

JERSEY / JUDGMENT

Chilukuri and Others -v- RS Holdings Limited and Others

[2009] JRC 139 (14 July 2009)

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judgment

the commissioner: 1. On 28 th May, 2009, the Court dismissed an application by the First, Second and Fifth defendants to discharge or vary interim injunctions imposed upon all the defendants. We now set out our reasons.

Background

2. The ultimate subject matter is a substantial hotel development being carried out in Morocco by Samanah Hotels SAS ("Samanah") which is owned as to 34% by Marprom SARL ("Marprom") whose principal is a Mr Hennessey. The remaining 66% is owned by a Luxembourg company Compagnie Foncière d'Investissement SA ("CFI") which is in turn a wholly owned subsidiary of a Cyprus company Aclyone Limited ("Aclyone"). 3. Aclyone is a corporate vehicle through which the four individual plaintiffs (for convenience we will refer to the surnames of the individual parties) namely Chilukuri, Rastogi, Rajpal and Malhotra, the Second defendant One Aldwych Holdings Limited ("Aldwych") and the Third defendant Verma have invested in the development and it is between them that issues have arisen. Aldwych is owned by a discretionary settlement with which the Fourth defendant Kansagra has some connection. The Fifth individual defendant Machan is the managing director of Verite Trust Company Limited ("Verite"), which carries on trust company business in Jersey and is a party cited. It is the trustee of the trust which owns Aldwych and Machan is a director of Aldwych. 4. The terms of CFI's participation in the development are set out in a co-operation agreement ("the co-operation agreement") which imposes certain funding obligations on CFI, including the making of an initial shareholder loan to Samanah of €500,000 ("the Samanah loan"), to have a certain minimum capital and to provide further funding by way of additional loans, failing which CFI could be required to sell all its shares in Samanah to Marprom for their nominal value and abandon the Samanah loan. CFI looks to Aclyone to fund these obligations and Aclyone to the investors. 5. Mr Hennessey is president of Samanah and acts as the site manager in relation to the development. Verma sits on the board of Samanah and thus through him, one of the defendant investors is on the

ground in relation to the development. The individual plaintiffs are passive investors. 6. We will summarise the somewhat involved and complex dispute in broad terms. In doing so it should be borne in mind that there have been no findings of fact by this Court. 7. Verma and Aldwych allege that Chilukuri, Rajpal and Malhotra failed to meet their financial obligations to Aclyone in respect of the development. In December 2007, in an attempt to save the development and their existing investment, Verma and Aldwych made payments to Aclyone totalling some €3,070,000 over and above their initial investment obligations. It was their intention that this contribution would be reflected in an increased shareholding in Aclyone. Instructions were given to the administrators of Aclyone to this effect but this was countermanded by Chilukuri. 8. In January 2008, Chilukuri and Rastogi called an EGM of the shareholders of Aclyone to remove the independent director, a Mrs Georgiou, and replace her with three of the plaintiffs, namely Rastogi, Malhotra and Rajpal. The individual plaintiffs together constituted a majority of the shareholders. 9. Proceedings were brought by Aldwych and Verma in the Nicosia District Court of Cyprus seeking to prevent the appointments of Rastogi, Malhotra and Rajpal as directors of Aclyone and to rectify the share register to reflect the increased investment by Aldwych and Verma. The application was unsuccessful. Thus the individual plaintiffs assumed control of Aclyone, although they did not seek to utilise that control to alter the composition of the board of its subsidiary CFI which comprised the plaintiff Chilukuri and the two individual defendants Verma and Kansagra. 10. A number of steps were then taken which are the cause of the proceedings in Jersey:- (i) Aldwych and Verma gave formal notice to Aclyone to repay the sums advanced to it, namely €1,520,000 to Aldwych and €1,550,000 to Verma within twenty-one days. (ii) A Jersey company R S Holdings Limited ("RSH") was incorporated by Verite on 25 th June, 2008, and through a number of transactions the benefit of the loans due by Aclyone to Verma and Aldwych were assigned to it. Machan was a director of RHS as well as Aldwych. In the application to the Jersey Financial Services Commission signed by Machan, the intended beneficial owner of RSH was stated to be a Mr Patel from Kenya who is apparently 91 years of age and the father of the fourth defendant, Kansagra. Mr Patel is apparently also a beneficiary of the Shapal Trust which owns Aldwych. (iii) Kansagra and Verma gave notice to Chilukuri of a meeting of the directors of CFI to take place on 27 th June, 2008, to deliberate upon the following matters:- (a) The election of a chairman. (b) The balance sheets for 2006 and 2007 and the possible convening of an EGM. (c) Any other business. There was no mention of the proposed sale of CFI's only asset. (iv) On 25 th June, 2008, Samanah made a capital call on its shareholders of 12,000,000 Dirhams payable within ten days, namely by 5 th July, 2008, of which 7,920,000 Dirhams would be due by CFI. (v) On 26 th June, 2008, Kansagra and Verma gave notice to Chilukuri that at his request two items had been added to the agenda for the board meeting of CFI, namely a discussion on the investments and activities of CFI and details of the CFI investments and documents for determination of " Loss in a current statement ." (vi) The board meeting of CFI duly took place on 27 th June, 2008, and was attended by Chilukuri, Kansagra and Verma. According to Kansagra and Verma and the minutes of that meeting prepared by them, the company, noting that it faced a severe cash crisis on account of the loan repayment demand and the

