

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

- - - - - X
:
TJGEM LLC, :
:
Appellant, :
:
v. : No. 14-7036
:
REPUBLIC OF GHANA, ET AL., :
:
Appellees. :
:
- - - - - X

Wednesday, May 6, 2015

Washington, D.C.

The above-entitled matter came on for oral argument
pursuant to notice.

BEFORE:

CIRCUIT JUDGES ROGERS, GRIFFITH, AND WILKINS

APPEARANCES:

ON BEHALF OF THE APPELLANT:

MICHAEL A. LASLEY, ESQ.

ON BEHALF OF THE APPELLEES:

JUAN C. BASOMBRIO, ESQ.

Deposition Services, Inc.

12321 Middlebrook Road, Suite 210

Germantown, MD 20874

Tel: (301) 881-3344 Fax: (301) 881-3338

info@DepositionServices.com www.DepositionServices.com

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Michael A. Lasley, Esq.
On Behalf of the Appellant

3; 19

Juan C. Basombrio, Esq.
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 14-7036, TJGEM LLC,
Appellant v. Republic of Ghana, et al. Mr. Lasley for the
Appellant; Mr. Basombrio for the Appellees.

JUDGE ROGERS: Good morning.

ORAL ARGUMENT OF MICHAEL A. LASLEY, ESQ.

ON BEHALF OF THE APPELLANT

MR. LASLEY: Good morning. Michael Lasley on
behalf of the Appellant. I think we start with the
situation that the Supreme Court in the landmark opinions of
Bell Atlantic and *Ashcroft* mandated the trial court must
look at the factual matters and reasonable inferences, and
cannot ignore or negate those if they support the
Plaintiff's possible claims of relief. The Congress enacted
the FSIA traditional commercial exception to the affirmative
defense of sovereign immunity, and specifically the
unambiguous language in examples of 1603(d) and (e) and the
clauses of 1605(a)(2) define and dictate what is meant by a
commercial acts, activities, and substantial contact with
the United States. The commercial --

JUDGE GRIFFITH: Are you alleging that there was a
direct effect of the Defendant's actions in the United
States? In your brief you say there were direct effects, I
didn't see any support for that. What is the direct effect?

MR. LASLEY: Well, if you look at the

1 circumstances of the RICO claim, which the Court, trial
2 court did not really consider, the *Southway* case decides the
3 circumstances of the interrelationship of RICO predicate
4 acts --

5 JUDGE GRIFFITH: What's -- no, let me -- what's
6 the direct effect of the commercial activity you're
7 alleging, the direct effect in the United States?

8 MR. LASLEY: In the United States, if the loan had
9 been granted, the applications for a loan it's in violation
10 not only the protocols and rules of the bank, but the
11 foreign practice, the foreign practice act, and the basis of
12 the loan as we allege is the, from the Appellees was the
13 conspiracy, RICO conspiracy and predicate act. Those --

14 JUDGE ROGERS: So, you're saying that the loan
15 would have been paid off with funds that were deposited
16 somewhere in the United States?

17 MR. LASLEY: The loan would have been granted in
18 the United States as to direct effect, but --

19 JUDGE ROGERS: I know, but what is the direct
20 effect? Are you arguing that it's the money that would have
21 been deposited?

22 MR. LASLEY: I'm arguing that the loan itself, of
23 U.S. --

24 JUDGE ROGERS: So, the loan itself, all right.
25 So, what we know from your pleadings is that, what, there

1 was a meeting at the Export-Import Bank, and a letter of
2 interest?

3 MR. LASLEY: That's part of, but not only the
4 misappropriation of the Appellant's work product and trade
5 secrets was all a part of the circumstances of direct
6 effect, and also --

7 JUDGE ROGERS: What do we know about the
8 memorandum of understanding?

9 MR. LASLEY: Well, the Appellees never presented
10 it. What we do know about it --

11 JUDGE ROGERS: What did you tell the District
12 Court about it?

13 MR. LASLEY: Well, we told the District Court in
14 our pleadings, we didn't have a hearing on the matter, but
15 in our pleadings we told the District Court that the
16 memorandum of understanding was the essence of the whole
17 case.

