

Judgment 37/2008 Bank Julius Baer & Co Ltd v Winnetka Trading Corporation – Royal Court (Civil Action File 1267) – 18 November 2008

'Anti-suit injunction' – Bank's application for order that Winnetka cease proceedings it had instituted before the High Court in England – jurisdiction clauses in investment and credit agreements with the Bank – alleged oral representation that the jurisdiction clause was to be disregarded – held that the effect of the jurisdiction clause in the investment agreement was to give exclusive jurisdiction in favour of Guernsey – injunction granted as sought

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 18th day of November 2008, before Richard John Collas, Esquire Deputy Bailiff.

BANK JULIUS BAER & CO LTD

Applicant

v

WINNETKA TRADING CORPORATION

Respondent

Whereas on 10th November the Deputy Bailiff considered an application for an anti-suit injunction and heard thereon Advocates G S K Dawes and C J Hay counsel for the Applicant and Respondent respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and granted the order sought.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Case No:1267

BETWEEN:

BANK JULIUS BAER & CO LIMITED

Applicant

-v-

WINNETKA TRADING CORPORATION

Respondent

The Applicant, whose address for service, is 1 Le Marchant Street, St Peter Port, in the Island of Guernsey,

APPLIES

for the following orders:

- 1 The Respondent shall forthwith cease prosecuting and, as soon as practicable, withdraw the proceedings it has brought in the High Court of Justice, Chancery Division, London, numbered HC08C02033;
- 2 The Respondent shall pay the Applicant's costs of and relating to this application on an indemnity, alternatively, recoverable basis.

on the grounds set out in the affidavit Gordon Dawes attached hereto.

.....
GORDON DAWES
Advocate for the Applicant

Dated this 9th day of September 2008

resident in France and it operates as an investment vehicle on their behalf. The Directors of Winnetka are Panamanian Corporations.

4. Winnetka was introduced to BJB by a Mr Darren Porter of Julius Baer International Limited (“JBINT”), an Executive Director and Head of Portfolio Development of JBINT.
5. JBINT is a Swiss registered company with offices in London. BJB and JBINT are sister companies, they are both wholly owned subsidiaries of the Julius Baer Group.
6. The formal relationship between Winnetka and BJB is set out in three documents. The first, executed by Winnetka on 29th December 2005, is a “Bank Account Mandate for Corporate Clients” (“the Bank Account Mandate”). The Corporate Directors of Winnetka resolved on 20th December 2005 to open the bank account and authorised two of the beneficial owners, Jacob Hazout and John-Marie Valicon, to operate the account.
7. The second agreement was a credit agreement dated 20th January 2006 (“the Credit Agreement”) whereby BJB offered credit facilities to Winnetka up to €12,500,000 Euros, in accordance with the terms and conditions set out in a letter dated 20th January 2006 and the standard credit conditions of the bank, a copy of which was attached to the letter. Acceptance of the credit facility was signified by the signature of two Corporate Directors endorsed on a copy of the letter.
8. Thirdly, on 1st May 2006, Winnetka entered into an “Investment Advisory and Dealing Services Mandate” (“the Investment Agreement”), appointing BJB as an investment adviser. The Investment Agreement incorporated portfolio guidelines, terms and conditions and a portfolio risk warning statement.

Jurisdiction Clauses

9. Each of the three agreements between BJB and Winnetka contains a Governing Law or Jurisdiction clause and each of the three clauses is different.
10. Clause 26 of the General Banking Conditions attached to the Bank Account Mandate reads:

“26. Applicable law and jurisdiction

This Mandate shall be governed by and construed in accordance with the laws of Guernsey and the parties hereby submit to the non exclusive jurisdiction of the Courts of Guernsey”.

11. Clause 15 of the credit conditions attached to the Credit Agreement says:

“15. Applicable Law

15.1 The Credit Agreement shall be governed by and construed in accordance with the Laws of Guernsey. The Client agrees that any legal action or proceedings arising out of or in connection with the Credit Agreement may be brought in the Royal Court of Guernsey and/or the High Court of Justice in England as the Bank may determine, and the Client irrevocably submits to the non-exclusive jurisdiction of those courts provided, however, that nothing herein shall preclude the Bank from instituting proceedings against the Client in any other country or place which may have jurisdiction for the purpose of protecting and enforcing the Bank's rights under the Credit Agreement.

15.2 The Client hereby irrevocably waives any objection which the client may now or hereafter have to the venue of any suit, action or proceedings relating to the Credit Agreement and further irrevocably waives any claim that Guernsey is not a convenient forum for any suit, action or proceedings."

