

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KINGSLAND HOLDINGS INC.,)
)
)
Plaintiff,)
)
)
v.) Civil Action No. 14817
)
)
FULVIO BRACCO and BRACCO SpA)
f.k.a. BRACCO INDUSTRIA CHIMICA)
SpA, a company existing under)
the laws of Italy,)
)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: January 21, 1997
Date Decided: January 31, 1997

Grover C. Brown, Esquire, P. Clarkson Collins, Jr., Esquire, and Neal C. Belgam, Esquire, of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware, Attorneys for Plaintiff.

Josy W. Ingersoll, Esquire, Matthew P. Denn, Esquire, and Martin S. Lessner, Esquire, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; OF COUNSEL: Dennis J. Block, Esquire, and Irwin H. Warren, Esquire, of WEIL, GOTSHAL & MANGES, New York, New York, Attorneys for Garnishees.

CHANDLER, Vice Chancellor

Plaintiff Kingsland Holdings, Inc. (“Kingsland”) seeks to vacate the July 22, 1996, stay of proceedings I entered in favor of a Dutch action in which the plaintiff seeks similar relief against defendants Bracco SpA and Fulvio Bracco (collectively “Bracco”). Kingsland states that responsive pleadings have not yet been filed in the Dutch action and that the defendants may still raise jurisdictional defenses. Furthermore, Kingsland suggests that the delay in the Dutch proceeding is primarily due to the failure of Fulvio Bracco to enter an appearance.

In exchange for vacating the stay, Kingsland is willing to undertake any of the three following alternatives pending resolution of the action in Delaware. First, Kingsland offers to consent to a stay of the Dutch proceeding. Second, in the alternative, Kingsland proposes to dismiss the Dutch action if the defendants will agree not to alter the current ownership structure of Bracco Holdings B.V., a wholly-owned subsidiary of Bracco SpA and the company whose shares, upon request of Kingsland, have been attached by the District Court in Amsterdam to satisfy any potential judgment. Finally, if this Court is unwilling to accept either of the first two alternatives, Kingsland offers to dismiss the Dutch action without condition.

At issue now is whether Kingsland has demonstrated good cause for vacating the stay. The standard for vacating a stay is similar to the standard for granting

a stay. Both actions are discretionary and turn on the particular facts of the case.¹ I entered this stay because I found that “the Dutch Court’s exercise of jurisdiction and Kingsland’s ability to serve process on Bracco appears more firmly established and less subject to challenge in the Netherlands”² and because, in order for the Delaware proceeding to advance as far as the proceeding in the Netherlands, the parties must engage in further discovery to establish jurisdiction and only then determine if Bracco equitably owns the sequestered stock of the Bracco Delaware Group,³ which has been sequestered pursuant to 10 *Del. C.* § 366. These practical concerns are just as relevant to the pending motion as they were to my initial decision to grant the stay.

Kingsland’s motion addresses these concerns by arguing that the Dutch Court’s exercise of jurisdiction over Fulvio Bracco has not been as smooth as anticipated, largely due to Fulvio Bracco’s failure to appear. Bracco responds by noting that Bracco SpA has appeared in the Dutch action and that its attached assets, in combination with its other Dutch assets, are sufficient to satisfy any

¹*Issen & Settler v. GCS Enterprises, Inc.*, Del. Ch., C.A. No. 5452, Hartnett, V.C. (Dec. 28, 1983).

²*Kingsland Holdings, Inc. v. Bracco*, Del. Ch., C.A. No. 14817, Chandler, V.C. (July 22, 1996) at 14.

³*Id.* at 17.

judgment. The stay should not be lifted, according to Bracco, because failure to proceed is largely the fault of Kingsland who has unnecessarily involved Fulvio Bracco in this action, failed to provide proof of service upon Fulvio Bracco to the Dutch Court as expeditiously as possible, and failed to properly fill out and serve notice of the hearings upon Fulvio Bracco. Thus, Bracco contends that Kingsland has not shown that circumstances have changed sufficiently so that concerns of efficiency and other practical considerations now favor vacating the stay.

The type of claim, the reasons for delay, and the effect of Fulvio Bracco's failure to enter an appearance in the Dutch action are highly contested. To aid this Court in its understanding of Dutch law and the procedural history of this foreign action, Kingsland has submitted affidavits of its Dutch counsel, Mrs. Dr. L. Voetelink ("Voetelink"), and Bracco has submitted affidavits of Bracco SpA's Dutch counsel, Mr. Maarten J. Drop ("Drop"). These affidavits lay out the following history of the Dutch action.

Kingsland is the assignee of a judgment rendered against Bracco SpA and Fulvio Bracco by the High Court of Justice of Saint Vincent and the Grenadines. To initiate enforcement of the judgment in the Netherlands, Kingsland obtained an attachment against the shares of Bracco Holdings B.V., Bracco SpA's wholly-owned Dutch subsidiary, to the value of 15 million Swiss francs. In order to

maintain this attachment under Dutch law, Kingsland was required to initiate an action in the Dutch Court against the owner of the shares within sixty days. This it did. Although not necessary to protect the attachment, the action also sought to enforce the judgment against Fulvio Bracco. Hence, Kingsland served a writ on Bracco SpA and Fulvio Bracco.

