TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

On Appeal from the Commercial Division

HCVAP 2011/005

BETWEEN:

COMMERCIAL BANK – CAMEROUN

Appellant/Defendant

and

NIXON FINANCIAL GROUP LIMITED

Respondent/Claimant

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Sydney Bennett, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Willins for the Appellant
Mr. Dirk Van Heck for the Respondent

_____

2011: May 5;
June 6.

_____

Commercial appeal – Contract – Service out of the jurisdiction – Application to set aside service out of the jurisdiction – Non-disclosure of material facts in application to serve party to claim out of the jurisdiction – Abuse of process and lis alibi pendens – Whether it would be an abuse of process to have proceedings between the same parties brought simultaneously in two different jurisdictions if they are in respect of the same cause of action

The respondent's claim against the appellant bank arose out of a written agreement between the parties, dated 28th December 2008. By that agreement, the respondent, Nixon Financial Group Limited ("Nixon"), agreed to loan a sum of US$4.6 million to the appellant, Commercial Bank – Cameroun ("the Bank"). In particular, the parties expressly agreed that the agreement was to be governed by the law of the British Virgin Islands ("BVI"). By 30th June 2009, the date of maturity of the loan agreement, the Bank had failed to pay the outstanding principal on the loan as had been agreed. Furthermore, the

promissory note given to secure payment of the sums advanced had been presented twice and dishonoured on each presentation. Nixon therefore sought to obtain an order for it to garnish amounts standing to the credit of the Bank at any bank in France, in an effort to secure the sums due to it under the loan agreement. On 22nd July 2010, Nixon commenced proceedings in the Paris Commercial Court, on the basis of the Bank's failure to honour the promissory note. A few weeks later, on 11th August 2010, Nixon issued an application in the BVI Commercial Court for permission to serve these proceedings on the Bank at an address in Cameroon. The application in the BVI was heard on 7th October 2010, and was granted. Service out of the jurisdiction was effected on 18th October 2010 and acknowledged. On 1st October 2010 however, judgment was entered in the Paris Commercial Court in favour of Nixon, and the Bank was ordered to pay Nixon the Euro equivalent of US$4,206,000.00 with interest from 30th June 2009, the date when the loan ought to have been repaid. By application issued on 14th December 2010, the Bank asked the Court to set aside service of the claim on two bases; firstly, on the basis that Nixon's failure to disclose details of the proceedings which had been brought in France, amounted to a failure to fulfill its duty to give full and frank disclosure of the facts relevant to the application for permission to serve out of the jurisdiction; and secondly, on the basis that the institution of the instant proceedings in the BVI amounted to an abuse of process since these proceedings involved a claim for the outstanding balance on the same loan for which Nixon had already obtained judgment in the Paris Commercial Court. The trial judge dismissed the Bank's application and the matter was brought before the Court of Appeal.

Held: dismissing the appeal against the refusal to set aside service of the claim form on the appellant, allowing the appeal to the extent that the proceedings in the court below be stayed pending the final decision of the relevant appellate tribunal in France or until further order of the court below, and awarding costs of these proceedings in the court below to the appellants, such costs to be assessed unless agreed within 21 days of the date of this order, that:

1. In the case of an application for permission to serve out of the jurisdiction the focus of the inquiry is on whether the Court should assume jurisdiction over a dispute. The relevant questions are whether there is a serious issue to be tried whether there is a good arguable case that the Court has jurisdiction to hear it and whether the Court being asked to grant permission is clearly the appropriate forum. It is with reference to the third question that non-disclosure is relevant in this case. A party whose application satisfies the criterion set out in Rule 7.3 Civil Procedure Rules 2000 does not have an absolute right to permission to serve out. The Court will generally need to be satisfied that the case is a fit and proper one for service out of the jurisdiction, and that the BVI is the appropriate forum for trial of the intended action. The fact that proceedings were already taking place in another jurisdiction with respect to the claim which was the subject of the application for service out of the jurisdiction is highly relevant to the question of whether the BVI Court should assume jurisdiction. Even more relevant is the fact that the applicant had obtained a judgment in the courts of that other jurisdiction for substantially the same relief as was claimed in the process for which permission to serve out was sought. It is therefore clear that, as was found by the Judge in the court below, there was material non-disclosure in this case.

MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) applied.

2. A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the Court, and a negligent failure to state certain facts which should have been stated. Thus, the first question to be determined is whether the non-disclosure, though material, was innocent in the sense that it occurred in circumstances where there was no intention to deceive the Court. In the instant case, the respondent explained that it was aware of its duty to make full disclosure but considered that this duty had been discharged. In their view, the facts not disclosed were not relevant. The Court below did not make any finding that non-disclosure was culpable in the sense that the relevant facts were concealed in a deliberate attempt to mislead the Court.

   Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 cited; MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) cited.

3. Whether the matters not disclosed were of such relevance and importance to the issues to be decided on the application that the Court was justified in immediately discharging the order notwithstanding that the non-disclosure had been innocent is a matter of the Judge's discretion on which an appellate court would only interfere if it were demonstrated that he had erred in principle. The present case is not one in which interim relief of a draconian nature was obtained by an applicant in circumstances where evidence relevant to the decision to grant it was not disclosed. Rather, the Court permitted service out of the jurisdiction which had the effect of facilitating the bringing of an action against the appellant in the jurisdiction which it had identified as being the only appropriate one for such an action. The appellant's stance is to challenge the jurisdiction of the Court in which the claim has been brought and at the same time to object to proceedings being brought in the jurisdiction which it asserts is the only appropriate forum on the basis that proceedings are already afoot elsewhere. If it were to succeed in its appeals and/or applications in both jurisdictions, it would be able to delay or frustrate the enforcement of its obligations under the agreement without disputing the claim on its merits. Further, if full facts had been before the Judge, he would have given leave.

   Kuwait Oil Co (KSC) v Idemitsu Tankers KK (The Hida Maru) [1981] 2 Lloyd's Rep. 510 applied.

4. The respondent has already obtained judgment against the appellant in the Paris Commercial Court on its claim, which the appellant has not disputed on its merits. It is at liberty to enforce that judgment upon assets which are available in France for the purpose of such enforcement. The only purpose which parallel proceedings in the BVI could serve is as a hedge against the possibility that the Bank might succeed in its challenge to the jurisdiction of the Paris Commercial Court with the consequence that Nixon would lose the benefit of its judgment and of the attachments obtained. This could not justify the inconvenience, effort and

expense involved in permitting the two sets of proceedings to be pursued simultaneously in France and in the BVI – effort and expense which, in so far as it was incurred in connection with the BVI proceedings would be entirely wasted if the existing judgment in the respondent's favour in the Paris Commercial Court was upheld on appeal. It is only if the appellant succeeded in its challenge to the jurisdiction of the French courts that the justice of the case would require that it be made to answer in the courts of the BVI.

The Abidin Daver [1984] A.C. 398 cited.

5. As found by the Judge, the extent and degree of non-disclosure by the respondent on its application for permission to serve out was "…material and serious…". Having regard to the policy objectives underlying the exercise of the Court's discretion in cases where there has been material non-disclosure on applications made without notice, it would be appropriate for the respondent to bear the appellant's costs of the application to set aside service in the Court below.

MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) applied.

JUDGMENT

[1] BENNETT J.A. [AG.]: This is an appeal against the decision of Bannister J (Ag) refusing to set aside his order made 7th October 2010, on the ex parte application of the Respondent, Nixon Financial Group Ltd ("Nixon"). By that order Nixon was given permission to serve the instant proceedings upon the Appellant Commercial Bank – Cameroun ("the Bank") at an address in Cameroon.

The dispute

[2] Nixon's claim against the Bank arose out of an agreement made in writing between those parties dated 28th December 2008. By that document Nixon agreed to extend credit to the Bank in the total amount of US$4.6 million for a renewable term of six (6) months from draw-down at an annual rate of 5.5%. The agreement permitted the Bank to repay early upon one (1) month's notice, and contained provision for earlier enforcement upon the occurrence of certain specified events. It further provided that should the Bank fail to repay at maturity, it would become liable to pay a 'lump sum indemnity' equal to 1% of the amount outstanding '…without prejudice to damages and disposition of secured assets…'.

