[2022] SC (Bda) 90 Civ. 24 November 2022

In The Supreme Court Of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2021: No. 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125 & 126

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

BETWEEN:

OASIS INVESTMENT II MASTER FUND LIMITED AND OTHERS

Plaintiffs

-and-

(1) JARDINE STRATEGIC HOLDINGS LIMITED
(2) JARDINE STRATEGIC LIMITED

Defendants

Before: The Hon. Chief Justice Hargun

Appearances: Jonathan Adkin KC, Laura Williamson of Kennedys Chudleigh Limited, Matthew Watson of Cox Hallett Wilkinson Limited, Delroy Duncan KC and Ryan Hawthorne of Trott and Duncan Limited for the Plaintiffs

Martin Moore KC and John Wasty of Appleby (Bermuda) Limited for Jardine Strategic Holdings Limited and Jardine Strategic Limited

Dates of Hearing: 9 November 2022

Date of Judgment: 24 November 2022

JUDGMENT

Application to cross-examine a deponent on his affidavit filed in relation to a discovery application; circumstances where it is appropriate to order such cross-examination

HARGUN CJ

Introduction

1. In these 18 separate actions commenced by Originating Summonses the Plaintiffs ("**the Dissenting Shareholders**") seek, pursuant to the terms of section 106(6) of the Companies Act 1981 ("**the Act**"), appraisal of the fair value of their shares in Jardine Strategic Holdings Limited ("**the Company**"). These proceedings arise out of the amalgamation of the Company with JMH Bermuda Limited ("**JMH**") on 14 April 2021 ("**the Amalgamation**") pursuant to the provisions of the Act, on which date JMH and the Company continued as Jardine Strategic Limited ("**Jardine Strategic**"). The background to these proceedings is set out at paragraphs 2 to 11 of the Judgment of this Court dated 12 November 2021 and is not repeated here.

2. Commencing 12 December 2022, the Court is scheduled to hear an application by certain Dissenting Shareholders seeking an order that the Defendants give discovery on the footing the documents over which they have possession, custody or power include the documents held by the following entities or their agents:
   (i) Jardine Matheson Limited;
   (ii) Jardine Matheson Holdings Limited;
   (iii) Hongkong Land Holdings Limited;
   (iv) DFI Retail Group Holdings Limited (formerly known as Dairy Farm International Holdings Limited);
   (v) Mandarin Oriental International Limited;
   (vi) Jardine Cycle & Carriage Limited;
   (vii) PT Astra International Tbk;
   (viii) Jardine Motors Group Holdings Limited;
   (ix) Jardine Pacific Holdings Limited;
   (x) Zhongsheng Group Holdings Limited ("**the Principal Group Companies**").

3. This discovery application is supported by the second affidavit of Mr Mark Chudleigh dated 8 August 2022. In that affidavit Mr Chudleigh states at paragraph 51 that it is the Dissenting Shareholders' position that the evidence presented to the Court by the Defendants at the previous directions hearing, which provided the basis for the Order then made by the Court, together with what is apparent from the documents in fact disclosed, is consistent, and only consistent, with there being in place between the Company and at least the Principal Group Companies, and remaining in place between Jardine Strategic and the Principal Group Companies, an arrangement or understanding the effect of which was that the Defendants had and have free access to the documents of those entities.

4. Paragraph 51 of Mr Chudleigh's second affidavit seeks to assert that even if the Defendants may not have a legally enforceable right to the documents of the Principal Group Companies, the Defendants have *practical control* and as such these documents are within the possession, custody or power of the Defendants. Relying upon the line of authorities which include *North*

Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11, *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56, and *Berkeley Square Holdings Ltd v Lancer Property Asset Management Limited* [2021] EWHC 849 (Ch) the Dissenting Shareholders contend that the Defendants are obliged to give discovery of the documents which are within the *practical control* of the Defendants.

5. The discovery application is opposed by the Defendants and the Defendants' evidence in relation to the application is set out in Ms Khiyara Krige's second affidavit dated 30 September 2022 and Mr Jeremy Parr's fifth affidavit dated 29 September 2022. Mr Parr is the former Group General Counsel of the Jardine Matheson group of companies. In paragraph 11 of his affidavit, Mr Parr states that the alleged agreement or understanding referred to in paragraph 51 of Mr Chudleigh's second affidavit does not exist and, so far as he is aware, has never existed. Mr Parr positively asserts that the Defendants do not have "*free access*" to the documents of the Principal Group Companies (or any Group companies). He says that on conventional principles, those documents are under the control of the respective boards of each relevant Group company.

