THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES COMMERCIAL COURT (QBD)

YS GM MARFIN II LLC & ORS v LAKHANI & ORS

[2020] EWHC 2629 (Comm)

5 October 2020

BEFORE: MR JUSTICE JACOBS

CASE SUMMARY

Background

The Claimants sought summary judgment against the three Defendants under a series of guarantees issued in order to support loans made for the purposes of financing a large-scale family-controlled business relating to the purchase and sale of ocean-going vessels for scrap. The Claimants were Delaware corporations established to advance commercial loans financed by private equity funding. The Third Defendant ("**Tahir**") was the father of First Defendant ("**Ali**") and the Second Defendant ("**Hasan**"). Tahir had built up a ship recycling business over many years and by 2019, the business was carried out by North Star Maritime Holdings Ltd ("**North Star**").

Between June 2018 and September 2019, the Claimants agreed to advance to various borrower counterparties ("**the Borrowers**"), a number of commercial loans. 4 out of the 5 loan agreements were signed by Ali. Each loan contained terms which made it clear that security would include personal guarantees. These were given by each of the Defendants and contained comprehensive indemnity provisions. Ali and Hasan executed numerous deeds of confirmation, re-affirming their guarantee liabilities whenever the underlying loans were amended.

The loans were the subject of many non-payment "Events of Default". In February 2020, further Events of Default occurred when the Borrower's corporate parent company, North Star, was put into voluntary liquidation. In March 2020, the Borrowers were given notice of acceleration of the loans under the powers contained in the various loan agreements, and payment was demanded. Upon acceleration of the loans, the total sum due from the Borrowers was US$76.7 million. Ali and Hasan were the sole directors of North Star and each owned 50% of the company. The shareholdings of Ali and Hasan in North Star were neither a sham nor were they nominal. Each of the Defendants were served demands for payments in March 2020. They provided no substantive response to the demands under the guarantees.

Tahir did not engage with the application, although he had been properly served with proceedings. The Court therefore held (at [5]) that summary judgment against him was clearly appropriate. Ali and Hasan sought to defend the summary judgment application and discharge a worldwide freezing order (the "**WFO**") which had been originally granted by Butcher J on 2 April 2020. Ali and Hasan relied on a defence of undue influence.

The Undue Influence Defence

Ali and Hasan argued that notwithstanding their respective 50% beneficial shareholding in North Star, and their directorship of Northstar and its subsidiaries, their father "*retained full control over the business carried out by North Star and its subsidiaries*" and the relationship with the Claimants, even though Tahir had no formal role at those companies. Hasan argued that his involvement was even less than that of his brother. It was common ground that the relevant principles were those set out in the judgment of Lord Nicholls in *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773. In addition, the Court followed the approach outlined by the Court of Appeal in *Charter v Mortgage Agency Services Number Two Ltd* [2003] EWCA Civ 490 at [20]. The Defendants therefore needed to demonstrate: (a) that they were unduly influenced to enter into the transactions; (b) that the lenders were put on inquiry as to some equitable wrong; and (c) that the lender did not take reasonable steps and as a result was fixed with notice of the undue influence.

The Claimants argued that Ali and Hasan had no real prospect of a successful defence based on undue influence because (i) neither of them would be able to establish that he was unduly influenced to enter into the guarantees and (ii) the Claimants were not put on inquiry as to some equitable wrong. They contended that if these two hurdles were overcome, Ali and Hasan would have a sufficient argument on whether reasonable steps had been taken. The Claimants argued that none of the transactions were ones which called for explanation and that any case of undue influence would need to depend upon proof of actual undue influence and no case was made of any overt acts of improper pressure or coercion. Even if the second stage of the inquiry arose, then the relationship between the debtor and the surety had to be non-commercial and the transaction had to be, on its face, not to the financial advantage of the surety.

The Defendants argued that the inherent nature of undue influence was that the influenced party took actions without making a free and informed decision and that there was sufficient evidence of this. It was denied that it was necessary to show conscious wrongdoing, and that even if there was such a requirement, that an objective standard was to be applied so that it did not matter whether or not the person with influence believed he was behaving badly, or had set out deliberately to improperly influence. The Defendants submitted that the only question was to look at how the intention of the influenced party was produced, and whether it should be fairly treated as an expression of the person's free will. The Defendant's submitted that the threshold to put lenders on inquiry was a low one and was met.

Jacobs J held (at [73]) that there was a sufficient case that Tahir exercised *de facto* control over the business of North Star, and the wider group, in which his sons worked. He held (at [74]) that Ali and Hasan understood the nature of the guarantees they were signing and realised that they were guaranteeing very significant liabilities under the loans. Ultimately, however, it was possible for a defence of undue influence to arise in circumstances where a party did understand the nature of the guarantees that were being signed. The Court held (at [75]) that there was no realistic prospect of Ali and Hasan establishing at trial that a presumption of undue influence applied. It held (at [78]) that the guarantees did not call for an explanation and were readily explicable by the relationship of the parties since it was entirely natural and normal for guarantees to be provided not only by the corporate parent of the Borrowers but also by the beneficial owners of that corporate parent.

