Disclosure - reasons for granting relief sought by the Plaintiff in respect of information and documents held by the Defendant.

[2018]JRC033A

ROYAL COURT
(Samedi)

12 February 2018

Before : Sir Michael Birt, Commissioner, and Jurats Nicolle and Crill.

Between	**Riba Consultaria Empresarial Ltda**	**Plaintiff**
And	**Pinnacle Trustees Limited**	**Defendant**

Advocate J. N. Heywood for the Plaintiff.

Advocate E. B. Drummond for the Defendant.

JUDGMENT

THE COMMISSIONER:

1. On 21st July, 2017, the plaintiff ("Riba") applied *ex parte* before the Deputy Bailiff for Norwich Pharmacal relief in respect of information and documents held by the defendant ("Pinnacle"). Not surprisingly, the Deputy Bailiff refused to grant the order *ex parte* and directed that there should be an *inter partes* hearing. He did however grant a gagging order restraining Pinnacle from communicating the existence of the proceedings to others.

2. The hearing duly took place before us on 10th October, 2017, and, following the hearing, we granted relief in respect of information held by Pinnacle. We now give the reasons for our decision.

Background

3. Riba was formerly known as Arbi SA Sociedade Corretora de Cambio, Titulos e Valores Mobiliarios ("Arbi") but changed its name to Riba in February 2011. We shall for convenience refer to it as Riba even in relation to events which took place when it was called Arbi.

4. Riba acted as a broker on the Brazilian stock market. In the summer of 1989, the Brazilian stock market suffered a period of volatility. At that time, Riba was engaged by a company called Selecta Participacoes e Servicos Ltda ("Selecta") to trade shares on Selecta's behalf. In addition Riba and Selecta entered into a liquidity agreement under which Riba agreed to provide Selecta with a revolving credit limit with which to invest in spot trades.

5. In June or July 1989, Selecta failed to pay Riba amounts due to it in connection with the above matters. On 4th February, 1994, the Third Central Civil Court of Sao Paulo ("the Sao Paulo Court") granted a judgment in favour of Riba against Selecta. Selecta appealed the decision to the Sao Paulo appellate court but that was dismissed on 9th September, 1997. On 5th February, 1999, Riba applied to enforce the judgment debt in the sum of R$21,074,506.92 (approximately US$6,366,920.00). That application was granted and attempts were made to enforce the judgment against Selecta but Riba was unsuccessful in recovering any assets of Selecta to satisfy the judgment.

6. According to the affidavit sworn on behalf of Riba, the ultimate beneficial owners of Selecta were at all material times Mr Naji Robert Nahas ("Naji Nahas") and his wife, Mrs Sueli Au Nahas ("Sueli Nahas"). Naji Nahas is said to be a well-known businessman in Brazil and he and his wife are said to live a lavish lifestyle.

7. Having failed to enforce the judgment against Selecta, Riba applied to the Sao Paulo court for an order that the corporate veil of Selecta be pierced in order to enable Riba to enforce the judgment against the assets of the beneficial owners of Selecta, Naji Nahas and Sueli Nahas. On 27th November, 2003, the Sao Paulo court granted this application and ordered that the corporate veil be lifted so that the assets and liabilities of Naji Nahas and Sueli Nahas were to be treated as assets and liabilities of Selecta, and vice versa.

8. Naji Nahas and Sueli Nahas appealed against that decision but on 11th March, 2008, that appeal was dismissed.

9. The judgment contained a provision which allowed it to be adjusted for inflation. Naji Nahas, Sueli Nahas and Selecta (together "the Judgment Debtors") asserted that the judgment debt as then claimed was excessive. On 28th May, 2008, a judge of the Sao Paulo court appointed an expert in the field of accountancy to assess the current size of the judgment debt and to determine its exact sum. In due course, having received the report of the expert the Sao Paulo court determined on 4th February, 2011, that the judgment debt was R$34,478,726.25 (approximately US$10,482,000) ("the Judgment Debt").

