Mrs C v Trilogy Management Ltd and YT Charitable Foundation (International) Ltd

Jurisdiction:	Jersey
Judge:	McNeill JA
Judgment Date:	08 June 2012
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Text

Mrs C
Applicant
and
Trilogy Management Limited
First Respondent
YT Charitable Foundation (International) Limited
Second Respondent

[2012] JCA 113

Before:

J. W. McNeill, **Q.C., sitting as a Single Judge**.

COURT OF APPEAL

Trust — application for an extension of a stay of execution.

Authorities

Trilogy Management v YT and Others [2012] JRC 093 .

Companies (Jersey) Law 1991.

Court of Appeal (Civil) Rules 1964.

Seale Street Developments Limited v M A Chapman and Another [1992] JLR 243 .

Veka A.G. v T.A. Picot [1999] JLR 306 .

Winchester Cigarette Machinery Limited v Payne and Another [1993] WL 963008 .

Bhimji v Chatwani (29 January 1993).

Hotchkiss v CI Knitwear 2000/160D .

Leicester Circuits Limited v Coates Brothers plc [2002] EWCA (Civ) 474 .

In Re Earl of Radnor's Will Trusts (1890) LR 45 Ch. D. 402 .

Gallagher v Jones [1993] STC 537 .

CIR v Morrison 1932 SC 638 .

Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc [2011] CSIH 87 .

Advocate N. F. Journeaux **for the Applicant**.

Advocate S. M. Baker **for the First Respondent**.

McNeill JA

1 This is an application, made before me as a single judge of the Court of Appeal, for a stay of execution of part of an Act of the Royal Court dated 10th May, 2012.

2 By Act of Court dated 10th May, 2012, the Royal Court had also stayed the execution of the judgment pending appeal for one month, until 5pm on 11th June, 2012; directing that, should notice of appeal be served within that period, and the applicant wished to extend the stay, application should be made on notice to a single judge of the Court of Appeal.

3 The applicant, Mrs. C, has issued, served and filed a notice of appeal within the specified period.

4 I have been furnished with (i) contentions and documents on behalf of Mrs. C (ii)

contentions and documents on behalf of Trilogy Management Limited ("Trilogy"), the first named respondent in the appeal, and (iii) a response to the latter on behalf of Mrs. C.

5 By her Notice of Appeal, Mrs. C seeks to bring under review only one of the matters disputed before the Royal Court, namely, Issue 1 which I shall set out below.

Background

6 In the judgment below, given by the learned Bailiff, the essential background is set out in paragraphs 4 to 16. From this I take the following as salient for the purposes of this decision.

7 The late Mr. C, prior to his death, established a charitable structure, the entities of which are the subject of the dispute in these proceedings. Among other matters he established a Jersey company, "JY" and a Jersey charitable trust, the trustee of which was and remains a Jersey company "YT". YT, legally or beneficially owned by Mr. C during his lifetime, held the entirety of that part of the shareholding in JY which carried the economic interest of that company including the right to receive dividends.

8 Mr. C died in December 2001 and his Will purported to dispose of his shares in JY and YT; however, litigation ensued in respect of his testamentary instructions. A hearing was fixed for June 2004 but, after complex negotiations, agreement was reached which was reflected in an order of Court dated 11th June, 2004. Among other matters, eight charitable sub-trusts of YT were created each having as its guardian one of the children of Mr. C. Ninety nine per cent of the controlling shares in JY were vested in YT with the remaining one per cent vested in Mrs. C. Ninety six per cent of the shares in YT were vested in a purpose trust and one per cent vested in Mrs. C. The Representor in the pleadings giving rise to this appeal (the current first respondent) is the current trustee of three of the sub-trusts of which three sisters were the original guardians.

9 There was a division of family opinion as to the 2004 compromise. The parties before the Royal Court were Trilogy, YT and Mrs. C. Mrs. C was not initially or directly involved in the issues below but had been given leave to participate in the proceedings. By the time of the hearing below, YT was adopting a neutral position as its board of directors were split on the three issues before the Court and its Articles of Association required decisions to be taken unanimously. YT therefore confined itself to making submissions intended to assist the Court. Mrs. C put forward arguments in opposition to those of Trilogy.

