

ROYAL COURT
(Samedi)

14th May, 1996.

92.

Before: The Deputy Bailiff and
Jurats Orchard and Herbert

BETWEEN	The National Airline Commission of Papua New Guinea	PLAINTIFF
AND	Henryk Boguhull Chabrowski	DEFENDANT
AND	Lloyds Bank PLC	FIRST PARTY CITED
AND	Standard Chartered Bank (C.I.) Limited	SECOND PARTY CITED

Representation of the Plaintiff seeking leave to be released from undertakings contained in the Order of Justice.

Application by the Plaintiff for release of documents to an English Court, sitting on a jurisdictional point.

Application by the Defendant for a stay of the Plaintiff's application, pending hearing of the action in Jersey.

Advocate M. St. J. O'Connell for the Plaintiff
Advocate N.M. Santos Costa for the Defendant

JUDGMENT

THE DEPUTY BAILIFF: There are in fact two summonses before us this afternoon. An application by the Plaintiff in this action for documents to be released to an English Court, which is sitting as a matter of urgency on Friday on a jurisdictional point, and an application by the Defendant for any decision to be stayed pending the hearing of the action in Jersey on a jurisdictional point.

Briefly, by way of background, on 21st March I signed an Order of Justice brought by the Plaintiff which operates an airline called Air Nuigini providing domestic air services within

Papua New Guinea and other countries in the South Pacific, Asia and Australia.

5 We have established this afternoon that the Plaintiff is a properly constituted Plaintiff being defined by the National Airline Commission Act Ch. 244 of the Independent State of Papua New Guinea. It is therefore a creature of statute.

10 The Defendant was employed by the Plaintiff from 15th August, 1988, to 17th December, 1995 - and that date is significant - as the manager of the Plaintiff's purchasing and supply department. During the course of his employment he had care and control of all of the Plaintiff's aircraft parts which were held by the airline both in Papua New Guinea and overseas.

15 When the Order of Justice came before me the Plaintiff stated that it had reason to believe that the Defendant, during the period of his employment, had caused aircraft spare parts to be sold to third parties and this without knowledge or authority of the Plaintiff, and that he had failed to account to the Plaintiff for the proceeds from those sales.

20 The serving of the Order of Justice brought information, in some detail, from two banks: the first party cited, Lloyds Bank Plc and the second party cited, Standard Chartered Bank (C.I.) Limited. As a result of the information obtained the worst fears of the Plaintiff were in fact confirmed. The Plaintiff has again given us a detailed affidavit showing how it has traced the source of the monies. The funds held in Jersey are substantial.

30 Mr. Costa, makes the point that the Plaintiff's claim is essentially in contract, although there is also an alternative claim for breach of fiduciary duty and a claim for a conversion in tort. Mr. Costa made the point forcefully before us that there is much yet to be proved in order to found an action in contract which will enable the matter to be heard in Jersey because quite clearly the Plaintiff is based in New Guinea, the Defendant lives in England, the contracts were all carried out abroad and the only connection with Jersey is the funds which have been discovered to have been deposited here.

45 It may be, from looking at the documents before us, that the actions of the Defendant took place during the course of his employment and that the contracts were entered into before he left the services of Air Nugini and all that was coming into Jersey at a later stage were the funds. We just do not know and we will not know, of course, until the matter comes for a proper hearing before the Court and we are able to have evidence tested.

50 One thing, however, has disturbed us and that is that on 20th February 1995, the Defendant opened a bank account and signed a mandate with Standard Chartered Bank. The account number at the

5 top of that mandate apparently ties up with the account number at
Standard Chartered, where substantial funds have been discovered.
That bank mandate, signed on 20th February by the Defendant, says
that he is in fact a principal of the firm Air Nuigini Consulting
Services. The Plaintiff says that it had no knowledge of the
existence of this consultancy firm. The business card of the
Defendant uses the logo of Air Nuigini and their name. The
Plaintiff had no idea that that consulting services business was
10 in existence and of course did not authorise the deposit of any
accounts in its name within this jurisdiction.

15 So, it seems to us that the Defendant has much to answer in
due course. Our concern is that the English Court should have
the best information available before it when it is asked to make
a decision which could be very far reaching because the attack in
England is apparently made on the Mareva Injunctions themselves.

