Taher and others v Towey and others
COURT OF APPEAL (CIVIL DIVISION)
(Transcript: Smith Bernal)
HEARING-DATES: 18 MARCH 1999
18 MARCH 1999

COUNSEL:
V Joffe for the Applicants; P McGrath for the Respondents; Miss H Stonefrost for the liquidators of the Respondent; R Knowles for the Receivers appointed by the Society of Lloyds over the Respondent
PANEL: AULD, CLARKE LJJ

JUDGMENTBY-1: CLARKE LJ
JUDGMENT-1:
CLARKE LJ: This is an application for leave to appeal against a decision of His Honour Judge Macduff QC made on 11 March 1999 in which he transferred this action to the Chancery Division. The plaintiffs say that he was wrong in principle to do so or alternatively that his decision was plainly wrong such that this Court should interfere with the exercise of his discretion. This action has something of a history, but it is only necessary to refer to part of it.

The first defendant is the chairman and a director of the second and third defendants and the registered holder of 99 % of the shares of the third defendant. The third defendant is the owner of all of the shares in the second defendant. This action was begun by writ dated 30 November 1998 and includes claims for breach of contract, misrepresentation and breach of alleged guarantees or undertakings.

The plaintiffs secured a Mareva injunction against the defendants by ex parte application to Sullivan J on 25 November 1998. That order was subsequently amended by order of Steel J made on 1 December 1998. It is said that the defendants ignored the mandatory provisions of those orders.

None of the defendants applied to transfer the action from the Queen's Bench Division to the Chancery Division. They were apparently content (at that time at least) that it should continue in the Queen's Bench Division. It is not suggested that the Queen's Bench Division was not the appropriate division in which to commence the proceedings.

On 9 December 1998 Thomas J made a consent order. At that time the first defendant was represented by solicitors, although not, we were told, by counsel. However, having said that, I now observe that the order itself asserts that the judge heard counsel for the plaintiffs and counsel for the defendants but whether the first defendant was represented by counsel or not is not of any importance on this application. The consent order records that the parties agreed terms of settlement and sets out in some detail what was agreed.

The defendants gave a series of undertakings, including undertakings to execute transfers of various shares. The order also provided that, in the event of a failure to comply with the undertakings, the defendants would pay £1 million to the second plaintiff, failing which all the real and personal property of each of the defendants would vest in the second plaintiff. The order further provided that the first defendant would procure a document to be signed by all the shareholders in the second and third defendants stating that on default they would transfer all of the real and personal property.

Mr McGrath, who has represented the first defendant this morning, was only instructed yesterday. His present solicitors were only instructed about a week ago. We have been informed that the first defendant did not have solicitors on the record between about the middle of December and the time that his present solicitors were instructed, although he may have had some advice in the meantime. No application has been made, and no attempt has been made to set aside the order of Thomas J or to challenge the agreement which formed the basis of it.

The plaintiffs' case was that, save for the assignment of a documentary letter of credit, the order of Thomas J was not complied with. In the event, on 22 February, on the ex parte application of the plaintiffs on notice (which I think was in part at least on notice to the defendants) Klevan J recited that the defendants had breached their undertakings and obligations in the order of Thomas J and ordered that there be judgment for the plaintiffs both in the sum of $ 565,000 and in the sum of £1 million. The order also contains a number of other detailed provisions which required the defendants to take various steps. Some two days later, on 24 February, it was resolved to place the second

defendant in creditor's voluntary liquidation and liquidators were appointed. Miss Stonefrost has represented the liquidators today. Also at some stage, Lloyd's appointed Price Waterhouse Coopers as receivers of the second defendant's property under the Lloyd's Brokers Security and Trust Deed, and Mr Knowles has represented the receivers this morning.

A meeting of the creditors of the second defendant was convened for 8 March. Before that, on 5 March, the plaintiffs made an ex parte application to His Honour Judge Macduff QC for an order restraining the defendants from holding the creditors meeting any steps taken to place the second defendant in liquidation and obliging them to revoke or recognise that they were void ab initio. The liquidators appeared before the judge, but on short notice.

The judge made various orders restraining the holding of the creditors meeting, and ordering the third defendant to exercise its votes as holders of the shares in the second defendant to revoke the resolution for winding up. He also ordered the first defendant to exercise his powers as holders of the shares in the third defendant, and as a director of the second and third defendants, to ensure compliance with the order.