The Issue

10 The issue sought to be appealed is as to the proper construction of Article 96 of the Articles of Association of JY which had been amended as part of the compromise. Among other matters it provided that, in any financial year in which profits of that year were available for dividend, the Directors should recommend to the Company a dividend of not less than 75

per cent of such profits. Such dividends would be paid to YT as trustee of a charitable trust and, hence, equally to the eight Sub-Trusts.

The Decision Below

11 Trilogy had argued that, if one compared the net assets at 31 December 2004 (prepared on the historical cost basis) with the net assets as shown in the accounts as at 31st December, 2005, (prepared on the IFRS basis), the difference must be the profit for the year and 75 per cent of that had to be distributed because of Article 96. The board of JY, on the other hand, had taken the view initially that, according to the accounts for 2005, the company had made a loss and therefore there was no obligation to pay a dividend under Article 96 in respect of that year. Both Trilogy and YT (albeit confining itself to making submissions intended to assist the Court) called expert accountancy evidence. Neither expert sought to say that either the historical cost basis or the IFRS basis was not a generally accepted accounting practice for the purposes of Article 114 of the Companies (Jersey) Law 1991. Both agreed that the IFRS gave a more accurate picture of annual performance, and further, that there seemed to be a general move towards adopting it.

12 The experts were agreed that the figure of $225M, representing revaluation and increase in fair value, constituted profits and that they were profits which were first recognised in the 2005 accounts. They were profits available for distribution. The sole difference of opinion was whether they were profits of 2005 for the purposes of the mandatory distribution provision of Article 96.

13 The court, preferring the evidence of Trilogy's expert, reached the opinion that, unless there was something in Article 96 which rendered it inconsistent with the subject or context, “profit” for the purpose of Article 96 was to be ascertained in accordance with generally accepted accounting principles; and it was unable to find any such inconsistency. The question then arose as to which generally accepted accounting principle ought to be used.

14 In the judgment of the court below, the revaluation figure of $225M had to be treated as a profit of 2005 although it might have accrued over many previous years. If it was not treated as a profit for that year, it would not be treated as a profit of any year. Such a result, in the opinion of the court below, would be wrong.

15 As the learned Bailiff indicated in paragraph 62 of the judgment, the only area where the court differed from the submissions of Advocate Journeaux, for Mrs. C, was as to whether one was restricted to the figure shown in the profit and loss account (as Advocate Journeaux had submitted) or whether one could consider the accounts as a whole. The Royal Court, for the reasons given, adopted the latter approach.

The Law

16 The parties to this application were agreed as to the law and authorities applying to

terminations on applications for stays pending appeal.

17 The Court of Appeal (Civil) Rules 1964 provide, among other matters:-

> ***"(1) Except so far as the court below or the Court may otherwise direct –***
>
> ***(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;***
>
> ***(b) no intermediate act or proceedings shall be invalidated by an appeal"***

18 In *Seale Street Developments Limited -v- M A Chapman and Another* [1992] JLR 243 this court, having reviewed English authorities, expressed the opinion (at page 251) that "once it is shown that if no stay be granted the right of appeal would be likely to be rendered nugatory, and that once a reasonable ground of appeal has been shown to exist, then special (that is to say, exceptional) circumstances have to be advanced to justify a refusal of the stay.".

19 A similar approach was expressed by Southwell J.A., delivering the opinion of the court, in *Veka A.G. -v- T.A. Picot* [1999] JLR 306, 309.

20 In the latter case it appears that there was no citation to this court of the decision of the Court of Appeal in England in *Winchester Cigarette Machinery Limited -v- Payne and Another* [1993] WL 963008. In that decision, Hobhouse L.J. (as he then was) agreed with the leading judgment of Ralph Gibson L.J. and added that "since the discretion is unfettered, no authority can lay down rules for its exercise, all that can be done is to say that it must be exercised judicially and to provide guidance."

21 Ralph Gibson L.J. had respectfully agreed with the approach of Balcombe L.J. (sitting as a single judge of the Court of Appeal) in *Bhimji -v- Chatwani*(29 January 1993) to the effect that such applications should be approached as a matter of ***"common sense and balance of advantage".*** However, Ralph Gibson L J added that "there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason."

