24-9-10

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 65/2009 (AJEF)

BETWEEN:

ENNISMORE FUND MANAGEMENT LIMITED

Plaintiff

AND:

FENRIS CONSULTING LIMITED

Defendant

Coram: The Hon. Mr. Justice Angus Foster, QC

Appearances: Plaintiff – Mr. J. Wood and Ms. M. Hudson of Appleby

Defendant – Ms. T. Asgarian and Mrs. C. Kish of Ogier

Heard: Wednesday 1st September 2010

RULING

1. This is an application by the Defendant by summons dated 6th October 2009 to vary an injunction order dated 27th February 2009 (Quin J.) ("the injunction order") so as to enable the defendant to use approximately 10% of the money subject to the injunction to pay its legal costs of these proceedings to date and its future legal costs through trial.

Background

2. The Plaintiff is a company registered in England and is the investment manager of two Cayman Islands funds, namely Ennismore Vigeland Fund (In Liquidation) ("EVF") and Ennismore European Smaller Companies Hedge Fund and an Irish fund, Ennismore European Smaller Companies Fund (together "the Funds").

3. The defendant is a company incorporated in Belize which provided investment consultancy services solely to the plaintiff in respect of the funds. At all material times it was under the sole control of Mr. Arne Vigeland, a resident of Norway ("Mr. Vigeland").

4. By letter dated 24th June 2004 the plaintiff entered into a consultancy services agreement with the defendant ("the CSA") pursuant to which the defendant was to make available to the plaintiff the services of "one suitably qualified and experienced investment manager" employed by the defendant. Fees payable for the services of the investment manager were to be agreed from time to time. The defendant duly made available to the plaintiff its one and only director and employee, namely Mr. Vigeland.

5. On 6th April 2006 the plaintiff entered into a second agreement with the defendant ("the Clawback Agreement"). The purpose of this agreement was to provide for the clawback of discretionary fees paid by the plaintiff to the defendant under the CSA in the event that any net investment losses suffered by the funds were attributable to the investment advice provided to the plaintiff by the defendant, through Mr. Vigeland.

6. There is a dispute between the parties as to the construction of the Clawback Agreement. The plaintiff contends that a supplemental oral agreement was made between the parties between August and December 2006 ("the Supplemental Agreement"), the acceptance of which it claims to be established by the parties' conduct. Broadly speaking, the plaintiff's case, based on the Clawback Agreement

and the Supplemental Agreement, is that the annual fee payable to the defendant for Mr. Vigeland's services would be allocated such that 50% of the fee would be paid to the defendant unconditionally and the remaining 50% would be used by the defendant to buy shares in the funds which it would retain until the appropriate clawback, if any, was determined. If the funds suffered a loss in a relevant year, the plaintiff could claw back a percentage of that loss through transfer to it of the retained shares. As I have said, there is a dispute about the construction of the Clawback Agreement and the defendant denies the Supplemental Agreement but this summary represents at least the general basis of the plaintiff's claim.

7. During 2007 the performance of the Funds began to decline. In that year, claw back of a total sum of £1,258,000 was paid by the defendant to the plaintiff from retained shares held by the defendant pursuant to the Clawback Agreement. In 2008 the plaintiff claimed a total claw back of £2,962,000 from shares retained by the defendant (or the redemption proceeds in respect of some of them) pursuant to the Clawback Agreement. However, this claim was rejected by the defendant and is now the subject of these proceedings.

8. In addition to the dispute over the construction of the Clawback Agreement there is also a dispute between the parties as to whether the losses which the plaintiff claims were incurred by the Funds were attributable to the investment advice provided by Mr. Vigeland. Furthermore, as I have said, the defendant denies that there was any Supplemental Agreement.

9. The defendant is now seeking a sum of US$220,000 in respect of its outstanding past and anticipated further legal costs. The anticipated future costs include the cost of instructing leading counsel from the UK for the trial of the proceedings. It is also clear that at the time of the injunction order the defendant had assets other than the shares and redemption proceeds the subject of that order, namely cash in its bank account. However, by the time of the hearing before me that cash had almost entirely been spent on legal costs in relation to these proceedings and the defendant had no other significant assets left.

