10 pages.

Royal Court - Samedi Division
21st June, 1990.
Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat J. H. Vint
Jurat Mrs. M. J. Le Ruez

87.

Between	IBL Limited	First Plaintiff
And	Meridian Group (UK) Limited	Second Plaintiff
And	Planet Financial and Legal Services Limited	First Defendant
And	Brian Harrison Webbe	Second Defendant

Application of Phillip Arthur Coussens and John Trevor Howard Henderson for leave to intervene.

Advocate J. G. White for Applicants
Advocate A. R. Binnington for Plaintiffs
Advocate M. St.J. O'Connell for Defendants

Messrs. Coussens and Henderson are defendants in proceedings instituted in England by the plaintiffs. The first action was commenced by Inspectorate International S.A. (now Adia S.A.) and the second plaintiff in March, 1988, in which the plaintiffs claim damages of approximately £40 million together with interest and costs based on alleged breaches of warranty and misrepresentations by Messrs. Coussens and Henderson. Mr. Coussens has filed a defence and a counter-claim seeking inter alia, delivery of £11.2 million of purchase consideration payable to him by the second plaintiff under the agreement by which he sold his shares in the first plaintiff to the second plaintiff. In the second action the first plaintiff issued proceedings against Mr. Coussens in August, 1988, for the return of certain property alleged to belong to the first plaintiff. These proceedings were consolidated with the first action in May, 1989, and are due to be heard at trial commencing 12th November, 1990. In August, 1989, Meridian International B.V. and the first plaintiff issued proceedings against Messrs. Coussens and Henderson for the return of certain share certificates; this action has now settled. In May, 1990, Meridian Group Services Limited (the subsidiary of Inspectorate International S.A.) issued proceedings against Mr. Coussens for the recovery of a loan of £850,000 together with interest. An application for summary judgment will be heard on 29th June, 1990.

As at the date of the representation (8th June, 1990) in none of the actions described above had the matters described in the Jersey proceedings been raised as pleaded issues. However, by Summons also dated the 8th June, 1990, returnable before the Master in Chambers this morning, the plaintiffs sought leave inter alia, to amend the Statement of Claim in the first English action to include at least one of the matters described in the Jersey proceedings (the CES transaction). We were informed that the application would be contested but that, by consent, it would be referred to a Judge in Chambers to be heard as expeditiously as possible.

Messrs. Coussens and Henderson sought leave to intervene forthwith in the Jersey proceedings.

On the 12th April, 1990, the plaintiffs obtained, ex parte, an Order of Justice against the defendants seeking disclosure of documents held by the defendants for Continental Equipment Supplies (CES) and Malverda Trading Limited (Malverda).

The plaintiffs gave an undertaking (as amended) in the Order of Justice as follows:-

"Not without the leave of the Court to use any documents or information obtained from the defendants....save for the purposes of the consolidated actions in the Queen's Bench Division of the High Court of England against Coussens and Henderson, the short title of which are Action 1988 I. No. 2329 and Action 1988 I. No. 6396 which actions have been commenced by the second plaintiff and its parent company Inspectorate International S.A. and/or in proceedings to be commenced by the first plaintiff herein against Coussens and Henderson in respect of breach of their fiduciary duties as aforesaid".

In clause 8 of the Order of Justice the plaintiffs claim that Coussens is believed by them "to have acted in breach of his fiduciary duties to the first plaintiff by artificially inflating the profits of the first plaintiff and its German subsidiary IBL Computer Gmbh (IBLG) and this having the effect of deceiving the auditors of the first plaintiff and prospective purchasers of the first plaintiff as to the true value of the first plaintiff".

In clause 12 of the Order of Justice it is stated that Messrs. Coussens and Henderson are believed by the plaintiffs "to have acted in breach of their fiduciary duties to the first plaintiff by transferring or arranging the transfer of sums due to the first plaintiff to companies not owned or controlled by the first plaintiff". The Order of Justice goes on to allege that transfers of this kind were made to Malverda.

The plaintiffs' intended claims against Messrs. Coussens and Henderson were further set out in affidavits sworn by Mr. David James Burger on the 11th and 18th April, 1990, in the first of which, in paragraph 76 Mr. Burger made it clear that the plaintiffs may use the documentation disclosed to them in the Jersey proceedings to amend the pleadings in the English proceedings.