capital call, sold its shareholding in Samanah to RSH for a consideration of €3,070,000 (a market value assessed by an independent accountant according to Machan) and assigned to RSH its rights and obligations in relation to the development. For the purchase price CFI accepted from RSH the assignment of the debts due by Aclyone, which according to Machan was of value as it enabled CFI to discharge its own indebtedness to Aclyone. Chilukuri says that no such resolutions were passed. Quoting from the minutes:- "The chairman [Kansagra] then announced that the Company has recently identified a purchaser for its 930.600 (sic) shares in Samanah Hotels S. A. S., namely RS Holdings Limited of Jersey. RS Holdings would be in a position to meet the Samanah Hotels S. A. S. capital call..... The Company's cash crisis would by this token be solved". (vii) The transfer of the shares in Samanah from CFI to RHS together with the rights under the co-operation agreement and the Samanah loan has been put into effect. 11. As a consequence of these transactions Aclyone no longer has (through CFI) the asset it was formed to hold on behalf of the investing parties. Indeed the individual plaintiffs are left with two empty shells. By their Order of Justice of the 18 th August, 2008, the plaintiffs seek the return of that shareholding to CFI together with its rights in respect of the co-operation agreement and the Samanah loan. They allege breach of fiduciary duty and conspiracy. 12. A number of interlocutory applications are on foot namely an application by the plaintiffs for summary judgement and an application by the same three defendants to strike out the Order of Justice or parts thereof. There is also due to be a directions hearing. The interim injunctions 13. The interim injunctions restrain the defendants from among other things:- (i) disposing or diminishing the value of RSH's shares in Samanah; (ii) disposing or diminishing the rights under the co-operation agreement; (iii) disposing or diminishing the value of any claim in respect of the Samanah loan and (iv) acting in relation to the rights under the co-operation agreement or the Samanah loan in any way to the detriment of CFI. 14. Mr Buckley for the applicants drew the Court's attention to two matters:- (i) By letter dated 10 th October, 2008, the defendants had made three open offers;

- (1) to be bought out by the plaintiffs, (2) to buy out the plaintiffs or (3) to proceed with the joint venture on the basis originally envisaged (i.e. that the investors should make equal financial contributions to Aclyone sufficient to enable it in turn to put CFI in a position to comply with its obligations and to progress the project). The plaintiffs refused to accept the offer which has now been withdrawn. They say the issue was lack of information on the development. (ii) Some €5,000,000 was due to be paid to Samanah by way of capital call in January 2009. It has not been paid. 15. The immediate problem facing RSH is that, contrary to what was stated at the board meeting, it is not in a position to pay the sums due to Samanah. It has no assets of its own and those parties who were prepared to fund it are not prepared to take the commercial risk of the plaintiffs' succeeding in their action i.e. the risk of the shares being returned to CFI. Lack of funding will not only delay the development but could lead to RHS forfeiting the Samanah shares to Marprom under the provisions of the co-operation agreement. Applicants'

submissions

16. Mr Buckley drew our attention to the principles for granting interim injunctions set out by Bailhache, Bailiff, in *Milner v Milner Labs Limited*