22 The approach of the Court of Appeal in England in *Winchester Cigarette Machinery Limited* was noted by the Royal Court in *Hotchkiss -v- CI Knitwear 2000/160D* where the Commissioner (Sir Peter Crill) noted that Hobhouse L.J. had also expressed the view that the appellant had to show some special circumstances which took the case out of the ordinary. The learned Commissioner considered that such an approach appeared to be somewhat different from the statement of this court in the *Seale Street* case.

23 Most recently, in *Leicester Circuits Limited -v- Coates Brothers plc* [2002] EWCA (Civ) 474,

the Court of Appeal in England made the following observations.

24 Potter L.J., at paragraph 13, said:-

> ***"The proper approach is to make the order which best accords with the interests of justice.*** Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

25 Arden L.J., agreeing with the orders proposed by Potter L.J. and his reasoning, indicated that she had formed no view as to the likelihood of the appeal succeeding and continued: "The prospect of success on an appeal is not without any substance and thus meets the threshold test required for permission to appeal."

26 It cannot fall to me, sitting as a single judge of the Court of Appeal, to declare of new the proper approach in this jurisdiction in respect of applications for stay of execution. I therefore consider the factors put forward by the respective parties on the basis set out in *Veka A.G. -v- T.A. Picot* to the effect that the order should not prevent the appeal, if successful, from being nugatory unless I am satisfied that the appeal is not presented in good faith, has no realistic chance of success or that there are other exceptional circumstances.

Applicant's Contentions

27 For the applicant, Advocate Journeaux submitted that the balance of advantage clearly favoured an order continuing the stay pending determination of the appeal. The basis of the appeal would be that the Royal Court had been wrongly mixing two accounting systems.

28 The lifting of the stay would result in the payment of a dividend by JY to YT and distributed to each of the eight sub-trusts. Once declared by JY, it could not subsequently be revoked. Even if some form of undertaking were offered, a repayment by the sub-trusts would raise the question as to the status of the repayments which might require to be treated as profit for the year ended 31st December, 2012. Any uncertainty about the status of any monies repaid indicated a balance of advantage in favour of a stay.

29 Even if it were possible to restore the status quo by use of an undertaking, there would be no real advantage to the sub-trusts in the meantime as they could not distribute the money. What would otherwise be the dividend would continue to earn a return in the meantime, and that return would ultimately be to the benefit of the sub-trusts.

30 Looking at JY, there could well be significant break up costs associated with putting an

order into effect as the 2009 accounts for JY showed that it did not then have sufficient cash reserves to make the orders made by the Royal Court.

31 Separately, none of the sub-trusts appeared to have any existing charitable projects or activities which would be disrupted by the continued stay of execution: indeed none of the sub-trusts appeared to have distributed more than half of the dividends so far received from YT. The sub-trusts could not prudently have made any pre-existing plans involving the use of distributions, particularly as there was at least a prospect of the appellant's appeal being successful. The sub-trusts already stood to receive substantial further funds from the parts of the judgment of the Royal Court which are not subject to appeal.

First Respondent's Submissions

32 For the first respondent, Advocate Baker addressed the merits of the appeal, the role of Mrs. C in the proceedings, question as to who should be pursuing the present appeal and the balance of convenience.

33 As to merits he submitted that the reasoning of the learned Bailiff was straightforward and incontrovertible and that the effect of the appellant's contentions would be that $225M profits would fall wholly out of account for the purposes of Article 96. The construction contended for by Mrs C could not have been reached by the court below on the basis of the evidence as to accountancy practices before it. In particular, there was no evidence before the Royal Court to support the contention for the appellant that the Royal Court had been wrongly mixing two accounting systems.

34 Advocate Baker carefully and helpfully analysed the role of Mrs C in the proceedings. He identified that Mrs C's anticipated participation in the proceedings below was expected to be limited. She had been joined to the proceedings effectively as a matter of courtesy and in order to offer any observations she might have on the wishes of Mr. C which the court might have found relevant. There was no reason to think that she would have any role to play in arguing the pure issue of construction which appeared now to be the subject of appeal. However, when it became clear that YT was unable to take any active role in the proceedings as a result of divisions within the board, Mrs C was allowed to take a more active role with a view to assisting the court by putting a case contrary to that of the first respondent. But there had never been any suggestion that Mrs C was being joined as a representative beneficiary: she was not a beneficiary, the beneficiaries were before the court and the Attorney General had been joined to represent the interests of charity.