18 JUDGE ROGERS: What does it say?

19 MR. LASLEY: Well, they never presented, we never
20 had a copy of the memorandum of understanding. What it says
21 based on the actions of the Appellant officials, Ghana
22 officials when they went to the bank, they went to the bank
23 with the purpose of trying to get the bank to consider the
24 loan that the Appellant had filed a letter, got a letter of
25 interest on. What we know about the memorandum of

1 understanding, the very key point we know about the
2 memorandum of understanding is that \$10 million was in
3 addition to what the Appellant had filed and got the letter
4 of interest on. We also know that there were two Inspector
5 General investigations of the Bank Inspector General on the
6 question of what's that \$10 million about. We argue that
7 there was a reasonable, and to the trial court it was
8 reasonable to infer that since there was no letter of
9 interest, there's no interest at all of the Appellees until
10 2013, but in March of 2012 when they used and
11 misappropriated the Appellant's letter of interest and other
12 documents what we do know is that at that point the Bank
13 knew and we knew by inference that there was no explanation
14 for the \$10 million increase of the amount, the \$585 million
15 that we had initially got the letter of interest on. The
16 \$10 million was never explained, they never submitted
17 anything to the trial court to explain, to refute that
18 inference that they were not using our particular documents,
19 and our particular work product at that point. So, what the
20 trial court knew is that there was an investigation, the
21 trial court knew that there was a \$10 million difference,
22 and that there was no way to explain it since there was no
23 project, there was no loan application, there was no loan
24 documents or anything before the U.S. Export-Import Bank
25 that would indicate whether or not there was any basis other

1 than what we had filed with the Bank, and what we had
2 submitted to the bank in terms of contract, project, what
3 have you. So, the trial court knew that at the time that
4 the Appellees Ghanadian officials went to the bank, signed
5 the memorandum of understanding in D.C., and we believe that
6 those was enough information to warrant some consideration,
7 given the Bank had two investigations going on.

8 JUDGE ROGERS: All right.

9 MR. LASLEY: And it's undisputable that the Bank,
10 that the Appellees used the information that was sent to the
11 Bank, and exported especially the letter of interest and
12 loan application. The most important point from the
13 Appellant's point of view is that we were damaged because of
14 the, we had structured an African Marshal Plan, that was the
15 whole purpose of the development of the, and creation of the
16 Appellant was to do that for the subsaharien countries, that
17 was undermined and destroyed, as well as the fact that the
18 circumstances of development work product was
19 misappropriated use by the Appellee. Appellants never
20 really had a --

21 JUDGE GRIFFITH: What's the nature of your
22 misappropriate claim? What's the cause of action here? Is
23 it under common law, is it under D.C. law? I don't think
24 you've told us in the complaint.

25 MR. LASLEY: I think it falls under both, Your

1 Honor, but the --

2 JUDGE GRIFFITH: But your pleading doesn't tell us
3 that --

4 MR. LASLEY: Well --

5 JUDGE GRIFFITH: -- which I find to be a problem
6 throughout your case. You've made it very hard for both the
7 District Court and for us to understand what your theory is.
8 And so, what's the misappropriation claim?

9 MR. LASLEY: The misappropriation claim was based
10 on the fact that we had developed this developer work,
11 business plan and model, and we had submitted that
12 information to the bank, the bank had agreed to consider it
13 at the \$585 million --

14 JUDGE GRIFFITH: And your claim is that that's a
15 trade secret?

16 MR. LASLEY: That's what we claim because it was
17 particular to the Bank, and now to the Ghanadian officials
18 who then sent it to other people. We believe that that is
19 definitely a misappropriation.

