



Tinkler v Stobart Group Limited
 Royal Court
 5th July, 2018

JUDGMENT
27/2018

Application for an interim injunction

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

WILLIAM ANDREW TINKLER

Applicant

- And -

STOBART GROUP LIMITED

Respondent

Application for an Interim Injunction

Application heard on: 28th June, 2018

Decision handed down on: 5th July, 2018

Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court

Counsel for the Applicant: Advocate S H Davies & Advocate A A M Horsbrugh-Porter

Counsel for the Respondents: Advocate T C Corfield & Advocate A D Lane

Materials referred to in Judgment:

The Law Reform (Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 1987, Section 1(7)

The White Book (2018), Section 15

Old Mutual Services v Rooney et al (Royal Court 12.12.2000);

American Cyanamid Co. v Ethicon Ltd [1975] AC 396;

Cambridge Nutrition Ltd v British Broadcasting Corporation [1990] 3 All ER 523, CA;

Cayne v Global Natural Resources plc [1984] 1 All ER 275, CA;

Fellowes & Son v Fisher [1975] 2 All ER 829, CA;

Lansing Linde Ltd v Kerr [1991] 1 WLR 251;

Lawrence David Ltd v Ashton [1991] 1 All ER 385, CA;
National Commercial Bank Jamaica Ltd v Olint Corp. Ltd (Practice Note) [2009] UKPC 16;
N. W. L. Ltd v Woods [1979] 1 WLR 1294, HL;
R v Secretary of State for Transport exp Factortame (No. 2) [1991] 1 AC 603, HL;
Siskina v Distos Compania Naviera SA [1979] AC 210;
Smith v Inner London Education Authority [1978] 1 All ER 411, CA.

JUDGMENT

Introduction

1. This is an application for an “interim injunction” on behalf of Mr William Andrew Tinkler (“A”) against Stobart Group Limited (“R”), a Guernsey-registered company. It is intended to prevent the removal of a shareholder resolution from the ballot paper of R’s Annual General Meeting, due to be held in St Peter Port on 6th July, 2018. The position is concisely set-out in R’s skeleton argument (“R’s skeleton”) at paragraphs 2 and 4. The relevant passages read:

“In summary, a dispute has arisen between the Applicant, Mr Tinkler, and the Chairman of the Company’s existing board of directors ... Mr Ferguson. Mr Ferguson has the backing of the majority of the Board of Directors, as well as significant shareholder support. Mr Tinkler also has significant shareholder backing, principally from Mr Woodford and his investment fund ... and Svenska Property Nominees Limited ...”

And:

“Mr Ferguson is due to retire from his office by rotation at the AGM on 6th July 2018. He is, however seeking re-election from the shareholders. Mr Tinkler was also due to retire by rotation and intended to seek re-election in the same way. Accordingly, both Mr Ferguson’s and Mr Tinkler’s putative re-elections were included as business on the AGM Notice on 8th June 2018. The fourth resolution on the AGM Notice proposing re-election is what is referred to in these proceedings as “Resolution 4”.

2. In A’s skeleton argument (“A’s skeleton”), the story is taken further at (c):

“Until 14th June 2018 (last Thursday) the anticipated position was that shareholders would be given the chance to decide, in effect, between those two factions. Both Mr Ferguson and Mr Tinkler are due to retire as directors by rotation at the AGM, and the board had proposed separate resolutions to re-appoint each. Proxy forms had gone out and each side stated their case to shareholders.”

However, a Committee of the Board purportedly summarily dismissed A from his employment as an executive and invoked Clause 17.4 of his service contract to require him to resign as a director of R. It is suggested on behalf of R that this is an “intervening event” that has “superseded” Resolution 4, which reads:

“To re-elect Andrew Tinkler under Article 76 of the Articles of Incorporation, who retires by rotation pursuant to Article 75(1) of the Articles of Incorporation and

provision B7.1 of the UK Corporate Compliance Code and who, being eligible, offers himself for re-election as a Director.”

3. The injunction is sought in this jurisdiction as R is a Guernsey-registered company. It is made under Section 1(7) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (A’s main bundle at divider B – “AB/1”). It is in support of the main litigation in England to be brought by A, alleging his dismissal and forced notice of resignation were invalid. (The service contract is subject to an exclusive jurisdiction clause in favour of the English courts). Section 1(7) of the Law reads:

“An injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the Court.”