12. Clause 15 of Part Two – Terms and Conditions of the Investment Agreement provides:

"15. Governing Law

The Mandate between the Client and the Bank including these terms and conditions shall be governed by the laws of the Island of Guernsey and the Client and the Bank hereby agree to submit to the jurisdiction of the Royal Court of Guernsey."

("The Mandate" is defined in Clause 1 as being the Investment Agreement).

13. Two issues raised by Advocate Hay, on behalf of Winnetka, were firstly that the jurisdiction clauses were not incorporated into the retainer because of an oral representation made to Mr Hazout by JBINT on behalf of BJB. Secondly, if they were incorporated, he argued that on their proper construction, Winnetka is not obliged to bring proceedings in Guernsey. Before dealing with those issues, I need to describe the High Court proceedings, the pursuit of which BJB is seeking to restrain.

The High Court Proceedings

14. The proceedings were commenced by Winnetka on 17th July 2008 in the High Court of Justice, Chancery Division against JBINT as First Defendant and BJB as Second Defendant. Winnetka is claiming damages for breach of contract and negligence arising out of an alleged failure properly to carry out the instructions it gave to purchase two tranches of shares in a pharmaceuticals company called Inyx. The instructions were to purchase shares to a total value of \$9,450,000 and it is alleged that although BJB paid out a total of \$9,450,000, it did not receive the full number of shares. 1,800,000 shares were

received but a further 3,301,523 shares never arrived, resulting in an overpayment of approximately \$7,232,400.

15. BJB says that it complied with the instructions of Winnetka and so denies any liability to Winnetka (in paragraph 6 of an affidavit filed by Advocate Dawes in support of the application before me).
16. On 5th September 2008, BJB and JBINT lodged an application in the High Court seeking a stay on the basis that the claim ought to have been brought in the Royal Court. I am told that application has been adjourned to a hearing date two weeks after the date of the hearing before me.
17. In the English proceedings, Winnetka alleges that BJB and JBINT, as agent for BJB breached a number of terms, express and implied, of what it calls “the retainer” which is the term used to refer to the relationship between the parties including the Bank Account Mandate, the Credit Agreement and the Investment Agreement.
18. In paragraph 26 of the Particulars of Claim, Winnetka sets out the four express terms it says were breached. It pleads:

26. By the retainer the 2nd Defendant and the 1st Defendant as the 2nd Defendant’s agent owed the claimant express duties as follows:

- a) regularly to contact the claimant with advice on investments (Part One - Portfolio guidelines),*
- b) to effect transactions in investments when requested (Part One – Portfolio guidelines),*
- c) to execute correctly signed orders placed with it during business hours with requisite care (General Banking Conditions – clause 16),*
- d) to act as investment adviser of the claimant’s portfolio of securities, cash, other assets, liabilities etc (Investment advisory and dealing services mandate).*

19. The portfolio guidelines are incorporated into the Investment Agreement so the express duties pleaded at paragraphs 26(a), (b) and (d), all arise under the Investment Agreement. The General Banking Conditions in paragraph 26(c) form part of the Bank Account Mandate.

20. Paragraph 27 pleads three implied duties which Winnetka alleges are required to give business efficiency and meaning to the retainer namely:

- a) That the 1st and 2nd Defendant would act with all due skill, care and diligence in the execution of transactions undertaken,*
- b) That the 1st and 2nd Defendant would so organise and control their affairs so as to provide proper risk management systems in the conduct of their business in relation to the claimant,*

c) That the 1st and 2nd Defendant would act in good faith in all transactions that it undertook for the claimant,”

21. Winnetka’s claim is also pleaded in tort, but I accept Advocate Dawes’ submission that the negligence claim adds nothing to the contractual claim. (There are no limitation issues because the alleged breaches occurred, at the earliest, in late 2006).

Was there a representation that the Jurisdiction Clauses were not to be relied upon?

