

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.25 OF 2005

BETWEEN:

[1] KYRGYZ MOBIL TEL LIMITED
[2] FLAXENDALE HOLDINGS LIMITED
[3] GEORGE RESOURCES LIMITED

Appellants

and

FELLOWES INTERNATIONAL HOLDINGS LIMITED

Respondent

Before:

The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Gerard Farara, QC with Ms. Tana'ania Small for the Appellants
Mr. James Thom, QC for the Respondent

2006: March 8;
2006: April 24.

JUDGMENT

[1] GORDON, J.A.: By an Order made without notice dated 13th May 2005 and continued and modified by consent of the parties on the 5th July 2005 (which orders are hereinafter referred to as “the BVI Orders”) the High Court enjoined the respondent in the following terms:

“IT IS ORDERED BY CONSENT

Until further order of the court the First Respondent (“Fellowes”) must not by itself, its servants or agents or otherwise howsoever.

[1] bring to [sic] pursue any suits or proceedings to enforce rights under the Transfer Agreement (except by way of LCIA arbitration in London in accordance with clause 17.2 of the Transfer

Agreement and any court proceeding in London ancillary to such arbitration);

[2] enforce or seek to enforce any judgment or order obtained from any Court or Tribunal on the basis that it was or became entitled to exercise any rights or perform any obligations under the Transfer Agreement, and in particular Fellowes shall not enforce or seek to enforce any such order or judgment obtained by it from the Bishkek Inter-district Court in Matter ED-144105MBel or ED-144/05MBsl;

[3] register itself or take any steps to have itself registered as the owner of the shares in Bitel, or to affect any change in the corporate charter reflecting such ownership pursuant to any such order or judgment.”,

The claimants have permission to abridge the time for service of the Application for Judgment on Admissions and evidence in support of that application;

The claimants are hereby granted a declaration that, as a matter of English Law, no contract exists between the claimants and the first defendant as the latter was not and never became a party to the Transfer Agreement and that, accordingly, the first defendant was not and is not entitled to exercise any of the contractual rights under the Transfer Agreement and, in particular, that it was not and is not entitled to exercise any right that IPOC International Growth Fund Limited as original party might have had to seek specific performance of the Transfer Agreement;

The first defendant is to pay the sum of US\$100,000.00 on account of such costs within twenty-eight (28) days.”

[2] By an Order of the Court dated 29th September 2005 (hereafter the Receivership Order) made upon the appellant’s application of the previous day Mr. Glen Harrigan was appointed as receiver of the respondent for the limited purpose of ensuring compliance with the BVI Orders with power to manage and administer the legal and other procedures regarding ownership and re-registration of the BITEL LLC shares, the court being satisfied on the evidence before it that the respondent had failed to comply with the BVI Orders by enforcing or attempting to enforce the judgment of the Bishkek Inter-district Court in Matter ED-144105MBcl or ED-144/05 Mbsl.

- [3] The Receivership Order also gave directions for the further inter partes hearing of this matter. The inter partes hearing took place on November 18th 2005 and judgment was delivered by the trial judge on 29th November 2005. It is from that judgment that this appeal arises.

Background

- [4] The starting point of this case is an agreement (the Agreement) between the appellants (companies incorporated in the Isle of Man) and IPOC International Growth Fund Limited of Bermuda Limited for the sale by the appellants to IPOC of their 100% shareholding in BITEL (the BITEL shares), a limited liability company incorporated in the Kyrgyz Republic. BITEL is the major provider of mobile telephone services in Kyrgyzstan. The appellants allege that the Agreement provides for IPOC to assign its rights and obligations under the Agreement to Kyrgyzstan Mobitel Investment Company Ltd, a wholly owned subsidiary of IPOC and that in breach of the agreement, and before completion of the purchase, agreed to assign all of its interest in its subsidiary, Mobitel Investment, to the respondent and that as a consequence the respondent is wrongly asserting that it is entitled to exercise IPOC's rights under the Agreement. The appellants have refused to complete the sale.
- [5] The Agreement includes a provision for the determination of any dispute arising from the Agreement by arbitration before the London Court of International Arbitration (LCIA). On 31st March 2004 Kyrgyzstan Mobitel Investment Company Limited made a request for arbitration pursuant to that latter clause and on 4th May 2004 the appellants responded. In March 2005 the respondent filed proceedings against the appellants before the Bishkek Inter-district Economic Court and obtained judgment without the appellants having had the opportunity of being heard. It is these proceedings that are referred to in the BVI Orders. The appellants filed an appeal against the Bishkek judgment, which appeal the respondent contested.

