



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 61

P657/22

OPINION OF LORD ERICHT

In Petition of

HUGH HALL CAMPBELL QC

Petitioner

against

JAMES FINLAY (KENYA) LIMITED

Respondent

for

Interdict and interdict ad interim and an order under the Court of Session Act 1988

Petitioner: Smith QC, C Smith; Thompsons

Respondent: Lord Davidson of Glen Clova QC, A McKenzie; CMS

30 August 2022

Motions

[1] On 24 August 2022 Lord Braid granted interim interdict and interim performance in this petition. He issued an opinion on 22 August ([2022] CSOH 57) and then put the case out for a hearing on 24 August for discussion of the precise terms of the interlocutor. He granted interim orders at that hearing and issued a Note explaining his reasons for making the orders. The circumstances of the case are set out in his opinion and Note of Reasons and I will not repeat them here.

[2] The next day, 25 August 2022, the Kenyan case called before the court in Kenya.

Further to the hearing in Kenya, both parties now seek variation of Lord Braid's orders.

[3] Today, 30 August 2022, the respondent seeks recall of the interim interdicts set out in paragraph 3(a) and (c) of Lord Braid's order and of the interim performance set out in paragraph 4(b). The petitioner seeks variation of Lord Braid's order by pronouncing an order to ordain the respondent to abandon the Kenyan proceedings.

[4] The paragraphs of which recall is sought are as follows:

"3. Interdicts *ad interim* the respondent or anyone acting on its behalf:

(a) from continuing to prosecute the proceedings at its instance in the Employment and Labour Relations Court of Kenya at Nairobi City under case number ELRCPET/E133/2022;

.....

(c) from seeking to implement the orders of the Court in Kenya pronounced on 28 July 2022 in any way, and in particular by posting copies of the list of Respondents to the Kenyan proceedings on notice boards or, if effected, by continuing to permit them to be posted;"

"4. Grants orders *ad interim* in terms of section 46 of the Court of Session Act 1988:

(b) ordaining the respondent as soon as practicably possible to publish a notice in English together with a translation to Swahili and published on its notice boards at all locations where it had previously displayed the names of employees who were engaged in the group proceedings in purported implement of the court orders in the Kenyan proceedings; orders that the notice should inform group members of the terms of the orders granted in 3(a) and 3(b) of this interlocutor and that it should include the following: 'Contrary to previous notices placed on this notice board, no person is required to provide their email address to JFK's Advocates;'"

Kenyan hearing on 25 August

[5] Lord Braid's order (paragraph 4(a)) also ordained the respondent:

"to apply to the Court in Kenya as soon as practicably possible in the [Kenyan] proceedings... (i) to recall or otherwise negate the effect of all orders which were granted on 28 July 2022, such as to permit the continuation of the Scottish Group Proceedings.... and (ii) to have the proceedings stayed; those applications to be at their sole expense;"

[6] A hearing had already been set down in the Kenyan proceedings for 25 August. When the Kenyan court granted the interim anti-suit injunction on 28 July it had also ordered that "the application be placed before the Duty Judge on 25th August 2022 for further directions on disposal."

[7] The petitioners in the Kenyan proceedings are the respondents in this petition, ie James Finlay (Kenya) Limited ("JFK"). The respondents in the Kenyan proceedings are 1044 named individuals who are the members of the group in the Scottish Group proceedings, with the representative party being called as an interested party.

[8] At the hearing at the Kenyan court on 25 August 2022 JFK were represented by Geoffrey Obura, an advocate of the High Court of Kenya. Prior to the hearing Mr Obura lodged with the Kenyan court an affidavit dated 25 August 2022 in which he stated:

- "1. THAT I have this morning received instructions from the Petitioner that they have been served with an Interim Order from the Scottish Court of Session directed at the Petitioner commanding it to apply to the Honourable Court to vacate the orders of the court issued on 28th July 2022
2. THAT the import and extent of the orders can be established from the Exhibit. annexed herewith [i.e. Lord Braid's interlocutor of 24 August.]
3. THAT I hereby produce the order to the court to enable the court to give further directions on this matter"

[9] At the hearing Mr Obura stated that JFK was served with an order from Scottish Court of Session, directing JFK to apply to the Kenyan Court to have the Court vacate the interim orders issued 28 July 2022 and to stay the proceedings. Mr Obura then read out Lord Braid's order. He then stated that as an advocate of the High Court of Kenya, he owed a duty to his clients to bring to the attention of Kenyan Court the order of the Court of Scotland. He stated that, at the same time, he noted that the terms of the order would like the Kenyan Court to vacate its order. He also noted that the respondents to the Kenyan proceedings had not come on record into these proceedings. He also noted this suit raises

issues of sovereignty and other constitutional aspects. In the circumstances and since this matter was coming before the court for directions, he sought directions in light of the obligation being imposed on JFK to make that application. Finally, he noted that JFK is a subject of Scottish jurisdiction just as it is a subject of the Kenyan court's jurisdiction.

