proposed defendants concealed from Mr Taylor that an agreement had been reached with Thornton & Ross was clearly a significant aspect of the evidence in support of their claim of a conspiracy to defraud. Yet the respondents were in fact in possession of documents which, putting it at its lowest, might be thought to suggest that this allegation was incorrect.

24 We have of course not heard Mr Taylor's explanation of the documents and we should not be taken as finding that the documents necessarily undermine the claim in paragraph 59. It may be that Mr Taylor has an explanation which will put a different light and show that there is no inconsistency. But the duty on an applicant for an *ex parte* order is to draw to the Court's attention possible lines of defence of which they are aware or ought to be aware. In our judgment the failure to draw attention to documents which were exhibited to the Fishleigh report upon which they relied to value their claim and of which therefore they were or should have been aware and to indicate the possible adverse effect of these documents on the respondents' claim in the Order of Justice was a serious breach of the duty to make full and frank disclosure.

25 As was said in the passage from *Goldtron* referred to above, the Court may discharge an *ex parte* order following a breach of the duty to make full and fair disclosure even if, after full enquiry, the view is taken that the order would probably have been made even if there had been full disclosure. This is because of the importance of emphasising to applicants the importance of the duty.

26 We are not here concerned with money in a bank which could be moved instantaneously if the injunction is lifted. We are concerned with the property in which Mr Devy and his family live. As we point out below, there will be nothing to prevent the respondents from bringing an *inter partes* application for a caveat at which all relevant matters can be explored. In the meantime we consider that the importance of emphasising the duty to make full and frank disclosure outweighs any possible prejudice which the respondents could suffer and we therefore lift the caveat.

Other points

27 In the light of our decision, we can deal with Advocate Young's other points fairly briefly.

28 First, Advocate Young argued that the respondents had no *locus standi* to lodge a caveat as they were not "creditors" of Mr Devy. He referred to Le Gros, Traité du Droit Coutumier de l'île de Jersey at page 330 where it is stated:-

"Un créancier a le droit de loger une opposition par écrit entre les mains du Chef Magistrat à l'aliénation des héritages de son débiteur."

In the following passage, Le Gros sets out what was then the standard form of application for a caveat and it ends with the words:-

"… et ce d'autant qu'il est créancier dudit Mr."

The whole of the rest of the chapter talks in terms of creditors and debtors. Although it was not referred to in argument as the judgment was not then available, we would refer also to *Clarke -v- Callaghan* [2011] JRC 158 at paras 14 – 19.

29 Advocate Young argued that this passage meant that the person lodging the caveat had actually to be a creditor of the person owning the immoveable property; a caveat could not be lodged in support of a disputed claim.

30 He produced no authority to support this assertion other than the passage in *Le Gros*. In our judgment, it cannot possibly be the case that a caveat may only be issued in support of an undisputed claim. As was stated in *MacKinnon*, applications for caveats have been running at between 25 and 30 per annum and they are regularly issued in support of a disputed claim. Furthermore, it would in our judgment be undesirable to limit caveats in this way. A person who alleges that he is owed money by someone is entitled to be protected against the risk of an empty judgment because the alleged debtor has, in the meantime, disposed of his assets. The policy of the law is to try and ensure that, if a person has assets when a claim is brought against him, he should not be able to dispose of those prior to a finding by a court that he does in fact owe the money.

31 We accept, of course, as stated in *Clarke -v- Callaghan*, that the person obtaining the caveat must have a claim directly against the person owning the immoveable property; but he does not, in our judgement, have to be an uncontested creditor. Naturally, the Court will take note of the nature and perceived strength of any claim but that is a matter going to discretion rather than to jurisdiction.

32 In this case, the respondents allege that Mr Devy is personally liable to them for his dishonest assistance of the breach of trust effected by Lincoln in its capacity as trustee of the Valetta Trust. In our judgment therefore the Court had the jurisdiction to grant a caveat.