The Royal Court’s basic jurisdiction in this application was not a subject of dispute. But it will have been noted that the decision needs to be produced in a timely fashion in view of the impending AGM. This is an urgent matter, which has to be treated accordingly. The date also produces another significant element, namely that the decision in practical terms, will largely determine the matter. No appeal, of course may be possible in this very short window of time. The issue between the parties, which produced lengthy and involved arguments, can be shortly summarised in the following way:

A submits he has not been validly or effectively dismissed. He has not been properly removed as a director. Resolution 4 should therefore be put to the shareholders for their decision. If the removal procedure was invalid then Resolution 4, if successful, would re-appoint A.

R submits that Resolution 4 is factually incorrect now. It is incapable of being properly put to the shareholders. It ignores A’s dismissal and the fact he is no longer a director. It would be a procedure on the basis of a “fiction”, which is wrong as a matter of principle.

In this case, it is considered that it will be helpful to set out the basic legal considerations first and then seek to apply them in more detail later on to the factual situation, bearing in mind throughout that it is not possible to make findings of fact in such an application, but to grasp whatever is helpful from the documents before the Court.

Applicable Legal Principles

4. One has to start with the leading English case American Cyanamid Co v Ethicon Ltd [1975] AC 396 (A/9). This has been followed consistently in Guernsey, most notably in Old Mutual Services v Rooney et al (Royal Court 12.12.2000), a decision of Day DB. At page 24, B-G, Day DB sets out the guiding principles as explained in the *White Book*. The current position in the *White Book* is found in R’s bundle at C/4. As was the position in the 2000 case, there are still twelve “key principles”. The initial questions that fall for consideration are set out as follows:

- “(1) Is there a serious question to be tried?
If the answer to that question is “yes”, then two further related questions arise, they are:
- (2) Would damages be an adequate remedy for a party injured by the court’s grant of, or its failure to grant, an injunction?
- (3) If not, where does the “balance of convenience” lie?”

5. But, it is evident that, in the circumstances of the present application, the decision is effectively the end of the Guernsey proceedings. In such a situation paragraph 15-18 of the *White Book* states:

“So, the position is that where the grant or refusal of an interlocutory injunction will effectively end the action, it is appropriate for the court in assessing the balance of convenience to investigate “the degree of likelihood” of the claimant succeeding at trial. However, such investigation need not, and perhaps should not, amount to a trial of the action. It is for the judge to control the extent of the enquiry undertaken (citation omitted).”

6. It is not necessary to set out the twelve principles in their entirety and whilst these American Cyanamid factors are not to be treated as Holy Writ; the question of the practical effect of the court’s decision, when it is determinative of the dispute, has been the subject of a number of decisions – see especially paragraph 15-18 of the *White Book*. In my judgment the approach should be as simple and clear-cut as possible. Such cases can be approached under the principles set-out in Lord Diplock’s speech, as the *White Book* puts it “without any modification of the principles in that case as properly understood”. It is further suggested there that “the likely disposal of the whole action by the grant or refusal of the interlocutory injunction” should be treated as a special factor to be taken into consideration in the particular circumstances of the case (guideline 7). One example cited is Lawrence David Ltd v Ashton [1991] 1 All ER 385 CA at 396, where Fox LJ clearly stated:

“As regards the authorities, in my view the majority of the Court of Appeal in Fellowes & Son v Fisher [1975] 2 All ER 829 CA at 841, 844 applied the principles in American Cyanamid and regarded themselves as bound to do so. I think we are bound accordingly.”

7. As Lord Diplock observed in N.W.L. Ltd v Woods [1979] 1 WLR 1294 HL at 1306:

“There is nothing in the decision of this House in American Cyanamid ... to suggest that in considering whether or not to grant the interlocutory injunction the judge should not give full weight to all the practical realities of the situation to which the injunction will apply.”

The investigation that the judge has to undertake referred to above is dealt with in Lansing Linde Ltd v Kerr [1991] 1 WLR 251 at 258 and 270. Staughton LJ at 258 said:

(Dealing with “some assessment of the Plaintiff’s prospects of success”.)

“I would emphasize “some assessment” because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the American Cyanamid doctrine, had in mind what its effect would be in that respect. Where an assessment of the prospects of success if required, it is for the judge to control its extent.”

Accordingly, it is considered that some investigation of this type is called for in the present case, but that the principles set –out in American Cyanamid do apply and are consistent with such an approach. It is for the judge to decide, on the individual circumstances of this case, the extent of such an investigation. No apology is made for repeating and stressing, that great care needs to be taken when considering affidavit evidence, especially in a case such as this where there are a number of directly contradictory accounts of what took place between the main protagonists on each side.