[10] At the hearing on 25 August the Kenyan court pronounced the following order:

- “1. The Respondents have not entered appearance, attended Court, or responded to the Application filed by the Petitioner, within 14 days, as directed by the Court on 28th July 2022.
2. The Orders issued by the Scotland Court cannot be enforced in this Court, as they are in breach of our Constitution, in particular with respect to our sovereignty.
3. The interim Orders issued on 28th July 2022 are confirmed.
4. The Respondents are granted another 14 days to respond to the main Petition.
5. Directions on hearing of the Petition to issue on 12th September 2022 before the Duty Judge.
6. The Respondents to be notified through the press media.”

Submissions for the respondent

[11] In support of his motion for recall, senior counsel for the respondent submitted that matters had escalated to an international incident where the Kenyan Court had rejected on sovereign grounds the Scottish court's orders. That had been a final and not interim order by the Kenyan court. The group members are at risk of being found in contempt of the Kenyan court. Seeking to penalise the respondent for the decision of the Kenyan court would be unusual. The argument that Lord Braid's order was *in personam* had been shown to be an error. The petitioner's motion requires Kenyan counsel to go behind the back of the Kenyan Court to achieve a result that subverts that court's orders. The best way forward would be for the group members to enter appearance in Kenya and seek recall of the anti-suit orders. This petition should be treated with caution as an anti anti-suit proceeding (*Turner v Grovit* [2002] 1 WLR 107). Lord Braid's interlocutor is a breach of the Kenyan constitution and it would offend against comity to grant the petitioner's motion in

the face of the Kenyan Court's decision on the sovereignty issue. The Kenyan court had jurisdiction given the domicile of the group members.

Submissions for the petitioner

[12] Senior Counsel for the petitioner submitted that the respondent had palpably failed to comply with the interim order, which had led to their claimed difficulty. Their conduct was a contempt of court and they were not permitted to rely on that to justify recall of interim interdicts. The publication of the names of group members causes serious concern and was illegitimate.

Analysis and decision

[13] The task of this court in dealing with the motions before it today is a very limited one.

[14] It is not the task of this court today to come to a decision on whether the Scottish court has jurisdiction to hear the group members' claims for damages in the group proceedings. That is a live issue in the group proceedings, and has not yet been decided in the group proceedings. In their defences in the group proceedings, JFK have pled that the group proceedings should be dismissed because the Scottish court has no jurisdiction. They have also pled that the group proceedings should be dismissed because the Scottish court is *forum non conveniens*. If either of these defences is upheld, then the case will not proceed in Scotland and there will be no conflict between the Scottish and Kenyan courts. In accordance with normal court procedure, a preliminary hearing will be held in the group proceedings for the court to set out further procedure including a substantive hearing for the court to make a decision on these pleas.

[15] Nor is it the task of this court today to rule on whether the respondent is in contempt of court for breach of interim orders in respect of what transpired in the Kenyan court on 25 August. That would be a matter for separate breach proceedings, which have not been brought by the petitioner.

[16] Nor is it the task of this court today to remake the decision of Lord Braid. Neither the respondent nor the petitioner has reclaimed (ie appealed) against his decision. That means his decision stands and another first instance judge cannot take a different view or decide the arguments differently. The exception to that is where there is a material change of circumstances.

[17] The sole and limited question before this court today is therefore whether the court should alter the orders granted by Lord Braid because of a material change of circumstance between the granting of the orders on 24 August and the hearing before me today, 30 August. Both the petitioner and the respondent rely on the Kenyan court hearing on 25 August as being such a material change.

[18] It is useful at this stage to remind ourselves of what Lord Braid's findings were.

[19] He first considered whether the petitioner had pled a *prima facie* case. He considered the authorities and concluded that the law was that where both countries concerned could have jurisdiction to decide the case, the power to grant an anti-suit injunction or interdict may be exercised where the pursuit of the proceedings in the other country was vexatious or oppressive; where only the other country has jurisdiction the bar is higher but an anti-suit injunction may be granted to prevent unconscionable conduct (para [14]). In applying that law to the circumstances of the case, he stated:

“[41]The petitioner accepts that JFKL has the right to argue that the claims should be litigated in Kenya; what the petitioner claims is oppressive is JFKL's conduct in raising the jurisdictional issue and attempting to have it decided there,

rather than in the Court of Session where the only substantive actions currently in existence are on-going.

[42] Turning, then, to what the petitioner's case is, his averments of oppressive conduct rely, in particular, on:

- the delay in raising the Kenyan proceedings;
- the alleged history of intimidation;
- the repeated attempts to thwart orders of the Scottish courts;
- the revision of the undertaking, which clearly shows that the anti-suit injunction was in contemplation at that point;
- misuse of the group register;
- the selective and in some respects misleading information which was provided to the Kenyan court.

