



**Alpha Development Limited et al &
Barclays Wealth Trustees (Guernsey) Limited et al**
Royal Court
7th May, 2014

**JUDGMENT
22/2014**

Plaintiffs' Application for issue of Letter of Request.

**Approved Text
07.05.2014**

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

**(1) ALPHA DEVELOPMENT LIMITED
(2) ALPHA DEVELOPMENT (CHELSEA) LIMITED**

Plaintiffs

-and-

**(1) BARCLAYS WEALTH TRUSTEES (GUERNSEY) LIMITED
(2) SHARON ANN PARR
(3) WARNER THOMAS KOLLER
(4) GAVIN ANTHONY ST PIER
(5) STEPHEN PERRY LE RAY
(6) BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED
(7) BARCLAYS WEALTH CORPORATE OFFICERS (GUERNSEY) LIMITED**

Defendants

-and-

**(1) LUBOV (ALSO KNOWN AS "LUBA") CHERNUKHIN
(2) CAPITAL CONSTRUCTION AND DEVELOPMENT LIMITED**

Third Parties

Plaintiffs' Application for issue of Letter of Request

Date of hearing: 5th March 2014

Reasons handed down: 7th May 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

**Counsel for the Plaintiffs: Advocate G K Bell
Counsel for the Defendants: Advocate M G A Dunster
Counsel for the Third Parties: Advocate N Robison**

Cases, Texts & Legislation referred to:

The Evidence (Proceedings in Other Jurisdictions) Act 1975
The Bankers' Books Evidence (Guernsey) Law, 1954
The Royal Court Civil Rules, 2007
The Town and Country Planning Act 1990
Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed.
Panayiotou v Sony Music Entertainment (UK) Ltd [1994] Ch 142
The Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980
Re Asbestos Insurance Coverage Cases [1985] 1 All ER 716
In re State of Norway's Application [1987] QB 433
First American Corporation v Zayed [1999] 1 WLR 1154
The States of Minnesota v Philip Morris Incorporated [1998] ILPr 170
Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547
Whitehouse v Jordan [1981] 1 WLR 246
Re J (1990) FCR 193
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011

Introduction

1. At the conclusion of the hearing on 5 March 2014, I announced that I was dismissing the Plaintiffs' application seeking the transmission of a Letter of Request to the Senior Master of the Senior Courts in England and Wales to be dealt with pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 1975 and outlined my reasons for doing so. I indicated that full reasons would be provided in due course and this judgment contains those reasons.
2. In their Application dated 13 July 2013, the Plaintiffs had also originally sought an order for inspection pursuant to section 9 of the Bankers' Books Evidence (Guernsey) Law, 1954, as amended, against Barclays Bank plc. Following correspondence between the Advocates and, in particular, following the filing of a witness statement dated 16 August 2013 of Gregory Wainwright concerning Barclays' electronic data storage policy, which clarified that those people working in the Guernsey branch of the bank did not have access to electronic copies of the documents sought on behalf of the Plaintiffs, that element of the Application had been abandoned. As a result, the hearing concentrated solely on whether a Letter of Request to the English court to obtain the evidence sought properly be granted.

Background

3. The Application was made in the context of proceedings brought by the Plaintiffs against the Defendants in respect of alleged lost profits that they would have made through developing a property in Chelsea. It was submitted on their behalf that the evidence in question would support the quantification of the losses pleaded at para. 55 of their Cause. On behalf of the Defendants, paragraph 49 of Les Defences denies that the Plaintiffs have sustained those losses.
4. The First Defendant, the First Plaintiff and the latter's parent company entered into an Administration Agreement dated 21 December 2006 under which, inter alia, the other Defendants acted as directors of the First Plaintiff and the Second to Fifth Defendants were also directors of the Second Plaintiff. The proposal was that the existing buildings on the site in question were to be demolished and replaced with high-end luxury apartments. To that end, the First Plaintiff entered into a facility letter with the Bank of Scotland on 2 July 2007 in order to fund the majority of the costs of purchasing the site and financing the development costs. It is the Plaintiffs' case that their opportunity to re-develop the site was lost, referring in that context to the decision of the Bank of Scotland refusing in late 2008 to advance further

