22-5-09

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 311 OF 2007

BETWEEN PHOENIX MERIDIAN EQUITY LIMITED
[A company incorporated under the laws of the Cayman Islands]

PLAINTIFF

AND LYXOR ASSET MANAGEMENT S.A.
(a wholly owned subsidiary of SOCIÉTÉ GÉNÉRALE)
[A company incorporated under the laws of France]

1ST DEFENDANT

AND SCOTIABANK & TRUST (CAYMAN) LIMTED
[A company incorporated under the laws of the Cayman Islands]

2ND DEFENDANT

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
The 3RD AND 6TH APRIL AND 22ND MAY 2009

APPEARANCES: Mr. Colin McKie and Mr. Pennay of Maples and Calder for the 1st defendant

Mr. Graeme Halkerston and Ms. Hudson of Appleby for the plaintiff

RULING

1. This is an application by the first defendant ("Lyxor") for injunctive relief restraining the plaintiff ("Phoenix") from continuing proceedings in the United States instituted by Phoenix and in which certain persons resident in the United States would be compelled to give depositions.

2. Those persons are Samuel Rosenberg and Anthony Phlipponneau or any other officer, director, managing agent or employee of SG Americas Securities LLC ("SGAS"), resident in the United States. SGAS is an affiliate entity of Société Générale ("Soc. Gen") and is incorporated in and operating in the United States.

3. The background is as follows.

4. Phoenix sues Lyxor in these proceedings before this Court in respect of what Phoenix claims is the full value of its investment in a group of Phoenix Investment Funds administered by Lyxor.

5. The dispute is over the sum of approximately $100 million which Lyxor claims it is entitled to withhold on behalf of its parent Soc. Gen. This large sum is in respect of what Soc. Gen now claims as an "undisclosed margin" or profit to which it is entitled for its part as investment advisor and leverage financier to the Phoenix Funds.

6. Lyxor's claim on behalf of Soc. Gen has only recently been clarified in the pleadings. Until then, it was rather differently pleaded in terms of a penalty or levy which Soc. Gen was entitled to impose because of Phoenix's early redemption of its investments.

7. Not surprisingly, Phoenix seeks to examine every aspect of Soc. Gen's claim and has required, through the discovery process, full and frank disclosure of any information in Lyxor's possession or control relating to Soc. Gen's claim. Lyxor has provided extensive witness statements and/or affidavits from Mr. Rosenberg in particular, in support of its discovery.

8. A complicating feature of the case is that while Lyxor asserts the claim on behalf of its principal Soc. Gen, the relevant institutional information is held by Soc. Gen

which is itself not a party to this action. And, while Lyxor claims to have made full and frank disclosure, the issues which Phoenix seeks to explore by way of the depositions in the United States, are matters within the knowledge of Messrs. Rosenberg and Phlipponneau (and perhaps others) who are officers of SGAS (and in the case at least of Mr. Rosenberg), of Soc. Gen itself; but not of Lyxor.

9. That being the nature of the inter-relationships, the witnesses Rosenberg and Phlipponneau are not immediately amenable to the process by which this Court can compel officers of companies, which are parties to proceedings before it, to submit to oral interrogation by way of discovery; that is: Grand Court Rules Order 24 Rule 16.

10. Phoenix has therefore resorted to the discovery process available by way of notice under Section 1782 of Title 28 of the United States Civil Procedure Code. By that process Phoenix seeks to depose Messrs. Rosenberg and Phlipponneau on a wide range of 11 separate topics relating to Soc. Gen's business as investment adviser and financier, not just of Phoenix Funds, but also – to the extent relevant to Soc. Gen's claims – relating also to Soc. Gen's dealing with other clients.

11. Phoenix argues that it should be allowed to pursue the depositions of Messrs. Rosenberg and Phlipponneau because Lyxor has significantly changed its case in a manner which is inconsistent with the earlier sworn affidavit of its chief witness Mr. Rosenberg and that the deposition of Mr. Rosenberg and his colleague Mr. Phlipponneau, will provide significant "litigation benefits" to Phoenix (and it is hoped this Court) in the trial to take place here in this action.

12. Lyxor objects to the Title 28 depositions on the grounds of oppression and prejudice. On its behalf, Mr. McKie argues that as Messrs Rosenberg and

Phlipponneau have both given witness statements in these proceedings and will be attending to testify at the trial, the proposed depositions are unconscionable for three main reasons:

(i) They will subject Mr. Rosenberg and Mr. Phlipponneau to unwarranted double cross-examination and the trial in this Court will suffer from that unwarranted duplication. Such interrogation of the proposed witnesses would be oppressive and could discourage them from attending for trial out of concern for being submitted to the same process again.

