Judgment 34/2003

Technocom Ltd v
Roscomm Ltd and Klabin
Royal Court
(Civil Action File 647)
16th May, 2003

Exception de Fond – forum non conveniens – conjoined application for stay pending determination of English arbitration – principles to be applied. [See also Judgment 13/2003]

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

16th day of May, 2003 before Andrew Christopher King Day, Esquire, C.B.E. Lieutenant Bailiff; sitting alone

IN THE MATTER OF

TECHNOCOM LIMITED

Plaintiff

and

(1) ROSCOMM LIMITED

Defendants

(2) MARK KLABIN

WHEREAS on 22nd, 23rd, 24th April, 2003 the Lieutenant Bailiff considered an Exception de Fond pleaded by the Second Defendant and a conjoined application to stay proceedings pending the determination of arbitration in England and heard thereon Advocates J. P. Greenfield and St J. Robilliard Counsel for the Plaintiff and Second Defendant respectively.

The Lieutenant Bailiff this day delivered judgment in the terms attached hereto and

1. DISMISSED the said Exception de Fond and conjoined application to stay proceedings pending the determination of arbitration in England.

2. AWARDED costs on a recoverable basis to the Plaintiff.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Judgment
16th May 2003

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between **TECHNOCOM LIMITED** **Plaintiff**

and

(1) ROSCOMM LIMITED **Defendants**

(2) MARK KLABIN

Judgment of Day L.B. on the Second Defendant's application to stay the proceedings.

Advocate J. P. Greenfield appeared for the Plaintiff.

Advocate St. J. A. Robilliard appeared for the Second Defendant.

Hearing dates: 22nd, 23rd 24th April, 2003

Judgment handed down: 16th May, 2003

Cases referred to:

Shamurin v. Base Metal Trading Company et Autres (24th July 2001) Guernsey Royal Court Hancox LB.

Singleton v. Zetshock (28th April 1997) Guernsey Royal Court Carey DB.

Dunlop Holdings plc v Far Eastern Rubber Holdings Ltd (15th October 1991) Guernsey Royal Court Dorey DB

Vardinonyannis v. Ansol Limited et Autres (24th May 2002) Guernsey Royal Court Newman LB.

Johnson v. Manitoba Marine Limited and Malta Dry Docks Corporation (23rd March 1999) Guernsey Royal Court Dorey B.

Spiliada Maritime Corp v. Cansulex Ltd [1987] AC 460.

The Abidin Daver (1984) 1 A.C. 398

Reichhold Norway ASA and Another v. Goldman Sachs International [1999] 2 Lloyd's Rep 567, [2000] 1WLR 173

1. Introduction

On the 11th February this year I handed down my judgment granting the Plaintiff's application for interim injunctive relief against the First and Second Defendants. At the start of that judgment I attempted to provide a background synopsis to that application, by identifying the leading players, the basic issues, certain documents central to those issues, and the procedural history of the case since it was commenced by an *ex* parte application by the Plaintiff on the 12th April 2002. I consider that background synopsis (for ease of reference attached as Appendix 1) together with the following brief comments and identification of other sources of information, sufficiently to set the scene for the determination of this application. It would be wearisome in the extreme, and of no assistance to all concerned, to repeat what has already and so recently been stated for that purpose. I therefore take it as read.

The essence of this case, by which I mean not only the current application but also the injunctive relief sought and the substantive proceedings themselves, as I hope will be clear from the background synopsis and my judgment of the 11th February, relates to a bitter dispute between the Plaintiff (and its owners) on the one hand, and the Second Defendant on the other, in respect of the govenance of the First Defendant, which in turn has the controlling interest of the telecommunications company, based in the Russian Federation, Teleport.

As a result of my decision on its application for interim injunctive relief, (the Act of Court following upon that decision is Appendix 2), the Plaintiff for the time being controls Roscomm and has full and exclusive rights to represent its interests, *per se*, as shareholders of Teleport, and thus is able, in that capacity, to exercise such influence as it can and to which it is entitled over the latter company. Nothing in my decision, however, is to impact in any way on those who were not parties to it, nor on any disputes which they might have with those who are, such as Roscomm; nor is Mr. Klabin to be restrained or injuncted in any way save in relation to his position in Roscomm.

