South East Asia Metal Ltd v Zahoor [2008] APP.L.R. 04/29

CA on appeal from Chancery (Ms S.Prevezer QC) before MR; Longmore LJ; Lawrence Collins LJ. 29th April 2008

Lord Justice Longmore:

Introduction

1. This application, for permission to appeal and to adduce further evidence for the purpose of such appeal, arises out of another privatisation of the old Soviet industries, on this occasion a steel mill at Donetsk in Ukraine operated by an entity known as DMZ. The defendant Mohammad Zahoor in his capacity as Chief Executive Officer and the major shareholder in Metalsrussia Group ("MRG"), either a subsidiary of or the same as Metalsrussia Group Holdings Ltd, now known as "ISTIL", was at the relevant time friendly with and a business associate of Mr Sohail Masood a director of MRG between November 1996 to November 2002. They hatched a plan to incorporate Metalsrussia Corporation Ltd ("MRC") in the British Virgin Islands which would participate in the privatisation of DMZ by raising considerable sums from investors together with $4 million from Mr Zahoor and $1 million from Mr Masood. They then realised that DMZ had far too many liabilities to make that an attractive proposition but that it made good commercial sense to acquire the Electric Arc Furnace ("EAF") belonging to DMZ at Donetsk. They therefore decided to buy an off the shelf company (Chain Power Ltd) which could acquire share certificates either in DMZ itself or the companies owning those certificates. That company would inherit the liabilities as well as the assets but the EAF would be spun off into a separate Metalsrussia company and DMZ thus be effectively asset stripped. All this occurred and Chain Power changed its name to South East Asia Metal Ltd ("SEAM") the claimant company in the present proceedings. SEAM was at all times assisted and advised by one of Mr Masood's companies, Newport West Financial Consultants. This plan worked well until Mr Masood and Mr Zahoor quarrelled in 2002; they then went their separate ways, initiating litigation in various different parts of the world. Some of this litigation related to ISTIL property and assets. Mr Masood executed a board room coup and for some time until about 2003 controlled ISTIL. Mr Zahoor later succeeded in taking back control of ISTIL and, I think, is still in charge of it.

2. Two separate cases were initiated in Oregon in the United States. The first related to ISTIL documents which were originally in the office of Metalsrussia (Hong Kong) Ltd but which, after that office closed, Mr Masood removed to the cellar of his private home in Oregon. This first Oregon litigation resulted in a compromise in the form of a Confidentiality and Protective Agreement of 3rd June 2004 relating to what were said to be 300 boxes of documents. In broad outline this agreement permitted the parties to that agreement (ISTIL and Mr Masood), their lawyers and experts to read the documents and disclose them to each other under a seal of confidentiality or in other words an agreement not to disclose them or their contents to outside third parties. Pursuant to this agreement the documents were taken out of Mr Masood's cellar and placed to the joint order of the parties at Bridge City Legal ("BCL") a storage facility in Portland, Oregon.

3. There was then later Oregon litigation in which ISTIL claimed that Mr Masood and others were guilty of misfeasance in their office as directors of ISTIL and had siphoned $750,000 out of the company. ISTIL sued Mr Masood for the return of that money and, since Mr Masood claimed that he had transferred the money to SEAM, he brought SEAM into that litigation as third parties. In the course of that litigation the parties (including SEAM) agreed in September 2005 a General Protective Order as to confidential materials as well as Specific Provisions regarding Production and Review of the documents, then currently located at BCL which had now become 620 boxes. Clause 3 of the latter agreement provided that the documents and the boxes could not be reviewed by any party *"unless the party's counsel is present at all times"*.

4. On this application we are, of course, dealing with English proceedings, These concern two transfers
   i) on 21 November 1996 a transfer from Mr Zahoor to SEAM of US$2.5m, the funds for which had come from MRC;
   ii) On 14/15 September 1998 a transfer from SEAM to Mr Zahoor of US$958,000.