Procedure

10. The plaintiff issued its writ on 24th February 2009 and filed its statement of claim on 27th February 2009. On the same date it applied for and obtained *ex parte* leave to serve the writ, the statement of claim and other process on the defendant in Belize. At the same time the injunction order was applied for and made. The relevant part of the injunction order provides:

> *IT IS ORDERED AS FOLLOWS:* ……
>
> *4. An order that pending determination of the Plaintiff's claim in this action or until further order, the Defendant be prohibited from seeking, procuring, authorizing or causing in any manner whatsoever any transfer, assignment or dealing in any manner whatsoever with:*
>
> *a. Any and all redemption proceeds relating to the 10,537.27 shares in the name of the Defendant in Ennismore Vigeland Fund* [EVF]*;*
>
> *b. Any and all distributions made or to be made from the liquidation of Ennismore Vigeland Fund in respect of the 3,512.42 shares held in the name of the Defendant; and*
>
> *c. the 7,828.22 shares in Ennismore European Smaller Companies Hedge Fund held in the name of the Defendant;*

5. *The Defendant (or anyone notified of this Order) may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but anyone wishing to do so must first inform the Plaintiff's attorneys in writing on not less than 10 days notice".*

11. The defendant has at no time applied to set aside the order for service out of the jurisdiction or until now to discharge or vary the injunction order. On 20th March 2009 the defendant acknowledged service of the plaintiff's writ and on 21st April 2009 filed its defence.

12. By agreement between the parties the various shares in issue, which were the subject of the injunction order and which had not already been redeemed by the defendant, were also redeemed by consent of the parties and by an Order for Directions dated 29th July 2009 the proceeds of the redemptions of all the shares concerned, while remaining subject to the injunction order, were directed to be paid into a bank account in the joint names of the parties' respective attorneys to be held there until further order or as otherwise agreed in writing between the parties. The sum so held amounts to Euro 2.7m and it is that sum which the plaintiff claims.

13. By summons dated 6th October 2009 the defendant applied for an order that the injunction order (as varied by the order dated 29th July 2009) should be varied to permit payment to the defendant *"of a reasonable sum in order pay legal expenses that will be incurred during the proceedings"*. The defendant requested that such sum be paid from the monies held in the joint bank account. For some reason, which is not apparent from the Court file, the defendant's application did not come on for hearing for 4 months, on 4th February 2010. At that hearing it was made clear that

the defendant had been struck off the register of companies in Belize. Accordingly the defendant's application was adjourned with an order that it may not be restored until the defendant had been restored to the register and had paid the plaintiff's costs, as taxed if not agreed, thrown away as a result of the adjournment.

14. Thereafter, the plaintiff, by a summons dated 24th March 2010 applied for specific discovery relating to various issues arising in relation to the defendant's application for variation of the injunction order. The defendant's adjourned application for variation of the injunction order and the plaintiff's application for specific discovery then came before the Court together on 22nd July 2010. On that date the Court ordered some of the specific discovery requested by the plaintiff to be provided by the defendant and further adjourned the hearing of the defendant's application until discovery was provided. Specific discovery was subsequently provided and the defendant's adjourned application for variation of the injunction accordingly came before me for hearing on 1st September 2010.

The arguments

15. In summary, it was argued on behalf of the defendant that the test applicable in determining whether to vary an injunction to enable the affected party to pay legal costs depends on whether the injunction is a proprietary injunction or a *mareva* injunction. It was submitted that the Court will much more readily consider varying, and almost as a matter of course will vary, a *mareva* injunction to allow a defendant to pay its legal costs than is the case where the injunction is a proprietary one. It was contended that the injunction order in the present case is a *mareva* or akin to a

mareva injunction and is not a proprietary injunction. This was based principally upon an analysis of the plaintiff's claim as pleaded in its statement of claim.

16. It was also submitted on behalf of the defendant that, whether or not the injunction order was a *mareva* or a proprietary injunction and notwithstanding that the defendant company was at all material times under the sole control of Mr. Vigeland, there was no basis upon which the Court would or should lift the corporate veil and effectively require Mr. Vigeland to meet the defendant's legal costs, as the plaintiff proposed. It was clear that the defendant did not have any further significant funds and it should, in justice, be allowed to defend itself. It was argued that the defendant has an arguable defence and the plaintiff has no more than an arguable claim itself. Any balance of the parties' interests came down in favour of the defendant's application.

17. Counsel for the plaintiff, on the other hand, contended that its claim to the shares in issue (or now the redemption proceeds thereof) is a proprietary claim and that the test applicable to variation of proprietary injunctions is the appropriate one for the Court to adopt in this case. On that basis, it was argued, the Court should not vary the injunction order to allow the defendant to use the redemption proceeds to which the plaintiff claims as it would amount to the defendant using money representing property which is the plaintiff's to pay its own legal costs. The defendant should not be allowed to use the plaintiff's property for its own purposes. It was submitted in the alternative that, even if the injunction is to be considered a *mareva* injunction, the defendant is not automatically entitled to the variation which it seeks. The Court

must have regard to all the circumstances of the case in determining in its discretion whether to vary the injunction.

