Case No: B4/2010/2976/FAFMF

Neutral Citation Number: [2011] EWCA Civ 232

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION
Mr Justice Mostyn
EWHC 3091[2010] Fam

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2011

Before:

SIR NICHOLAS WALL, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE SEDLEY
and
LADY JUSTICE ARDEN

- -

Between :

Everclear Limited (BVI)	**Appellant**
- and -	
Boris Agrest	**1st Respondent**
- and –	
Janna Kremen	**2nd Respondent**

- -
- -

Frank Feehan QC (instructed by **Horne Engall & Freeman LLP**) for the **Appellant**
The First Respondent did not appear and was not represented
Christopher Stirling (instructed by **Richardson Smith & Co**) for the **2nd Respondent**

Hearing date: 16 February 2011

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Judgment

Sir Nicholas Wall P:

Introduction

1. This is an appeal from a decision of Mostyn J given by way of a reserved judgment handed down on 3 December 2010 [2010] EWHC 3091 (Fam). The judge himself gave permission to appeal. By paragraphs 1 to 4 of his order made on that day:-

    1. It is declared that the transfer of the single share in (the appellant) to Edward Kinigopolou dated 27 September 2007 is a sham and of no effect.

    2. It is further declared that in consequence thereof Edward Kinigopolou held the said share as a nominee and / or bare trustee for (Boris Agrest) and that Boris Agrest retained beneficial ownership of the (appellant).

    3. It is further declared that all material times whilst he was the beneficial owner of (the appellant) Boris Agrest was wrongfully using the corporate identity of (the appellant) as a façade to conceal his interest in (the appellant's) sole asset namely South Lodge Burhill Road Walton on Thames Surrey KT12 4BE from Janna Kremen in any matrimonial proceedings.

    4. The transfer of the beneficial ownership of (the appellant) to George Chesnokov is set aside pursuant to section 23 of the Matrimonial and Family Proceedings Act 1984 ……...

2. Although this is – at bottom - an application by Mrs. Kremen under Part III of the Matrimonial and Family Proceedings Act 1984 (the 1984 Act) we heard the appeal, as is customary, in open court and no application was made to us for reporting restrictions to be imposed. The proper names of the participants were used throughout the appeal, and I see no reason to depart from that practice.

3. This appeal relates in essence to paragraph 4 of the judge's order, and it is that paragraph upon which I propose to concentrate. The appellant is a company registered in the British Virgin Islands. It has one bearer share, and was originally used by Mr. Boris Agrest to acquire a property at South Lodge Burhill Road Walton on Thames Surrey KT12 4BE (the property). The property remains the company's only asset. The principal question for us in this appeal is whether or not Mr. George Chesnokov – through the appellant – now owns the property.

4. The background to the case is, no doubt, suitably complex, but for present purposes can be very simply stated. Mr. Boris Agrest and Mrs Janna Kremen are both (amongst other foreign nationalities) Russian. They were formerly husband and wife, and have three sons now aged 19, 13 and 6. They were divorced in Israel in 2003. Mrs. Kremen, has now invoked the 1984 Act, and has obtained leave (the word used in the 1984 Act) to bring proceeding under Part III of that Act.

5. Under the 1984 Act, a woman in Mrs Kremen's position may apply for "financial relief" against Mr. Agrest in relation (inter alia) to real property in England and Wales. The 1984 Act also contains provisions which give the court powers similar to those contained in section 37 of the Matrimonial Causes Act 1973 to avoid transactions which

are intended to defeat applications for financial relief and to prevent transactions which are intended to defeat prospective applications for financial relief.

Prior to their separation, Mr. Agrest and Mrs. Kremen appear to have enjoyed an affluent life style. The detail does not matter. However, although he was neither represented nor appeared before either Mostyn J or in this court, it is not in dispute that Mr. Agrest has done his best to divest himself of any assets which could be the subject of a claim by Mrs Kremen under the 1984 Act. As the judge found in a judgment given on 16 April 2010: -

> "I have come to the clear conclusion that, as regards his obligations to maintain his wife and his children, (Mr. Agrest) is actuated by extreme malice towards (Mrs. Kremen). He had the means to pay, but refuses to do so."

