Biema Holdings Ltd v Evolution Partners Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	11 February 2016
Neutral Citation:	[2016] JRC 40
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Court:	Royal Court
Date:	11 February 2016

Text

[2016] JRC 40

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**

Between
Biema Holdings Limited
First Plaintiff
Evolution Partners Limited
Second Plaintiff
Pearl Investments Trading Limited
Third Plaintiff
and
SG Hambros Bank (Channel Islands) Limited
Defendant

Advocate E. L. Jordan **for the Plaintiffs**.

Advocate N. M. Sanders **for the Defendant**.

Authorities

Abacus C.I. Ltd as trustee of the Esteem Settlement and the number 52 Trust [2000] JLR 165 .

Re Esteem [2002] JLR 53 .

Stock v Pantrust International SA [2015] JRC 268 .

Companies — reasons in respect of refusal to order preliminary issue.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons in respect of an application by the plaintiffs that I order a preliminary issue. At the conclusion of argument I refused to order the preliminary issue as requested and gave certain directions for reasons I explain later in this judgment.

Background

2 These proceedings arise out of certain bank accounts maintained by the plaintiffs with the defendant in Jersey. The plaintiffs are a company incorporated under the laws of Cyprus (“the first plaintiff”) and companies incorporated under the laws of the British Virgin Islands (“the second and third plaintiffs”). The plaintiffs are wholly owned by First Trust

Management AG of Lichtenstein and High Town Ventures Inc of Nevis, in their capacity as trustees of the Gamma Lambda and Delta One Trusts ("the Trusts") which Trusts I am informed are governed by the laws of Nevis. Previously the trustee of the Trusts was InWealth Trustees Nevis Limited.

3 The pleadings in Jersey arise out of the defendant's refusal to act on the instruction of the plaintiffs on or about 10 th June, 2013, to transfer the balances of all the accounts to an account held in Switzerland. This refusal led to proceedings being commenced by order of justice including injunctive relief granted on 13 th June, 2013.

4 The background to the request to transfer money and the order of justice arises from an order dated 23 rd April, 2013, issued by District Judge Lewis A Kaplan of the Southern District of New York in proceedings between the United States of America and Arnold Maurice Bengis, Jeffrey Noll and David Bengis. This order restrained each of Arnold Bengis, David Bengis and Jeffrey Noll "from transferring or otherwise disposing of any assets held SG Hambros Bank in the Channel Islands except to the extent that any such assets exceed the sum of $54,883,550".

5 What led to the 23 rd April, 2013, order was that between 1987 and 2001 Arnold Bengis, Jeffrey Noll and David Bengis were engaged in a scheme involving illegally harvesting lobsters in South African waters for export to the United States in violation of both South African and US law. This conduct led to prosecutions in the United States where Arnold Bengis and Jeffrey Noll pleaded guilty to charges of conspiracy to commit smuggling and violations of certain statutory provisions with David Bengis pleading guilty to conspiracy only. All were sentenced to various terms of imprisonment and certain forfeiture orders were made.

6 Subsequent to these convictions, steps were taken before the Courts of the Southern District of New York to consider whether an order for restitution should be made in favour of South Africa.

7 At first instance the District Court of the Southern District of New York ruled that South Africa was not entitled to restitution. On appeal the appellate court held that South Africa had a proprietary interest in the illegally harvested lobster in its waters and was the victim of the conduct of Messrs Bengis and Noll and was therefore entitled in principle to restitution.

8 The amount to be ordered by way of restitution was remitted to District Judge Kaplan at first instance. On 14 th June, 2013, Judge Kaplan ordered restitution in the sum of $29,495,800, less $7,049,080 already paid by Messrs Bengis and Noll in South Africa, leaving a balance of $22,446,720.

9 With effect from 14 th June, 2013, the restraint order previously granted in the United States

was accordingly modified with the effect that the restrained sum was limited to $22,446,720.

