

IHC149/04

Neutral Citation Number: [2004] EWHC 1343 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2

Thursday, 27 May 2004

B E F O R E:

MR JUSTICE PARK

BRIMKO HOLDINGS LTD

(CLAIMANT)

-v-

EASTMAN KODAK COMPANY

(DEFENDANT)

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(Official Shorthand Writers to the Court)

MR P MARSHALL QC (instructed by Morgan Lewis Bockius, London EC2) appeared on behalf of the
CLAIMANT

MISS B DOHMANN QC AND MR R ANDERSON (instructed by DLA, Birmingham) appeared on behalf of
the DEFENDANT

J U D G M E N T

(As approved by the Court)

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MR JUSTICE PARK:

Overview

1. This is an application for security for costs. An element of security has been offered on behalf of the claimant and I will make an order providing for it. However, beyond what has been offered I decline to order any security except for a trivial sum of £15,000, which I explain later.
2. Security at the level applied for by the defendant would stifle the claim. In the course of the hearing Miss Dohmann QC on behalf of the defendant, the applicant for security, virtually accepted that that would be so, but she nevertheless invited me to order that security in a lower amount should be provided. For reasons which I will explain, I am not going to do that except to the extent of £15,000. Thus I will limit my order to the security which has been offered, plus £15,000.

The parties and the nature of the case

3. The claimant, BrimKo Holdings Ltd, is a Guernsey company indirectly owned by a Jersey settlement established by Mr Joe Brim. Mr Brim is the principal beneficiary under the settlement. He lives in England. The defendant is the well known United States corporation, the Eastman Kodak company ("Kodak"). The underlying dispute arises from the termination of a joint venture which had been started between Mr Brim and Kodak. Mr Brim's participation was to be through the claimant company, BrimKo Holdings Ltd ("BKH"). The purpose of the joint venture was to establish a franchising business offering high-quality business imaging services and products in Shanghai, China. It was to be undertaken by a joint venture company called BrimKo Franchising Ltd ("BKF"). BKF was established, and it, like BKH, was a Guernsey company. It was owned in 50/50 proportions by BKH and Kodak. BKH's shareholding represented the Brim interest.
4. There was a joint venture deed dated 18 April 2000. Clause 3.3 of the deed contained provisions under which, in certain circumstances, either party could serve a notice terminating the joint venture and requiring BKF to be wound up. In April 2001 Kodak served a notice, so the joint venture never got off the ground.
5. In this case BKH, the claimant, contends that Kodak was not entitled to serve the notice. It claims damages, partly for money already expended by it, but, more significantly, for what it says would have been the value of its 50 per cent shareholding in BKF if Kodak had not unilaterally terminated the joint venture. In the particulars of claim it estimates its loss as US\$52 million. Kodak strenuously denies the claim. It says that it was fully entitled to serve the notice and it says that in any event the loss which BKH alleges is hugely exaggerated. It is neither necessary nor appropriate for me at this stage to express any views as to the strength and weakness of the respective contentions. All that I say is that each party firmly advances its own case.
6. The trial is listed to start this November, with a time estimate of 25 to 30 days. It will undoubtedly be a costly trial.

The application for security for costs

7. In those circumstances the defendant, Kodak, has applied for security for costs. The amount of security which it seeks by its application notice is £2.5 million. That is a very large sum, even for a case of this magnitude. It was supported by a schedule giving particulars of costs already incurred and estimates of further costs yet to be incurred. Mr Marshall QC, counsel for BKH, was critical of the level at which Kodak was incurring costs and intended to continue to incur them. Miss Dohmann defended the schedule of costs, pointing out the international nature of the case, the number of witnesses from whom statements were required, the elaborate nature of the expert evidence which would be required, and other similar matters. The estimated total of Kodak's costs still seems large to me, but I do not take the view that the estimate has been inflated for the purposes of this application.

8. The statute law relating to security for costs is found in the Civil Procedure Rules, rule 25.12 and 25.13. It is alternatively found in the Companies Act 1985 section 726. The Civil Procedure Rules rule 25.13(1) provides:

"(1) The court may make an order for security for costs under rule 25.12 if –

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies."

One of the conditions in rule 25.13(2) is condition (c):

"the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so".

Section 726(1) of the Companies Act is to the same effect and I need not quote the section. In this judgment I will focus on the Civil Procedure Rules. The content of the judgment would be the same if I had focused instead on section 726.