8. With this in mind, it is necessary to go back to the three basic points (referred to at paragraph 4 above) laid-down in the American Cyanamid case. The first requires the court to determine if there is a “serious question to be tried?” In my judgment it suffices if the court asks itself if A’s action is “not frivolous or vexatious”. The various verbal formulations of the test amount to the same thing, see e.g. Smith v Inner London Education Authority [1978] 1 All ER 411, CA, at 419 per Browne LJ (*White Book*, 15-8).

If that hurdle is surmounted, question (2) asks if damages would be an adequate remedy for the injured party. The cases are set-out in the *White Book* at paragraph 15-10. The classical exposition is that of Browne LJ in the Fellowes case (*supra*). It is necessary to take into consideration that these proceedings, important and pressing though they are, are in effect, an adjunct to A’s actions in England. The word “trial” in the next quotation necessarily refers to that important element in this matter:

“The governing principle is that the court should first consider whether, if the complainant succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the claimant’s claim appeared to be at that stage.”

And item (3) refers to the “balance of convenience”, which will vary from case to case. As paragraph 15-12 of the *White Book* goes on to say:

“For the purpose of determining the balance of convenience, the court will consider all the circumstances of the case.”

The “basic principle” is that the Court “should take whatever course seems likely to cause the least irremediable prejudice to one party or the other” (National Commercial Bank Jamaica Ltd v Olint Corp. Ltd (Practice Note) [2009] UKPC 16).

9. In the Fellowes case, Browne LJ also alluded to the preservation of the status quo. The guideline, number (4) reads:

“Where other factors appear to be evenly-balanced it is a counsel of practice to take such measures as are calculated to preserve the status quo.”

As paragraph 15-14 of the *White Book* points out, it is sometimes said that “the principal function of the interlocutory injunction is to preserve the status quo (Siskina v Distos Compania Naviera SA [1979] AC 210 at 256, per Lord Diplock)”. But that must depend on the individual circumstances of the case as “in a given case the preservation of the status quo may on balance clearly incur the greater risk of injustice”. The court may wish to undo a fait accompli or where discreditable conduct has taken place. This, and the other main aspects of the case are discussed further below when considering the facts of the application.

10. These appear to be the relevant principles and considerations for the court to take into account. It is now necessary to apply the authorities to the individual circumstances of the application and consider the scope of any appropriate investigation that has to be undertaken. The submissions of counsel will be summarized when these points are discussed. They are, effectively, as set-out in paragraph 3 above.

Serious Question?

11. It is worth quoting the observations in the *White Book* at paragraph 15-8:

“The main significance of the American Cyanamid case lies in principles (9) and (10) The case establishes that it is not necessary, as a threshold requirement, for the court to be satisfied that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant’s legal rights.”

As mentioned earlier, this can be expressed as set out in the Smith case e.g. “is there a serious question to be tried?” This is in accord with Lord Diplock’s principle (10). Mention has been made of the decision disposing of the action due to the impending AGM. Also, the court has to give full weight to the commercial realities of the situation. Although some cases have deviated from Lord Diplock’s formulation (which is not in my judgment necessary when considering the authorities), there is in the present circumstances, little space between the cases already cited and the so-called “broad brush” approach enshrined in the question “what can the court do in its best endeavour to avoid injustice?” (Cayne v Global National Resources Plc [1984] 1 All E.R. 225 CA at 232). The different shades of language do not denote a different general approach in this case. Indeed in the Cayne case, Eveleigh LJ said on the page cited:

“Having asked myself the various questions referred to in American Cyanamid, I have reached the conclusion that this case is one that the court has to approach on a broad principle: what can the court do in its best endeavour to avoid injustice?”

(See also May LJ’s judgment to the like effect at 237 g-j.)

The multiplicity of factual situations may well show a difference in the application of these tests, but this case on its facts, falls into both, so in practice there is little between them. The case of Cambridge Nutrition Ltd v British Broadcasting Corporation [1990] 3 All ER 523, CA has to be seen as a decision on its own individual circumstances, where it was possible to drive a wedge between having a serious question to be tried and the “broad brush” approach. In my judgment that is not the position in the present case.

12. The relief sought, it will be recalled, is to restrain R from taking any step that would prevent shareholders from voting on Resolution 4 at the AGM on 6th July, 2018. It does not extend to challenging his removal as director or dismissal as an employee. There are several relevant considerations here. R forcibly submitted that these events have been an intervening event which makes Resolution 4 inaccurate. The wording is the same as if A was: (i) still a director; and (ii) has retired by rotation and offers himself for re-election. In the words of paragraph 23 of R’s skeleton:

“Mr Tinkler is, therefore, asking the court not simply to prevent the Company from taking a “blocking” action, but rather to put forward a resolution to its shareholders that it knows to be inaccurate as a result of recent (and highly pertinent) events, and that therefore would be invalid and ineffective even if supported by the shareholders.”