6. In light of the evidence of Mr Parr, the Dissenting Shareholders have made the present application under RSC Order 38, rule 2 for an order that Mr Parr attend the discovery application hearing for cross-examination on the matters arising out of his affidavit evidence relevant to the discovery application. In making this application, Mr Adkin KC, appearing for the Dissenting Shareholders, expresses concern that the Court should not seek to determine issues which are properly going to be argued and determined by the Court at the December hearing. In the circumstances, the Court will confine itself to the narrow issue whether it should order that Mr Parr attend the December hearing for the purposes of being cross-examined on his affidavit evidence touching upon the issue of practical control. Nothing said in this judgment represents any concluded view of the Court in relation to the factual assertions made in the respective affidavits touching upon the issue of practical control.

7. The Company itself has made an application for an order pursuant to RSC Order 24, requiring the Dissenting Shareholders to produce for inspection the documents identified in Mr Chudleigh's third affidavit as being allegedly "*inconsistent and incompatible*" with Mr Parr's evidence. It is said that the application is made on the basis that the documents will assist the parties in resolving the Dissenting Shareholders' discovery application. Further, if (contrary to the Company's position) the Court was to require Mr Parr to be cross-examined, the relief sought under RSC Order 24, rule 11 would enable the Company, and Mr Parr, to understand the case which the Dissenting Shareholders would wish to put to him.

The cross-examination application

8. Mr Adkin KC says that the application for cross-examination of Mr Parr is based on RSC Order 38, rule 2(3) which provides that:

> *"In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, the person's affidavit shall not be used in evidence without leave of the Court."*

9. Mr Adkin KC relies upon the English Court of Appeal decision in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67 as to the proper approach to be adopted by the court in the exercise of the power set out in RSC Order 38, rule 2(3). In that case an application was made under Order 38, rule 2(3) to cross-examine the deponent accused of contempt upon his affidavit answering that allegation. In considering the exercise of the discretion conferred by Order 38, rule 2(3), Megaw LJ stated the position at page 76G as follows:

"... the judge had a discretion under RSC Ord. 38, r. 2(3) whether or not to allow cross-examination of Mr Hawkins on his affidavit. In general I think that in interlocutory proceedings, where there is a bona fide application to cross-examine a deponent on his affidavit, that application should normally be granted."

10. Cross LJ expressed the approach to be taken in relation to the exercise of discretion under Order 38, rule 2(3) at page 77F, as follows:

"It is, I think, only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit."

11. Reliance is also placed on cases which followed the approach set out in *Comet Products* including the decision of the Grand Court of the Cayman Islands in *Jorek Shipping Company v Palmerston Chartering Co Ltd* [1986-87] CILR 350 per Hull J at 357-358, this Court's decisions in *Bank of Bermuda v Todd* [1992] Bda LR 42, and *Wong v Grand View Private Trust Co Ltd* (action No 2018: 44) BM 2020 SC 67 (7 December 2020).

12. In considering these authorities, cited on behalf of the Dissenting Shareholders, it is to be noted that none of these authorities deal with the issue whether it is appropriate, and if so in what circumstances, to order cross-examination of a deponent of an affidavit sworn in a discovery application. In *Comet Products* an order for cross-examination was sought in relation to an application that the defendants were guilty of contempt of court in disobeying the injunction and committal of the second defendant to prison for his contempt.

13. In *Bank of Bermuda v Todd* an order for cross examination of Mr Todd was sought in relation to an affidavit sworn by Mr Todd filed in compliance with a *Mareva* injunction and for the purposes of testing whether Mr Todd had indeed complied with the court's order.

14. In *Jorek Shipping* whilst there was an outstanding application for discovery, the cross-examination of the deponents was allowed in relation to matters other than discovery and in particular on the basis that "*the plaintiffs have made out a strong case for breach of trust and for duty, though it would remain open to the deponents in cross-examination to explain more fully why this might not be so.*"

15. In *Wong v Grand View,* Kawaley AJ was dealing with an application seeking cross-examination of a deponent on his affidavit filed in support of an application to purge his contempt on the principal ground that the breach of the implied undertaking not to use discovery for collateral purpose was inadvertent.

16. Mr Adkin KC also relied upon this Court's decision in *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2020] SC (Bda) 11 Civ (11 February 2020). It is correct that in that case, in the context of a discovery application, the parties agreed that the Swiss law experts should be cross-examined in order to determine a non-party Swiss bank's obligation to provide information and documents to the defendant in proceedings under Article 400 of the Swiss Code of Obligations. However, it is to be noted that: (i) the scope of the bank's obligation to provide the documentation and information to the defendant depended on an issue of foreign law; (ii) there was disagreement between the two experts in relation to the scope of Article 400; (iii) the parties voluntarily tendered the Swiss law experts for examination in relation to the scope of Article 400; and (iv) the court did not make an order for cross-examination of a deponent against the wishes of that deponent or the party.

