[1988–90 Gib LR 109]

THYSSEN-VERKEHR GMBH v. ODIEL SHIPPING COMPANY LIMITED and RHEIN-MASS-UND SEESCHIFFHRTAKONTOR GMBH

THYSSEN STAHLUNION GMBH v. ODIEL SHIPPING COMPANY LIMITED and RHEIN-MASS-UND SEESCHIFFHRTAKONTOR GMBH

SUPREME COURT (Alcantara, A.J.): October 20th, 1988

Civil Procedure—affidavits—uncontested actions—court to be satisfied as to identity of witness and gist of evidence before allowing adducing of evidence by affidavit in uncontested action—when not clear that action to be uncontested, normal procedure to be followed

Legal Profession—retainer—solicitor ceasing to represent client—solicitor bears burden of showing that he has ceased to represent client—court to consider consequences (e.g. client having no address for service within jurisdiction) when deciding whether sufficient evidence adduced

The first defendant's solicitors sought an order declaring that they had ceased to act for the first defendant; the plaintiff sought an order that it was at liberty prove the facts in its application by affidavit of evidence, the defendants being unrepresented.

The first defendant's solicitors, Hassans, had acted for the first defendant in the present action since August 1985; a number of interlocutory applications had been made, including a consolidation and an appeal to the Court of Appeal from an interlocutory order. On June 9th, 1988, the first defendant terminated Hassans' instructions. Neither the first nor the second defendant was represented in the present application.

The defendant's solicitors submitted that the Rules of the Supreme Court, O.67, r.6 provided that if the court were satisfied that the retainer had ceased, its discretion was very limited and it had to make the requested order.

The plaintiff submitted that (a) although the defendants so far had been represented, there was good reason to believe that they would not be represented at the trial, a proposition supported by the fact that solicitors for the first and second defendants did not appear in the present application; (b) requiring witnesses to be brought from outside the jurisdiction to

prove an uncontested claim would be a waste of money; and (c) the court could make a "conditional blanket order" that all evidence be given by affidavit unless the defendants appeared at the trial.

Held, refusing to make either order:

(1) The defendant's solicitors bore the burden of showing that they had ceased to act for their client. The possible consequences that could ensue from one party to the litigation not being represented (*e.g.* an overseas litigant having no address for service within the jurisdiction) were factors that the court could bear in mind when deciding whether the evidence adduced by a solicitor was sufficient to reach the conclusion that he had in fact ceased to act; here, not enough evidence had been offered, and the order sought would therefore not be made (paras. 9–10).

(2) It was not clear that the action would be uncontested, although the indications pointed towards that conclusion. Before the court made an order allowing the adducing of evidence by affidavit, it should be satisfied as to the identity of a witness and the gist of his evidence. Here, in all the circumstances, the proper course was for the plaintiffs to follow the normal procedure of giving information to the court and to the defendants; the order sought would not be made (para. 13; paras. 17–19).

Case cited:

(1) *Creehouse Ltd.*, *In re*, [1982] 1 W.L.R. 710; [1982] 2 All E.R. 422; (1982), 126 Sol. Jo. 294, *dicta* of Vinelott, J. applied.

P.R. Caruana for the plaintiffs;
D.J.V. Dumas for the defendants.

1 **ALCANTARA, A.J.:** On October 10th, 1988, I was first confronted with three summonses in relation to the above action. Two were similar *ex parte* applications by the solicitors of the first and second defendants. Insofar as the application of the solicitors for the second defendants, Messrs. Levy & Co., is concerned, the matter has now been adjourned *sine die*, and I am not at present concerned with it.

2 The summons of the solicitors for the first defendants, Messrs. J.A. Hassan & Partners, seeks an order "declaring that the said Messrs. J.A. Hassan & Partners have ceased to be the solicitors acting for the first defendant in the above action and that the costs of this application be taxed and paid by the first defendant."

3 The third summons was issued on behalf of the plaintiffs and was "an application of the plaintiffs, the defendants being unrepresented, for an order that the plaintiffs be at liberty to prove the facts in this action by affidavit of evidence."

4 It is convenient for me to give my ruling on these two different matters at the same time, as the history of the action is common to both. I heard

the applications separately, although counsel for the opposing side was present in chambers.