An initial hearing was held on August 14, 1996. Drop entered an appearance for Bracco SpA, but not Fulvio Bracco. Appearance for Kingsland was made on behalf of Kingsland's counsel, Voetelink. Because Fulvio Bracco did not make an appearance, the presiding Judge postponed further action until papers indicating that he had been properly served could be presented to the Court. A reply from the Italian authorities indicating that Fulvio Bracco had been properly served with notice of the August 14 hearing was filed with the Dutch Court and, on September 11, the Judge ruled that notice had been properly served. In order to provide Fulvio Bracco with a second opportunity to appear, the Judge ordered that another hearing be scheduled for December 18 and that a default judgment would be entered against Fulvio Bracco, if he failed to appear. The December 18 hearing was postponed until March 12, 1997, because service of notice of the hearing was not provided to Fulvio Bracco.

1. Service of Notice upon Fulvio Bracco

According to the affidavits, Dutch law provides that, in circumstances like this, when a party fails to appear at a hearing, despite proof of proper notice, a second hearing is scheduled. At that time the party either makes an appearance or has a default judgment entered against him. Kingsland properly served notice to Fulvio Bracco of the August 14 hearing. Although confirmation of that service was apparently readily available, Kingsland did not provide such notice to the Dutch Court at the hearing. Thus, when Fulvio Bracco failed to appear, the Court had to postpone the hearing until such notice could be provided. Once such notice was provided at a second hearing on September 11, the Judge was able to rule that notice had been properly served and scheduled a third hearing for December 18, at which time Fulvio Bracco had the opportunity to appear or have a default judgment entered against him.

Notice of the December 18 hearing was also required but Fulvio Bracco failed to receive such notice. Voetelink's January 7 affidavit states that although an Italian translation was provided to the Dutch authorities for service upon Fulvio Bracco, the Italian authorities refused to serve such notice because they did not receive such a translation. Dutch authorities have indicated that the appropriate translation was provided.

In his affidavit of January 13, Drop claims that Voetelink's statements are incorrect. His translation of the information obtained from the Italian authorities indicates that service failed not because the Italian authorities overlooked the properly included translations, but because Kingsland's counsel failed to complete required model forms which would have notified Fulvio Bracco of the nature of the documents and of the time and place of his required appearance. Furthermore, Drop claims that if Kingsland had filled out these forms properly, the December 18 hearing could have proceeded against Bracco SpA. He notes also that Bracco SpA has appeared at every hearing, including the one scheduled for December 18.

Regardless of the reasons why the Italian authorities did not serve notice of the December 18 hearing on Fulvio Bracco, it is undisputed that he did not receive such notice and that Kingsland was therefore unable to provide such proof at the December 18 hearing. Apparently as a result, another hearing has been scheduled for March 12, 1997. Kingsland will again need to serve notice of this hearing on Fulvio Bracco and submit proof of such service at the March 12 hearing. If Fulvio Bracco fails to appear at that time, and if Kingsland is able to submit proof of service, a default judgment will be entered against Fulvio Bracco and the proceeding will be able to move forward against the other judgment debtor, Bracco SpA.

2. The Necessity of Proceeding Against Fulvio Bracco

Voetelink states that the Dutch action is in the form of a contract claim which Kingsland will attempt to prove with proof of the foreign judgment. In such an action, according to Voetelink, it is important to join both Bracco SpA and Fulvio Bracco especially in the light of the fact that Bracco SpA attempted to defend an earlier action by claiming, *inter alia*, that it should not be bound by Fulvio Bracco's unauthorized signature on the underlying obligations.

Drop contests the description of the claim provided by Voetelink. He states it is not a contract claim but an action to enforce the judgment. He argues that because no assets of Fulvio Bracco have been attached, it was not necessary to involve Fulvio Bracco in the Dutch proceedings and that any delay in the proceedings is attributable to Kingsland's desire to involve him. Furthermore, Drop contends that Fulvio Bracco's presence at this stage is unnecessary, as under the Netherlands Rules of Civil Procedure, the Court may, at the request of either party, call a witness to provide a statement at a later date. Kingsland responds to Drop's affidavit by stating that it does no more than establish that he disagrees with their counsel, who stands by her affidavits and notes that the disputed method of service was previously acceptable and successfully resulted in service on both defendants.

Nothing in Kingsland's motion persuades me that good cause yet exists for vacating the stay and going forward here. Since the stay was entered, Bracco SpA has appeared in the Dutch action and its Dutch counsel has stated that it is willing to proceed in the Dutch action and that it does not intend to raise any jurisdictional defenses. Proceedings in Delaware would still involve additional discovery even to reach the point where jurisdiction here could be established. Yet the sequestered stock of the Bracco Delaware Group assures Kingsland that it will have adequate assets to move against in the event the Dutch action fails or truly becomes a jurisdictional or procedural quagmire.

Kingsland has also not convinced me that they have not been primarily, if not completely, responsible for failing to serve notice of the December 18 hearing upon Fulvio Bracco and for failing to provide the Dutch Court with prompt proof of previous successful service at the August 14 hearing. Either action, both of which were the responsibility of Kingsland, would have allowed the proceedings to move forward. Proceedings have been delayed by the failure of Fulvio Bracco to make an appearance, but I do not find that, under the circumstances, this delay justifies vacating the stay in Delaware because I do not find that the delay is due to matters beyond Kingsland's control. I do not mean to imply that Kingsland should be foreclosed from or penalized by its election to proceed against Fulvio

Bracco. He and Bracco SpA are the judgment debtors of the decision rendered by the High Court of Saint Vincent and the Grenadines. Having elected to proceed against Fulvio Bracco, however, Kingsland cannot cite as reason for the delay and as support for vacating the stay, its own failure to properly provide proof of service of process to the Dutch Court as expeditiously as possible. Accordingly, at this time I find that the delay in the Dutch proceedings has not yet risen to the point where the stay should be vacated.

IT IS SO ORDERED.