The Court of Appeal for Bermuda

CIVIL APPEAL No. 10 of 2010

Between:

TEYSEER CONTRACTING CO. WLL

Appellant

-v-

MR. MUNIB MASRI & OTHERS

Respondent

Before: Edward Zacca, President
Anthony Evans, JA
Scott Baker, JA

Appearances: Victor Lyon, QC; Mr. Peter Dunlop, for Appellant
Mr. Beltrami, Mr. Ben Adamson, Ms. Nicole Tovey, Mr. D. Kessaram and Andrew Martin for Respondents

JUDGMENT

Date of Hearing: Tuesday, 1 March 2011
Date of Judgment: Friday, 18 March 2011

SCOTT BAKER, JA

1. The appellant Teyseer Contracting Co. WLL ("Teyseer") appeals against the Order of Kawaley J dated 22 March 2010 refusing its application to set aside an interim receivership order dated 13 June 2008, as amended

on 26 March 2009. Leave to appeal was granted by the judge on 23 July 2010.

2. There are four respondents to the appeal but only the first respondent, Mr. Masri, has participated actively in the hearing before us.

Background

3. Mr. Masri is a judgment creditor. The second respondent, Consolidated Contractors International Company SAL ("CCIC"), is the judgment debtor. The amount of the judgment debt exceeds $50 million. Mr. Masri obtained the judgments in the English High Court in 2007 and 2008 and ever since has been making unsuccessful efforts to obtain satisfaction. On 6 June 2008 the judgment creditor obtained a freezing order against CCIC in respect of receivables due under various contracts. The judgments were registered in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958. The Order was made on 13 June 2008, the same day as the Interim Receivership Order was made. The judgments arose out of a 1992 agreement relating to the Masila Oil Concession in Yemen. Mr. Masri is a substantial Palestinian businessman. CCIC is company incorporated in Lebanon but has its principal office in Greece. It is said to be controlled by a Mr. Khoury, the former business partner of Mr. Masri.

4. The third respondent is Qatar Shell GTL Ltd. ("Qatar Shell") a Bermuda Registered Company. The fourth respondent, Mr. Mark W R Smith of Deloittes is the interim receiver. He was appointed interim receiver against the judgment debtor CCIC "to receive all amounts due to CCIC from Qatar Shell (such amounts to be referred to as "contract revenues")". An affidavit of assets filed in the English proceedings on behalf of CCIC had disclosed the existence of contract number PL-125 with Qatar Shell covering the period 2 November 2006 to 31 December 2011.

5. It was only following the appointment of the receiver that it was discovered that the contract revenues were owned, not by CCIC alone but, on the face of the relevant contract, jointly by CCIC and Teyseer. There was a joint venture agreement ("the JVA") between CCIC and Teyseer. I shall refer to the contract with Qatar Shell and the JVA in more detail in a moment.

6. CCIC sought to challenge the registration of the judgments in Bermuda but the challenge was dismissed by Kawaley J with costs on an indemnity basis. The basis of the challenge was, principally, that the English judgments had been obtained by fraud. The judge described the challenge as:

> "demonstrably part of a wider litigation strategy by (CCIC) in various parts of the world..... to frustrate the judgment creditor's legitimate efforts to obtain the fruits of his hard earned judgments."

CCIC appealed to the Court of Appeal who dismissed it as "unmeritorious". CCIC then appealed to the Privy Council. We were told that that appeal remains extant.

7. The joint venture carries on business in Qatar constructing the Pearl Gas to Liquid "GTL" project for Qatar Shell who has described it as the largest ever construction project in Qatar. Qatar Shell is part of the Royal Dutch Shell Group.

8. Teyseer sought to set aside the Receivership Order on two broad grounds. The first was that Qatar Shell owed the contract revenues to CCIC and Teyseer jointly and that joint debts could not be collected by the receiver in satisfaction of CCIC's sole debt to the judgment creditor. The second was that under the joint venture agreement between CCIC and Teyseer, which was governed by Swiss law, CCIC's rights to the contract revenues were limited to an up-front fee which it had already

received. There was, therefore, no debt as a matter of law or fact on which the receivership could bite.

9. A further point that emerged only after the appointment of the receiver was that the contract with Qatar Shell contained an English governing law and exclusive jurisdiction clause ("the EJC"). Qatar Shell's main submission before the judge was its concern as to double jeopardy: The contract was governed by English law so only an order of the English Court directing it to pay the receiver rather than the joint venture would discharge the relevant debt under the contract's governing law.

