BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 70 OF 2006

BETWEEN:

BOSTON LIFE ANNUITY COMPANY LTD.

Claimant/Respondent

and

(1) Dijon Holdings Limited
(2) International Association for Professional Benefits Inc
(3) Employers International
(4) Amber Cape Productions, LLC
(5) A.S. Sawhney
(6) Baldocchi & Sons, Inc. DBA Pacific Nurseries
(7) Barnes Yard Inc.
(8) Beamus, LP
(9) William P Wheeler Revocable Trust
(10) Bradford Black
(11) Brian S. Grossman
(12) BRS Architects
(13) Charles Brooks
(14) Christopher P. Raggio
(15) CLIA, Inc.
(16) Craig Frank Ltd
(17) Daniel J. Olsen
(18) Daniel P. Buttafuoco
(19) Darrell W. Daugherty
(20) Douglas J. Spriggs
(21) Dr M. Burger
(22) Dunbar Construction
(23) Earthworks Recycling, Inc.
(24) Felix O. Sogade
(25) Gerardo Aguirre
(26) Gregory Smith
(27) Herman A. Carstens
(28) Hope Medicinals
(29) Howard Merritt
(30) Infinity Stairs, Inc.
(31) JMB Materials
(32) Janelle Jones
(33) Jeffery J. Walby
(34) Kenneth Grabow
(35) Law Practice Management Consultants, LLC
(36) Lawrence L. Anderson
(37) Lewis Grayson Smyer
(38) Lyle B. Faber
(39) Marek Stawiski
(40) Marilyn A. Dahms
(41) Mark Hinman
(42) Marlin D. Collier
(43) Marvin Triplett
(44) Matthew J. Benetti
(45) Maxa Beam Searchlights, Inc.
(46) Mimbres Internal Medicine P.A.
(47) Morrow & Company CPAS
(48) North County Oncology Medical Clinic, Inc.
(49) Pyra Cap Inc.
(50) RaDCon, PC
(51) Richard W. Wilson
(52) RND, LLC
(53) Rosalind D. Triplett
(54) Stanley G. Hopp
(55) Stephen C. Klasson
(56) Stephen J. Kroll
(57) Terry L. McVey
(58) THECO, Inc.
(59) Timothy W. Teslow, MD
(60) Tony Zakhem
(61) Warren Hutchings
(62) Waterfront Funding Group
(63) WKNB Productions LLC

Defendants/Applicants

and

(1) B & P ADVISORS INC.
(2) QUAINT PROPERTIES LLC
(3) THE HETARCHY INVESTMENT PROGRAM INC

Additional Defendants to the Counter-Claim/Respondents

Appearances:

Mr. Philip Shepard Q.C. with Mr. Michael Fay and Ms. Claire-Louise Whiley of Ogier for the Claimant and the Ancillary Defendants

Dr. J. S. Archibald Q. C. of JS Archibald & Co. with Mr. Martin Kenny and Dan Wise of Martin Kenny & Co. for Defendants 3 – 27, 29, 30, 32, 34 -51, 53 – 63

April 30th, May 11th and 18th

JUDGMENT

[1] JOSEPH-OLIVETTI, J.: "Boston Life and Annuity Company Ltd" – the name evokes visions of Harvard Square and the River Charles in the famous capital of the State of Massachusetts, USA. In reality however, the name is merely that of an offshore insurance company incorporated in the British Virgin Islands in 2001 under the International Business Companies Act with no connections to Boston that I can discern.

Procedural History

[2] On 18th April on the application of fifty-seven of the defendants (nos. 3–27, 29, 30, 32, 34–51, 53–63) together "the JSA Defendants" I granted an ex parte injunction world-wide freezing injunction, with a disclosure order to police the injunction and an order to join three additional parties, B & P Advisors Inc. ("B & P"), Quaint Properties LLC ("Quaint"), and The Hetarchy Investment Program Inc. ("Hetarchy") as ancillary defendants to the JSA Defendants' counterclaim in this action. The return date on the injunction was 9th May.

[3] On 24th April Boston Life and the ancillary defendants, all represented by the same firm of lawyers applied on short notice to discharge the orders. Boston Life sought a stay of the disclosure order pending the determination of the discharge application. This was granted at an ex parte hearing by telephone. The matter came before the court on the 25th April. The JSA Defendants took issue

with the short notice and the matter was adjourned after a two hour hearing to allow the JSA Defendants proper opportunity to respond. However, on the application of Boston Life and having regard to a consent order arrived at in relation to an imminent payment of monies from Puritan International ("Puritan") to Boston Life, the court varied the order to allow for payment of Boston Life's legal fees and its ordinary business expenses.