20 JUDGE GRIFFITH: So, is this under D.C. Code, or
21 under common law? What are the --

22 MR. LASLEY: I don't have the specific D.C. Code,
23 but I think it covers both common --

24 JUDGE GRIFFITH: Well, you have to have, I mean,
25 for us to find a commercial activity exception there has to

1 be an allegation that the act performed in the United States
2 was an element of the cause of action, how are we supposed
3 to know that when you haven't told us --

4 MR. LASLEY: Well, the --

5 JUDGE GRIFFITH: -- what the cause of action is?

6 MR. LASLEY: -- the cause of action in terms of
7 what happened in this case I think it's clear that what we
8 allege was factually based on what was taken from us. I
9 would submit to Your Honor that the situation was such that
10 they knew exactly what they were doing in reference to
11 taking the property. Now, it was not --

12 JUDGE GRIFFITH: They may very well have, but you
13 have to put it in a form that's intelligible to us, and --

14 MR. LASLEY: Well --

15 JUDGE GRIFFITH: -- I for one have found it very
16 difficult to follow your complaint.

17 MR. LASLEY: Well, I think the complaint itself
18 focused on what occurred in terms of the --

19 JUDGE GRIFFITH: Okay.

20 MR. LASLEY: -- actions of the Appellees. And I
21 think they had no right to use or to appropriate what we had
22 done.

23 JUDGE GRIFFITH: Let me ask you a question, the
24 District Court noted that TJGEM had published in the record
25 all the documents that it claims were protected by the trade

1 secret, is that correct?

2 MR. LASLEY: That was after certain documents were
3 submitted to the Court, that was after the litigation had
4 begun, it was after the, as we claim, misappropriation
5 occurred in use of those documents. The only persons that
6 had the documents that we had, and that we were using and we
7 were claiming were misappropriated was the Ghanadians before
8 this litigation started. After litigation started those
9 particular events occurred, but not before that, other than
10 the Bank and the Ghanadians later, the Bank initially, the
11 Ghanadians later, that was the extent of what we were
12 dealing with. There was no use or giving of the documents
13 prior to the litigation.

14 JUDGE GRIFFITH: Yes. Okay.

15 JUDGE ROGERS: All right. Why don't we hear --

16 JUDGE GRIFFITH: Thank you.

17 JUDGE ROGERS: -- from Counsel for Appellees.

18 MR. LASLEY: All right. Thank you very much, Your
19 Honor.

20 ORAL ARGUMENT OF JUAN C. BASOMBRIO, ESQ.

21 ON BEHALF OF THE APPELLEES

22 MR. BASOMBRIO: Good morning. May it please the
23 Court.

24 JUDGE ROGERS: Good morning.

25 MR. BASOMBRIO: I want to mention briefly that the

1 Solicitor General of Ghana, Ms. Gaisie, was here. We
2 believe that the *Saudi Arabia v. Nelson* case of the Supreme
3 Court disposes of this appeal, and I want to spend a couple
4 of minutes talking about that case. In that case the
5 Supreme Court held that whether you come under any of the
6 different clauses of the commercial activity exception, that
7 claim has to be based upon the subject commercial activity.
8 So, you have to first ask what is the commercial activity
9 that's at issue, then you need to ask is the claim based
10 upon that commercial activity? If it's not, there is no
11 application of the exception. So, what happened in *Saudi*
12 *Arabia v. Nelson*? Nelson was recruited by Saudi Arabia in
13 the United States, and he signed a contract in the United
14 States to go work for a hospital in Saudi Arabia. When he
15 got there he was basically a whistleblower, he got arrested,
16 he got tortured, returned to the United States, and sued
17 Saudi Arabia. He said the commercial activity exception
18 applies because they came to the United States, they
19 recruited me here, even more than our case we signed a
20 contract in the United States, and so there was commercial
21 activity here. The Supreme Court said you're missing the
22 point, you are not suing for breach of contract, you are not
23 suing for what happened in the United States, you are suing
24 because you were tortured in Saudi Arabia. So, the claim is
25 based upon the torts inflicted on you in Saudi Arabia, not

1 the preceding commercial activity in the United States.
2 This is the identical case, why is TJGEM bringing a lawsuit?
3 Because they claim that the Mayor of Accra --

4 JUDGE GRIFFITH: But, Mr. Basombrio, I mean, the
5 statute says it is an act performed in the United States in
6 connection with the commercial activity of the foreign state
7 elsewhere.