35 Turning to the issue as to who should be pursuing the appeal, the order appealed against having been made against YT. If YT had been concerned about the nature of the order, it was YT who should be appealing the order itself. Advocate Baker recognised, however, that were YT, as trustee, to seek to appeal the order, it would potentially face criticism and be unlikely to receive the approval of the court: reference was made *In Re Earl of Radnor's Will Trusts* (1890) LR 45 Ch. D. 402, 422–3. Mrs C, on the other hand, had no financial

interest in the outcome of the appeal and the effect of her appeal was to circumvent the justified restrictions which made it untenable for YT to appeal the order.

36 As regards balance of convenience, Advocate Baker submitted that Mrs C would suffer no prejudice if the stay was lifted. She had no financial interest in the outcome of the case and the only real difference between the position before and after compliance with the order lay in who had immediate control of the assets.

37 By contrast, the stay kept the first respondent out of its money. By reason of Article 102 of the articles of JY, the first respondent would not be entitled to interest on late payment of a dividend. It would only receive a share of the income generated on the sum for the dividend if JY made a profit in the relevant years. There was no substance in the argument that breaking the current investments would be costly as most of the assets of JY were held as marketable investments.

38 If the true purport of Mrs C's position was to express the founder's wishes, this was irrelevant as his wishes had been superseded by the 2004 compromise. In Advocate Baker's submission, the first respondent was entitled to a strong suspicion that Mrs C was being used as a cipher for the inclinations of one or more of the other children of the late Mr C.

Discussion

39 As I have already indicated, I approach the competing contentions adopting the same approach set out by this court in *Veka A.G. -v- T.A. Picot*.

40 The first question is whether lifting the stay would result in the appeal being rendered nugatory. The order of the court below declares a sum as the profit of JY for the accounting period in question. It orders YT, as trustee, to procure without delay the declaration of a dividend in a specific amount for that period and the payment without delay of one-eighth of that sum to each of the sub-trusts. If the stay is lifted effect must be given to that order and, absent any other associated mechanism, the funds will have left control of YT and JY, the sub-trusts would be perfectly entitled to distribute sums to charitable beneficiaries and there must be extreme doubt as to whether they could be traced and recovered.

41 In my opinion therefore, lifting the stay would result in the appeal, if successful, being nugatory.

42 I turn, therefore, to consider whether the appeal appears to be presented other than in good faith.

43 Subject to what I shall say later, I am of opinion that, on the information before me, it is not

open to me to proceed upon the basis that this appeal is being presented other than in good faith. The role of Mrs C in these proceedings has been a singular one, but these are trust proceedings where the appropriate procedure and its management are very much matters for the Royal Court which has admitted Mrs C to participation. As the learned Bailiff indicated at paragraph 62 of the judgment below, there was a difference between the submissions of Advocate Journeaux and the views of the Royal Court as to whether, when considering the 2005 accounts, it was open to restrict consideration to the figure shown in the profit and loss account whether it was open to consider the accounts as a whole. This is the issue proposed to be taken forward in the appeal. Whilst the notice of appeal dated 29th May, 2012, indicates more advanced line of reasoning than that apparently set out below, such a situation is by no means unusual. As Mrs C is not a trustee for present purposes, I do not discern any clear basis for reaching the view that an appeal, taken specifically on a point taken below, has not been taken in good faith.

44 The next question is whether or not the appeal has a realistic chance of success.

45 In using the words used by Southwell J A in *Veka A.G. -v- T.A. Picot*, I am conscious that they are words which do not necessarily echo the more recent expression by Arden L J in *Leicester Circuits Limited* where her Ladyship adopted a phraseology meeting the threshold test required (in England and Wales) for permission to appeal. There may indeed be an argument as to whether the test should be the same in an application for continuation of stay as with an application for leave to appeal but I proceed, again, upon the basis set out in *Veka A.G.*

46 As set out in the skeleton argument from Mrs C presented by Advocate Journeaux, the issue before the Royal Court was what was meant by “profits of that year” in Article 96. That, he says, was a question for the court, not for experts. The reasoning of the Royal Court involved taking the figure of $225M that was not shown as a profit of 2005 in the 2005 accounts and treating it as a profit of 2005. The Royal Court had purported to apply the IFRS basis but had not. The Royal Court had departed from the law as set out by Sir Thomas Bingham MR (as he then was) in *Gallagher -v- Jones* [1993] STC 537, 555G which the Royal Court itself had set out at paragraph 50 of its judgment. The Royal Court had wrongly allowed itself to be swayed by what it saw as the “dividend gap” for the purposes of Article 96 and wrongly mixed two accounting systems, contrary to the decision of the first division of the Court of Session in Scotland, sitting as the Court of Exchequer, in *CIR -v- Morrison* 1932 SC 638.