22. Advocate Hay relied upon an alleged explicit representation that the jurisdiction clauses were to be disregarded. He produced an affidavit (the first affidavit) of Ian Gordon Park sworn on 1st October 2008. Mr Park is an English Solicitor instructed by Winnetka. In paragraph 6(b) of his affidavit, Mr Park described Mr Hazout’s introduction to Mr Porter of JBINT and referred to a meeting at JBINT’s offices in London with Mr Hazout and Mr Valicon when the Bank Account Mandate was completed. He said:

“Mr Porter produced this document [the Bank Account Mandate]. Mr Hazout said that he wanted to deal specifically with Mr Porter at the London bank and that he did not wish to travel to Guernsey or to have anything to do with the Guernsey branch of Bank Julius Baer and Co Limited (...). Mr Porter replied: “Don’t worry, it is only a formality.” Mr Hazout and Mr Valicon have a reasonable command of the English language, but their first language is French. All discussions, and all documents, were in English. Mr Hazout and Mr Valicon signed the documents relying on Mr Porter’s assurance that “it was only a formality”.”

23. In reply, Mr Darren Porter swore an affidavit dated 24th October 2008. In paragraph 11 he said:

“Further, Mr Park then says that I said to Mr Hazout, in relation to the mandate and Mr Hazout’s supposed desire not to have anything to do with Guernsey “Don’t worry, it is only a formality”. I have no recollection of having ever made such a statement nor do I have any recollection of Mr Hazout saying he wanted nothing to do with [BJB] as relayed by Mr Park”.

24. In paragraph 12 of the affidavit Mr Porter said that the Mandate was not produced by him at the meeting on 29th December 2005. Instead, he had previously e-mailed it to a management company in Luxembourg and on 29th December Mr Hazout delivered it duly signed. Mr Valicon was not present; the only other attendee was Mr Hazout’s brother-in-law.
25. Mr Porter exhibited a copy of his file note of that meeting which makes no reference to any discussion as to the jurisdiction governing the relationship.
26. Mr Porter also said that in his dealings with Mr Hazout, he has always demonstrated a competent grasp of the English language (paragraph 13).

27. Mr Park swore a second affidavit on 29th October 2008 in which he replied to a number of matters raised by Mr Porter in his affidavit.
28. As Mr Park was reporting, at second hand, the evidence of Mr Hazout, Advocate Dawes criticised the absence of any affidavit by Mr Hazout. Advocate Hay said Mr Hazout could not swear an affidavit during the time period allowed by the Court because he was away. In my view, Advocate Hay gave no adequate explanation as to why he could not have applied for extra time, or for leave to file an affidavit by Mr Hazout out of time.
29. At this interlocutory stage I have not heard “live” evidence from the two witnesses. How should I approach the conflict between them? Paragraph 12-090 of Dicey, Morris and Collins on The Conflicts of Laws, (14th Edition), states a principle of English common law that the law which governs the contract will also generally govern the Jurisdiction Agreement and it states that a preliminary decision can be taken as to a jurisdiction clause, without deciding the issue. It says:

“The difficulty arises in cases in which it is necessary to take a preliminary decision as to whether there is a jurisdiction clause in a contract in order to help identify the law which governs that contract. It has been held, and appears to be correct, that this preliminary assessment has to be undertaken by reference to English domestic law principles. But it should follow that once the law governing the contract has been identified by these means, it is that law which must be used to make the definitive assessment of whether the jurisdiction agreement in question is in fact one of the terms of the contract.”

In relation to the words “preliminary decision”, there is a footnote “*But, it is submitted, not to decide*”.

30. I am satisfied that Guernsey law would follow the English common law. So, I must take a preliminary decision as to the jurisdiction governing the relationship between the parties to this litigation.
31. Advocate Hay argued that Mr Porter did not deny making the alleged representation and instead said that he had no recollection of making that representation. So, he argued, the only conclusion that can properly be drawn is that Mr Porter probably did make that representation, but he has forgotten doing so.
32. Although he emphasized the absence of any first hand evidence of the alleged representation, Advocate Dawes did not argue that Mr Park’s second hand evidence is inadmissible. Instead, he challenged both the credibility of what Mr Hazout had told him and he questioned the true meaning of the words that were allegedly spoken.