9. Reverting to the Civil Procedure Rules, the condition in rule 25.13(2)(c) is clearly satisfied. The claimant, BKH, is a company and there is reason to believe that it will be unable to pay Kodak's costs if ordered to do so. Indeed, it is conceded that it will be unable to pay Kodak's costs, at least if it (BKH) is considered by itself. BKH was a special purpose company established to hold the 50 per cent shareholding in the joint venture company BKF. When the joint venture did not proceed, the 50 per cent shareholding was worthless and therefore BKH also became worthless. Accordingly the case depends on rule 25.13(1)(a): is the court satisfied, having regard to all the circumstances of the case, that it is just to make an order for security for costs? The principles which should guide the court's discretion are well established by authority. The cases have been referred to and discussed in various reported judgments, several of which have been considered in paragraph 25.13.13 of the current edition of the White Book. I will not review them again in this judgment. There is no effective dispute between the parties about the principles which fall to be applied.
10. It is sufficient for me to say that, so far as the present case is concerned, a particularly important principle is that an order for security for costs should not ordinarily be made if it would probably have the effect of "stifling a genuine claim". In Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 at 550, Peter Gibson LJ put it in this way:

"The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression such as by stifling a genuine claim by an indigent company against a more prosperous company"

11. That basic proposition needs to be considered together with two other propositions. First, the burden of establishing that a claim would be stifled by an order for security rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled if security was ordered. Second, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs.

12. At the same time the court should not press too far the proposition that the burden rests on the claimant. It should be recalled that when the claimant has to establish that third parties do not exist from whom security can reasonably be expected and obtained, that is to place on the claimant the burden of proving a negative. That is always difficult to do, and the court should, in my judgment, evaluate the evidence with a degree of sympathy for the difficulty which a claimant faces. I would venture, if I may, to draw attention to a paragraph in a judgment which I wrote sitting in the Court of Appeal in Anglo-Eastern Trust Ltd v Kermanshahchi [2002] EWCA Civ 198. The relevant paragraph is paragraph 55. I will not prolong this judgment by reading it out, but I draw attention to what I have said.

The present case: analysis and discussions

13. In this case BKH says that if it was ordered to provide security at the sort of level for which Kodak applies, the claim would certainly be stifled. It adds that the security which it has offered, or which has been offered on its behalf (which I will describe later), is the most that can realistically and reasonably be provided. It submits that, except to the extent of that offer, Kodak's application should be dismissed.

14. There are three matters which are not controversial and which I can mention now.

(1) In the Keary Developments case (supra) Peter Gibson LJ referred to stifling a "genuine" claim. It is accepted that BKH's claim against Kodak is a genuine claim for this purpose. Kodak says that the claim will fail, but it does not say that the claim is spurious, or whatever other adjective may be the antithesis of genuine. BKH, of course, says that its claim is not just genuine but also strong. I do not need to form a view of my own on the strength or weakness of the claim and I do not have one.

(2) If the matter turned solely on the resources of BKH, the claimant, itself, any order for security for costs would certainly stifle the claim. BKH has no resources and is dependent on third parties, and now on a funding arrangement with its solicitors, for its ability to prosecute the claim at all.

(3) Given that the matter does not turn solely on the resources of BKH it is relevant to take into account the resources of

(a) Mr Brim,

(b) the Jersey settlement which owns the shares in BKH, and

(c) other non-United Kingdom companies which are owned directly or indirectly by the settlement.

It is controversial whether there should always be taken into account the resources of

(d) Mrs Brim, and

(e) Mr and Mrs Brim's two sons.

15. Thus BKH accepts that the burden is on it to show that, if account is taken of the resources of itself, of Mr Brim, of the Jersey settlement and of the settlement's underlying companies, an order for security for costs could not be met, with the result that the claim would be stifled. Information about the resources of the various persons whom I have identified was set out in letters plus enclosures from BKH's solicitors, Morgan Lewis Bockius, to Kodak's solicitors, DLA. The conclusion which was suggested by Morgan Lewis Bockius was that security valued at between £200,000 and £250,000 could be provided, but no more. Kodak was not willing to accept the offer of that security and issued the present application notice on 9 March 2004.

16. As I have said earlier, the application notice seeks security of £2.5 million. Miss Dohmann indicated at the outset of the hearing that the amount of security is in the discretion of the court, and I do not think that she expected that I would order £2.5 million or anything like it. However, it is worth pointing out

that the application notice itself simply asks for security of £2.5 million. There was, for example, no reference to "such other amount as the court may direct".