Certain documentation relating to the CES transactions was disclosed to the plaintiffs by the defendants pursuant to the Order of Justice.

On 25th April, 1990, Messrs. Herbert Smith & Co., the firm of solicitors in London acting for Messrs. Coussens and Henderson in all the English actions, was approached by the second defendant and informed of the Jersey proceedings.

On or about the 8th May, 1990, Mr. O'Connell informed me that the defendants wished to apply to have the Jersey proceedings struck out. With the co-operation of Mr. Binnington, the Court, as now constituted, was convened for the 10th May, 1990, and, at my request, a Summons was prepared for that sitting, seeking (1) that the interim injunctions contained in the Order of Justice should be lifted and (2) that the Order of Justice should be struck out on the grounds (i) that it disclosed no reasonable cause of action and/or (ii) that it was otherwise an abuse of the process of the Court.

On the 10th May, 1990, Advocate Boxall appeared for the defendants and sought an adjournment of the hearing of the summons. The Court received an affidavit from the second defendant and heard submissions from both Counsel. The Court granted only a very short adjournment for the further inter-partes hearing of the substantive issues. The Court was concerned about the effect and development of the principle contained in Norwich Pharmacal Co. v. Commissioners of Customs and Excise (1973) 2 All E.R. 943, which had been applied in Jersey on a number of occasions. The Court was also concerned about

the interests of justice. The defendants had had since the 18th April, 1990, to consider the principles of law involved and, in the opinion of the Court, should have been ready to argue the substantive matters. Indeed the defendants had been saved from being in contempt only by my willingness to abridge time so that the matter could come before the Court that day. The Court adjourned the further hearing, on the principles of substantive law to be applied, until the 15th May, 1990, and indicated that it would expect to be addressed further, by Mr. Boxall (or Mr. O'Connell), in particular, on the development of the Norwich Pharmacal principle and why we should not, in the interests of justice, further extend the principle, if it were necessary to do so, in order to enable the plaintiffs to obtain the information they sought, even if we were to go beyond the decisions of the English Courts in the process; and by Mr. Binnington, in particular, on the question which concerned us, raised by Mr. Boxall, that the Jersey proceedings amounted to a "fishing" expedition and no more.

In the meantime, the Court noted the undertaking, contained in the second defendant's affidavit, that he was able to and would abide by the restraining order set out in the prayer of the Order of Justice which restrained the defendants from altering, destroying, disposing of or transferring out of their possession, custody or power all or any of the documents sought to be disclosed and produced, and further ordered that the CES material already obtained by the plaintiffs as a result of the part compliance by the defendants with the disclosure and production order should not be used for any purpose until after the completion of the inter partes hearing and the delivery of the Court's decision upon it.

On the 15th May, 1990, leave was given to the defendants, without objection from Mr. Binnington, to amend their summons by the addition of two new paragraphs: (3) asking that the plaintiffs be compelled to return to the defendants all the copy documents disclosed to the plaintiffs pursuant to the Order of Justice together with all copies of the copy documents made by the plaintiffs and all working papers made by the plaintiffs on the contents of either the originals or the copy documents referred to and (4) seeking an injunction restraining the plaintiffs from using, disclosing or passing on information in their possession.

Throughout the 15th and the afternoon of the 16th May, 1990, the Court heard lengthy submissions from Mr. O'Connell and Mr. Binnington. The Court believes that during the hearings of the 10th, 15th and 16th May, all possible arguments for and against the original injunctions and, indeed, the Order of Justice, were fully canvassed before us. These included the Norwich Pharmacal principle and its development, the obtaining of evidence for foreign courts, the Service of Process and Taking of Evidence (Jersey) Law, 1960, and the 1985 amendment to that Law, the Hague Convention, the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order, 1983 (Act of 1975), subpoena duces tecum, full and frank disclosure, substantial cause of action, confidentiality, "fishing" and "trawling" exercises and expeditions, and many authorities. The Court received and considered a second affidavit from the second defendant and an affidavit from Patricia Jane Hardy, an English Solicitor, of Herbert Smith & Co., acting for Messrs. Coussens and Henderson, to which was attached a Counsel's Opinion from Junior Counsel for Messrs Coussens and Henderson in the English proceedings. At the conclusion of the hearing the Court reserved its decision and judgment.