10. Riba has sought to enforce the Judgment Debt since then but has so far not managed to locate any assets belonging to the Judgment Debtors against which to enforce.

11. In circumstances which we shall describe in more detail shortly, Riba believes that Pinnacle is in possession of information about certain entities which have been used to conceal the assets of Naji Nahas and Sueli Nahas with a view to their defeating enforcement of the Judgment Debt and that assets have been moved through the entities in respect of which information is sought.

12. It is in those circumstances that Riba now seeks Norwich Pharmacal relief against Pinnacle in respect of those entities.

The law on Norwich Pharmacal relief

13. The law in this area takes its name from the leading case of Norwich Pharmacal Co.-v- Customs and Excise Commissioners [1974] AC 133 and, in particular, the statement of principle by Lord Reid where he said at 175:-

> ***"They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."***

14. Although that case was concerned with information about the identity of the wrongdoer, the principle has regularly been applied to include information about the whereabouts of assets or other information to support the existence of a cause of action.

15. The Norwich Pharmacal principle has been applied in Jersey in the case of IBL Limited –v- Planet Financial and Legal Services Limited [1990] JLR 294 and in subsequent cases. The leading authority is now the decision of the Court of Appeal in Macdoel Investments Limited-v-Federal Republic of Brazil [2007] JLR 201. In that case, the Court of Appeal considered the standard of proof required in relation to the issue of whether the person from whom information is being sought has become mixed up in the alleged wrongdoing. The Royal Court had found that there

was *prima facie* evidence that the plaintiffs in that case had been the victims of fraud but that there was only a suspicion that some of the proceeds of the fraud had found their way into the accounts held with the banks in Jersey from whom information was being sought (so that they had become mixed up in the wrongdoing).

16. It was contended by the appellants in that case that relief could only be granted if there was *prima facie* evidence that a defendant had been mixed up in the wrongdoing. The Court of Appeal disagreed. Thus Jones JA said as follows at paras 47 and 48:-

> ***"47. In the absence of clear assistance from the authorities in which Lord Reid's statement of principle has been applied, we must decide for ourselves the standard to which the Royal Court should be satisfied that an innocent third party has become mixed up in the alleged wrongdoing, so that he owes the person wronged a duty of disclosure. Even where, as here, the plaintiff can adduce prima facie evidence of wrongdoing, it may be very difficult for him to bring prima facie evidence that an innocent third party, such as a bank, has been unwittingly mixed up in the wrongdoing. In some cases, it will be impossible. It is to be expected that the wrongdoer will have taken steps to conceal the fact that the third party has facilitated the wrongdoing. The innocent bank, by definition, will not have known. Having regard to these considerations, should the threshold in respect of involvement be set lower than a requirement that prima facie evidence be adduced?***
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> ***48. In our view, in attempting to answer that question, it is helpful to look at the position of the third party who is convened as the defendant in an action for disclosure of this kind. He is brought to court because the person wronged believes that he may have information about the wrongdoer. It is confidential information, the duty of confidence is likely to be owed, directly or indirectly, to the wrongdoer. It is likely that the third party has become mixed up because the wrongdoer, directly or indirectly, has chosen to involve him in order to facilitate the wrongdoing. His innocence is acknowledged by fixing responsibility for his costs on the person wronged. Disclosure will only be ordered if there is no other source of information that will assist the person wronged. It does not seem to us unjust that a duty to disclose should arise where the court is satisfied that there is a reasonable suspicion that the third party has been mixed up in the wrongdoing."***

17. The Court of Appeal went on to confirm that the test was one of reasonable suspicion and that this was a lower test than that of *prima facie* evidence.

