

Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 41 OF 1988

IN THE MATTER of the Foreign
Tribunals Evidence Act 1856 (18 and
20 Victoria Chapter 113)

AND

IN THE MATTER of Part VIII of the
General Rules and Orders of the
Supreme Court of Judicature of
Jamaica 1938

AND

IN THE MATTER of Civil Proceedings
known as Case No. 86-7842 (CL) F now
pending before the Fifteenth Judicial
Circuit Court in and for Palm Beach
County, Florida, in the United States
of America.

BETWEEN	HASSTMEX CORPORATION	)	
	NEIL GORE, SENIOR	)	PLAINTIFFS
A N D	JENNIFER MARION GORE	)	
	MICHAELA TRAVIS	)	
	LYDIA HENNIGER	)	DEFENDANTS
	RACHAEL GORE	)	
	ERIC BARTLEY and the	)	
	ESTATE OF SYDNEY GORE,	)	
	DECEASED	)	

D. M. Muirhead Q.C., and L. S. D. Harrison instructed by Milholland,
Ashenheim and Stone for the Plaintiffs/Applicants.

C. Piper instructed by Clinton Hart and Company for Gore Bros. Limited
an interested party.

October 26, 27 and 28, 1988

IN CHAMBERS

ELLIS, J.

When this matter came on for hearing Mr. Piper sought leave to
address the court. He was granted leave. He said the matter only came
to his attention in the morning. He contended that he should have had
notice of the hearing and without that notice no jurisdiction resides in
the court to hear the application.

In support of his contention he referred to and relied on -

- (i) Atkins Court Forms 2nd Edition Volume 22, paragraph 19 at page 84;
- (ii) Halsbury's Laws of England 4th Edition Volume 24 paragraphs 1054 and 1055. He objected to the matter being heard without notice.

Muirhead Q.C., submitted that the court had jurisdiction to hear the matter ex parte. He said the situation was one of urgency and demanded the expedition which an ex parte application would afford. He cited Order 29 rule 1/18 of The Supreme Court Practice and the case of London City Agency (J.C.D.), Limited et al vs. Lee et al [1969] All E.R. 1376 a judgment of Megarry J. as he then was.

He further submitted that in any event Piper was present therefore the matter could be heard as if inter partes. I ruled against Mr. Piper's objection having preferred the reasoning of Megarry J. as he then was in the London City case to the statement in Halsbury's Laws of England.

THE HISTORY OF THE MATTER

On the 26th of July 1988 Smith J. on an Originating Summons dated 15th July 1988 accompanied by a Letter of Request made the following order pursuant to the Foreign Tribunals Evidence Act 1856 and Part VIII of the General Rules and Orders of The Supreme Court of Judicature of Jamaica 1938. IT IS HEREBY ORDERED that:

- 1. Mrs. Angela Hudson-Philips of 15 Duke Street, Kingston, one of Her Majesty's Counsel and Attorney-at-Law of the Supreme Court of Judicature of Jamaica be appointed the examiner for the purpose of obtaining the testimony of the witnesses referred to in the certified copy Letter of Request, dated the 13th day of July, 1988 for use in the abovenamed civil proceedings;
- 2. The said witnesses do attend at such time and place as the said examiner may appoint by due notice to each of them in writing with such document or documents as may be specified in the said notice

- and do there submit to be examined viva voce upon oath or affirmation touching the testimony so required as aforesaid before the parties herein and their Attorneys-at-Law and the certified court reporter of the parties' Attorneys-at-Law;
3. The Registrar of our Supreme Court of Judicature of Jamaica be at liberty to issue such process as may be necessary to compel the attendance of any of the said witnesses at such time and place as may be appointed as aforesaid by the examiner;
 4. The said parties' Attorneys-at-Law be permitted to examine, cross-examine and re-examine as the case may be the said witnesses viva voce in accordance with the Florida Rules of Civil Procedure and the Florida Rules of Evidence;
 5. The said testimony of the said witnesses and all additional viva voce examination be reduced into writing by the said court reporter and that all documents produced on such examination be duly marked by the said court reporter for authentication by him in accordance with the Florida Rules of Civil Procedure and the submission by the said examiner to the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County Florida in the United States of America;
 6. The costs of this Summons will be provided for.
- Consequent upon that order, the examiner named therein on the 10th October, 1988, embarked upon the taking of deposition in obedience to it.

Mr. Piper who was present, objected to the proceedings on grounds that -

- (1) The examiner was not supplied with copies of the Pleadings or other documents relative to the action which gave rise to the order of examination of witnesses. In that circumstance, a mandatory provision of the Jamaica Civil Procedure Code - S.377 was breached.

(ii) Order 4 of Part VIII of General Rules and Orders of Supreme Court allows for a direction for the examiner to conduct an examination in the Letter of Request. However the direction by Smith J. on the 26th of July were limited to the Requesting states rules of Civil Procedure relative to examination, cross-examination and re-examination;

(iii) The order of 26th July did not exclude the application of SS.371-392 of the Judicature Civil Procedure Code.

The examiner ruled against Mr. Piper's objection and intimated that the taking of depositions would continue.

On the 12th of October an application on behalf of Gore Bros. Limited, an interested party, was made for an ex parte interim injunction enjoining the examiner against continuing the taking of depositions until the issues and questions set out in Suit E. 272 of 1988 were determined. That order was granted by Wolfe J. (Actg.) extended the order of 12th October for a further 10 days.