On the 28th June, 2002, the Second Defendant filed Defences to the Cause, which are of a preliminary nature as an *Exception de Fonds* is pleaded. The essence of that *Exception* is as follows:-

> *"The Second Defendant submits that under the principle of* forum non conveniens *the Court should decline jurisdiction against the Second Defendant in this matter.".*

The particulars which are then provided as the basis for the *Exception*, apart from a statement that the Second Defendant is not and has never been resident in the jurisdiction, are the various paragraphs in the Cause upon which the Plaintiff's claim for relief is based.

As was clear from the Second Defendant's skeleton argument on the *Exception*, which was filed with the Court as long ago as the 16th August, 2002, the basis of his argument with regard to the appropriate *forum*

is that the principal issues between the parties (by which he means, in broad terms, those relating to or involving Teleport) should be determined in the Russian Federation; and that following resolution thereof, any relatively minor and consequential issues relating to Guernsey Company Law (for which Guernsey must be the appropriate jurisdiction) could then be disposed of by the Royal Court with relative ease and dispatch.

However, following the Plaintiff's assumption of control of the First Defendant, as a result of my decision of the 11th February, 2003, the First Defendant has itself instituted arbitration proceedings in England against Helian in relation to the Pledge Agreement, those proceedings being instituted at the end of February. In effect, those arbitration proceedings have been instituted by this Plaintiff because, whatever the legal niceties, the Plaintiff has full control for the time being of the First Defendant; they may be viewed as one and the same (for present purposes). Having became aware of the English arbitration proceedings (though I have no hard evidence before me, I think I am entitled to infer from the evidence which I do have that the information was provided by Helian), on the 17th April, 2003, the Second Defendant filed the following application with the Court:-

> *"**HEREBY APPLIES** to the **COURT TO***
>
> 1. *Order that **WITHOUT PREJUDICE** to the Second Defendant's current Defences the substantive action between the parties be stayed until such time as the arbitration proceedings initiated by the First Defendant with regard to the Helian pledge have been finally determined.*
>
> 2. *Make such other order and/or directions that it shall consider just or expedient **and** the Second Defendant claims costs.".*

As became clear at the start of Mr. Robilliard's submissions to me, the wording of the *Exception* filed nearly ten months ago was no longer appropriate and leave was given to amend it. The *Exception* is now in the following form:-

> *"The Second Defendant submits that under the principle of forum non conveniens and or its inherent jurisdiction the Court should stay the proceedings until such time as:*
>
> *(i) the arbitration proceedings commenced by the First Defendant to determine the status of the Helian Pledge Agreement are resolved and/or*
>
> *(ii) the Plaintiff and/or the First Defendant has obtained in the appropriate forum a determination of its allegations with regard to Teleoport-TP as set out in particular at paragraph 29 of the Cause.".*

For the removal of any doubt, the reference to the appropriate forum in paragraph (ii), is the Russian Federation. The particulars upon which the Teleport aspect of the *Exception* is based are as earlier identified, namely -

"Particulars

1. *The Second Defendant is not nor ever has been resident in the jurisdiction.*
2. *The grounds of the dispute are set out inter alia in paragraph 21 – 35 of the Cause of which:*

(a) *Paragraphs 21-25 relate to the "Helian Services Agreement"*

paragraph 21 refers to payments alledgedly made between Teleport, a company registered in Russia which is not a party to these proceedings and Helian, a company registered in Panama, which is not a party to these proceedings;

paragraph 22 refers to the Helian Services Agreement of 12th August 1995 which agreement is subject to the law of Russia;

paragraph 23 & 24 raise further issues about the said Agreement

paragraph 25 raises the issue of whether services were provided under the Agreement, which services were to be supplied principally in Russia.