The parties expressly agreed that the agreement was to be governed by the law of the British Virgin Islands ("BVI"), and provided in Clause 10 that -

> "…for the performance of this agreement and the consequences thereof, as for all possible disputes arising between the Lender and the beneficiary in connection with their business relations the parties have agreed to confer express jurisdiction to the British Virgin Islands Commercial Court…".

[3] Nixon pleads that it advanced some US$4,596,075.00 to the Bank in two installments - $3,921,075.00 on 31st December 2008, and $675,000.00 on 27th January 2009. It had subsequently been agreed between the parties that the initial installment would be repaid in April 2009, and the balance would be repaid on 30th June 2009. The Bank had made payments of $999,949.00 on 16th April 2009, and $138,640.67 on 11th August 2009, in respect of interest due, but had failed to pay the outstanding principal of $3.6 million by 30th June 2009, as agreed. The promissory note given to secure repayment of the sums advanced had been presented twice and dishonoured on each presentation.

Proceedings in France

[4] On 25th March 2010, Nixon obtained in the Tribunal de Grand Instance de Paris ("the TGI"), a civil court in Paris, France, an order permitting it to garnish amounts standing to the credit of the Bank at any bank in France, in particular BNP Paribus and Nataxis, up to a total of US$4,206,000.00. This attachment was expressed to cover principal, contractual interest, penalties and damages due to it from the Bank under the loan agreement. It was a condition of that attachment that substantive proceedings be brought within a period of 2 months.

[5] On 23rd April 2010, in compliance with that condition, Nixon issued a summary claim ("the first summary claim") against the Bank in the TGI. The matter was heard on 17th June 2010. At that hearing the Bank contended to the TGI that it had no jurisdiction to hear and decide the matter because the loan agreement provided for the matter in dispute to be resolved in the Commercial Court of the BVI.

[6] On 24th June 2010, the attachment was amended to permit Nixon to garnish an increased amount of US$4.866 million ("the amended attachment").

[7] On 1st July 2010, the TGI issued a ruling in which it dismissed the first summary claim on the ground that it had no jurisdiction to entertain it.

[8] On 22nd July 2010, Nixon:

(a) issued a second summary process in the TGI claiming damages for breach of the loan credit agreement; and

(b) issued proceedings in the Paris Commercial Court claiming the sum of US$4,206,000.00 on the basis of the Bank's failure to honour the Promissory Note.

The application for service out

[9] On 11th August 2010, Nixon issued an application in the Commercial Court in the BVI for permission to serve these proceedings on the Bank at an address in Cameroon. That application was supported by an affidavit of the same date sworn by M. Thierry Daou, a lawyer practicing in France, who explained in paragraph 1 that he represented Nixon in related proceedings taking place in France. He gave details as to the manner in which it was alleged that the Bank had defaulted on its payment obligation under the agreement, referred to the particulars of claim, referred the Court to the governing law and jurisdiction clauses, and continued:

> "…13 Given the express agreement between the parties that BVI law governed the loan agreement and that the BVI court have jurisdiction in the event of any dispute, I believe that it is right for the BVI Court to grant permission to the Claimant to serve the claim form and the accompanying documents on the Defendant out of the jurisdiction.
> …
>
> 20. The Claimant is particularly conscious that this claim can be litigated in a timely manner as the Claimant has obtained interim protective measures in France against the Defendant which are time-sensitive and which the Defendant is trying to avoid. I attach at pages 30 to 31 of exhibit TD-1 a copy of the most recent "Provisional Seizure" Order obtained in the Paris Tribunal de Grand Instance de Paris (the equivalent of a County Court) in France on 24th June 2010 in French and with a

certified English translation. The next hearing date is listed for 3rd September 2010, in the Paris Tribunal de Grand Instance de Paris, after which there is a possibility of appeal."

Material facts not disclosed on the application

[10] The Affidavit of M. Daou failed to disclose to the Commercial Court that:

(a) Nixon had initiated two summary proceedings in the TGI claiming substantially the same relief, and arising out of the same facts as the claim which was the subject matter of the application for permission to serve out.

