Judgments

Libyan Investment Authority v Maud

[2016] EWCA Civ 788

Court of Appeal, Civil Division

Moore-Bick VP, Longmore and Macur LJJ

27 July 2016

Judgment

Mr. Jonathan Swift Q.C. and **Mr. Adam Al-Attar** (instructed by **Hogan Lovells International LLP**) for the **appellant**

Mr. Alan Maclean Q.C. (instructed by **Paul Hastings (Europe) LLP**) for the **respondent**

Hearing date : 6th July 2016

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Approved Judgment

Lord Justice Moore-Bick :

1. This is an appeal by the Libyan Investment Authority ("LIA") against the order of Rose J. setting aside a statutory demand dated 19th February 2014 which it served on the respondent, Mr. Glenn Maud.

2. The proceedings have their origin in a guarantee given by Mr. Maud in April 2008 in support of a loan of EUR 12.5 million made by the LIA to Propinvest Group Ltd. It is common ground that by the date of the statutory demand Mr. Maud had become liable under the guarantee in an amount equivalent to £17,574,778. By the guarantee Mr. Maud undertook a primary obligation to the LIA in respect of the loan to Propinvest. His liability therefore sounds in debt.

3. On 13th August 2014 Mr. Maud applied under Rule 6.5(4)(b) and (d) of the Bankruptcy Rules to set aside the statutory demand on the grounds that payment of the debt would contravene Regulation (EU) No. 204/2011 and the Libya (Asset-Freezing) Regulations 2011. That application was made well outside the period of 18 days allowed for that purpose by Rule 6.4(1). It was therefore necessary for him to obtain an extension of time in order for his application to proceed.

The Libyan Sanctions Regime

4. On 26th February 2011 the United Nations Security Council adopted Resolution 1970 (2011) imposing sanctions on Libya, which included a freeze on assets belonging to the various persons and entities identified in annex II. Later, on 17th March 2011 the Security Council adopted Resolution 1973 (2011) which allowed the sanctions committee to designate additional persons and entities to which the sanctions were to apply. The LIA became subject to the sanctions with effect from 12th April 2011 following its designation by the sanctions committee on 17th March 2011 as an entity to which annex II applied.

5. Resolution 1970 (2011) included the following paragraphs:

"Asset freeze

17. [The Security Council] Decides that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution . . . and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II . . .

. . .

20. Decides that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen."

6. On 2nd March 2011 the Council of the European Union adopted Regulation (EU) No. 204/2011 in order to implement throughout the Union Security Council Resolution 1970 (2011). The Regulation contained the following provisions:

"Article 1

For the purposes of this Regulation, the following definitions shall apply:

(a) 'funds' means financial assets and benefits of every kind, including but not limited to

. . .

(ii) . . . debts

. . .

(v) . . . guarantees

(b) 'freezing of funds' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;

(c) 'economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services;

(d) 'freezing of economic resources' means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them.

Article 5

1. All funds and economic resources belonging to, owned, held or controlled by [the LIA] shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of [the LIA].

. . .

Article 9

1. Article 5(2) shall not apply to the addition to frozen accounts of:

. . .

(b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which [the LIA] has been designated by . . . the Security Council . . .

provided that any such interest, other earnings and payments are frozen in accordance with Article 5(1).

Article 12

1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, . . . such as a claim . . . under a guarantee, in particular a claim for . . . payment of

a bond, guarantee or indemnity, particularly a financial guarantee . . . shall be satisfied, if they are made by [the LIA].

2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim."

7. On 12th April 2011 the European Council adopted Implementing Regulation (EU) No. 360/2011, by which the LIA was added to the entities listed in annex II to Regulation (EU) No. 204/2011.

8. On 16th September 2011, following the fall of Colonel Gadaffi and the establishment of the National Transitional Council of Libya, the Security Council, recalling its determination to ensure that assets frozen pursuant to resolutions 1970 (2011) and 1973 (2011) should as soon as possible be made available to and for the benefit of the people of Libya, decided to modify the sanctions regime by adopting Resolution 2009 (2011). Under paragraph 15 funds outside Libya that were frozen at the date of the resolution continued to be subject to the exemptions set out in paragraphs 19, 20 and 21 of Resolution 1970 (2011); otherwise the LIA was no longer subject to the asset-freezing provisions. Thus, the existing freeze on funds held by the LIA outside Libya continued on the same terms as before, but the prohibition on making new assets in the form of funds, financial assets or economic resources available to the LIA was lifted, as was the freeze on any newly acquired assets.