[4] On 30th April the court heard the application to discharge the injunction and the order joining the ancillary defendants and reserved its ruling. In the interim it ordered that the interim injunction should continue until judgment was delivered and continued the stay of the discovery order pending judgment.

[5] Having regard to the subject matter of the application and to the wise advice of Mr. Fay learned counsel for Boston Life; I delivered my judgment in draft on Friday 11th May. I now give my full reasons.

Allegations of misconduct by lawyers for JSA Defendants

[6] I alluded to what I am about to say next at the first hearing of the application to discharge but I feel it necessary to document this because allegations of 'judge shopping' were leveled at the JSA Defendants' lawyers and as the court has direct knowledge of the surrounding circumstances giving rise to this court hearing the ex parte application and as those allegations are unfounded it is not proper to allow them to stand as they will tend to besmirch the reputations of those who had conduct of the ex parte proceedings. I should also venture to say that such damaging allegations ought not to be lightly made and that the lawyers for Boston Life and the ancillary defendants acted precipitately and intemperately in that respect, surprisingly so I might add, given the fact that they are by all accounts experienced practitioners.

[7] The background to this is that at the time of the ex parte application a summary judgment application had been heard by another judge of this court and a ruling had been reserved. The JSA Defendants properly disclosed that to me.

[8] The application was sent by the Court Office to the judge who dealt with the summary judgment application as that seemed the appropriate course. The Learned judge however recused herself, I am told, as the ruling on the summary judgment application was outstanding and the Learned Judge was careful to avoid any risk of her judgment being challenged on the basis that it had been influenced in any way by the evidence relied on which said evidence the JSA Defendants had been barred by the Master from adducing on the summary judgment application. The application was therefore placed on my docket but the case file itself was retained for purposes of the summary judgment writing.

[9] The court is familiar with the proceedings to a certain extent having granted initial orders in it. After reviewing the application and mindful of the pressing nature of it I felt able to proceed without having the full benefit of the entire case file. No fault attaches to the JSA Defendants as they could not have been aware of the circumstances which led to this court hearing the matter. The reality is that the JSA Defendants made no effort to get a different judge to adjudicate on their application.

Synopsis of JSA Defendant's Case

[10] The action was commenced by Boston Life in March 2006. Essentially Boston Life sought relief in the form of declarations as to the interpretation of certain clauses in certain insurance polices. If the interpretation it seeks is approved this would result in it having lawfully determined the policies without any liabilities to its insured who it regarded as Dijon Holdings Ltd ("Dijon") the first defendant. International Association for Professional Benefits Inc, ("IAPB") the second Defendant

was the agent who received the premiums and paid them to Boston Life and the other defendants were beneficiaries of the policy or policies issued to Dijon. Dijon and IAPB did not defend the summary judgment application subsequently filed by Boston Life - a glaring factor in a case of such moment and one which to my mind lends prima facie weight to the JSA Defendants' arguments that Dijon and IAPB are subsidiaries of or are controlled by Boston Life.

[11] The JSA Defendants counterclaimed relying in the main on misrepresentation as to the effect of the policies and claiming inter alia the refund of the premiums.

[12] The gist of the evidence[1] relied on before me on the ex parte application is to the following effect. The JSA Defendants are beneficiaries of insurance policies, called "Refund Plus" policies issued by Boston Life. Boston Life marketed a policy called "Refund Plus" aimed at professional persons through their professional bodies in the USA. The unique feature of the Refund Plus policy was that the insured could make payments of premiums for a period of 5 years and insurance cover would be provided. However, at the end of the 5 year period the premiums would be returned, subject to the relevant claims history and deduction of value for a small administration fee. In addition, it was expected that the money contributed as premiums would be invested and would generate a return. The contribution of premiums therefore both procured insurance cover, acted as a savings vehicle and also resulted in a legitimate deferral of tax liabilities under the laws of the Unites States.

[13] The JSA Defendants participated in the program on that basis and contributed approximately $US11M by way of premiums.