17. Kodak having issued the present application notice, BKH then set out in witness statements the material which its solicitors had previously set out in letters, plus certain further information. The solicitor at DLA with conduct of the matter for Kodak then made a witness statement pointing out alleged flaws in the evidence filed on behalf of BKH. Further witness statements on behalf of BKH were filed in response.
18. In the end, I had before me on behalf of BKH the following witness statements: two by Mr Brim; two by Mrs Brim; one by a director of the corporate trustee of the Jersey settlement, Mr Samson; two by Mr Brim's nephew, Mr Moor; two by Mr Jacobson, a partner in BDO Stoy Hayward who has been the accountant for Mr Brim and the auditor of his former company for some 15 years; one by a specialist forensic accountant, Mr Cohen; and two by the solicitor at Morgan Lewis Bockius who has carriage of the matter for BKH. The statements were backed by a significant number of supporting documents.
19. I will say more about the content of the witness statements later, but if they are accurate they appear to me overwhelmingly to support BKH's case that it can afford to provide the security which it has offered but that if it is ordered to provide significantly more, let alone the £2.5 million for which Kodak is apparently asking, the claim will be stifled.
20. It is necessary for me to consider whether the witness statements are accurate. In my judgment I should proceed on the basis that they are. At least, if there are inaccuracies (and there could be a few inadvertent ones), they will not make an appreciable difference. I take it for granted that the chartered accountants, Mr Jacobson and Mr Cohen, conscientiously prepared their statements and the accounts and schedules which they also produced. Mr Samson, the director of the Jersey trust company, is also a chartered accountant and I see absolutely no reason to question the completeness and the accuracy of the information which he gives.
21. Mr Brim has given evidence about his bank accounts; about his former business, a company which went into insolvent liquidation; about two cars which he owns; and about property interests which he has or has had. He has described the underlying assets of the Jersey trust and its underlying companies. His evidence in the latter respect has been confirmed by Mr Samson. Mr Brim says that he has approached other people to ascertain whether they would be prepared to support him in providing security for Kodak's costs. They have declined. I would add it is not at all surprising in the circumstances that they have declined.
22. A question which might be asked is whether Mr Brim could have a secret cash hoard secreted away somewhere to which he could have access to provide money for security for costs. In the nature of things I cannot say that that is impossible, but I think that it is most unlikely. There is no doubt that Mr and Mrs Brim, after the termination of the joint venture, have moved into a smaller house. They say that that was because of the deterioration in their financial situation, which they blame on Kodak's withdrawal from the joint venture. It is hard to imagine that they would have moved house in that way if there was a secret cash hoard available. In any case, and more fundamentally, there is no evidence of the existence of a cash hoard. Mr Brim has given evidence that he has disclosed everything. The impression which his witness statements make on me is that he has made every effort to give full particulars, backed by supporting documents wherever they are available, of his entire financial affairs. I see absolutely no reason why I should assume that he might have lied outrageously and that in truth he might have large secret funds accessible to him.
23. It follows that I propose to deal with this application on the basis of the evidence which I have, and not to take account of conjectures that there may exist other facts and assets of which I know nothing. That being so, there is no conceivable basis on which I could order security for costs of £2.5 million or anything like it.
24. However, I do need to consider the assets which are disclosed by the evidence and to determine whether I should order a greater amount of security than has hitherto been offered, though it would be an amount

far short of £2.5 million. I propose to do that mostly by reference to a list of assets set out in paragraph 8 of the supplemental skeleton argument of Miss Dohmann and Mr Anderson. The numbered items which follow correspond to the numbered subparagraphs in paragraph 8 of the skeleton, followed by the description of the items which is given there. However, I will take item 8.6 first, since it is the source of the security which has been offered.