(ii) The parties are working flat out to prepare for this complex trial, albeit now postponed from May 2009 to September 2009. It is unnecessary and undesirable for there to be the distraction of depositions.

(iii) The area of enquiry defined by the 11 topics is far too broad and intrusive.

13. Phoenix's summons now before me, by which it seeks to restrain Lyxor from pursuing the Title 28 depositions, raises an important issue of Cayman Islands Civil procedure. This is whether the Cayman Courts should intervene to prevent depositions in the United States ordered by the United States court to be given by deponents who are residents there and where the deponents are potential witnesses in a Cayman action in respect of which it is clear that the Cayman Court is the only appropriate forum for the ultimate trial of the action.

14. While the case law on this point has developed in other places in the Commonwealth, it is a point of first impression for this Court; the question whether an anti-suit injunction should be issued to restrain foreign proceedings

having been reported to have arisen before only in the context of cases where there were disputes over the forum conveniens. See ***In Re Cotorro Trust 1997 CILR 1; Lemos v Coutts and Co. (Cayman) Ltd.1992-93 CILR 460*** and ***Unilever PLC v ABC International 2008 CILR 87.*** (In the first two of those cases, the foreign proceedings were restrained on the basis that Cayman was the proper forum. In the ***Unilever case***, arbitration proceedings in Paris were restrained on the basis that the defendant, ABC International, a Cayman Islands company, was seeking vexatiously to compel the plaintiff to submit to those arbitration proceedings).

15. In the context of this application there are competing discernible issues of principle involved. Unlike the position in many other Commonwealth jurisdictions including England; Cayman civil procedure does allow – pursuant to GCR O. 24 R. 16 – oral discovery by way of depositions prior to trial. This is however, as already noted limited to officers of companies which are parties to proceedings before the Court. So while it may not be said that Cayman law is hostile to witnesses being cross-examined prior to trial, such a procedure remains unusual. No case concerning this procedure has been reported since O. 24 R. 16 was amended in September 2003 to allow it.

16. O. 24. R.16 apart, there is, generally, no power by which the Cayman courts on behalf of parties to actions before it, can compel persons who are not parties to give a full measure of pre-trial discovery. That is: where discovery includes both the disclosure and production for inspection and copying of documents, as well as the giving of oral or written testimony. In this regard, Cayman law and procedure

differs essentially from that of several foreign jurisdictions, including the United States.

17. This Court must therefore be alive to natural concerns of practitioners about the possibility of such pitfalls as duplication of effort and oppression arising from the use of pre-trial depositions. These are considerations which are identified by Lyxor here as militating against the Title 28 proceeding from the perspective of the Court in ways which, perhaps, would not trouble the United States or other foreign courts where such pre-trial depositions are routine.

18. But the further issue of principle is the other side of the coin: it raises the question to what extent is it desirable or appropriate, that a party to litigation before our Courts, should be prevented from availing itself of a statutory right which it may have under foreign law (here United States Federal law), to apply for an order that persons resident in the foreign jurisdiction who are themselves not parties to the action before this Court, and so not amenable to its process, should give pre-trial discovery by way of deposition evidence relevant to the issues in dispute before this Court.

19. Framing the competing issues of principle in this way brings into stark relief the competing and equally important concerns which must be considered. It is plain from the outset, that where a party has a right to avail itself of a legitimate foreign process, there must be a very compelling reason to prevent it from doing so – something more than just the philosophical differences of approach to litigation existing between jurisdictions.

20. The way in which the English courts have come to terms with the problem is, as ever, of high persuasive value.

21. Dicta from the leading case of ***South Carolina Insurance Co. v Assurantie Maatshappij "De Zeven Provincia" N.V. [1987] AC 24 H.L.*** sets the now classical framework for the consideration of the principles (per Lord Brandon at p 40 C-E):

> ***"...the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."***

22. And at p 41 letter D:

> ***"It is difficult, and would probably be unwise, to seek to define the expression "unconscionable conduct" in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interfered with the due process of the Court."***

23. Here Lyxor, for the reasons already summarized above, does not rely on what Lord Brandon describes as situation (1) but rather on situation (2).