Jurisdiction to Appoint a Receiver

10. The Court's jurisdiction to appoint a receiver arises from section 19 (c) of the Supreme Court Act 1905 which provides:

> "An injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that such an order should be made; and any such order may be made either conditionally or upon such terms and conditions as the court thinks just;…"

This is in very similar terms to the equivalent English provision namely section 37 of the Supreme Court Act 1981 and it was accepted that for the purposes of the present case there is no relevant difference.

The Judge's Conclusions

11. In summary the judge concluded:

> (i) That Teyseer lacked sufficient interest to challenge the jurisdiction of the court to determine whether it was just and equitable as between Mr. Masri and CCIC to appoint a receiver.
>
> (ii) That the court had jurisdiction to make the receivership order on just and convenience grounds.

(iii) That the receiver was not as a matter of law prevented from collecting a joint debt.

(iv) That all the judgment creditor needed to show was that there was a good arguable case that CCIC owned a portion of the contract revenues payable to CCIC and Teyseer under the contract. He was not satisfied that provisions of the joint venture agreement governing how the joint venture parties were to share the contract revenues after receipt was determinative of whether of not CCIC should be regarded as legally and beneficially interested in the joint debt and/or at the time when it was paid.

(v) That having regard to the receiver's undertaking to take no action to collect the contract revenues until further order of the court and the fact that the mere existence of the receivership order caused no tangible prejudice to Teyseer, there was no good reason to deprive the receiver of the opportunity to investigate further.

(vi) That the receivership order should not be set aside as representing an exorbitant extraterritorial exercise of the jurisdiction of the court. Although the relevant debt was situated in Qatar and this might result in the English court having regard to Qatari law under English conflict of law rules that did not undermine the primary jurisdictional finding that the English court was the appropriate forum to make a binding determination whether any payment by Qatar Shell to the receiver would discharge its obligations to CCIC and Teyseer under the contract. He accepted the receiver's intention to seek such relief from the English court before seeking to make any collection from Qatar Shell.

(vii) That because the receiver was appointed to collect a joint debt from Qatar Shell before it was received by the Swiss partnership, Swiss law had no bearing on the issues before the court.

Accordingly, Teyseer's application to set aside the receivership order failed.

The Contract and the JVA

12. It is necessary to explore in a little detail the contents of the contract and the JVA. The contract with Qatar Shell was made on 2 November 2006 and made between Qatar Shell and the contractor, described as an unincorporated joint venture comprising CCIC and Teyseer. Article 22 provides for terms of payment.

Article 22.1 provides:

> "In consideration for the performance and completion of the work, the company shall pay or cause to be paid to the contractor the amounts provided in section III—Schedule of Prices at the times and in the manner specified in section III and in this Article."

And 22.7:

> "Within thirty (30) days from receipt of a correctly prepared and adequately supported invoice by the company at the address specified above, the company shall authorize payment in respect of such invoices as follows:
>
> (a) For payments in local currency the company shall authorise payment of the due amount into the bank account of the contractor specified in Section V—Administration Instructions;
>
> (b) For payments in foreign currencies, the company shall authorize payments in the due amount in the appropriate currency into the bank account of the contractor specified in Section V—Administration Instructions."

Thus Qatar Shell could only discharge its payment obligations by payment into the bank account of the contractor and not anywhere or to anyone else.

13. By clause 35.8 each party submits to the exclusive jurisdiction of the English courts and by Section IIB Special Articles of Agreement the contract is governed by English law.

14. The contract price provision appears in Section III Article 2 and amounts to $US 977,058,000. Article 22 of Section V deals with invoicing

instruction. It envisages ensuring the company's software package has the correct contractor contact and bank account details. The contract at no stage draws any distinction between CCIC and Teyseer who are together described as "the contractors".

15. The JVA between CCIC and Teyseer was made on 19 December 2006 and is said in Article 22 to be governed by and to be construed in accordance with the laws of Switzerland.