33. If Mr Porter had said that the jurisdiction clause in the Bank Account Mandate was a formality, did he mean that the clause was to be disregarded or ignored? As Advocate Dawes put it, formalities are generally to be observed. In my view, that is a persuasive argument.
34. Furthermore, even if the jurisdiction clause in the Bank Account Mandate was to be disregarded, it does not follow that the differently worded jurisdiction clauses in each of the two later agreements were also to be ignored. It is not suggested that any representation was made in relation to those agreements.
35. If I am wrong on those issues and if the correct interpretation of the words allegedly spoken is that the jurisdiction clauses are not incorporated into the agreements, I would have to resolve the conflict between the evidence in the two affidavits. Advocate Dawes has drawn attention to a number of inaccuracies in Mr Park's affidavit which would tend to call into question the degree of reliance that can be placed upon its contents. He did not seek to impugn the credibility of Mr Park. I have no doubt that as a solicitor, Mr Park has reported accurately what Mr Hazout told him. What is in question is whether Mr Hazout's instructions were correct.
36. Mr Dawes submitted that Mr Park's statement at paragraph 7 of his affidavit that "*I am informed by Mr Hazout that at all times he considered that he was dealing with the London Bank*" is inconsistent with the case pleaded in the High Court proceedings that JBINT was acting as the agent of BJB (at paragraph 26 of the Particulars of Claim).
37. It is also contradicted by the contents of e-mails exhibited to the affidavit of Stephen Burt, an Executive Director (formerly Vice President) of BJB. At page 18 of the exhibits to Mr Burt's affidavit, sworn on the 24th October 2008, is an exchange of e-mails between Mr Burt and Mr Hazout. Mr Burt signed himself as Vice-President, Head of Private Banking and Credit at BJB. In one of the e-mails (which is undated), he said that Winnetka's application was to be approved in Guernsey. Furthermore, in an e-mail from Mr Hazout to him dated 6th July 2006, at 10:52, Mr Hazout wrote: "*Steve, many thanks to you. We are very glad to be a customer of BJB.*"
38. Yet in paragraph 6(b) of Mr Park's affidavit, Mr Park reported that:
- "Mr Hazout said that he wanted to deal specifically with Mr Porter at the London Bank and that he did not wish to travel to Guernsey or to have anything to do with [BJB]"*.
39. I am satisfied that these inconsistencies do call into question the degree of reliance that I could place upon what Mr Park reports in relation to Mr Hazout's dealings with Mr Porter.
40. Applying the quotation from Dicey and Morris above, I must take a preliminary decision, but not decide this issue. My preliminary decision is that the terms of the written agreements should prevail and that Winnetka's allegation of an oral

agreement to exclude the provisions of the jurisdiction clauses, should be rejected.

Is Winnetka obliged to bring its proceedings in Guernsey?

41. Advocate Hay urged me to construe the agreements together. That follows the approach taken by Winnetka in the High Court proceedings, where the Bank Account Mandate, the Credit Agreement and the Investment Agreement are referred to collectively as “the retainer” as if there was a single agreement that covered the whole of the relationship between the parties. Similarly, in the course of his argument before me, Advocate Hay sought to consider the jurisdiction clauses in each of the agreements collectively. In paragraph 12 of his Skeleton Argument he stated:

“By the general wording and the words non-exclusive, it is submitted that the better construction is that these clauses, taken together, were not exclusive but were permissive: allowing, yet not obliging, the parties to bring their suits in Guernsey.”

42. I am not persuaded that it is correct to take the three jurisdiction clauses together or collectively in attempting to deduce a common provision applicable to all three agreements. The parties entered into three different agreements for different aspects of their relationship. In each agreement they chose a different jurisdiction clause and it would be wrong to ignore their choices by treating them as if they were all the same.

43. As I have said, the Particulars of Claim plead breaches of a number of express and implied terms of the “retainer”. Three of the express terms relied upon are in the Investment Agreement and the other is in the Bank Account Mandate. The implied terms apparently are derived from the relationship taken as a whole, including all three agreements. The essence of the dispute is the alleged failure to carry out properly the instruction to purchase shares in Inyx. Such activity is governed, principally at least, by the Investment Agreement. I agree with Advocate Dawes’ submission that the breaches alleged of express terms of that agreement are the core allegations and that the other alleged breaches do not add greatly to the substance of the claim.

44. I must therefore consider first the meaning of clause 15 of the Investment Agreement, which I have quoted above. The parties agreed to submit to the jurisdiction of the Royal Court of Guernsey but did not use the word ‘exclusive’. However, paragraph 14.017 of Commercial Injunctions, Fifth Edition, by Stephen G QC, M A (Oxon), says that “*the word “exclusive” does not have to be used to make the effect of a clause an agreement to submit disputes only to the English Court*”.

45. What then is the true meaning of the clause? Is it to be read as a “non-exclusive” jurisdiction clause? In the first agreement executed by the parties, the Bank Account Mandate, they agreed to submit to the non-exclusive jurisdiction of the Courts of Guernsey. Next they executed the Credit Agreement which allowed BJB to decide whether to issue proceedings in the

Royal Court or the High Court and Winnetka irrevocably submitted to the non-exclusive jurisdictions of those courts without precluding BJB from instituting proceedings against it elsewhere.

