

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT FINANCIAL SERVICES DIVISION

CICA 19 OF 2017
(On Appeal from FSD 45 OF 2016 (IMJ))

BETWEEN:

(1) SELLTEN POLSKA SP. Z.O.O.

Appellant/Interested Party

AND

(1) JSC MEZHDUNARODNIY PROMYSHLENNIY BANK
(2) STATE CORPORATION DEPOSIT INSURANCE AGENCY

Plaintiffs / Respondents

(3) MICHAEL SAVILLE
(4) HUGH DICKSON

(As Joint Receivers of the entire issued share capital in DB Marine, Joint Receivers and Managers of DB Marine, Joint Receivers of the yacht known as DB9 and Joint Receivers of the direct and indirect assets of DB Marine)

Applicants/ Respondents

BEFORE:

The Right Honourable Sir John Goldring, President
The Honourable John Martin QC, Justice of Appeal
The Honourable Sir George Newman, Justice of Appeal

Appearances: Neil McLarnon of Travers Thorp Alberga for the appellant and Nick Dunne of Walkers for the respondents.

Note of judgment released: 16 November 2017

This is a note of a judgment delivered by the President on 12 September 2017. It is the President's best recollection of the substance of what he said. However, the judgment itself was what was delivered in court, albeit it was not recorded. Both members of the court agreed.

The President:

Introduction

- 1 This is a proposed appeal in respect of a ruling by the Honourable Mrs Justice Mangatal of 28 July. On that date, the learned judge refused an adjournment and granted approval for Mr

Saville and Mr Dickson, as joint receivers of the share capital, and managers of the assets, of a company called DB Marine, to sell a yacht known as DB9 for \$US6 million. She provided reasons for her decision on 30th August 2017. The appellant/interested party, is a company known as Sellten Polska SP. Z.O.O. (“Sellten”). In short, Sellten claims the yacht was not part of the assets of DB Marine. The learned judge was wrong to order its sale. Moreover, the proposed sale is at an undervaluation.

- 2 On 2nd August, the appellant issued a notice of appeal in respect of the learned judge’s order. It did not seek leave to appeal. It sought however an urgent stay of the order for sale, which was likely soon to take place. The appellant did not inform the respondents of its application for a stay. Neither, due to an oversight by the court, did the court provide the respondents with the application. I imposed a stay pending this hearing.
- 3 On 3rd August 2017, the respondents filed a notice of their intention to rely on a preliminary objection. By that notice, the respondents submit that the appellants need leave to appeal the learned judge’s order.
- 4 On 16th August 2017, the appellant filed a skeleton in which it is submitted leave to appeal is not needed.
- 5 While the case was listed before us simply to consider the question of a stay, that aspect cannot sensibly be considered in isolation. As the appellant argued in its first skeleton argument seeking a stay, the court is bound to consider the strength of the proposed appeal when deciding whether or not to impose one. Moreover, at paragraph 11 of its second skeleton argument the appellant asks the court to grant leave if needed. The court therefore informed the parties that it would consider whether leave to appeal is needed, if so, whether it should be granted and, if so, whether a stay should be imposed.

A short summary of the background

- 6 In her clear and helpful reasons for her ruling, the learned judge set out some of the background. In paragraph 1, with as it seems to me, ample justification, she described the application as “deeply unattractive...made at the eleventh hour, in an uncommon manner, by party that is not a party to these proceedings.”
- 7 I shall try shortly to set out the relevant parts of the background.
- 8 Mr Pugachev was a prominent Russian businessman. He founded the first respondent bank. He was sued in Russia by the first and second respondents. He lost. He was ordered to pay substantial damages, the US dollar equivalent of \$1.3 billion. In July 2014, in support of the judgment, the High Court in England imposed a worldwide freezing order against him. He was under the order required to disclose assets. Among other things, he disclosed shares in a company called DB Marine and the yacht DB9. In February 2016, the English court found he was in contempt for, among other things, lying on oath, failing to give proper disclosure and breaching the freezing order. In order to avoid the sentence imposed of two years’ imprisonment, he fled the UK.
- 9 On 20th April 2016, in support of the Russian judgment, Mrs Justice Mangatal imposed a freezing order in respect of Mr Pugachev’s assets linked to the Cayman Islands, including those held through other entities such as DB Marine. A writ seeking to enforce the Russian judgment was filed shortly thereafter. Judgment in default was entered on 10 June 2016.
- 10 The Cayman freezing order of 20th April 2016 was served on, among others, entities called Arcadia Nominees Limited and Arcadia Group Limited. Arcadia Nominees was the nominee shareholder of DB Marine and held shares on behalf of Mr Pugachev, apparently pursuant to a declaration of trust of 4th October 2010. Arcadia Group was the registered office provider of DB Marine. Mr Rich, a director of both, in an affidavit on behalf of Arcadia Nominees, said

that on 12th April 2016, 2000 shares in DB Marine had been transferred to Mr Pugachev. That of course was in breach of the English freezing order. Mr Rich also said that Mr Pugachev gave instructions that the 2000 shares be transferred to Sellten. The sole director of Sellten was someone called Mr Telitski. He was also sole director of DB Marine. That transfer of shares was never registered. It could not be without breaching the Cayman freezing order. I shall return to Mr Telitski and the so-called sale.