5 The above action was commenced in August 1985. There have been a number of interlocutory applications, including a consolidation and an appeal to the Court of Appeal from an interlocutory order. On May 16th, 1988 there was an order for directions. On August 17th, 1988, a notice was received in the Registry seeking to have the case set down for hearing.

6 The application of J.A. Hassan & Partners is supported by an affidavit of service dated October 11th, 1988, and by a very short affidavit of Mr. David Dumas dated June 30th, 1988, which states as follows:

> "1. I am the litigation partner in the firm of Messrs. J.A. Hassan & Partners and the acting solicitor for the first defendant in this action and have been since August 1985.
>
> 2. On June 9th, 1988, I was informed by those instructing me and on behalf of the first defendants that my instructions in this action were to be withdrawn as of that date.
>
> 3. I respectfully request, therefore, that an order be made declaring that I and the said firm of Messrs. J.A. Hassan & Partners have ceased to be the solicitors for the first defendants."

7 The authority enabling this court to make the order sought is to be found in the Rules of the Supreme Court, O.67, r.6, the relevant part of which reads:

> "(1) Where a solicitor who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with rule 1, or notice of intention to act in person in accordance with rule 4, the solicitor may apply to the Court for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the cause or matter, and the Court or the Court of Appeal, as the case may be, may make an order accordingly, but unless and until the solicitor—
>
> (*a*) serves on every party to the cause or matter (not being a party in default as to acknowledgement of service) a copy of the order, and
>
> (*b*) procures the order to be entered in the district registry or other appropriate office mentioned in rule 1(2) and
>
> (*c*) leaves at that office a copy of the order and a certificate signed by him that the order has been duly served as aforesaid,
>
> he shall, subject to the foregoing provisions of this Order, be

considered the solicitor of the party till the final conclusion of the cause or matter, whether in the High Court or Court of Appeal.

(2) An application for an order under this rule must be made by summons or, in the case of an application to the Court of Appeal, by motion, and the summons or notice of motion must, unless the Court or Court of Appeal, as the case may be, otherwise directs, be served on the party for whom the solicitor acted.

The application must be supported by an affidavit stating the grounds of the application."

The notes to O.67, r.6 do not give any indication as to what the affidavit in support should contain. The economy of words and information in the present affidavit is extreme, not even giving the names of those instructing the applicant. A good precedent is to be found in Chitty & Jacob's *Queen's Bench Forms*, 20th ed., at 742 (1969).

8 Counsel has argued that if the court is satisfied that the retainer has ceased, then it must make the order; in other words, that the discretion of the court is a very limited one. Counsel was not able to produce any authority for this proposition, and at the hearing I was not completely satisfied that his contention was correct. The matter however was adjourned for decision and I have found a case which supports counsel's proposition: *In re Creehouse Ltd.* (1), of which the last sentence of the headnote to the case in *The All England Law Reports* ([1982] 2 All E.R. at 422–423) reads:

"Furthermore, the fact that an order for a declaration under r. 6(1) and the consequent removal of the solicitor's name from the record will make the conduct of the litigation more time-consuming and expensive for the other parties is not a ground for refusing to make an order under r. 6."

Vinelott, J. dealt with the matter thus ([1982] 2 All E.R. at 425):

"It is clear from evidence filed in support of this application that it would be difficult, expensive and time-consuming to serve orders or notices of application in Switzerland, and that while orders for substituted service can be made it would be expensive and time-consuming to obtain such an order every time an order is made or notice of an application is given. But that is not, I think, a ground that can be relied on in support of an application to set aside the orders made under O.67, r.6. What the court is authorized to do by that rule is to declare that a solicitor who has ceased to be the solicitor acting for a party in a cause or matter has ceased so to act. If the solicitor applying can show, as in this case he undoubtedly can, that he has ceased so to act, the fact that the declaration and the consequent removal of the solicitor's name from the record will

make the conduct of the litigation more time-consuming and expensive for other parties is not, as I see it, a ground for refusing to make the declaration."

