[2009] CA (Bda) 16 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 7 of 2009

Between:

CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL (CCIC)
Appellant

-V-

MR. MUNIB MASRI
Respondent

Before: **Zacca, President**
Evans, JA
Ward, JA

Date of Hearing: **Friday, 13 November 2009**
Date of Judgment: **Thursday, 19 November 2009**

Appearances: Alexander Layton, QC and Nicole Tovey of Trott & Duncan for the Appellant
Jeff Elkinson and Ben Adamson of Conyers Dill & Pearman for the Respondent

JUDGMENT

Evans, JA

1. This is an unmeritorious appeal against the dismissal by the Hon. Mr. Justice Kawaley of an application which he described as follows –

> "16. Overall, the application appeared to be one which should simply be summarily dismissed both because it is wholly unmeritorious and because it is improperly

> motivated and constitutes an abuse of the process of the Court."

2. Undeterred, the Appellants obtained a Ruling that they were entitled to appeal to this Court as of right, that is to say, without first applying for and being given leave to appeal: judgment of the Court of Appeal, June 2009.

3. The Appeal was heard on 13 November 2009 when the Appellants were represented by Alexander Layton QC making his first appearance before the Courts in Bermuda. We are grateful to him for his skilled and restrained submissions, notwithstanding that their content was of so little merit.

4. In this respect, we found ourselves in the same situation as Kawaley J. was. His Judgment (para. 16) continued –

> "However, due to the history of this litigation elsewhere and in deference to the sheer volume of paper which has been deployed in support of the present application (not to mention the elegant style, if not content, of the arguments advanced on the Applicants` behalf [by Mr. Delroy Duncan]), it seems appropriate to deliver a fully reasoned judgment on the merits. It is to be hoped that similar applications in the future in this jurisdiction can, where appropriate, be dealt with in a more summary manner."

5. For our part, we propose to confine this judgment to the two specific issues which Mr. Layton identified for us, out of four or more grounds which originally were put forward. As for the sheer volume of paper put before the Court, ostensibly in support of the appeal, we made it clear at the outset of the hearing that we considered this wholly indefensible in the present case. Not only does it increase the physical burden on the Court staff, not to mention the lawyers who produce and have to handle it, but it becomes more difficult for counsel to present the parties` cases in Court. In our view, the time has come, indeed it is long past, when

specific costs penalties should be imposed on parties and even their legal representatives for this particular abuse.

The Application

6. The Application was made to the Supreme Court to set aside the registration of three judgments given in the Commercial Court in London, in favour of the Respondent to this Appeal, Mr. Masri, against the Appellant company, Consolidated Contractors International Company SAL, whom we will call "CCIC". They were dated 15 June 2007, 5 October 2007 and 11 February 2008 for a total of US $49,964,644 (see the Judgment para.1). All were certified by the High Court of England and Wales under section 10 of the Administration of Justice Act 1920 on April 18 and 14 March 2008, respectively.

7. The three judgments were given in two actions which were consolidated and heard together by Gloster J. in the summer of 2006. Her judgment is dated 28 July 2006. Briefly, Mr. Masri claimed damages for breach by CCIC (and by asscociated companies who are not involved in this Appeal) for breach of a contract to share the costs of and the profits arising out of an oilfield PSA (Production Sharing Agreement) in the state of Yemen.

8. The judgments were registered in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958 ("the 1958 Act"). The 1958 Act provides for registration on the application of the judgment creditor (section 3) and that any party against whom it may be enforced may apply to the Court for the registration to be set aside (section 4). Here, the registration was dated 13 June 2008 and CCIC`s Application was made on 25 November 2008. Difficulties of service intervened which need not detain us here. The Application was heard by Kawaley J. on 28-29 January 2009.

9. The grounds for setting aside a registration listed in the 1958 Act include the following –

> "**Setting aside registration**
> 4 (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration-
> (a) shall be set aside if the Supreme Court is satisfied –
> (i)……
> (ii) that the courts of the United Kingdom had no jurisdiction in the circumstances of the case;
> (iii) ……;or
> (iv) that the judgment was obtained by fraud; or
> (v)……
> (b) may be set aside if……."

10. Section 10(1) of the 1958 Act provides that "Rules for the carrying into operation of this Act shall be made by the Supreme Court and shall provide…….".