18. In New Media Holding Company LLC –v- Capita Fiduciary Group Limited [2010] JLR 272, the Royal Court had to consider a number of issues in relation to Norwich Pharmacal orders. Having referred to the judgment of the Court of Appeal in Macdoel, William Bailhache, Deputy Bailiff, helpfully summarised the position as follows at paras 16 and 17:-

> ***"16. Taking into account the comments of the Court of Appeal in Macdoel, we consider there are three questions for us to answer:-***
>
> ***(i) Are we satisfied there is a good arguable case that the plaintiff is the victim of wrongdoing?***
>
> ***(ii) Are we satisfied, to the same standard, that the defendant was mixed up in that wrongdoing?***
>
> ***(iii) as a matter of discretion, do we consider it to be in the interests of justice to order the defendant to make disclosure?***
>
> ***17. We have used the expression "good arguable case" because it is clear that something less than prima facie evidence will suffice so as to entitle the court to order disclosure to be made.***
>
> ***…"***

The judgment then went on to quote two extracts from the judgment in Macdoel which confirmed that the Court of Appeal was intending to establish a threshold for the second question which was lower than *prima facie* evidence.

19. It is clear from the above extracts that the Royal Court in New Media was intending to set a threshold for establishing whether an innocent party had become mixed up in alleged wrongdoing which was consistent with the decision of the Court of Appeal in Macdoel. However, we have a concern that, because the Royal Court used the expression 'good arguable case' rather than that of 'reasonable suspicion' (which was the test chosen by the Court of Appeal in Macdoel), there is a risk of confusion. That is because in other contexts the expression 'good arguable case' has been treated as imposing a higher test than '*prima facie case'*. Thus:-

(i) It is well established both in England and Wales and in this jurisdiction that, when deciding whether to grant leave to serve proceedings out of the jurisdiction, a plaintiff must show a

'good arguable case' that the matter falls within one of the paragraphs of the relevant rule which allows service out of the jurisdiction.

(ii) In James Capel (Channel Islands) Limited –v- Koppel and Fenchurch Trust Limited [1989] JLR 51, the Royal Court approved the explanation of the expression 'good arguable case' contained in the White Book (1988 Edition) at para 11/1/6 which stated:-

> ***"The degree of proof required was discussed in the Brabo and Vitcovice Horni –v- Korner. The expression 'good arguable case' is probably the best way of summarising the effect of these authorities; it indicates that, though the court will not, at this stage, require proof of the plaintiff's case to its satisfaction, it will expect something better than a mere prima facie case. …"***

(iii) The wording in the 1999 Edition of the White Book, at para 11/1/11, whilst not identical, is to similar effect:-

> ***"Good arguable case: this is the degree of proof required by the court to show that the case falls within one of the sub-paragraphs of O.11, r, 1(1) so as to give it jurisdiction to consider the application.***
>
> ***What this means was discussed in the Brabo and Vitcovice Horni –v- Korner. It indicates that though the court will not at this stage require proof to its satisfaction, it will require something better than a mere prima facie case…."***

(iv) Once the court is satisfied there is a good arguable case that the matter falls within one of the relevant paragraphs permitting service out of the jurisdiction, the court then only has to be satisfied to the lower degree of proof of a 'serious issue to be tried' in relation to the merits of the underlying action. That was confirmed as part of Jersey law by the Court of Appeal in United Capital Corporation Limited –v- Bender [2006] JLR 242 at para 32.

(v) One of the authorities relied upon by the White Book is Vitcovice Horni –v- Korner [1951] 2 All ER 334 case. It is clear that, in fixing upon a test of 'good arguable case', the House of Lords in that case was intending to fix a standard which was higher than a '*prima facie* case' but lower than the court being 'satisfied'. Thus Lord Radcliffe said at 340:-

"The other criticism is that "a prima facie case" puts the standard of proof somewhat too low, while to be 'satisfied' puts it somewhat too high."