> "Article 1 provides that:
> the object of the Agreement is to set the detailed provisions to govern their relationship in respect of the contract on the basis that CCIC shall receive a fixed compensation for acting as the sponsor of the joint venture and shall provide any additional work as a subcontractor for the joint venture, while allocating to Teyseer the final profit or loss under the contract.
>
> Under Article 3 CCIC is to receive 5% of the contract price and any additional work provided by CCIC, other than as sponsor is to be performed as a subcontractor of the joint venture on terms to be agreed by the managing board of the joint venture but this apart, all profit and looses are to accrue solely to Teyseer.
>
> By Article 9.1 the working capital is to be provided by Teyseer to include all sums paid by Qatar Shell to the joint venture, Teyseer, CCIC or any other person designated by the Managing Board. Also, a bank account is to be opened is such bank and in such name or names as the Board may determine.
>
> Article 9.2 provides that if CCIC advances any sums to the joint venture, such sums are to be repaid to CCIC prior to distribution to Teyseer.
>
> Article 9.3 that no distribution of profit to Teyseer is to be made prior to the completion of the contract, the main principle of the joint venture being that all costs and expenses related to the execution of the project including payments to CCIC as a subcontractor or pursuant to

> Article 9.2 are to be paid prior to the distribution of any profit."

Apart from the monies in the joint account there are, it seems to me, other monies that can come into the sole hands of CCIC. These are

- Subcontractor remuneration (Article 1)
- 5 % said to have been paid already (Article 3)
- Repayment of loans (Article 9.2)

Accordingly, I cannot accept Mr. Lyon's submission that there is nothing for the receiver to receive under the contract with Qatar Shell.

The Issues

16. There were essentially four issues raised before us

(i) whether Teyseer has a sufficient interest to set aside the receivership order;

(ii) whether a receiver could be appointed over a joint debt;

(iii) whether the receivership should be set aside because nothing would ever be recovered;

(iv) whether the Bermudian court had jurisdiction to make the receivership order.

Whether Teyseer has a Sufficient Interest.

17. The judge concluded that Teyseer did not have a sufficient interest to set aside the receivership order. He said at paragraph 57 of his judgment:

> "I accept Mr. Beltrami's submission that Teyseer lacks sufficient interest to challenge the jurisdiction of this court to determine that it is just and equitable, as between Mr. Masri and CCIC to appoint a receiver. The crucial portion of the receivership order provides that "*Mark W R Smith be and hereby is appointed to receive all amounts due to CCIC from Qatar Shell GTL Limited"* (paragraph 4). Paragraph 12 set out an injunction also

> directed at CCIC alone. Teyseer may complain that enforcement of the receivership order will cause impermissible prejudice to it as an innocent third party and seek to procure appropriate directions from this Court to the receiver to mitigate such damage. It has no legitimate basis for seeking to set aside the receivership order altogether."

18. As Mr. Adrian Beltrami, QC for the Respondent to the appeal points out, these proceedings involve an application by a third party to discharge a post judgment interlocutory order granted to assist the enforcement of a registered judgment. The order is not challenged by the judgment debtor and does not have extraterritorial effect against Teyseer or cause it tangible prejudice.

19. The thrust of Mr. Lyon's argument is that Teyseer is prejudiced by the order. In his affidavit on behalf of Teyseer, sworn on 24 August 2008, Mr. Qussini said Teyseer was seeking to challenge and set aside orders that adversely and unfairly affected its interest and that it purported to interfere with monies to which Teyseer was entitled. He said that up until that point only $US150 million or 15% of the total price for the works had been paid. CCIC had already been paid the only payment to which it was entitled and the implication was that if the receivership was not set aside monies would be wrongly diverted to CCIC with grave consequences not only for Teyseer but also the 10,000 plus contract workers whose wages might not be paid. Mr. Lyon referred to what he described as "an appalling injustice" if the receivership was not set aside. He was pressed many times during argument to identify any prejudice suffered by his client. He eventually conceded that no prejudice had been suffered to date. There was no evidence that any money had been paid otherwise than in accordance with the contractual arrangements and

nothing had been wrongly diverted to CCIC. Nor did he persuade me that the position would be any different in future if the receivership order remained in place.

20. The contract runs from 2 November 2006 to 31 December 2011. Over fourth fifths of its period has now run and only a matter of months remains. The prejudice feared in Mr. Qussini's August 2008 affidavit has not occurred and that is accepted. What, if any, evidence is there that there will or may be prejudice between now and the end of the contract on 31 December 2011? In my judgment Mr. Lyon was unable to identify any. The judge was right to say (paragraph 74) that the mere existence of the receivership order caused no tangible prejudice. It was accepted that Teyseer had not been paid anything they ought not to have been paid under the contract and there was no evidence that they would not be paid anything that they ought to be paid in the future.

