

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

SUIT NO. 87/2003

BETWEEN:

FURSEY MANAGEMENT LIMITED

Applicant/Respondent

and

GEFIO GENERAL FINANCE CORPORATION INC
COTEVA INVESTMENTS LIMITED

Respondents/Applicants

Appearances:

Mr. Stephen Moverley Smith Q.C.

Mr. Phillip Kite and Mr. James Hilsdon for the Applicant/Respondent

Mr. Michael Gadd, Q.C. with him, Mr. Michael Faye and Mrs. Benedicta
Samuels for the Respondents/Applicants

2003 22nd and 23rd September
 7th October

JUDGMENT

[1] **d'Auvergne J:** This is an application to discharge the injunction granted on the 27th June 2003 on the ex parte application of Fursey Management Limited who is the Respondent in this application. The Order of injunction granted reads as follows:

1. The Second Respondent be restrained until further order from voting its shares in the Humanoids Group SA whether at the proposed general meeting on 30 June 2003 or at any adjournment thereof or at

- all except as represented by Linda Bengaouer or her lawfully appointed representative;
2. The First Respondent and its servants, officers and agents be restrained until further order from any act whereby it directly or indirectly acts as the director, officer or other representative of the Second Respondent;
 3. The Respondents be restrained from taking any steps to amend the Memorandum and Articles of the Second Respondent until further order.
 4. The Applicant do have permission to serve the Notice of Application upon the First Respondent in Switzerland;
 5. The First Respondent do have 42 days from the date of service of the Notice of Application to file its Acknowledgement of Service;
 6. The Applicant is to serve the Respondents promptly with a copy of this Order, Notice of Application and Affidavits;
 7. The Respondents may apply to discharge this Order on giving the Applicant 4 working days notice;
 8. The matter be listed for further consideration on 18 September 2003;
 9. Consideration of the costs of the Application be reserved.

[2] Notices of application to discharge the order of injunction were filed by both Applicants namely Gefio General Corporation Inc and Coteva Investments Ltd. and were both dated the 11th July 2003.

BACKGROUND

[3] Humanoids S.A. is a company incorporated in Luxembourg. Coteva, the Second-named Applicant is a British Virgin Islands company who owns over 80% of the shares in Humanoids S.A. Gefio, the First named Applicant is a Panamanian Company who owns 66 percent of shares in Coteva with the Respondent, Fursey, a Company registered in the British Virgin Islands owning the remaining 33 percent of the shares.

- [4] The application for injunctive relief was made pursuant to **Part 8.1(6)(b) of CPR 2000** for an injunction ancillary to foreign proceedings. Those proceedings are in the form of a reference to Arbitration in Geneva (Switzerland) arising from a dispute about an agreement.
- [5] This agreement entitled “Protocol” is a shareholders agreement dated the 28th of November 2001. The parties to the agreement are the Respondent, Fursey, the First named Applicant, Gefio and a French Company called France Vendome S.A. who is not a party to the application before the Court. On the 25th March 2003 the Second-named Applicant, Coteva became a party to the agreement (signatory to the second Amendment of the said “Protocol”)
- [6] Fabrice Giger who swore to the contents of the affidavit in support of Fursey’s application for injunctive relief alleges that Gefio had breached the agreement of 28th November 2001 in that on the 12th of June 2003 by a written resolution Gefio as 66 percent shareholder in Coteva had Linda Bengaouer the sole director of Coteva removed from the Board of Coteva and replaced by Marc Angst.
- [7] Article 7 of the Agreement of 28th November 2001 reads as follows:
- “Any dispute concerning the interpretation, validity or performance of this agreement shall be within the exclusive jurisdiction of an arbitration tribunal with a single arbitrator appointed under the rules of the Chamber of Commerce (ICC) in Geneva, who will judge *ex aequo et bono* and at last instance. The tribunal will sit in Geneva.”
- [8] A careful reading of the last paragraph clearly shows that exclusive jurisdiction was conferred on the arbitrator in Geneva and consequently arbitration proceedings were filed in Geneva (Switzerland) and this is the foreign proceedings referred to earlier. The Applicants’ contention is that Fabrice Giger has mismanaged Humanoids and misappropriated money. Fabrice Giger on the other hand denies the allegations though he accepts that Humanoids has not prospered financially.

[9] At the hearing Learned Senior Counsel informed the Court that the grounds upon which the Applicants were relying were wider than those set out in the Notice of Application and were contained in the skeleton arguments which were exchanged and filed with the Court.

[10] The grounds are as follows:

- (1) This Court has no jurisdiction to grant an injunction in aid of the Swiss arbitration.
- (2) That although Fursey's claim in the present proceedings does not purport to a substantive claim but if they were to seek at this stage to recast their claim into a substantive claim, ... this Court would have no jurisdiction to hear any substantive claim.
- (3) Fursey has no basis for making any claim against Coteva
- (4) This was not a proper case for giving leave to serve out of the jurisdiction on Gefio.
- (5) What was served out of the jurisdiction in this case was an application and not a claim form, there is, in fact, no provision under the CPR 2000 permitting service out of these proceedings.
- (6) Fursey has given wholly inadequate evidence of its ability to satisfy an undertaking in damages.
- (7) The grant of an injunction over a fairly long period.