20 Mr. Costa brings out two cases to us: I.B.L. Limited and
Meridian Group (U.K.) Limited -v- Planet Financial and Legal
Services and Webbe (1990) JLR 316 CofA where at page 320 the
learned Bailiff sitting as a single judge of the Court of Appeal
said this:

25 *"The court below seems to have taken the view that there
is a distinction which it could make between an appellant
with an unfettered right of appeal and an appellant
granted leave to appeal upon application. It seems to me
that once an appellant has been granted leave to appeal he
stands in the same position as an appellant who has an
30 appeal as of right. With respect, I think the court
misdirected itself on that matter. It is not a matter
which has a bearing on this application, but I comment on
it. The court below, as I have said, had regard to the
facts of the case and it was in a much better position to
35 consider them than I am, sitting at very short notice to
hear this application. But, as I said earlier, I do not
think I need go into the merits of the case. The
position is quite clear to me; as a result of something
which the court did - its delay in giving its judgment -
40 both parties were prejudiced.*

45 *In my opinion, a stay of execution would have the effect
of preventing the English court having the documents which
are sought by the plaintiffs produced before it. On the
other hand, if I were to refuse a stay of execution and
the documents were sent, and the English hearing went in
favour for the intervenors, those documents would have
been released but it would have been too late to do
anything about it and the appeal - if indeed it were
50 prosecuted to the Court of Appeal at all - would be, so to
speak, an empty appeal confined to the legal principles
which, important as they will certainly be when it gets to*

5 *the the Court of Appeal and it gives its decision, cannot be considered in limbo, so to speak, without the facts of the case. I think the two are inextricably bound up and I do not think it would be right, if the parties pursued the appeal, to put the Court of Appeal into the position of having to give what, in effect, would be merely a declaratory judgment. That would be wrong."*

10 Mr. Costa again cited from the Court of Appeal Judgment Seale Street Developments Limited -v- Chapman (1992) JLR 243 at page 251. That in effect says more or less what the earlier case said but with the greater authority of a full Court of Appeal.

15 Mr. Costa pointed out that it was really for Mr. O'Connell to show exceptional circumstances which would allow the documents to be sent to England and thereby deny him the fruits of what might be a successful appeal if this Court were wrong in the decision which we had intimated that we were minded to make.

20 The exceptional circumstances which required the documents to be disclosed were, in our opinion, that apparently on Friday in England an application is to be made by the Defendant in this action to attack the Mareva Injunction on the basis of jurisdiction. We allowed Mr. Costa to take instructions. He is
25 unable to give us a firm undertaking but his instructing solicitors in England felt ninety-nine per cent certain - those are the words that he used, and their advice to the Defendant was apparently fortified by Counsel's opinion - that all that would now happen on Friday would be an attempt to vary the injunctions
30 to boost the Defendant's living expenses.

35 We therefore allow Mr. O'Connell - and Mr. Costa did not demur on this point - to release to his instructing solicitors such information as will enable them in the unlikely event of a decision by the Defendant to proceed as originally envisaged, to supply such information to the English Court as they think necessary. However, if matters proceed as Mr. Costa has outlined then we will continue to confirm our embargo on the use of the
40 information obtained and we would not expect that information to be used by anybody outside this jurisdiction until a decision has been made by this Court on the jurisdictional matter to which we have referred.

45 There are two other matters raised in the Order of Justice: that the information should also be supplied to the fraud office in Papua New Guinea and to insurers under a fidelity insurance so that they can settle a claim against the Defendant. We do not think that either of those two matters are of pressing importance at the present time and it would be wrong, we think, for that
50 information to be supplied until the jurisdictional matters have been decided. We can only suggest to both Counsel that we think

it important that the jurisdictional point should be brought to this Court's attention for a decision in the near future.

Authorities

I.B.L. Limited and Meridian Group (U.K.) Limited -v- Planet
Financial and Legal Services Limited and Webbe (1990 JLR 316.

Seale Street Developments Limited -v- Chapman (1992) JLR 243.

Guinness Plc -v- Market & Acquisition Consultants Limited & Ors.
(1987-88) JLR 104.