(b) One of the summary proceedings had on 1st July 2010, been dismissed by the TGI on the basis that that Court had no jurisdiction to hear and determine it. Nixon had appealed against that decision.

(c) The second summary claim had been instituted by Nixon on 22nd July 2010, in relation to the further provisional order obtained 24th June 2010, and claimed damages for breach of the loan/credit agreement.

(d) Nixon had commenced proceedings in the Paris Commercial Court for damages on the basis of the Bank's failure to honour the promissory note by which the loan/credit agreement had been secured. The relief claimed in those proceedings included substantially the same sums as were claimed in the process for which permission to serve out was being sought.

[11] The Paris Commercial Court proceedings were heard on 24th September 2010. In a judgment handed down on 1st October 2010, that Court ruled that although the jurisdiction clause in the loan credit agreement granted jurisdiction to the BVI Commercial Court to decide disputes arising from that agreement, no such dispute had in fact arisen: the Bank could not and had not disputed its liability to pay the sums secured by the promissory note. The Paris Commercial Court accordingly

ordered the Bank to pay Nixon the Euro equivalent of US$4,206,000.00 with interest from 30th June 2009, the date when the loan ought to have been repaid.

[12] On 7th October 2010, Nixon's application for service out of the jurisdiction was heard by Bannister J (Ag.) in Chambers. At the hearing the Judge inquired as to why proceedings had been brought in the BVI rather than in Cameroon. He was told of the presence of available assets in France and of provisional seizure orders granted there. It was explained that those orders were contingent on an action being brought within a limited time. It was further explained that the BVI had been chosen because of the parties' agreement concerning the governing law and the Court for any disputes. No mention was made of the summary proceedings commenced in the TGI in connection with the attachment orders which had been obtained. This would have left the Judge with the impression that the issue of proceedings in the BVI was a requirement for the continued viability of those attachments.

[13] Moreover, the Judge was not told at the hearing that Nixon had already obtained judgment in the Paris Commercial Court granting substantively the relief intended to be claimed in the proceedings which were the subject of the application.

[14] In that state of knowledge, the Judge gave permission to serve out. Service was effected on 18th October 2010, and acknowledged.

The application to set aside service

[15] By application issued on 14th December 2010, the Bank asked the Court to set aside service of the claim on the bases, firstly, that Nixon's failure to disclose details of the same alleged non-performance of the same contract amounted to a failure to fulfill its duty to give full and frank disclosure of the facts relevant to the application for permission to serve out; and secondly, that the institution of the instant proceedings in the BVI amounted to an abuse of process since these proceedings involved a claim for the outstanding balance on the same loan for which Nixon had already obtained judgment in the Paris Commercial Court.

Non-disclosure

[16] Bannister J. (Ag.) accepted that the non-disclosures were 'material and serious' but concluded that Nixon should not be penalized in consequence. He gave two reasons.

Firstly, he noted that, rather than joining issue with Nixon on the merits of the claim in the proceedings in France, the Bank had challenged the jurisdiction of the French Courts to entertain the claim. As a result of that challenge Nixon had been driven to sue in the Commercial Court in the BVI, the forum identified by the Bank as having jurisdiction to hear the matter. Full disclosure of the details of the proceedings in the French Courts would have inevitably exposed the Banks stance in relation to the jurisdiction of the French Courts (and its corresponding contention that the BVI Commercial Court was the appropriate forum) and would thus have confirmed the need for Nixon to proceed in the BVI. Therefore, full disclosure would have led to the same outcome.

Secondly, the Judge concluded that the justice of the case required that the Bank be made to answer in the courts of the jurisdiction in which it has asserted that it must be sued. Non-disclosure of the type that had occurred did not require the court to take the drastic step of depriving Nixon of the right to seek a remedy at all.

[17] The principles underlying the duty to make full and frank disclosure in applications made without notice may be summarized as follows –

(1) A person applying for relief upon an application made ex-parte must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.[1]

(2) The test of materiality is "…whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application…"[2]

[1] R. v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac [1917] 1 K.B. 486.
[2] MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [30] .