17. Mr Moore KC, appearing for the Defendants, also referred to the scope of RSC Order 38, rule 2(3) but did so in the context of discovery applications and emphasised that, in the context of a discovery application Order 38, rule 2(3) has limited, if any, application.

18. The Supreme Court Practice (1999), in relation to Order 38, rule 2(3) states at 38/2/10 that "*...there can be no cross-examination on an affidavit of documents*."

19. The extent to which cross-examination on an affidavit of documents in discovery proceedings is permissible was considered in detail by the English Court of Appeal in *Fayed and Others v Lonroh Plc* [1993] Lexis Citation 1614. In that case the Fayed brothers were ordered to state on affidavit to whom and in what circumstances they parted with certain categories of documents in their possession, custody and power. They duly verified the facts stated in three lists of documents about the categories of documents which were no longer in their possession and provided particulars in relation to some of the documents. The plaintiff sought cross-examination of the deponents in relation to these affidavits and the application for cross-examination was supported by an affidavit stating that the discovery was still deficient in many respects and that their evidence explaining what had become of documents no longer in their possession was untrue. The application for cross examination was granted at first instance but set aside by the Court of Appeal. The leading judgment delivered by Stuart-Smith LJ shows that:

(1) The Court of Appeal referred to *Halsbury's Laws* volume 13 paragraph 47 in approving terms:

"*The party seeking discovery cannot bring evidence by affidavit or otherwise to show that the statements in the lists of documents, whether verified by affidavit or not, are untrue, nor can he seek to cross-examine the party making the list or the deponent verifying the affidavit, nor as a rule can he interrogate for that purpose*."

(2) The Court of Appeal referred to *Birmingham & Midland Motor Omnibus Company Ltd v LNWR* [1913] 3 KB 850 Buckley LJ, with whose judgment Vaughan Williams LJ agreed, and said at page 855:

"***An affidavit of documents is sworn testimony which stands in a position which is in certain respects unique. The opposite party cannot cross-examine upon it and cannot read a contentious affidavit to contradict it.*** *He is entitled to ask the Court to look at the affidavit and all the documents produced under the affidavit, and from those materials to reach the conclusion that the affidavit does not disclose all that it ought to disclose. In that case he can obtain an order for a further and better affidavit. Further, under the particular rule relating to a specific document, Order 31 rule 19A3, he may field an affidavit specifying further documents and calling upon the party making the affidavit of documents to account for them. But subject to these qualifications the affidavit of documents cannot be called in question but must be accepted as being correct.*" (emphasis added)

(3) After reviewing the decisions in *Jones v The Monte Video Gas Company* (1880) 5 QBD 556, *Lyell v Kennedy* (1884) 27 Ch D 1, *Wiedeman v Walpole* (1890) 24 QBD 537, *British Association of Glass Bottle Manufacturers Ltd v Nettlefold* [1911] 1 KB 369, and *Birmingham & Midland Motor Omnibus Company Ltd v LNWR* [1913] 3 KB 850, the Court of Appeal concluded:

"*Those authorities lead me to the conclusion that on whatever ground the order for a further affidavit is made, whether because of some admission by the deponent or the belief of the opposite party that other documents exist, the oath of the deponent in answer is conclusive;* ***it cannot be contravened by a further contentious affidavit and cannot be the subject of cross-examination.***" (emphasis added)

(4) The Court of Appeal justified the existence of the rule on the ground, *inter-alia*, that it avoids delay and expense: "*One of the most serious indictments of our civil litigation is the time taken in cases coming to judgment and the expense involved in doing so. Protracted interlocutory applications add to both the delay and expense; they should be avoided as far as possible.*"

(5) The Court of Appeal held that even if the court had the power to order cross examination in relation to an affidavit of documents that power should only be exercised in exceptional

circumstances: " *If I am wrong in holding that the statement in an affidavit or further affidavit of documents is conclusive, so that the court has no power to order cross-examination, the exercise of that power should in my judgment be reserved for those cases where the existence or non-existence of the document raises a discreet issue which does not impinge to any serious extent on the issues in the action.*"

20. In *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) Beatson J summarised the law and practice in relation to ordering cross-examination in interlocutory proceedings at paragraph 86 (4) (d) as follows:

"At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: (House of Spring Gardens Ltd v Wait; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan (No. 2)). ***However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents:*** **Frankenstein's case;** ***Birmingham and Midland Motor Omnibus Co Ltd v*** **London and North Western Railway Co** ***and Fayed v Lonrho.*** *In cases where the issue is whether the documents exist (as it was in Frankenstein's case and Fayed v Lonrho) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue."* (emphasis added)

21. The current practice of ordering cross-examination in discovery proceedings is also summarised in *Matthews & Malek (5th ed.)* at 6.47:

"Under the RSC, the court did not generally permit that a deponent be cross-examined on his affidavit for the purposes of obtaining further disclosure (Lyell v Kennedy (No.3) (1884) 27 Ch.D. 1 CA; Birmingham & Midland Omnibus v London and North Western Rly [1913] 3 K.B. 850 CA; Fruehauf Finance v Zurich Australian Insurance Ltd (1990) 20 N.S.W.L.R.