18. It was also strongly argued for the plaintiff that the defendant has alternative means of meeting its legal costs to which it should have recourse rather than using the plaintiff's property. The company, it was said, was no more than a conduit for payment of the consultancy fees to Mr. Vigeland and Mr. Vigeland had not been full and frank about his interest in the defendant company. In any it was clear that the great majority of the consultancy fees were paid to him. It was submitted that Mr. Vigeland would be the beneficiary if the plaintiff failed in its claim and it was he who had the beneficial interest in defending the proceedings. The defendant was simply a shell. The evidence showed that Mr. Vigeland had financial resources of his own. It was reasonable and just to take the view that he could and should arrange for the defendant's legal costs to be met without encroaching on the specific share redemption proceeds claimed by the plaintiff.

19. I shall endeavour to address the arguments of counsel for the parties more fully in my analysis and comments below.

Analysis and comments

20. A substantial part of the plaintiff's statement of claim sets out the terms of the Clawback Agreement and the alleged Supplemental Agreement and the effect and actual implementation thereof from the plaintiff's perspective as the basis for its claim that it is entitled to the shares concerned (or the redemption proceeds) by way of claw back from the defendant. The defendant's argument is that the plaintiff's

case as pleaded is clearly a contractual claim for alleged breach of the Clawback Agreement (and the alleged Supplemental Agreement) and not a proprietary claim. It was submitted for the defendant that the claim is for payment by way of clawback of shares (or the redemption proceeds thereof), in which the defendant invested, pursuant to the terms of the Clawback Agreement (together also with a shortfall monies allegedly due to the plaintiff by way of clawback pursuant to the Clawback and Supplemental Agreements). Counsel for the defendant pointed out that the shares concerned were, until redeemed, in the defendant's name and the defendant's property. She noted, for example, that at paragraph 19 of the statement of claim the specific shares and monetary shortfall claimed are said to be repayable to the plaintiff by the defendant *"In accordance with the Clawback Agreement as supplemented by the Supplemental Agreement"*. At paragraph 23 it is pleaded that *"the Clawback Agreement has not been terminated or otherwise modified since 6 April 2006 (except it has been supplemented by the Supplemental Agreement). As a result, the restriction on redemption, transfer or assignment of Fenris's* [the defendant's] *shares continues to be contractually binding upon Fenris save that redemption has been permitted by Ennismore* [the plaintiff] *in respect of 75% of the shares in EVF, conditional upon the proceeds of redemption not being distributed by Citco* [the Fund's administrator] *to Fenris without Ennismore's prior express approval"*. At paragraph 27 of the statement of claim it is pleaded *"To date, Fenris has refused to instruct the joint liquidators* [of EVF] *and Citco to give effect to the Clawback Agreement"*. The relief which the plaintiff claims is for an order that the defendant *"procure, authorize, or cause"* the relevant shares and redemption

proceeds to be transferred or paid directly to the plaintiff. It was argued that the plaintiff is not the owner of the shares, the shares were not charged to it and there is no claim that they were held in trust for the plaintiff, therefore it is not a proprietary claim. There is an alternative prayer for damages for breach of the Clawback Agreement and Supplemental Agreement, although as it expressly says that is, in my view, clearly an alternative and not the plaintiff's principal action.

21. The plaintiff contends that its claim is for transfer to it by the defendant of ownership of the relevant shares (as now represented by their redemption proceeds) to ownership of which it is entitled and that it is not simply a claim for a debt. It is a claim for transfer of ownership of assets. It was argued for the plaintiff that, albeit pursuant to contract, it has a proprietary entitlement to the shares concerned and its claim is to enforce that entitlement. It was submitted that just because the proprietary right arises pursuant to a contract it is no less a proprietary claim to specific assets. Incidentally, counsel for the plaintiff confirmed that the plaintiff's claim to the monetary shortfall referred to at paragraph 19 of its statement of claim is not now being pursued because it is clear that the defendant no longer has assets to enable it to pay that. The plaintiff's only claim now is to the specific shares, as represented by their redemption proceeds, which are the subject of the injunction order.

