In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2015: No. 441

IN THE MATTER OF ROYAL CHEMIE INTERNATIONAL LIMITED

AND IN THE MATTER

BETWEEN:

ROYAL CHEMIE INTERNATIONAL LIMITED

Applicant

-v-

(1) BARCLAYS BANK PLC

(2) ERSTE ABWICKLUNGSANSTALT

Respondent

EX TEMPORE RULING ON APPLICATION FOR LEAVE TO APPEAL/STAY PENDING APPEAL

(in Chambers)

Application for injunction to restrain presentation of winding-up petition -leave to appeal-stay pending appeal-governing principles

Date of Ruling: June 21, 2016

Mr Narinder Hargun and Ms Robin Mayor, Conyers Dill and Pearman Limited, for the Applicant

Mr. Rod Attride-Stirling and Ms Kehinde George, ASW Law Limited, for the Respondents

Introductory

1. These proceedings were begun by a Specially Endorsed Writ of Summons filed on October 29, 2015 whereby the Applicant sought a permanent injunction restraining the Respondents from presenting a petition to wind up the Applicant on the basis of statutory demands served on September 28, 2015, or otherwise. Following a hearing on November 17, 2015, on December 11, 2015 I ruled that the Company had failed to make out a *prima facie* case that the presentation of a winding up petition by the Respondents based on the Statutory Demands would be an abuse of process. I accordingly set aside the Ex Parte Injunction which I granted on October 30, 2015[1].

2. On the same date, the Applicant applied for leave to appeal and supported that application with a draft Notice of Appeal.

The issues in controversy on the proposed appeal

3. The issues in controversy are probably best summarised in paragraphs 14 and 15 of the December 11, 2015 Ruling where I said this:

> "*14. In light of this chronology of events, the key issue in controversy, as framed by the Respondents, was whether the Facility Agreement contemplated that the Majority Lenders had the right to accept an Exit Offer after an individual lender had given notice of independent enforcement action and, as a result, implement amendments to the Facility Agreement which would nullify the independent enforcement action already put in train. There was, after all, no suggestion that the Majority Lenders had voted to amend those provisions of the Facility agreement, principally clauses 2.3.3 and 25, which permitted independent enforcement action.*
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> *15. The Applicant framed the question as simply being whether or not the Respondents were entitled to frustrate the vote of the Majority Lenders to accept the Renewed Exit Offer and, in the process, to breach their contractual bargain to be bound by such vote. The logical extension of this argument, applied to the present facts, was that the Majority Lenders had the right,*

[1] *Re Royal Chemie International Ltd* [2015] Bda LR 115; [2015] SC (Bda) 91 Com (11 December 2015).

without expressly amending the Facility Agreement to abrogate independent enforcement rights, to nullify those independent rights. This result flowed from the fact that all key commercial decisions under the Agreement were governed by the umbrella principle of 'majority rule'."

4. I noted in paragraph 12 that I found this question to be so difficult that I invited supplementary submissions. In the result I resolved those questions in favour of the Respondents. The Applicant now seeks both leave to appeal and a stay of my December 11, 2015 Ruling, specifically with a view to restraining the Respondents from pursuing the Petition which they filed the very same day, pending the hearing of the appeal which it is now sought to pursue.

5. The kernel of the argument of the Applicant for granting is stay is that if a stay is not granted the appeal will be rendered nugatory. Mr Hargun referred the Court in this regard to the decision of Megarry J in *Erinford Properties Ltd.-v- Cheshire County Council* [1974] 2 All ER 448 at 454 where he said as follows:

> "*I can see no inconsistency between any of these cases*[2]*. The questions which have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of the appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.*"

[2] That is to say granting by way of interim relief pending an appeal the same form of interim relief which has been refused at trial.

6. Mr Attride-Stirling has sought to oppose both applications on the grounds that the appeal is now hopeless. Central to his analysis is the contention that, if he is right, the present lack of any binding contract between the Company and Avalon, the Offeror, means that there is no longer any impediment to the Respondents taking independent enforcement action. That analysis seeks to nullify altogether the main thesis underpinning the present appeal. And that is that the Respondents were not entitled to present the Petition that they presented on December 11, 2015 because they were not entitled to frustrate the Facilities Agreement which they entered into.

7. Mr Attride-Stirling further sought to persuade the Court that the related or ancillary Renewed Exit Offer, which has now on any view lapsed, was in fact the dominant contract and since that contract has lapsed, there is nothing against which the present appeal can bite. That argument, it seems to me, lacks force because it asks the Court to assume that the framing of the issue on which the Applicant relies is bound to be rejected. This amounts therefore to an instance of 'pulling oneself up by one's own bootstraps'. It may well be that the absence of a binding Exit Offer means that there is no technical objection to the Respondents filing a fresh petition, but it does not necessarily mean that it is not still open to the Court of Appeal to find that the presentation of the particular Petition which is presently before the Court was an abuse of process and ought to have been restrained. Because the reason why the Exit Offer in question lapsed was because of the Respondents' own actions in taking enforcement action which the Facilities Agreement did not entitle them to take.

8. Further, I accept that while the question of how the Facilities Agreement should be interpreted as regards the individual enforcement rights and collective enforcement rights issue is concerned may not be a question of general <u>public</u> importance, I do take into account the fact that this issue is of general <u>legal</u> importance in Bermuda and elsewhere. Moreover, it does have some practical significance because, even if the appeal the appeal were to succeed on a narrow historic basis only, any decision which the Court of Appeal might make on the nature and scope of the Respondents' individual enforcement rights would have a bearing on the future conduct of the parties.

9. It is very obvious that at this point there is no clear evidence that a new, binding Exit Offer will be accepted. That is not the pivotal point in considering whether or not a stay should be granted because the ground is clearly shifting and the present situation in which the parties find themselves is, to a large extent, the result of the present legal proceedings. These have created uncertainty as to what the scope and effect of the Majority Lenders' rights are *vis a vis* the Respondents' independent enforcement rights. Once the relevant position is clarified by the Court of Appeal it is possible, and it is not necessary for me to find that it is probable, that the alignment of commercial forces may be different to what it is today.

10. In those circumstances and for these reasons I grant the application for leave to appeal and also grant a stay of my Ruling with the intent that the Respondents be restrained from prosecuting the Petition which they filed on December 11, 2015 pending the determination of this appeal or further Order of the Court of Appeal.

11. Subject to hearing counsel I would order that the costs of the present application should be costs in the appeal.

Dated this 21st day of June, 2016 ____________________

IAN RC KAWALEY CJ