33 Secondly, Advocate Young submits that, quite apart from the specific point dealt with at paragraphs 15–26 above, the respondents failed to make full and frank disclosure because the affidavit in support did not disclose any possible defences to the claim. Given that there had been no letter before action and accordingly no correspondence between the parties, the Court pressed Advocate Young as to what possible defences the respondents should have been aware of and therefore should have disclosed in the affidavit. In the end Advocate Young was reduced to suggesting that the affidavit should have referred to the

possibility of the respondents' expert being wrong in his assessment of the value of the claim.

34 In our judgment this submission takes the observations in *Goldtron* too far. That case refers to the need for an applicant to identify in the affidavit all defences actually raised by the defendant or which can reasonably be expected to be raised in due course. No defences had actually been raised in this case and, save for the point dealt with earlier, we do not think that the respondents could at this stage be expected to identify any specific defences which could reasonably be expected to be raised in due course. The Court would of course assume that a claim such as that pleaded might well be denied. Accordingly, in the particular circumstances of this case, we would not have set aside the caveat on the grounds of a failure to identify defences which could reasonably be expected to be raised.

35 Thirdly, Advocate Young argued that there was insufficient evidence of any risk of dissipation of assets by Mr Devy. He submitted that the short bland assertion in Advocate Robinson's affidavit was wholly insufficient. Advocate Springate argued that the respondents' fear of dissipation arose from the fact that the cause of action relied upon in the Order of Justice was one of conspiracy to defraud. If Mr Devy was willing to act dishonestly by conspiring to defraud the respondents, he might well also be willing to seek to defeat any judgment by removing assets.

36 We agree with Advocate Young that the affidavit was inadequate in this respect. If the reason for the respondents' concern was as described by Advocate Springate, the affidavit should have said so. However, the nature of the claim as being one of dishonesty emerged clearly from the Order of Justice and would have been available to the Bailiff. If this matter had stood alone, we do not think that we would have found it sufficient on its own to have set aside the caveat.

37 Advocate Young further submitted that the application for a caveat was really an abuse of process because the claim was old and speculative, Mr Devy was a man of substance who had lived in the Island for many years and has considerable ties and the affidavit was simply too thin on detail.

38 These are matters which it will be open to Mr Devy to raise at an *inter partes* hearing. However we think it helpful to emphasize the distinction between a caveat and a Marevainjunction. A Mareva injunction is a very considerable restriction on a defendant's ability to carry on with his everyday life. The injunction usually restrains him from dealing in any way with any of his assets. He cannot even make ordinary day to day payments out of his bank account. It is because of the very restrictive nature of the injunction that an exemption has to be made for matters like living expenses so as to ensure that the injunction does not act unduly harshly. Nevertheless, even allowing for these exemptions, a Mareva injunction places very considerable restrictions on a defendant's ability to carry out his day to day financial activities.

39 A caveat is very different. It only prohibits a defendant from selling or charging his immoveable property. This is something which most persons do only very infrequently. Unless a defendant wishes to sell or charge his home, a caveat will in fact have no effect on his day to day life or his ability to spend money on whatever he chooses. If he wishes to sell or charge his home, the Court will invariably sit at short notice in order to resolve the position.

40 In the circumstances the prejudice caused by a caveat is normally very much less than that caused by a Mareva injunction. It follows that the threshold for imposing a caveat and regarding it as a proportionate measure to protect an alleged creditor is likely to be lower than that for a Mareva injunction.

Conclusion

41 However, we say no more about the merits of this case. The Court having set aside the caveat on the grounds of failure to make full and frank disclosure, it is of course open to the respondents now to apply for a caveat on an *inter partes* basis. At that stage all matters can be explored including the nature and substance of the respondents' concerns and any prejudice to Mr Devy. This may well require him to give rather more information about his plans in relation to his housing and other matters relevant to the alleged risk of dissipation. He may also wish to elaborate on why it is said that the existence of a caveat might put off potential purchasers as this was a point which was not immediately obvious to us. These and other relevant matters will all be for consideration by the Court which considers any *inter partes* application for a caveat brought by the respondents should they elect to do so.