The dispute

5. The dispute in this case concerned the nature of these transfers. SEAM's claim was for the $958,000, which it said was a loan to Mr Zahoor which had since become repayable. Mr Zahoor denied this and made a counterclaim for the $2.5m, which he said was a loan to SEAM. This dispute between the parties necessitated an extensive examination of the purpose for which SEAM existed and the level of involvement of Mr Asad Ali, Mrs Ali-Paruk and Mr Saad Ali, who now claim to be the owners and directors/company secretary of SEAM.

SEAM's Case

6. Mrs Ali-Paruk was approached by Mr Masood in 1996, which led her to meet with Mr Zahoor in about August 1996 to discuss the opportunity of becoming involved as an investor in the privatisation of SEAM. Mr Zahoor explained that MRC could not itself acquire DMZ for cash flow reasons and because there was a plan to float it on the AIM exchange, but it badly wanted to acquire the EAF. She claimed that she saw an opportunity to lead the privatisation with a group of investors acquiring DMZ. It was her and Mr Masood's decision to set up SEAM, which was therefore essentially an investment vehicle entirely independent from Metalsrussia and Mr Zahoor. Nancy Martin became a director as a matter of convenience, but from around December 1996 Mrs Ali-Paruk was the one who really ran SEAM and from March 1997 she became SEAM's sole director. Investments were secured from a number of third parties by Mrs Ali-Paruk and Mr Asad Ali. Mr Asad Ali was SEAM's general manager.

7. In autumn 1996 Mrs Ali-Paruk had a conference call with Mr Zahoor and Mr Masood on the subject of a Mr Lipoukhine's involvement with SEAM. Mr Zahoor wanted to ensure Mr Lipoukhine continued to supply steel to ISTIL, and so wanted him to be given the opportunity to invest in SEAM for the long term benefit of the MG. The $2.5m

was this investment by Lipoukhine in exchange for a 15% stake in SEAM, which was held by a company called Ubenefit on Lipoukhine's behalf. It was not a loan from Mr Zahoor.

8. In August 1998 Mr Asad Ali, Mr Masood and Mr Zahoor were in Pakistan together. An agreement was reached between SEAM and Mr Zahoor that the former would lend $958k to the latter, and this was reduced to writing in a Promissory Note dated 10 August 1998 which was signed by Mr Masood on Mr Zahoor's behalf, after a telephone conversation authorising him to do so, and by Mr Asad Ali as general manager for SEAM. The note was notarised. The loan, evidenced by the Note, fell due for repayment in 2003.

Mr Zahoor's Case

9. The transfer of $2.5m in November 1996 was a provision by Mr Zahoor of working capital on SEAM's incorporation, which was consistent with his or ISTIL's ownership of SEAM. He said this was a loan. The reason the funds had originally come from MRC was because they were a dividend the company was paying him. The real power behind SEAM was Mr Zahoor together with MRC. Although documents had come into existence which made it look as if SEAM was independent that was a *"fiction"* dreamed up for the purpose of milking DZW of its one profitable asset, without MRC or ISTIL appearing to be involved.

10. The transfer of $958,000 in September 1998 was a repayment by SEAM of monies Mr Zahoor had paid to other entities within the Group in relation to the privatisation. Mr Zahoor's original defence to the claim alleged that the $958k was part repayment of the $2.5m, but he later amended his defence to say it was unrelated to that payment and was instead the reimbursement of prior expenditure by him on behalf of MRC. He consistently said that he had never authorised the issue of the promissory note and in his defence put SEAM to proof that it came into existence in the way which they said it had.

The Trial

11. Discovery in the action took place in the ordinary way. SEAM disclosed a number of documents emanating from Mr Masood which it is said were collected together in 2002 and on any view well before the storage of ISTIL documents in the BCL facility in Portland. Copies of Financial Statements for SEAM showed the $2.5m as part of shareholders equity and the $958,000 as a loan to Mr Zahoor (i.e. in both cases supporting SEAM's case). Copies of Subscription Agreements were produced in support of SEAM's contention that Mrs Ali-Paruk and Mr Asad Ali had secured third party investment into SEAM. A copy of the notarised Promissory Note was also provided. Disputes about the genuineness of these and other documents had been prefigured by a letter from Mr Zahoor's solicitors of 7th December 2006 challenging 5 separate documents or group of documents relied on by SEAM. That was in time under the Rules. There was a further out of time challenge on 12th February 2007 to six further documents including the Financial Statements and a purported auditor's certificate. That coincided with further disclosure of documents emanating from Mr Masood. The trial itself began on 19th February and lasted more than a week. Mr Masood gave evidence on SEAM's behalf.