*359). **Indeed, the weight of authority was to the effect that an opposing party could not cross-examine the deponent on his verifying affidavit at all. This was on the basis that the affidavit did not go to any of the issues in the action** (Bray, at p.211; Birmingham and Midland Omnibus v London and North Western Ry [1913] 3 K.B. 850 at 855; Re Grosvenor Hotel, London [1964] 1 Ch. 464 at 481; Lonrho Plc v Fayed (No.3), The Times, 24 June 1993, CA, disproving a dictum to the contrary effect in Berkeley Administration Inc v McClelland [1990] F.S.R. 381; Re Pickering, Pickering v Pickering (1883) 25 Ch.D. 247 at 274, 248). The position is the same under the CPR. **Even if there is no jurisdictional bar to ordering cross-examination of a deponent on his affidavit or disclosure statement, the exercise of such power is reserved to extreme cases where there is no alternative relief** (Proctor v Kalivis [2009] F.C.A. 461, (2010) 263 A.L.R. 461 Fed. Ct. Aus (cross-examination refused, but order to file further and better affidavits as to discovery). In general, the only circumstances where cross-examination as to documents and disclosure may be appropriate at an interlocutory stage is in the context of freezing and search orders, where it may be crucial to establish what has happened to and the location of assets prior to trial."* (emphasis added)

22. The above review of the authorities provides ample support for the proposition that it is the settled practice of the court not to order cross-examination of a deponent on his verifying affidavit of documents. Further, even if the Court considered it appropriate to depart from the settled practice, it should only do so in extreme cases where there is no alternative relief.

23. Mr Adkin KC submitted that Mr Parr's fifth affidavit is not an affidavit of documents, as that expression is used in the authorities referred to above. He says that extending the rule of settled practice beyond the confines of an affidavit of documents to any affidavit touching on a disputed issue of discovery is unwarranted and inappropriate.

24. I agree with the submission of Mr Moore KC that the distinction which Mr Adkin KC seeks to draw is too fine and highly technical bearing in mind that one of the reasons for the settled practice is to avoid the unnecessary expense and delay of a mini trial associated with interlocutory applications. In the Court's view, the affidavit evidence of Mr Parr is an affidavit of documents in that it asserts that certain categories of documents are not within the control of the Company and seeks to give the factual basis why the Company maintains that to be the case. In that sense, Mr Parr's affidavit is in the same category as the relevant affidavits of the Fayed brothers in *Fayed v Lonroh* listing documents which were no longer in their possession and adding particulars in relation to some of those documents.

25. Accordingly, in accordance with the settled practice, the Court declines to order that Mr Parr attend the discovery hearing for the purposes of cross-examination in relation to his affidavit evidence touching upon the issue of practical control. The Court does not consider that this is an extreme case where it should depart from settled practice. It seems to the Court that if there are any deficiencies in Mr Parr's affidavit they can be remedied by requiring Mr Parr to file a further affidavit dealing with such deficiencies.

RSC Order 24, rule 11 summons

26. The Court declines to grant the relief sought. The Court accepts the submission that even assuming there is a reference to an identifiable category of documents, by reason of Order 24, rule 13(1) no order for production for inspection may be made under Order 24, rule 11 unless the court is satisfied that "*the order is necessary either for disposing fairly of the cause or matter or for saving costs*". The order sought by the Company is not necessary because the documents on which the Dissenting Shareholders rely in relation to the December discovery hearing will, according to the Dissenting Shareholders, have been fully identified in a further affidavit to be filed by Mr Chudleigh prior to the December hearing.

Conclusion

27. The Court declines to grant the relief sought by the Dissenting Shareholders requiring Mr Parr to attend at the December hearing for the purposes of being cross-examined upon his affidavit evidence touching upon the issue of practical control. The Court also declines to grant the relief sought by the Company requiring production of documents for inspection under Order 24, rule 11.

28. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 24th day of November 2022

SEAL OF THE SUPREME COURT OF BERMUDA

NARINDER K HARGUN
CHIEF JUSTICE