22. While, as I have said, there is a dispute as to the construction of the Clawback Agreement and about the existence of the Supplemental Agreement, it is nonetheless a fact that the shares which the plaintiff claims pursuant to the Clawback Agreement

(and Supplemental Agreement) were registered, until redeemed, in the name of the defendant in accordance with the Clawback Agreement. Quite apart from the relevance, if any, of that in determining whether the plaintiff's claim is a proprietary one, it presumably follows that, in practical terms, if the plaintiff's claim fails the redemption proceeds concerned will not be paid to the plaintiff and will remain the defendant's as fees for Mr. Vigeland's consultancy services.

23. Of course the point of the parties' endeavours to establish that the plaintiff's claim as pleaded is or is not a proprietary one is to assist in determining the nature of the injunction order and consequently the appropriate test for considering whether it should be varied as the defendant seeks. The purpose of the injunction is to stop the defendant using for its own benefit money to which the plaintiff claims it is entitled to. If the property subject to the injunction may belong to the plaintiff, the Court will not readily allow those funds to be used for legal costs at least until the defendant has shown by proper evidence that it has no other assets which can be used to find its legal costs (see Gee on Commercial Injunctions (5th Edn) at para 20.057 under reference to ***Ostrich Farming Corporation Ltd. v Ketchell*** (unreported – 10 December 1997); ***Fitzgerald v Williams*** [1996] QB 657 and ***PCW (Underwriting Agencies) Ltd. v Dixon*** [1983] 2 All ER 158). If there are no other assets which can be used to meet the defendant's legal costs then there is a difficult balance for the Court to resolve in its discretion between the risk of injustice to a defendant in not having access to the assets in question to meet his legal fees against the risk of injustice to the plaintiff that his own property may be used to fight the

litigation against him (see ***Xylas v Khanna*** (unreported, English Court of Appeal, 4th November 1992).

24. The position in the case of a *mareva* injunction is different in that the assets frozen by the injunction are undoubtedly the defendant's own assets and the Court, being generally concerned to ensure that a defendant is not deprived of professional legal representation as a result of such an injunction, will generally, although not inevitably in all circumstances, be in favour of permitting such expenditure because a defendant *"ought to be able to use his own assets to defend himself"* (see Gee (ibid) para. 20.050 and ***Halifax Plc v Chandler*** [2001] EWCA 1750).

25. The Grand Court Rules ("GCR") by O.1, r.10 require the forms prescribed to be used where applicable, with such variations as the circumstances of the particular case requires. It was pointed out on behalf of the plaintiff that the injunction order is clearly not in the form (No. 64) prescribed by the GCR for a *mareva* injunction or, indeed, in a form which could reasonably be described as a variation of that prescribed form. Counsel for the defendant submitted that it is the substance of the order, rather than its form, which in this case, is relevant. However, the judge who made the injunction order is very familiar with *mareva* injunctions, including their prescribed form, which is in very common use in these courts. It does seem to me reasonable to assume that if he had intended the injunction order to be a *mareva* injunction he would have required it to be in the prescribed form. This is not a conclusive point but it is, I think, a significant one.

26. I note that the plaintiff's skeleton argument which was submitted in support of its *ex parte* application on 27th February 2009 for the injunction order makes no mention of a *mareva* injunction, although equally, it makes no mention of a proprietary claim either. The background to and summary of the plaintiff's claim set out in that skeleton argument clearly summarizes the statement of claim, much as I have summarized it myself, and the general point of the plaintiff's application appears to me to have been to seek preservation of the shares (or their redemption proceeds) which are the specific subject-matter of the proceedings. Although there is no reference to the GCR in the skeleton in support of the application or in the injunction order itself, the injunction order does, in my view, have all the hallmarks of having been made pursuant to GCR O.29, r.2 (1), namely to preserve the property which is the subject-matter of this cause. In that respect I do not think it makes a difference that the shares concerned have now been converted, as a result of their redemption, into cash.

27. Counsel for the defendant submitted that in circumstances such as these there is no other type of injunction than a proprietary injunction and a *mareva* injunction and that a proprietary injunction may only be made in relation to a proprietary claim. I am not convinced that it is quite as simple as that, at least when it comes to the appropriate factors to be considered in determining whether, in its discretion, the Court should or should not vary the injunction concerned in the circumstances of the particular case.

