Judgment 23/2012

Cobra Business Ventures Limited et al and Green Field Capital Limited et al
Civil Action File No 1653
Royal Court
17th May 2012

Application for an interim, interlocutory injunction.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 17th day of May 2012 before Richard John Collas, Esquire, Bailiff

COBRA BUSINESS VENTURES LIMITED (1)

BELMONT FUTURES LIMITED (2)

BRANDEN SYSTEMS LIMITED (3)

("Applicants")

and

GREEN FIELD CAPITAL LIMITED (1)

ARTEMIS CORPORATE SERVICES LIMITED (2)

LAHOYAGP LIMITED (3)

ALEXEY EDUARDOVICH MILEEV (4)

("Respondents")

WHEREAS on 3rd and 4th May 2012 the Bailiff having heard thereon from Advocate M G Ferbrache Advocate for the Applicants, Advocate E Gray Advocate for the First and Second Respondent and Advocate P T R Ferbrache Advocate for the Third and Fourth Respondent granted an interim injunction, the Bailiff this day handed down reasons for the said order in the terms attached hereto.

S M D Ross
Her Majesty's Deputy Greffier

Approved Text
17.05.12

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between:

COBRA BUSINESS VENTURES LIMITED (1)
BELMONT FUTURES LIMITED (2)
BRANDEN SYSTEMS LIMITED (3)

("Applicants")

and

GREEN FIELD CAPITAL LIMITED (1)
ARTEMIS CORPORATE SERVICES LIMITED (2)
LAHOYAGP LIMITED (3)
ALEXEY EDUARDOVICH MILEEV (4)

("Respondents")

Hearing date: **3rd and 4th May 2012**

Judgment handed down: **17th May 2012**

Before: **Richard John Collas, Esq., Bailiff**

Advocate for the Applicants: **Advocate M G Ferbrache**

Advocate for the First and Second Respondent: **Advocate E Gray**

Advocate for the Third and Fourth Respondent: **Advocate P T R Ferbrache**

1. I am writing this judgment to give my reasons for granting an interim, interlocutory, injunction on 4 May 2012.

2. The background to the matter is that the three Applicants and the Third Respondent (who are all companies registered in the British Virgin Islands) are equal shareholders in the First Respondent, a Guernsey registered company administered in Guernsey by the Second Respondent which is also a Guernsey registered company. The First Respondent is the holding company of a group of companies with, allegedly, substantial assets including an oil refinery and a polyethylene terephthalate (or PET) manufacturing plant.

3. The Fourth Respondent is the beneficial owner of the Third Respondent. He is a Russian national as are the beneficial owners of each of the Applicant companies. The four individuals came together to operate businesses in the emerging free markets in Russia. I am told that they agreed to create a somewhat complex ownership structure for their businesses in order to protect themselves against the risk of what is apparently known as "corporate raiding" in Russia.

4. The facts are inevitably complicated and I am conscious that I have so far heard only the Applicants' version. Suffice it to say that the Applicants allege that the Third Respondent has taken a number of steps to seek to secure unilateral control of the group to his economic

advantage and to the disadvantage of the other partners or quasi-partners as they have been described to me.

5. Such steps are said to include the implementation or proposed implementation of a number of corporate resolutions. The present position is summarised in paragraph 11 of the Applicants' skeleton argument dated 2 May 2012:

> *"The position now therefore is that [the Third Respondent] has been seeking to entrench his control over the group and thereby to prejudice the Applicants – by reducing their economic interest in the group through improper share transfers and share issues – whilst consolidating his hold over the group by arranging for the appointment of his associates as directors of the four key subsidiaries [of the First Respondent]."*

6. The Applicants intend to bring proceedings in the Royal Court seeking relief for what they claim to be unfair prejudice in the affairs of the First Respondent which, as I have said, is a Guernsey company by invoking the Court's powers to grant relief under sections 349 and 350 of The Companies (Guernsey) Law, 2008.

