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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 11 of 2000
(Grand Court Cause No. 638 of 1999)

BETWEEN:

COLUMBRARIA LTD.

Appellant/Defendant

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- and -

RAMON E. BETETA

Respondent/Plaintiff

CAYMAN ISLANDS COURT OF APPEAL

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice G. Collett, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

Charles Haddon-Cave Q.C. and Del Magner instructed by Ritch & Conolly for the Appellant.
Andrew Hochhauser Q.C. and Shaun McCann instructed by Bruce Campbell & Co. for the Respondent.

February 5th, 6th, 7th and 8th 2001 Released February 23rd 2001

REASONS FOR JUDGMENT

On 8th February, 2001 we dismissed this appeal with costs to the Respondent and now set out our reasons for so doing.

The Appellant is a Cayman Islands registered company whose share capital is beneficially owned by two Mexican citizens, Dr. Edward Luque and his daughter Anna. Its sole asset, vested in it on its incorporation in 1988, has been 858,000 shares of Danek Group Inc., a corporation to which Dr. Luque had sold certain patents two years earlier.

The Respondent is a godson of Dr. Luque to whom in 1994 the business affairs of the Doctor were entrusted and he was duly appointed as the president and sole director of the Appellant company.

In 1995, the Respondent with the consent of Dr. Luque and his daughter, arranged for physical custody of the Danek shares to be transferred to the Interamericas Group of Companies which proposed to use them as collateral for a six month temporary loan in the amount of $5,000,000.00 which it was seeking to raise. At that time the Interamericas Group was represented by two individuals based in Houston, Texas, namely Hugo Pimienta and Rodolfo Garcia. The overt intention with respect to the shares was to employ them in a so called "collar transaction", whereby they would be sold on the stock market while, at the same time, "put" and "call" options would be taken out to ensure that the shares could be repurchased once the anticipated loan had been repaid, without loss to Columbraria.

In actual fact no such transaction took place. Instead, the Respondent having issued a broadly worded power of attorney on behalf of Columbraria in favour of Mssrs. Pimienta and Garcia; the latter proceeded to sell 790,000 of the shares through Merrill Lynch, the well known broker's offices in Houston and apply the proceeds to the general purposes of the Interamericas Group without informing Dr. Luque or his daughter of this change of plan.

From 1995 until 1998, these beneficial owners of Columbraria were mislead into believing that the shares were still vested in that company and the Respondent passed on to them inaccurate statements of account purporting to show that this was so; the origin of these statements and whether or not the Respondent was aware of their falsity remain hotly contested issues in this litigation.

It was not until 1998 that Dr. Luque and his daughter discovered that in fact the shares had been sold three years earlier for $14 million, a discovery which occasioned them great distress, seeing that, in the interim period, their stock market value had dramatically increased to more than $100 million. Initially Dr. Luque entrusted the Respondent with the task of attempting to recover the lost stock or its appreciated value but subsequently, in 1999, he became convinced that the Respondent himself bore responsibility for that loss either alone or in conjunction with Mssrs. Pimienta and Garcia as co-conspirators.

Pimienta and Garcia commenced proceedings against Columbraria in the Federal District Court for the Southern District of Texas, seeking an indemnity, and in November, 1999 the Respondent was cited in those proceedings as a third party. Almost simultaneously the Respondent on 18th October, 1999 issued the writ in these proceedings in the Grand Court claiming declarations that he had properly fulfilled his duties as a director of Columbraria and an indemnity for any loss which he might sustain as a consequence of his execution of those responsibilities. It should be noted that Columbraria, as a Cayman registered company, was served as of right with that writ.

Accordingly, despite their contention that the institution of proceedings in the Grand Court was mere forum shopping and a pre-emptive strike on the part of Mr. Beteta to avoid a trial of the issues in Texas, Columbraria were obliged to file a full defence to the statement of claim which had been filed on 5th November, 1999. This they did on 3rd February, 2000 and included a counterclaim which alleges that the Respondent conspired with Mssrs. Pimienta and Garcia to defraud the Company and claims damages.