(3) Materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.[3]

(4) The duty of candour is a heavy one.[4] The duty of disclosure extends not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries.[5] Moreover, the applicant is under a duty to present fairly the facts so disclosed.[6] The rationale for the duty is that the court is being asked to grant relief in the absence of the Defendant and is wholly reliant on the information provided by the Claimant. Other parties do not have the opportunity to collect or supplement the evidence which has been put before the Court.[7] Observance of the duty is essential to secure the integrity of the Court process and to protect the interest of those potentially affected by whatever order the Court is invited to make.

(5) The general principles about disclosure on applications made ex parte for injunctions and other interim relief, apply to applications made ex parte for permission to serve out of the jurisdiction but the context is different.[8]

[18] In the case of an application for permission to serve out of the jurisdiction the focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The relevant questions are whether there is a serious issue to be tried; whether there is a good arguable case that the Court has jurisdiction to hear it; and whether the Court being asked to grant permission is clearly the appropriate forum.[9] It is with reference to the third question that non-disclosure is relevant in this case. A party whose application satisfies the criterion set out in Rule 7.3 Civil Procedure Rules 2000 does not have an absolute right to permission to serve out. The Court will generally need to be satisfied that the case is a fit and proper

[3] Brink's-MAT Ltd v Elcombe [1988] 1 W.L.R. 1350 per Ralph Gibson LJ at 1356G.
[4] Brink's-MAT Ltd v Elcombe [1988] 1 W.L.R. 1350 per Slade LJ at 1359C.
[5] Brink's-MAT Ltd v Elcombe [1988] 1 W.L.R. 1350 per Ralph Gibson LJ at 1356H.
[6] Lloyds Bowmaker v Britannia Arrow Holdings Plc [1988] 1 W.L.R. 1337 at 1343 per Dillon LJ at 1348E-F.
[7] Ghafoor v Cliff [2006] 1 W.L.R. 3020 at [46].
[8] MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [26].
[9] MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [26].

one for service out, and that the British Virgin Islands are the appropriate forum for trial of the intended action. The fact that proceedings were already taking place in another jurisdiction with respect to the claim which was the subject of the application for service out is highly relevant to the question of whether the BVI Court should assume jurisdiction. Even more relevant is the fact that the applicant had obtained a judgment in the courts of that other jurisdiction for substantially the same relief as was claimed in the process for which permission to serve out was sought.

[19] It is clear that, as found by the Judge, there was material non-disclosure in the instant case.

[20] The approach to be taken by the Court where there is non-disclosure in connection with application to serve out of the jurisdiction may be summarised as follows:

(1) If there is a breach of the duty to make full and frank disclosure on an application for service out, the Court may discharge the order obtained even though the applicant may be able to make another application which would succeed.[10]

(2) The rule that an [order made ex parte] will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrong doer of an advantage improperly obtained;[11] but it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and are made aware of the consequences (which may include a liability in costs) of failing in that duty.[12]

[10] Macaulay (A) (Tweeds) v Hepworths, Independent Harris Tweed Producers [1961] R.P.C. 184, per Cross J at 194.
[11] R. v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac [1917] 1 K.B. 486 per Warrington, L.J. at 509.
[12] Brink's-MAT Ltd v Elcombe [1988] 1 W.L.R. 1350 per Balcombe LJ at 1358 C – D.

(3) A balance must be maintained between marking the Court's displeasure at the non-disclosure and doing justice between the parties.[13]

(4) In exercising its discretion the Court should assess the degree and extent of any culpability on the part of the applicant, having regard to the matters which it was necessary for the Court to consider on the ex parte application. Also relevant is any prejudice to the defendant.[14] Whether the fact not disclosed is of sufficient materiality to justify setting aside the order for service out will depend on the importance of that fact to the issues which were to be decided on the application.[15] A material question may be – if the full facts had been before the Court, would the Court have given permission?[16]

(5) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the Court, and a negligent failure to state certain facts which should have been stated.[17]

(6) If the Court is satisfied that there was a deliberate intention to deceive the Court, the order is likely to be discharged.[18]