7. The Applicants first came before me in the afternoon of the 4th April as a matter of extreme urgency, seeking ex parte orders. I have not understood why the application was left so late in the day that I scarcely had time to read the papers before me and there was no time to give notice to the other parties of the application which should properly have been brought on notice to them. On that day the only Respondents were the two Guernsey companies; the Third and Fourth Respondents were not named as parties. I was persuaded to grant certain orders for the purpose of "holding the line" in the affairs of the company. The urgency justified making an immediate order but to remain in place for one night only and to be reviewed the following morning on notice to the other parties. On that morning Advocate Dunster appeared for the first two Applicants and Advocate Peter Ferbrache for the other two, in a limited capacity only as he was not fully instructed and reserved his clients' rights as to the Court's jurisdiction. I agreed to continue the order, not so much with the consent of the other two counsel but on the basis that they did not oppose its continuation, as I recall. I set a return date of 27 April.

8. On that return date, Advocate Mark Ferbrache tabled a revised application without having given sufficient notice to either myself or counsel to deal with it substantively. He conceded there would have to be an adjournment but sought to persuade me that the adjournment should be on terms that most of the orders sought should be granted. I was not so persuaded although, without opposition from the other counsel, I granted paragraph 1.1.1 of the application which, in effect, continued the earlier Order but in a modified form.

9. The matter came back before me on the 3rd and 4th May when it was opposed, except for paragraph 1.1.1. The application with which I was then concerned was dated 2 May and was an amended version of the application I had seen on 27 April. The amendments had been made in an attempt to deal with some of the objections raised by the Respondents on 27 April.

10. The substantive parts of the draft order attached to the 2 May application are as follows:

> *"1. CONDUCT OF CORPORATE BUSINESS*

1.1 Until the Return Date or further order of the Court, Lahoyagp Limited and Alexey Eduardovich Mileev and each of them:

1.1.1. shall not themselves or by their servants, nominees or agents or otherwise howsoever take any step to implement or cause the implementation of any or all of (i) the written resolutions of Alexey Eduardovich Mileev, Nikolay Alexandrovich Khatov, Sergey Eduardovich Korendovich and Artur Gennadievich Perepelkin ("the Beneficiaries") dated August 2011 ("the August 2011 Resolutions") or (ii) the resolutions passed by Green Field Limited in January 2012 ("the January 2012 Resolutions");

1.1.2. shall not themselves or by their servants, nominees or agents or otherwise howsoever give any instructions to or make any other statement (whether written or oral) to any person with a view to implementing or securing the implementation of the August 2011 Resolutions or the January 2012 Resolutions or any of them; and

1.1.3 shall not themselves or by their servants, nominees or agents or otherwise howsoever seek to cause or procure:-

(a) any transfers, sales, issues, allotments or other dispositions or dealings relating to any shares, stock, options or warrants in respect of any of the companies listed in Schedule 3 hereto; and/or

(b) any transfers, sales or other dispositions or dealings in respect of legal or beneficial ownership of any assets of any of those companies save in the ordinary course of business.

2. BVI PROCEEDINGS

2.1 Subject to paragraph 2.2 below, the Applicants are authorised to bring civil proceedings in the Eastern Caribbean Supreme Court (British Virgin Islands) ("the BVI Proceedings") in the name of Green Field Limited.

2.2 The Applicants shall not without the prior written permission of this Court take any steps in the BVI Proceedings other than:

2.2.1 the commencement of a claim in the form or substantially the same form as the claim set out in Schedule 4 hereto;

2.2.2 the service of the claim form in the form or substantially the same form as the claim set out in Schedule 4 hereto together with a statement of claim and such further or other documents as may be required by the procedural rules of the Eastern Caribbean Supreme Court (British Virgin Islands);

2.2.3 the issuing and making of an application for an order for interim relief in the form or substantially the same form as the relief

identified by paragraphs 5,6, 9 and 10 of the claim form referred to above pending trial or further order;

2.2.4 such further or other steps as may be required or permitted by any procedural rule, direction or order of the Eastern Caribbean Supreme Court (British Virgin Islands) in connection with the steps set out above."