20. We think that there is a considerable risk of confusion if the expression 'good arguable case' is used to mean something more than a '*prima facie* case' when considering service out of the jurisdiction but is used to mean something less than a '*prima facie* case' in the context of Norwich Pharmacal relief. We would prefer that the expression should continue to have its normal meaning referred to in the White Book and approved in this jurisdiction in the James Capel case and in UCC –v- Bender as well as by the House of Lords in Vitcovice Horni, i.e. something more than a *prima facie* case.

21. In relation to Norwich Pharmacal relief, we would therefore prefer to return to the expression actually used by the Court of Appeal in Macdoel, namely one of 'reasonable suspicion'. We would therefore respectfully reformulate the second question posed at para 16 of New Media to read:-

"(ii) Are we satisfied that there is a reasonable suspicion that the defendant has been mixed up in the wrongdoing?"

22. We shall therefore consider whether there is a reasonable suspicion that Pinnacle has become mixed up in any alleged wrongdoing by the Judgment Debtors. We should add that, for the reasons set out at paragraph 27 below, we do not need to consider in this case whether the threshold of 'good arguable case' is also applicable to the first question and if so, what 'good arguable case' means in that question. Our provisional view however, is that, given the invasion of confidentiality which follows from a Norwich Pharmacal order, it would be reasonable to require the evidence of wrongdoing to amount to a 'good arguable case' using the conventional meaning of that phrase i.e. something more than a *prima facie* case.

Application to the facts

23. Riba's application seeks disclosure of all documents held by Pinnacle relating to any of the following:-

(i) High Cedar Developments Limited ("High Cedar"), a company incorporated in the BVI.

(ii) The Monceau Trust, a Jersey trust of which Pinnacle is the trustee.

(iii) Blue Stone Investment Co. SAL ("Blue Stone Lebanon"), a company incorporated in Lebanon.

(iv) Blue Stone (Portugal) Investments SA ("Blue Stone Portugal"), a company incorporated in Madeira.

(v) Naji Nahas.

(vi) Sueli Nahas.

24. On 17th November, 2016, on the application of Riba, the High Court of Justice in the BVI ("the BVI court") granted Norwich Pharmacal relief ordering the firm of Mossack Fonseca as administrators of High Cedar, to provide copies of all documents which related in any way to High Cedar. Those documents disclosed that High Cedar was beneficially owned by the Monceau Trust of which Naji Nahas was said to be '*its discretionary beneficiary*'. It is in those circumstances that Riba now applies for Norwich Pharmacal relief from Pinnacle.

25. We have been provided with an affidavit by Mr Rodrigo Kaysserlian, the Brazilian lawyer who acts for Riba. He has exhibited a substantial amount of material which includes the affidavit placed before the BVI court.

26. In the light of that material, we turn to consider the three questions listed in New Media subject to amendment of the second question as we have described above.

27. The first question therefore is whether there is a good arguable case that Riba has been the victim of wrongdoing. We have no hesitation in concluding that there is such a good arguable case (using that expression on this occasion in the same sense as in cases of seeking leave to serve out of the jurisdiction and therefore amounting to more than a *prima facie* case). Not only have the Brazilian courts thought it appropriate to lift the corporate veil but the individual Judgment Debtors apparently continue to live in a lavish style. Putting that together with the evidence referred to below in connection with the second question, there is a good arguable case that Riba has been the victim of wrongdoing, namely disposal of assets by the Judgment Debtors with a view to avoiding payment of the Judgment Debt.

28. We turn therefore to the second question, namely are we satisfied that there is a reasonable suspicion that Pinnacle has become innocently mixed up in that wrongdoing? We emphasise that

there is no suggestion by Riba that Pinnacle was aware of any wrongdoing on the part of Naji Nahas, his wife or his family. The evidence before us suggests the following.

(i) High Cedar

29. High Cedar was incorporated in May 1997 and its registered agent was Mossack Fonseca. As already mentioned, it was beneficially owned by Pinnacle as trustee of the Monceau Trust. Naji Nahas was either a, or the, discretionary beneficiary of the trust and he was described by Pinnacle in a letter of 24th March, 2015, to Mossack Fonseca as being 'the beneficial owner' of High Cedar.