(7) Even if there is no deliberate intention to deceive the Court "…the question, as I see it, is essentially one of degree. The negligence may be so serious as to justify the Court in discharging the order even though it is satisfied that the deponent had no intention to deceive the Court. On the other hand, if the judge is satisfied that there was no intention to deceive and that the misstatement is not grossly negligent, he may think it better not to visit it with a penalty which may fall as heavily on the Defendants as

[13] Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 per Cresswell J at paras 123 (3).
[14] Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 per Cresswell J at paras 123 (4) and (5).
[15] Beecham Group Plc and Another v Norton Health Care and Others [1997] F.S.R. 81 per Jacob J at 89; Macaulay (A) (Tweeds) v Hepworths, Independent Harris Tweed Producers [1961] R.P.C. 184 per Cross J at 194.
[16] Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 per Cresswell J at para 123 (6).
[17] Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 per Cresswell J at para 123 (6); MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [28].
[18] Tajik Aluminium Plant v Ermatov and Others [2006] EWHC 2374 per Cresswell J at para 123 (7).

> the Plaintiffs, since the Plaintiffs can, ex hypothesi, make a fresh application which will succeed…"[19]

[21] The first question to be determined is whether the non-disclosure, though material, was innocent in the sense that it occurred in circumstances where there was no intention to deceive the Court. "…simple non-disclosure is to be differentiated from a deliberate intention to mislead a court by a combination of things said and left unsaid…".[20] In the instant case it was for the respondent to explain the circumstances of the non-disclosure. The evidence on that point was contained in the Second Affidavit of M Daou. In summary he explained that he was aware of his duty to make full disclosure but considered that he had discharged it. In his view the facts not disclosed were not relevant. The Judge concluded on this point that "…whatever M Daou thought on the question, the decision whether there has been material non-disclosure is for the Court,…, and I am satisfied that there has been material non-disclosure in this case".

[22] Mr. Willins for the appellant Bank argued that having found that there had been material non-disclosure, the Court failed to assess Nixon's culpability and whether the demonstrated breaches of duty on the part of Nixon or its advisors had been innocent. In my view, the statement of Woolf LJ in the case of Behbehani and Others v Salem and Others,[21] although made in the context of non-disclosure of material facts on an application for an injunction, is apt. As he pointed out at 728 F-

> "…I am not happy about the suggestion that it is appropriate to regard a disclosure as not innocent when the facts not disclosed were not known at the time to be material, albeit that it ought to have been known they were material. In practice in most cases it will be extremely difficult for a defendant who is applying to discharge injunctions which have been granted ex-parte to show that the matters which were not disclosed, but which should have been disclosed, were the subject of any decision not to disclose which was made in circumstances where it was appreciated that

[19] See Kuwait Oil Co (KSC) v Idemitsu Tankers KK (The Hida Maru) [1981] 2 Lloyd's Rep 510 per Denning MR, approving the statement of Cross J (later Lord Cross of Chelsea) in the case of Macaulay (A) (Tweeds) v Hepworths, Independent Harris Tweed Producers [1961] R.P.C. 184 at 194.
[20] MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [28].
[21] [1989] 1 W.L.R. 723.

> there should have been disclosure. In the majority of cases the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision as to whether or not there has in fact been bad faith. If, of course, it can be established that there has been bad faith, either on behalf of the parties or their legal advisers, that will be a most material matter, in considering whether injunctions which have been granted should be discharged…".

[23] In the course of hearing submissions on the costs on Wednesday 2nd February 2011, the Judge stated that if he were to make no order as to costs, it would deprive the successful claimant of its costs and therefore, "… would, Mr. Willins submits, operate to mark the court's disapproval of suppression of information in the way that has happened." It was argued that this amounted to a finding by the Judge that Nixon had '…suppressed information…' and therefore that the relevant non-disclosure occurred by reason of bad faith on its part. In my view, this statement should be treated simply as the Judge's paraphrasing of a submission that had been made by Mr. Willins on behalf of the Bank at the post judgment hearing on costs. The Court did not in the judgment make any finding that non-disclosure was culpable in the sense that the relevant facts were concealed in a deliberate attempt to mislead the Court.