[14] Mr. Jacobson, a U.S. attorney engaged in tax advice inspected the master insurance policy in Road Town, Tortola in or about March 2002 and noted that the policy he was shown by Boston Life

[1] The Pleadngs in particular the Defence and counterclaim and the Affidavits and witness statements of Mr. Huff, Mr. Jacobsen, Mr. Barros, Mr. Sigel, Mr. Jute, Mr. McCabe.

contained no provision allowing early termination or forfeiture of premiums paid. A Power Point presentation and other marketing materials circulated by Boston Life at the time the Refund Plus policy was marketed is also relied on to show their entitlement to a refund. In addition, Boston Life sent out semi-annual statements via its agent, IAPB to the JSA Defendants showing the unused reserves of each defendant.

[15] Boston Life purported to terminate the Refund Plus Program in September 2005 before the majority of policies had been in place for 5 years thus making it impossible for participants including the JSA Defendants to make the requisite number of payments to complete the Refund Plus Program and to be entitled to a refund. Boston Life then closed its offices in the US Virgin Islands in December 2006 and left no forwarding address.

[16] After Boston Life instituted these proceedings in the BVI some of the Defendants filed suit against it and its alleged owners in Miami on 25th May 2006 and that action was stayed pending the determination of these later proceedings.

[17] The alleged owners and officers of Boson Life are Mr. Denis Kleinfeld, a Florida lawyer, Mr. Leo Ford and Mr. Rick May apparently of England (owner and managing director)[2].

[18] It is believed that Boston Life also used its reserves to invest in Puritan International Ltd. ("Puritan") through the ancillary defendants who are all believed to be special purpose vehicles and wholly owned or wholly controlled by Boston Life.

[19] The JSA Defendants became aware on or about 5th April 2007 that Boston Life and the ancillary defendants were to receive in excess of $6M from Puritan pursuant to a 3rd April Settlement

[2] Mr. May allegedly described Boston Life as a BVI insurer that specializes in providing tax efficient solutions to high net worth individuals. See Hoff Exhibit B.

Agreement of litigation in the British Virgin Islands involving Boston Life and the ancillary Defendants. This impending payment, the first tranche of which ($500,000.) was due on 20th April, sparked the ex parte applications.

[20] The evidence suggests that each of B & P, Quaint and Hetarchy, are either wholly owned subsidiaries or alter egos of Boston Life hence the order made to join them as ancillary defendants to the counter claim to recover the monies which would come into their hands from Puritan. It is also pertinent to note that the ancillary defendants chose to be represented by the same lawyers as represent Boston Life and also chose like Boston Life not to put in any evidence to counter the serious allegations made against them here.

[21] Mr. Hoff of Employees International ("EI")alleges that he gave Boston Life assistance in finding good investment opportunities for the Refund Plus premiums. As a result Boston Life invested $1M into certain promissory notes offered by Medical Capital II and further sums into a legal receivables program in the U.S. Varenko Investment Ltd, is believed to be a special purpose vehicle was set up to enable Boston Life to invest in Medical Capital via EI.

[22] The Varenko note was assigned by Boston Life recently to Blue Topaz LLC of Nevis believed to be controlled by Boston Life. This assignment is also believed to have been at an undervalue. This assignment is the subject of litigation in the USA. Mr. Hoff believes that moneys contributed by the JSA Defendants formed a significant part of the funds used to purchase the note. Boston Life alleged to have sold all shares in Varenko to a Gibraltar company to Elektra Services. Mr. Huff knew of this on 9th April 2007.

[23] Evidence suggests that Boston Life invested $2M of the unused reserves to purchase an interest in real estate in the BVI, known as Dolphin Cove and that Rick May and Leo Ford were material investors and promoters of that project and that that investment was made to assist them.

[24] Recently discovered evidence was put before the court to suggest that Mr. May, intended to move from the U.K. to Panama and that Mr. Ford cannot be located in the US for service of US process and may move to the Commonwealth of Dominica.

Abuse of process

[25] The injunction and ancillary orders were challenged on approximately eight, what I would call technical grounds as no affidavit on the merits was filed. The primary ground was that the JSA Defendants abused the process of the court by relying on evidence which they had been debarred by the Master from deploying on Boston Life's summary judgment application. By so doing, Boston Life says, they attempted to get around the Master's order, 'an impermissible thing to do and the plainest abuse of the process.'

[26] Now, was the reliance on the excluded evidence in support of a freezing injunction to protect a prospective judgment on the counterclaim and or an alleged proprietary interest in Boston Life's reserves an abuse of process?