On 8 March the liquidators made an application to the Companies Court for directions. That application was stood over until 11 March which was a Thursday. In the meantime, the plaintiffs returned before Judge Macduff on 9 March, without, as I understand it, giving notice to the liquidators. They put before the judge a letter from the first defendant consenting to the order of 5 March being made final. The plaintiffs persuaded the judge to add these two paragraphs to his order of 5 March:

"(9) The resolution[s] numbered 1 and 2 purportedly passed in general meeting of the Second Defendant on 24th February 1999 are hereby declared null and void and the nomination and appointment of [the] liquidators of the Second Defendant is accordingly declared null and void; and

(10) [The liquidators] shall, and are hereby ordered to return all documents to the Second Defendant taken [by] them from the Second Defendant since their purported nomination and appointment as joint liquidators of the Second Defendant on 24 February 1999."

On 11 March the adjourned hearing for directions began before Jonathan Parker J in the Companies Court. Concern was expressed (to put it no higher) as to what orders had been made by Judge Macduff, and the matter then came back before Judge Macduff in order to clarify the position. During the course of that application, the judge suggested of his own motion that the matter be transferred to the Chancery Division. Having considered the matter, he transferred the action to the Chancery Division.

It appears from the note of his judgment which is available to us that his concern was that the proceedings before him should not interfere with the proceedings before the Companies Court. He appears to have taken the view that in those circumstances it would be better to transfer the whole matter to the Chancery Division where, in effect, it could be controlled by the Companies Court.

In the course of his judgment, he said that he was satisfied that the interim order which he had made earlier was made without full argument. He also made it clear that the order which he had made was made in the absence of the liquidators, and that it could not bind the liquidators. It appears that his particular concern was paras 9 and 10 of the order that he had made on 9 March. Thus he was indicating on that day that paras 9 and 10 of the order would not bind the liquidators.

It is right to say, as Mr Knowles has pointed out, that the plaintiffs' position at that time was that it was appropriate for a judge of the Queen's Bench Division to determine questions such as the validity of the resolutions which gave rise to the liquidation. The matter then came back before Jonathan Parker J in the Companies Court on 12 March. On that occasion, although I have not seen the detailed reasons of the judge, he held that the resolutions for winding up and for the appointment of the liquidators were valid. He further held that the third defendant was the registered holder of the shares in the second defendant, and that the statutory formalities had been complied with. In short, he held that the liquidation was regular. The plaintiffs applied for leave to appeal. That was refused by Jonathan Parker J It is not clear whether any application has been made to this Court for leave to appeal.

I understand that the matter was to come back before Jonathan Parker J this morning when the directions were to be finalised and when the liquidators were to seek an order for costs against the plaintiffs in relation, not only to the hearing before Jonathan Parker J himself, but also in relation to the hearing before Judge Macduff. It is right to observe that it is conceded by the plaintiffs that Jonathan Parker J will have jurisdiction, whatever the outcome of this application, to determine the issues of costs before Judge Macduff. Mr Joffe expressly undertook to this Court on behalf of the plaintiffs not to submit to Jonathan Parker J that he does not have jurisdiction to determine those issues of costs, either as a judge of the Chancery Division or sitting as an additional judge of the Queen's Bench Division. The position is, therefore, that those costs will be dealt with at a hearing (which unfortunately cannot now take place this morning) before Jonathan Parker J.

The plaintiffs also concede that paras 9 and 10 of the order of 5 March as amended on 9 March should be discharged. They concede that they should be discharged as between themselves and all the defendants. The defendants (not surprisingly) consent to such an order being made too. It is also agreed that this Court should have jurisdiction to include that discharge in its order on this application.

The position therefore now is that the validity of the liquidation has been resolved as between the plaintiffs, the liquidators and indeed the other parties subject, in theory, to a successful application for leave to appeal to this Court. So too the issues of costs before Judge Macduff will be resolved in the near future before Jonathan Parker J.

The plaintiffs seek leave to appeal against the judge's order transferring the whole action to the Chancery Division principally because tomorrow there is to be a hearing before a Queen's Bench Master at which they are seeking the appointment of a receiver of the first defendant's assets. They say that it would be appropriate for the Court to appoint a receiver as an aid to execution of the judgment which was given by Klevan J on 22 February, no application having been made to date to set aside that judgment.