9. In order to implement Resolution 2009 (2011) the European Council by Regulation (EU) No. 965/2011 amended Regulation (EU) No. 204/2011 by removing the LIA from Annex II (and thereby from the scope of Articles 5(1) and 5(2)) and adding a new Article 5(4) in the following terms:

"4. All funds and economic resources belonging to, or owned, held or controlled by the following on 16th September 2011:

(a) Libyan Investment Authority

. . .

and located outside Libya on that date shall remain frozen."

10. Regulation (EU) No. 204/2011 has since been repealed and replaced by Regulation (EU) No. EU 44/2016, in which the numbering of some of the articles has been changed. However, the language of the relevant articles has not been altered and it is convenient to continue to refer to Regulation (EU) No. 204/2011, which was in force at the relevant time.

11. Finally, it is necessary to mention The Libya (Asset-Freezing) Regulations 2011 ("the domestic regulations"), made on 3rd March 2011, which reflected Regulation (EU) No. 204/2011 and made provision for certain supplementary matters, including a licensing regime to be operated by H.M. Treasury reflecting article 8b of Regulation (EU) No. 204/2011 as amended. The Regulations were amended to reflect the change to the sanctions regime and the adoption

of the corresponding EU Council Regulation.

The judgment below

12. The first task facing Mr. Maud was to persuade the judge that she ought to extend time for making an application to set aside the statutory demand. The explanation he put forward for the delay was that he had not become aware of the imposition of sanctions until late July or early August 2014, but the judge regarded that as highly implausible. Nonetheless, she granted the necessary extension of time because she considered that there was a strong public interest in ensuring that the sanctions regime was properly observed. As to the merits of the application, she held that since the guarantee represented "funds" within the meaning of article 1(a) of Regulation (EU) No. 204/2011, payment under the guarantee would involve dealing with it in a way that would result in a change of character of a kind that would enable the funds to be used within the meaning of article 1(b), and so would contravene article 5(4). She also held that the service of a statutory demand amounted to a claim under the guarantee and that the court's refusal to set it aside would amount to the satisfaction of that claim within the meaning of article 12. Finally, the judge held that in order for Mr. Maud to be able to rely on the sanctions regime to excuse payment it was not necessary for him to satisfy the court that an application for a licence would have been unsuccessful. As a result, she set aside the statutory demand. The judge's decision on each of these questions was challenged on the appeal.

The extension of time

13. It is convenient to consider first the judge's decision to extend time. A delay of about 5 months in the context of a time limit of 18 days is very significant and calls for a compelling explanation. However, the judge focused primarily on the extent to which each of the parties would be prejudiced if an extension of time were not granted. Prejudice is, of course, important, but in my view where there has been a delay of this length it is essential that the applicant provide a good explanation for it. If he cannot, he can properly be regarded as the author of his own misfortune and must bear whatever prejudice he has brought upon himself. In this case the judge considered Mr. Maud's explanation for the delay to be "highly implausible" and she was therefore right in my view to attach little weight to it.

14. In the end, however, what appears to have weighed most heavily with the judge was the public interest in ensuring that the sanctions regime was observed. In my view she was entitled to attach considerable importance to that factor and to the fact that the question would have to be decided sooner or later in the context of the bankruptcy proceedings if the statutory demand were not set aside. That also provided a good reason for deciding the issue on the application rather than leaving it for determination on another occasion. For these reasons I think that in the rather unusual circumstances of this case the judge was entitled to extend time in order to enable the substantive question to be decided.