- 11 On 2nd November 2016, the learned judge granted the respondents' application to enforce its Cayman judgment by way of appointing the respondents jointly as receivers in respect of Mr Pugachev's shareholding in DB Marine, as receivers and managers of DB Marine, over the Cayman registered yacht DB9 and any other assets of DB Marine.
- 12 Again, without going into detail, there was evidence of continued attempts by Mr Pugachev to put assets, including DB9, out of reach of the Plaintiffs (see paragraph 15 of the learned judge's reasons). On 23 November 2016, the joint receivers took control of DB9 in Istanbul. On the same date, solicitors, by email, claimed DB9 belonged to Sellten. They began proceedings in Istanbul seeking the arrest of DB9. They alleged that Sellten, not Mr Pugachev, was the legal/beneficial owner of DB9. The application to the Turkish court failed, ultimately on appeal. So too did a claim for DB9's arrest on the basis of a purportedly unpaid invoice.
- 13 On 8th February 2017, on the morning of a hearing at which the learned judge was to deal with applications regarding the receivership, the claim regarding the ownership of DB9 was further asserted in a letter sent to the court by someone called Mr McNutt, ostensibly Mr Pugachev's Senior Litigation Adviser. Not surprisingly, the judge attached no weight to the letter.

14 On 6th July 2017, the respondents and the joint receivers applied for approval to sell DB9, and for permission to transfer the title in DB9 to a purchaser. The summons was listed for Tuesday 25th July 2017. On 21st July (some 8 months after the appointment of joint receivers), Sellten issued a writ against the joint receivers claiming, among other things, that it was the beneficial owner of the shares in DB Marine. It sought, among other things, to restrain the receivers from selling DB9.

15 On 24th July 2017, solicitors representing Sellten indicated an intention to instruct counsel at the hearing on 25th July, and to seek an adjournment pending the outcome of the proceedings claiming Sellten's beneficial ownership. Without going into detail, on 25th July the hearing was adjourned to 27th.

The hearing on 27th July

16 It is not necessary to deal with matters which are irrelevant to the present proceedings.

17 In support of its application for an adjournment, Sellten relied on an affidavit from Mr Telitski. The relevant parts are set out in paragraph 40 of the learned judge's reasons.

18 At paragraph 10 of his affidavit, Mr Telitski states:

“It is Sellten's position that the court ought not to exercise its discretion to sanction the sale while the issue of the beneficial ownership of the shares in DB Marine remains pending before the Court and that the Court ought, in the exercise of its case management discretion...adjourn the Joint Receivers' summons, to be heard after the issue of the ownership of the shares in DB Marine has been determined by way of trial proceedings.”

19 The judge also referred to other parts of Mr Telitski's affidavit: see paragraph 40 of the her reasons.

20 Mr Telitski referred to an agreement for the sale of the 2000 shares in DB Marine. He said that Sellten was to pay Mr Pugachev US\$12 million by way of an unsecured promissory note payable on demand, but not before 5th April 2017: see paragraphs 42-3 of the judge's reasons.

21 It was submitted to the judge that the failure to register the transfer of the shares from Arcadia Nominees to Sellten (see para 6 above) was not fatal to Sellten's position (see paragraphs 45-7 of the judge's reasons).

Where it is said the judge went wrong

22 It is submitted that, knowing of Sellten's claim for some 8 months (presumably because of the Turkish application), the joint receivers should sooner have raised the matter with the court and not have sought to press ahead with such a sale given such knowledge. In support of the contention that the court should have adjourned in order for the issue of ownership to be resolved, reliance (as it was below) is placed on two English Court of Appeal decisions, namely *Shalabayev v JSC BTA Bank* EWCA Civ 987 and *JSC BTA Bank v Ablyazov* [2014] EWCA Civ 602. In each case the court decided, that in the face of adverse claims of ownership, the claimant had the right to have the issue of ownership decided before a charging order effectively depriving him of ownership was lodged against the property in issue.

23 Here of course, the judge's order did not decide the issue of ownership. She merely ordered the sale of an asset. If entitled to the asset, the appellant will be entitled to the proceeds of sale. Moreover, in every case the judge is entitled to assess the claim of ownership made, on the basis of the evidence before him or her. Each case, in other words, depends on its own facts.

24 It is also submitted there was good evidence of the appellant's ownership of DB9 by reason of the sale agreement. As it is said, the law does not permit a receiver to enforce against assets owned in equity by another.

25 It was urged upon the learned judge, as set out in paragraph 38 of her ruling, it would be fundamentally unfair, and a breach of due process and Articles 7 and 15 of the Cayman Islands Bill of Rights, not to give Sellten the opportunity to have its claim concerning the true ownership of DB9 tried.

