UCC v Bender

Jurisdiction:	Jersey
Judge:	H.W.B. Page
Judgment Date:	13 February 2007
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Text

[2007] JRC 37

ROYAL COURT

(Samedi Division)

Before:

H.W.B. Page, **Esq., 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**.

Advocate A. P. Begg **appears for the Fourth Defendant**.

Advocate D. Gilbert **for the Fifth and Sixth Defendants**.

Authorities

Armco v Donohue and Ors [1999] JRC 185 .

A.E. Smith & Sons Ltd v. L'Eau des Iles (Jersey) Ltd [1999] JLR 319 .

COMMISSIONER:

The applications

1 There is a number of cost-related applications before me on which Advocate Baker appears for the Second Defendant, Mr. Koonmen; Advocate Young appears for the Plaintiff, UCC; and Advocate Gilbert appears for the Fifth and Sixth Defendants, Dovetail and Bluebird, and for the Receiver of the Gemstone A and B Trusts.

Mr. Koonmen's applications for (1) an increase in his allowances from injuncted funds, for legal expenses and for living and travel expenses; and (2) security for costs from UCC.

2 So far as the first is concerned, following a hearing in mid-December 2006 I made a series of rulings on 4 th January 2007, accompanied by a fairly full judgment, the effect of which was to authorise an interim amount of £250,000 to be available to Mr. Koonmen for legal expenses with effect from 1 st January 2007 (in place of the previous monthly allowance), to indicate a number of areas in which it appeared to me that Mr. Koonmen's affidavit evidence was less than satisfactory, and to adjourn the matter to 17 th January 2007 for further hearing in conjunction with Mr. Koomen's application for security for costs (which

had been listed for that later date). Further progress was made on both matters on the afternoon of 17 th January but time ran out before they could be concluded. On 22 nd January I made a second interim order increasing the amount of £250,000 referred to above by a further £50,000 pending the adjourned hearing. The adjourned hearings resumed and concluded on 8 th February.

3 Since the December hearing additional affidavit evidence bearing on these closely-related matters has been sworn on behalf of Mr. Koonmen (Mr Koonmen's 7 th and 8 th and Mr. Platt's 2 nd) and on behalf of UCC (Mr. Young's 8 th).

4 So far as Mr. Koonmen's application for increased allowances for legal and other expenses are concerned, the matter has moved on since December in several respects. Mr. Koonmen has sworn a further affidavit giving an up-dated account of his current assets and earnings and no further criticism on this score is made by Mr. Young. The application for an allowance for a wedding celebration has, sensibly, not been pursued; nor has that concerning the separate retrospective amount of £179,712. The primary emphasis is now rightly placed on future legal expenses, as to which Mr. Koonmen asks for an increase in his allowance from £25,000 to £120,000 per month. In that respect, Mr. Koonmen's advisers have re-calculated their estimate having regard to a re-assessment of the work to be done, changes in some charging rates and - importantly - a change of premise as to the likely trial date form July to October 2007. Costs from 13 th November 2006 to trial are now estimated at some £1.1 million.

5 Mr. Young's stance on this aspect of things is essentially three-fold. First, he submits, the further evidence produced by Mr. Koonmen still fails to respond adequately to several of the reservations previously expressed in my earlier judgment, and therefore leaves the court in a position in which it cannot properly conduct the careful balancing exercise called for in *Armco* as a necessary prerequisite to allowing a defendant to have access to frozen funds which are the subject of a proprietary claim. To some extent, this criticism is well made. There is in particular nothing new to support the costs that are said to be anticipated in connection with the services of New York attorneys and Professor Clayton and nothing new as regards the expense of Anguillan proceedings (though that no longer forms part of the relevant calculations - because, explains Mr. Baker, he has not had time to gather the necessary information); and no further information about Mr. Koonmen's borrowings, actual or potential, beyond the information that the previously expected contribution of US$ 1 million to the so-called "fighting fund" held by Anguillan lawyers has now been received and that the unused balance of the fund stands at some US$421,000. On the other hand, Mr. Baker and his team have endeavoured to respond to my previous concerns about the way in which future costs were estimated and have re-structured their approach accordingly.