46. The use of different wording in each agreement tends to suggest they were not intended to be all the same. When the parties have omitted the words “non-exclusive”, it would seem wrong for the Court to insert those words. Furthermore, the change from “non-exclusive jurisdiction” in each of the first two agreements to simply “jurisdiction” suggests that a change was intended and that, in the absence of anything to the contrary, the wording should be given its ordinary and natural meaning. In my opinion, that means it is to be read as an “exclusive” jurisdiction clause.
47. The House of Lords held in *Donohue v Armco Inc and others* [2002] 1 All ER 749, that “Where the parties had bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.”
48. If the High Court proceedings named only BJB as a defendant and relied only upon breaches of the terms of the Investment Agreement, my decision would be easy.
49. As it is, the decision is complicated by, essentially, three issues. First, that Winnetka has pleaded a breach of the Bank Account Mandate and breaches of the implied terms of the entirety of the relationship. Second, that Winnetka has pleaded a claim in negligence and third that JBINT is a party to the High Court proceedings. In relation to all three issues, I understand that the effect of the *Donohue* decision is to require me to decide whether these three issues taken either on their own or together amount to strong reasons justifying a departure from the exclusive jurisdiction clause in the Investment Agreement.
50. In relation to the first issue, the Bank Account Mandate contains a “non-exclusive” jurisdiction clause so if that was the only agreement alleged to have been breached, Winnetka could commence its proceedings outside Guernsey. But I agree with Advocate Dawes’ submission that the central issue in the High Court proceedings concerns the Investment Agreement and that the alleged breach of the Bank Account Mandate agreement adds little or nothing to the substance of the claim.
51. I take the same view of the alleged breaches of the implied terms relied upon. I would also say in respect of those that I do not consider it appropriate to try to distil a common jurisdiction clause from all three agreements. I believe it is unrealistic and arbitrary to assume that the parties intended that their relationship was governed by a single choice of jurisdiction
52. As for the claim in negligence, I have already said that I do not think it adds anything to the contractual claim. Furthermore, the negligence claim is based upon some of the express terms of the Investment Agreement. It would not be right to allow Winnetka to adopt those provisions of the agreement that suit its

case whilst ignoring any other express provisions (such as the choice of jurisdiction) that it does not like.

53. Finally, regarding the claim against JBINT in its capacity as agent of BJB, I accept Advocate Hay's submission that an agent can be liable for his engagements (*Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC 787 at 795 per Lord Scarman). Whether JBINT can be personally liable is a matter of interpretation of the relationship and the circumstances giving rise to the claim. I am told there is no written contract or agreement evidencing the terms of the relationship between Winnetka and JBINT although there is a reference to the appointment of agents of BJB in paragraph 12 of part two of the Investment Agreement. That paragraph entitles BJB to the performance of any of its duties etc. to any of its associate companies. I do not believe that Winnetka has established a basis for holding JBINT personally liable for any breach.
54. So, in respect of those three issues Winnetka has not persuaded me that there are strong reasons not to give effect to the exclusive jurisdiction clause in the Investment Agreement. That is so, whether the three issues I have identified are taken individually or together.
55. Advocate Hay also placed reliance upon the fact that JBINT is an English company trading in England. It is not disputed that it is subject to the jurisdiction of the High Court. However, it has agreed to submit to the jurisdiction of the Royal Court for the purpose of Winnetka's claim which would avoid the risk of parallel proceedings with possible conflicting decisions in the two courts if there were parallel sets of proceedings in the two jurisdictions. There are no other compelling reasons to bring the proceedings in London. Winnetka, its directors and its beneficial owners are not English. The governing law is Guernsey (although there may well be no relevant differences between Guernsey law and English law at the substantive hearing). If it is necessary for me to consider the balance of convenience, I am not persuaded that Winnetka has made out a case that London is more convenient than Guernsey.

Conclusion

56. I am satisfied that the Royal Court has the power to grant an anti-suit injunction in an appropriate case (see for example, *Ashton v Ansol Ltd, Guernsey Court of Appeal, 10 January 2003*). I grant the order requested by BJB for the reasons I have given which are, in summary, that the Investment Agreement is central to Winnetka's case, that the Investment Agreement contains (what I have interpreted to be) an exclusive jurisdiction clause in favour of Guernsey, that I should ordinarily give effect to that agreement and that Winnetka has not persuaded me that there are strong reasons to depart from it.