Neutral Citation Number: [2007] EWHC 171 (QB)

Case No: HQ06X03638

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2007

Before :

THE HONORABLE MR JUSTICE LANGLEY

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Between :

(1) BENFIELD HOLDINGS LIMITED **(2) BENFIELD GROUP LIMITED** **(3) BENFIELD LIMITED**	**Claimants**
- and -	
(1) ELLIOT RICHARDSON **(2) AON LIMITED** **(3) AON CORPORATION**	**Defendants**

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Mr G. Mansfield (instructed by **LeBoeuf Lamb**) for the **Claimants**
Mr T. Lord (instructed by **Simons & Simmons**) for the **Defendants**

Hearing date: 23rd January 2007

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Judgment

The Hon. Mr Justice Langley :

The order sought

1. The Second and Third Defendants ("AON") sought, at a without notice hearing on 16 January 2007, before Wyn Williams J, an interim order restraining the second-named Claimant ("Benfield") from deposing certain witnesses for the purposes of proceedings brought by another company in the Benfield Group against other Aon Group companies in the United States District Court for the Southern District of New York pending the trial in this jurisdiction of liability issues in these proceedings. That trial is estimated to last 10 days and fixed to commence on 5 March this year and so some 7 weeks after the date of the hearing before Wyn Williams J. The order made entitled Benfield to apply to set it aside. Benfield did so and the application came before me on 23 January when both parties were represented by solicitors and counsel. At the end of the hearing, I said I had reached the conclusion that Benfield's application to set aside the order of Wyn Williams J should be dismissed with the consequence that the injunction would remain in force in its then form until further order. The application raised what I think are important issues and I said I would put my reasons for the decision in writing. They are set out in what follows.

The Dispute

2. The Benfield Group and the Aon Group are major and competing insurance and reinsurance groups each operating on a global basis. In the autumn of 2006, a number of members of Benfield's specialist facultative reinsurance group ("the Fac group") resigned from Benfield in order to work for Aon. The head of the Fac group was Mr Richardson (the first defendant). Benfield alleges that there was a conspiracy by which Aon and Richardson orchestrated and co-ordinated the poaching of the Fac group. Mr Richardson was employed by the first-named Claimant and was based in and worked out of London.

The English Proceedings

3. These proceedings were begun by the first Claimant on 29 November 2006. Benfield and the third Claimant were added on 20 December. Benfield is incorporated in Bermuda. It is the parent company of the Benfield Group. Aon Corporation has its headquarters and principal place of business in Chicago, Illinois. It is the parent company of the Aon Group. The other claimant and defendant companies are English companies. The claimants allege breach of contract, fiduciary duty and confidence against Mr Richardson and that he induced other senior Benfield employees to breach their contracts and fiduciary duties. Inducement of breach of contract and breach of a non-solicitation agreement are alleged against Aon and conspiracy to injure and wrongful interference with business are alleged against Aon and Mr Richardson. Damages and injunctive relief are claimed. The claims concern inducement of employees and clients in Europe, the USA, Australia, New Zealand and South Africa as well as the UK.

4. Aon's defence was served on 15 January 2007. Essentially it alleges that the movement of the Fac group was at their own initiative and was part of a normal hiring process by Aon.

5. On 20 December 2006, a Consent Order was made whereby the claim was certified to be fit for a speedy trial of liability issues to be heard as soon as possible on or after 5 March and directions were given to ensure such a trial would be ready and effective. Those directions included standard disclosure of documents to be made by 31 January and witness statements to be exchanged by 14 February. Thus, and by agreement between them, all documentary and witness evidence on which any party relies in the liability issues are and will be fully available shortly.

6. The Consent Order also recorded undertakings given by Mr Richardson until trial or further order, including an undertaking not to be engaged in any business other than the business of Benfield, and undertakings by Aon, including an undertaking not directly or indirectly to solicit Benfield employees to breach their contractual or fiduciary obligations to Benfield and not to disclose any trade secrets of Benfield or Benfield Group companies.

