Neutral Citation Number: [2011] EWCA Civ 1042

A3/2011/2048

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(MR JUSTICE FLAUX)

Royal Courts of Justice
Strand
London, WC2

Thursday, 11 August 2011

B E F O R E:

THE MASTER OF THE ROLLS
(**Lord Neuberger of Abbotsbury**)

LORD JUSTICE STANLEY BURNTON

- - - - - - -

LINSEN INTERNATIONAL LIMITED AND OTHERS
Claimants/Applicants

-v

HUMPUSS TRANSPORTASI KIMIA
Defendants/Respondents

(Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MR MICHAEL HOWARD QC and **MS SARIA PARUK** appeared on behalf of the Applicants

MR JUSTIN FENWICK and **MR JAMES WILLAN** appeared on behalf of the 3rd, 8th and 13th Respondents

MR ALI MALEK QC and **MR CHRISTOPHER HARRIS** appeared on behalf of the 11th and 12th Respondents

Judgment
As Approved by the Court

1. **LORD NEUBERGER:** This is an application made in somewhat unusual circumstances. The claimants entered into contractual arrangements with the first and second defendants, which were subject to arbitration agreements. The claimants then alleged breaches of those contracts, which resulted in arbitrations. Some of those arbitrations have already been determined in favour of the claimants and, being subject to English jurisdiction clauses, the arbitration awards have now been, as it were, converted into orders of the court.

2. On 17 December 2009 the claimants obtained a worldwide freezing order against the first and second defendants.

3. The corporate structure involving the first and second defendants and a number of other companies, who are now parties to these proceedings, is complex and is contained in a document which I have as appendix 1 to the skeleton argument of the third to eighth and thirteenth defendants, and I will simply incorporate it as an appendix to this judgment.

4. The claimants discovered that a transfer of assets has been made between the first defendant and the third defendant. In effect, what happened was that the shares in the fourth, fifth and thirteenth defendants were transferred from the first defendant to the third defendant, and the sixth, seventh and eighth defendants -- being one-ship companies -- transferred their ships to the third defendant. Thus, in effect the first defendant transferred its directly and indirectly owned assets to the third defendant.

5. In those circumstances, the claimants applied **ex parte** for, and obtained from His Honour Judge Mackie QC, sitting as a judge of the Commercial Court, on 10 June 2011, freezing orders against those nine other corporate defendants and against Mr Suharto, the 12th defendant, and against his directly-owned company, the 11th defendant, who for present purposes I am prepared to assume is his alter ego.

6. The return date for those injunctions was on 5 July 2011, when the matter came on for two days before Flaux J. He would have discharged the injunctions against all but the first and second defendants, "the other defendants", insofar as the underlying claim against the other defendants was based on the proposition that the corporate veil between all the defendants, including Mr Suharto, should be pierced, but in a helpful ruling -- because he was not in a position to give a full judgment -- dated 13 July 2011 he indicated that he would be prepared to reconsider the possibility of continuing the injunctions against some or all of the other defendants on the basis of the principle, as it is known, in **TSB International v Chabra** [1992] 1 WLR 231. On that basis, he stood matters over to 19 July. On 19 July, having heard the argument in relation to the **Chabra** jurisdiction, he decided the issue against the claimants. He again indicated he was not in a position to give a full judgment. It was pointed out to him that he may have left the claimants in limbo, because he was not in a position to give a measured judgment, and there was therefore no final order, and, because the return date in relation to Judge Mackie's order had been arrived at, the injunctions granted by Judge Mackie were effectively discharged.

7. As I understand it, the Judge pointed out to the claimants, so that they could apply for permission to appeal against his decision not to extend the injunctions granted by Judge Mackie against the other defendants, and in early August, 2 August, the claimants

applied in writing for permission to appeal and for renewal of the injunctions in the meantime.

8. In light of the apparent complexity and the apparent urgency of the matter, I directed on the papers that the matter come before the court this week and in the meantime that the injunctions granted by Judge Mackie should be renewed.

9. We have now had the benefit of argument as to what should be done in relation to the injunctions granted by Judge Mackie, but effectively discharged by Flaux J.

10. For my part, I consider that the decision of Flaux J not to renew the injunctions which he refused to renew was correct.

11. So far as the claimants' case was based on piercing the corporate veil, it seems to me, with due respect to Mr Howard's written and oral arguments, to be plainly unsustainable. The complaint is that one company in the group, the first defendant, has transferred its assets or some of its assets to another company in the same group, the third defendant, partly or wholly for the purpose of avoiding its liability to the claimants. That is the assumption which the judge was prepared to accept as established for present purposes, and I think he was right to do so.

12. But that does not mean that one can simply pierce the corporate veil. At most it might give rise to a possible argument that one could pierce the corporate veil between the first and the third defendants, but I see no grounds for piercing it further. However, if one examines the ground on which it is said that the corporate veil should be pierced even as between the first and third defendants, it seems to me to be hopeless. As Lord Justice Stanley Burnton, pointed out in argument and as Mr Howard has sensibly accepted, piercing the corporate veil would effectively involve treating the third defendant as if it was a contractual party to the arrangements between the first defendant and the claimants. I can see no reason why the mere fact that the third defendant, as I am prepared to assume for present purposes, knowingly received assets from the first defendant, for the purpose of avoiding the first defendant's liability under a contract already entered into and breached by the first defendant, should render the third defendant liable under the contract. It may well enable the claimants to follow the assets but that is an entirely different matter.