At the same time, the Appellant issued a summons on 3rd December, 1999 seeking a stay of the Grand Court proceedings upon the twin grounds of lis alibi pendens and forum non conveniens. The defence and counterclaim were also stated to be without prejudice to this claim for a stay of the proceedings. It is important to note that the "lis" which was relied upon for this purpose by the Appellant was specified in both these documents as being the proceedings in the Federal District Court for the South District of Texas and the alternative forum relied upon was specified as that Court. At no time before hearing of the summons for a stay were any proceedings commenced in the State Courts of Texas nor was that system of justice alleged to be an alternative appropriate forum for resolution of the present dispute between the parties.

The hearing of the Appellant's summons took place before Mr. Justice Kellock on 16th and 17th March, 2000 in Chambers, after copious affidavit evidence had been filed on both sides dealing, inter alia, with the respective merits of trial in the Federal District Court or the Grand Court and the existence or otherwise of sustainable jurisdiction in the District Court over the parties personally and over the subject matter of the dispute. The

burden of proof lay upon the Appellant, in seeking to justify a stay on the ground of forum non conveniens, to satisfy the judge that the Federal District Court was an "available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, that is to say in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

This test was formulated by Lord Goff of Chieveley in Spiliada Martime Corp. v. Cansulex Ltd [1987] A.C. 460 at page 477 and it has since been accepted and followed as established law. There was no issue between counsel as to the correctness of the test and it was cited with approval at page 25 in the judgment of Kellock J. from which this appeal was brought. In a careful judgment of 40 pages, the learned judge, having canvassed all of the factors bearing upon the issue concluded that the Appellant had not satisfied him that the Federal District Court should be preferred to the Grand Court as the proper forum for resolution of this dispute.

At the date when the ruling of Kellock J refusing a stay was delivered, 14th April, 2000, the parallel proceedings in the Federal District Court in Houston, Texas were on-going but a challenge to the entire jurisdiction of that Court by the Respondent had been mounted and a reserved judgment on that point by the presiding judge of that Court, Judge Hittner, was expected. Pending delivery of that judgement the Appellant here applied unsuccessfully to Kellock J. for leave to appeal to this Court. He renewed his application subsequently with more success to the August 2000 session of this Court and was granted leave on 12th August of that year. At that time the anticipated judgment of

Judge Hittner in Texas had still not been handed down. No other proceedings in any other court in Texas had as of that date been instituted either by Columbraria or Mr. Beteta.

Judge Hittner's judgment was handed down on 21st August, 2000. Pursuant to leave granted on 19th December, 2000 by Graham J. acting as a single judge of this Court, a further affidavit of Joe Meyer sworn on 18th October, 2000 was admitted into evidence, exhibiting the order and reasons of the Texas Court. As Mr. Meyer testifies, being a qualified expert in the laws of Texas, the effect of Judge Hittner's order was to dismiss the pending lawsuit in the Federal District Court between the parties including Columbraria, Beteta, Pimienta and Garcia. By reference to the exhibited reasoned order of the judge, it is apparent that the ground for that dismissal is lack of subject matter jurisdiction, that is to say, that the Federal District Court does not possess the jurisdiction which would enable it to resolve the matters presently in dispute between these parties. Mr. Meyer's affidavit was uncontradicted.

In the face of the unambiguous ruling of Judge Hittner, the submission of Mr. Haddon-Cave that its only effect is to dismiss Mr. Beteta personally from the ongoing suit cannot be accepted. Equally unavailing is his further submission that, since Columbraria is still willing to be sued in the Federal Court in Texas, this is still an available competing forum to the Grand Court. That cannot be the case since Judge Hittner's order establishes that his court is not one which is competent to try these issues between these parties. The competing forum has simply ruled itself incompetent.

Where then did this development leave the present appeal when it was opened by Mr. Haddon-Cave on 5th February, 2001? Notice had been given of an application to adduce before us further new evidence, in addition to the new evidence which had been ordered admitted by the Court at its August 2000 sitting and by Graham J. on 19th December, 2000. The purpose of that evidence was said to be to advise this Court that, following dismissal of the Federal District Court proceedings, the Appellant had filed identical proceedings against the Respondent and other defendants in the State Court at Houston, Harris County. In support of his application counsel submitted that he would be entitled on the basis of that evidence to maintain his claim of forum non conveniens notwithstanding the dismissal of his suit in the Federal District Court. Initially the submission went so far as to suggest that, if evidence to that effect were admitted, it would be unnecessary to afford the Respondent's an opportunity to reply, although by the close of his address on the point counsel had conceded that this would not be possible and that an adjournment of the hearing to a future session would be required so that yet further evidence might be filed on both sides for our consideration.