The New York proceedings

7. The New York proceedings were issued on 20 October 2006, a month or so before the English proceedings. The Plaintiff is a Benfield company incorporated in Delaware and with its principal place of business in Minneapolis, Minnesota. The defendants

are two employees of the Fac group resident in New York (Mr Talbott and Mr Garner), Mr Richardson, and two Aon subsidiaries within the court's jurisdiction.

8. The basis of the New York proceedings is the same dispute as is the basis of the English proceedings. Claims are made against Mr Talbott (former head of the Fac Group in the USA) and Mr Garner (a broker in the Fac Group) for breach of fiduciary duty and contract and against Mr Richardson for breach of fiduciary duty. Claims for "unfair competition" and "misappropriation of trade secrets" are made against all the defendants.

Overlap

9. Mr Lord, for Aon, submitted that it was apparent that "while the US proceedings overlap with the English proceedings, they are much narrower in scope and relate only to the US aspects of the conspiracy alleged in the English proceedings (and which is alleged to have been orchestrated in England)". I agree. The Particulars of Claim (paragraphs 45 and 46) in these proceedings allege that Richardson "instructed and encouraged Talbott" to induce members of the Fac Group in the USA to leave Benfield and join Aon and that Talbott induced and encouraged them to do so. The principal movers in the conspiracy are alleged to be Mr Richardson and Derek Mahoney, an employee of Aon Limited in London. The substantive trial of liability issues will take place here on 5 March. It is difficult to imagine why Benfield should need to pursue such issues in New York, should they succeed in the English proceedings, and should they lose in England, pursuit of the New York proceedings on those issues is likely to be problematic. Be that as it may, there is no room to dispute that, despite the timing of their commencement, the English proceedings are the lead action. The Consent Order itself demonstrates as much. There is no trial date in New York and no one has sought one. The evidence is that it is highly unlikely that any trial would take place before at least some months after the trial here.

Depositions in New York

10. At the time the New York proceedings were commenced, Benfield also applied for expedited discovery. On 1 November 2006, District Judge Deborah A. Batts granted the application against all the Defendants with the proviso that Mr Richardson be discovered as a non-party as jurisdiction had not then been established in his case. Mr Garner was deposed on 28 November. Mr Talbott was deposed on 30 November. On 6 December, William Kasbeer, CEO of one of the Aon Defendant companies was deposed, and on 12 January 2007 another Aon executive, Mr O'Halleran was also deposed.

11. On 12 December, Benfield requested the New York court to depose Mr Mahoney and Toby Sisson. Mr Sisson is the HR Manager, Global Specialisms and Reinsurance of Aon Limited, based in and working out of the London office. The request to depose them was founded on the claim that they were "managing agents" of the American Defendant Aon companies. The request was refused by Magistrate Judge Ellis on 22 December without prejudice to the submission of further evidence by Benfield on the agent issue.

12. On 21 December, Mr Richardson applied in these proceedings for a stay of the New York proceedings or an order preventing his deposition. This application was due to

be heard on 4 January 2007 but, on 3 January, on Benfield's application, District Judge Batts granted a temporary injunction restraining Mr Richardson from pursuing his application to this court. As a result it could not be and was not pursued. On 9 January this order and the deposition of Mr Richardson on 17 January were confirmed by District Judge Batts. It was also ordered that the deposition should be temporarily sealed pending the exchange of witness statements in these proceedings. At the time of the hearing in this court the precise timing of Mr Richardson's deposition was not known. The 17 January date was known not to be effective.

13. There are two other Aon executives whom Aon is concerned to exclude from deposition in the New York proceedings. They are Michael Reynolds, the Chief Financial Officer of Aon Limited, and Stuart Fox, the Head of Human Resources at Aon Limited. Both Mr Reynolds and Mr Fox are based in England and work out of the London office. Benfield has said it wishes "to preserve its right" to depose Mr Reynolds and Mr Fox.

14. In the New York court, it has been Benfield's submission that the depositions were required to support an application for a preliminary injunction to be sought there and required as a matter of urgency. It has not been suggested that they were required for the collateral purposes of this litigation and it may be that the New York courts would not have been impressed if that had been the case.

