Abuse of process—can a party apply to set aside an interlocutory order on the grounds of material change of circumstances where the party instigated the change itself? (JSC VTB Bank v Skurikhin)

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Dispute Resolution analysis: The Court of Appeal dismissed the appeal of The Berenger Foundation (Berenger) against the decision of the judge at first instance (Patricia Robertson QC) that it was an abuse of process to apply to set aside an order for the appointment of receivers over membership interests in an English limited liability partnership (LLP) on the grounds that there had been a 'material change of circumstances' where those circumstances were brought about by Berenger itself. The circumstances in this case were that Berenger passed a resolution excluding a beneficiary, Mr Skurikhin, from the class of beneficiaries of Berenger but only at a time when enforcement actions were well advanced by the claimant, JSC VTB Bank (VTB) against Mr Skurikhin and in a clear effort to put assets out of the reach of enforcement. The Court of Appeal applied the test set out in Johnson v Gore Wood & Co of a 'broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'. Written by Michael Rhode, senior associate, at Trowers & Hamlins LLP.

JSC VTB Bank (a company incorporated in Russia) v Skurikhin and others [2020] EWCA Civ 1337

What are the practical implications of this case?

Debtors seeking to avoid paying creditors is not uncommon and can pose creditors with significant difficulties and expense in pursuing enforcement actions in order to recover debts. Sophisticated debtors can utilise complex corporate structures across multiple jurisdictions in order to delay execution as much as possible in an effort to ultimately frustrate the process.

The Court of Appeal's judgment in *Skurikhin* should provide some reassurance to judgment creditors faced with such difficulties. The facts in *Skurikhin* showed clearly that the application by Berenger to set aside an order appointing receivers over an English LLP was an attempt to evade enforcement action and was made only at a time when VTB was close to obtaining orders for sale against three properties controlled or de facto owned by Mr Skurikhin in Italy, after a number of years of ongoing enforcement actions across multiple jurisdictions.

The application was, accordingly, an abuse of process. In fact, the Court of Appeal considered that 'there could not be a clearer example of a wrongful and abusive process'. That conclusion was drawn by Lord Justice Philips (giving the leading judgment, with which Lord Justice Lewison and Sir Keith Lindblom agreed) applying the test in *Johnson v Gore Wood & Co* [2002] 2 AC 1, and that the court's inquiry into whether an action was an abuse of process was a fact sensitive enquiry, examining whether the actions could be characterised as unfair or the bringing of the administration of justice into disrepute (as explained in the judgment of Lord Justice Buxton in *Laing v Taylor Walton* [2007] EWCA Civ 1146). The determination as to whether or not proceedings were an abuse of process was not an exercise of discretion. However, it was an exercise of judgment in respect of which the Court of Appeal would always give considerable weight to the opinion of the first instance judge.

What was the background?

VTB obtained summary judgments in England against Mr Skurikhin for sums in Russian roubles in 2014 with a value of approximately £13.4m. VTB also obtained a worldwide freezing order against Mr Skurikhin, freezing his assets up to a value of £25m.

VTB's subsequent enforcement actions were concentrated on three properties in Italy used by Mr Skurikhin and owned by an English LLP, the second defendant, Pikeville Investments LLP ('Pikeville'). The membership shares in Pikeville were originally registered to an individual, Mr Meier (later judged to be Mr Skurikhin's 'right hand man' by the first instance judge) and a company incorporated in Hong Kong Crown Capital Holdings Ltd), who held the properties on trust for Mr Skurikhin. Later, the properties were held on trust for The Berenger Foundation (Berenger), a foundation incorporated in Lichtenstein (the appellant who sought to set aside the order appointing receivers over Pikeville).

In 2015 VTB obtained an order for the appointment of receivers over the membership interests in Pikeville (the receivership order), the court concluding in making the order that Mr Skurikhin had a right to call for the assets of Berenger to be transferred to him, or had de facto control of those assets.

The appointed receivers over Pikeville applied for the LLP to be put into administration and, as administrators, brought proceedings in Italy to obtain possession of the three properties.

In August 2017 the board of Berenger passed a resolution (backdated to June 2017) excluding Mr Skurikhin from the class of beneficiaries of the foundation and introduced new regulations providing that there should be a new class of beneficiary, being a company incorporated in Nevis (Accreda) as trustee of the 'Olympic Settlement' (Olympic). Accreda passed resolutions around the same time excluding Mr Skurikhin as a beneficiary of Olympic.

In July 2018 Berenger applied to discharge the receivership order on the grounds that it should not have been made in the first place or, alternatively (and most relevantly) that Mr Skurikhin's exclusion as a beneficiary of Berenger and Olympic was a material change of circumstance which meant the receivership order should not continue.

Berenger's argument was, essentially, that Mr Skurikhin no longer had any equitable interest in Pikeville as a result of no longer being a beneficiary. That (it was argued) was a material change of circumstance justifying the lifting of the receivership order (it being common ground that an interlocutory order could be reopened where there was a material change of circumstance, or because the party has subsequently become aware of facts which he could not reasonably have known about, per *Chanel Ltd v Woolworth & Co* [1981] 1 WLR 485).

What did the court decide?

The Court of Appeal upheld the first instance decision that the application was an abuse of process (notwithstanding that the resolutions passed by Berenger and Accreda were lawfully made) because the alleged change of circumstance was brought about by Berenger, most likely at the instigation of Mr Skurikhin, for the purposes of putting obstacles in the way of enforcement.

Albeit technically Mr Skurikhin was no longer a beneficiary, on the facts he was able to direct that the interests in the three properties be transferred to a third party who could then transfer them to Mr Skurikhin.

In applying the 'fact sensitive inquiry' (per *Gore Wood*) Philips LJ dismissed Berenger's contention that proceedings cannot be struck down as an abuse of process where there has been no unlawful conduct. On the contrary, the power to rule a proceeding as an abuse of process exists 'precisely to prevent the court's processes being abused through the lawful and literal application of the rules'. Indeed the power would not be needed where a party had acted unlawfully, as established rules of law or procedural sanctions would normally suffice to protect the court process.

Relevant to Philips LJ's decision was the fact that, some three years before its application, Berenger had been served with the application to appoint receivers but had not participated in the hearing of the application. Berenger could have passed such a resolution before the application for the receivership order was heard, but did not do so. Berenger only sought to make its application in an apparent change of strategy to avoid enforcement when directed to do so by Mr Skurikhin. This direction was made by Mr Skurikhin after he originally sought to make the application but was prevented from doing so because he had previously been found to be in contempt of court (since when he had stayed out of the jurisdiction to avoid imprisonment).

It was also found at first instance that in any event the change was not material as it did not undermine the basis on which the receivership order was made. Philips LJ agreed, viewing Berenger's arguments as purely technical in relation to the removal of Mr Skurikhin as a nominee. It was more than arguable that if the properties were distributed to a member of Mr Skurikhin's family or a company under his control, that they would be held on trust for Mr Skurikhin. The appointment of receivers was, accordingly, entirely justified.

The Court of Appeal also granted permission to VTB to amend its respondent's notice that the resolution by Berenger was in breach of the worldwide freezing order. It could not, therefore, rely on the resolution to set aside the receivership order.

Case details

- Court: Civil Division, Court of Appeal
- Judge: Lewison LJ, Sir Keith Lindblom, Phillips LJ
- Date of judgment: 21 October 2020

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