11. Advocate Mark Ferbrache, appearing for the Applicants, agreed with other counsel that paragraph 2 be adjourned for hearing at a later date. I found that a little surprising after he had argued strenuously on the previous Friday that I should make an order in such terms as a matter of urgency in order to enable the Applicants to commence proceedings in the British Virgin Islands. Nevertheless, I granted the adjournment.

12. On the 3rd and 4th May we were therefore left with having to consider paragraph 1 of the draft order. The First and Second Respondents were represented by Advocate Gray who indicated that her clients, quite correctly, were taking a neutral role in the dispute between the quasi-partners and therefore did not wish to make representations on paragraph 1 although they will wish to be heard in relation to paragraph 2.

13. Advocate Peter Ferbrache appeared for the Third and Fourth Respondents on a limited basis explained in a skeleton argument dated 2 May.

14. No objection was taken to paragraph 1.1.1 as an interim order to "hold the line" pending a contested hearing on a future date at which the Third and Fourth Respondents will apply to have the injunction lifted. Paragraph 1.1.1 represents a continuation in modified form of the first order made by me on 4 April.

15. They object to paragraph 1.1.2 on the ground that it is otiose and adds nothing to the restraints imposed under paragraph 1.1.1. Advocate Mark Ferbrache has argued strenuously that 1.1.2 is required to supplement 1.1.1. He says that giving instructions, for example, to an agent to take steps to implement the resolutions is different from taking any step to implement or cause to be implemented the resolutions. I fail to see the difference. Paragraph 1.1.1 prevents the Third and Fourth Respondents from causing the implementation of the resolutions by their servants and agents. I do not understand how they could cause a servant or agent to implement a resolution without giving instructions to the servant or agent to do so. I remain unconvinced by Advocate Mark Ferbrache's submissions.

16. In principle it is wrong that a Court Order should contain provisions that are otiose. In the present case, if I made the order in the terms requested, it would in my view call into question the meaning of paragraph 1.1.1. What does it mean to take steps to cause a resolution to be implemented by a servant or agent if the giving of instructions is not considered to be prohibited by clause 1.1.1?

17. In case I am wrong and there is some merit in Advocate Mark Ferbrache's submissions that has escaped me, I made the order in a modified form proposed by him in a skeleton argument which combined paragraphs 1.1.1 and 1.1.2:

> *"Mr Mileev and/or Lahoyagp shall not themselves or by their servants or agents take any step to implement or secure the implementation of any or all of the written resolutions of Alexey Eduardovich Mileev, Nikolay Alexandrovich Khatov, Sergey Eduardovich Korendovich and Artur Gennadievich Perepelkin ("the Beneficiaries") dated August 2011 ("the Resolutions"), including giving any instructions to or making any other statement (whether written or oral) to any person with a view to securing the implementation of the Resolutions or any of them".*

18. A more substantial objection was made to paragraph 1.1.3 of the draft order. The proposed draft was a modified version of what had been requested on 27th April, modified to address the objection that the early draft was so tight that it would have impeded the everyday operations of the group of companies.

19. In his skeleton argument prepared after seeing the earlier application that had been before the court on 27 April, Advocate Peter Ferbrache listed four grounds for opposing the order: 1) it goes beyond the jurisdiction of the court in seeking orders against non-residents in respect of 18 non-resident companies; 2) it does not reflect the balance of convenience; 3) it is hopelessly wide and would render the companies listed unmanageable; and 4) it goes well beyond "holding the line" and would in fact alter the status quo.

20. The third of those points had been addressed, in my view, by the amendments incorporated in the 2nd May application. The other three grounds had to be considered by me.