24. I will come below to more fully examine the arguments, but before so doing there are further points of principle relevant to this application which may be gleaned from Lord Brandon's speech from pages 41-43. They are conveniently

summarized also in ***Nokia Corporation v Interdigital Technology Corporation*** as adopted and applied by Pumfrey J (at para. 25 [2004] EWHC 2920):

"*(a) The English courts do not, in general, exercise any control over the way in which a party obtains the evidence which it needs to present to support its case...*"

[(and directly from Lord Brandon at p 41-42:

"Subject, however, to the help of the court in these various ways [*e.g.* **pursuant to Orders 24 and 38**], *the basic principle underlying the preparation and presentation of a party's case in the High Court is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used."*]

"*(b) If a third party voluntarily assists a party by providing evidence, there can be no objection to that evidence being gfused by the party. The provision of material in this way does not interfere with the court's control of its own process.*

(c) Consequently, by exercising a right potentially available to it under US law to obtain documents or evidence from a third party, a party to litigation is not departing from or interfering with the procedure of the English [**(Cayman)**] *court. ...*

(e) ***It is for the US court hearing the 1782 application to decide upon the merits of the application under US law and to determine the nature and scope of the relief to be granted. The fact that a party is enabled by exercising those rights to obtain documents and evidence which would not otherwise be available to it is not a ground for interference by the English court."***

25. With those ground rules in mind, the main question arising in the present application is the question whether to allow the Title 28 deposition to proceed would be "unconscionable" within the meaning identified by Lord Brandon's situation (2).

26. Mr. Halkerston on behalf of Phoenix refutes the suggestion of unconsionableness. He emphasizes the fact that as neither Messrs. Rosenberg nor Phlipponneau is an officer of Lyxor, Order 24 Rule 16 cannot be invoked by this Court in aid of Phoenix's quest for information. He argues that there are several significant and legitimate litigation reasons why Phoenix wishes to seek depositions from those witnesses as officers of SGAS/Soc. Gen. These include:

(a) Identifying how Lyxor's/Soc. Gen's valuation process of the Phoenix Funds operated for the purpose of assisting Phoenix' expert witnesses to complete their reports for the trial. As Lyxor's witnesses have had access to Soc. Gen's witnesses and processes in compiling their evidence, Phoenix should have the mutual benefit of access for the preparation of its expert evidence. This access is said to be confined only to certain levels of seniority of internal control at Soc. Gen.

(b) Given the degree of urgency which attended the preparation for this trial when the Title 28 proceedings was first instituted, exacerbated by the recent and important amendment to Lyxor's defence; the taking of depositions would be less prone to delay than the alternative means of written interrogatories available through this Court's process. The taking of depositions would allow for the "drilling down" several levels of questions in one day which would take several weeks, if not months, in the interrogatories process pursuant to GCR Order 26 and would also save the additional costs and Court time likely to be taken by the interrogatories process.

(c) Identification of the witnesses and documentation which would assist the case. For example, the identification of other clients of SGAS/Lyxor who may be expected to have had similar issues with this type of product because Lyxor and Soc. Gen rely on market practice for the implication of the right to charge the undisclosed margin. Finding this information out at the trial in live evidence will not allow Phoenix the chance effectively to marshall this further evidence before the Court.

(d) Identifying the interaction between SGAS/Soc. Gen and third parties involved in the Phoenix deal, particularly in relation to certain "kickbacks" which were allegedly paid.

(e) Identifying how the SGAS/Soc. Gen/Lyxor audit process was conducted and the information which was or which was not available to PWC, the auditors of the Funds.

27. Lyxor's complaint, that the Title 28 depositions would be merely duplicative of the testimony to be given at the trial, must be viewed in the context of what it is that Phoenix hopes to achieve by the depositions.

28. It is acknowledged by Lyxor that Messrs. Rosenberg and Phlipponneau are indeed the officers who are privy to the kind of information to be elicited. While the scope of the 11 issues is criticized for being too wide, there is no denial of their general relevance to the trial.

29. As the depositions are to be regarded as part of the discovery process – a concept not yet readily embraced by Cayman lawyers – they may not be restrained simply for being duplicative in and of themselves.

30. Moreover, on the basis of the ***South Carolina*** principles, and bearing in mind that GCR Order 24 Rule 16 provides for pre-trial discovery by way of depositions, I may not proceed on the basis that Cayman law regards double-cross-examination as being, in and of itself, an abuse. Indeed, it is worth noting here again, that it is well established that for the purposes of eliciting full answers to written interrogatories, witnesses can be submitted to pre-trial cross-examinations, limited though that may be. See GCR O 26 R 5(2).

31. While it has been intimated that Messrs. Rosenberg and Phlipponneau may be daunted or discouraged by the Title 28 process from coming to testify again at the trial, Mr. McKie did not positively assert that that would be so. Such an assertion – given their seniority within SGAS and their importance as witnesses to Lyxor's case – would be surprising to say the least.

32. The fact that they remain amenable to giving evidence before this court does not, however, diminish the concerns about unconsionableness.

33. There are proper concerns over the proportionality of what is sought by Phoenix when compared to the obvious inconvenience, costs and potential oppressiveness of the Title 28 deposition especially if framed as widely as proposed.

