Case No: A2/2010/2322 + 2323 + 2327

Neutral Citation Number: [2010] EWCA Civ 1248
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
THE HONOURABLE MRS JUSTICE PROUDMAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 22nd October 2010

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE JACOB
and
MR JUSTICE KITCHIN

- -

Between:

HHY Luxembourg SARL & ANR

Appellants

- and -

Barclays Bank Plc & Ors

Respondents

- -

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Mr A Zacaroli QC, Mr M Hapgood QC, Mr D Alison, Mr W Traver QC and Mr M Haywood (instructed by Allen and Overy LLP, Linklaters Solicitors, Quinn Emanuel Urquhart and Sullivan) appeared on behalf of the **Appellants**.

Mr R Knowles (instructed by **Kirkland and Ellis International LLP**) appeared on behalf of the **Respondents**.

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Judgment
(As Approved by the Court)

Lord Justice Longmore:

1. This appeal from Proudman J has been given an expedited hearing and requires an urgent decision if the proposed restructuring is to go ahead. We heard the appeal yesterday and give judgment this morning.

2. The European Directors Group ("the Group") operates a directories business across a number of European companies. We were shown a detailed structure chart of the Group; the business is substantially carried on by the various operating subsidiaries, all of which sit below European Directories DH 7 (BV) ("DH7") on the structure chart.

3. The second appellant, which I shall call DH6, is the immediate parent company of DH7. DH6, along with a number of other Group companies, is party to a number of Facility Agreements, including 1) a Senior Facilities Agreement dated 30 June 2005 ("the SFA"); 2) a Mezzanine Facility Agreement dated 30 June 2005; and 3) a PIK Facilities Agreement dated 30 June 2005. The lending under the FSA is divided into tranches. I won't set out the tranches, but Facility D is subordinated to the other Facilities under the FSA. Accordingly, Facilities A1 to C3 inclusive and the revolving Facilities are, together with the counter parties, defined as the "Priority Senior Liabilities", and the lenders in respect of them are defined as "the Priority Senior Creditors". Lenders in Facilities, D1 and D2, are conveniently referred to as the "Facility D Lenders". They are the respondents to this appeal; the Mezzanine and PIK Facilities are each subordinated for the lending under the FSA.

4. The relationship between each of the creditor Groups and the Group under the various Facilities Agreement is regulated by an inter-creditor Agreement dated 30 June 2005 ("ICA"). DH6, its immediate subsidiary, DH7, and a number of direct and indirect subsidiaries of DH7, are "Obligors" within the meaning of the ICA; that is, either they were originally borrowers, guarantors or providers of Security to the lenders as at the time of the ICA or have since provided Security or a guarantee to or for benefit of lenders and have formally acceded to the ICA.

5. The ICA contemplates that any company within the Group which has provided a guarantee or Security in respect of amounts owed to the lenders will be "an Obligor". Obligor is defined as "each original Obligor and any subsidiary of the company which becomes a party as an Obligor in accordance with the terms of Clause 19". By Clause 19.10 any member of the Group which gives "any Security guarantee indemnity or other assurance against loss in respect of the liabilities" is required to become an Obligor by executing and delivering to the Security Trustee an Accession Deed.

6. The benefit of the Security is held by the Security Trustee. The powers and duties of the Security Trustee are set out in the Facilities Agreements and the ICA. Those provisions include Clause 15.2, which confers on the Security Trustee the power to release liabilities of, and the Security provided by, certain

companies in the Group and the power to sell debt owed by certain companies in the Group.

7. The Group is in serious financial difficulties and a restructuring is proposed, the full details of which are not material for the purpose of the short issue of construction raised by this appeal. In essence, however, and so far as relevant to the issue raised by this claim, 1) DH6 is to be placed into administration in England; 2) the shares in DH7 owned by DH6 are to be sold to a new company; 3) the Security Trustee will transfer on behalf of the lenders the primary and guarantee liabilities in respect of the FSA, and the Mezzanine Facility Agreement to that new company under the provisions of 15.2C of the ICA and the new company, will issue debt instruments to the Priority Senior Creditors; 4) the Security Trustee will effect the release of guarantees and Security given in respect of the FSA and the Mezzanine Facility Agreement by various members of the Group, each of which is an "Obligor" for the purposes of the ICA under the provisions of 15.2(b) of the ICA. It is these third and fourth steps, the transfer of liabilities and the release of guarantees and Security, which are challenged by the Facility D Lenders. Clause 15.2 of the ICA is headed Disposal After Enforcement Action:

> "If any assets are sold or otherwise disposed of by (or on behalf of) the Security Trustee or by an Obligor or the Parent of the request at the Security Trustee […] either as a result of the enforcement of the Transaction Security or a disposal by an Obligor after any Enforcement Action, the Security Trustee shall be authorised.... to release those assets from the Transaction Security and is authorised to execute or enter into, on behalf of and, without the need for any further authority from any of the Lenders, Subordinated Creditors or Obligors:
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> (b) if the asset which is disposed of consists of all of the shares (which are held by an Obligor or European Directories (DH5) BV…) in the capital of an Obligor or any holding company of that Obligor, any release of the Obligor or holding company from all liabilities it may have to any Lender, Subordinated Creditor or other Obligor, both actual and contingent in its capacity as a guarantor or borrower and a release of any Transaction Security granted by that Obligor or holding company over any of its assets under any of the Security Documents; and
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> (c) if the asset disposed of consists of all of the shares held by an Obligor or the Parent in the capital of an Obligor or any holding company of that

> Obligor and if the Security Trustee wishes to dispose of any liabilities owed by that Obligor or Holding Company, any Agreement to dispose of all or any part of those liabilities on behalf of the relevant Lenders, Subordinated Creditors, Obligors and Facility Agents (with the proceeds thereof being applied as if they were the proceeds of enforcement of the Transaction Security) provided that the Security Trustee shall take reasonable care to obtain a fair market price in the prevailing market conditions (though the Security Trustee shall have no obligation to postpone any disposal in order to achieve a higher price.
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> 12. The conditions for the application of Clause 15.2 are 'if any assets are sold or otherwise disposed of by (or on behalf of) THE Security Trustee or by an Obligor or the Parent at the request of the Security Trustee…either as a result of the enforcement of the Transaction Security or a disposal by an Obligor after any Enforcement Action…."

8. It is common ground that those conditions will be met in the proposed restructuring. DH6 is an Obligor, the disposal is of the shares in DH7 and, it is said, the operating Group of companies of which it is the holding company, via a sale of the shares in DH7, the immediate subsidiary of DH6; and the disposal will be made by DH6 in administration after enforcement action has been taken and at the request of the Security Trustee.

9. It is also common ground that Clause 15.2 authorises, once those conditions are met, the Security Trustee to "release those assets [ie the assets being sold or otherwise disposed of] from the Transaction Security". "Transaction Security" means any security created over the assets of any of the companies in the Group pursuant to the Security documents as defined in each of the Facilities Agreements.

10. Dispute between the parties relates to the operation of Clauses 15, 2(b) and 15.2(c). 15.2(b) covers the situation where the disposal is of Group companies, rather than underlying assets, and permits the release of Security over the assets held by those companies. It further permits the release of liabilities incurred by companies being disposed of. 15.2C similarly applies where the disposal is of companies rather than underlying assets and authorises the Security Trustee to sell on behalf of the lenders the liabilities owed by those companies.

11. The relevant wording in Clauses 15.2(b) and 15.2(c) is materially the same. I can focus primarily therefore on the operation of Clause 15.2(b), but the same arguments also apply to Clause 15.2(c). The particular words in Clause 15.2(b) which give rise to this claim are as follows:

> "**[**the Security Trustee is authorised to execute or enter into] if the a**s**set which is disposed of consists of all of the shares **(**which are held by an Obligor or Europe**a**n Directories (DH5) BV…) in the capital of an Obligor or an**y** holding company of that Obligor**,** an**y** release of the Obligor or holding company from all liabilities it ma**y** have to an**y** Lender, Subordinated Creditor or other Obligor**,** both actual and contingent in its capacity a**s** a guarantor or borrower and a release of an**y** Transaction Security granted by that Obligor or holding company over any of its a**ss**ets under an**y** of the Security Documents**."**

12. The judge found at paragraph 19, and the respondents contend, that these words permit the Security Trustee to release (from Security or liabilities) only the very entity whose shares are being sold, ie that it provides only for one layer of release. Thus, if the shares being sold are in the Obligor then only that Obligor's liabilities/Security can be released; and if the shares being sold are in any holding company of an Obligor then only that holding company's Security/liabilities can be released. In the present case the shares being sold are in DH7, which is an Obligor, so, on the judge's interpretation, only its Security/liabilities can be released. The judge thought that this result must be right in the context of ordinary corporation law according to which separate companies are regarded as separate corporate entities, so that the sale of shares in company A, which itself owns shares in company B, operates to change the ownership of company B but does not operate to change the ownership of B's subsidiary companies (companies of which company B is the holding company) which are still owned by company B and are not part of the property in company A, which is being transferred to a third party.