The plaintiffs/applicants Massimex Corporation et al now seek to have that order discharged on grounds that --

- (i) Urgency of the Pending Proceedings in the Foreign jurisdiction demands that the examiner continue to take depositions;
- (ii) The court which granted the order was "deceived" by the interested party;
- (iii) The applicants in that court had no locus standi to apply for injunctive remedy against the examiner;
- (iv) Originating Summons was inappropriate process;
- (v) There was no application for leave to serve process out of the jurisdiction.

Mr. Muirhead in the argument said that Gore Bros. Limited, the applicants for the interim injunction, was not a party to any pending proceedings foreign or domestic. The Company was not listed as even a

potential witness. The upshot of that was that a non party to Suit M.41 of 1988 was granted injunctive remedy to facilitate his bringing an Originating Summons E. 272 of 1988 in which the parties are those in the action pending in Florida.

He said the provisions of SS. 371-392 of the Judicature Civil Procedure Code are excluded since the Foreign Tribunals Evidence Act of 1856 governed the proceedings. That Act he said is wide in scope and in that light and in light of the Special Direction contained in the order of Smith J. made on the 26th of July 1988 the issues and questions raised in Suit E. 272 of 1988 are irrelevant. He concluded by saying that Gore Bros. Limited, not being a named witness in the pending matter had no locus standi to enter any appearance or in which to apply for an injunction in these proceedings. The injunction should therefore be discharged.

Mr. Piper on his part argued that section 377 of The Civil Procedure Code is mandatory and the examiner ought to have been provided with the copy Writ and Pleadings in relation to the proceedings in Florida. He contended that the order of Smith J. directed the examiner in one Specific Area of Florida Law; that is examination, cross-examination and re-examination of witnesses. He said that the proviso to Rule 4 of Part VIII of the General Rules and Orders of The Supreme Court of Judicature of Jamaica 1938 makes applicable all the relevant sections of the Civil Procedure Code. That goes to the merits of the issues raised in the Originating Summons and ought to be determined. Since none of the "proper" parties sought to have the matters determined, Gore Bros. Limited had to do so.

According to him all relevant circumstances were placed before Reckord J. and there was no "deception" in the application. He cited SS.48 and 49 of Judicature (Supreme Court) Act as giving the court jurisdiction to grant the injunction. He argued that since two judges have already determined the justness and convenience of the order the correct procedure of complaint should be by way of appeal instead of application to discharge the order.

He cited and relied on Radio Corporation of America v. Rauland Corporation et al [1956] 1 All E.R. 549 and Rio Corporation et al [1978] 1 All E.R. 434 to say that there are substantial issues to be tried. Those were the arguments.

THE LAW

The law on the matter is The Foreign Tribunals Evidence Act 1856 and Part VIII of Supreme Court General Rules and Orders 1938. The 1856 Act provides inter alia for -

1. Order for the examination of witnesses in relation to matters pending before a Foreign Tribunal;
2. The certificate of a Diplomatic Agent as being sufficient support for an application;
3. The examination of witnesses on oath;
4. The payment of express of witness;
5. Extent of right of refusal to answer questions and to produce documents.

These provisions have been adopted by Jamaica vide Part VIII of Supreme Court General Rules and Orders of 1938.

Order 4 of these orders states that an order may be made directing that an examination be taken in the manner requested by the Commission Rogatoire or letter of request from the Foreign Court provided that if there is no direction as to how the examination is to be taken then it shall be taken in the manner prescribed in sections 365-386 of The Civil Procedure Code of Law 40 of 1888 which are similar to sections 371-392 of the present Judicature Civil Procedure Code. (underlining mine).

To my mind, the effect of the aforesaid proviso determine the validity of the arguments for Core Bros. Limited, the applicant for the injunction.

The reaction against the exclusion of the sections 371-392 is understandable since every country and attorneys-at-Law will jealously seeks to limit the incursion of the procedure of Foreign Tribunals into their courts in maintenance of sovereignty.

When it becomes necessary to allow any such incursion, e.g., the taking of evidence in this country for use in a Foreign Tribunal, it has to be done by express statutory provision.

I have closely examined the proviso and I am in no doubt that it is exclusionary when there has been a direction as to how examination is to be taken.

I am also in no doubt that one direction is enough to exclude the sections of the Civil Procedure Code. The proviso speaks of the absence of "any such special direction" not "such special directions" (my underlining).

1. I find that the Foreign Tribunals Evidence Act of 1856 provides a complete Code of Procedure once an order is made thereunder. Where special directions are given, as I find in this case, the provisions of sections 371-392 of The Judicature Civil Procedure Code are excluded;
2. I find that Gore Bros. Limited, is a complete stranger to the proceedings without any locus standi to enjoin the examiner;
3. Gore Bros. Limited, has not shown, prima facie, that it would be able to establish any interest which it could legitimately protect by way of injunction;
4. I hold that a stranger to a cause cannot enjoin another stranger to that cause from acting, especially where that other stranger is an appointee of the court;
5. I hold that injunctive remedy in any case would not be proper;
6. Lastly, I find that so much doubt exists as to the applicant's right to frustrate the examination of witnesses that the continuance of the ex parte order for injunction would not be equitable.

It is on the basis of the above findings that I dissolved the ex parte order for interim injunction granted on the 24th of October 1983.

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The plaintiffs Massimex Corporation et al is granted a certificate for Queen's Counsel to have costs agreed or taxed.

Leave to appeal is granted.