15. Aon, however, understandably, point to the facts that at the time of the hearing in this court no application had been made to the New York court for injunctive relief, the undertakings given by Aon Corporation on 20 December in the Consent Order should provide sufficient protection for any legitimate concerns of Benfield, and, if they do not, Benfield had not even sought further undertakings from any Aon Group company or executive pending the trial here; nor did Benfield make such a submission at the present hearing. It is Aon's submission that this serves to demonstrate that Benfield's real purpose is to obtain evidential advantages in these proceedings which would not be available to them through the procedures of this court, and to cause disruption to the necessarily urgent preparations of Aon for the trial on 5 March. Whilst Mr Mansfield, for Benfield, asserted that it remained Benfield's intention to move for a preliminary injunction in New York he could offer no satisfactory explanation for why that had not already been done nor why discovery or depositions were needed to enable it to be done, nor indeed as to against whom or for what such an injunction would be sought.

The Four Witnesses

16. The four persons who are the subject of the present injunction, Mr Mahoney, Mr Sissons, Mr Fox and Mr Reynolds, are all Aon executives employed and working out of London. Aon's solicitor has stated in respect of Mr Mahoney and Mr Sissons that it is "practically certain" that each will be called to give evidence at the trial in this court and each will give a witness statement to be exchanged with Benfield's statements on 14 February. In the cases of Mr Fox and Mr Reynolds it is said they are "practically assured" to be produced as witnesses and so will also have to give witness statements. All four have confirmed their availability for the trial and their willingness to give evidence at it.

The Law

17. There is no significant issue between the parties as to the law to be applied to an application of this sort. The perhaps unusual feature is that the application does not seek to prevent Benfield from pursuing such depositions in the New York proceedings as the courts there might consider to be appropriate except pending the trial which both parties have sought in this country and which is to commence on 5 March. Most anti-suit injunctions have as their objective the total restraint of proceedings in one jurisdiction in favour of another. But there are decisions of English courts on cases analogous to the present to some of which I will refer briefly after addressing the basis for the jurisdiction more generally.

18. The basis for the jurisdiction, if, as here, it cannot be found in contract, is "unconscionable conduct", or the threat of it, on the part of the party sought to be restrained. Such unconscionable conduct may be found where the pursuit of the overseas proceedings is vexatious or oppressive or interferes with the due process of this court: South Carolina Insurance Co v A.M.Z.P. [1987] AC 24 at page 41D per Lord Brandon (a decision which involved an unsuccessful attempt to restrain the taking of depositions in the USA from American citizens under s.1782 of Title 28 of the United States Code); Glencore International v Exeter Shipping [2002] 2 All ER (Comm) 1 at para 42.

19. Plainly, the jurisdiction has to be exercised with caution. Although any injunction is directed only against the party restrained, it cannot be ignored that it may interfere with the due processes of the overseas court and particularly so where, as here, it is the procedure of that court which may be affected. No doubt the New York court had just such considerations in mind when Mr Richardson was restrained from pursuing his application in these courts. There are many warnings in the authorities against a prescriptive approach to these questions. Each case provides its own features and factors to be taken into consideration in deciding whether or not conduct is unconscionable such as to justify a restraint.

20. In the South Carolina Case the emphasis was upon the right of a party to obtain "the evidence he needs to support his case" and to obtain documentary evidence by lawful means available in (in that case) South Carolina. The decision ante-dated the changes made in English procedure when the CPR replaced the RSC.

21. In Omega Group Holdings Ltd v Kozeny [2002] CLC 132 Peter Gross QC, sitting as a Deputy High Court Judge, held that it was unconscionable for a defendant party to pursue orders under s. 1782 of Title 28 of the United States Code in respect of employees and former employees of and investors in the claimant companies. He did so because (paragraph 23):

> "(1) If the relevant witnesses (i) give English witness statements, (ii) are then deposed in the US, (iii) thereafter attend to be cross-examined in the English trial, they will have been subjected to unwarranted double cross-examination and the trial will suffer from unnecessary duplication. I am not persuaded to reach a contrary view by the fact that the witnesses are or may be familiar with US deposition procedures in the context of US litigation. In any event, I accept Mr

> Mortimore's submission in this regard that, here, oppression must be judged by English standards.
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> (2) Conversely, accepting as I do that there is a real, if unquantifiable, risk that a witness once deposed in the US may be discouraged from attending the trial in England in order to be cross-examined a second time, the s. 1782 applications pose a risk of interference with the trial itself. It would be most unsatisfactory for the trial court to be left with depositions from witnesses in such circumstances and to be deprived of their live testimony at the trial itself.
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> (3) For the reasons already discussed, I do not think that South Carolina precludes the conclusion which I have reached. In this case and in respect of witnesses who are intended to come and give oral evidence at trial here, depositions are different and unconscionable…. I do not shrink from saying that the use of s. 1782 to depose the selfsame witnesses who will give witness statements and attend to give oral evidence here, has, in general little to commend it.
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> …."