13. The appellants contend, on the other hand, that Clause 15.2(b) permits the Security Trustee to release an Obligor from Security and liabilities provided that the relevant assets being disposed of are either that Obligor's shares or shares in any holding company of that Obligor. It is common ground "that any holding company" includes both direct and indirect holding companies.

14. In other words, the Clause permits the release of Security and liabilities of any Obligor which is being transferred, whether directly via sale of its shares or indirectly by the sale of its holding company's shares, to a purchaser on a disposal following Enforcement Action. In this case DH7 is not only an Obligor but also a holding company for all Obligors within the operating Group; therefore each of the Obligors in that operating Group is an Obligor whose holding company's shares are being disposed of. Clause 15.2(b) is therefore said to permit the release of each of those Obligors' security and liabilities. Not only is this said to be the natural meaning of the words in Clause 15.2(b) on their face, but it is also said that it is the only construction which makes sense when read in light of the purpose of the release provisions in Clause 15.2 in the context of the overall scheme of the ICA.

15. Mr Zacaroli, of Queen's Counsel for the appellants, submitted that the judge went wrong because she gave too much emphasis to the grammatical meaning of the words of the claim and ignored the wider context of the overall scheme of the ICA, just as the Court of Appeal had in Re Sigma Finance Corporation, only to find itself being reversed by the Supreme Court, [2010] 1 AER 571, and criticised by Lord Mance for attaching too much weight to what they perceived to be the natural meaning of the words in a particular sentence or a relevant clause, and too little weight to the context in which that sentence appeared and the scheme of the relevant deed as a whole.

16. We have also reminded ourselves that Lord Hoffman had said in the Investors Corporation Case [1998] 1 WLR 896 and Chartbrook v Persimmon Homes [2009] 1 AC 1101 that it is the meaning which is conveyed to a reasonable person that is the meaning of any disputed clause.

17. Mr Zacaroli said that when the parties entered into the ICA they would, as reasonable persons, have known, or be likely to have reasonably assumed:

    1) the real values in the Group lay in the various asset-owning and operating companies that sat within the corporate structure beneath DH7. The ability to release those companies from debt and Security provided to or for the benefit of Lenders was, he said, crucial to any disposal in the Enforcement Action.
    2) Numerous of those asset-owning and operating companies in the Group, which sat in chains of subsidiaries beneath DH7 (as the holding company for the entire operating group) were "Obligors", having assumed a debt or guarantee liability to the lenders or having provided Security for amounts due to the lenders. Indeed, any company whose gross assets represented 5 per cent or more of the gross assets of a Group was required to become an Obligor.
    3) In the event that it was necessary to take enforcement action it was highly likely that a better price could be obtained for the assets and business of the Group if the operating Group was sold as a going concern rather than by disposing separately of each company or asset within the Group.
    4) A sale as a going concern would be achieved much more easily by a sale of shares in one or more of the companies higher up the corporate structure as opposed to separate sales of companies lower down the structure. To engage in separate sales would be far more complicated and expensive, would give rise to mechanical and legal enforcement issues in the different jurisdictions in which the underlying companies and their businesses were situated, and would be bound to give rise to material tax issues in more than one such jurisdiction as it would lead to breaking the tax Group. If it could be shown that the objective was to maximise value, that could only be achieved by releasing the subsidiaries liabilities.
    5) Where a disposal as a going concern was effected by sale of shares in one or other holding company, the Security which would have to be released in order to ensure that the purchaser acquired the operating Group free from burden of existing debt and Security was the Security over the underlying assets in each of the asset owning and operating companies. Similarly, it was those companies whose debt would need to be released in order to achieve the

aim of delivering a "clean" operating Group to the purchaser and thereby maximising value on disposal.