8 MR. BASOMBRIIO: That's the third clause. They
9 have involved two clauses.

10 JUDGE GRIFFITH: That's in the statute. Yes.
11 Yes, right. Yes.

12 MR. BASOMBRIIO: Yes, the first clause, I'm
13 discussing the first clause first --

14 JUDGE GRIFFITH: Okay. Yes.

15 MR. BASOMBRIIO: -- where you've got to have
16 commercial activity in the U.S. That, the first clause of
17 the commercial activity exception --

18 JUDGE GRIFFITH: Well, that's not the problem.
19 That's not the problem --

20 JUDGE ROGERS: Problem here.

21 JUDGE GRIFFITH: -- you face, at least in my mind,
22 the problem you face is whether at this meeting where the
23 memorandum of understanding was entered into whether an act
24 of misappropriation occurred there, because the signing of
25 that agreement was an act performed in the United States in

1 connection with a commercial activity elsewhere, you agree
2 to that?

3 MR. BASOMBRIIO: Yes.

4 JUDGE GRIFFITH: Okay.

5 MR. BASOMBRIIO: So, let me address both the first
6 clause and the third clause --

7 JUDGE GRIFFITH: Okay, thank you.

8 MR. BASOMBRIIO: -- to be thorough. So, in terms
9 of the first clause, that would not fit because there was
10 no --

11 JUDGE GRIFFITH: I see.

12 MR. BASOMBRIIO: -- commercial activity in the
13 United States.

14 JUDGE GRIFFITH: Yes. Yes.

15 MR. BASOMBRIIO: Now, in terms of the third clause,
16 Section 1605(a)(2) still requires that the lawsuit be,
17 quote, unquote, based upon the activity in the United
18 States, which was --

19 JUDGE GRIFFITH: Yes, and the claim is that
20 there --

21 MR. BASOMBRIIO: Right.

22 JUDGE GRIFFITH: -- a misappropriation occurred
23 here in the United States in connection --

24 MR. BASOMBRIIO: No, it's not.

25 JUDGE GRIFFITH: It's not?

1 MR. BASOMBRIO: The allegation, as the District
2 Court correctly points out in its opinion, was the
3 misappropriation occurred in Ghana, the request or a bribery
4 occurred allegedly in Ghana. Only two things happened in
5 the United States, an MOU was signed, and there were
6 meetings at the Export-Import Bank regarding financing.
7 However, even under the third clause the claims still have
8 to be based upon those acts, and they are not suing based on
9 those acts. TJGEM gets no relief based on the fact that an
10 MOU was signed with --

11 JUDGE GRIFFITH: Well, let me ask you, let's
12 imagine it were the case, and this is perhaps a
13 hypothetical --

14 MR. BASOMBRIO: Yes.

15 JUDGE GRIFFITH: -- okay? So, don't say that's
16 not my case. But let's just imagine that a memorandum of
17 understanding was signed here in the United States, and that
18 as part of that trade secrets were given to the Export-
19 Import Bank, that confidential information that had been
20 developed is part of the proposal that was to be made in
21 Ghana was brought to the United States and given to the Bank
22 unlawfully then, under those circumstances wouldn't you have
23 an act performed in the United States in connection with the
24 commercial activity elsewhere?