monies and demanding repayment of monies already advanced, with the bank also alleging that the First Plaintiff had not complied with some of the conditions attached to the facility letter. Joint fixed charge receivers were then appointed in respect of the site and, in early 2012, it was reported that a joint venture entity had acquired the site from those receivers. Information put into the public domain reported that this joint venture entity, Alpha Place Development LLP, intended to re-develop the site in a similar manner to that previously proposed by the Plaintiffs and that financing had been obtained from Barclays Bank plc. These announcements also indicated that Savills had acted as adviser to the joint venture entity. Savills had previously provided valuations of the site for the Bank of Scotland in connection with the financing obtained by the Plaintiffs.

5. The planning permission in respect of the site at the time it was acquired by the Plaintiffs had been granted by the Royal Borough of Kensington & Chelsea on 13 March 2007. It provided for the construction of 38 apartments, of which 13 would be “affordable” apartments, together with a health suite, parking and landscaping. This permission was amended in 2008 to remove a condition relating to the timing of the demolition. However, the First Plaintiff considered that there was scope for even greater returns if the permission were changed to have fewer high-end apartments in the building. Accordingly, in 2008, it sought permission for there to be 31 apartments in the development, of which 13 would still be “affordable”, three would be for staff serving the high-end apartments, of which there would be just 15 rather than the 25 apartments in the existing permission. In principle, on 3 July 2008 an indication was given by the planning authority that such permission would be forthcoming, subject to concluding an agreement pursuant to section 106 of the Town and Country Planning Act 1990. In the event, such an agreement was not concluded with the consequence that the application made in 2008 was refused in March 2009. The Plaintiffs have pleaded their case on the basis that, but for the failings of the Defendants, the Plaintiffs would have been in a position to progress the permission sought in 2008 and to have reaped the returns from that particular development.
6. From the announcements made on behalf of the joint venture entity now developing the site, it is apparent that the earlier 2007 planning permission for 25 luxury apartments is being utilised, albeit subject to modifications to its terms obtained on behalf of the joint venture entity. As summarised in Advocate Bell’s Third Affidavit, sworn on 8 July 2013, the planning permission from which the Plaintiffs hoped to benefit had the 2008 application been granted anticipated that the internal saleable areas associated with the 15 luxury apartments (plus the three staff apartments) totalled 85,794 square feet and those of the 13 affordable apartments totalled 10,707 square feet, whereas the layouts of the plans being developed on behalf of the joint venture entity indicate internal saleable areas of 84,998 square feet and 12,371 square feet respectively.
7. In the light of these similarities, the Plaintiffs argued that six categories of document that they considered must be held by Barclays Bank plc would assist them in proving the extent of their losses at trial. These were the types of documents with which they had had experience when seeking financing for their own re-development project from Bank of Scotland and they considered it highly likely that similar documents would have been produced at the request of Barclays Bank plc by the joint venture entity or persons on its behalf. The documents sought were: (i) the initial desktop valuation and full valuation report of the development of the site as planned by the joint venture entity; (ii) the valuation of that development conducted by Savills and/or another valuer; (iii) documents submitted containing the analysis of the joint venture of the likely sales values to be achievable and the likely rental yields of the apartments; (iv) the development cash flow document submitted in respect of the joint venture project; (v) the costs breakdown document in respect of the joint venture entity’s re-development; and (vi) the facility letter setting out the details and terms of the financing of the joint venture entity’s project. The basis for seeking production of the documents was that that they would provide an exceptionally proximate valuation of the likely returns on sales of

apartments, which would be more reliable than simply using comparable apartments from other sites. Further, the cash flow and costings documents would corroborate the Plaintiffs' own figures in respect of their project.

8. The Application was opposed on behalf of the Defendants. Advocate Dunster submitted that it was speculative and failed to particularise the documents, as required, because the Plaintiffs did not even know whether the documents sought actually existed or not. They believed from their own experience through seeking and obtaining financing for their own re-development project that these types of document would be held by the financier of the joint venture entity's project, but, in the absence of any knowledge as to their existence, this was a classic fishing expedition and should be rejected as such. In any event, the Defendants questioned the relevance of the documents sought where the two re-development projects were different and the quantification of the Plaintiffs' losses would inevitably be the subject of expert evidence based on what the Plaintiffs had wished to develop rather than what the joint venture entity was in the process of developing.
9. The Third Parties were neutral in respect of the Application and made no submissions.