Jacobs J held (at [80]) that Ali and Hasan had to establish a case of "actual" undue influence since no presumption was available. It was held (at [83]) that a case of undue influence does not depend simply upon the effect of the influence on the person who responds. There is an additional requirement that there be abuse of the influence (at [84]). The Court placed reliance

on the reasoning of Millett LJ in *Dunbar Bank PLC v Nadeem* [1998] 3 ALL ER 876 and *National Commercial Bank (Jamaica) Ltd. v Hew* [2003] UKPC 51, holding (at [91]) that there was a need for unconscionable conduct, abuse of influence and unfair exploitation of the influence over the vulnerable party. Unconscionable conduct requires a conscious act of wrongdoing (at [92]), albeit this does not mean that the influencing party must subjectively appreciate that he is acting wrongly in a situation where he in fact abuses his influence (at [93]).

Jacobs J held (at [95]) that Ali and Hasan had only presented evidence that they were dominated by their father and did what they were told without giving any thought to what they were doing and without appreciating the scale of the liabilities they were incurring. This was insufficient for the purposes of establishing a case of undue influence. No evidence had been put forward that the influence exerted by Tahir was done so abusively. Accordingly, the question as to whether the Claimants were put on inquiry as to any equitable wrong did not arise (at [99]). In any event, had it arisen, the Court held (at [99]) that they would not have not been put on inquiry. The relationship between the debtors and the Ali and Hasan was commercial (at [105]). There were a number of factors that supported this conclusion, including, *inter alia*, the ownership structures of the Borrowers, that North Star had also provided a corporate guarantee as part of a commercial relationship (at [106]), and that one would ordinarily expect owners of the Borrowers including their natural owners to give guarantees in ship finance transactions (at [107]). Whilst it was true that the ownership of North Star did not provide a reliable guide to the person who (on Ali and Hasan's case) had conduct of the company's business, this was insufficient in itself to put the Claimants on inquiry (at [109]).

Non-Disclosure on the WFO Application

Ali and Hasan sought to discharge the WFO granted by Butcher J on 2 April 2020 on the grounds of non-disclosure with respect to the representations made that there was a solid risk of dissipation by Ali and Hasan. No arguments were made that there was not actually solid evidence of risk of dissipation. The applicable legal principles were contained in the judgment of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350 at 1356F to 1357.

There were three non-disclosures alleged by the Defendants : (a) that the Claimants had not disclosed the lack of involvement of Ali and Hasan in the business of North Star; (b) that the Claimants had not disclosed that they had effectively "*tipped off*" the Defendants through WhatsApp that they were applying for a WFO; and (c) that the Claimants had not disclosed the reasons for the Borrowers' financial difficulties. The Court held (at [129], [140], [147], [148], [151]) that none of the allegations of non-disclosure had any substance and that there had not been any material non-disclosure. The Court further held (at [154]) in relation to all of the non-disclosure arguments, that it would have been appropriate to continue the WFO even if they had been accepted since the points were ones of "*fine detail*" in the context of an application which had been fairly presented; they all concerned issues which had been raised by the Claimants and would have done nothing to materially damage the strength of a case for a WFO.

Notification of the WFO to Third Parties

The WFO had been notified to a number of individuals, companies and financial institutions outside the jurisdiction. The Defendants argued that this communication had been illegitimate and oppressive since it had been sent to parties outside England and Wales although it stated it did not have extra-territorial effect unless these parties had been served in England and Wales. Furthermore, the Defendants argued that reference in the communications to the possibility of

contempt of court and the penal notice was misleading. The Defendants sought to discharge the injunction. Jacobs J held (at [169], [171]) that notifying third parties outside of the jurisdiction as to the existence of a WFO was not improper as part of a legitimate aim of trying to make a WFO effective, albeit that if no order was obtained from a relevant overseas court, the Claimant would be relying on what might be termed the "soft power" of the English Court's order rather than its coercive effect.

However, the Court held (at [172]) that the effect of the order should not be misrepresented and that the stark reference to contempt and the penal notice was not appropriate. Notwithstanding that the Claimants letters "*went too far*", this was held (at [173]) not to be sufficient to justify discharging the injunction.

CONCLUSION

The Court granted summary judgment against the Defendants and refused to discharge the WFO for alleged non-disclosure and/or oppressive notification of the WFO to third parties.

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: https://www.bailii.org/ew/cases/EWHC/Comm/