12. Not surprisingly, Ms Prevezer QC sitting as a Deputy Judge of the Chancery Division, said in the course of her judgment that the conflicts on the evidence were so great that some witnesses must have given deliberately untrue evidence. Her findings on the three key areas of factual dispute and her principal reasons for those findings are as follows.

Incorporation of SEAM

13. There was a considerable amount of unchallenged contemporaneous documentary evidence which supported Mr Zahoor's position that SEAM's apparent independence was a fiction. The judge found it striking that there was no mention in these documents of Mrs Ali-Paruk, Mr Asad Ali or any other investors. Mrs Ali-Paruk's oral evidence was entirely unconvincing, and failed to explain the inconsistencies between her story and the unchallenged documents. Her evidence was inconsistent with that of Mr Asad Ali and also in parts with what she had deposed to in the Oregon proceedings. Her evidence on how she acquired a very significant sum of money representing her investment ($700,000) was evasive and vague. She also could not remember the names of a number of supposed investors. Mr Asad Ali's evidence was also vague and he could not produce his original receipt for his investment or his original Subscription Agreement. There were a number of reasons for considering that the Subscription Agreements were forgeries. In summary, Mr Zahoor's case on this matter was correct and it could only be concluded that Mrs Ali-Paruk and Mr Asad Ali had participated in the production of inauthentic documents on this part of the case.

The $2.5m payment

14. Faxes produced by SEAM in support of their position were not authentic. They were unnaturally convenient and strikingly self-serving. Often Fax Activity Reports were missing even though in one case such a Report had been produced for a period only 3 days earlier. All this raised serious questions about the credibility of the evidence of Mr Asad Ali and Mr Masood. An agreement known as The Ubenefit Agreement alleged to support SEAM's claim was a forgery. Further, it made no sense for Mr Lipoukhine to invest in SEAM: he was obviously an important man in this field of business and Mr Zahoor would not have recommended to him to invest in SEAM which was always going to be a shell company. There was no reasonable explanation of why the money would have come from Mr Zahoor's personal account if it was an investment by Mr Lipoukhine. SEAM's case on this point was rejected.

15. That did not however, mean that Mr Zahoor is correct in saying that there was a loan from him and the judge proceeded to reject all his evidence to that effect. Accordingly, the counterclaim was dismissed.

The $958k payment

16. The judge held the Financial Statements were forgeries. Mr Masood's explanation of why these statements alone of SEAM's yearly statements were certified, unlike their predecessors or other accounts for BVI companies, was said to

be incoherent. The documents provided with the accounts were very curious, since they included fax logs which no auditor would need to see. No fees were paid to the auditors, no Audit Certificate had been disclosed by SEAM with the statements and no original had been produced. There was no signed statement from the directors.

17. She further held that The Promissory Note was also forged in the sense that it was signed by Mr Masood without Mr Zahoor's authority. It maybe more accurate to call it a fraudulent document rather than a forgery. The reasons for her finding were that
    i) there was no obvious reason why Mr Zahoor would borrow this relatively small sum from SEAM, given that he is a very wealthy man;
    ii) he did not in fact use the money for any of the purposes that were suggested by Mr Masood and Mr Asad Ali;
    iii) there was no reason for the document being notarised; there was no evidence that any other agreement between Mr Zahoor and SEAM was notarised;
    iv) the alleged loan was entirely inconsistent with the picture more generally painted by Mr Zahoor, which had already been accepted, including that Mr Asad Ali had no real involvement with SEAM, so he would not have negotiated the supposed loan to Mr Zahoor;
    v) it was inconsistent with an unchallenged document that showed that the money was in fact paid by SEAM in repayment of outstanding indebtedness to Mr Zahoor;
    vi) if Mr Zahoor was in Pakistan at the time, he could have signed it himself instead of Mr Masood doing so on his behalf; it made little sense for Mr Zahoor and Mr Masood to be together, only for Mr Masood to be left for him to sign a document on his behalf when SEAM was in fact a vehicle controlled by Mr Zahoor/MRC;
    vii) no copies of the Promissory Note were kept by anyone, and indeed it was striking that it was one of the few documents in this case where the original has been produced. Mr Masood's and Mr Asad Ali's evidence was unsatisfactory and at times evasive.