The law

10. There was no dispute between the parties that the Court has jurisdiction to issue letters of request to obtain evidence from other jurisdictions. The position of this Court is similar to that of the English High Court in that the power to issue a letter of request derives from its inherent jurisdiction (see, eg, Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed., para. 8-071). The basis of the jurisdiction was helpfully explained by Sir Donald Nicholls V-C in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 (at p. 149H), in a passage I consider accurately reflects the position in Guernsey (subject, of course, to modifications in the reference to the rules for subpoenas):

“In my view that court’s power to issue a letter of request stems from the jurisdiction inherent in the court. Inherent in the court is power to do those acts which the court needs must have to maintain its character as a court of justice: see Lord Diplock in Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909, 977. It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make a request to a foreign court for assistance. It is not making an order. It is not making an order addressed to a foreign court or to witnesses. Further, the subject matter on which assistance is sought, the obtaining of evidence, is one over which the court has long exercised close control. This is a subject peculiarly within the court’s own control. Thus, the process by which the court compels the attendance of witnesses, or compels the production of documents as evidence, is a process whose source is the court’s own inherent powers. R.S.C., Ord. 38, rr. 14 to 19 regulate the form of subpoenas, and the way they should be issued and served and so forth; those rules do not create the jurisdiction. Specifically with regard to a subpoena to produce documents (duces tecum), Lord Ellenborough C.J. observed as long ago as 1808 in Amey v. Long (1808) 9 East 473, 484:

“The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and

possession of the party who was interested in the production of it, or the voluntary favour of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing for so many centuries, must have employed the same or similar means to those which we find them to have in fact used from the time of Charles the Second at least ...”

Against this background there is nothing surprising or remarkable in the idea that the English court should choose to communicate with a foreign court, and seek its assistance in the production of documents which, had they been in England, could properly have been made the subject of a subpoena issued by the English court. The English court would not normally embark on such a course unless there was reason to suppose the foreign court would be receptive to the request.”

11. In relation to incoming letters of request, there is legislation clarifying which requests fall outside the ambit of the regime. The Evidence (Proceedings in Other Jurisdictions) Act 1975 has been extended, with modifications, to the Bailiwick of Guernsey by the Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980. In the context of the present case, when considering whether to make a request to a court in England and Wales, similar considerations to those with which the Court is familiar in respect of incoming requests will, therefore, apply.

12. Section 2(4) of the 1975 Act provides that:

“An order under this section shall not require a person–

(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power.”

13. In the *Panayiotou* case (*supra*), the Vice-Chancellor explained (at p. 152) that paragraph (a) excludes discovery and that paragraph (b) “narrows the ambit of the order even further”, having previously stated (at p. 151F) that the English courts apply a similar approach to the production of documents under a letter of request as they do to subpoenas. That approach was set out by him (at p. 151D) in the following terms:

“... it is established that a subpoena to produce documents cannot be drawn so widely as to requiring the witness to give discovery. The object of the subpoena is to compel the witness to produce evidence directly material to the issues in the case. The object is not to require him to produce documents just because they may be useful for the purpose of corroborating or challenging a witness, or because they may lead to a train of inquiry which may result in the discovery of evidence or may, in some other way, advance one party’s case or damage the other’s.”

14. Further guidance about the need for the letter of request to focus on “particular documents” was given in the speech of Lord Fraser of Tullybelton in *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716 (at p. 721f):

“The second test of particular documents is that they must be actual documents, about which there is evidence which has satisfied the judge that they exist, or at least that they did exist, and that they are likely to be in the respondents’ possession. Actual documents are to be contrasted with conjectural documents, which may or may not exist.”