(b) *Paragraph 26 raises allegations concerning the Second Defendant of which: the paragraph generally raises issues of alleged acts which took place outside the jurisdiction, including:*

26.1 & 26.2 – the construction of the Helian Services Agreement and the construction of the Equipment Leases which are subject to the law of Russia. 26.1 & 26.4 – relates to the consultancy agreement made between PLD and the Second Defendant which is subject to the law of New York

26.7 – relates to the validity of certain bills of exchange payable in Austria and the validity of a pledge agreement subject to the law of England.

(c) *Paragraph 27*

27.1 – relates to the validity of a power of attorney allegedly issued with regard to the Pledge Agreement;

27.2 – relates to the validity of a power of attorney allegedly issued by Teleport to Helian;

(d) *Paragraph 29 makes allegations about a Mr. Mustafidi, who is a resident of Russia and not a party to the action about acts wholly or mainly carried out in Russia and makes allegation that Mr. Mustafidi, as director, has injured Teleport.*

Paragraphs 33 & 34 make allegations that the Second Defendant has damaged Teleport, which is not a party to this action, and which is not a party to this action, and which is governed by the laws of Russia, its place of incorporation.".

For completeness the relevant paragraphs of the Cause are attached as Appendix 3.

It is also necessary to cite the appropriate paragraphs of the affidavit of Charles Russell a partner in the firm of London Solicitors of that name, filed in support of the Second Defendant's application of the 17th April relating to the English arbitration procedures:-

> *"5. It is clear from the Notice of Arbitration that the main purpose of the Arbitration is to establish the validity and enforceability of the Pledge Agreement dated 15th April 1999 between the First Defendant and Helian International Corporation ("the Pledge Agreement"). The First Defendant alleges that the Pledge Agreement is not enforceable or valid and is in fact fabricated. The Plaintiff will have suffered no substantial loss claimed in this action should the First Defendant succeed in the arbitration. The validity and effect of the Pledge Agreement are therefore matters, which are highly material to the continuation of these proceedings. Indeed in his judgment dated 11th February 2003 in this action when giving interim injunctive relief Deputy Bailiff Day identified the Pledge Agreement as a central document to this action and observed that the document "features prominently, almost incessantly". He further identified that the proper judicial determination of the Pledge Agreement would be established in litigation instigated by one of the parties to it. In my submission, until the award in the Arbitration, a final decision in this case, especially in respect of damages, would proceed on an assumption or a speculation as to the outcome of the Arbitration.*
>
> *6. I am informed by Ozannes, the Second Defendant's Guernsey lawyers, that the Jurats award damages and that issues of liability and damages should usually be considered at the same time. Accordingly, in my submission it is appropriate that this action be stayed until the conclusion of the Arbitration, because this case cannot proceed to a conclusion until this has happened, and if the Plaintiff (which now controls the First Defendant and are clearly directing the case in the Arbitration) obtain the award they are seeking, any costs which are expended in this case are likely to have been completely wasted.*
>
> *7. I respectively request the Court to grant the application sought.*

It is also desirable I believe to note the contents of the request for arbitration filed by the First Defendant's London Solicitors, Salans (who also act for the Plaintiff), together with the relevant attached documents, namely the Helian Services Agreement and the Pledge Agreement itself. They are Appendix 4.

It should also be noted that the Second Defendant has not, through his Counsel, given any undertaking to be bound by any decision reached in the English arbitration, nor by any proceedings in the Russian Federation, which in any event have not been instituted.

So much for the relevant background.

2. The relevant legal principles

The Plaintiff is clearly entitled to institute proceedings against the First Defendant "as of right", it being a company registered in this jurisdiction. In my view, the Second Defendant must be a necessary and proper party to those proceedings, the test propounded in Rule 27(3) of Dicey & Morris being satisfied, namely *"supposing both prospective defendants had been in Guernsey would they both have been proper parties to the action?".* In any event, Mr. Robilliard takes no issue on this point for the purpose of these proceedings. Thus the *forum non conveniens* principles do not relate in this case as to whether the Second Defendant has properly been served out of the jurisdiction, but are limited merely to the staying of proceedings (the two sides of the *forum* coin illustrated by the authorities).