22. In this case, of course, the witnesses in question are English and their evidence is, at least on the face of it, sought for use in New York not in aid of these proceedings so that S. 1782 has no application. The risks of unwarranted double cross-examination and interference with the trial are of course particularly acute where, as here, the depositions are sought from those who might be expected to be and are witnesses for the opposing not deposing party.

The material factors

23. In my judgment the material factors to be considered on this application are that:

    i) These proceedings are the lead proceedings in which the liability disputes between the parties can expect to be resolved. The parties recognise that England is the natural forum for the resolution of those disputes.

    ii) The trial is to take place on an expedited basis in the near future. Whilst "both" parties are extensively represented there is serious pressure of work for them to be ready for that trial which should not be disrupted save for compelling reasons.

    iii) There is no reason at all to doubt that the four witnesses in question will provide witness statements and give oral evidence at the trial. They are compellable.

    iv) English procedure provides for documentary disclosure which it has not been suggested is any less extensive than New York procedure.

v) English procedure provides for witness statements (verified by a statement of truth) which must contain "the evidence which that person would be allowed to give orally" CPR 32.4. If the evidence is to be relied upon it must (subject to very limited exceptions) be in the statement. Thus, very shortly, Benfield will know what oral evidence is to be given by the four witnesses at the trial.

vi) Like any other litigant, Benfield will then be able to prepare what cross-examination is considered appropriate, but in a context in which, as English procedure requires, they have also given documentary disclosure and have also properly performed their own obligation to serve by exchange the witness statements upon which they intend to rely.

vii) I think Aon has made a compelling case that Benfield do not require the depositions for any immediate or real purpose of the New York proceedings. Moreover, they will have disclosure and witness statements in these proceedings for which, if there is substance in any need to use them in New York, they can apply to this court for an order permitting them to do so.

viii) It follows that I see no prejudice to Benfield if they are restrained in the limited manner sought by Aon.

ix) There is a real forensic unfairness both to the witness and to Aon if Benfield is in effect permitted to have a pre-trial cross-examination of witnesses whom Benfield can hardly expect to be helpful to their real cause, when that would not be permitted by English procedures and there is and can be no reciprocity.

Conclusion

24. In my judgment the factors to which I have referred all point in the same direction. No good reason has been shown for seeking depositions, certainly not before the March trial, from the four witnesses. To do so would be disruptive of these proceedings and procedurally and forensically unfair and oppressive to Aon. I do not think that can be cured by any provision for "sealing" the depositions or limiting their use to use in the New York proceedings, such as Mr Mansfield put forward and the New York courts have sought to employ in the case of Mr Richardson. The unfairness lies in the one-sided disruption to trial preparation and double cross-examination, not in the use or timing of the use to be made of it which in any event may prove unrealistic. Nor, as stated, is there any urgency. The very fact that Benfield put forward the proposal to delay depositions until after service of witness statements (letter of 18 January) betrays both the lack of urgency and that use of depositions in this jurisdiction is a, if not the real, target.

25. It is, as I would hope the New York courts would recognise, the protection of our procedures which, like theirs, are designed to secure fairness and equality between the parties, upon which the court is acting. It is important to note that there are currently no orders of the New York courts which require depositions of any of the four witnesses. The injunction is aimed at Benfield's expressed intention to seek such orders.

26. It was for these reasons that I ordered that the injunction should not be set aside but should continue in force together with the cross-undertakings given by Aon. I will

hear the parties on any ancillary matters, which cannot be agreed, when this judgment is handed down. It was supplied to the parties in draft on 6th February 2007.