[27] I must confess that at first I fluctuated between the two positions advanced as the court has a duty to prevent an abuse of its process as was so strenuously argued by Mr. Shepherd Q.C. whilst on the other side the interests of justice dictate that the court should not without good reason fetter a person's right to approach the court for redress.

[28] Boston Life submitted that it is an abuse of the process of the court to directly or indirectly undermine or avoid the effects of a prior order of the court in the same proceedings and that the JSA Defendants are guilty of the plainest abuse as they are seeking an injunction based upon the very evidence they were barred from adducing on the summary judgment application. The

collateral effect is that the JSA Defendants are thereby attempting, before a different judge, to bypass the debarring order and pre-empt any appeal against that order.

[29] It is useful to first consider the governing principles as enunciated in Gilham v Browning[3] the main case relied on by Boston Life. Gilham concerned the sale of some goats which were allegedly infected with Johne's disease and which were included in the sale of a farm and its assets. In 1991 Mr. Gilham, the seller, commenced action in the County Court for breach of contract. The next year the defendants served a defence and counterclaim for damages for misrepresentation and breach of contract. Orders for directions were made in 1993 but no trial date was fixed until 1996. In the interim Mr. Gilham died. Six weeks before trial the Court substituted his wife as plaintiff and refused leave to the defendants to adduce further evidence on the grounds that there was no proper explanation for its late service and that it would cause considerable prejudice to the plaintiff since Mr. Gilham could no longer deal with it.

[30] Eleven days before trial the defendants served notice of discontinuance of the counterclaim with the intention of starting new proceedings in which the disallowed evidence could be called. The plaintiff applied for the notice of discontinuance to be struck out as an abuse of the process. The trial judge granted the application. The defendants tried to choose to be nonsuited on their counterclaim and that was refused. They then offered no evidence on their counterclaim which was dismissed and the plaintiffs' claim was compromised. Then, the defendants started new proceedings in the High Court which was in substance the same as their counterclaim. The Defendants appealed against the County Court's order to strike out the notice of discontinuance and to refuse to allow them to be nonsuited.

[3] [1998] WLR 682

[31] The Court of Appeal found that the filing of the notice constituted a clear abuse of process, as the defendants were "seeking to use the court's process to obtain a collateral advantage which it would be unjust for [them] to obtain, i.e. to escape by the side door from the first action where their counterclaim was evidentially hopeless in order to start a new action where the evidential problems would not arise." (Emphasis mine)

[32] What can be gleaned from this case is that the court has an inherent jurisdiction to strike out for abuse but that it is one to be exercised sparingly and in plain cases and that whether there is an abuse is a question of fact and degree. See p. 689 C – May L.J. – "it is of course important to recognize on the one hand that the court uses a jurisdiction to strike out for abuse sparingly and in plain cases where there has been misuse of the court's process, and on the other hand that the court is not constrained by fixed categories of circumstances in which the court has this power.'' (Emphasis mine)

[33] And at page 690 E: - "Whether in a particular case there is abuse will be a question of fact and degree. It is a jurisdiction to be used with circumspection no doubt, but it is a jurisdiction which is available in the county court as in the High Court."

[34] It is therefore necessary to examine the facts and in particular the proceedings before the Master to determine the scope and effect of what has been referred to by Boston Life as "the debarring order". This is to my mind is the correct approach as submitted by the JSA Defendants.

[35] On 28th November, 2006 the Master, at what was scheduled as a case management conference gave certain directions which from the very terms of the order must clearly have been in response to Boston Life's express intention to apply for summary judgment. These directions related to the time for filing the summary judgment application, the evidence and submissions and adjourned the

matter to 1st February.[4] It is noted that no other aspect of the action was dealt with and specifically that no directions were given in respect of the counterclaim which had been filed with the Defence.

[36] Boston Life did not comply strictly with the order as it did not file its application and supporting evidence on 22nd December as ordered but between the 11th and 17th of January 2007 which resulted in the JSA Defendants being unable to file their evidence in response and their submissions within the stipulated time.

[37] On the 1st February 2007, the matter came before another Master whereupon he extended the times for compliance by both parties and listed the matter for hearing before Hariprashad-Charles, J. on 3rd April.

[38] The JSA Defendants failed to file their materials in opposition in accordance with that order. They therefore applied on 7th March for an extension of time and Boston Life in answer filed an application on 9th March for "an order debarring the JSA Defendants from filing evidence and/or a skeleton argument in response to the Claimant's claim."