34. Messrs. Rosenberg and Phlipponneau have both given extensive witness statements (and/or affidavits) in this case and are required to attend the trial which is now postponed from this month to September 2009.

35. Between now and then, there is, arguably, time enough for Phoenix to be able, by the written interrogatories process available through this Court, to elicit the sworn information which it may properly require to complete the discovery process before the trial.

36. Accordingly, while I am sympathetic to Phoenix' concern at having been met with what it describes as the *volte face* of Lyxor's change of defence, that circumstance must be weighed against allowing Phoenix to unleash the full brunt of the Title 28 process against key witnesses upon whom Lyxor must rely for its defence. The Title 28 process, if allowed to go unchecked, could result in the kind of real forensic unfairness which was perceived by the English courts in comparable circumstances in ***Omega Group Holdings Ltd. v Kozeny and Benfield [2002] CLC 132 and Benfield Holdings Ltd. v Aon Ltd. [2007] EWHC 171.***

37. I have particularly in mind, as did Justice Langley in ***Benfield Holdings*** (at para. 23) that English (Cayman) procedures provide for proofs of witness statements or affidavits which must contain the truthful account of evidence which witnesses may give orally. Evidence to be relied upon must be disclosed beforehand in statements or affidavits. Thus, Phoenix must be told just what evidence it is that

Lyxor relies upon for its (and Soc. Gen's) defence. Like any other litigant, Phoenix should be able to prepare for cross-examination by reference also to the documentary disclosure which has been given. If gaps in the evidence appear, Phoenix should be able to put specific interrogatories to Lyxor requiring binding responses or may put requests for specific further disclosure of documentary evidence.

38. In other words, it seems to me that I am obliged to consider whether a comparable forensic objective to that sought by the Title 28 process, can be achieved by means of the ordinary process of this Court without exposing the witnesses to what is perceived to be the potential inconvenience, costs and oppression of the Title 28 process. The mere fact that witnesses have committed their positions to witness statements is not in and of itself a bar to Title 28 depositions. The question is whether there are proper concerns about vexatiousness and oppression.

39. However, the United States courts are shown to be alive to such concerns. They have the power to control the scope. They have determined that it must ordinarily be a matter for them to control their own process. See ***Intel Corp. v Advanced Micro Devices Inc. 542 U.S. 241 (2004).*** In the same vein, the United States court will also be able to determine the extent, if at all, to which the application should be curtailed for being "fishing" – another objection raised by Lyxor .

40. And while the United States courts have no separate direct interest in the application itself or the outcome of the proceedings in the Court to be assisted by them, I may not proceed on the basis that they might fail to protect the witnesses from oppression. The evidence on United States law indicates that very similar

objections to those raised by Messrs. Rosenberg and Phlipponneau before this Court as to oppressiveness can be raised before the United States court.

41. Mr. McKie, in his usual careful arguments, also points out – as was observed in ***Intel*** – that where the parties to a Title 28 proceeding are the same as those in the foreign proceedings, the need for assistance is not as apparent as it is when evidence is sought from a non-participant in the matter arising abroad, when the foreign tribunal can itself decide whether to order the parties to produce evidence.

42. This view of the approach likely to be taken by the United States Court has been recognised as a factor to be considered by the English courts when deciding whether to injunct deposition proceedings: see **Nokia** (above, at para 22(i)).

43. However, the involvement of Messrs. Rosenberg and Phlipponneau in these proceedings as key witnesses on behalf of Lyxor seeking to advance what is ultimately Soc. Gen's case, but being themselves not amenable to the process of this court as officers of Soc. Gen, is a circumstance of a different kind. Treating them as parties who are fully amenable as contemplated by the ***Intel*** case would not be a realistic approach to take. Yet this is a premise upon which Lyxor bases its objection to Phoenix's Title 28 application. It is, I conclude, a false premise.

44. It was also proposed in the arguments that without Lyxor having the reciprocal ability to examine Phoenix' witnesses, the Title 28 procedure must be inherently unfair. While there is no case law authoritatively to that effect, one may accept that, in broad terms, "equality is equity".

45. In accepting this, Mr. Halkerston did offer that Phoenix' main factual witness – its principal and director Mr. Al-Ibrahim – would make himself amenable, pursuant to our local Order 24. R. 16.

46. As Title 28 would not apply to him because he is not a resident of the United States, that offer of reciprocity under Order 24. R. 16 can hardly be described as unreasonable.

47. In conclusion, I am not satisfied that Lyxor has established the threshold test of unconscionability for the grant of the injunction so as to override Phoenix' legitimate right to invoke the Title 28 procedure. On balance, in the exercise of discretion, I therefore refuse the order for the injunction.

Hon. Anthony Smellie
Chief Justice

May 22 2009