Mr McGrath has indicated that consideration is being given to the whole of the position of the first defendant. Consideration is being given to what (if any) challenge could be made to the agreement which led to the order of Thomas J, and indeed to whether an application should be made to set aside the order of Klevan J But as matters stand at the moment, there is a valid and subsisting judgment in favour of the plaintiffs against, amongst others, the first defendant, and the plaintiffs say that in principle they are entitled to enforce it. It is with that end in view that they wish to be heard tomorrow.

In my judgment, that is an entirely legitimate position for the plaintiffs to take. Moreover, it is a legitimate position for them to take, however inappropriately they acted in relation to the procuring of paras 9 and 10 of the order to which I have referred.

I entirely understand the submissions made by Miss Stonefrost and Mr Knowles as to the plaintiffs' conduct in relation to the procuring of those orders. That is a matter that has no doubt been dealt with in detail in the judgment of Jonathan Parker J and, moreover, it is a matter the judge will no doubt take into account when he decides what order for costs to make on the applications before Judge Macduff.

Mr Joffe submits that the order to transfer the action to the Chancery Division was contrary to principle. He submits that the relevant principles may be summarised as follows:

1 An application for transfer should not be made unless the proceedings have been commenced in a division which is inappropriate under the rules or generally accepted practice.

2 A transfer should be ordered only if an action is commenced in a division in which it is inappropriate for trial to take place.

3 Where a speedier trial will result from not ordering a transfer, a transfer should only be ordered if a hearing in the division where the action was originally commenced is clearly inappropriate.

He relies upon Barclays Bank v Bemister [1989] 1 All ER 10, [1989] 1 WLR 128 at 13 of the former report, and Pantheon Ltd v Chandler Hargreaves Ltd (1989) 139 NLJ 329. He submits that the position here is a fortiori to the

position in those cases because those were cases which concerned matters before trial of an action, whereas here the plaintiffs already have judgment.

I accept the submission that those are a summary of the general principles. However, it is submitted in particular by Mr Knowles and Miss Stonefrost that this is a very different case because here the judge made his order not on an application of a party but of his own motion. Moreover, it is submitted that he did so because of the very special circumstances arising out of the way in which paras 9 and 10 came to be included in the order of 9 March.

I accept the submission that this case is different in a number of respects from the two cases relied upon. Mr Joffe draws our attention, however, to the steps which should be taken by a judge who considers that transfer of an action from one division to another is appropriate: see Supreme Court Practice 1999, vol 1, page 26. He correctly points out that the process set out in the note was not followed here.

In my judgment, a judge who is considering transfer from one division to another should only do so after giving careful consideration to all the relevant matters. As I see it, the problem here is that there is no indication that the judge gave any consideration to the position as between the plaintiffs and the first and third defendants. The judge was naturally concerned about the behaviour of the plaintiffs so far as the liquidation was concerned, and the overlap between the responsibilities of the Companies Court and the responsibilities of the judge of the Queen's Bench Division before whom the action was proceeding.

In my judgment, if he had given consideration to all these matters, having clarified the position which Jonathan Parker J wanted him to clarify in particular, namely the status of paras 9 and 10 of the order, and having made it clear that they were not binding on the liquidators, there was no need to transfer the whole action to the Chancery Division. Judgment had already been obtained. The only remaining matter so far as he was aware therefore was enforcement of the judgment. The action had been appropriately begun in the Queen's Bench Division. There was no sensible basis, in my judgment, for not allowing the matter to continue in the Queen's Bench Division for appropriate enforcement process to be taken. Indeed, on a transfer to the Chancery Division matters of enforcement would be dealt with a Chancery Master, just as in the Queen's Bench Division matters of enforcement would be dealt with, in the first instance at least, by a Queen's Bench Master. The concerns which have been expressed by Miss Stonefrost and Mr Knowles essentially amount to this. They say that the plaintiffs acted in an inappropriate way (to put it no higher) in the past and there is a risk that they may act in an inappropriate way in the future so that it would be better to leave the Companies Court judge to control their actions.

I see the force of that submission. However, as Mr Joffe has pointed out, the position now is this. The liquidation is proceeding. It is difficult to see what the plaintiffs can do against the second defendants other than prove in the liquidation. If the plaintiffs should take some step vis-a-vis the second defendants, the liquidators can simply apply to the Companies Court for a stay under the relevant provision of the Insolvency Act, and/or apply to the Companies Court for directions. It appears to me that in the light of the history of this matter to date and the experience we all now have on it, there is no risk of any repeat of what happened in the past. So far as costs are concerned given the undertaking that has been given, the liquidators' position will be entirely protected.