21. Jurisdiction to appoint a receiver is statutory under section 19(c) of the Supreme Court Act 1905. The Court can exercise its power, which is discretionary, when it is just or convenient to do so. As Colman J pointed out in *Soinco SACI v. Novokuznetsk* [1998] QB 406, 421 the remedy of appointment of a receiver is inherently capable of great flexibility. It is an in personam order against an individual as opposed to being an order in rem. The Court's jurisdiction is similar to that of a freezing order. Like a freezing order, a receivership order is not to do with execution as such. Teyseer's position is analogous to that of a third party to a freezing order. The Court will intervene to protect a third party that has been prejudiced by a freezing order and the Court would intervene to protect Teyseer in the present case were it satisfied that it was prejudiced by the appointment of a receiver against CCIC.

22. The Court has already determined the receivership order is just and convenient as between the parties to it. The third party has no business

to come in and argue the case for the respondent. The sole issue is prejudice and there is none in the present case. I can see no reason why a court on hearing a third party challenge to an order appointing a receiver should revisit the appropriateness of the order, not least where the application is unsupported by the party against whom the order was made. No money has been diverted by the receivership order. The receiver can only exercise the rights of CCIC; he in effect stands in CCIC's shoes.

23. If the receiver is to pursue any recovery out of the contract revenues, this will require proceedings abroad, probably in England. Only if and in so far as the English law or another court with appropriate jurisdiction makes a final determination adverse to Teyseer (which would be after discovery and full investigation of the facts) would Teyseer be affected. In no way can that be described as prejudice flowing from the current order.

24. The receiver says in his second affidavit that he is unable to satisfy himself on the material that he has seen that CCIC is not entitled to the contract revenues and that it would be relevant to inquire further as to the substance of the implementation of the contractual terms to understand the real nature of the rights and obligations of the parties. He would need to inquire into the structure of the contract and the method by which the obligations under the contract are performed and how the responsibilities are attributed between the relevant parties and to consider how those matters relate to the way in which the contract revenues are distributed. These are matters that seem to me to require discovery and they will have to be explored, pursuant to the EJC in the English proceedings. On 6 November 2008 the receiver asked for an unredacted copy of the contract and details of the account into which all contract payments have been made with dates and amounts and also whether any payments had been made to or for the account of CCIC and

if so the dates and amounts, but this information was declined. It is also to be noted that Teyseer injuncted Qatar Shell in Qatar from giving disclosure and that that injunction is still in place.

25. The striking feature of the present case is that it is Teyseer not CCIC who is seeking to set aside the receivership order. The present position is that there remains in place an undertaking given by the receiver to the Court on 28 August 2008 to take no steps to enforce the receivership order without leave of the Court. CCIC has never challenged the contention that it has assets in Bermuda. Whilst it was the assumed (and uncontradicted) existence of the contract revenues that precipitated the appointment of a receiver here, there is no evidence one way or the other whether CCIC has other assets in Bermuda. Whilst the true relationship between CCIC and Teyseer is at present unclear, the Court cannot allow Teyseer to be used as a front by CCIC to avoid discharging its liabilities to Mr. Masri. Whether or not this is so, it seems to me that Teyseer's application to discharge the appointment of a receiver in Bermuda cannot get off the ground absent persuading the Court it has a sufficient interest to make the application.

26. As I have concluded that Teyseer does not have a sufficient interest to set aside the receivership order it is not necessary to reach a conclusion on the other three issues and accordingly I do not express any view one way or the other on the arguments advanced on Teyseer's behalf by Victor Lyon QC. As I am unpersuaded Teyseer has a sufficient interest the appeal must fail. Lest there be any doubt about it, even were I persuaded that there was nothing for the receiver to receive under the Qatar Shell contract, I would still be of the view that Teyseer have no sufficient interest to set aside the receivership order because it may very well be that CCIC have other assets in Bermuda.

27. There is one further point that requires brief mention. The receivership order contains a provision that until further order CCIC must not take any steps to procure, encourage or assist in the payment of contract revenues to any entity other than the receiver (paragraph 12B). That order may require to be varied, in particular were it to be inconsistent with any order of, for example, the English Court. That, however, it seems to me can be left until the situation arises, when an amendment could easily be made at short notice.

Signed

Scott Baker, JA

Signed

I agree Zacca, President

Signed

I agree Anthony Evans, JA