10 On 17 th October, 2013, Judge Kaplan further ordered:-

The granting of the restitution order by Judge Kaplan was appealed which appeal was generally unsuccessful apart from referring back to Judge Kaplan the issue of when David Bengis became involved in the conspiracy and therefore whether he was liable for the entire amount due by way of restitution or whether he was only liable for losses from the date he became a party to the conspiracy. This issue was resolved by agreement with David Bengis's restitution obligations being satisfied on paying the sum of $1,250,000 which I was informed had been paid. This agreement was approved by Judge Kaplan on 17 th November, 2015. Accordingly the balance of the restitution order now stands at $21,196,720.

> ***"1. Defendants and all persons in active concert or participation with any of them who get actual notice of this Order, through personal service or otherwise, forthwith shall transfer all funds that are the property of any defendant or in which any defendant has a legal, beneficial, or other interest (up to the aggregate sum of $22,446,720) to the Clerk of Court*** .
>
> ***2. Defendants and all persons in active concert or participation with any of them who get actual notice of this Order, through personal service or otherwise, be and hereby are enjoined from encumbering or transferring to anyone other than the Clerk of Court any property of any defendant or in which any defendant has a legal, beneficial, or other interest (up to the aggregate sum of $22,446,720)."***

11 In its answer, the defendant in summary pleaded, by reference to its terms and conditions of business, that it was entitled to refuse to comply with the instructions given to it by the plaintiffs on 10 th June, 2013. Clause 17 of the defendant's terms and conditions commences with "We reserve the right at our sole discretion to refuse any instructions given by you without giving any reason or being liable of any loss that may be occasioned thereby". The reason for the refusal was set out at paragraph 18(e) of the defendant's answer setting out the extent of the defendant's dealings with Arnold and David Bengis on behalf of the Trusts leading to the conclusion at paragraph 18 (f) that "There was a risk to the Defendant of the US Court exercising jurisdiction to find the Defendant in contempt of the US Restraint Orders, if it found that the Defendant actively aided and abetted an enjoined party in violating that order, sufficient to establish the personal jurisdiction of the US Court over the Defendant."

12 The defendant therefore sought directions as to whether to pay money to the plaintiffs in accordance with their instructions. It is against this background that the plaintiffs seek a preliminary issue.

13 The preliminary issue sought is that set out at paragraph (a) of the prayer to the re-

amended order of justice which provides as follows:-

> *"(a) Declare that Arnold Bengis and Jeffrey Noll have no legal, beneficial or other interest in the property currently held by SG Hambros in the Accounts such property being owned by the Trusts and that as a result the Restraint Order does not prevent the transfer of the funds by SG Hambros to the Plaintiffs."*

14 It is right to set out that while the Jersey proceedings were commenced in 2013, because of the appeals in the United States, since the filing of pleadings in Jersey and an order for discovery made by Sir Michael Birt on 14 th October, 2013, the Jersey proceedings have otherwise been stayed pending determination of the various appeals in the United States.

15 It is because the second appeal in the United States has been determined and matters have been resolved with David Bengis that the stay of the Jersey proceedings has been lifted and the plaintiffs issued their present application.

16 Notwithstanding the earlier stays, it is also right to set out that following a case management conference on 17 th February, 2014, I wrote to the parties indicating that in my opinion both South Africa and the United States of America should be notified of the Jersey proceedings. My reasons for doing so were as follows:-