9 I think that the operative phrase in the above quotation is "if the solicitor applying . . . can show that he has ceased so to act." In other words, the solicitor has a burden of proof to show that he has ceased to act. This burden is not discharged by simply saying that he has ceased to act. This must be so considering the possible consequences that can ensue, such as one of the parties to the litigation having no address for service within the jurisdiction. The consequence is not a ground for refusing to make the declaration sought, but can be a factor to bear in mind in deciding whether the evidence in fact adduced is sufficient to reach the conclusion that the solicitor has in fact ceased to act. In other words, has the solicitor shown that he has in fact and genuinely ceased to act?

10 In the present application, on the evidence adduced, I am not satisfied that the solicitors have shown that they have ceased to act. I would be justified in dismissing the application. However, I think that it is right and proper to give them an opportunity to perfect their case. I commend to them the precedent in *Chitty & Jacob* and to the third paragraph in the judgment of Vinelott, J. in *In re Creehouse Ltd.* (1).

11 The present summons is therefore adjourned to a date to be fixed by the Registrar on application. I now turn to the summons on behalf of the plaintiffs. Although Mr. Dumas remained in chambers, this summons was uncontested, the defendants not making an appearance.

12 For the sake of lucidity, I will again set out the text of the summons: "[A]n application of the plaintiffs, the defendants not being represented, for an order that the plaintiffs be at liberty to prove the facts in this action by affidavit of evidence." The phrase "the defendants not being represented" does not refer to the present application but to the action. Mr. Caruana for the plaintiffs concedes that, so far, the defendants are represented, J.A. Hassan & Partners being the solicitors on the record for the first defendants and Levy & Co. being the solicitors on the record for the second defendants.

13 What he is saying is that he has good reasons to believe that the defendants will not be represented at the trial and do not intend to contest the claim. His assessment of the situation takes credence from the fact that the solicitors for the first and second defendants did not appear in the present application. Counsel argues that if the defendants are not going to contest the action it would be a waste of money to bring witnesses from outside the jurisdiction to prove the claim. Though the indications are that the action is not going to be contested, I have no evidence to show that this is going to be a certainty.

14 Counsel seeks to rely on the Rules of the Supreme Court, O.38, r.2, which reads:

> "(1) The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.
>
> (2) An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose."

15 As to the meaning of O.38, r.2, *Phipson on Evidence*, 12th ed., para. 1696, at 701 (1976) is not very helpful:

> "Under Order 38, r.2, the court may order that the affidavit of any witness be read at the trial if in the circumstances of the case it thinks it reasonable . . . Evidence has been allowed to be given by affidavit, where the parties were poor and the witnesses resided at a distance; so, with evidence as to foreign law."

16 *Halsbury's Laws of England*, 4th ed., para. 307, at 213 is no more helpful:

> "Facts to be proved at the trial of actions begun by writ are normally proved by the examination of witnesses orally and in open court. The court may, however, at or before the trial of such an action, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order."

The note to O.38, r.2 is more helpful. In para. 38/2/1 of *The Supreme Court Practice 1988*, at 592, it is stated that—

> "the order is usually made on the hearing of the summons for directions or on application by notice under it. The rule is of especial value where the witness is abroad, or the evidence will not be contested. A draft of the proposed affidavit should be submitted for the consideration of the other side before the application, unless it is clear what it will contain. It is not practicable to make such an order where the evidence will be strongly contested and its credibility depends on the Court's view of the witness . . ."

17 However, my good friend *Chitty & Jacob* is most helpful and illuminating. It is clear from the forms suggested therein that O.38, r.2 is not to be used for the purpose of trying cases on affidavits, but that the affidavits of certain witnesses may be allowed in certain circumstances. Before the court makes an order on affidavit evidence it should be

satisfied as to who the witness is going to be, and as to what the evidence or the gist of it is going to be. See Forms 518, 519 and 520.

18 What the plaintiffs are seeking in the present summons is a "blanket" order that the whole of the action be tried by affidavit evidence. Counsel for the plaintiffs suggested that I should give a conditional blanket order, in the sense that if the defendants appeared at the trial then they would have to produce their witnesses.

19 I am not satisfied that it would be proper for me under O.38, r.2 to make the order requested. I feel that the proper course is for the plaintiffs to follow the normal procedure of giving information to the court and to the other side. I do not feel disposed to make the order in the form sought.

Application dismissed.