

JERSEY / JUDGMENT

Boru and Others -v- Tepe [2016]

JCA 067C (18 March 2016)

[2016] JCA 067C

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Court of Appeal (SAMEDI DIVISION) 18 March 2016 Before : James McNeill QC, sitting as a single Judge Between Boru Hatlari Petrol Taşmina AŞ First Appellant Turkish Petroleum International Company Limited Second Appellant Botaş International Limited Third Appellant And Tepe İnşaat Sanayii AŞ Respondent Advocate D. Evans for the Appellants. Advocate E. Moran for the Respondent

judgment

MCNEILL JA: 1. There are before me, sitting as a single judge of the Court of Appeal, various applications relating to a potential appeal in this matter. The full circumstances are set out in the very detailed judgments dated 19 January (Tepe-v-Botas

[2016] JRC 012A) and 22 February, 2016 (Tepe-v-Botas

[2016] JRC 047). 2. The first application is made on behalf of the Appellants for a continuation of a stay of execution. The stay in question is one in respect of part of an Order of the Royal Court dated 22 February whereby the Respondent was given leave to enforce Arbitration Awards and, in pursuance of that, an arrêt entre mains confirmé was made over the interest of the Appellants in the shares in certain companies. The Order sought to facilitate the sale of those shares against the event that the sum due under the Awards was not paid but a stay, for a period of 28 days, was granted in respect of the direction that the Viscount should realise the shares and the companies should co-operate with the Viscount. The reason for limiting the stay to 28 days was to allow the decision as to the stay and its terms to be reviewed by this Court: see paragraph 45 of the February Judgment. 3. The appeal in this matter is anticipated to be heard in the May sitting this year, although that is yet to be confirmed. 4. This court has jurisdiction to grant a stay of execution by virtue of the provisions of Rule 15 of the Court of Appeal (Civil) Rules 1964 . It will do so if it appears that enforcement would render the appeal nugatory unless satisfied that the appeal is not presented in good faith, has no realistic chance of success or there are other exceptional circumstances: see Veka AG v TA Picot (CI)

[1999] JLR 306 , Trilogy v YT

[2012] JCA 113 . 5. Here, the learned Commissioner (Sir Michael Birt, Kt), with the full knowledge of the circumstances presented to the Royal Court, and noting that the appeal is made as of right, has expressed the view that sale of the Shares would render the appeal nugatory and that it could not be said that the appeal has no realistic chance of success or that it was not made in good faith: see paragraphs 29 to 34 of the Judgment of 22 February. Those views are entitled to great respect but I must make my own decision on the arguments presented to me. 6. For my own part I agree that the possibility of sale of the Shares should be treated as rendering the appeal nugatory. Whilst I recognise the force in arguments presented by Advocate Moran as to the likelihood of there being an actual sale in the very singular circumstances here, I do not consider that I am entitled to enter into speculation on that point. The stay requested is in respect of a sale, the purpose of the appeal is, among other matters, to prevent that sale taking place and the whole undertaking embraced within the shareholding is manifestly of value. 7. I am further of the view that it cannot be said that the appeal has no realistic chance of success. Sovereign Immunity arguments are almost invariably of considerable complexity and open to different views: witness the judgments in this court and the decision of the Privy Council in *F G Hemisphere*

[2012] UKPC 27 . 8. Further, I am not persuaded that there are sound grounds for suggesting that the appeal is not being made in good faith. That is a high test to overcome. Whilst I agree with Advocate Moran that it may not be necessary to find an abuse of process, and I take into account her concerns noted by the learned Commissioner at paragraph 41 (iii) of the February Judgment and repeated before me, the fact of there being a well arguable case seems to me to militate against a finding of bad faith. What is being subjected to appraisal is the faith of the appellant in using the appeal process itself, not in respect of matters extraneous to that process. 9. In presenting her cogent arguments, Advocate Moran sought to impress upon me that, whilst there may not have been an abuse of process while the matter was with the Commissioner, that was no longer the case: since 22 February there had been an order for payment, the Appellants were failing to comply and were in contempt of a court to whose jurisdiction it had submitted. However this change of circumstance was prayed in aid not to suggest that there should no longer be a stay: a continued stay was not resisted. Rather it was presented as a reason for making payment into court a condition. As I indicate below, the possible effect of such a condition here prevents me from viewing it as an option. 10. As matters were developed before me, the true issue between the parties was, as it had to an extent been before the learned Commissioner, whether the continuation of the stay should be conditional on a payment into court. Here the position for the Respondent is of some strength. It is a creditor with sums of some US\$97m due and payable and, as the Commissioner has pointed out, that position may readily be presumed to be causing prejudice. In many cases, practical justice may be done by requiring a payment into court of, or the provision of adequate security for, a sum reflecting a likely award: an example is *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation*