[39] On 22nd March the JSA Defendants applied to adjourn the hearing of their application to extend time. In one of the supporting affidavits (Ms. Worrel's paras. 4 - 5) they indicated that they had in their possession 'the necessary voluminous affidavit evidence' on which they would rely in opposition to the summary judgment application but had not filed it pending leave to do so out of time.

[40] The Master heard both applications on 26th March. He dismissed the application for an extension to file affidavit evidence and granted Boston Life's debarring application. The Learned Master ordered in addition:-

[4] See order of Master, dated 28th November 2006

"...2. Defendants to file and serve the submissions with authorities in support by the 27th March, ...

"...4. Should the Defendants fail to file and serve their submissions by close of business on 27th March, the Defendants are debarred from making oral submissions at the hearing on 3rd April."

[41] I say this as I feel constrained to do so although I am acutely aware that this court has no authority to review the Master's order and that it is in the process of being appealed against. That order, with all due respect to the Master, was a draconian one as it had the effect of allowing Boston Life to make an entirely unopposed summary judgment application in a claim with a real value of approximately $11 million[5] although ostensibly on the face of the claim it was merely one for declarations that insurance policies had been properly terminated and that Boston Life had no liability to repay premiums to any of the Defendants. En passant, it is noted that neither in its claim form nor in its statement of case did Boston Life disclose the amount of the premiums which had been paid by the JSA Defendants over the years and which it was seeking to retain - a not entirely disingenuous mode of pleadings I would hazard.

[42] To sum up, the debarring order related specifically to Boston Life's application for summary judgment and must be confined to that as it stemmed from the JSA Defendants' failure to comply with directions for the hearing of Boston Life's application for summary judgment in which no mention of the counterclaim had been made and it is obvious from the proceedings before the Masters that no consideration had been given to the counterclaim.

[5] See Amended Defence and Counterclaim filed on 18th January 2007, para. 7 (6)

[43] It is well established that a counterclaim is a claim in its own right. According to CPR Rule 18.1(1)(c) it is classed as an ancillary claim and treated as a claim for the purposes of the Rule 18.2 (1). And, Rule 18.6 specifically provides that a defendant may continue a counterclaim if the court gives judgment on the claim for the claimant and does not dismiss the counterclaim or the claim is stayed, discontinued or dismissed. Rule 14(1) mandates the Court to fix a case management conference to consider the future conduct of the proceedings and give appropriate directions where an ancillary claim is defended which is the case here. No case management conference as that envisaged by the rules has been held. It is also of moment that in its summary judgment application Boston Life did not seek to have the counterclaim dismissed.[6]

[44] The case of Woodhouse v Consignia PLC[7] cited by the JSA Defendants among others, is also instructive as to the court's approach on abuse of process concerns. Woodhouse considered the rule in Henderson v Henderson[8], part of the court's prevention of abuse of process arsenal, that parties should bring their whole case before the court so that all aspects of it may be decided and in that context it considered the question of disproportionate relief or penalties.

[45] In Woodhouse the court allowed appeals against the striking out of interlocutory applications which had been dismissed at first instance as offending against the rule in Henderson. The court held that although the rule has relevance as regards successive pre-trial applications for the same relief, it should be applied less strictly than in relation to a final decision of the court. It also found that to strike out those interlocutory applications would be to impose a disproportionate penalty which was not justified in all the circumstances.

[46] Here, the Master's order concerned an interlocutory application albeit one if successful would determine Boston Life's claim. However, neither the order nor the summary judgment application

[6] See summary judgment application filed on 24th November, 2006
[7] [2002] 2 All ER 737
[8] (1843) 3 Hare 100

dealt with the counterclaim which as I have held is a claim in its own right which would not be automatically extinguished by a summary judgment on the claim. Here, we are concerned with protecting the fruits of a prospective judgment on the counterclaim and on a strict interpretation of the order the JSA Defendants cannot be said to be debarred from adducing evidence in support of their counterclaim. To hold otherwise and debar them from relying on the same evidence they had sought to adduce in opposition to the summary judgment application would be to impose a disproportionate and unjust penalty having regard to what is at stake here.