13. In that connection, it seems to me that the reasoning of Toulson J in **Yukong Line Ltd of Korea v Rendsberg Investments Corporation Liberia (No 2)** [1998] 1 WLR 294 in this connection was correct. Furthermore, I note that Munby J in **Ben Hashem v Ali Shayif** [2008] EWHC 2380 (Fam) held that piercing the corporate veil was a course which the court should take if no other remedy was possible and if certain requirements were satisfied. The requirements in this case are not satisfied and, if they are, an appropriate remedy is available, namely following the assets.

14. Piercing the corporate veil not being available to the claimants, what about the argument based on the jurisdiction in the **TSB v Chabra** case?

15. In my view, the only possible person who could be held liable under that jurisdiction is the third defendant. Effectively, you follow the assets. I accept that the authorities establish that the claim based on the **TSB** case would not necessarily involve the

claimants having to establish that the first defendant had a proprietary interest in the assets transferred to the third defendants. But in my view it would require something akin thereto, although I accept the jurisdiction is wider.

16. To say that the jurisdiction is so wide as to enable other people involved in the transaction, (in particular the 12th defendant, who, on the evidence we have received, received none of the assets himself) should be liable under this jurisdiction appears to me hard to justify. It involves creating a new tort, that of being responsible for orchestrating the removal of assets from A to B to avoid A's liability, in circumstances where the assets are still with B and can be pursued against B.

17. In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted. However, it seems to me that we have to stick fast to principle and reality and not simply say that because something was done which should not have been done, everybody conceivable should be a permissible defendant. That is really what Mr Howard's submissions seem to me to involve.

18. It would be wrong for me to express a concluded view as to Mr Suharto's potential liability under the **Chabra** principle, but I am very sceptical about it. Certainly I find it hard to see how anyone other than the third defendant could be liable under it.

19. That brings me to the claim against the third defendant, which involves a different point. As it is an Indonesian company, which is not party to the contract, how can it be held to be susceptible to the jurisdiction of this court? In answer to that question, Mr Howard has taken us to practice direction 6B, "Service out of the jurisdiction". He relies on three sub-paragraphs of paragraph 3.1, namely 3.1(3), 3.1(6) and 3.1(10).

20. Not unreasonably, although not necessarily conclusively, Mr Malek, who appears for the 11th and 12th defendants, and Mr Fenwick, who appears for the third, eighth and thirteenth defendants, rely on the fact that the point on which Mr Howard took his main stand in front of us (sub-paragraph 10) was one which he effectively abandoned before Flaux J.

21. Mr Howard attractively says that the fact that he was persuaded to abandon it does not mean it was not a good point. I accept, and I think realistically Mr Fenwick and Mr Malek accept, that the fact he abandoned it below is not the end of the matter.

22. Nonetheless, having heard what Mr Fenwick has to say, I am satisfied, having initially had my doubts, that Mr Howard was right to abandon it.

23. Sub-paragraph 10 reads:

> "A claim is made to enforce any judgment or arbitral award."

24. The award was made under an English law contract and, therefore, once the award was made, it was properly registered and "converted" into a judgment in this country. But what subparagraph (10) is concerned with is, as Mr Fenwick says, a claim being made "to enforce any judgment or arbitral award". The third defendant has no assets in this country and what is sought to be done is to enforce the judgment against the first

defendant, i.e. to follow assets which the first defendant has transferred to the third defendant. That enforcement cannot be in this country and must be abroad. Therefore, I accept the submission that sub-paragraph 10 cannot be relied on.

25. Once one accepts that, it is easy to see that the same logic effectively applies to sub-paragraph 3 and sub-paragraph 6. Accordingly, it seems to me that there is no basis on which an order should be made against the third defendant.

26. So far as the 12th defendant is concerned, it would be wrong for me, particularly not having seen what Flaux J has said and not having heard sufficient argument, to say that I am completely satisfied that the **TSB v Chabra** jurisdiction does not apply. So I do not rule out the possibility of Mr Suharto being held to be liable. But it seems to me that the claim against him is remarkably weak, if it is susceptible of being successfully argued at all, and it would be inappropriate in all these circumstances for an injunction to be granted. There is no realistic prospect of the court renewing it, at any rate at this stage.

27. Those are my views on the basis of the position as it now is. I cannot rule out the possibility that consideration of the judgment of Flaux J in due course -- although it will be adverse, one gathers, to the defendants -- will not for some reason open a door which apparently to me appears to be closed.

28. However, at this stage I would refuse permission to appeal to the claimants, and would not renew the injunction granted by Judge Mackie, while emphasising that although this is obviously not a promising judgment from the point of view of the claimants when they come to consider whether to appeal Flaux J's eventual decision, this cannot shut them out from seeking to appeal it when that judgment is given, if and when they wish to do so.

29. So, for my part, I would dismiss this application.

30. LORD JUSTICE STANLEY BURNTON: I entirely agree. The main ground on which permission is sought to serve the third defendant out of the jurisdiction is paragraph 10 of practice direction 6B, paragraph 3.1. The object of that provision is to enable enforcement of a judgment against assets within this country that belong to a defendant who is out of the jurisdiction. It has no application to a case such as the present.