21. The Court has jurisdiction to grant interim or interlocutory relief pursuant to section 1 of The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. (On the 4th April, when this matter first came before me Advocate Mark Ferbrache applied only under sections 349 and 350 of The Companies (Guernsey) Law, 2008 but readily accepted, correctly in my opinion, that the latter sections did not confer on the Court the power to grant interlocutory relief.)

22. Counsel were agreed that in deciding whether to exercise the Court's jurisdiction, I was to have regard to the principles set out in American Cyanamid Co v Ethicon Ltd [1975] A.C. 396: 1) is there a serious question to be tried? If yes, 2) would damages be an adequate remedy? If not, 3) where does the balance of convenience lie? I will deal with each question in turn.

23. I am satisfied on the evidence before me in the affidavits sworn on behalf of the applicants, including by Artur Perepelkin who is one of the quasi-partners, that there is a serious issue to be tried namely to determine whether the Third Respondent has taken control over the First Respondent and the group of companies owned by it without the authorisation of his quasi-partners and/or in contravention of any agreements or understandings between them and is operating the group, or seeking to do so, to his economic advantage and to the detriment of the Applicants.

24. It is clear that damages would not be an adequate remedy. The relief sought by the Applicants in their substantive proceedings is relief for unfair prejudice in the operation of the First Respondent. Section 350 of The Companies (Guernsey) Law, 2008 prescribes a number of heads of relief that could be available if the grounds set out in section 349 are established. In the circumstances, I am satisfied that damages would not be an adequate remedy.

25. That brings me to the third of the American Cyanamid principles. As regards paragraph 1.1.1 of the draft order, the balance of convenience favours the making of the order. The parties are agreed that it is necessary to hold the line for the time being. The status quo would be altered if the resolutions are implemented. If so and if it were later established that the Third Respondent had acted improperly, it could be impossible to re-establish the present status quo. I have not been told of any prejudice to the Respondents if the resolutions are not implemented immediately that would outweigh the prejudice to the Applicants if they are implemented.

26. As regards paragraph 1.1.3, Advocate Peter Ferbrache asserted that the breadth and scope of the draft in the application considered by me on 27th April were so broad and wide that it would have interfered with the day to day operations of the company. He said it would have altered the status quo. I understand the objection was that it would have prevented the third Respondent and others involved in the running of the group of companies from performing the duties for which the Applicants acknowledge they were properly responsible.

27. I agree that such concerns were validly raised in respect of the form of order I was asked to make on 27 April. However I believe the modified version in the draft order attached to the application of 2 May addresses the concerns. It seeks to prevent any diminution in the value of the group companies forming the group structure underlying the holding company, the First Respondent and to prevent any reduction in the value of the assets of the group. It does not prevent disposals or sales of companies or their assets in the ordinary course of business.

28. The balance of convenience favours the preservation of the value of the group pending a full inter partes hearing at which the Respondents may seek to challenge the order and/or pending the final outcome of substantive proceedings.

29. Advocate Peter Ferbrache drew my attention to Stop Notices issued in the British Virgin Islands which gives some protection to the Applicants. In my view, the existence of the BVI Stop Notices has little bearing on the balance of convenience. They are not sufficient reason to justify not granting the injunction requested.

30. Advocate Peter Ferbrache also asserted that the Royal Court could have no jurisdiction to impose such an order, even in its modified form, on non-residents to restrain them from operating companies that are neither incorporated nor resident in Guernsey. He also submitted that the matter is not a proper case for service out of the jurisdiction as Guernsey does not have jurisdiction over the Third and Fourth Respondents and because it is not the appropriate forum which he suggested is Russia. As to the question of forum, he relied on the principles set out in Spiliada Maritime Corporation v Cansulex Ltd [1987] A. C. 460.

31. Advocate Mark Ferbrache had not adequately addressed me on the jurisdiction issues in his skeleton argument or his oral submissions. When I made the order of 4 April, jurisdiction did not arise because the only two Respondents were both Guernsey companies. Advocate Peter Ferbrache appeared at the next hearing on behalf of the Third and Fourth Respondents but in a limited capacity only and reserving the right to challenge the court's jurisdiction. His intention was to oppose the injunction granted against the first two Respondents and his clients were made a party for that purpose only, whilst reserving jurisdiction.