[47] In summary, in my judgment, the JSA Defendants cannot be said to have abused the process of the Court. Their counterclaim is a valid one; they were not barred from adducing evidence in support of their counterclaim, indeed no case management directions were given for the hearing of their counterclaim. And it cannot be said that the counterclaim was so bound up with the claim that summary judgment on the claim would automatically result in the counterclaim being dismissed. They were entitled to take proper steps to protect the fruits of a prospective judgment on their claim and to protect assets over which they advanced a proprietary claim if they had a prima facie claim and objective evidence that those assets were in danger of being dissipated prior to the determination of their claim. Those protective measures include an interim freezing injunction.

Material non-disclosure

[48] The next main issue related to material non-disclosure. Boston Life alleges that the JSA Defendants failed to disclose numerous matters and made misleading statements as set out in their written submissions and advanced orally.

[49] I find it helpful at this juncture to refer to the general principles governing the grant of freezing injunctions and the obligation to make full and fair disclosure on an ex parte hearing.

[50] Lord Bingham of Cornhill in Fourie v Le Roux said at para. 2, endorsing a passage from Gee op. cit. that such injunctions are granted for the important but limited purpose of preventing a defendant dissipating his assets with the intention of frustrating enforcement of a prospective judgment, that they are not a proprietary remedy, they are not granted to give a claimant advance security for his claim although they have that effect and that they are a supplementary remedy, granted to protect the efficacy of court proceedings - domestic or foreign.

[51] Lord Bingham explained further at para. 3 that in recognition of the severe effect of these injunctions on a defendant, the procedure for obtaining them has become more closely regulated and incorporates certain safeguards for the defendant. "The procedure incorporates important safeguards for the defendant. One of these safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.

[52] The law on the effect of non-disclosure is well established. A party who seeks relief from the court without notice to the other side is under a duty to make full and fair disclosure of all material facts. The material facts are those which is material for the judge to know in dealing with the application as made. Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors. The applicant must make proper inquiries before making the application as the duty applies also to additional facts which he might have known had he made such enquiries. The extent of the enquiries depends on the circumstances of the case. If material non-disclosure is

established the court will, be- "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by the breach of duty."[9] Whether the fact not disclosed is sufficient to warrant a discharge without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application and finally it is not for every omission that the injunction will be discharged. For, "the court has discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order or to make a new order on terms."[10] See Brinks Mat Ltd v Elcombe[11]. See Gee op. cit para. 9.016 for the foregoing general principles distilled from the distilled cases.

[53] Boston Life submits that the principal omission was that the JSA Defendants failed to inform the court that Boston Life instituted the action for declaratory relief in the first place and the reasons for and the effect of so doing. In short, that Boston Life's bringing of the action is, "the antithesis of a party seeking to behave in a covert or improper manner."[12]

[54] The court finds no merit in that argument. The Court was well aware that Boston Life instituted the action, and the basis of its claim and the relief sought. That is obvious on the claim itself and clear from the summary of Boston Life's claim and the merits thereof given at the ex parte hearing. The inferences to be drawn from Boston Life instituting the action are ambiguous especially in these times when clever schemes are often resorted to and legal measures invoked to clothe them in

---

[9] Commercial Injunctions, Steven Gee Q.C., 5th Edition (2004) para. 9.016

[10] Lloyd's Bowmaker Ltd. v. Britannia Arrow Holdings Plc. [1988] 1WLR 1337 pp.1343H-1344 'When the whole of the facts, including that of the original non- disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed'

[11] [1988]1WLR1350

[12] See Boston Life's written submissions p.7 para 18 a. iii.

legality. The case of Fourie v Le Roux[13] cited by Boston Life in support of another point is also of interest here. In that case the alleged fraudsters were the first to initiate proceedings in South Africa and Lord Scott of Foscote referred to the judgment of Bosielo J in the South African court where the learned judge found: - "… the proceedings in the Germiston Magistrate's Court were a shameless sham by the parties to hoodwink the magistrate into granting an order, the sole purpose and effect whereof was to grant the parties, in particular [Mr. Le Roux], the right to strip HEE of all its assets." So, it is not a correct proposition either in law or in fact that the mere fact that a party commences legal action means that that party is conducting itself properly. At most it is a neutral factor.

[55] The second complaint is that the application was premised on fraud and that it was not proper to do so as fraud was not pleaded against Boston Life. Further, that although the JSA Defendants expressly reserved the right to plead fraud at some time in the future that course was not open to them. Boston Life says that it is too late to amend to plead fraud as the first case management had been held and thus the JSA Defendants could not meet the criteria laid down by CPR 18.4(6) for being allowed to amend their pleadings and that they omitted to inform the court of this. Boston Life relied on dicta of Lord Scott in Fourie as authority for this proposition, namely that it is not proper to allege fraud or ask for a freezing injunction premised on fraud without putting before the court a properly formulated pleading.