6. As a consequence, the judge directed himself that any transaction undertaken by Mr. Agrest from the beginning of 2007 onwards must be judged, at least presumptively, to have been effected with the intention of leaving Mrs. Kremen (and presumably the children of the marriage) "utterly destitute". Apart from having been found to be in contempt of court. Mr Agrest was, in the words of the judge "a fugitive from British justice". His current whereabouts are unknown.

7. Nobody on this appeal has called the foregoing analysis into question, and it is the basis upon which I proceed. The only other persons whom it is necessary to mention by name at this stage are; (1) Mr Edward Kinigopolu, who was a business associate of both Mr. Agrest and Mr Chesnokov and who was (at least nominally) the sole director and shareholder of the appellant prior to its transfer to Mr Chesnokov; and (2) Mr George Chesnokov, who, subject to the findings of the judge, setting aside the transfer to him, is now the owner of the appellant. (It will, of course, be recalled that the judge held that the transfer of the single share in the appellant by Mr Agrest to Mr.Kinigopolou was a sham and that Mr Agrest retained the beneficial ownership of the appellant prior to the transfer to Mr Chesnokov and thus if the judge's order setting aside such transfer is upheld Mr Agrest will remain the beneficial owner of the appellant).

The questions for the court

8. There are only two questions for this court. The first is whether or not the property already belonged beneficially to Mr Chesnokov prior to February/March 2009, who, as I have already stated, asserts that he was the sole director and shareholder of the appellant (which in turn owns the property) by virtue of a share sale agreement in August/September 2008; **or** whether, as the judge found, the property remained effectively vested in Mr. Agrest until after February/March 2009 such that the judge was entitled to set aside the subsequent transfer to Mr Chesnokov by virtue of section 23 of the 1984 Act. If the judge is right, and he was entitled to set aside the transfer, then the property is subject to the jurisdiction of the English Courts and thus to a claim by Mrs. Kremen under the 1984 Act.

9. A second question arises if the transfer of the appellant to Mr Chesnokov is capable of being set aside, namely whether or not, as an exercise of discretion, the judge should set it aside.

10. The first point at issue is capable of further refinement, because on 12 February 2009, Mr Jonathan Cohen QC sitting as a Deputy Judge of the High Court made an order which (although we do not have a copy) appears to have been in the terms of paragraph 40 of the Deputy Judge's judgment given on the same day:

> "It does seem to me critical to try and preserve the one asset which still seems to be in existence, albeit that its ownership is much in dispute. I therefore order that (Mr. Agrest) and (the appellant) are restrained from taking or permitting any step to be taken that leads to (1) a charging, sale of other dealing with (the property) and (2) the creation of any tenancy of (the property)……"

11. In summary, the case was argued on the basis that if Mr Chesnokov's acquisition of the property was completed prior to Mr. Cohen QC's order (or prior to Mr Chesnokov receiving notice (constructive or actual) of that order) then he could legitimately claim to be a purchaser for value in good faith and without notice of any intention on Mr. Agrest's part to defeat his former wife's claim for financial relief: see section 23(7) of the 1984 Act. If, on the other hand, the acquisition of his beneficial interest only occurred after Mr. Cohen's order (or after he had notice (either actual or constructive) of it) then the edifice of the bona fide purchaser without notice evaporates, and it was open to the judge to set the purchase aside.

12. The case was argued for the appellant with great charm and skill by Mr Frank Feehan QC. For Mrs. Kremen, Mr Christopher Stirling of counsel was equally concise and measured. Indeed, it would be difficult to envisage the case being better argued on either side. By simplifying the matter in the manner I have, I mean no disrespect to Mr. Feehan or his clear argument. As I understood him, however, he took only one main point, and it is that point which I propose to address.

The judge's view

13. The judge's view was unequivocal, and expressed with equal clarity in paragraph 35 of his judgment: :

> "Although the contract was made on 27 August 2008 for the sale of the single share in (the appellant), it was amended in December 2008. Much more importantly it was the subject of a clear, albeit unwritten, collateral agreement to the effect that (Mr Chesnokov) could reverse out of the deal if he could not obtain mortgage finance on (the property) to supply part of the consideration. It is accurate to describe the obtainment of mortgage finance as a condition precedent for performance of the contract. Therefore I agree with Mr Stirling that the effective date of the second transaction for the purposes of Section 23 is 3 March 2009 when the mortgage was completed and the funds made available."

It was on this basis that the judge set aside the transfer of the property to Mr. Chesnokov.