> *(i) In my judgment, if they wish to apply to intervene, the parties I have indicated to be notified have an arguable case to do so*.
>
> *(ii) The jurisdiction to join parties is contained in Royal Court Rule 6/36 (b).* The test for joinder was referred to in *Abacus C.I. Ltd as trustee of the Esteem Settlement and the number 52 Trust* [2000] JLR 165 . *Although the relief in the Plaintiffs Order of Justice is a narrow claim requiring the Defendant to adhere to the terms of the mandate, underlying the argument is the extent of the interest of Arnold Bengis and David Bengis in relation to the trust managed by the Plaintiffs and the effect of the order made by Judge Kaplan.* Accordingly, I am satisfied that it is appropriate for South Africa and the United States to be given notice of the present proceedings by these directions so that they can decide if they wish to intervene. If they do not apply to intervene then the Plaintiffs' claim against the First Defendant will be determined as I have directed. I also consider that Arnold and David Bengis should be notified of the proceedings. If the other parties notified apply to intervene, they should also be notified of that application to decide if they wish to intervene themselves.
>
> *(iii) I do not regard it as appropriate to determine the claim between the Plaintiffs and the Defendant first and then notify the countries concerned of the outcome of the proceedings.* That could give rise to arguments as to whether such countries are bound by the determination of the proceedings then concluded. Secondly, it is open to the Plaintiffs to apply to the United States for clarification as whether the restitution order made on 14 th June, 2013, by Judge Kaplan applies to assets held in the name of the Plaintiffs with the Defendant. The Plaintiffs do not wish to do so although this

would be one option to resolve the current impasse. Instead as they are entitled to, the Plaintiffs wish the Royal Court to determine the matters in issue. Given that approach I consider it appropriate to allow the countries concerned an opportunity to intervene. If they elect to not to intervene then the Royal Court can resolve the matters in issue on the pleadings between the Plaintiffs and the Defendant in an efficient manner as I have directed.

(iv) It is also right to observe that the order made by Judge Kaplan appears to be a form of compensation order in favour of South Africa. It does not therefore appear to give any ownership right in the funds held by the Defendant. This means that any application to intervene would have to be on the basis of the sorts of issues raised in *Re Esteem* [2002] JLR 53 . *I of course express no view on the merits of any such arguments*.

17 I also record that at the hearing before Sir Michael Birt on 14 th October, 2013, the plaintiffs were also exploring a preliminary issue. However that preliminary issue related to the relief sought in paragraph (b) of the plaintiff's re-amended order of justice to the effect that the defendant had no discretion to refuse to act on instructions or was unreasonably exercising its discretion and therefore requiring the defendant to return assets held by it to the plaintiffs. This application for a preliminary issue brought by the plaintiffs, acting through a previous legal adviser, was never pursued.

The applicable legal principles

18 There was no dispute between the parties, on the applicable legal principles when a preliminary issue might be ordered which I considered recently at paragraphs 12 to 15 *Stock v Pantrust* [2015] JRC 268. Advocate Jordan in particular emphasised paragraph 14 and 15 of *Pantrust* which state as follows:-

> ***"He also referred me to a decision of the English Court of Appeal reported at*** *McLoughlin v Grovers* [2001] EWCA Civ 1743 . ***In setting aside a first instance judgment where a preliminary issue had been ordered and had taken place, the English Court of Appeal were critical of a trial on the issue of foreseeability of damage only.*** Mr Justice David Steel at paragraph 65 of the decision stated:-
>
> ***"No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability.*** It was wholly impracticable for there to have a full trial of the factual issues pertinent to foreseeability. It was an issue that should have presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately .
>
> ***In my judgment, the right approach to preliminary issues should be as follows:-***

a. Only issues which are decisive or potentially decisive should be identified;

b. The questions should usually be questions of law;

c. They should be decided on the basis of a schedule of agreed or assumed facts;

d. They should be triable without significant delay, making full allowance for the implications of a possible appeal;

e. Any order should be made by the court following a case management conference."

Decision

In respect of the applicable legal principles to be followed I agree these are as set out by Advocate Sinel by reference to the Jersey authorities he cited. To be fair to Advocate Thomas he did not dispute those principles. The approach in *McLoughlin v Grovers* ***is consistent with these decisions and is a useful summary of the factors I should consider although it may also be possible to have a preliminary issue where there are limited disputed facts in issue not requiring significant evidence."***

19 Advocate Jordan contended that the preliminary issue she was seeking was determinative of the proceedings, because, if it was found that Arnold Bengis had no legal, beneficial or other interest in the funds with the United States having settled with David Bengis, then the defendant had no justification for refusing to transfer sums it was holding. It was therefore a straightforward factual question whether or not Arnold Bengis had an interest in the Trusts as at 17 th October, 2013, which could be resolved by a hearing lasting only a day.