6 Secondly, says Mr. Young, the evidence suggests that Mr. Koonmen could perfectly well fund his costs through borrowings: witness the Anguillan "fighting fund" and other loans. Certainly, Mr. Koonmen's capacity to secure loans appears to have been considerable (and

vestigial concerns of the kind that I mentioned in my earlier judgment can never be entirely eliminated); and little detail and no documentary evidence of these arrangements has been supplied. On the other hand, if he is to be believed, Mr. Koonmen has already incurred substantial borrowing liabilities, the terms of the fighting-fund loans are onerous, and his capacity for further borrowing is at or near an end. To that extent, a not inconsiderable contribution towards his legal costs has already been secured from such sources and, to that extent, the injuncted funds have been spared from recourse to them.

7 Thirdly, Mr. Young contends, the amount sought by Mr. Koonmen is, in any event, excessive.

8 As to Mr. Koonmen's application for security for costs, the issue is solely one of quantum: Mr. Young does not resist the application in principle, UCC being outside the jurisdiction. Mr. Baker asks for security to be ordered in an amount of £585,000 in respect of past costs and approximately £1 million to cover future costs up to and including the trial. Mr. Young suggests that this is way over the top, that there should be no security for past costs, and that the appropriate amount for future costs is some £260,000.

9 The central factor common to both applications and the heart of the differences between the parties is, therefore, the reasonableness or otherwise of the assessment presented on behalf of Mr. Koonmen of the level of costs likely to be incurred in carrying this dispute through to conclusion of the trial. The rival contentions are certainly a long way apart.

10 Although there are numerous subsidiary points where one could argue indefinitely and to no great advantage about the rights and wrongs of particular elements in the parties' rival calculations, the matter turns at heart on different - very different - assessments as to what Mr. Koonmen's defence of these proceedings involves. Parties and their advisers can, we all know, vary hugely in the approach that they take to litigation and the resources that they elect to deploy. Here, quite plainly, Mr. Koonmen and his advisers take the view that defence of this claim involves, for a start, an extensive trawl through very large numbers of documents spanning a number of years' operation of the Amber Fund and a considerable programme of interviews of anyone and everyone who might be a potential witness. When it comes to discovery of documents, the earlier litigation between Mr. Koonmen and Mr. Bender (which culminated in the Settlement Agreement of August 2003), means that innumerable difficult questions of potential documentary privilege arise and require consideration. Complicated questions of New York law also arise. The extent and perceived complexity of the whole exercise is summarised in paragraphs 12 to 20 of Mr. Platt's second affidavit.

11 Mr. Young expresses incredulity that an operation on this scale is necessary in fact, and invites me to reject it as a basis for the sort of applications made on behalf of Mr. Bender. In a meticulous tabular presentation he compares the number of man-hours anticipated by Mr. Baker's team with what he - Mr. Young - submits would be reasonable having regard to the matters in issue on the pleadings, and the time and resources allocated to the same issues

by UCC. Mr. Baker is dismissive of such refined analysis. But whatever else may be said of it, the exercise points up the very considerable differences of approach to specific areas. For example, discovery and inspection — 980 hours in the case of Mr. Koonmen and 390 for UCC; preparation of witness statements — 1750 hours in the case of Mr. Koonmen and 120 in the case of UCC; and 'trial preparation' - 840 hours in the case of Mr. Koonmen and 180 in the case of UCC. It also highlights the extent to which the total estimated man-hours and costs have risen in Mr. Koonmen's case between the dates of Mr. Platt's first and second affidavits: from 3771 (£742,090) to 5870 (£892,570). Mr. Young's assessment of what would be reasonable is 970 hours (£195,222).

12 Analysed in this way Mr. Baker's approach has, at first blush, the look of extravagance about it. But what he says in rebuttal cannot be ignored. This is bitterly fought litigation. What is at stake, so far as Mr. Koonmen is concerned, is his entire wealth. It is essential for him and his advisers to explore the history of the Amber funds in order to understand exactly what Mr. Silverman's role was, with a view - for example - to trying to see why it was that he received payments in 1996 and 1997 but not in later years; and this means carrying out extensive programmes of document-review and interviews of those involved at the time. And I can well see that, in a case where the crucial alleged agreement between Mr. Silverman and Mr. Bender is said to have been made orally on an occasion long before Mr. Koonmen had any involvement with the Amber Fund and Mr. Bender has abandoned defence of the proceedings, it will be all the more natural for Mr. Koonmen to want to show (if he legitimately can) that surrounding circumstances of one kind or another make it improbable that such an agreement was ever made: in a sense, that is all he *can* do as regards the alleged agreement that is at the heart of this litigation (apart from denying all personal knowledge of any such agreement). Mr. Baker agrees that this is a 'leave-no-stone-unturned' approach, but does not shrink from saying that it is more than justified.

