



2 August 2017

PRESS SUMMARY

Goldtrail Travel Limited (in liquidation) (Respondent) v Onur Air Taşımacılık AŞ (Appellant)
[2017] UKSC 57
On appeal from [2016] EWCA Civ 20

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

The appellant is a Turkish airline, largely owned by Mr Bagana. Prior to its liquidation, the respondent was a holiday tour company which had been wholly owned by Mr Aydin. The respondent, by its liquidator, sued the appellant in relation to two agreements between the parties. Rose J held that the appellant had dishonestly assisted Mr Aydin in defrauding the respondent and that it should pay damages to it in the sum of £3.64 million.

The appellant was granted permission to appeal to the Court of Appeal against the order of Rose J. By an application made under then Rule 52.9(1)(c) of the Civil Procedure Rules, the respondent requested that the court should impose on the appellant a number of conditions for the continuation of its appeal. One requested condition was that the appellant should pay into court the sum of £3.64 million which Rose J had awarded to the respondent, on the basis that the appellant was likely to have no other assets even temporarily in England and Wales. The appellant disputed the imposition of this condition, but it did not allege that the disputed condition would stifle its appeal. By order dated 11 June 2015, Floyd LJ concluded that there was a compelling reason for imposing a condition and required that the appellant, as a condition for the continuation of its appeal, pay into the court (or otherwise secure payment of) £3.64 million by 9 July 2015.

The appellant did not pay the sum into court. On 14 January 2016 Patten LJ heard the anticipated application by the respondent for dismissal of the appeal, together with a cross-application by the appellant for discharge of the condition on the ground that payment of that sum was now beyond its means and its continuation would stifle the appellant's appeal. Patten LJ held that the appellant's appeal should be dismissed on the grounds that in exceptional circumstances the ability of a third party to provide funds, in this case Mr Bagana, could be taken into account in assessing the likelihood that a company could make a payment into court. Patten LJ stated that "Mr Bagana has decided not to fund the payment by the company" and concluded that the appellant had not established that the condition for payment would stifle its appeal.

The appellant alleges that Patten LJ erred in his application of the relevant principles and in concluding that its relationship with Mr Bagana was such as to defeat its complaint that the condition for payment would stifle the appeal.

JUDGMENT

The Supreme Court by a majority of 3 to 2 allows Onur Air Taşımacılık AŞ's appeal. It remits both applications to Patten LJ to determine the appellant's application for discharge of the condition by reference to the correct criterion [26]. Lord Wilson gives the lead majority judgment, with which Lord Neuberger and Lord Hodge agree. Lord Clarke and Lord Carnwath give dissenting judgments.

REASONS FOR THE JUDGMENTS

Principles

To stifle an appeal is to impose a condition which prevents an appellant from bringing it or continuing it. If an appellant has permission to bring an appeal, it is wrong to impose a condition which has the effect of preventing him from bringing it or continuing it. For the purposes of Article 6 of the European Convention on Human Rights, there will seldom be a “fair hearing” if a court which has permitted a litigant to bring an appeal then, by indirect means, does not permit him to bring it [12]. The appellant must establish on the balance of probabilities that a proposed condition would stifle the continuation of its appeal [15]. The courts can proceed on the basis that, were it to be established that the condition would probably stifle the appeal, the condition should not be imposed [16].

Even if an appellant appears to have no realisable assets, a condition for payment will not stifle its appeal if it can raise the sum [17]. However, the court must be cautious in respect of a suggestion that a corporate appellant can raise money from its controlling shareholder. The shareholder’s distinct legal personality must remain in the forefront of its analysis. The question should always be whether the company can raise the money and never whether the shareholder can raise the money [18]. The criterion which should be applied is as follows: “Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?” [23].

Where a company and/or its owner denies that the necessary funds would be made available to the company, the court should not take that assertion at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position and to its relationship with its owner, including the extent to which he is directing its affairs and is supporting it in financial terms [24].

Application of principles to the present case

The appellant’s application for discharge of the condition was refused by reference to the incorrect criterion. Patten LJ proceeded by reference to the Court of Appeal’s misconception in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2011] EWCA Civ 2065 and *Societe Generale SA v Saad Trading, Contracting and Financial Services Co and Al-Sanea* [2012] EWCA Civ 695, that in exceptional circumstances an order for a party, without apparent assets of its own, to make a payment into court could be justified by whether another person probably *could* advance the necessary funds to it irrespective of whether he probably *would* do so [25].

Dissenting Judgments

Lord Clarke and Lord Carnwath would have dismissed the appeal. Patten LJ did not materially misstate the relevant principles or arrive at the wrong conclusion [27, 46]. Where a company does not have resources of its own and the issue is whether it has access to the resources of others, the question is whether the company would (not could) have had access to the resources [42]. There was no direct evidence from Mr Bagana on the question of whether he would have declined to provide funds. The evidence falls far short of establishing that the condition would stifle the appeal [44, 48].

References in square brackets are to paragraphs in the judgment

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 are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>