18. He also made submissions on the overall scheme of the ICA and drew our attention to numerous clauses. He said:
1) The ICA provides for an agreed order of priority as between the Lenders in respect of the obligations of the Group and the Security provided by the Group in respect of that lending (see Clause 2.1).
2) It governs the circumstances in which Enforcement Action may be taken by each of the different Groups of lenders, giving priority to the rights of the Priority Senior Lenders to take such action (see Clause 10).
3) It provides a hierarchy which follows the order of priority set out in Clause 2.1 for instructing the Security Trustee to take Enforcement Action (see Clause 14).
4) It contains an irrevocable authority in favour of the Security Trustee to effect releases of Security and liabilities on disposal of assets (whether tangible assets or shares in Group companies) in connection with any Enforcement Action (see Clause 15.2).
5) It provides for the proceeds of the enforcement of Security and any other amounts received by the Security Trustee to be applied according to a "waterfall" which reflects the priorities set out in Clause 2.1 (see Clause 16).
6) It provides that the Security Trustee holds the Transaction Security on trust for the Secured Parties (Clause 17.2).

19. The ICA as a whole therefore, said Mr Zacaroli, showed that the objective of 15.2 -- the Disposal after Enforcement Action clause -- was indeed to maximise the value of the disposal.

20. Mr Knowles of Queen's Counsel, for the respondent, supported the judge and relied on what he called “the natural meaning of the words” and on the fact that an asset consisting "of all the shares […] in the capital Obligor or any holding company of that Obligor" cannot mean an asset consisting of the shares of just any Obligor or any subsidiary company of an Obligor. He submitted that the judge was right to start with the words and ask if they made sense and then to see whether they fitted the context. He further said that it would have been easy enough to include the concept of a sale of a subsidiary's assets if the parties wanted to do so but they did not. Elaborate arguments about context could not distort a plain and obvious meaning.

21. Attractively as Mr Knowles puts his argument on behalf of the Facility D Lenders, I fear I cannot accept them. The ICA is one part of a complex financial structure and is itself a complex document. The Group is a complex Group of pan-European companies and subsidiaries; the lenders to the Group probably know, and would anyway have assumed, that the substantial assets would be likely to lie in the companies in the various jurisdictions where business was done. In those circumstances, it is not at all surprising that Obligors themselves (and any holding company of such Obligor) should be the primary focus of a sub-clause headed "Disposal after Enforcement Action".

22. It is no misuse of language to use the words "disposal of all of the shares in the capital of an Obligor or any holding company of that Obligor" to refer to individual Obligors lower down the company chain and any holding company of such Obligors. It is agreed that the holding company can be both a direct and indirect holding company, and in such circumstances DH7 is indeed the Obligor's holding company and the company the shares in which it is proposed to dispose of.

23. It can be said that this a reading of the clause bottom upwards rather than from the top down, but it seems to me that in the context of the company structure and the scheme of the ICA Agreement, together with the Facilities Agreements, a bottom upwards construction is at least as natural as a top downwards construction. I say "at least as natural" in deference to the judge's opinion that the opposite construction was more natural, but, in a situation in which every company whose assets represented 5 per cent or more of the gross assets of the Group was required to become an Obligor, I would say it is the more natural construction of the clause.

24. The matter does not of course rest there because when alternative constructions are available one has to consider which is the more commercially sensible. On this aspect of the matter Mr Zacaroli has all the cards. It is accepted by Mr Knowles that the Security Trustee could, if it had gone through all the right hoops, have sold all the shares of each Obligor separately and thereby become entitled to execute a release of the liabilities of that Obligor. If the words required that exercise to be done, no doubt it would have to be done; but that would not only be an exercise in futility, it would also incur expenditure which would mean that there was even less money for the creditors at the end of the day. Mr Knowles submitted that that was indeed the bargain and was intended to give the subordinate creditors the opportunity to negotiate with the Primary Senior Creditors if those creditors wanted to find an easier way out of the difficulties of separate sales in separate jurisdictions; but that stands the whole concept of primary creditors and deferred creditors on its head, and is unlikely to have been the intention of the parties to the ICA, which is, after all, intended to be a cooperative document between parties with similar interests, who would want to maximise recovery if at all possible. Moreover, as Jacob LJ pointed out in argument, any one creditor could in any event stymie any such negotiation that Mr Knowles envisages should take place.

25. The judge said that it did not flout common sense to say that the clause provided for a very limited level of release, but that, with respect, is not quite the way to look at the matter. If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction.

26. For those reasons, I would allow this appeal, set aside the judgment of Proudman J and ask counsel to agree an appropriate form of order.

Lord Justice Jacob:

27. I agree

Mr Justice Kitchin:

28. I agree

Order: Application granted