R also submitted, especially forcefully in oral argument, that the Court is being asked to act upon a fiction that A has not been removed/dismissed. This, with respect, is true and a Court must recoil from acting on facts that no longer subsist.

Advocate Davies emphasized the fact (undoubtedly correctly) that here we have two opposing factions in bitter conflict – indeed, in my judgment, some of the incidents and most of the frequently sulphurous correspondence between the English lawyers was reminiscent of an acrimonious divorce case. He further pointed out in argument (again on the papers, correctly), that the committee that he said “purported” to get rid of A was composed of one faction and

did not, he suggested, have authority to act as it did; it was tainted by all sorts of bias and conflicts of interest, in his submission. Indeed it had no authority to dismiss him. We were taken to A's second bundle at pages 255-258 and paragraph 17.4(a) of A's Service Agreement (page 15). In short, this refers to "any Group Company" not the Company itself. The removal was therefore "legally invalid".

13. These comments may well turn out to be wholly or partially correct. But resolving this is a matter for the competent court in England. The duty of the Guernsey Court is to rule on the issue before it. At present, on the face of the documents, it was lawful for R to appoint a Committee (whoever comprised it) and A remains removed/dismissed. If the English court finds this was unlawful, and it may do so, then A has his remedy there. Any "investigation" carried out by the Guernsey court must be limited due to the nature of the case, with unchallenged affidavit evidence and fundamentally different views of the facts. In short, this court cannot properly resolve the issue of A's service as a director and employment on what is before it, as well as being circumscribed by the legal principles to be followed. A further factor, which cannot be ignored, is that (paragraph 35 of R's skeleton) R will commit to convening an EGM to put the question of A's election to the Board within 28 days of a valid shareholder requisition. On the facts, and given the substantial level of support for A, he could well succeed. Advocate Davies strongly submitted that the approach of the Board "would remove choice from the shareholders". He added that no doubt a number of those entitled to vote have already used their proxies in A's favour. Advocate Corfield replied to the effect that this was likely done before they were aware of his recent removal, which might have affected their decision.

It follows from this examination of the facts and submissions that this Court cannot expect the AGM to vote on an incorrect set of facts as set out in Motion 4, and cannot be expected to investigate the larger questions that are a matter for proceedings in England. If A's key propositions are accepted, then he will rightly claim to have been hard done by and obtain the appropriate satisfaction. But that cannot be resolved in this application. It has not been necessary to set out all the contentions of counsel, but they have been considered in arriving at this view.

Adequacy of Damages and Balance of Convenience

14. If this view of the case is technically incorrect then it would be necessary to proceed to the two remaining questions set out in the Cyanamid case. The first is whether damages would be an "adequate remedy" for the injured party. A's case was simply and plainly put by Advocate Davies, and in accordance with paragraphs 49-50 of A's skeleton. The essential point, it was suggested, is that they would be impossible to quantify. As the skeleton puts it, "This is simply not a case of that type – it is to do with the proper conduct of the Company's affairs, it is not (directly) a pecuniary point at all. This injunction is not about protecting Mr Tinkler's salary or benefits ...". Advocate Corfield was also happily to the point in his submissions. If A is unfairly dismissed his remedy is in damages; if he suffers qua director, then the loss is quantifiable as it relates directly to his remuneration over the period in question.
15. Reference has been made already to the leading case of Fellowes and it is necessary to consider it further. The guiding principles are set out in the *White Book* at paragraph 15-10. (1) is very clear and apposite. It is set out above at paragraph 8. Further elucidation is found in R v Secretary of State for Transport exp Factortame (No. 2) [1991] 1 AC 603, HL. The relevance of the availability of an adequate remedy in damages should be considered first. "As far as the claimant is concerned, the availability to him of such a remedy will normally preclude the grant to him of an interim injunction."

But closely linked to this is the “balance of convenience”. In (3) of the Fellowes guidelines Browne LJ stated:

“It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.”