25 MR. BASOMBRIO: That's not what happened here.

1 JUDGE GRIFFITH: That's right. Yes. But if that
2 is --

3 MR. BASOMBRIO: So, I mean, I --

4 JUDGE GRIFFITH: -- what happened, if under those
5 circumstances we'd find the exception fits, right?

6 MR. BASOMBRIO: Well, perhaps. As a lawyer I
7 would look at all the facts around your hypothetical.

8 JUDGE GRIFFITH: Yes. Why do you say that's not
9 what happened here? Because I think that's what the
10 allegation is.

11 MR. BASOMBRIO: No, the allegation is that the
12 information was provided in Ghana, and was --

13 JUDGE GRIFFITH: I see.

14 MR. BASOMBRIO: -- misappropriated in Ghana. And
15 that's the finding of fact of the District Court. So, now
16 on appeal TJGEM had the burden to show that there was an
17 abuse of discretion in making that finding of fact, and
18 they've never done that. That's not *de novo*, *de novo* review
19 is on the law, but on the facts it's going to be abuse of
20 discretion, and I believe that the finding stands.

21 So, there are basically two reasons, the one we
22 have discussed that none of what happened in the United
23 States is an element of the claim, it's not what the claim
24 is based upon; the other reason is that the alleged torts by
25 the Mayor, which by the way, Ghana disputes, but it didn't

1 have to disprove in a motion to dismiss, those are not
2 considered to be commercial activity in any event by the
3 Republic of Ghana under the *Phaneuf* case from the Ninth
4 Circuit. The D.C. Circuit hasn't had the opportunity as of
5 yet to adopt *Phaneuf*, but every other circuit has followed
6 that, and the reason why we require actual authority of a
7 foreign government official is because that's what we
8 require of the United States. When you enter into a
9 contract with the United States it's buyer beware, and you
10 have to make sure that the agent has actual authority.

11 JUDGE ROGERS: So, could I just follow up for a
12 moment on Judge Griffith's hypothetical with you?

13 MR. BASOMBRIIO: Yes.

14 JUDGE ROGERS: We have held that on a motion to
15 dismiss under 12(b)(1) the District Court should allow
16 sufficient discovery to enable an understanding of what are
17 the underlying facts for the complaint. So, here in this
18 case all we know that I have found about the MOU is in that
19 website article. We know nothing about the details of that,
20 and as I understand Counsel's argument even today it's
21 simply that the inference in the Plaintiff's favor arises as
22 a result of sort of the sequence of events, the timing, but
23 we know nothing about the content of the MOU. Why in this
24 case was the District Court not obligated to allow some
25 jurisdictional discovery on that issue?

1 MR. BASOMBRIIO: I think there are two reasons,
2 one, when a foreign sovereign is sued the case is a little
3 different than the normal 12(b)(1) motion, because the FSIA
4 is intended to create a presumption of immunity, and then
5 the Plaintiff has to come forward with evidence, and so it
6 protects the foreign sovereign from the normal procedure. A
7 Plaintiff has a much higher burden to come forward with
8 evidence from the start before they file the lawsuit. Here,
9 they filed a 250-page complaint with 1,000 pages of
10 exhibits, and I think --

11 JUDGE GRIFFITH: We know.

12 MR. BASOMBRIIO: -- the District Court was --

13 JUDGE GRIFFITH: We know.

14 MR. BASOMBRIIO: -- correct in saying --

15 JUDGE GRIFFITH: Yes.

16 MR. BASOMBRIIO: -- you know, enough is enough, and
17 we had over 1,000 pages of pleadings. And, you know, will
18 all due respect to Opposing Counsel, the District Court to
19 some extent had to throw its hands up and say, you know, we
20 really don't know what you're alleging, what are you claims,
21 what are your causes of action? This is just a rambling
22 thing. And Plaintiffs are not supposed to dump a stack of
23 papers on a District Judge --

24 JUDGE GRIFFITH: Right.

25 MR. BASOMBRIIO: -- and say you figure it out.

1 Now, the second reason is it's because it really doesn't
2 matter, they are not suing for a breach of the MOU, and
3 there's plenty of authority that we have cited that
4 indicates that the based upon language is the limiting
5 language.