25. Item 8.6: "Unencumbered value of 25 Richbourne Court". 25 Richbourne Court is the flat where Mr and Mrs Brim live. It is owned by a Guernsey company called 25 Richbourne Ltd. The company is owned by the Jersey settlement, and it is therefore a sister company of BKH. The flat is mortgaged to a bank. Mr and Mrs Brim pay a rent which enables the Guernsey company to pay the mortgage interest and the service charge. Mr Brim's witness statement says that the present value of the property, free from the mortgage, is around £1,325,000 and that the mortgage is £1,085,000. On that basis the equity in the flat is worth around £240,000. That equity value is what Miss Dohmann and Mr Anderson mean by the "unencumbered value" of the flat. Mr Samson, the director of the Jersey trustee who has given evidence, has offered on behalf of the trustee and of the directors of 25 Richbourne Ltd to charge the property, subject to the existing mortgage, to Kodak by way of security for Kodak's costs of this action.
26. I take this opportunity of mentioning another item, although it is not 25 Richbourne Court. Another Guernsey company owned by the settlement is called Xerton Ltd. It has some sort of contingent entitlement to receive 50 per cent of a sum of money held by a company called Crawford Building Ltd. Mr Brim explains that there are reasons why this may never amount to anything, but he and Mr Samson confirm that Xerton Ltd will charge its contingent entitlement against Crawford Building Ltd, for what it is worth, to Kodak by way of further security for Kodak's costs.
27. Item 8.1: "the unencumbered value of 56 Acacia Road". 56 Acacia Road is a house in St John's Wood where Mr and Mrs Brim used to live with their two sons. In the light of their worsened financial situation after the joint venture was terminated and after Mr Brim's United Kingdom company, Laser Bureau Ltd, became insolvent, they let the house to an outside tenant and moved to live at Richbourne Court. The sons moved into small flats of their own. Mr and Mrs Brim thought about selling 56 Acacia Road but decided to keep it. The house is mortgaged to a bank for over £1.7 million and it is also subject to a second charge in the amount of £350,000 in favour of BKH's solicitors, Morgan Lewis Bockius. That second charge is to provide security to Morgan Lewis Bockius for liabilities for disbursements in the present case. The property free from mortgages and charges has been valued in December 2003 at £2.4 million, so subject to the mortgage and to Morgan Lewis Bockius' charge it could have a value of approaching £350,000.
28. The circumstances in which a second charge over 56 Acacia Road was given to Morgan Lewis Bockius are important and in outline were as follows. Morgan Lewis Bockius were prepared to act for BKH in this case on a funding arrangement as respects their own charges, but they required security to cover themselves for their disbursements. An amount of cash had been paid to them on account but they required more. A second charge over the house was acceptable to them but it required the consent of both Mr Brim and Mrs Brim. The house was owned by Mr and Mrs Brim jointly. Mr Brim was willing to grant the second charge but in the first instance Mrs Brim was not. She was so concerned about the risk of her own financial position being wiped out by the present litigation that she took independent advice. This led to a negotiation between her and her husband, which each of them confirms to have been a genuine negotiation. The negotiation ended with the following agreement:
 - (1) Mrs Brim would concur in 56 Acacia Road being the subject of a second charge in favour of Morgan Lewis Bockius for £350,000 of disbursements.
 - (2) Mr Brim would pay to Mrs Brim £50,000 (which became £45,000).
 - (3) The entire equity in the house, subject to the mortgage to the bank and the second charge in favour of Morgan Lewis Bockius, would belong beneficially Mrs Brim. The legal title remains in the joint names of Mr and Mrs Brim, but they both accept, and indeed affirm, that the beneficial ownership lies entirely with Mrs Brim.