The effect of Article 5 of Regulation (EU) No. 204/211

15. Mr. Swift Q.C. submitted that the key to a proper understanding of Regulation (EU) No. 204/2011, as amended by Regulation (EU) No. 965/2011, lay in the Security Council Resolutions to which they were intended to give effect. He submitted that paragraph 17 of Resolution 1970 (2011) dealt separately with assets of two kinds: funds and economic resources owned or controlled by Libyan persons and entities and funds and economic

resources that might be made available to such persons or entities. That distinction was reflected in article 5 of the Regulations as originally adopted, which drew a distinction between the freezing of funds and economic resources belonging to the LIA in article 5(1) and the prohibition in article 5(2) on making funds or economic resources available to it. The freezing of assets was, however, subject to the provisions of paragraph 20 of the resolution, which permitted payments into frozen accounts of sums due in respect of obligations that had arisen before the date on which the accounts became frozen, provided that they remained frozen in accordance with the resolution. That provision, he submitted, was reflected in article 9 of the Regulations and its effect was to allow Mr. Maud to make payment under the guarantee, provided the money was paid into a frozen account. The relaxation of the sanctions in relation to the LIA in September 2011 limited their effect to maintaining the freeze only on those assets which it owned outside Libya at the date of the resolution, but even those remained frozen subject to the provisions of paragraph 20. In Mr. Swift's submission, following its amendment by Regulation (EU) No. 965/2011, Regulation (EU) No. 204/2011 as a whole was to be construed in a way that gave effect to the Security Council resolutions.

16. Mr. Maclean Q.C. submitted that the language of article 5(4) was clear: all funds belonging to the LIA on 16th September 2011 and located outside Libya on that date were to remain frozen. For this purpose, by virtue of article 1(a) "funds" included the guarantee given by Mr. Maud and by virtue of article 1(b) "frozen" meant that any form of dealing with the guarantee which would enable the funds to be used was prohibited. Payment of the guarantee was a form of dealing with it and was the most obvious way of enabling the funds to be used. Article 9 of the Regulation could be disregarded; it no longer had any effect as far as the LIA was concerned, because the LIA was no longer subject to the provisions of articles 5(1) or 5(2).

17. I think there is little doubt that the successive EU Regulations were intended to reflect and give effect to the Security Council resolutions rather than to establish a parallel but independent regime of a potentially more extensive nature. That appears clearly from the recitals to the Regulations themselves. Accordingly, I think they must be construed as far as possible compatibly with the Security Council resolutions. The purpose behind those resolutions is clear from their terms: Resolution 1970/2011 was intended to freeze economic assets owned by certain Libyan persons and entities and to prevent new economic assets from being made available to them. But even that all-embracing regime was subject to certain exceptions, the most important of which for present purposes was that contained in paragraph 20, which permitted the payment of frozen debts into frozen bank accounts, thus substituting one form of frozen asset for another. The relaxation of sanctions following the overthrow of Colonel Gaddafi's regime was intended to allow the LIA to deal with assets outside Libya acquired after 16th September 2011 and to allow it to obtain new assets free of sanctions. It would have been very surprising if the Security Council had intended at the same time to tighten the sanctions insofar as they applied to assets which remained frozen, and the terms of Resolution 2009 (2011) make it clear that it did not. In my view Regulation (EU) No. 204/2011 as amended must be construed with that in mind.

18. I can see the force of Mr. Maclean's argument that paying a debt involves dealing with the chose in action in a way that enables the funds it represents to be used, but in my view the Regulations must be read and understood as a coherent whole against the background of the Security Council Resolutions. The extensive definition of "funds" and the expression "freezing of funds" in article 1 makes it easy to elide the difference between the asset and the funds into which it can be turned. Mr. Swift submitted that, under the Regulation in its original form, enabling the LIA to deal with the guarantee, for example, by way of assignment, would have contravened article 5(1), whereas paying the debt due under it would have involved making funds available to the LIA, contrary to article 5(2). I think that that is right. Article 1(a) is concerned with dealing with the asset itself, in this case the guarantee, which could be

discounted or used as security in order to obtain new funds. Paying the debt is not dealing with the instrument itself in any real sense; it is simply performing the obligation to which it gives rise. That can be seen as providing funds which are otherwise not available to the recipient.

19. This approach to the construction of article 1(a) may appear rather technical, but paragraph 20 of Resolution 1970 (2011) and article 9(1)(b) of the Regulation in my view point clearly to that conclusion. The two limbs of paragraph 17 are reflected in articles 5(1) and 5(2) of Regulation (EU) No. 204/2011, but article 9, which reflects paragraph 20, states in terms that it provides an exception to article 5(2), not article 5(1). It follows, therefore, that the payment of debts arising under obligations which came into existence before sanctions were imposed is to be regarded as falling within article 5(2) and thus as making new funds available rather than dealing with existing assets. That in turn strongly suggests that debts arising under frozen assets continue to be recoverable, although they no longer need to be paid into frozen accounts, and that the correct understanding of article 5(4) is that the payment of debts due under obligations such as the guarantee in this case does not involve dealing with the obligation but represents the provision of new or additional funds.