The argument for the appellant and Mr. Chesnokov

14. Mr. Feehan's argument, as I understood it, ran along the following lines. We were, of course, not concerned with the transfer of the property but of the single share in the appellant. Mr Feehan submitted that the proper date for the contact was August 2008. It was in that month that Mr Chesnokov acquired the appellant. A term of the contract was that a substantial portion of the purchase price would be raised by Mr Chesnokov by way of mortgage. It was a further term of the contract that if Mr Chesnokov was, for any reason, unable to obtain a mortgage he, Mr Chesnokov, would be able to withdraw from the transaction. In the event, due, we were told, to the collapse of Lehmann Brothers, Mr Chesnokov did not obtain the mortgage funds until ***after*** the date of Mr. Cohen's order.

15. Mr. Feehan argued that the contract was complete in August 2008 when the contract was signed and the transfer to Mr Chesnokov of the single share in the appellant took place. He relied on some propositions set out in the latest edition of ***Chitty on Contract*** and on the decision of Vinelott J in ***Re French's (Wine Bar) ltd*** [1987] BCLC 499. In that case, a company entered into a contract for the sale of (inter alia) its leasehold premises. It was a term of the contact that the company could rescind the contract if it was unable to obtain the necessary consent to the assignment from the lessor. In the event, the company allowed the purchase into possession in October 1985, although the completion date for the sale was 31 January 1986, and the contact was in fact completed on 17 January 1986. A petition for the compulsory winding up of the company was presented on 5 December 1985, and an order was made on 20 January 1986.

16. The question for the court in ***Re French's (Wine Bar) Ltd*** was whether or not the completion of the sale constituted a disposition by the company within section 522 of the Companies Act 1986. Vinelott J held that it did not. By analogy, Mr. Feehan argued that what mattered was Mr Chesnokov's acquisition of the appellant. Since Mr. Chesnokov had entered into a valid contract for the acquisition of the appellant in August 2008, a complete contact had arisen on which he could be sued, and the fact that he paid later was immaterial. Title to the property, in effect, passed with the contract

The argument for Mrs. Kremen.

17. Mr Stirling ripostes that whilst it cannot be said that the contract was void for uncertainty, it remained a conditional contract, and the fact remains that the condition precedent had not been fulfilled at the time when it could no longer be said that Mr Chesnokov was acting in good faith. Furthermore, whilst there was no definition of "transaction" in the 1984 Act, the term should be given a purposive construction, and it was not acceptable for a party to rely on an earlier period of innocence in order to complete a transaction which was contrary to an order of the court.

Discussion

18. Skilfully as Mr. Feehan advanced his argument, I am unable to accept it. Apart from anything else, it seems to me to fall down on the facts. If the contract were indeed that title to the property passed in August 2008, the contract would, in my judgment, need to make that clear. In fact, the reverse seems to be the case. Examined in chief on the point, Mr Chesnokov said (16 November 2010 transcript p 13):

> "(inaudible) I would buy the company and house (inaudible) but if I get a mortgage for it – so I didn't want it to come up as a lot of money, but the mortgages was very good at the time, cheap, and I buy the property if I get the mortgage. (Inaudible). All the searches was done. Of course, the bank will never give the mortgage if something isn't clear. "

19. Under cross-examination, Mr Chesnokov was asked about the stock purchase agreement. The following exchange then occurs:

> Question: ….you always understood, and had explained to Mr. Kinigopolou – that in order to purchase the property you required finance
>
> Answer Yes, that it is correct. ……
>
> Q If you could not obtain finance, the deal was off, whatever the stock purchase agreement said?
>
> A Yes, that is correct

20. Slightly later, in answer to the judge, the following exchange occurs: -

> Judge So there was no piece of paper that said: "if I fail to get a mortgage, I can unwind the deal"? There was an understanding between you, is that right? Is that what you are saying?
>
> A It was – I didn't really think that there would be a problem to get a mortgage

21. Finally, at page 60 it is put to Mr Chesnokov that the documents do not tell the story. He denies this, and adds: "… but as I said at the beginning, the idea was for me. I will buy the property if I get the mortgage".

22. In my judgment, the evidence is plain. This is a conditional contract, and the condition precedent was as described by the judge in paragraph 35 of his judgment. It follows that the judge was right, and, on the first point. I would dismiss the appeal.