[56] Fourie concerned an appeal against the discharge of a Mareva (freezing injunction) granted on a without notice application by liquidators who were not clear whether substantive proceedings would be filed in England or in South Africa and so had no substantive claim before the English court at

[13] [2007] 1 WLR 320

the time of the ex parte application. The case reiterated the well-known principles on which freezing injunctions are granted which were adverted to before.

[57] The decision to discharge the injunction in Fourie was upheld on the primary basis that at the time of the grant the learned judge did not have before him a substantive claim or any undertaking to file a claim and therefore in all the circumstances he ought not to have granted the injunction in the first place. The court did not specifically address the issue of fraud in pleadings. See Lord Scott at para. 35.

[58] Here, unlike Fourie, the court had a properly instituted counterclaim before it. Counsel for the JSA Defendants at the ex parte hearing pointed out that the counterclaim made allegations which if established would give rise to remedies in misrepresentation; monies had and received, restitution and breach of fiduciary duty. This, supported by the evidence adduced in support of the ex parte application establish an arguable case on the merits. See specifically the evidence adduced as summarized at para. 13-34 and 51-59 of the ex parte submissions.

[59] Therefore, when one looks at the application in the round it cannot be said that it was premised on fraud which admittedly was not pleaded and which point was specifically and most properly adverted to by Mr. Wise at the ex parte hearing in his written submissions at para 12 and see p. 4 of the JSA Defendants' notes of the ex parte proceedings.

[60] The JSA Defendants did fail to inform the Court of the relevant provisions of CPR on the amendment of a claim after the first case management conference. However the Court does not think this such a failure that would merit the discharge of the injunction as the court is aware of the strictures on amending pleadings after the case management conference and it is obvious that whether or not there was a first case management conference on the counterclaim is debatable. In any event discharge on this ground would only be arguable if the JSA Defendants did not make out

a prima facie case for relief on other grounds in their counterclaim which I find that they have done and were merely relying on their intention to amend to plead fraud as further support for the relief sought.

[61] Other complaints of non-disclosure were made including the complaint that the JSA Defendants did not properly put Boston Life's arguments and position on the summary judgment application before the court and that they did not explain why they did not file evidence on the summary judgment application, the same evidence that they are seeking to rely on here.

[62] The JSA Defendants' duty is to, "identify the crucial points for and against the application." See Gee 9.003. In the main I find that they did so. These complaints are not well founded having regard to the written and oral submissions made at the without notice hearing which to my mind fairly set out Boston Life's position both on its claim and on its defence to the counterclaim and the current state of the proceedings. I find that the JSA Defendants identified the issues for and against the application fairly and gave an accurate summary of all material matters to the Court. I also think that to have required full debate on the merits of Boston Life's summary judgment application would have run the risk of trespassing on the province of my fellow judge as that matter is sub judici and what is more would have resulted in a duplication of arguments on peripheral issues which I was not called upon to determine and would have consumed an unreasonable and disproportionate amount of the court's resources. As it is, the oral hearing itself lasted 2½ hours[14] and this does not include the court's perusal of the application and written submissions prior to the hearing.

[63] Looking at the matter in its proper context I am not persuaded that the JSA Defendants failed to make full disclosure of all material matters. Mr. Wise was painfully aware of his duty and was

[14] A considerable time. In contrast see Gee op.cit. para. 9.003 where it is noted that such applications are dealt with comparatively shortly.

extremely careful to ensure that he fulfilled that duty. More could not have been required of him. If I am mistaken in my view of this and matters not disclosed were indeed material to the exercise of my discretion then I would exercise my discretion to nevertheless continue the order having regard to all the circumstances of the case as I am not of the view that even if the complaints were justified they would not have resulted in a refusal of the injunction if they had been disclosed. In this regard I emphasize that Boston Life chose not to put in even one affidavit on the merits, to refute the allegations that it was dissipating its assets prior to trial.

Justification for moving ex parte

[64] The other challenges relate to whether the JSA Defendants were entitled to move the court without notice. In view of the allegations made as to the imminent payment by Puritan and the allegations as to the manner in which the principals of Boston Life were deploying its reserves which evidence was recently discovered by the JSA Defendants, the Court feels that there was ample justification for moving the Court ex parte.