[24] The next question is whether the matters not disclosed were of such relevance and importance to the issues to be decided on the application that the Court was justified in immediately discharging the order notwithstanding that the non-disclosure had been innocent. This was a matter of the Judge's discretion on which an appellate court would interfere only if it were demonstrated that he had erred in principle. The present case is not one in which interim relief of a draconian nature was obtained by an applicant in circumstances where evidence relevant to the decision to grant it was not disclosed. Rather, the Court permitted the service out of process which had the effect of facilitating the bringing of an action against the Bank in the jurisdiction which it had identified as being the only appropriate one for such an action. The Bank's stance is to challenge the jurisdiction of the Court in which the claim has been brought and at the same time to object to proceedings being brought in the jurisdiction which it asserts is the

only appropriate forum on the basis that proceedings are already afoot elsewhere. If it were to succeed in its appeals and/or applications in both jurisdictions it would be able to delay or frustrate the enforcement of its obligations under the agreement without disputing the claim on its merits.

[25] The approach which recommends itself to me is that of the English Court of Appeal in the case of Kuwait Oil Co (KSC) v Idemitsu Tankers KK (The Hida Maru).[22] In that case the defendant's oil tanker damaged the plaintiff's oil installations off Kuwait while moving into berth for loading. The immediate cause of the damage was that the tug master misinterpreted the orders of the pilot with the result that the tug so maneuvered the vessel as to cause enormous damage to the plaintiff's installation. The plaintiff commenced action in delict in the courts of Kuwait. At one stage of the proceedings the Kuwaiti Court intimated, on the basis of the report of its expert, that the ship was probably not liable in delict. The plaintiff amended its pleadings to add a claim in contract since by contract between the parties the vessel bore the risk of any damage done to the plaintiff's installations while coming into port. That contract contained a jurisdiction clause to the effect that it should be construed according to the law of England and that the ship owners submitted to the jurisdiction of the English courts. The Kuwaiti court eventually held that the ship owners were not liable in delict and declined jurisdiction in respect of the claims in contract. The plaintiffs appealed the finding but subsequently decided not to continue the proceedings in Kuwait. While the appeals were pending, they commenced proceedings in the High Court in England in respect of the same claim. In the affidavit filed in support of their application for leave to serve out, the plaintiffs set out the outline of the contract including the jurisdiction clause and recounted the damage to the installations. No mention was made of the previous and pending proceedings in Kuwait. The ship owners applied to the court for the order for service out to be set aside on the ground that there had been material non-disclosure on the application. The matter came before Neill J who decided that although there had been material non-disclosure in

[22] [1981] 2 Lloyd's Rep 510.

that the plaintiffs had not told the court about the proceedings in Kuwait, the Court would not set aside the service. He took the view that if the full facts had been before the Judge, he would have given leave. The Court of Appeal agreed, noting, as per Denning MR at page 512

> "…It is a matter which is essentially one of degree on which the Judge's view should carry great weight…".

[26] I find no reason to interfere with the order of the Judge refusing to set aside service of the claim on the ground of non-disclosure in this case.

Abuse of process and lis alibi pendens

[27] The other issue in the present appeal arose out of the refusal of the Judge to set aside service of the claim on the ground that the issue of proceedings in the BVI in parallel with proceedings being carried out in France between the same parties and in respect of the same cause of action was an abuse of process. Prima facie it is an abuse of process for a claimant to pursue a defendant for the same debt or damages in two jurisdictions. That is recognised by the statement of principle of Sir Nicholas Browne-Wilkinson V-C in Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd[23] to the effect that where a plaintiff seeks to pursue the same defendant in two jurisdictions in relation to the same subject matter he is required to elect which set of proceedings he wishes to pursue. That is because the effect of such conduct is vexatious and oppressive.

[28] The Judge took the position that it was not oppressive or vexatious for the Bank to have to dispute its liability to repay the money lent in two jurisdictions. Its stance in challenging the jurisdiction of the courts in which it had been sued had forced Nixon to commence proceedings against it in the jurisdiction which it asserted that it ought to have been sued. Nixon's action in this regard represented a proportionate response to the position taken by the Bank.

[23] [1989] 3 All E.R. 65 at paragraphs 69-70.