[2005] EWHC 726 (Com). The sum or the security is then in the hands of the court until determination and cannot be released without its authority. 11. The unusual problem, here, is that even if the Appellants succeed on their arguments regarding Sovereign Immunity they remain a judgment debtor and the Respondent has arguments as to its own entitlement to obtain release of such funds were they to be paid in. Payment in, therefore, would not carry the usual neutral characteristics. Advocate Moran, however, points out that in IPCO the stay was made conditional on actual payment of an undisputed amount and prays that in aid of her argument that the stay here should be conditional on payment in; but, in the circumstances of the present case, where on the Appellants' success on appeal the Respondent would argue strongly that it was entitled to the sums paid in, to make the stay conditional on that payment, whilst not use of the power for an inappropriate reason, could have the effect of enforcing the order for payment in the Order of 22 February by a circuitous route. I am, therefore, not persuaded that an order for stay should be made conditional on payment in. 12. I shall therefore order that paragraphs 3 and 8 (but not paragraphs 4 to 7) of the Order of Royal Court dated 22 February 2016 shall be stayed pending the determination by the Court of Appeal of the Appellants' Appeal, and the Respondent's Notice and Cross-Appeal. 13. The second Application put before me was for a stay in respect of the return of certain securities situated in Turkey. However those securities were delivered on 17 March at 4pm Ankara time and there was now no need for such an order. Advocate Evans suggested that I might consider making a retrospective order to cover the period up to the delivery but I see no good reason to take that course when, to do so, would be to pre-judge any future issue that might lie between the parties regarding the fact of the delay and the reasons for it. 14. The third application is by the Respondent for security for costs. On this matter I have the advantage of the views of the learned Commissioner at paragraph 87 of the February Judgment where he indicated, with some firmness, that having had the benefit of hearing the case in full, and assuming that he was sitting as a single judge of the Court of Appeal, he would have regarded the case as suitable for an order for security. Whilst authorities were not referred to, the considerations set out there are those to be found in *Gheewala v Compendium Trust Company Limited*

[1999] JLR 74 , as further discussed in *Leeds v Admatch*

[2009] JCA 097 . 15. For my own part, I have deliberated over the importance of the issue as to difficulty in recovering costs where, as here, both parties are located in the same foreign jurisdiction; but I find the considerations set out by the learned Commissioner to be compelling and, clearly, still applicable. In particular I agree that the *arrêt entre mains* does not provide adequate security because of the perceptible difficulty in realisation. 16. The final question, therefore is as to the appropriate amount. On this Advocate Moran has produced an Affidavit in the usual form showing a total built up of £126,851.30 for the Jersey and English legal teams and £23,894.27 in respect of that in Turkey. Advocate Evans has made criticisms in respect of the number of partners at the English law firm involved and as to the claim in respect of Turkish lawyers. On the first of those matters Advocate

Moran explained that two partners were involved because of particular knowledge of the issues and that it should be noted that there was no deployment of English counsel. If the costs for only one partner was to be allowed, it should be Mr Elliott. As regards the Turkish lawyers she accepted that she could not press for that inclusion as the account did not differentiate between work on the appeal and on the cross appeal. 17. I am not persuaded that there are particularly compelling reasons to base the calculation upon a need to allow for two members of the legal team at partner level. In my view security should be ordered in the sum of £100,000 which, by my calculation and in a round sum, is the total identified under exclusion of the Turkish element and of Mr Roe. Authorities Tepe-v-Botas

[2016] JRC 012A . Tepe-v-Botas

[2016] JRC 047 . Court of Appeal (Civil) Rules 1964. Veka AG v TA Picot (CI)

[1999] JLR 306 . Trilogy v YT

[2012] JCA 113 . F G Hemisphere

[2012] UKPC 27 . IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation

[2005] EWHC 726 (Com). Gheewala v Compendium Trust Company Limited

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