20. That interpretation of the Regulation is reinforced by two further considerations. First, it is apparent from the recitals to Resolution 2009 (2011) that the Security Council intended to relax the sanctions regime to enable the Libyan people to have the benefit of most of the assets to which it had previously related. It is not surprising, therefore, that the funds frozen at the date of that resolution should remain frozen, and thus incapable of being alienated, but that LIA should be allowed to obtain payment of sums due under them without restriction. Second, the argument put forward on behalf of Mr. Maud proves too much, since, if it were correct, it would make it impossible for any payments to be recovered under paragraph 20 of Resolution 1970 (2011) and article 9(1)(b) of Regulation (EU) No. 204/2011 by any party which remained subject to article 5(2). That can hardly have been the intention of the Security Council or the EU Council of Ministers.

21. The judge thought that the expressions "funds" and "economic resources" had to be given the same meaning wherever they appeared in articles 5(1), 5(2) and 5(4). With that I respectfully agree. However, she also considered that payment under the guarantee would amount to an alteration which would result in a change of character that would enable it to be used. There, with respect, I think she went wrong, confusing "funds" in the sense of the guarantee with "funds" in the sense of the proceeds of payment. She appears to have thought that the limited scope of article 9(1)(b) was to be explained by an error on the part of the draftsman in failing to state expressly that article 9 as a whole provided an exception to article 5(1) as well as article 5(2), but for the reasons I have given I do not think that can be correct.

Satisfaction of a claim

22. As an alternative to his primary argument Mr. Maclean submitted that the statutory demand constituted a "claim" within the meaning of Regulation 12(1) and that the judge should therefore set it aside because a failure to do so would amount to satisfying it. The judge accepted that argument as providing an additional reason for setting aside the statutory demand, but in my view she was wrong to do so.

23. Mr. Maclean did not place much emphasis on this argument, because he recognised that if the LIA were to succeed on the primary point, it would be difficult to contend that performance of the guarantee was any longer affected by any of the measures imposed under the

Regulations. That is clearly correct, but it is not the only reason why the submission cannot succeed. I accept that the word "claim" must be given an autonomous meaning in order to enable it to comprehend a variety of procedures to be found among Member States, but it is a common feature of any procedure that can properly be called a "claim" that it may lead directly to the grant of the relief which the claimant seeks. The purpose of article 12 was to prevent the LIA from obtaining funds owed to it by means of judicial process. Similarly, the satisfaction of a claim involves the grant of relief to the extent that the law allows. A statutory demand does not fulfil either of those criteria. It is simply a means of proving that a person is unable to pay his debts and as such is a precursor to the filing of a bankruptcy petition, which, if successful, will lead to the appointment of a trustee in bankruptcy. Claims in the form of proofs of debt may then be made by individual creditors which, if accepted by the trustee in bankruptcy or established by legal proceedings, will lead to their satisfaction by the payment of a dividend. That being the nature of bankruptcy proceedings, I am unable to accept that a statutory demand is a "claim" for the amount due under the guarantee within the meaning of article 12 or that a the court's refusal to set it aside involves the satisfaction of a claim.

The licence provisions

24. Before the judge the LIA contended that in order to establish a defence to the claim it was necessary for Mr. Maud to satisfy the court that he did not qualify for the grant of a licence under the domestic regulations, or that, if he had applied for one, his application would not have been successful. Authority for that proposition was said to be found in decisions relating to the prohibition of export, such as *J.W. Taylor & Co. v Landauer & Co.* [1940] 4 All E.R. 335 and *Vidler & Co. (London) Ltd v R. Silcock & Sons Ltd* [1960] 1 Lloyd's Rep. 509. The judge rejected that submission. She held that the nature of the sanctions regime was such as to cast on the LIA the burden of proving that Mr. Maud could have obtained a licence to pay the debt due under the guarantee, if he had applied for one, and that in any event there was no reason to think that a licence would have been forthcoming.