[11] With regard the first submission Counsel drew the Court's attention to the decision in **Floyd Koch and others vs. Robert Chew et al 1997/98 page 537 at page 546 Offshore Financial Law Reports**. This is a British Virgin Islands case heard by Ephraim Georges J. in December 1996. The Learned Judge dismissed the action and struck out the Plaintiff's Writ of Summons as disclosing no reasonable cause of action. He also found that the Plaintiff had failed to show cause of action to which a Mareva injunction could attach. A Mareva injunction could only be granted if it is ancillary to a substantive claim.

[12] In that case, reference was made to the **Siskina vs Distos Copania Naveira S.A. 1979 A.C. 210 at page 256** Per Lord Diplock, "A right to obtain an interlocutory injunction is not

a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court.”

- [13] Counsel quoted the case of **Mercedes-Benz A.G. c. Leiduck 1995 3 All E.R. Page 929** (Privy Council case) which held that a Mareva Injunction was not an injunction of the sort which gave the Court extra-territorial jurisdiction. Counsel referred to **Rule 8.1 (6)(b) of CPR 2000**) which reads,

“In relation to proceedings which are taking place, or will take place, in another jurisdiction; must seek that application under Part 11.”

- [14] He said that the above was a procedural rule, and that it merely says how an application should be made assuming that it is an application which the Court has jurisdiction to hear.
- [15] With regards to ground two, Counsel said that there was no possibility of the Respondent saving the situation by bringing a substantive claim in this Court since the parties have agreed that exclusive jurisdiction should lie elsewhere.
- [16] Mr. Gadd said that there was no cause of action against Coteva, the second named applicant; that the problem was a dispute between the shareholders Fursey and Gefio, the shareholders in Coteva.
- [17] Mr. Gadd contended that the Applicants were seeking to set aside the whole of the order which included leave to serve out of the jurisdiction and that the leave to serve out of the jurisdiction could not be granted under **Rule 7.3(2)(a)**, nor any provision of **Rule 7.3** since those proceedings were not commenced by a claim form.
- [18] It was argued on behalf of the Applicants that the Respondent did not give an adequate undertaking as to damages and that he was unable to do so. Counsel rejected the evidence of Fabrice Giger that the Second named Applicant was “worth approximately

EURO 20,000,000.” For he said that the Second named Respondent did not have any worth other than the fact that it holds a large shareholding in Humanoids.

[19] He pointed out that no account or any documentary evidence to show that the claims made in Giger’s affidavit were true. Again, he referred to the sixth affidavit of Giger, who more or less stated that without further money coming from the First named Applicant, Humanoids would be faced with financial difficulties.

[20] The final submission was that the injunction was granted for a period in excess of 28 days contrary to **Rule 17.4(4) of the CPR 2000** which reads

“The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period).”

[21] Mr. Moverley-Smith adopted the same order of points enumerated earlier. He drew the Court’s attention to letter B at page 546 of **Koch v. Chew** at paragraph 12 of this judgment. He said that the injunction at issue in the **Siskina** case was a Mareva injunction which was totally different to the sort of injunction being sought in the present case which was one which flowed from the invasion actual or threatened of a legal right namely the rights of Respondent under the Protocol (agreement) to which both of the Applicants are parties. That by applying Lord Diplock’s speech to the present case it could be seen that there was a pre-existing cause of action in contract: an invasion of the contractual rights threatened by the Applicants.

[22] He further submitted that the Second named Applicant was present within the jurisdiction and that **Rule 7.3 (2) (b)** specifically refers to a claim “for an injunction ordering the Defendant to do or refrain from doing some act within the jurisdiction. He emphasized that the order of injunction against the First named Applicant were acts being restrained within the jurisdiction and that the principle in the **Siskina** case had no application to the present case.

[23] He confirmed that in accordance with Article 7 of “Protocol”, arbitration proceedings had been filed in Geneva but he noted **Article 23.2** of the **International Chamber of Commerce ICC Arbitration Rules** which provides,

“Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter the parties may apply to any competent judicial authority for interim or conservatory measures.”

[24] Counsel said that the arbitration in the present case had started on the 18th of June in Paris, the headquarters of the ICC but he was certain that by the 27th of June, the day the injunctive relief was granted no Arbitral Tribunal had been formed.

[25] He further submitted that under Article 23 noted above the Parties could apply for relief from a competent judicial authority to whom the Applicants/Respondents were amenable and therefore the special rules that apply to Mareva injunctions, where there is no other cause of action within the jurisdiction has no relevance to the present situation where there was a cause of action within the jurisdiction.