13 In the end, my decision as regards Mr. Koonmen's application for an increase in his legal-expenses allowance has been determined principally by the following considerations: First, I accept - as I must - that the programme of work and estimate of costs put together by those advising Mr. Koonmen represents their *bona fide* best estimate of what is necessary in the interests of their client. Secondly, Mr. Young's assessment of what is reasonably necessary for the defence of these proceedings, is just that: a plaintiff's view of how a defendant should run his case. Thirdly, I am ill-equipped to make an informed judgment as to why Mr. Young's figures - which, after all, can be no more than 'guestimates' - should be preferred to Mr. Baker's, or as to what intermediate set of figures would be more reasonable. In any event it is not appropriate to approach issues such as the present ones as if the court were conducting a form of taxation. Fourthly, there is, therefore, no point in attempting an alternative detailed assessment of my own: to do so would involve a degree of refinement that would be incompatible with the arbitrariness of the underlying assumptions. Fifthly, the total amount involved, although considerable, still represents only a small percentage of the total amount of the funds currently frozen and is calculated on the basis of costs after taxation (although I recognise that there are differences between the parties on the appropriate up-lift rates to be applied). And, sixthly, although it is still possible to pick holes in the case presented on behalf of Mr. Koonmen, it is much improved over that originally put forward in support of this application.

14 I am inclined, therefore, to think that I must take the assessment presented on behalf of Mr. Koonmen at face value. I am also now satisfied that for the most part at least the other *Armco* considerations that I am required to weigh up point in favour of acceding to Mr. Koonmen's application so far as future costs of the proceedings in this court are concerned.

15 On the other hand, while I am prepared to give Mr. Koonmen the benefit of the doubt in permitting him to run his defence in the way that he has chosen to do, I do not think that, in justice, the same indulgence should be replicated in the context of his application for security for costs against UCC - even allowing for Mr. Baker's point that there has been no suggestion that UCC would have any difficulty in meeting any order. In approaching this aspect of matters I have due regard to the principles summarised by the Court of Appeal in *A.E. Smith & Sons Ltd v. L'Eau des Iles (Jersey) Ltd* [1999] JLR 319, but should make it clear that in view of the complexity of this matter I express no view at this stage on the merits of the claim.

16 But the foregoing approach to both applications is based, for my part, on the premise that there is as yet no consensus that the entirety of the trial will necessarily have to be postponed from July to October 2007 as Mr. Koonmen's advisers assume in calculating costs. And given that there is to be a full pre-trial review in a few weeks time on 19 th March (at which, among other things, the question of the extent of the trial currently listed for 2 nd July 2007, will arise), I think that it would be right for the moment to limit, in time, both the increased allowances that I now permit, and the order for security that I make. Both orders can then be reviewed in the light of the outcome of that hearing and other circumstances at that time when the scope of trial may be clearer.

17 On this basis, Mr. Koonmen will be allowed legal expenses from injuncted funds up to 30 th April 2007 in an amount of £575,000. This represents four months, January to April 2007, at £120,000 per month as sought, plus a further £95,000 which I am prepared to allow in respect of December 2006 in respect of the difference between the previous allowance of £25,000 and £120,000 (taking, as I do, a somewhat arbitrary but, I think, fair starting point of 1 st December 2006 for the new regime). I take the end of April as the end date for the moment on the basis that Mr. Koonmen's advisers no doubt need to pre-plan their work to a certain extent and this will take them six weeks beyond the pre-trial review in March. This allowance is in place of the earlier interim allowances of £250,000 and £50,000 and applies solely to costs of the proceedings in this court.

18 Mr. Koonmen's monthly allowance for living and travel expenses will also be increased with effect from 1 st January 2007 from £10,000 to £15,000 in order to cover anticipated extra travel as the trial approaches. Mr. Young argued strenuously that no increase was shown to be justified, but here too I am prepared, in the light of the additional evidence filed, to give Mr. Koonmen the benefit of the doubt to some extent, though not to the full extent that he seeks: the subject does not warrant extended discussion.

