Supreme Court finds appeal condition stifled appellants fair trial rights (Goldtrail Travel Limited v Onur Air Taşimacilik AŞ)

LNB News 02/08/2017 114

The Supreme Court has allowed the appeal of a Turkish airline, Onur Air Taşimacilik AŞ, against the impositions of conditions of an appeal. The Court of Appeal had made Onur Air's (the appellant) appeal conditional upon payment into court of £3.64m. However, the appellant argued that this would stifle its right to appeal. In a majority of three to two, the Supreme Court allowed the appeal and held that, if an appellant has permission to bring an appeal, it was wrong to impose a condition which would have the effect of preventing them from bringing it or continuing it. Practitioners believe the judgement is very helpful in explaining the test to be applied when deciding an appellant's stifling argument. Barristers also believe the practical importance of the decision resides in the burdens and tactics of satisfying the test.

The appellant, largely owned by Hamit Bagana, was sued by a holiday tour company (the respondent) which went into liquidation. The respondent sued the appellant in relation to two agreements between the parties. Rose J held that the appellant had dishonestly assisted the respondent's owner, Mr Aydin, in defrauding the respondent and that it should pay damages to it in the sum of £3.64m.

The appellant was granted permission to appeal to the Court of Appeal against the order of Rose J. However, a condition was placed on the continuation of the appeal—that the appellant should pay into court the sum of £3.64m which Rose J had awarded to the respondent. This was on the basis that the appellant was likely to have no other assets even temporarily in England and Wales.

Patten LJ held that the appellant's appeal should be dismissed on the grounds that in exceptional circumstances the ability of a third party to provide funds, in this case Mr Bagana, could be taken into account in assessing the likelihood that a company could make a payment into court. Patten LJ stated: 'Mr Bagana has decided not to fund the payment by the company' and concluded that the appellant had not established that the condition for payment would stifle its appeal.

What did the Supreme Court decide?

Adam Kramer and Dominic Kennelly, barrister and pupil barrister at 3 Verulam Buildings, said the appeal turned on the question of whether the imposition of a condition requiring the appellant to pay the judgment debt of £3.64m would stifle the debtor's appeal, in breach of the debtor's right to a fair trial under Article 6 of the European Convention on Human Rights.

The test for stifling was confirmed as being whether the condition probably would stifle the appeal, meaning the appellant company probably would not have the funds available to it to satisfy the condition, whether from its owners or funders or others.

Lords Neuberger, Wilson and Hodge allowed the appeal on the basis that the Court of Appeal had applied the wrong test—asking whether an owner or funder probably 'could' advance funds rather than whether it probably 'would'.

It sent the case back to Patten LJ in the Court of Appeal to apply the correct test.

Is the judgment helpful in clarifying the law in this area?

Shail Patel, from 4 New Square, believes the judgement is very helpful in explaining the test to be applied when deciding an appellant's stifling argument, for example where he argues that to require him to pay sums into court as a condition of bringing his appeal would stifle the proceedings and breach his Article 6 rights.

In particular, Patel said it deals with how the court should address the question of whether funds could be made available by a third party, in this case the owner of the appellant. 'There are two useful pieces of guidance. The first is that the principles to be applied are essentially the same as when determining the same argument being made by a claimant in response to an application for security for costs, albeit the different context might influence how the court exercises its discretion.'

Secondly, Patel believes the case provides clarity on whether the court should ask:

• if the appellant can raise the funds from its backers

• if the appellant's backers can make the funds available

Patel said: 'The answer has now been clearly stated—the proper question is the first one, not the second.'

Patel says it is ironic that it is not obvious whether the judgment will result in a difference in outcome. 'The majority of the Supreme Court remitted the appeal back to the Court of Appeal to determine whether the appeal should be struck out following the appellant's non-payment, this time employing the correct test. However, the minority, while agreeing with the principle stated, thought that the evidence before the Court of Appeal was plain—that the correct test was satisfied even though the wrong question might have been asked, and there was no need to remit the matter.'

How does this affect practitioners considering advancing or opposing a stifling argument?

Adam Kramer and Dominic Kennelly say the confirmation of the legal test—whether the owner or funder probably would fund the payment required by the condition—will be welcome. However, they believe the practical importance of the decision probably resides in the burdens and tactics of satisfying the test.

'The majority of the Supreme Court confirmed that burden falls on the party saying its appeal will be stifled to satisfy the court that it probably will. Further, the court must not take assertions by the company or owner that it will not be funded to satisfy the condition at face value and must instead judge the probable availability

of funds by reference to the underlying realities of the company's financial position and its relationship with its owner.'

Litigation funding

Kramer and Kennelly say the decision is also part of a general clarification of the involvement in litigation that can be entailed by funding that litigation. 'In RBS Rights Issue Litigation [2017] EWHC 1217 (Ch) the latest position as to the imposition of security for costs against a litigation funder was set out. In short, litigation funders will often be required to fund security for the opposition's costs.'

Kramer and Kennelly believe this case fills in the jigsaw as to the extent to which a third party funder will have to step up and satisfy judgment as a condition of an appeal being pursued, although in this situation the law only requires the funder to do so if it already as a matter of fact is willing and able to do so to save the appeal opportunity.

Kramer and Kennelly say this test will have to be applied slightly differently in cases where the funder is not a majority owner of the litigant with materially similar interests, but a litigation funder with a contractually defined financial interest in the outcome.