28. Whether or not the injunction order is properly described as a proprietary injunction or as a *mareva* or akin to a *mareva* injunction, the plaintiff anyway contends that the defendant has an obvious and appropriate alternative source of funding for its legal costs, namely Mr. Vigeland. The affidavit evidence before me does establish that Mr. Vigeland is the sole director and employee of the defendant company and that at all relevant time it has been under his sole control. I was not referred to any specific evidence on the point but it seems to me a reasonable inference that it was Mr. Vigeland who paid the costs of incorporation of the defendant company and of subsequently restoring it to the register earlier this year. I was satisfied also from the evidence that, apart from some relatively small (in the context) sums spent on purely administrative matters, all of the substantial fees paid by the plaintiff pursuant to the CSA were paid on through the defendant's bank account to Mr. Vigeland and Mr. Vigeland confirmed that.

29. An uncertainty, which regrettably has not been resolved by Mr. Vigeland's affidavit evidence or by the specific discovery made, concerns the identity of the ultimate beneficial owner of the defendant company. The registered shareholder is a Belize trust called The 4th Dominion Trust ("the Trust"), apparently established on 20th August 1999, of which Mr. Vigeland is the settlor, the protector and was the first trustee. The first Trustee Minute, also dated 20th August 1999, which is in evidence, records a decision of the trustee relating to the issue of 100 "Interest Bearer Shares", according to the wishes of the Settlor, to the "Heirs of Arne Vigeland". It also records a decision to change the official Trust mailing address to an address in Norway. In his affidavit evidence Mr. Vigeland states that he is no longer the trustee

of the Trust and that when he ceased to be the trustee he destroyed his only copy of the relevant pages of the Trust documentation identifying the beneficiary or beneficiaries of the Trust and thereby the indirect ultimate beneficiary or beneficiaries of the defendant company. There was no explanation of why Mr. Vigeland, as settlor, of the Trust could not have obtained a complete copy of the Trust documentation from the present trustee to assist the Court.

30. There was also no evidence provided by Mr. Vigeland to indicate whether, and if so how, any part of the substantial fees by the plaintiff pursuant to the CSA, which were paid on from the defendant's bank account to Mr. Vigeland, had been paid on by Mr. Vigeland to the Trust. In fact Mr. Vigeland states that he paid most of the fees into his own pension fund. It is also clear that it is Mr. Vigeland who is giving instructions to the attorneys appearing for the defendant in these proceedings. The plaintiff's counsel contended that in all the circumstances it is Mr. Vigeland personally who would benefit from a successful defence of the plaintiff's claim.

31. Mr. Vigeland has stated in his affidavit evidence that he is currently not in employment (although a copy of his passport in evidence shows that he is a relatively young man, not yet forty) and that his only significant asset is his pension fund into which the majority of the consultancy fees he received were paid. He states that he does not wish to use the pension to meet the legal costs of the defendant's defence. No details of the pension fund were provided. Mr. Vigeland contends that the consultancy fees paid over to him were paid to him in his capacity as an employee of the defendant and not as a director. In the particular

circumstances of this case that does not seem to me to be a material distinction for these purposes. If it is correct, it adds weight to the plaintiff's contention that the defendant company was simply a conduit for the payment of the consultancy fees to Mr. Vigeland personally. It also confirms that the clawback which the plaintiff claims is indeed, in practical terms, a clawback from fees which would be paid through the defendant to him personally and adds force to the plaintiff's argument that it is Mr. Vigeland who would be the ultimate beneficiary of a successful defence to the plaintiff's claim.

32. It was argued on behalf of the defendant that the plaintiff's contention that in the circumstances there is an appropriate alternative source of funding of the defendant's legal costs, namely Mr. Vigeland, amounts to piercing the defendant's corporate veil either directly or indirectly. It was said that there is no application to do so and that there is no basis for it in the present case, particularly since there is no allegation of fraud or other wrong doing against Mr. Vigeland. The Court should uphold the principle of separate corporate personality. Mr. Vigeland has stated on affidavit that he is not the beneficial owner of the defendant company and, there is, it was contended, no basis for going behind his sworn statement.

33. Furthermore, it was submitted on behalf of the defendant, that, even at its lowest, the defendant clearly has a *prima facie* arguable defence to the plaintiff's claim. It cannot be said that the plaintiff itself has more than an arguable case, still less can it be said that it is bound to succeed in its claim. Therefore, it was argued, it is by no means certain that the plaintiff's claim to the redemption proceeds, which are the

subject of the injunction order, will succeed. Accordingly, even if the injunction order is a proprietary one (and the defendant's case is that it is not) the balance of fairness and justice lies in granting the variation of the injunction order to allow the defendant to meet its legal costs in order to be able to defend the plaintiff's claim.

Conclusions

34. Whether or not the plaintiff's pleaded case amounts to a proprietary claim in the strict sense, the injunction order is not, in my opinion, a *mareva* injunction or akin to a *mareva* injunction. It seems to me that it is an order for the preservation of property, namely the relevant shares (as now represented by the proceeds of their redemption) which is the subject-matter of these proceedings. It is an order which relates solely and specifically to the particular property which is the subject of the plaintiff's claim. The evidence is that at the time of the injunction order the defendant had other assets, namely sums to its credit in its bank account, which were not the subject of the injunction order. It was suggested on behalf of the defendant that the injunction order simply limits the scope of what is otherwise akin to a *mareva* order but I do not agree. The plaintiff's claim is for payment to it of the redemption proceeds of the specific shares to which it claims entitlement, and the injunction order expressly relates solely and expressly of those specific redemption proceeds. Its intention was clearly, in my view, to preserve the subject-matter of the proceedings until it is determined which party is entitled to it. There was no indication that the other assets of the defendant, which existed at the time, were taken into consideration but intentionally excluded from the scope of the injunction order.

35. Furthermore, the injunction order was clearly not in the prescribed form of a *mareva* injunction and I consider I am entitled to conclude that that was because it was not and was not intended to be a *mareva* injunction. It was, as counsel for the plaintiff referred it, a preservation order intended to preserve the subject-matter of the plaintiff's claim. The intent behind and nature of the injunction order is, in my opinion clear. The suggestion that it is akin to a *mareva* injunction is not made out.

36. The question for determination are the appropriate considerations to apply in deciding whether the injunction order should be varied, which various English authorities cited to me indicate will depend on the nature of the order. However, as explained I do not consider it essential in the circumstances of this case for me to determine whether or not the plaintiff's case as pleaded amounts in law to a proprietary claim. In my view I should approach the injunction order as it stands in light of its purpose. In my view, the circumstances here are that, with regard to the specific identified assets safeguarded by the injunction order, which the defendant now seeks to use, in part, for its legal costs of opposing the plaintiff's claim, the appropriate considerations, if there be a distinction in this country, should be more akin to that said in the English cases to be appropriate to variation of a proprietary injunction rather than the test said to be appropriate to variation of a *mareva* injunction. However, even if I am wrong in my view of the nature and intent of the injunction order, and it is akin to a *mareva* injunction as the defendant contends, I nonetheless consider that I may and should have regard to all the circumstances of this matter in exercising my discretion in determining whether or not to vary the injunction order.

37. In ***Tasarruf Mevduati Sigorta Fonu* ["TMSF"] *v Merrill Lynch Bank and Trust Company (Cayman) Ltd. and Others*** (26th May 2008 – unreported), the Chief Justice, in considering whether to vary an injunction to enable the party affected to pay legal costs out of the assets which were the subject of injunction, said (para. 25)

> *In summary, the following principles are to be applied when deciding whether to allow payment of a defendant's legal costs out of injuncted assets, including in circumstances where the plaintiff asserts a proprietary claim to the assets (the list is not intended to be exhaustive); (see also the helpful judgment of the Court of Appeal of Jersey; **Armco Inc. et al v Donohue et al** 1998 JLR Note 12):*
>
> *(i) Payment of reasonable fees will be allowed, i.e., if there is no element of ulterior purpose or blatant or extravagant service. This is in keeping with the principle that a defendant should be allowed the legal representation of his own choosing.*
>
> *(ii) In instructing his attorney, a defendant should be entitled, subject to proper safeguards to be described below, to expect that his attorney would be remunerated on an attorney and own client basis, and not as constrained by the formal process of taxation aimed at the protection of a losing litigant.*
>
> *(iii) While it is also settled principle that the plaintiff has no priority over other claimants (including attorneys for their fees) by virtue of the injunction; a careful judgment has to be made as to whether possible injustice to the plaintiff – by permitting the use of the assets by the defendant – is outweighed by possible injustice to the defendant if he is denied the opportunity of presenting a proper defence or counter-claim.*
>
> *(iv) It follows that a defendant has the burden of satisfying the Court that he has no other funds of his own available to pay legal fees (or other expenses).*
>
> *(v) The Court will look to the reality of what would occur if no order were made. If the Court is not satisfied about the unavailability of other funds (including such as might be made available by a third party) then the Court will take that consideration into account.*
>
> *(vi) While the Court will not ordinarily concern itself with the quantum of individual items of costs, it may well fix a limit to the overall amount to be allowed (or monthly amounts in the case of living expenses). The Court will not act as a form of provisional taxing body for the purposes of scrutinizing the defendant's legal fees but, in keeping with its responsibility to ensure only such expenditure as is reasonable, will be in appropriate circumstances*

take a general assessment itself of the bill of fees or refer the bill to the Taxing Officer for informal assessment and advice to the Court.

(vii) The Court may impose safeguards, e.g., a requirement (by way of undertaking from the defendant; by order or otherwise) that he defendant will make good, out of any available funds in respect of which the plaintiff may be found to have no proprietary claim, any amounts spent on the defendant's legal fees which are subsequently found to have come out of property to which the plaintiff is proven to have a proprietary claim.

I note in particular that that was a case concerning a *mareva* injunction and the Chief Justice specifically said that the principles which he outlined applied also to circumstances where the plaintiff asserts a proprietary claim to the assets. He clearly did not draw any, or significant, distinction between the principles applicable to a *mareva* injunction and the principles applicable to a proprietary injunction. Although that does not necessarily accord entirely with all the English authorities which were cited to me, (none of which are, of course, binding on this Court), in the circumstances of the present case, and particularly since I have already concluded that, having regard to the nature and intent of the injunction order, considerations more akin to those which have been applied in England to proprietary injunctions should be adopted here, it seems to me that I should, with respect, follow the general principles (which are expressly stated not to be intended as an exhaustive list) set out by the Chief Justice.

38. In the present case there is the familiar difficult balancing act between the competing interests of the parties. However, in this respect, it is clearly established that I should not endeavour to conduct a mini trial in order to assess at this stage where the merits of the parties' respective cases lie. In any event there is no substantive

evidence before me which would enable me to do so, even if it was appropriate, which it clearly is not. Apart from the dispute about the construction of the Clawback Agreement there are the factual disputes, which I have already mentioned, concerning the alleged Supplemental Agreement whether the Funds suffered the losses which the plaintiff claims and, if so, whether the losses were attributable to the investment advice of Mr. Vigeland. As matters stand on the pleadings, I do not consider that either party very clearly has a better case on the merits than the other; it seems to me that they both have arguable cases. If the plaintiff succeeds in its claim it will be entitled to the redemption monies which are the subject of the injunction order. On the other hand, if the defendant succeeds in its defence it will be entitled to those monies.

39. However, in exercising my discretion I clearly should have regard to all of the circumstances of the case. In my opinion, it would be neither appropriate nor fair for me to ignore the reality that it is Mr. Vigeland personally who has the interest in the outcome of these proceedings since it is he who would ultimately benefit from the failure of the plaintiff to succeed in its claim for clawback of consultancy fees paid to the defendant which Mr. Vigeland would otherwise receive. Counsel for the defendant urged the Court to uphold the principle of separate corporate personality and contended that there is no basis for piercing the corporate veil. However, in my view, the circumstances here are such that it is appropriate to consider the practical reality of the situation and I propose to take that into account in my decision. Mr. Vigeland's stated threat that if the injunction order is not varied as requested he would simply wash his hands of the matter and allow the defendant company to go

into liquidation seems to me neither appropriate nor particularly convincing. Neither does it follow that in that event the plaintiff would necessarily simply rank as an ordinarily creditor in respect of the redemption proceeds in light of what it contends is its proprietary claim. That remains on open question.

40. I should mention that, in support of the defendant's request that it be allowed a total sum of US$220,000 out of the monies which are the subject of the injunction order in respect of its legal costs, it was submitted that the defendant should be entitled to the cost of instructing and bringing counsel of its choice and on that basis the defendant's estimate of future legal costs includes the cost of leading counsel from the UK to conduct the trial. Certainly the principle that a defendant should, in this context, be allowed the legal representation of his own choosing is one of the principles set out by the Chief Justice in the **TMSF** case (ibid) (see para. 25 (i)). In the same Ruling the Chief Justice said (para 4 *et seq*):

> *"4. ..... I am here primarily concerned with the payment of attorneys' fees. The starting point of course is to remember that a person is entitled to the legal representation of his choice and the terms upon which a client engages his attorney is a matter of contract between them.*
>
> *5. Thus, a plaintiff who obtains an injunction against the assets of a defendant cannot be heard to say that the defendant's choice of attorney should be restricted by the plaintiff's interests in having as much as possible of the injuncted assets preserved to meet a judgment that he might obtain.*
>
> *6. If it were otherwise, a defendant could be unfairly restricted as to the level of competence, experience or expertise of the attorney he might engage.*
>
> *7. So long as the terms are reasonable, a defendant should be entitled to pay from his injuncted assets, the costs of the legal representation of his own choosing".*