No specific provision is made for staying proceedings under the Royal Court Civil Rules, 1989. This Court, nevertheless, on at least five occasions in recent years (see Shamurin, Singleton, Dunlop Holdings, Vardinonyannis and Johnson) has exercised its inherent power whether or not to stay proceedings in appropriate circumstances, in my view correctly. In all cases, again in my respectful view correctly, this Court has been guided by the relevant English principles, or more precisely those which have emanated from the Scottish cases (of greater antiquity). I respectfully adopt the admirably succinct statement of the relevant legal principles by Newman LB in Vardinonyannis, the relevant passages of her judgment being as follows:-

> *"2. The application is brought under the Royal Court Civil Rules 1989. On an application for a stay on the grounds of* forum non conveniens *the party making the application must show that the court should exercise its discretion to grant a stay. He must show not only that Guernsey is not an appropriate forum, but that there is another available forum which is clearly and distinctly more appropriate than Guernsey. In considering this the court looks at a number of factors, eg in terms of convenience and expense, availability of witnesses, governing law and the residence of the parties. Unless the court is of the view that there is another forum which is more appropriate than Guernsey, it will not usually grant a stay.*
>
> *5. The leading case is Spiliada Maritime Corp v Cansulex Ltd [1987] 1 AC 460. The leading speech was delivered by Lord Goff of Chieveley. The defendant must establish that there is some other tribunal, having competent jurisdiction, which is clearly and distinctly a more appropriate jurisdiction in which to try the case in the interests of all parties and in the interests of justice. This is necessary in order to pay proper regard to the fact that the jurisdiction has been founded in Guernsey as of right: see p477 E/F."*

I agree that the legal principles to be applied in Guernsey are those as propounded by their Lordships in Spiliada and the Abidin Daver (and the line of cases from which their reasoning was derived). In addition to the basic principles identified by Newman LB, I would merely add that even where a defendant has satisfied the burden, which is on him, to persuade the Court that the decline of jurisdiction in favour of another jurisdiction would be appropriate, nevertheless it may still be in the interest of justice to allow a plaintiff to proceed in his chosen jurisdiction.

3. Conclusions

With regard to the English arbitration proceedings instituted by the First Defendant, Mr. Greenfield, rightly, would not make any comment on their progress without the consent of Helian (the other party involved), save to the extent that he informed the Court that the proceedings had not gone by default. For present purposes, I consider I must assume that those proceedings will be pursued to their conclusion. It is also my opinion that the First Defendant (or the Plaintiff) has properly instituted those proceedings in England, the proper *forum* for them, not least for contractual reasons

On proper analysis, the Second Defendant's application and *Exception* are not founded on the principles associated with the concept of *forum non conveniens*. In cases where those principles are fully applicable, the stay would in all probability be permanent and the Plaintiff be "*driven from the judgment seat"* (to adopt the words of Lord Bingham of Cornhill, CJ in Reichhold Norway). In other words, the fundamental question in that situation would be whether the Royal Court should hear the case at all. That is not the position in this case. As in Reichhold Norway, it is not a question of the Royal Court not becoming involved in the proceedings, but when, and to what extent, it should be. Nevertheless, the principles enunciated in the leading cases such as Spiliada are of great assistance.

In Reichhold Norway, a case which Mr. Greenfield helpfully referred to me in an exemplary professional manner, as superficially (though not in reality) it might appear to assist Mr. Robilliard's client rather than his own, Mr. Moore-Bick J very carefully analysed the issues between the three main parties, as well as the commercial effect of the relationships between them, and studiously applied all the relevant principles. On the facts, he concluded that, whilst granting the temporary stay requested by Goldman Sachs might delay the English proceedings for a year or so, awaiting the outcome of the arbitration in Norway, he had high expectations that the English action might then not be effective at all. The Court of Appeal, for whom Lord Bingham of Cornhill CJ delivered the leading judgment, could not fault the approach taken by the Judge and his conclusions on the facts.