25. Again, it is unnecessary to deal with this issue at any length because Mr. Maclean accepted that, if the Regulations no longer prohibited the payment of the debt, this argument could not advance Mr. Maud's case. It is therefore sufficient to say that in my view the question is not one which in principle falls to be determined by reference to the nature of the Regulations, but by reference to the terms of the relevant contract. If a person has promised to perform a certain obligation, whether it be to pay money or deliver goods, and fails to do so, the burden is on him to show that he was prevented from doing so by some cause for which he is not responsible. In this case, therefore, but for article 12(2), it would have been for Mr. Maud to show that the imposition of sanctions prevented him from performing his obligation and in order to do so he would have had to show that he could not have obtained the necessary licence from the Treasury. That was not a burden that he ever attempted to discharge. However, I think Mr. Maclean was right in saying that in any proceedings by the LIA to enforce the guarantee the position is reversed by article 12(2), which lays upon the LIA the onus of proving that satisfying the claim is not prohibited by article 12(1).

Who can speak for the LIA?

26. Finally, it is necessary to deal with a question which Mr. Maclean sought to raise at the outset of the hearing as an additional ground for setting aside the statutory demand. It concerns the identification of the person who has authority to give instructions on behalf of LIA. We were not provided with evidence of the constitution of the LIA, but both parties were prepared to proceed on the assumption that it is a body corporate with juridical personality.

That means that it can be a party to proceedings and that these proceedings are to all appearances properly constituted, but it does not necessarily follow that the person who purports to give instructions on its behalf at any given time actually has authority to do so.

27. As Mr. Maclean accepted, this alternative ground for upholding the judgment below ought to have been the subject of a respondent's notice. Accordingly, having settled a draft form of respondent's notice over the short adjournment, he sought permission on behalf of Mr. Maud to file it out of time. Before deciding whether to grant permission, however, we heard argument on the point de bene esse and it is therefore convenient to consider the merits of the argument before deciding whether to grant the necessary extension of time.

28. The person who has authority to act on behalf of the LIA is the person appointed as chairman from time to time. The appointment is made by the government, but since November 2014 two rival bodies, known for convenience as "the Tobruk government" and "the Tripoli government", have emerged, each claiming to be the true government of Libya. Her Majesty's Government recognises states rather than governments, but it does not currently regard either of those bodies as the legitimate government of Libya. The Tobruk government has purported to appoint Mr. Hassan Bouhadi as chairman of LIA; the Tripoli government has purported to appoint Mr. Abdulmagid Breish. The solicitors acting for the LIA in these proceedings take their instructions from Mr. Bouhadi.

29. In 2013 the LIA brought proceedings in this country against Goldman Sachs International and Société Générale. In order to resolve the question of who was authorised to give instructions in relation to those proceedings Mr. Bouhadi brought an action against Mr. Breish seeking a declaration that he was entitled to act on behalf of the LIA. The matter came on for trial before Blair J. on 7th March 2016, but the judge decided that he could not reach a decision without risking cutting across the position of Her Majesty's Government, which was to place the chairmanship within the sphere of the Government of National Accord, when that body was established. He therefore adjourned the proceedings and no further steps towards resolving them have yet been taken.

30. Mr. Maclean submitted that the uncertainty surrounding the identity of the chairman of the LIA was sufficient reason in itself for setting aside the statutory demand, since the court could not be satisfied that it had been served with authority. I do not agree. The statutory demand was issued in February 2014, before the current dispute between the Tobruk government and the Tripoli government had emerged. At the time Mr. Breish was apparently chairman of the LIA and it is not clear that anyone else claimed to have been appointed to that position at that time. At all events, Mr. Maud has not sought in these proceedings to show that the statutory demand was issued without authority. All he can do is point to the current unresolved dispute between Mr. Bouhadi and Mr. Breish, but in my view that is not enough to justify setting aside the statutory demand. To do that the court would need to be satisfied that there was real doubt whether it had been issued and served without authority, but no evidence has been adduced to that effect. Nor do I think that the service of a statutory demand was an inappropriate procedure to adopt in this case. There was no reason why the question whether it had been issued with the authority of the LIA (if it had been raised) should not have been determined in the present proceedings.

31. In those circumstances I would not grant an extension of time for filing the respondent's notice.

Conclusion

32. For these reasons I have reached the conclusion that there are no grounds for setting aside the statutory demand and that the appeal should be allowed.

Lord Justice Longmore :

33. I agree.

Lady Justice Macur :

34. I also agree.