In these circumstances I am entirely unpersuaded that good sense required or requires the transfer of the whole action to the Chancery Division simply to meet those concerns.

That leaves the position in particular of the first defendant. Mr McGrath says that the application tomorrow should be adjourned. He says that the affidavit of Mr Hardacre, who complains of a failure by the first defendant to comply with orders of the court and suggests a risk of dissipation of the first defendants of his assets, has only recently been served upon the first defendant, even though it was sworn as long ago as 4 March. He submits that this is a most unusual case in which consideration should be given to the detail of the order of Klevan J and the previous order of Thomas J He says that he is going to apply for an adjournment of tomorrow's application. That may be so. It will be a matter for the Master whether he grants or refuses that application in the exercise of his discretion having taken all relevant matters into account.

It appears to me that the plaintiff should be permitted to proceed as soon as may be with the enforcement of what is at present a valid judgment which he has obtained. I have reached the clear conclusion that the judge did not take

into account all relevant circumstances and that in these circumstances this Court has the power to interfere with his decision if it reaches a conclusion in the exercise of what would then be its discretion that it should do so.

For the reasons which I have given, I would exercise the discretion of this Court in favour of granting the application for leave to appeal and allowing the appeal, setting aside the order to transfer the action to the Chancery Division, subject to the particular orders that I indicated earlier, which will entirely protect the legitimate interests of the liquidations and will not cause any interference at all with the discretion of the judge of the Companies Court and will moreover fairly hold the balance between the parties.

JUDGMENTBY-2: AULD LJ
JUDGMENT-2:
AULD LJ: I agree. This action is for breach of contract and misrepresentation against three defendants, two of them limited companies. It began and proceeded to judgment in the Queen's Bench Division. It was entirely appropriate that it should be in that Division. The order challenged is of a Queen's Bench judge transferring it to the Chancery Division because of a conflict that had arisen between an order made by him and by a judge of the Chancery Division as to whether the second defendant was in liquidation. The result has been to give rise to issues as to the pace and manner of the plaintiffs' attempts to enforce their judgment against the defendants, more particularly against the first and third defendants who are not in liquidation.

It is now common ground that the second defendant is in liquidation and that any execution against it will be subject to that constraint in whatever division the matter proceeds.

There is also an issue which concerns the liquidators of the second defendant as to who should pay for, and which judge should deal with, their costs arising out of the conflict between the two divisions. The liquidators are of the view that that matter could more conveniently and efficiently be dealt with by a Chancery judge.

Those matters, pace and manner of enforcement of the Queen's Bench judgment, and costs as to unnecessary proceedings in the liquidation of the second defendant, do not, it seems to me, bear on the central question of the propriety of the Queen's Bench judge's transfer of all the proceedings, that is, as against all three defendants, to the Chancery Division at so late a stage. First the Queen's Bench judge seems to have acted of his own motion in so ordering, without first making inquiries of the Vice-Chancellor or obtaining the consent of his own head of division, as is the normal practice, and as an aid to the exercise by him of his discretion. Second as a matter of principle, he should have been guided in the exercise of his discretion by the general rule that the court should not normally allow the transfer of an action proceeding in an appropriate division to another division, merely on the ground that that action could be dealt with more expeditiously or efficiently there.

There is no indication in the Queen's Bench judge's order of transfer on what basis he acted in ordering it, other than as a response to the conflict that had arisen between him and the Chancery judge as to the liquidation of the second defendant. In my view, that is not a sufficient basis in the context of the overall disposal of the execution of the Queen's Bench judgment against all three defendants, but in particular against the first and third defendant, not affected by that complication.

Accordingly, I can see no proper basis on which the judge could have exercised his discretion to transfer the matter in the way he did out of an entirely appropriate division at such a late stage of the proceedings, and when the undoubted liquidation of one of the three defendants was no impediment to resolution of issues of execution in the normal way against all of them in the Queen's Bench Division.

Accordingly, the application for leave is granted and the appeal allowed in the terms and subject to the orders indicated by my Lord.

DISPOSITION:
Application and appeal allowed; no order as to costs between the plaintiff and the defendants; the liquidators to have their costs against the plaintiffs.

SOLICITORS:
Grunfeld Davis & Co; Gordons