30. Between March 1998 and October 2013, High Cedar was a shareholder in Rofer Administraçao e Construçao Ltda ("Rofer"), a Brazilian company also incorporated in 1997. Originally the share capital of Rofer was R$100,000 of which Fernando Nahas ("Fernando") and Robert Nahas ("Robert"), sons of Naji Nahas and Sueli Nahas, were the sole shareholders, each holding R$200,000 of share capital. In March 1998 the share capital of Rofer was increased to R$2,000,000 with High Cedar subscribing for all the new shares. In July 1998 the share capital of Rofer was increased to R3,000,000 with High Cedar again subscribing for all the new issued share capital. On 14th December, 2000, the share capital of Rofer was increased further to R$4,335,000 with High Cedar increasing its shareholding to some degree but Fernando and Robert also increasing their shareholding. Mr Pileggi was at all material times a lawyer advising Naji Nahas and he represented High Cedar in its dealings with Rofer.

31. On 6th April, 2005, Rofer acquired ownership of a Brazilian company called Lacerda Franco Incorporadcora SPE Ltda ("Lacerda"). Lacerda had on 11th March, 2005, received a parcel of highly valuable immovable property on Lacerda Fracno Avenue, Sao Paulo from another Brazilian company called Lafayete Empreendimentos e Administracoes Ltds ("Lafayete"). We will refer further to Lafayete shortly.

32. On 1st October, 2013, High Cedar transferred its shares in Rofer and ceased to hold any of the issued share capital of Rofer. It was apparently not compensated for this. Furthermore, bank records show that between 2000 and 2007, payments totalling more than R$6,313,415 had been transferred from High Cedar to Rofer, with only R$458,001 possibly going in the opposite direction from Rofer to High Cedar. In January 2015 the shareholders in Rofer voted to distribute the balance of accrued profits and retained earnings in Rofer almost entirely to Robert. Rofer's remaining assets were then transferred to another company RNN Empreendimentos e Participaçoes Ltda ("RNN") which is owned by Robert.

33. The upshot appears therefore to have been that High Cedar, a company which was owned by a trust of which Naji Nahas was either the, or a, beneficiary, transferred substantial sums to Rofer and then surrendered its interest at a time when not only had Rofer received these monies but had also received valuable land into a subsidiary. The effect is that valuable assets have ultimately been transferred for the benefit of Robert.

(iI) Lafayete and Blue Stone Lebanon

34. Since its incorporation in 1995 Lafayete has been majority owned by Etan Management Inc. ("Etan"), a BVI company with Mr Pileggi also owning one share in Lafayete. Etan is in turn owned wholly or partly by Blue Stone Lebanon.

35. Blue Stone Lebanon is also a shareholder in Blue Stone Portugal. Mr Pileggi is the agent of Blue Stone Portugal.

36. Bela Vista SA is a Brazilian company which was the owner of valuable property at Rua Iguatemi. In 1982, Bela Vista offered the Rua Iguatemi property by way of security to guarantee debts which Naji Nahas owed to Société Générale. There appears to have been a form of bankruptcy proceedings thereafter and it is asserted that Bela Vista became owned by Blue Stone Portugal which therefore became the indirect owner of the Rua Iguatemi property. It is further said that Bela Vista has entered into a form of lease transaction with a company owned by Robert and Fernando which effectively permits Robert and Fernando to use and exploit this valuable property free of any kind of payment. At the time of this transaction, Bela Vista was represented by Mr Pileggi.

37. Naji Nahas denies any involvement in the ownership of Blue Stone Lebanon or Blue Stone Portugal. However, when police searched the home of Naji Nahas in Brazil they found documents relating to Blue Stone Portugal and Blue Stone Lebanon including a letter from a real estate development company addressed to Blue Stone Lebanon, a power of attorney issued by Blue Stone Lebanon to Mr Pileggi, documents relating to the sale of property previously held by Blue Stone Lebanon and a draft power of attorney issued by Blue Stone Portugal to Mr Pileggi. Accounting documents and documents relating to expenses for Bela Vista were also found at the home.