11. The Judgments (Reciprocal Enforcement) Rules 1976 made under this section (Bermuda Statutory Instrument SR&O 60/176) include (hereinafter called "Rule 12") –

> "**Application to set aside**
> 12. The judgment debtor may at any time within the time limited by the order giving leave to register after service on him of the notice of registration of the judgment apply by summons in chambers to set aside the registration or to suspend execution on the judgment; and if the Judge on such application is satisfied that the case comes within one of the cases in which under section 4 of the Act no judgment can be ordered to be registered or that it is not just or convenient that the judgment should be enforced in Bermuda or that there is other sufficient reason he may order that registration be set aside or that execution on the judgment be suspended either unconditionally or on such terms as he thinks fit and either altogether or until such time as he directs:….."

12. The two remaining grounds on which the Appellants contend that the registration of these judgments should be set aside are –

(a) that the judgments were obtained by fraud (section 4(1)(iv)), and

(b) that it is not "just or convenient" that they should be enforced in Bermuda, within Rule 12.

"Obtained by fraud"

13. This requires some reference to the long and convoluted history of the proceedings in London. The Appellants contend that Mr. Masri made a fraudulent statement to the English Court and obtained thereby, not the judgments in his favour given by Gloster J. after trial of the action, but the Court`s previous Ruling that it had jurisdiction over Mr. Masri`s claims. By that route, it is submitted, Mr.Masri obtained the judgments eventually given in his favour.

14. It is not contended, therefore, that Mr. Masri gave false evidence to the trial judge and thereby obtained the judgments that were given. To the contrary, it is alleged that evidence he gave at the trial, and the Judge`s findings as to his credibility, or lack of it in the Judge`s view, establishes that statements he made in support of his contention that the English Courts had jurisdiction in respect of his substantive claims were false and made recklessly or with knowledge that they were untrue.

15. The circumstances can be summarised as follows. CCIC is a company domiciled in Greece. As such, the English Courts have jurisdiction to hear claims against it only in the cases specified in the Judgments Regulation No.44/2001 of the European Union, of which both Greece and the United Kingdom are Member States. One such case is defined in Article 6 –

"Article 6
A person domiciled in a Member State may also be sued:

> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

16. The contract on which Mr. Masri relied against CCIC was reduced into writing in a document dated 6 November 1992. CCIC was and is a member of the CCC group of companies. The Group was owned and controlled by Mr. Khoury (and his partner Mr. Sabbagh) and the agreement was made with him. They negotiated and signed it in London, at the offices of Consolidated Contractors (U.K.)Ltd., an English company which was also a member of the Group. The Agreement was drafted by Mr. Khoury or on his behalf, and was written on the headed writing paper of CC(UK). Nothing was said as to why that writing paper was used or as to which, if not all of the CCC companies was or were the contracting parties.

17. In 2004, Mr. Masri brought two actions against Mr. Khoury and his companies. He claimed in the first action in June 2004 against CCUK, alternatively against CC Holding (Consolidated Contractors Group SAL Holding Company). In the second action, in October 2004, the defendants were Mr. Khoury, CCIC, Consolidated Contractors (Oil and Gas) SAL ("CC Oil and Gas") and the Holding Company (the first action having been discontinued against it owing to problems with service). It should be recorded that all the companies were incorporated in Lebanon except CCUK, a subsidiary incorporated in England. CCIC like Mr. Khoury was domiciled in Greece.

18. Various applications in both actions were heard by Cresswell J. in May 2005. CCUK sought summary dismissal of the claim against it. The Judge held that Mr. Masri "has a real prospect of succeeding at trial in showing that (a) the 1992 Agreement was between Mr. Masri and CCUK,

or alternatively (b) between Mr. Masri and the CCC Group (which would include for present purposes all corporate defendants in both actions, including CCUK)". He continued "The true construction of the Agreement must, in my opinion, await a trial at which the background knowledge available to the parties will be clearly established. A different conclusion as to the contracting party or parties may result from a trial. I emphasize that this is an interlocutory application." (Judgment dated 17 May 2005 para.4.)

19. In addition, CCIC and the other defendants, apart from CCUK, contended that the EU Judgments Regulation precluded the English Court from exercising jurisdiction over the claims against them. The Judge held, first, that the claim against CCIC (though made in a separate action from the claim against CCUK) was within Article 6.1 (quoted above), and secondly, that jurisdiction also existed under Article 5.1 of the Judgments Regulation by virtue of the English law rule that the alleged debtor (CCIC) owes the obligation to pay at the place where the potential creditor resides, which for Mr. Masri at that time was London.