20 Advocate Sanders for the defendant pointed out that the present application sought a different preliminary issue from that sought previously; he also indicated that the position was not necessarily as clear as was being contended. He expressed concern as to whether determining the extent of the interest of Arnold Bengis in the Trusts or in the accounts was decisive. Firstly, such determination did not automatically lead to an order for the return of the funds. Secondly, it did not address the question of the exercise of discretion by the defendant. Thirdly, even if there was agreement on funds being returned, there might still be an argument on costs because the defendant sought its costs of the proceedings.

Decision

21 The view I reached was that the tests set out in *Stock v Pantrust* in particular at paragraph 14 had not been met. At this stage I was not satisfied that the preliminary issue sought by Advocate Jordan for the plaintiffs was going to be decisive or potentially decisive. This was firstly, because in my view, without evidence from US lawyers the scope and effect of the

orders made by Judge Kaplan were unclear. In particular it was not clear whether it was enough simply for the Royal Court to decide that Arnold Bengis had no interest as at 17 th November, 2013, in any assets held by the defendant in Jersey or whether the orders applied to any prior interests that Arnold Bengis may have had in the companies or the Trust owning them at some earlier point in time.

22 Secondly, Advocate Jordan in response to a question put by me was unable to confirm, if the preliminary issue was determined against her clients, that the Royal Court's ruling would also resolve the matter. At that stage she indicated that the discretion point would still have to be determined. This led me to conclude that the plaintiffs' approach was therefore asking the Royal Court to decide the case on an issue by issue basis. As noted in *Pantrust* and earlier decisions referred to in *Pantrust* there are real dangers with such an approach.

23 Thirdly, evidence of US law was not just relevant to the Royal Court's understanding of the scope of the orders made by the US Courts; it was also relevant to whether or not the defendant had exercised its discretion reasonably. There was therefore a significant overlap between evidence relevant to the preliminary issue and the evidence relevant to the exercise of discretion by the defendant.

24 Fourthly, there was no agreement between the parties that if the preliminary issue was determined in the plaintiffs' favour that would lead to proceedings being resolved. At the very least there was potential for disagreement on costs which disagreement could in practice require the Royal Court to determine the discretion issue raised on the pleadings. There was also potential for disagreement on the discretion issue.

25 For all these reasons I therefore refused to order a preliminary issue.

26 However, I was not unsympathetic to the parties trying to find a pragmatic resolution to the issues raised. In particular I noted the defendant had not indicated its position in relation to the effect of the US orders in its pleading, save in general terms that it faced a risk of being found in contempt. Both in its pleading and in its skeleton argument filed for the past application, there was an element of the defendant sitting on the fence and being unwilling to justify why it had refused to accept the instructions given to it.

27 In addition, therefore to giving the plaintiffs leave to re-amend their order of justice which was agreed, I directed the defendant to set out within 28 days its case on the effect of the orders made by the US Court referred to in this judgment. Once this pleading was filed and the plaintiffs had filed a reply, if they chose to do so, it was at that stage that South Africa and the United States of America, the Attorney General of Jersey and Arnold Bengis were to be notified of the Jersey proceedings and given an opportunity to intervene. I would then determine their application to intervene and any required directions if the application to intervene was agreed or was successful.

28 If no party notified chose to intervene, I ordered the plaintiffs and the defendant to give supplemental discovery and then exchange expert evidence on relevant issues of US law and the law of Nevis. I gave permission in respect of the latter because the proper law of the Trusts is the law of Nevis and there may be issues of Nevis law which could be relevant to the issues that the Royal Court has been asked to decide. Following the exchange of this expert evidence the parties were also directed to come back to me for further directions to determine the most practical manner of resolving the present dispute.

29 In terms of costs, while the plaintiffs' application failed, I ordered costs in the cause because the matter required directions to both parties to progress the proceedings and because the plaintiff was trying to find a proportionate outcome to the issues in dispute.