6 Let me just make a quick point about *Pimentel* and
7 the other Defendants. Under the Supreme Court's decision in
8 *Pimentel*, and we have gone through the Rule 19 analysis,
9 clearly AMA and the Republic of Ghana were necessary or
10 required parties.

11 JUDGE ROGERS: Could I just interrupt and ask you
12 to go back on one issue? The complaint does refer to other
13 officials of the Government of Ghana.

14 MR. BASOMBRIO: Yes.

15 JUDGE ROGERS: And makes the argument that those
16 officials had actual authority to act on behalf of the
17 Government, at least one of them, and even that I'll get the
18 name wrong, but the man who was assisting the Mayor claims
19 that there was authority to negotiate on behalf of the
20 Government. And so, is your response as to both of those
21 that still given the presumption the --

22 MR. BASOMBRIO: Our responses that we submitted
23 the declaration of a Ghanaian professor, our expert
24 witness --

25 JUDGE ROGERS: Yes.

1 MR. BASOMBRIO: -- who disputed that and cited the
2 provisions of Ghanaian procurement law --

3 JUDGE ROGERS: Yes.

4 MR. BASOMBRIO: -- and that was never disputed.

5 JUDGE ROGERS: I see. All right. Thank you.

6 MR. BASOMBRIO: And just on *Pimentel*, I won't
7 reargue that, again, but it extends the benefit of immunity
8 to the rest of the Defendants.

9 JUDGE ROGERS: Thank you.

10 MR. BASOMBRIO: Thank you.

11 JUDGE ROGERS: Counsel for Appellant, if you'd
12 like a minute.

13 ORAL ARGUMENT OF MICHAEL A. LASLEY, ESQ.

14 ON BEHALF OF THE APPELLANT

15 MR. LASLEY: Yes. As the Court just mentioned,
16 the circumstances of Vandepoozie (phonetic sp.) he had the
17 authority as the CEO of the AMA, in fact, he was tasked with
18 the authority to negotiate and recommend infrastructure
19 develops and projects. The notion that he was the only
20 person involved was one of the errors of the trial court, he
21 was involved, as well as Samuel. Exhibit No. 10 attached to
22 the complaint noted the letter of 12-20-2011 where Samuel
23 Ayeh-Dartey, who is the Metro Coordinating Director of the
24 AMA, indicated that he had indeed the authority to negotiate
25 along with Vandepoozie and other people involved in this

1 matter. But there's no reason to conclude that there's no
2 distinction between negotiation powers and scope of your
3 authority as a CEO, and as well as Samuel's role in the
4 Metropolitan Assembly, and not having the power to let
5 contracts, and that I think was what the issue was in that
6 regard.

7 So, we would submit that the notion that that's
8 not the case is also undermined by the notion of Exhibit 51
9 where the Mayor talks about how he was appointed in a Modern
10 Ghana News report to deal with the issues of metro problems
11 in Accra, and he was authorized by the President Mills at
12 that point. So, we would submit that there's a notion that
13 he had no power and the other people didn't have any power,
14 there was a difference between the power to, and the
15 responsibility to work on issues of the sewage system in
16 Accra, and the reason to, power to let a contract, which is
17 totally different. The contract was not decided until 2013,
18 was not granted. The Ex-Im Bank in the exhibit that was
19 submitted, I believe it was Exhibit 55 that was attached to
20 the complaint, indicated that indeed the circumstances of
21 the let of the contract and the loan was to the end user,
22 AMA.

23 JUDGE ROGERS: All right. Thank you.

24 MR. LASLEY: Thank you.

25 JUDGE ROGERS: We'll take the case under

1 advisement.

2 MR. LASLEY: Thank you.

3 MR. BASOMBRIO: Thank you.

4 (Whereupon, at 10:00 a.m., the proceedings were
5 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

August 18, 2016

DEPOSITION SERVICES, INC.