20. The Court of Appeal dismissed the appeal against Cresswell J`s judgment on the ground that Article 6.1 of the Judgments Convention applied. This made it unnecessary for them to consider whether jurisdiction was established under Article 5.1 also. Mr. Layton suggested that the Court of Appeal "had some problems" with the Judge`s view of that issue, but the fact remains that jurisdiction was established.

21. The present Appellants were given leave to appeal to the House of Lords, but the trial of the action and Gloster J`s judgment intervened before the appeal was heard. Her judgment was not satisfied, and a stay of execution was refused. Retrospectively, and unusually, the Appellate Committee made the leave to appeal conditional upon the Appellants

paying a large part (US$30 million) of the judgment amount into Court. The Appellants chose not to do so and therefore lost their right of appeal.

Mr. Masri's statement

22. The statement which the Appellants suggest was made fraudulently, and with the object of obtaining the English Court`s ruling that jurisdiction could be exercised against CCIC (though not a defendant in the first action) was the following allegation in the Particulars of Claim in the first action –

> "12. The Claimant [Mr.Masri] contends that the parties to the 1992 Agreement were the Claimant and First Defendant [CCUK]. The Claimant believed, at the time of signing the 1992 Agreement, that Mr. Khoury was signing the agreement on behalf of the first Defendant. This was consistent with the fact that the agreement was recorded on the letterhead of the First Defendant."

23. This was repeated in the second action (Particulars of Claim paragraph 12), and in both pleadings the statutory Statement of Truth ("I believe that the facts stated in these Particulars of Claim are true") was signed by Mr. Masri.

24. In his Witness Statement, Mr. Masri said this –

> "CCUK
> 49. I did not know the structure of CCC and there was never any discussion between myself, Sabbagh and Khoury as to which company held CCC`s interest in the Concession……..Sabbagh and Khoury regarded CCC as an extension of themselves and we all treated the Concession as a Sabbagh/Khoury interest as much as a CCC interest. However, I believed that the Agreement reached on 6 November purported to be an agreement between myself and CCUK and I believed that it was indeed an agreement between myself and CCUK."

25. The Particulars of Claim in the first action also contained a reference to a letter dated 24 October 1992 allegedly received by Mr. Masri. This letter was not referred to in the Particulars of Claim in the second action, and

when he gave evidence at the trial he denied having received it. It was relevant to the issue whether CCIC had an interest in the concession.

26. In her judgment, Gloster J. rejected the contention that CCUK was a party to the November 1992 Agreement. This contradicted Mr. Masri`s evidence and statements that he believed that it was. She expressed her finding as follows –

> "72. In my judgment the suggestion that Mr. khoury was contracting on behalf of CCUK, an English company with a limited role within CCC, merely because its writing paper was used for the purpose of setting out the terms of the1992 Agreement, has an air of total unreality about it..... Not only was Mr.Masri aware that the entity that held the legal interest in the Concession was CCIC andf that it was the contracting party under the PSA, but he had never suggested at any time, prior to servinghis proceedings in June 2004, that CCUK, the English company, was in any way involved or liable to him....."

27. She also found with regard to the letter dated 24 October 1992 "Mr. Masri denied that he ever received the letter, but I consider that it is highly probable that he did so" (paragraph 63).

28. She expressed her general conclusion with regard to Mr. Masri`s evidence as follows –

> "14. In many respects I found Mr. Masri to be an unsatisfactory and unreliable witness. He gave inconsistent evidence at times and was prone to regular exaggeration when he considered it suited his case. There were a number of occasions where I felt that I could not trust his credibility and that his evidence was self-serving. On other occasions, however, he gave his evidence frankly and truthfully."

Findings

29. The Appellant`s contention that Mr. Masri induced the English Courts to hear his claim against CCIC and thereby "obtained" the judgments against the company, by means of his statement that he believed that CCUK was a party to the November 1992 Agreement, not only requires

proof that the statement was (a) false, and (b) made fraudulently. It also faces a number of major and apparently insuperable obstacles., including (1) the Judge held on an objective assessment of the evidence which was before him that the claim had a reasonable prospect of success; (2) his judgment was upheld by the Court of Appeal; (3) the Appellants failed to pursue their appeal to the House, though in the circumstances described above; (4) Mr. Masri was not cross-examined at the trial as to the truth or falsity of the statements in question, although the Appellants` counsel had the opportunity to do so (possibly this was because he recognised that the issue did not turn on Mr. Masri`s subjective belief, in any event); and (5) jurisdiction was established under Article 5.1, a separate and independent ground. This was not ruled upon by the Court of Appeal, but it could have been pursued before the House of Lords.