(iii) Dissolution of High Cedar

38. High Cedar was struck-off the register in the BVI on 31st October, 2011. It was re-instated on 30th April, 2015, at the request of Mr Sami Raphael, who is also a director of Blue Stone Portugal. Mr Raphael stated originally that there was an urgent need to re-instate High Cedar. Subsequently, Mossack Fonseca wrote to Mr Raphael asking for due diligence documents such as a source of funds declaration and the certified passport and proof of address of the ultimate beneficial owner. These documents were not provided despite further emails from Mossack Fonseca requesting their provision. As already stated, Pinnacle had written to Mossack Fonseca on 24th March, 2015, giving them authority to communicate with Mr Raphael, on behalf of the beneficial owner of the company Naji Nahas, in connection with the request to re-instate the company. The requested due diligence details were never forthcoming and on 23rd February, 2016, Mr Raphael stated that the ultimate beneficial owner had "decided to liquidate" High Cedar.

39. In summary, Riba asserts that there is evidence to the following effect:-

(i) Naji Nahas was a wealthy man who still lives a lavish lifestyle.

(ii) Most of Naji Nahas' assets have ended up in the control of companies owned by Blue Stone Portugal.

(iii) Blue Stone Portugal granted the use of certain of those valuable assets to entities owned by Fernando and Robert for no consideration.

(iv) Lafayete (ultimately owned by Blue Stone Lebanon) has transferred valuable property in Brazil to Rofer for the ultimate benefit of Robert.

(v) There is evidence to suggest a close connection between Naji Nahas and the Blue Stone companies by reason of the involvement of Mr Pileggi and the documents found at the home address in Brazil.

(vi) Pinnacle has described Naji Nahas as the ultimate beneficial owner of High Cedar. High Cedar has paid substantial sums across to Rofer for no apparent return in circumstances where Rofer's assets ultimately accrued to the benefit of Robert. When due diligence for the beneficial owner of High Cedar was sought from Mr Raphael, there was reluctance to provide this.

40. Riba accepts that it has no direct evidence at this stage as to the source of the monies paid into High Cedar which were in turn paid across to Rofer; nor does it have direct evidence as to the ownership of Blue Stone Lebanon. However, we are in no doubt from the evidence presented to us that there is a reasonable suspicion that Pinnacle, through its trusteeship and ownership of High Cedar has innocently become mixed up in the wrongdoing of Naji Nahas and his wife referred to at para 27 above and therefore can be ordered to make disclosure in accordance with Norwich Pharmacal principles.

41. The third question is whether in our discretion we should order such disclosure. We are in no doubt that we should. The Judgment Debtors owe the Judgment Debt to Riba. It is in the interests of justice that Riba should be able to obtain information as to what the Judgment Debtors have done with their assets with a view to it being able, if so advised, to institute proceedings seeking to set aside disposals made in fraud of creditors.

42. We therefore granted the relief sought by Riba and ordered Pinnacle to produce any documents in its possession relating to any of the six entities listed at para 23 above together with other consequential orders.

Authorities

Norwich Pharmacal Co-v-Customs and Excise Commissioners [1974] AC 133.

IBL Limited-v-Planet Financial and Legal Services Limited [1990] JLR 294.

Macdoel Investments Limited –v- Federal Republic of Brazil [2007] JLR 201.

New Media Holding Company LLC-v-Capita Fiduciary Group Limited [2010] JLR 272.

James Capel (Channel Islands) Limited –v- Koppel and Fenchurch Trust Limited [1989] JLR 51.

White Book (1988 Edition).

United Capital Corporation Limited –v- Bender [2006] JLR 242.

Vitcovice Horni –v- Korner [1951] 2 All ER 334