[2000] JLR 266 namely:- (i) Has the plaintiff shown on the evidence before the Court that there is a serious question to be tried? If not, then no injunction is granted. (ii) If there is a serious question to be tried, then the Court considers whether the damages awarded at the trial would be an adequate remedy for the plaintiff. If so, then no injunction is granted. (iii) If damages would not be an adequate remedy for the plaintiff, the Court then goes on to consider if damages would be an adequate remedy for the defendant. If so, then normally an injunction shall be granted. (iv) If damages would not be an adequate remedy for the defendant, the Court goes on to consider the factors affecting the balance of convenience, i.e. which party will suffer more uncompensatable damage from the grant or refusal of the injunction. (v) If the balance of convenience is fairly even, then it is prudent for the Court to seek to reserve the status quo. (vi) Finally, where there is approximately uncompensatable damage to both parties, it is proper to look at the relative strength of the parties' substantive cases. Where one is disproportionately stronger than the other, this may swing the balance. 17. The three defendant applicants sought the lifting of the interim injunctions on a number of grounds:- (i) The plaintiffs had not demonstrated a genuine concern to pursue their claim to trial evidenced by the lack of progress procedurally and their rejection of the open offer. (ii) The plaintiffs' claim against the three applicants was in substantial part manifestly ill founded. (iii) There was no serious issue to try in respect of the three applicants. (iv) Damages would plainly be an adequate remedy. The only specific relief being sought by the plaintiffs was the re-transfer of the shares in Samanah and the rights under the co-operation agreement and the Samanah loan. Any benefit from such relief would be entirely illusory because the plaintiffs were manifestly unable to comply with the obligations that attached to the shares or to the co-operation agreement as evidenced by the failure of Chilukuri, Rajpal and Malhotra to meet their respective investment obligations. (v) The balance of convenience was now firmly in favour of the injunctions being discharged. These proceedings are now very likely to end up being a dispute about nothing. Samanah's capital call cannot be met and RSH is likely to be obliged to transfer the shares to Marprom at their nominal value and to abandon the Samanah loan. Thus any real value in the shares, the co-operation agreement and the Samanah loan will be lost. (vi) There can only be no real prejudice to the plaintiffs from the discharge of the injunctions and they cannot reasonably object to such discharge in circumstances where they have flatly rejected the defendants' offers, which would have given them precisely the specific relief they seek in this litigation and they are manifestly unable to comply with the obligations that attach to the shares or to the co-operation agreement. Set against that there is real prejudice to RSH (at least) if the injunctions are maintained and if they bite. Court's findings 18. In terms of procedural progress there was a stay in the proceedings between 9 th December, 2008, and 31 st January, 2009, for settlement negotiations. The plaintiffs say that they were not in possession of sufficient

information to properly conduct those negotiations until the end of January and those negotiations did not finally end until the end of February 2009. A date had been fixed for the plaintiffs' summary judgment application and for directions to be given. In our view the delays in this case, such as they are, are not sufficient to justify the lifting of the interim injunctions. 19. In terms of the open offers, the plaintiffs say they had insufficient information about the development to assess the same properly and they have in any event been withdrawn. We felt unable to draw any conclusions from this exercise. 20. The plaintiffs submitted that the contentions of these defendants in relation to the merits of the claim against them are best dealt with at their application for a strike-out scheduled for 10 th June, 2009, and we agreed. 21. At the heart of the plaintiffs' claim is the contention that there was a dishonest enterprise to remove the shares from CFI and the circumstances in which this transaction appears to have taken place as summarised above left us in no doubt that there was a serious issue to be tried. 22. As mentioned above, Mr Buckley submitted that it was the risk of the plaintiffs succeeding in having the shares transferred back to CFI that had prevented those unidentified persons behind RHS funding the capital call. The Court asked him how the lifting of the interim injunctions assisted RSH or those funding the call in relation to this commercial risk bearing in mind that it would not dispose of the action which would continue. The risk would remain. He accepted that this was a good question to which he had no real response. He had no instructions that RSH intended to transfer the shares away or as to precisely what the lifting of the interim injunctions would enable it to do. 23. Mr Young pointed out that there was no evidence that Chilukuri, Rastogi, Rajpal and Malhotra were not in a position to meet their obligations to CFI, their concern as passive investors being as to what they allege to be a lack of information in relation to the underlying development. The position of the plaintiffs is straightforward. The shares have been removed from CFI, they say dishonestly, and they want them reinstated. Damages against a nominal company (it is accepted that RSH has no other assets other than the shares in Samanah) would not be an adequate remedy. It is clear from *Play Limited v Legato Assets Limited*

[2006] JLR 94 at paragraph 43 that the ability of a defendant to pay damages is a relevant issue. 24. It was not clear to us what prejudice RSH was suffering as a result of the interim injunctions, as they did not prevent it being funded to meet its call obligations, funding that was apparently in place at the outset, but if damages were not an adequate remedy for RSH then we had no doubt that in the circumstances in which RSH acquired the shares, the status quo should be maintained. *Authorities Milner v Milner Labs Limited*

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