[26] It was further argued on behalf of the Respondent that the Court should have the power to grant a freezing order in a situation as the present one, where no cause of action could be brought within the jurisdiction and should be able to justify it on the basis of **Part 8.1(6)(b)**.

[27] Counsel agreed that **Part 8.1(6)(b)** applied to anti-suit injunctions and for the obtaining of evidence in foreign Courts but that it also applied to applications for a true free-standing injunction like a Mareva or an application based on an existing cause of action, a pre-existing cause of action.

[28] Counsel submitted that proceedings were commenced under **Part 11** in accordance with **Part 8.1(6)(b)** and moreover the arbitration rules envisaged such an application to the Court. He quoted

(1) **Chitty on Contracts Vol. 1 – Stay of Legal Proceedings – paragraph 16-036** which states:

“If contrary to an agreement to refer a matter to arbitration, one party resorts to legal proceedings in an English Court in respect of that matter the Court has no jurisdiction to hear the dispute.”

and

(2) **Dicey v. Morris 13th Edition page 442 paragraph 12-114** which in summary states that where someone refers disputes to a foreign Court in breach of an agreement, the defendants can still apply for a stay, and that it was a matter of discretion for the Court as to whether or not a stay should be granted.

[29] Counsel submitted that since the Second named Applicant in an addendum confirmed the terms of “protocol” and the amendments to the said “protocol”, it became a party and injunctive relief could flow.

[30] Counsel submitted that there was no restraint on serving a notice of application out of the jurisdiction since there are no rules restraining such service as is found in **Part 7.2** which reads,

A claim form may be served out of the jurisdiction only if

- (a) Rule 7.3 allows; and
- (b) The Court gives permission

[31] With regard to the undertaking as to damages Counsel submitted that there was no evidence that the valuation placed on shares in the Second named Applicant was unrealistic or wrong or that any loss was suffered. Therefore the amount EURO 20 million suggested by the Respondent should be a sufficient undertaking in damages.

[32] It was submitted on behalf of the Respondent Fursey, that the reason why the injunction was granted in excess of 28 days was because of the difficulties the Court had with regard to listing matters before the 16th of September 2003.

[33] He quoted **Part 26.9(2) of CPR 2000** which reads:

“An error of procedure or failure to comply with a rule, practice direction, Court order or direction does not invalidate any step taken in the proceedings, unless the Court so orders.”

CONCLUSION

[34] Having considered all the evidence it is my view that grounds one, two and three should be considered together.

[35] The principle expounded by Lord Diplock at page 256 in the **Siskina 1979 A.C. 210** applies to all injunctions (see paragraph 12) and I agree with Counsel for the Respondent that the principle deals with jurisdiction. The order sought must have its foundation in a cause of action in the jurisdiction. What then is the cause of action? The Respondent has argued that there is an invasion of its legal right, anticipated breaches of contract. The passage (paragraph 12) does not state that substantive proceedings should have commenced in the jurisdiction where the interlocutory injunction was being sought.

[36] It is noteworthy that the cases quoted by Counsel for the Applicants were before the CPR 2000 came into force. In **Biguzzi v. Rank Leisure PLC 1999 Vol. 4 AER 933** it was held that earlier authorities are no longer generally of any relevance once the CPR applies:

Part 8.1(6)(b) of the CPR 2000 clearly states that:

“A person who seeks a remedy

- (a) before proceedings have been started; or
- (b) in relation to proceedings which are taking place, or will take place in another jurisdiction;

must seek the remedy by a application under Part 11. A perusal of the application filed will show that the Respondent acted in conformity with Part 11.

[37] Moreover, even if parties agree to refer a matter to arbitration and one party resorts to legal proceedings it is trite law that the Court has jurisdiction to hear the dispute. (Chitty on Contracts noted earlier).

[38] As stated earlier in this judgment the Second Named Applicant (Coteva) became a party to the Protocol on the 25th of March 2003 whereas the Respondent Fursey was a former party to the agreement.

[39] With regard to grounds four and five **Part 6 of CPR 2000 deals with service of other Documents. Part 6.1(1)** states who is to serve documents other than a claim form. **Part 6.1(2)** states

“The following orders must be served by the party obtaining the order and Part 6.1(2)(b) states “an injunction”.

Part 7 of CPR 2000 deals with service of Court Process out of the jurisdiction and **Part 7.2** stipulates the service of the claim form out of the jurisdiction. There is no restraint of serving notice of applications out of the jurisdiction.

[40] With regard to ground six the evidence clearly discloses that the value of the Respondent’s assets is 20 million Euros.

[41] The final ground – the grant of an injunction over a fairly long period. **Part 17.4(1)(4)** provides:

“The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period).

[42] The above noted rule is pellucid – “not more than 28 days.” The period given in the order of injunction on the 27th June 2003 extends over the period set by the rules and therefore the injunction should be discharged.

[43] My order is the order of injunction granted on the 27th June 2003 be and is hereby discharged. Costs to the Applicants is reserved pending filed application for costs.

Suzie d'Auvergne
High Court Judge