15. When considering an application for the issuing of a letter of request, the Court needs to be alive to whether the request amounts to a fishing expedition or impermissible third party disclosure (see, eg, *In re State of Norway’s Application* [1987] QB 433 and *First American Corporation v Zayed* [1999] 1 WLR 1154 and the consequences described in *The States of Minnesota v Philip Morris Incorporated* [1998] ILPr 170, at para. 16). The “fishing” label is more readily applied to a request to produce documents than to a request to conduct oral questioning of a witness. This is why section 2(4)(b) of the 1975 Act requires any document to be accurately described and readily available to the person who might be required to produce it and why there is also a requirement that the evidence to be included in the letter of request is evidence that will be properly admissible at the trial of the proceedings in which the request is to be made.
16. In the event that these various hurdles can be surmounted by an applicant for the issuing of a letter of request, the Court should be confident that the request made will be received positively by the English court, recognising that English courts frequently refer to it being their duty and their pleasure to render assistance to foreign courts (see, eg, Lord Denning MR in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, 560). I believe that similar principles would apply to a letter of request from this Court to the English court as it would to a foreign court, even though the principle of the comity of nations is strictly not applicable.

Discussion

17. During the course of the hearing, I tested with Advocate Bell, appearing on behalf of the Plaintiffs, whether what was to be included in the letter of request sought could properly be regarded as relating to documents already in existence and would constitute evidence to be used at the trial of the dispute between the parties. Advocate Bell acknowledged that the Plaintiffs did not know whether the documents sought to be produced actually existed but that they were firmly of the view, in the light of their experience seeking and obtaining financing for the re-development of the site, that it was inevitable that Barclays Bank plc would have these documents in their custody or possession. He referred in particular to an e-mail received in September 2008 when the Plaintiffs were looking for ways to re-finance their project from a Mr Chilver of Barclays Commercial Bank as indicative of what they would have expected to be produced by the joint venture entity some years later. He also highlighted that Lord Fraser of Tullybelton had been prepared to recognise that there was sufficient particularity in a request if it is obvious that a document must exist (see the *Asbestos Insurance* case (*supra*), at p. 722c), albeit that care needed to be taken not to stray into the realms of conjecture as to whether the document existed or not.
18. I was satisfied from the evidence adduced that there must have been a facility letter relating to the financing provided by Barclays Bank plc. I was further satisfied that a valuation report will inevitably have been required. Whether or not the type of documents that the Plaintiffs had supplied, ie, the development cash flow and costs breakdown documents, existed in relation to the joint venture entity’s proposals was more speculative. I took a similar view as to whether there would have been any documentation supplied relating to likely sales values achievable and the likely rental yields of the apartments. Had I needed to do so, I would have been unlikely to have granted the application in relation to those documents, or categories of document, because I could not be satisfied on the evidence of the Plaintiffs that, when the matter reached London, the High Court would have been prepared to accede to the request

and order respondent bank to produce documents of that nature due to the lack of particularity in respect of them on the face of the proposed letter of request. I would, therefore, have needed to distinguish between those items where I was satisfied the test required by section 2(4)(b) of the 1975 Act had been met and those where it had not but, in any event, I rejected the application for other reasons.