16. The commentary at paragraph 15-12 of the *White Book* takes this further. The authorities appear to boil down to the basic principle that the court “should take whatever course seems likely to cause the least irremediable prejudice to the one party or the other” (National Commercial Bank case, supra). The circumstances, of course, will vary from case to case. Another, and consistent, way of articulating the question is “which course carries the lower risk of injustice” (N.W.L case, supra). A’s submissions on this point are admirably economical (see paragraphs 51-51 of A’s skeleton). “On the one hand there is obvious prejudice to Mr Tinkler’s interests, and those of others, if Resolution 4 is not put. By contrast, there is no possible harm to the company in putting the Resolution – it is simply a vote at a meeting.” In oral submissions he added that the proposed relief is solely aimed at allowing shareholders to vote and that the proper course is not to assume the Resolution is invalid and it should be voted on as proposed. There is a binary choice between Messrs Tinkler and Ferguson on the 6th July, 2018 and this should not be frustrated. Advocate Corfield responded that A is seeking a false proposition to be voted on at the AGM. The invalid vote would have an impact on R who cannot explain that to the Market. Essentially, A is just creating mischief for the Company. Furthermore, this course of action is likely to be divisive and produce even more litigation.
17. One further factor to be noted is that A’s application contains the by now familiar undertaking as to compensating R for any loss, (A’s main bundle p 8). Paragraph 15-12 of the *White Book* points out that this is a “very material consideration”. It adds:

“The fact that an ultimately unsuccessful claimant will have to compensate the defendant for losses suffered by him through his complying with the interim remedy for the duration of the period during which it took effect is a major factor in assessing the balance of convenience (citation omitted).”

In all the circumstances of the present application it seems to me that damages would be “an adequate remedy” and R is presently in a position to pay them. A’s loss is, in my judgment, susceptible to quantification. It is not one of those situations, despite A’s hurt feelings, where an award of damages would not adequately recompense him.

Status Quo

18. Following on from the aspect of the case submission were made on the status quo ante (see paragraph 9 above). Advocate Davies suggested that the Guernsey court should maintain the status quo and preserve choice. This is mentioned at paragraph 9 above, where the guideline case of Fellowes is cited, principle (4) being applicable. In his skeleton Advocate Corfield states that the status quo ante “is a notoriously difficult concept to apply”. It is R’s submission that the status quo is simply that A was no longer a director and “therefore incapable of being properly re-elected by the shareholders pursuant to Resolution 4”. This was repeated in oral argument. Although the relevant point of time for the purpose of status quo, according to the *White Book*, “may be difficult to determine and may vary”, this does not seem to be the situation here. There is, of course, always the temptation to over-simplify in

weighty commercial litigation, but it seems plain on the facts that the status quo ante is that suggested on behalf of R - A is no longer a director.

Special Factors

19. These arise from item (7) of the Fellowes guidelines. They do not receive much space in the otherwise lengthy exposition in the *White Book*. (7) reads:

“In addition to the factors already mentioned, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.”

These (*White Book*, paragraphs 15-16) refer “only to special factors affecting the balance of convenience”. A submits that there is such a factor “going beyond the interests of the direct parties”, which is that of shareholders and the public in “proper corporate governance and shareholder democracy” (paragraph 54 of A’s skeleton). R’s response (paragraph 71 of R’s skeleton) is that “the principle of shareholder democracy should not be used to circumvent other well-established and equally important principles, such as the need for shareholder resolutions to be accurate and effective”. Allowing the application would “cause confusion, uncertainty and difficulty for the company”. In the circumstances of the present case the suggested special factors are the main issues boiled-down and do not call for further consideration. They simply reproduce the main dispute between the parties.

Conclusion

20. For the reasons set-out, in my judgment A’s application fails and is dismissed. I have been at pains to indicate that it is not possible to make any findings on the affidavits. It is repeated that A may succeed in the main English action, or indeed may not. Several facets of the evidence require investigation and determination, the constitution of the committee is one matter and, also to my mind, the allegations against A, particularly the rather ancient tax matter. No opinion, of course, is expressed on these, A may well be wronged, R may well be right, but it is for a trial and cross-examination to resolve. However, for the purposes of this hearing, his submissions do not fit in the legal mould created by the leading cases and therefore do not succeed.

Postscript

21. On Friday 29th June, the day after the oral hearing, I received further written submissions and evidence from Advocate Corfield. For the avoidance of doubt, I had already formed my main conclusions prior to the lodging of these items and have not felt it right to take them into account. In particular, when considering Mr Hodges’ affidavit it was plain, that whatever its value, he was a supporter of A. After writing this judgment a response was received on behalf of A, and the same applies.

My thanks to counsel for their impressive submissions and presentation of documents, given at the end of the hearing, are repeated here.

Costs

22. Written submissions are invited within 14 days of the handing-down of this judgment. Counsel can extend this period by agreement without the need to resort further to the Court.

J R Finch, O.B.E.
Judge of the Royal Court