My conclusions

26 In my judgment, the learned judge was plainly right not to adjourn the application for the many reasons she gave. She was also right to approve the sale as she did. In short:

(1) The judge was entitled to reject the contention that Sellten was an entity independent from Mr Pugachev. The judge clearly set out her reasons (see paragraph 68 and following). I will put them shortly and in my own words:

- (i) Mr Telitski was the sole director of DB Marine when Mr Pugachev owned all its shares.
- (ii) Mr Telitski was previously a director of another Pugachev company, Egina S. a. r. l. He was so in 2013.
- (iii) Mr Telitski was employed by Luxury Consulting Limited. That company was Mr Pugachev's English family office. Mrs Justice Rose, in her English judgment, described it as "his personal wallet."
- (iv) Mr Telitski only first admitted that Mr Pugachev was a contact after he, in effect, had no choice following a third affidavit from Mrs Wales on behalf of the respondents. He claims not to know what she has said about Egina.
- (v) Even on his account, Mr Telitski first heard of the summons from Mr Pugachev.

(vi) Mr Telitski says Mr Pugachev does not own or control Sellten. He does not say who does.

(vii) The alleged transaction by which Sellten is said to have agreed the purchase of Mr Pugachev's shares is extraordinary. No money passed. There is an unsecured promissory note for US\$12million from what is said to be an independent, unconnected entity.

Moreover, the whole transaction took place in breach of the English Worldwide Freezing Order. Mr Telitski does not say whether he knew of that order.

(2) Furthermore, the joint receivers were appointed on 23 November 2016. Their appointment was not challenged. That Sellten knew of their appointment is plain. It made the claim in Turkey, to which reference has been made. On 21st July 2017, two working days before a hearing in which approval for the sale of DB9 was sought, Sellten first issued a writ seeking, among other things, to restrain the sale. It then sought, on the basis of that writ, to prevent the judge approving the sale. In my view, as the judge was entitled to conclude, its service at this time was merely a device orchestrated by Mr Pugachev, to seek further to frustrate the sale of this substantial asset, and to impede the consequences of the judgment against him. Such an interpretation would be of a piece with his conduct both in respect of the English and Cayman litigation. I do not for a moment accept that, when considering the application to adjourn, the judge was constrained from reaching a view about the true reasons for filing the writ. The court is not obliged to close its eyes to the obvious.

27 As to the merits of an order for sale, they are plain. This is a substantial asset. It is depreciating and incurring costs. While my stay delayed the sale, and could have resulted in its failure, it seems there are good grounds to believe it can go ahead. There is no foundation for the suggestion the sale is at an undervalue. In short, I have no doubt the stay should be set aside.

Is leave to appeal needed?

28 It seems to me plain that it is.

29 By section 6(f) of the Court of Appeal Law, no appeal lies from an interlocutory judgment without leave (particular exceptions irrelevant to the present case apart).

30 By Rule 12(1), a judgment or order “shall be treated as final or interlocutory in accordance with sub-rules (2) to (7).”

31 Rule 12(3) provides that:

“A judgment or order shall be treated as final if the entire cause or matter... have been finally determined...”

32 By Rule 12(4):

“For the purpose of sub-rule (3), where the final hearing or trial of a cause or matter is divided into parts, a judgment or order made at the end of any part shall be treated as if made at the end of the complete hearing or trial.”

33. Neither the order refusing to adjourn the case, nor the order for sale made by the learned judge dispose of this case. It was an application and decision in the course of a receivership. It said by the appellant that sub-rule (4) applies. In ordering the sale, the court was finally deciding the ownership of DB9. I do not agree. What the court did was approve the sale of DB9. It will be replaced by the sum obtained. If the appellant is entitled to that sum, he may claim it.

34. Rule 12(5) sets out some exceptions to rule 12(3). None apply here.

35. The respondents submit that Rule 12(6)(bb) applies. That provides that an order will be treated as interlocutory when:

“...made for, or relating to, the enforcement of an earlier order (whether...final or interlocutory) or giving further directions as to such an order...

[and] (iii) [it is] an order for the sale of any property by way of enforcement of an earlier order...or an order giving directions regarding any sale, or an order designed to regulate or facilitate such a sale.”

36. As I have said, on 10th June 2016 judgment was entered against Mr Pugachev in Cayman. On 2nd November 2016, the learned judge granted the application to appoint the joint receivers. On 28th July 2017, the judge made the order which it is sought to appeal. It seems to me, as the respondents argue, the order of 28th July 2017 related to and was part of the enforcement of the order of 2nd November 2016. It also gave directions and facilitated a sale under that order.

37. As I understand the contrary submission, it is that to fall within sub-rule (6), the order must relate to the original judgment order against Mr Pugachev, that it does not, and is therefore outside the sub-rule. It is also said that only orders or directions for sale pursuant to Rule 31 can fall within the sub-rule 6(iii). That interpretation (insofar as I can follow it) is contrary to what the rule says.

Conclusion

38. In the light of my decision, it is not necessary to consider the other matters raised in the skeleton arguments.

39. In short, I have no doubt the learned judge was right. Leave to appeal should be refused. No question of a stay arises.

40. I would finally add this. It seems to me most unfortunate that I was invited to impose a stay without the respondents being informed and, in particular, without the potential difficulties of leave being raised.

Martin JA

I agree

Newman JA

I also agree