32. Advocate Mark Ferbrache appeared to take the view that because they were present in Court, he could obtain orders against them. In my view, that cannot be correct; someone who is present

but challenging jurisdiction should not be treated as if they have acceded to the jurisdiction of the Court. They must be entitled to appear for the purpose of challenging jurisdiction and seeking the discharge of the interim orders without being treated as if they had accepted jurisdiction for the purpose of service of any other proceedings. In my view, such a conclusion is consistent with the decision of Michael Briggs Q.C. in IBS Technologies (PVT) Ltd v APM Technologies SA and Another (HC 03C00106).

33. Under some pressure from me to do so, Advocate Mark Ferbrache addressed the jurisdiction question in his oral submissions. He had issued substantive proceedings against the first two Respondents returnable on 11 May and on that day was proposing to apply for leave to serve the substantive proceedings out of the jurisdiction on the Third and Fourth Respondents. He reluctantly agreed with me that he should address the principles that govern service out of the jurisdiction at this interlocutory stage.

34. In my opinion, the purpose of the order sought in paragraph 1.1.3 is to preserve the status quo until the conclusion of the substantive proceedings for relief under section 350 of the Companies Law. If there is no jurisdiction to issue the substantive proceedings against the Third and Fourth Respondents, it would be very surprising if the court had jurisdiction to grant interlocutory relief except perhaps under section 1(7) of the 1987 Law which the Applicants are not seeking to invoke.

35. Without prejudging the application to be made under Rule 8 of the Royal Court Civil Rules, 2007 for service out of the jurisdiction of the substantive claim, I am satisfied that it is appropriate to make the interlocutory order and for notice to be served on the Third and Fourth Respondents. The Fourth Respondent is a shareholder, along with the three applicants in the First Respondent which is a Guernsey registered company in respect of which the Applicants will be seeking relief on the grounds on unfair prejudice in the affairs of the company. The power to grant relief under section 350 of the Companies Law is vested in the Royal Court. The affidavit evidence presently before me appears to show there is a good arguable case. Guernsey appears to be the appropriate forum because of the relief available under section 350. In a skeleton argument, Advocate Peter Ferbrache has submitted that Russia would be the appropriate forum but I have no evidence to support such submission. At this stage in the proceedings I therefore have to conclude that Guernsey is the appropriate forum for the trial of the action.

36. All of those factors also apply in respect of the Third Defendant except that he is not a shareholder in the First Respondent. As the beneficial owner of the Fourth Respondent he is more remote from the First Respondent. His beneficial ownership might not be sufficient by itself to justify service out on him. However it is also alleged that he is, or has become, the de facto controller of the First Respondent and its group of companies. In my view, that fact is sufficient to persuade me that the court has jurisdiction to make the interlocutory orders sought against him.

37. My findings with regard to jurisdiction are in respect of this interlocutory application only; they are not to prejudge the application to be made in respect of the substantive proceedings. Furthermore, they do not preclude the Third and Fourth Respondents challenging jurisdiction at a subsequent hearing which they have indicated they intend to do.

38. For the reasons I have given in this judgment, I made orders against all four Respondents on 4 May 2012.

39. At the request of Advocate Peter Ferbrache, I also addressed the matter of provision of security of costs and an undertaking in damages. Advocate Mark Ferbrache agreed, on behalf of his clients, to lodge an additional £30,000 as security. The undertaking in damages will be reinforced by an affidavit to be sworn on behalf of the Applicants verifying what they believe to be the value of their shares in the First Respondent, the latter being the security offered for their undertaking. The affidavit may not provide any new information to the Third or Fourth Respondents as their knowledge of the company is derived from what the Third Respondent has told them but in principle, it was appropriate to make an order.