If proved, these averments are easily capable of founding the inference that JFKL's conduct in raising the Kenyan proceedings was vexatious, oppressive and unconscionable. I consider that the petitioner has made out a strong *prima facie* case"

[20] He then considered the balance of convenience (paras [43]-[44]). He found that the balance of convenience clearly favoured the petitioner. There was no prejudice to the respondent, a Scottish company, from presenting its arguments on jurisdiction to a Scottish court and it could afford to do so. There was serious doubt as to whether group members would be able to bring substantive damages claims and give instructions and obtain funding in Kenya. The time taken to obtain 1044 sets of instructions may lead to a delay in Kenyan anti-suit proceedings being concluded.

[21] In my opinion the Kenyan hearing on 25 August is not a material change of circumstances in respect of the reasoning set out in Lord Braid's opinion. Lord Braid was made aware when granting the orders that the Kenyan hearing would take place the next day. In his opinion he took the view that the orders were directed not at the foreign court but at the wrongful conduct of the party to be restrained (para [17]). The Kenyan court has decided that the orders were directed at the foreign court: it states that Lord Braid's orders cannot be enforced in the Kenyan court as they are in breach of the Kenyan constitution in particular with respect to sovereignty. That decision makes no material difference to the reasoning of Lord Braid as to *prima facie* case. Lord Braid's reasoning was that he was

merely exercising his jurisdiction over the person of JFK, which is a Scottish company.

The orders are in *personam* against JFK and are not intended to be an interference with the jurisdiction of the courts of Kenya or the sovereignty of Kenya (*Sabah Shipyard (Pakistan) Ltd v Republic of Pakistan* [2002] EWCA Civ 1643 para [45]). There is nothing in the decision of the Kenyan court which detracts from that conduct-based reasoning: the decision of the Kenyan court is silent on the conduct of JFK. Nor does that decision make any difference on the balance of convenience: all the matters on which Lord Braid relies in para [41] and [42] are unaffected by the decision of the Kenyan court.

[22] I turn now to the petitioner's motion to order the respondent to abandon the Kenyan proceedings. The petitioner had previously requested Lord Braid to ordain the respondent to apply to the Kenyan court to have the proceedings discontinued. Had Lord Braid agreed, that would have had a similar effect to the current motion. However, Lord Braid did not agree, and instead he granted the order in paragraph 4(a) ie ordaining JFK to apply in the Kenyan proceedings to have the proceedings stayed. For the reasons already explained, I can only revisit this matter if there has been a material change of circumstances. In my view there has been no such material change of circumstances. The petitioner's position is that no application for a stay was made to the Kenyan court on 25 August. That is a matter of dispute. It seems to me that there is considerable force to the petitioner's position. The whole tenor of the Kenyan advocate's affidavit and oral submissions is of bringing Lord Braid's interlocutor to the attention of the Kenyan court, rather than seeking to persuade that court to grant a stay. However, that is not a dispute which I have to conclusively determine at this stage. It is enough for me to note that the petitioner has not persuaded me that there has been a material change of circumstances. On the petitioner's own account of what happened on 25 August, the Kenyan court has not refused an

application to stay: no such application was made. No application to stay having been refused, there is no material change in circumstances from when Lord Braid decided it was appropriate to order JFK to stay the Kenyan proceedings rather than discontinue or abandon them.

Order

[23] I shall refuse the petitioner's motion and I shall also refuse the respondent's motion. I shall arrange for this *ex tempore* opinion to be issued in writing.

[24] It is important that going forward all cases relating to the group proceedings are dealt with by the judge who is case managing the group proceedings. That will enable that judge to take an overview of all the related cases in the interests of the efficient administration of justice. The preliminary hearing for the group proceedings has been set down to call before Lord Weir at 9.00am on Friday 16 September. I shall discharge the by order in this petition which had been set down for Lord Braid on 27 September for discussion of further procedure and instead put this case out by order for discussion of further procedure before Lord Weir at the same time and date as that preliminary hearing, and order parties in this petition to lodge Notes of Proposals for Further Procedure by 4.00pm on Wednesday 14 September. I shall also make arrangements for the interdict petition P305/22 to be heard by order at the same time, with Notes of Proposals for Further Procedure lodged for the same deadline.

[25] After I delivered this opinion orally, there was discussion as to the practical implications for the next hearing in the Kenyan court, which is due to take place on 12 September, and the preliminary hearing/by orders in this court on 16 September. There was agreement that parties should not be prevented from attending these hearings. This

was given effect to by the variation of the interim interdict granted on 24 August so as to exclude the 12 September hearing from paragraph 3(a) of the interim interdict, and by senior counsel for the respondent giving an undertaking that he will take no steps to prevent the preliminary hearing taking place on behalf of JFK or any other interested party.