Have the JSA Defendants established an arguable case on the merits?

[65] The final ground for discharge is that the JSA Defendants did not establish an arguable case on the merits of their counterclaim.

[66] This injunction as was noted earlier can be described as a hybrid – part asset preservation and part freezing injunction.

[67] To obtain such relief a claimant must satisfy the Court that it has a good arguable case and that there is a real risk that judgment will go unsatisfied by reason of the defendant's disposal of his assets unless he is restrained. See Gee op. cit. 79.

[68] Again, having considered the pleadings, the evidence adduced by the JSA Defendants and the submissions including those made at the ex parte hearing on this point I remain of the view that the JSA Defendants have made out a prima facie case on their counterclaim.

Delay

[69] Another complaint was that there was inexcusable delay in making the application as it has been approximately 17 months since the claim was filed. Page 222 of Gee op. cit. is apposite - "Freezing relief must be sought with reasonable promptness, once all the facts and matters on which the application is to be founded are known to the Claimant. The failure to make the application until several weeks may suggest to the Court that the motive in seeking the relief is not to protect the Claimant's position, but instead to put pressure on the Defendant. This may lead to a refusal to grant the injunction. This should not be the case, however, if the delay arose because the Claimant was investigating matters relevant to the application with a view to ensuring that he had sufficient information to support his case and that he had complied with his duty to make full disclosure of all relevant facts and matters. This is of particular relevance in cases in which the Claimant is a large organization and several people are involved as sources of information." (Emphasis mine)

[70] Here there is no evidence that the JSA Defendants were seized of the events giving rise to the application at the outset and that they delayed in coming to the court. It is evident from the extensive affidavits relied on in support of the application that the JSA Defendants had to make in-depth investigations and only became aware of the intended pay out by Puritan on or about the 5th April and likewise were only aware of the allegations involving the dissipation of assets recently. In summary, in my judgment the delay in coming to the court having regard to the fact that here there are fifty-seven defendants and that they all reside outside the jurisdiction, the nature of the case,

and of the application, the extensive investigations involved and the need to formulate the application properly is not such as to render such delay inexcusable. The devil lies in the details.[15]

The undertaking in damages was not fortified

[71] The question of the undertaking in damages not being fortified was raised. The Court at the hearing took into consideration as was expressly stated by Counsel for the JSA Defendants that the Defendants are all professional persons or bodies and thus although resident outside the jurisdiction prima facie have means. This is borne out by para. 7 of the Statement of Claim. I note also that Boston Life chose to sue these defendants here in the BVI knowing full well that they had no assets here. Clearly, it was satisfied that if successful it would have no difficulty in recovering its costs. The same could be said of the undertaking in damages, that is that if the injunction was improperly granted and Boston Life suffered damages it would have no difficulty recovering the fruits of any judgment from the JSA Defendants. The Court therefore exercised its discretion and did not make any provision for fortification as it was satisfied that prima facie the JSA Defendants had means.

Balance of Convenience

[72] The balance of convenience favours the JSA Defendants when one considers all the circumstances. It is noted that Boston Life claims that it is acting with utmost good faith as illustrated by its bringing the initial claim and that it is prepared to await the outcome of the case whatever it may be. This injunction is designed to ensure that the very reserves which are in issue are not dissipated prior to judgment on the Counterclaim and therefore Boston Life cannot claim to

[15] International Commercial Fraud 1st Edn. Goldspink p. 367

be unduly prejudiced by this injunction as if it is indeed acting properly it will not have had any plans to spend its reserves prior to the court disposing of its claim. The court notes specifically that reserves does not, in the proper course of business, form any part of working capital. On the other hand if Boston Life is engaged in dissipating its assets as appears to be the prima facie position then the JSA Defendants would suffer untold prejudice if the situation is not contained.

Conclusion

[73] In conclusion, the application to discharge the injunction and all ancillary orders is dismissed and the stay on the disclosure order is lifted. The injunction will continue until the determination of the counterclaim. It was my intention to order costs of this application to the JSA Defendants on the basis that the costs should be assessed upon application if not agreed they being the successful parties and no argument on costs having been made. However, in the face of dissent when I delivered my ruling in draft I will hear Counsel on costs and on the directions for disclosure and any clarification on the variation made to the injunction or on any further variations that may be agreed on.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands