

Libary

6/6/2007

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3
4 CAUSE NO. 119 OF 2007



5
6 BETWEEN:

7 (1) **ASESORIAS DE INGENIERIA Y CONSTRUCCIONES**
8 LTDA (IN LIQUIDATION) (FORMERLY KNOWN AS
9 ZÜBLIN CHILE INGENIERIA Y CONSTRUCCIONES
10 LTDA)

11 (2) ZÜBLIN CHILE INGENIERIA Y CONSTRUCCIONES
12 LTDA SUCURSAL PERU (IN LIQUIDATION)

13 Plaintiffs

14
15 AND:

16 ATLANTIC SECURITY BANK

17 Defendant

18
19 BEFORE: The Honourable Madam Justice Levers

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21 Appearances:

22 Counsel for the Plaintiffs: Mr. Jonathan Tarboton of Appleby

23 Counsel for the Defendant: Mr. Mac Imrie with Mr. Crispian Lynch of
24 Maples & Calder

25
26 HEARD: 1st June 2007

27

REASONS



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29 Levers, J.

30 This is an application for disclosure. The background to this

31 particular application which was heard on 1 June 2007 is that the

32 Plaintiffs are seeking identical orders to those granted by me on 19

1 September 2006 in cause no 370/06, in which a Mr. and Mrs. Forsyth
2 are also defendants.

3

4 The order made by me on 19 September 2006 in cause no 370/06 is
5 being contested by the defendants in that matter Mr. and Mrs.

6 Forsyth and is due to be heard in this Court in the near future.

7 Meanwhile the Plaintiffs have also taken out a summons to stay the

8 proceedings in that same cause. That too is due to be heard

9 sometime in the near future.

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11 The Defendants, Mr. and Mrs. Forsyth, however are asking for the
12 matter not to be stayed but to be set aside on the basis that the Court

13 has no jurisdiction over them. The Plaintiffs have not filed any

14 evidence in response to the application by Mr. and Mrs. Forsyth.

15

16 Mr. and Mrs. Forsyth make some very serious objections. They say:

17

18 (a) under Chilean law, the Plaintiffs were not proper parties and are
19 not authorized to bring the claim in cause no 370/06;

20 (b) the Forsyths have no assets in the Cayman Islands;

1 (c) this Court is not the appropriate Court in which to try the issues
2 between the Plaintiffs and the Forsyths;

3 (d) there are proceedings pending in Florida between the Plaintiffs
4 and the Forsyths on the same subject matter of the underlying
5 proceedings;

6 (e) there are defamation proceedings brought by the Forsyths
7 against the Plaintiffs in Stuttgart Germany which the Forsyths
8 say are relevant to the merits of the underlying proceedings,
9 and possible limitation of action problems and defences;

10 (f) the Plaintiffs have failed to make full and frank disclosure to the
11 Court on:

12

13 (i) the facts giving rise to the Plaintiffs' belief that the
14 Forsyths had assets in the Cayman Islands;

15 (ii) the related proceedings in Florida; and

16 (iii) the defences which are relevant to the underlying
17 proceedings which have arisen in the Stuttgart
18 proceedings.

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20 This new application which is before me now, excludes the Forsyths
21 as Defendants. In a letter to the Plaintiffs' attorney, the Forsyths
22 attorneys-at-law, Nelson & Company have stated that:

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24 (a) they will not be appearing in these proceedings, as they will not
25 submit themselves to the jurisdiction; and

1 (b) the particular application is vexatious and is an abuse of
2 process which is aimed at circumventing their challenge to the
3 underlying proceedings.

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5 The Plaintiffs position clearly is that they wish to find out if Mr. and
6 Mrs. Forsyth have any assets in this jurisdiction, as Mr. Tarbaton on
7 behalf of the Plaintiffs admits the assets may not even be here now,
8 they may have been moved out. There is no evidence that assets
9 belonging to the Forsyths were here at all.

10

11 The Defendant in this action is the Bank, its position is that it is
12 concerned about its reputation. There is a duplication because the
13 order made previously is the same order that is being asked for now,
14 and the Plaintiffs themselves have applied for a stay in cause no 370,
15 in which I granted the previous order.

16

17 The entire case for disclosure comes out of the Mareva granted in
18 cause no 370/06. The Forsyths are challenging the very Mareva
19 granted, not only as to jurisdiction, but also as to non disclosure. The
20 Plaintiffs ask for a stay in cause no 370/06 in which case it is a moot
21 point whether the Mareva will be extended indefinitely.

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1 Further, there is a question of the identical order made previously
2 being challenged by the Defendants, the Forsyth. The Bank is
3 naturally concerned that if cause no 370/06 falls away, as a result of
4 the Defendants being successful, it would have divulged information
5 which it need not have divulged if the forum non conveniens
6 application and other objections being made are successful.

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8 With the increasing use of pre-action protocols there will be
9 increasing number of cases where disclosure will effectively take
10 place where proceedings are issued. However, in circumstances
11 such as this, the disclosure is being used to obtain information
12 designed to assist in identifying evidence against a defendant in
13 another case in which (in this application) the Bank is the Defendants'
14 agents and the principal parties are not made defendants. The
15 Plaintiffs clearly wish to circumvent any further objections raised by
16 the principals and that is why they are not named in this application
17 for discovery.

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19 Having considered all the matters and in view of the various
20 objections taken by the Defendants in cause no 370/06 which are the

1 underlying proceedings which could give rise to this application, the
2 Court is of the view that this application should be dismissed with
3 costs on an indemnity basis to the Defendant, Atlantic Security Bank.

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5 Dated this 6th day of June 2007

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9 Judge of the Grand Court