On the 4th June, 1990, when work on the judgment was proceeding, Mr. White attended on me in Chambers to advise me that he had been instructed by Messrs. Coussens and Henderson to apply to intervene in the Jersey proceedings. Messrs. Coussens and Henderson had concluded that their interests were not necessarily the same as those of the defendants and they wished to have the opportunity to address the Court. At that stage Mr. White envisaged an intervention after the reserved judgment had been handed down. For that reason a decision with reasons to be given later would not suffice. A fully reasoned judgment was essential. He envisaged making a Representation on the 8th June, 1990, which would be adjourned until delivery of the judgment; a reasoned judgment would be delivered; if necessary he would apply for a further stay of compliance whilst he considered the judgment and whether he wished to be heard.

Between the 4th and 8th June, 1990, there was a change of plan and the Representation of Messrs. Coussens and Henderson, which we heard yesterday, seeks leave to intervene in the Jersey proceedings and in particular permission to be heard in the matters raised in the defendants' amended summons before the Court issues its judgment.

The applicants claim that they understood from the defendants that the defendants' application would initially involve a preliminary point of law which would be argued by the defendants on the "Norwich Pharmacal" ground and would not involve an analysis of the facts relating to the plaintiffs' claims or any evaluation of the merits of the possible claims, that the defendants put forward no substantive affidavit on the facts, and that at the hearing, the plaintiffs' counsel referred the Court to the affidavit evidence of Mr. Burger in opposition to the defendants' amended summons, and that in doing so the plaintiffs relied upon their version of the facts before the Court.

In the opinion of the Court there is no strength in this ground of the Representation. The defendants were seeking to have the injunctions lifted. The grant of injunctions is dependent upon a good arguable case being made out. A good arguable case was made out by the Order of Justice and the affidavit evidence of Mr. Burger. The affidavit of Mr. Coussens, placed before us yesterday, contains no denial that the plaintiffs have a good arguable case. Indeed Mr. Coussens has elected, on the basis of advice received, not to set out in an affidavit his answer to the factual allegations made by Mr. Burger. It appears therefore, that the applicants now seek leave to intervene in order only to address us, through their Counsel, on all the legal aspects of this matter which have already been so fully canvassed before us. The reason given for delay on the part of the applicants is quite unconvincing. They now wish to be heard on the very matters which they were previously content to leave to the defendants.

However, yesterday Mr. White based his case mainly on the principles of natural justice. He also argued that the plaintiffs had knowingly misled the Court, because they had now sought leave to amend their Statement of Claim in the English proceedings before receiving the Jersey documentation, and that a further delay to enable the applicants to be heard would not cause any prejudice to the plaintiffs. He also claimed that the applicants were being treated oppressively because they faced a "barrage of litigation in several jurisdictions".

In the Court's view there is no force in the complaint of oppression. Nor do we accept that we were knowingly misled by the plaintiffs. We accept

Mr. Binnington's assurance that the application to amend the Statement of Claim in the English proceedings affects only one CES transaction and does not rely on any information disclosed as a result of the injunction. Certainly no Malverda transaction is referred to in the amended Statement.

On the other hand we do not place much emphasis on the matter of prejudice to the plaintiffs. Prejudice in the length of the Jersey hearings resulting from a late intervention can be compensated with costs. Prejudice in the English proceedings must be weighed against earlier delays on the part of the plaintiffs in those proceedings.

The deciding factor, in the opinion of this Court, is the principle of natural justice.

The Court is persuaded that the applicants are affected by the allegations of fraud made against them and, therefore, that they should be permitted to be heard.

Rule 6/10(9) provides the Court with an absolute discretion to order that ... person whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. The presence of the applicants is "necessary" only because the principles of natural justice require it. We very much doubt whether their presence and their being heard will add anything to the very full submissions we have heard already. Mr. O'Connell put forward all the arguments available to the applicants very well indeed but we do not think that that can preclude the applicants from being heard through Counsel of their own choice. The "audi alteram partem" rule requires the hearing of all parties affected. Until the applicants have been heard the Court cannot be certain that they cannot add anything to the submissions already made.