However, that case did not involve the cost of instructing and bringing leading counsel from abroad to conduct the proceedings and in my opinion it can be inferred that the Chief Justice had in mind in his comments the entitlement of a party to choose counsel of his choice from within the jurisdiction not necessarily counsel from another jurisdiction. Furthermore, the Chief Justice anyway made it clear that the ultimate test is one of reasonableness, with which I respectfully agree. It does not seem to me that the entitlement of a party to proceedings in this jurisdiction to the legal representation of his choice necessarily extends in every case to legal representation from counsel from another jurisdiction. In my view, while I accept that it is not for the Court to carry out a taxing exercise, it is for the defendant to establish, in circumstances such as these, that it is reasonable in the particular case for the expense of bringing counsel from abroad to provide legal advise and conduct proceedings, rather than using counsel in this country, should be met out of the funds claimed by the plaintiff. The present case is not exceptionally complex nor does it involve a particularly large amount of money by comparison with many of the commercial cases before our Courts. The issues involved are not unusually difficult. The matter has been conducted to date perfectly competently and capably by the defendant's Cayman Islands counsel and in my opinion it is not a case in respect of which it is reasonable for the cost of bringing in counsel from overseas to be met out of the monies claimed by the plaintiff and subject to the injunction order. It was contended by counsel for the defendant that the cost of instructing counsel from abroad would be cheaper than the cost of the defendant's Cayman Islands counsel

conducting the case. If that is correct I would find it a most surprising and unsatisfactory situation and I am not willing to proceed on that assumption.

41. In all the circumstances, and looking at the whole matter in the round, and taking into account the principles outlined by the Chief Justice in the **TMSF** case (ibid), in my judgment it is appropriate that the injunction order should be varied so as to allow the defendant to withdraw from the joint bank account subject to the injunction order a reasonable sum in respect of its legal costs of these proceedings. However, I consider that in assessing the appropriate amount of such sum it is not reasonable for the costs which would be involved in the defendant instructing and bringing counsel from overseas to conduct the trial to be met out of the monies in the joint account. In my opinion the defendant's Cayman Islands attorneys are perfectly competent and capable of conducting the trial in this matter and at a cost no greater than that which would be involved in instructing counsel from abroad. It is, of course, entirely up to the defendant's Cayman Islands attorneys and Mr. Vigeland to agree the costs to be paid in respect of the attorneys' past and future legal services but in my opinion a reasonable amount to allow the defendant to withdraw from the joint bank account in respect of its legal costs would not be in excess of a total of US$195,000.

42. Furthermore, the variation of the injunction order for this purpose and in that amount should, in my opinion, be subject to the pre-condition that prior to the withdrawal of any monies from the joint bank account for this purpose the defendant should first procure payment into Court (or, if agreed between the parties, into a joint bank

account in name of the parties' respective counsel) by Mr. Vigeland (or any third party on his behalf) of a sum of US$195,000 ("the Deposit") on the following terms:

(i) In the event that the plaintiff is successful in its claim to the total amount of the redemption proceeds currently in the joint bank account and subject to the injunction order (Euro 2.2m) the Deposit shall be paid to the plaintiff to make up the total of Euro 2.2m.

(ii) In the event that the plaintiff is not successful in its claim to the total amount of the said redemption proceeds the Deposit shall be repaid to Mr. Vigeland (or such third party on his behalf).

(iii) In the event that the plaintiff is partly successful in its claim, such proportion of the Deposit, if any, as may be necessary to make up the total amount of the plaintiff's partly successful claim shall be paid to the plaintiff and the balance of the Deposit shall be refunded to Mr. Vigeland (or such third party on his behalf).

I should add, for the avoidance of any doubt, that my ruling above is entirely without prejudice to and is not intended to pre-judge in any way any application which may be made at any time by the plaintiff to join Mr. Vigeland as a party to the proceedings or any other application by the plaintiff, for the purpose, whether express or overt or not, of seeking any costs in relation to these proceedings, or any part thereof, against Mr. Vigeland personally.

43. I reserve the costs of this application for further hearing at a future date.

Dated: 24th September 2010

Hon. Mr. Justice Angus Foster QC
Judge of the Grand Court