18. The claim for $958,000 was therefore dismissed. I have itemised the main documents held to be forgeries or fraudulent but it is a striking fact that the judge found in necessary to hold that no less that 20 documents or sets of documents were forgeries or fraudulent.

Appellant's Submissions

19. The proposed appeal is put forward on the basis that Mr Masood at all times before judgment scrupulously respected Mr Zahoor's right to confidence in the documents at the BCL facility but was so distressed by the judge's findings of forgery and fraud that he considered that he was released from his confidence obligations and decided to carry out a search of the 600 boxes at that facility and reveal to SEAM the result of that search. This search was carried out on 2 May 2007. It is said that the documents found are highly relevant to the findings the judge made and permission should be granted for an appeal in which such documents could be adduced as additional evidence. Particular emphasis was laid on the facts
    i) that it appeared that the promissory note and the board resolution authorising the supposed loan (which were held by the judge to have been fraudulently made), were faxed by Mr Asad Ali to Hong Kong for Mr Zahoor's file on 15th August 2008, and
    ii) that the 1998 Financial Statements had been apparently faxed to Hong Kong from Metalsrussia in Moscow on 16th July 1999, despite the judge's findings that they were made at a later date.

    It was further said that, while these were particularly striking examples refuting the judge's conclusions that Mr Masood had created documents for the trial, the very great majority of the other documents, which the judge had also held were forgeries, were also to be found in the 600 boxes after a comparatively short search lasting the single day of 2nd May 2007.

20. In the light of decisions such as ***Hertfordshire Investments v Bubb*** [2000] 1 WLR 2318 and ***Hamilton v Al-Fayed*** [2001] EMLR 15, Mr Edward Bannister QC for SEAM accepted that, although CPR 52.11(2) says merely that the appeal court will not receive evidence which was not before the lower court unless the court orders otherwise, the decision whether to order otherwise is still governed by the principles set out in ***Ladd v Marshall*** [1954] 1 WLR 1489. As is very well-known those principles are
    i) the new evidence could not have been obtained with reasonable diligence for use at the trial;
    ii) the evidence must be such that it would probably have an important influence on the result of the case;
    iii) the evidence must be apparently credible, though it need not be incontrovertible.

    I turn, therefore, to these requirements.

Obtainable by reasonable diligence

21. Mr Bannister submitted that SEAM could not have obtained the documents found in the BCL facility by the exercise of reasonable (or indeed any) diligence. Although Mr Masood knew of the existence of the boxes at the facility and could, at any time, have searched the boxes in the company of his lawyer, he could not inform SEAM of the results of his search or hand over any of the documents so found. He was a mere witness in the case who was bound by an express agreement of confidence in relation to the BCL documents. The fact that he did what he ought not to have done once judgment was given should not be held against SEAM now that relevant documentation has been found.

22. As it seems to me there are at least two compelling answers to that submission
    i) it is totally unrealistic to regard Mr Masood as a mere witness disinterestedly helping SEAM to enforce their legal rights. Since he quarrelled with Mr Zahoor, he has been the moving spirit in anti-Zahoor litigation (see for

example ***ISTIL Group Inc v Zahoor*** [2003] 2 AER 252). He was in court sitting behind Mr Bannister during the trial. He provided SEAM with the documents they needed for the litigation including the copy of the promissory note, the copies of the 1998 financial statements and the board resolution of SEAM approving the loan. When later disclosure was given in February 2007 just before the beginning of the trial SEAM's solicitors explained that they had received the documents from Mr Masood in early 2006 but had unfortunately misfiled then so that they had gone missing. It is said that the documents provided by Mr Masood were documents held by him legitimately before the quarrel with Mr Zahoor and before the documents now in issue between him and ISTIL had been removed to the BCL facility, but the fact remains that between the time the action began in January 2005 and the trial of the action Mr Masood was providing documentation to SEAM and must have been continually reviewing with SEAM and their solicitors the necessary documentation for the trial. At any time he could have either himself searched and obtained relevant documentation in Oregon and sent it to Mr Zahoor or his solicitors with a request that it be disclosed in the action or suggested to SEAM's solicitors that they seek permission from the relevant court to cause a search to be made of the boxes at the BCL facility. He did neither of those things and it is idle to say that, in these circumstances, SEAM could not have obtained by exercising reasonable diligence the documents which they now seek to adduce;