Needless to say, this application was strongly opposed. Counsel for the Respondent pointed out that throughout the proceedings before Kellock J the Appellant had relied exclusively upon the Federal District Court both in relation to lis alibi pendens and forum non conveniens. No attempt had been made to amend the summons at any stage even though it had been open to the Appellants to have applied for this to be done so as to allege reliance upon the State Courts of Texas as an alternative more convenient venue.

All the evidence as to competence had been directed exclusively on both sides towards the Federal District Court, and despite an obiter dictum at page 38 of his judgment, the decision of the judge had been rendered upon that basis. The new evidence now sought to be admitted had been, we were informed, the subject matter of a late application to admit made on the last day of hearing before Kellock J. which had been refused by him in the exercise of his discretion on the ground of prejudice to the Respondent, a decision from which no appeal had been made.

If we had acceded to this application it is apparent that the entire basis upon which the application for a stay had been considered and refused by Kellock J. would have been altered. This Court would have been obliged to grant an adjournment of the hearing of the appeal to an uncertain future date and to have eventually decided the question upon a basis and upon fresh evidence which was never before the learned judge below. At least three days of hearing time out of a three-week session would have been wasted and prejudice would have been caused to the Respondent being required to obtain and file yet more evidence and to have his leading counsel return yet again to re-argue the appeal. Moreover there could be no certainty that the disputed question whether or not the State Courts of Texas would rule finally upon the existence or otherwise of their relevant jurisdiction by the date fixed for any resumed hearing of the appeal.

Modern authority requires that choice of a forum in trans-jurisdictional litigation should be settled at an early stage of proceedings and preferably by the judge of first instance – see the remarks of Lord Templeman in Spiliada at page 465. It cannot be right that a

question of this kind should be in effect re-litigated ab initio by the Court of Appeal after extensive adjournment and consequent delay on a basis which was never advanced before the court of first instance.

For all these reasons we concluded after hearing argument that the interests of justice would not be served by admitting this new evidence at this stage and leave to do so was refused.

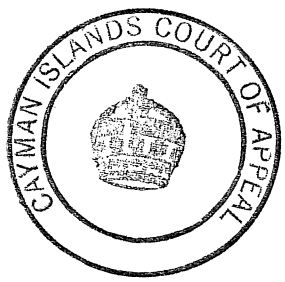
Following this decision, counsel for the Appellant opened his appeal with a root and branch attack upon the judgment of the learned judge, alleging multiple misdirection's both of law and of fact, any one of which, in his submission, would entitle and indeed oblige this Court to reject his conclusion and to exercise afresh the discretion to consider imposition of a stay. Counsel's case against the judgment of Kellock J. was fully deployed but, when counsel for the Respondent commenced his reply, the fatal flaw in the argument was quickly exposed and he was not required to refute the detailed criticisms of the judgment.

Even if we had been minded, after hearing full argument as to the alleged misdirections to find any of them established, it became abundantly clear the we could not have exercised any fresh discretion so as to grant a stay or to overturn the decision of Kellock J.

The reason, of course, is that in the absence of any evidence of the availability of the State Courts of Texas as a proper forum for the resolution of the parties' differences, no determination could be made adverse to the Grand Court proceedings in favour of any competing jurisdiction. The Federal District Court had eliminated itself from the contest: the State Courts of Texas had not been properly or timely entered as a competitor. This leaves the Grand Court proceedings, already at an advanced stage of preparation with pleadings closed, discovery due to be completed momentarily and exchange of witness statements due, in sole possession of the field.

Accordingly at the close of submissions we dismissed the appeal with costs to the Respondent and affirmed the decision of the Court below to refuse a stay of these proceedings.

Zacca, P.



Collett, J.A.

Taylor, J.A.