47 In my opinion it is not open to me to reach the view that the present appeal has no realistic chance of success. Contrary to Advocate Baker's submissions that there had been no evidence before the Royal Court to support the contention for the appellant that the Royal Court had been wrongly mixing two accounting systems, Advocate Journeaux's point on appeal is that the issue as to what was meant by “profits of that year” in Article 96 was a question for the court, not for experts. As it happens, the implications of changing accounting standards to those of IFRS have already been the subject of litigation before the Court of Session in Scotland and now being appealed to the Supreme Court, albeit the

circumstances are different to those of the present litigation: see *Lloyds TSB Foundation for Scotland -v- Lloyds Banking Group plc* [2011] CSIH 87. Whilst the decision on that appeal is highly unlikely to be of relevance to the present proceedings, the factual matrix shows that it is not always easy to resolve issues arising when a change occurs in generally accepted accounting practices and the effect that such changes can have on unrelated contracts.

48 I turn therefore to consider whether the submissions of Advocate Baker indicate that there are other exceptional circumstances which would place the balance in favour of the first respondent notwithstanding the appeal being rendered nugatory.

49 On this issue it seems to me that there are two competing considerations. The first is that, whilst Mrs C has title to pursue her arguments and appeal by being admitted to the proceedings by the Royal Court, there appears to be a serious question mark as to her proper interest. Whilst, as a 1% shareholder following the 2004 compromise she has a financial interest in JY which might be affected by the levels of dividend to be paid, that independent financial interest was not a basis upon which she was given leave to participate in the proceedings. In Mrs C's response in the proceedings before me, Advocate Journeaux candidly accepts that the fact that Mrs C has no personal or financial interest in the outcome of the appeal but has the position of a “person interested” in the charity and seeks to put forward a case as to the prejudice to the Charity, as she understands the Settlor intended it. Alternatively, as Advocate Baker has submitted, the sums to be paid as a dividend under the court's order are in practice held on charitable trusts before the order and would be held for the same purposes after the order is complied with: the critical difference between the position before and after compliance with the order below lying in who has immediate control of the assets.

50 On the other hand, I am not persuaded that the position of the first respondents is so exceptional that to continue the stay would result in serious deprivation to it. I agree with the tenor of Advocate Journeaux's submissions that, given that the first respondent had to get representation because of the difference of opinion, the sub-trusts could not have been making detailed plans for distribution of the dividend prior to the determination of the Royal Court. It therefore follows that no other person would have a particular expectation of receiving benefit from a particular sub-trust as a result of the declaration of a particular dividend.

51 Further, any reduction in receipt of income or interest in the period between this decision and a determination by the Court of Appeal on the appeal itself could not, in my opinion, constitute an exceptional circumstance having regard to (i) the present economic climate and (ii) the lack of commitments on the part of the sub-trusts.

52 As a Parthian shot, Advocate Baker had suggested that Mrs C could have precluded the argument of nugatory outcome by offering to loan the relevant amounts to the sub-trusts interest free during the currency of the appeal. In my opinion that submission does not

present a logical hurdle for Mrs C and an exceptional circumstance. All that such an arrangement would do would be to entitle the sub-trusts to use the funds to generate income, to which, if the appeal were successful, they would not have been entitled. Doubtless there would also have to be various guarantees to ensure that the funds were recoverable in event of the appeal being successful.

Conclusion

53 For all the reasons which I have set out above I am of opinion that the stay of execution should be continued until determination by the Court of Appeal of the appeal by Mrs C against the relevant parts of the Order of the Royal Court of 10th May, 2012. In my view the lifting of the stay would render the appeal nugatory, it has not been shown that the appeal is not presented in good faith, it has not been shown that the appeal has no realistic chance of success and there are no other exceptional circumstances supportingthe lifting of the stay.