[29] Mr. Willins for the Bank, submitted that even had Nixon been driven to sue in this jurisdiction it was not driven to conduct such proceedings simultaneously with those being carried on in France. It should have pursued the proceedings in the French Courts to completion and commenced action in this jurisdiction only if the French courts declined jurisdiction. He further contended that the proceedings were lis alibi pendens and that service should be set aside pursuant to the principles stated by Lord Diplock in The Abidin Daver[24] –

> "…Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."

[30] The Judge refused to set aside service on this basis. He noted that while it was obviously undesirable that two sets of proceedings should be conducted in two different jurisdictions "…although the evidence is thin on this point…a judgment obtained here in these proceedings might be useful to Nixon in France in circumstances where the Bank is challenging the jurisdiction of the French courts and I think I am entitled to infer that Nixon would not have gone to the trouble and expense of commencing proceedings here unless that were the case…". Mr. Willins, for the Bank, submits that this is a wholly impermissible inference; if it were a proper inference it could be drawn in every case in which concurrent proceedings had been brought in different jurisdictions. I agree.

[31] The would-be claimant is required to establish '…objectively, by cogent evidence…' the particular '…personal or judicial advantage, available to him only in the [BVI] action that is of such importance that it would cause injustice to him to

[24] [1984] A.C. 398 at para 411.

deprive him of it…'.[25] The Judge's finding reflects the fact that Nixon has failed to satisfy this requirement.

[32] The position is that Nixon has already obtained judgment against the Bank in the Paris Commercial Court on its claim, which the Bank has not disputed on its merits. It is at liberty to enforce that judgment upon assets which are available in France for the purpose of such enforcement. The only purpose which parallel proceedings in the BVI could serve is as a hedge against the possibility that the Bank might succeed in its challenge to the jurisdiction of the Paris Commercial Court with the consequence that Nixon would lose the benefit of its judgment and of the attachments obtained. This could not justify the inconvenience, effort and expense involved in permitting the two sets of proceedings to be pursued simultaneously in France and in the BVI- effort and expense which, in so far as it was incurred in connection with the BVI proceedings would be entirely wasted if the existing judgment in Nixons favour in the Paris Commercial Court was upheld on appeal. It is only if the Bank succeeded in its challenge to the jurisdiction of the French courts that the justice of the case would require that it be made to answer in the courts of the BVI. On the facts shown I see no good reason why concurrent proceedings mirroring each other should be carried on apace in the two jurisdictions and to this extent I would allow the appeal.

[33] The order that I would make in the circumstances is that the instant proceedings be stayed pending the final decision of the relevant appellate tribunal in France on the Bank's challenge to the jurisdiction of the Paris Commercial Court. Otherwise the decision of the Court stands.

Costs

[34] As found by the Judge, the extent and degree of non-disclosure by Nixon on its application for permission to serve out was '…material and serious…'. Having regard to the policy objectives underlying the exercise of the Court's discretion in cases where there has been material non-disclosure on applications made without

[25] See: The Abidin Daver [1984] A.C. 398 per Diplock L.J. at para 411.

notice, I consider that the appropriate order in this case is that Nixon should bear the Banks's costs of the application to set aside service in the Court below. This seems to me to be consonant with the view expressed by Toulson J in MRG (Japan) Ltd v Engelhard Metals Japan Ltd[26] where he said that '[i]n the absence of any intention … to mislead the court, non-disclosure could be penalised … by some form of costs sanction…'

I would further order that each party bear its own costs of this appeal.

Conclusion

[35] The orders then would be as follows:

(1) That the appeal against the refusal to set aside service of the claim form on the appellant is dismissed.

(2) The appeal is allowed to the extent that the proceedings in the court below be stayed pending the final decision of the relevant appellate tribunal in France or until further order of the court below.

(3) The respondent shall pay the appellants costs of these proceedings in the court below such costs to be assessed unless agreed within 21 days of the date of this order.

(4) Each party shall bear its own costs of this appeal.

Sydney Bennett, QC
Justice of Appeal [Ag.]

I concur.

Janice M.Pereira
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

[26] [2003] EWHC 3418 (Com.) at [43].