19 On the other hand, I take the view that, all in all, a fair figure to order by way of security for costs at this stage would be £450,000 in respect of costs from 1 st December 2006 to 30 th April 2007, with a further review on 19 th March of the appropriate amount to be ordered in respect of costs from 1 st May 2007 onwards. Having regard to the late stage at which the application was launched, the fact that Mr. Koonmen elected to change his legal representation in the summer of 2006, and the existence of unrecovered (as yet untaxed) costs orders in UCC's favour against Mr. Koonmen totalling £343,986, I do not regard it as appropriate to order security for pre-1 st December 2006 costs.

The Receiver's applications (1) for an increase in the litigation cap; (2) for security for costs from UCC; and (3) for authorisation of certain receivership fees and disbursements.

20 So far as access to injuncted funds are concerned, the present position is governed by the Deputy Bailiff's order of 20 th October 2005 limiting the total fees that the Receiver may take from the Gemstone Trust funds, without further application to the court to £100,000, as varied by a consent order made on 21 st July 2006 which involved a formula that produced a 'cap' of £173,376 and a further agreed adjustment to £177,005 in December 2006. It is common ground that this limit relates to the Receiver's litigation costs on behalf of Dovetail and Bluebird rather that his fees and expenses *qua* receiver, the latter not being subject to any limit.

21 By 15 th November 2006, that limit was almost exhausted and Crill Canavan took out a summons seeking an increase in the cap to £420,000 to cover the Receiver's estimated litigation costs through to the end of trial. This was said to represent £172,145 in respect of past costs up to 23 rd October 2006 and £250,000 for costs thereafter. The supporting figures have been prepared by a costs draftsman. The Receiver also seeks an order for security in a similar amount of £420,000.

22 Mr. Young suggests that an appropriate amount would be some £60,000, on the basis that the pleaded Answer of Dovetail and Bluebird is minimalistic, consisting of little more than a string of non-admissions, that there have been repeated professions of neutrality on the part of the Receiver, and that the Deputy Bailiff has in the past made clear his concern that the Receiver's costs should be carefully monitored.

23 Miss Gilbert submits that neutrality is not the same as passivity; that the Receiver is charged with protecting the Gemstone Trusts; that, while the beneficiary of the Gemstone A Trusts is believed to be Mr. Koonmen, in the case of Gemstone B the beneficiaries are a group of employees and former employees of Blue Edge Technologies KK who are otherwise not involved in the disputes the subject of the litigation and the Receiver has, in particular, a responsibility to look after their interests. Accordingly, while not proposing to become involved as extensively as Mr. Koonmen, it is, Miss Gilbert submits, inappropriate

to leave the conduct of the defence of UCC's claim entirely to Mr. Koonmen and proper for the Receiver to "patrol the perimeter" of the litigation.

24 There is, I accept, some force in Miss Gilbert's submissions. But I have three broad concerns in particular about the Receiver's applications. First, even allowing for the Receiver's role as described by Miss Gilbert, the estimate for post-23 rd October 2006 costs is considerable. Secondly, it seems to me that the Receiver may not be making adequate allowance for the depth and breadth of the investigation being conducted on behalf of Mr. Koonmen and the extent of the resources being deployed in defence of the claim against him, all of which will operate, as far as I can see, equally to the advantage of the beneficiaries of Gemstone B. And, thirdly, it emerged by chance in the course of the hearing, that there are, or may be, proceedings on foot in Anguilla challenging the appointment of the Receiver.

25 With these circumstances in mind, and having regard again to the pre-trial review fixed for 19 th March, I shall make interim orders on the Receiver's applications, pending further consideration on 19 th March, as follows: (i) the litigation cap will be raised to £275,000; and (ii) security for costs is to be provided by UCC in an amount of £185,000 (£85,000 in respect of pre-23 rd October costs and £100,000 in respect of subsequent costs). On the adjourned hearing I shall need to be properly informed of the state of play as regards any proceedings in Anguilla that may have a bearing on the current Receiver's position.

26 The Receiver also sought authority for the payment from injuncted funds of certain fees and disbursements covered by his summons dated 12 th January 2007 and the supporting affidavit of Miss Clare Nicolle of Crill Canavan. This was not opposed by Mr. Young and there will be orders accordingly. The matter raised in paragraph 7 of that affidavit was left over for discussion and agreement between Miss Gilbert and Mr. Young.

Generally

27 There will be liberty to apply to all parties as regards any matters that I have omitted to deal with or other loose ends. All questions of costs concerning these applications are reserved to the hearing on 19 th March.