ii) even if this were in some way incorrect, the fact remains that SEAM did, pursuant to the second agreement of September 2005, have the right themselves to inspect the 600 boxes at BCL. No suggestion is made that SEAM did not know of the existence of the documents at the facility and, in the light of their close connection with Mr Masood, I would infer that they did. In the light of this the scruples which Mr Masood claims to have had about Mr Zahoor's rights of confidence before the trial can be seen to be irrelevant. It is true that if, having inspected the boxes, SEAM had found material which they wanted to adduce, Mr Zahoor might have sought to object to production of that material by saying that it was confidential. But that was never put to the test and it might, in any event, be thought that any claim to override that confidence would be so likely to have succeeded that the very act of objecting to production would hardly have enhanced Mr Zahoor's case.

23. For these reasons it seems to me that the first requirement of ***Ladd v Marshall*** is not met on the facts of this case.

Other Submissions

24. Mr Bannister submitted that that could not be the end of the matter since the requirements must be looked at together in the round. If, therefore, he met the second and third requirements it should not matter that he failed the first.

25. No doubt that might be right in theory. If new evidence could point unequivocally to a miscarriage of justice it might not be fatal that it could have been obtained before the trial. But in what one might call a typical commercial dispute that will be a rarity. Finality in litigation is a most pressing public need.

26. Although Mr Bannister attempted to show that this was just such a rare case, he did not succeed. Although the present case might not be said to be exactly a typical commercial dispute since, as the judge said, it was impossible to avoid the conclusion that at least one party had to be lying (if not both), it was at bottom a dispute about whether a loan had been made. As Mr Trace QC for Mr Zahoor pointed out the judge accepted the reality of the *"fiction"* averred by Mr Zahoor as set out in paragraph 13 above. There was a considerable body of oral evidence (quite apart from the documentary evidence) which the judge did not accept. It is a remarkable fact that if the critical documents were in fact sent to Hong Kong, the relevant witnesses never said so. There can be little doubt that, at least one document obtained from the BCL facility (although not a critical document for the purpose of this case) is not a genuine document. The new evidence is not in any sense a "*blinding light*" showing that the judge must be wrong. It is evidence about documents which were already before the judge. In all the circumstances it is not a case where the court should or could ignore the fact that the documents (if genuine) could have been obtained by the exercise of reasonable diligence in the part of the claimant.

27. I would therefore refuse the application to adduce new evidence. Once it is decided that the new evidence ought not to be admitted, any appeal would be hopeless. I would therefore dismiss both the application for permission to appeal and the application to adduce further evidence on any such proposed appeal.

Postscript

28. I have not found it to be necessary to emphasise that Mr Zahoor contends that the new documentation said to have been found in the BCL facility is no more genuine than the documents found to have been forged or fraudulent by the judge. If it had been necessary to consider this contention it would have been very difficult for this court to conclude that the evidence was "*apparently credible*" or indeed "*apparently incredible*" for the purpose of the third requirement of ***Ladd v Marshall***. That might have put the court in a genuine difficulty and in those circumstances it might have been relevant to consider whether the court should exercise its discretion at all in the light of the fact that, if the claimant's contentions were correct, they would have an alternative remedy in the form of an action to set aside the judgment as having been obtained by the fraud of Mr Zahoor. In a future similar case that may be a nettle which has to be grasped.

Lord Justice Lawrence Collins:

29. I agree.

Master of the Rolls:

30. I also agree.

Mr Edward Bannister QC instructed by Devonshires for the Appellant;
Mr Anthony Trace QC & Mr James Aldridge instructed by Hogan & Hartson for the Respondent