19. In my judgment, it was important to recognise that the Application related to the production of evidence for use at the trial and not just to information that might be useful to other witnesses. Put another way, was any of the documentation that was the subject of the Application actually going to be adduced as evidence in the form in which it would be produced? In that context, I needed to ask myself whether the evidence that was the subject of the Application, if held in Guernsey rather than in England, would be compellable through a witness summons. I quickly reached the conclusion that it would not.
20. The first five documents, or categories of document, would, in my view, appear to constitute opinion evidence rather than factual evidence directly relevant to the dispute between the parties. There is a distinction between what one of the parties to a dispute has prepared for its own use, such as the documents provided to the Bank of Scotland by or on behalf of the Plaintiffs setting out their projections, including any desktop valuation, and something prepared by a third party for a similar but separate purpose of obtaining its own financing. The former is material evidence in the dispute relating to the Plaintiffs' alleged losses arising from their claim against the Defendants, whereas the latter is not directly in dispute between those parties. As Advocate Bell explained, the usefulness of getting sight of the documentation sought was not to adduce it directly as evidence in support of the Plaintiffs' case but rather to use it to assist the Plaintiffs' experts, for which no leave has yet been given, to prepare evidence in support of the quantification of the Plaintiffs' claim. I regarded this as effectively a concession that the documentation was not to be used as evidence but rather as background information to assist those who would, in due course, prepare and give evidence at the trial. Moreover, there appeared to be an element of wanting to level the playing field, based on the assumption that the Defendants would be privy to any information of this nature held by Barclays Bank plc because they are all within that group of companies.
21. As soon as the case was explained in this fashion, and the focus shifted to whether the bulk of the items in the proposed letter of request could properly be adduced as opinion evidence, it became clear that the Application was less about compellable evidence and more about seeking information. By way of a simple example in relation to the Savills valuation, if indeed that was the source of the valuation provided to Barclays Bank plc, the Plaintiffs immediately run into difficulties as to whether it would be seen to be sufficiently independent of the parties (see, eg, *Whitehouse v Jordan* [1981] 1 WLR 246) to be admissible, given the role Savills previously played in supporting the Plaintiffs' own re-development project.
22. It was further apparent to me that the intention was not to make use of the documents sought to be produced in the form in which they would be produced as evidence in the case relevant directly to the dispute between the parties. The documents were not to be used as part of the Plaintiffs' case in the manner in which evidence obtained through a letter of request would usually be used, eg, in the same way as if a witness summons for the production of documents had been granted domestically. I take the view that any concern the Plaintiffs have about the Defendants using this material in opposition to the claims for damages is potentially capable of being met as and when the stage of producing expert evidence is reached. Although it is premature to consider questions of whether leave will be granted to the Defendants to put in one or more reports relating to quantification, assuming for a moment that such leave were to be granted, such an expert's report would need to state the facts or assumptions on which it is based (see, eg, *Re J* (1990) FCR 193) and, if it referred to material of the type set out in the Application, the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 contain provisions under which questions could be put to that expert on behalf of the Plaintiffs, which

would potentially redress any imbalance between the parties relating to access to this material. It would only be at the stage of someone making use of it that it would become relevant to the proceedings. If no one uses it, then the opinions given about the likely returns available and on topics such as the state of the market for properties in or around Chelsea at any given point in time will be based on whatever facts and assumptions are known to the expert and stated in his or her report.

23. In the context of this case, I reached the conclusion that the evidence relating to quantification of the Plaintiffs' alleged losses will probably be dealt with by expert evidence adduced based on the facts of the case pleaded by them. This relates to a different scheme from that being undertaken by the joint venture entity. In those circumstances, the material which formed the subject-matter of the Application will not be adduced as evidence but might be used by an appropriate expert in the same way that other material available to him or her might be. In my view, these circumstances do not provide the foundation for issuing a letter of request to a court in another jurisdiction requesting that it make an order that material be produced in the same way that compelling a witness to produce documents for use as evidence could be granted in its domestic proceedings.
24. The facility letter is different. It is a factual document rather than opinion evidence. However, I was not satisfied that it was relevant to the dispute between the parties to warrant granting the Application solely in relation to it. Whilst it is the Plaintiffs' case that they were seeking alternative financing in 2008 and so the terms on which financing was eventually given in 2012 will indicate whether their efforts to obtain financing on appropriate terms were realistic, I have concluded that the time difference is such that the joint venture entity's facility letter does not have a bearing on the issue in dispute between the Plaintiffs and the Defendants. Instead, I am satisfied that, if Barclays Bank plc were to oppose production of it, as seems likely from the approach taken to the withdrawn element of the Application pursuant to the 1954 Law, the High Court would decline to give effect to the letter of request because it is not relevant evidence in the Guernsey proceedings. I took into account that this Court should not normally issue a letter of request that it did not consider would be well-received by the recipient court.

Conclusion

25. For these reasons, I concluded that I could not properly grant the Plaintiffs' Application. Whilst the documents, or categories of documents, listed might be of assistance to those who will, in due course, prepare such expert evidence as the Court may permit on the question of quantification of the losses claimed by the Plaintiffs, I decided that this was a request to obtain information that might prove useful, effectively leading to a further train of inquiry, rather than being a request for evidence to be adduced by one party in support of its case, or in opposition to the other side's case. The Application did not relate to obtaining actual evidence for use in the substantive proceedings between the parties. I, therefore, dismissed the Application.
26. Further, because Advocate Bell did not resist Advocate Dunster's application for the Defendants to be awarded their costs on the standard recoverable basis in respect of this element of the Application, I made such an order in respect of those costs.