29. Mrs Brim is not willing to concur in her equitable interest being charged to Kodak by way of security for Kodak's costs. The issue for me is whether I should put pressure on her to grant a charge nevertheless. I could do that by ordering BKH to provide security in an amount or value which I know that it could not meet itself with the assistance which has already been offered by associated companies within its own group, but which could be met if Mrs Brim would give a charge over the equitable interest in 56 Acacia Road. In my judgment it would not be right for me to put pressure on her in that way. Mr Brim is certainly a backer of BKH's claim against Kodak; indeed it seems clear to me that he is the prime mover in the claim. But Mrs Brim is not a backer. She was reluctant for the second charge to Morgan Lewis Bockius to go ahead and she only agreed to it going ahead on the basis which I have described. It would be unreasonable for me to expect her to support the present action by BKH to a greater extent than she has reluctantly done already.
30. Item 8.2: "Mr Brim's bank accounts: £41,206". The bank accounts are joint accounts of Mr and Mrs Brim so that only half of the balances belongs beneficially to Mr Brim. In any case, he is not currently earning an income: understandably so, as it seems to me, because if BKH is going to persevere with its claim against Kodak, Mr Brim's assistance and guidance is constantly needed. Therefore the expenditure of Mr and Mrs Brim exceeds their income, which is in essence the excess of rent from 56 Acacia Road over mortgage interest referable to that property. Mr and Mrs Brim are running through their financial resources, and need to retain the modest amount which they have simply in order to meet ordinary living expenses. I do not think that it would be fair or reasonable for me to regard the amounts in their bank accounts as available to be paid into court by way of security for Kodak's costs. I am not willing to make an order which would have the effect of preventing them from drawing on their accounts. It would be different if they had millions of pounds in the bank, or even hundreds of thousands of pounds in the bank, but they have not.
31. Item 8.3: "Mr Brim's two motor vehicles". Mr Brim owns a Smart car worth about £6,000 and a four-year-old Lotus worth £15,000-£20,000. I add that Mrs Brim owns an old BMW and a 2003 Mazda. It seems rather petty, given the vast figures involved, but it is I suppose a fair point for Kodak to make that Mr and Mrs Brim do not need four cars and could raise a modest sum to put up by way of security for costs by selling one or two of them. Having regard to this minor point, I will direct security of £15,000 to be provided in cash. It is up to BKH to decide how to raise it, but my thinking is that it can be raised by one or two cars being sold by Mr Brim.
32. Item 8.4: "Monies given to Mrs Brim in the relevant period -- £45,000". This is a reference to the £45,000 which, as I explained earlier, Mr Brim paid to Mrs Brim for her agreement to 56 Acacia Road being made the subject of the second charge to Morgan Lewis Bockius. The word "given" is wrong: the payment was not a gift, it was made pursuant to a bargain. It is Mrs Brim's money, not Mr Brim's. For the same reasons as those which led me to regard the value of Mrs Brim's equitable interest in 56 Acacia Road as not being available to provide security for Kodak's costs, I regard this sum of £45,000 as not being available to provide security for Kodak's costs.
33. Item 8.5: "Mr Brim's pension fund: £188,547". In my judgment this is not available at all. Mr Brim is not of pensionable age, and, even if he was, he would not be entitled to receive the capital value of his pension fund. Nor could he now raise a loan on the security of his pension fund: Pensions Act 1995, section 19(1). No value should be placed on the pension fund in considering what amount of security for costs could reasonably be ordered.
34. Item 8.6 was the unencumbered value of 25 Richbourne Court. I have dealt with it already. A charge is offered over it.
35. Item 8.7: "Monies held by C's [BKH's] solicitors (at least): £130,000". At an early stage in this litigation £200,000 was paid to Morgan Lewis Bockius on account of disbursements etc. Some £130,000 of it remains. There is now a funding arrangement for the firms's own charges and the firm has further cover in the form of the second charge over 56 Acacia Road for £350,000 for the heavy disbursements which a case of this magnitude is likely to entail. Mr Asserson of Morgan Lewis Bockius has stated:

"Were we not to retain this money on account and the security, we would not be able to

continue to act."

I accept that evidence, and in the circumstances it would be entirely wrong for me to regard the £130,000 as available to be paid into court by way of security for Kodak's costs.

36. That completes my examination of the items listed in the supplemental skeleton of Miss Dohmann and Mr Anderson. The evidence has explored many other matters. Since no arguments are now based on other matters I do not in general need to deal with them. However, there are two points which I will mention briefly. First, Mr Brim has attempted to make some money by buying and selling two apartments in Florida. The connection came via his nephew, Mr Moor, who is a real estate developer in Florida. However, the investments have not been profitable and there are no assets in Florida which can be regarded as any sort of backing for a security order.
37. Second, suggestions were made to me that I should regard the value of flats and cars owned by Mr and Mrs Brim's two sons as available to provide security. Mr Brim did make some gifts to the sons towards payment for the flats and the cars. However, the flats and the cars belong to the sons, not to Mr Brim. The sons are not involved in the case and it would be unreasonable for me to pressurise them into making their assets available as security for Kodak's costs, as I could do by ordering BKH to provide security at a level which could only be complied with if the sons charged their flats and sold their cars. I am not prepared to do that. I add in this connection that if Kodak takes objection to Mr Brim having helped his sons financially to acquire their flats and their cars, there may be a remedy available in provisions of the Insolvency Act 1986. I do not, however, consider that an equivalent effect can be obtained via an order for security for costs.

Conclusions

38. The overall result is that, except to a very small extent, this application for security for costs fails. I am assuming that 25 Richbourne Ltd will grant a charge to Kodak over the equity of redemption in 25 Richbourne Court and that Xerton Ltd will grant a charge over its contingent entitlement to receive a sum of money from Crawford Building Ltd. I will also direct BKH to pay into court £15,000 by way of security.
39. I will be pleased to discuss the form of an order with counsel. I would prefer an order which gives the impression that the application has failed rather than succeeded. I have in mind something along the lines of an order which (a) defines three conditions, being the granting of the two charges and the payment of £15,000; (b) states that upon the fulfillment of the conditions the application is dismissed; and (c) states that if the conditions are not fulfilled, BKH's claim against Kodak will be struck out.