Discretion

23. Here, in my judgment, Mr. Feehan is on stronger ground, although in my view the terrain is not firm enough to allow the appeal. The judge's conclusion on this part of the case is terse. In the following extracts GC is Mr. Chesnokov: EK is Mr. Kinigopolu, H is Mr. Agrest and W is Mrs. Kremen.

> "38. The next question is whether I should exercise my discretion to set the charge aside. Mr Stirling argues that in making that decision I should have regard to the relative impact of my decision: who would suffer more – (Mr Chesnokov) or Mrs. Kremen? Mr Feehan QC strongly disagrees and says that the discretion should only be exercised by reference to the circumstances surrounding the transaction itself. I believe the

Court can take into account the full range of facts when deciding whether to exercise its discretion, including the fact that about £600,000 - £800,000 of equity in the property will make a significant difference to (Mrs Kremen's) claims to relief, for the reasons explained in my previous judgment. At this stage it is a question of striking a balance of fairness as between W and GC."

39. I now turn to GC's position. If I were to reverse the sale of the single share in (the appellant) then I must go on to reverse the assignment of the Kyrgyzstani Bonds to EK as a consequential order (no one is suggesting that I can or should reverse the mortgage in favour of the Bank of Scotland). Having regard to the nature of the relationship between EK and GC I have little doubt that the bonds will in fact be returned to GC. Thus other than in relation to some costs referable to South Lodge (including the loss of rent from Jolima since April 2010), he will have suffered minimally if the transaction is set aside. I will in any event order that (Mr. Agrest) indemnify GC against all expenses and costs incurred by him in this transaction and the subsequent litigation to include any cost order made by me against GC in W's favour. Although GC is liable to the Bank of Scotland under the personal guarantee it is unrealistic to think that the Bank will recover its money from any source other than the proceeds of South Lodge.

My disposition is therefore as follows:

i) It is declared that at all times EK was acting as nominee for H.

ii) The sale of the single share in (the appellant) by H (through his nominee EK) to GC is set aside.

iii) It is declared that (the appellant) holds the property beneficially for H, subject to the mortgage in favour of the Bank of Scotland.

iv) The order of Mr Cohen QC dated 12 February 2009 concerning the property is confirmed.

v) The assignment by GC to EK on 3 April 2009 of bonds issued by AUB Bank with a face value of €1,489,850 is set aside.

vi) H shall indemnify GC against all expenses and costs incurred by him in the transaction and in the subsequent litigation to include any costs order made against GC in W's favour.

I will hear counsel as to the form of the order and as to costs."

24. Mr Feehan complains, with some force, that the judge gives no consideration to the transaction entered into by Mr Chesnokov all that he does is assert that – on the balance of convenience – Mr Chesnokov can get his money back from Mr. Kinigopolou, and the costs incurred from Mr Agrest. No weight is given to the extent of the breach by Mr Chesnokov of the statutory provisions which aim to protect the innocent third party who has acquired property which is in fact the subject of a matrimonial dispute. Mr. Feehan also argues that the judge was wrong to find that Mr. Chesnokov could recover his money. He was further wrong to give Mr Chesnokov worthless rights of indemnity against Mr Agrest and failed to take into account the likely effect of his order on Mrs Kreman's claim. He also failed to weigh Mrs. Kremen's falsehoods and the conduct of the parties generally.

25. Speaking for myself, I take the view that it would have been preferable for the judge to have been more expansive in his description of the manner in which he exercised his discretion in this case, and in any future case I hope that a judge will explain in greater detail why the judicial discretion has been exercised in the way that it has.

26. That said, it seems to me that once the discretion had been found to exist, it could only have been exercised in one way on the facts of the case. There was manifestly an attempt by Mr. Agrest to defeat Mrs. Kremen's claims, and the addition, as the judge found, of between £600,000 and £800,000 to the matrimonial "pot" was plainly a material factor when considering the support of Mrs. Kremen and her children. In addition, the factors which the judge identified. in paragraph 39 of his judgment all seem to me material.

Conclusion

27. I would dismiss the appeal. The judge was right. He was entitled to set aside the transfer of the Appellant, and thus the property, Mr. Chesnokov.

28. I would, however, like to make it clear that I am making no imputations in this judgment against Mr. Chesnokov's integrity. As Sedley LJ said in the course of argument: "he bought a pig in a poke, the English law, as I read it, does not entitle him on the facts of this case to retain it".

Lord Justice Sedley

29. I agree.

Lady Justice Arden

30. I also agree.