Order 15/6(2) of the Rules of the Supreme Court is in almost identical terms to Rule 6/10(9). The authorities cited in the 'White Book' are, therefore, relevant to the matters we have to decide. Lord Esher M.R. in Byrne v. Byrne (1889) 22 QBD 657 pp666.7, said that this rule should be construed so as to effectuate what was one of the great objects of the

Judicature Acts, namely, to bring all parties to disputes relating to one subject matter before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate trials and actions. At this late stage this will not be achieved in full here but the inconvenience of two separate hearings - if we were to allow intervention after judgment - and the inconvenience of two separate judgments, will be avoided. The authorities cited in the White Book show that the power given by the rule is widely exercised though the addition of new parties may cause new expense and necessitate new evidence.

Accordingly we give leave to the applicants to intervene and order that they be heard in the matters raised in the Summons, before the Court issues its judgment.

However, the discretion of the Court is to be exercised on such terms as the Court thinks just. The "terms" include orders as to costs.

The delay on the part of the applicants is inexcusable. The reason given in paragraph 13 of the representation relating to facts is untenable since the applicants have themselves avoided an answer to the factual allegations and have not denied them. We are left therefore, with either a simple change of mind or a tactical delay. Costs will undoubtedly have been thrown away as a result of the delay. The Court will have been much inconvenienced by having to hear the same issues twice, with inevitably a great deal of repetition. We have some sympathy for the argument of Mr. Binnington that permitting the applicants to rely on the principles of natural justice may in effect tend to defeat, at least to delay, the interests of justice.

We have no hesitation in saying, therefore, that the terms upon which leave is granted must include terms as to costs. The Court orders that the applicants will pay the costs of both the plaintiffs and the defendants of and incidental to yesterday's hearing on a taxation basis. Moreover, the applicants will pay the costs thrown away of and incidental to the hearings of the 10th, 15th and 16th May, on a taxation basis and, if such costs cannot be agreed, they will be referred to the Judicial Greffier for taxation and assessment.

The second defendant will remain bound by his undertaking that he is able to and will abide by the restraining order set out in the Order of Justice restraining the defendants from altering, destroying, disposing of or transferring out of their possession, custody or power all or any of the documents sought to be disclosed and produced.

The plaintiffs will remain bound by the stay préviously ordered that the CES material already obtained by the plaintiffs as a result of the part compliance by the defendants with the disclosure and production order should not be used for any purpose until after the completion of the inter partes hearing and the delivery of the Court's decision upon it.

The Court is not prepared to accede to Mr. Binnington's request that the latter stay should be lifted in respect of certain documents, without notice and detailed consideration of the documents concerned. Whilst the Court has sympathy with the application it cannot deal with such a matter without full consideration because the reasons why the documents to which he referred are not available to the first plaintiff would have to be explored. Accordingly any application to vary the stay should be by summons, supported by affidavit.

Nor is the Court prepared to make the leave to intervene conditional upon the filing by the applicants of affidavits dealing with factual matters of whcih the plaintiffs made complaint. This is an interlocutory matter and we must avoid a trial of substantive matters which should be better dealt with in the English proceedings. Whilst Mr. Binnington may well be correct that the applicants are being selective in their use of the natural justice arguments the fact remains that they have a right to be heard. It may well be that, with the benefit of hindsight, the court should of its own motion have convened them or that, when signing the Order of Justice, I should have insisted that they be made defendants. Whilst that does not exonerate the applicants from responsibility for the delay it does mean that the Court should now resist a widening of the proceedings to incorporate all the factual issues. The Court must always be careful, when dealing with interlocutory matters, not to try the same issues twice and the "forum conveniens" on the facts is undoubtedly England.

Authorities

Royal Court Rules 6/10(9).

The Supreme Court Practice 1988 Rule 15/6 - 15/6/15.

Settlement Corporation and Others -v- Hochschild (No.2) (1970) 1 All ER.

Gurtner -v- Circuit (1968) 1 All ER.

Amon -v- Raphael Tuck & Sons Ltd (1956) 1 All ER.

Norwich Pharmacal Co -v- Commissioners of Customs and Excise (1973) 2 All ER 943.

Byrne -v- Byrne (1889) 22 QBD 657 p.p. 666/7.