30. However, it is unnecessary for this Court to consider any of those issues, because we are satisfied that the contention falls at the first hurdle. There is simply no evidence that the statements were made fraudulently, and we reject that contention outright, for three principal reasons. First, the statement relied upon ("I believe that the contract was with CCUK") was a statement of belief. Creswell J held that there were objective grounds for that belief. Three factors which supported it were admittedly correct – the contract was written on CCUK headed writing paper; the agreement was made and signed at CCUK`s offices; and CCUK was a member of the CCC Group, which on one view was the contracting party.

31. Secondly, Gloster J`s description of the contention as "having an air of total unreality", considering the matter on an objective basis and after full examination of all the circumstances, does not mean that the belief was not genuinely held, any more than it invalidates Cresswell J`s finding that the contention was properly arguable, on the facts known to

him at that stage. Moreover, the genuineness or otherwise of Mr. Masri`s belief was not relevant to Gloster J`s conclusion, and it appears not to have been raised as an issue at the trial. She did not find that Mr. Masri gave false evidence as to whether or not CCUK was a contracting party. The most she found was that he knew that CCIC not CCUK held the legal interest in the Concession.

32. Thirdly, Gloster J also found that Mr.Masri and Mr. Khoury were not concerned with the identity of the particular corporate entity within the CCC Group: "as far as they were concerned, Mr. Khoury was agreeing on behalf of "CCC" and that was enough" (paragraph 73). Admittedly, she was concerned there with CCIC and CC Oil and Gas, whose interests in the concession may have been unclear, and she had excluded CCUK from the equation in the previous paragraph. If the contracting party could have been "one or more company, or companies, within the CCC Group" (ibid.), she does not say that it was not possible for Mr. Masri to believe that it was, or included, CCUK, the only company identified on the document which Mr. Khoury signed.

Conclusion

33. It was common ground, or so we understood, that unless there was prima facie evidence that the statements were fraudulent, this ground of the Application failed. Had there been such evidence, the appropriate course may have been to order a trial of that issue. However, we agree with Kawaley J. that the need to do so does not arise.

34. A number of legal issues was discussed by Kawaley J. in his judgment, and leading authorities were cited to us, broadly as to whether a party resisting enforcement of a foreign judgment and who alleges that the judgment was obtained by fraud can only rely on fresh evidence which was not available at the trial, and as to the burden of proof which he

must discharge. If there is not even *prima facie* evidence of the alleged fraud, these issues do not arise.

"Just or convenient"

35. We have already referred to the fact that the House of Lords made the grant of permission to the Appellants to challenge the jurisdiction ruling of the Court of Appeal, upholding Cresswell J., conditional upon the payment of a large sum of money into Court. Lord Bingham described it as an unusual order, but by that time (26 June 2008) Gloster J had given judgment for even larger sums, and the Appellants did not contend that they were unable to pay them, if required to do so. A similar condition was attached to the Appellants` permission to appeal from her judgment to the Court of Appeal. On 21 October 2008, Tomlinson J. said this about the Appellants in the Commercial Court –

> "The Defendants have shown both determination and ruthlessness in taking advantage of any opportunity open to them to resist enforcement of the judgment. They will put every obstacle in the way of Mr. Masri in his efforts to enforce the judgment in whatever jurisdiction those efforts may be made. These are my own conclusions on the light of the evidence before me, but they do no more than reflect similar conclusions reached earlier both by Gloster J. and by different constitutions of the Court of Appeal. I suspect that Lord Bingham had similar considerations in mind when on 26 June 2008, speaking for the Appellate Committee of the House of Lords, he said that "the circumstances and history of this case call for an unusual order."

36. We have quoted in paragraph 1 above the observations made by Kawaley J. regarding the lack of merit in the Application. It is inconceivable in our judgment that the scales of justice, even inconvenience, could weigh in the Appellants` favour, and for that reason we reject this ground of appeal also.

37. The Appeal therefore is dismissed and, subject to any submission made in writing within seven days of the judgment being handed down, we direct the Appellants to pay the Respondent's costs of the appeal.

Signed

Evans, JA

I agree

Signed

Zacca, President

I agree

Signed

Ward, JA