Mr. Robilliard has strongly prayed in aid the concept of "case management". In this case, he strongly urges upon me that the most effective way of managing the Guernsey proceedings is, firstly, to allow the English arbitration to run its course so as to determine the validity and enforceability of the Pledge Agreement. Thereafter the appropriate court of the Russian Federation should determine those issues (the

Teleport issues), of which I accept there are many, for which the applicable law is Russian, and which is the territory where the relevant events took place (the convenience of witnesses, etc.). Only after those matters have been determined should the Royal Court grapple with the remaining issues, which he argued would by then be peripheral.

Mr. Robilliard is not suggesting that there is a more suitable *forum* than the Royal Court in which this case should be tried. He is merely arguing that certain issues should be left more appropriately to the determination of other jurisdictions, with the ultimate responsibility for deciding this case remaining with this Court. Mr. Robilliard is unable to cite any authority in support of such a proposed course of action, which is unsurprising as in my view it is wrong in principle and a recipe for injustice.

In contrast to Moore-Bick J in Reichhold Norway, I hold out no expectation at all that the English arbitration would render the Guernsey action ineffective with regard to the Pledge Agreement; even less so with regard to the issues recommended to be determined in Russian proceedings.

Whilst I accept Mr. Robilliard's contentions that many of the matters in dispute are in fact governed by the law of the Russian Federation, that many of the relevant events took place in that country, that the telecommunications company, Teleport, the control of which is central to this dispute, is registered there, and that all of those matters have particular significance as far as concerns the Plaintiff's claim in damages, nevertheless the vital nub of these proceedings relates to the governance of a Guernsey registered company, the First Defendant, and the conduct of the Second Defendant as a director of it. It relates to the questions as to whether or not Mr. Klabin resigned as a director of Roscomm on the 30th September, 1999, and to his conduct as a director of that company both prior to the 30th September, 1999, but most particularly since that date. Much of his alleged misconduct in respect of his fiduciary duties towards the First Defendant may involve his alleged manipulation of the chief executive of Teleport for his own, that is Mr. Klabin's personal purposes, in priority to his duties as a director of Roscomm; but much of that misconduct equally involves Mr. Klabin, for similar impugned purposes, issuing on behalf of Roscomm Bills of Exchange in favour of Helian, and granting the Pledge in favour of that entity of Roscomm's 10% shareholding in Teleport, its only asset. Central to any determination of all these allegations of misconduct is the assessment of Mr. Klabin's credibility. To state the problem in that way can only lead to one just conclusion. That exercise cannot be compartmentalised and parts outsourced (in the current commercial jargon). Only one jurisdiction can properly make that assessment of credibility and take an overall view of the allegations against Mr. Klabin. Guernsey. Equally, only the Royal Court can properly determine whether a person is fit to be a director of a particular Guernsey company, or any Guernsey company. Even Mr. Robilliard accepts that any final determination has to be made here. If, as a result, the Plaintiff encounters evidential difficulties with regard to its claim in damages, so be it; it lies on its own head as Mr. Greenfield fully acknowledges.

Further, if I was to accede to the submission that the appropriate court (whatever that may be) of the Russian Federation should exercise jurisdiction over certain relevant matters, this Court would lose total control of these proceedings. That must be the antithesis of sound case of management.

Finally, the course proposed by Mr. Robilliard would be oppressive to the Plaintiff, which has, in my view, properly instituted proceedings in this jurisdiction, as of right against the First Defendant and effectively as of right against the Second Defendant; it has not instituted, nor has any desire to institute, proceedings in the Russian Federation against either of those Defendants. Whilst I accept that such consideration for a plaintiff, as guided by the developing English jurisprudence, is not a conclusive factor, it nevertheless must be an important one and particularly on the facts, as I analyse them, in this case.

Accordingly I find no merit in the *Exception de Fonds* as now pleaded nor in the conjoined application to stay the proceedings pending the determination of the English arbitration. They are both dismissed.