- [6] The appellants instituted action here in May, 2005 claiming, inter alia, certain declarations to the effect that no contractual relationship exists between them and the respondent and that the respondent did not become a party to the Agreement and is not entitled to exercise any rights thereunder. In particular they sought a declaration that the Bishkek Judgment was obtained by fraud and or in a manner contrary to public policy and accordingly not enforceable. Certain injunctions to buttress those declarations were also sought. It is also of some interest that a parallel action was commenced in England just before this action.
- [7] The principal decisions made by the learned trial judge was that the respondent had breached the BVI Orders by contesting the appeal of the Bishkek judgment. She further held that she did have jurisdiction to appoint a receiver for the limited purpose of ensuring compliance with the BVI Orders with power to manage and administer the legal and other procedures regarding ownership and re-registration of the BITEL shares. Finally, the trial judge found that the appointment of a receiver to manage and administer legal and other procedures in foreign countries offended against the rules of international comity. To quote the trial judge directly: “[t]o sum up on this issue, I am of the view that the September Order [the Receivership Order] amounts to an unjustified interference with the suit before the Kyrgyz Republic court and so does not respect the territorial sovereignty of the Kyrgyz Republic and therefore undoubtedly offends against the rule of international comity. Accordingly, on this ground alone I am satisfied that it cannot stand.¹”
- [8] The appellants have appealed against the Order of the learned trial judge on the primary basis that the finding that the Receivership Order offended against the rules of comity was in error. The respondent filed a respondent’s counter-notice in which it sought to uphold the decision of the trial judge for the reasons expressed in the judgment and the further reasons that:
- it was inappropriate to appoint a receiver where there are no assets within the scope of the receivership;

¹ Paragraph 52, judgment

- neither the respondent nor the receiver on its behalf could act inconsistently with the mandatory orders of the Bishkek court requiring the respondent to appear before it in the appeal proceedings;
- that the discharge of the receivership order was a reasonable exercise of the learned judge's discretion;
- that to the extent that the learned judge rejected the respondent's arguments that the scope of the order sought by the appellants was too wide and ambiguous she should not have done so.

[9] Learned Queen's Counsel for the respondent had a most difficult path to walk. That he was able to present his argument doing justice to his case whilst in no way compromising the integrity of the profession spoke in no small measure to both his skill as an advocate and an exemplar of the legal profession.

[10] The respondent's case commenced with the concession that, for the purposes of this appeal, (learned Counsel reserved his position in the event that other proceedings, e.g. contempt proceedings, might be brought) the BVI Orders, which, in the end, were consent orders, had been breached by the respondent. Learned Queen's Counsel further conceded that principles of international comity were not breached by the granting of anti-suit injunctions in this case such injunction having been granted by consent. However, according to learned Queen's Counsel, the issue before this Court was whether the much more invasive nature of the appointment of a receiver to manage and administer legal proceedings overseas raised new and different issues of comity.

Power to appoint a receiver

[11] The respondent in its counter-notice raised the issue that "it was not appropriate on the basis of the authorities to appoint a receiver in the circumstances of this case and in the manner proposed by the appellants namely to manage and

administer legal and other procedures where there were no assets within the scope of the receivership and to enforce an interim anti-suit injunction”.²

- [12] Section 24 (1) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance Cap 80 of the Laws of The British Virgin Islands reads as follows:

“24 (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made unconditionally or upon such terms and conditions as the court or judge thinks just.”

That section provides the statutory basis for the exercise by the High Court of a power to appoint a receiver. In *Hart et al v Emelkirk Ltd*³ tenants in a block of flats brought actions to obtain a mandatory injunction against the defendant company to enjoin it to observe the covenants in the leases and for damages. The tenants applied for an order that pending trial a named surveyor should be appointed to receive the rents and manage the block in accordance with the landlord's obligations. Goulding J said the following:

“Now I know of no precedent for such relief but I also know of no authority that forbids it under the provisions of the Judicature Acts now represented by the Supreme Court Act 1981. Section 37 (1) provides:

“The High Court may by order (whether interlocutory or final).... appoint a receiver in all cases in which it appears to the court to be just and convenient to do so”

It clearly appears to me to be just to appoint a receiver in this case because it is done to support the enforcement by the court of covenants affecting property...”

- [13] Like Goulding J, I too know of no precedent for the appointing of a receiver in the circumstances of this case, but nor do I know of any authority that forbids it. I would require strong authority to persuade me that a court should limit a jurisdiction it clearly has in such a way as to make its injunctive orders have the force of a toothless tiger. In the circumstances, I hold that there is nothing legally

² Paragraph 1, Respondent's Counter-notice

³ [1983] 1WLR 1289

or intrinsically wrong in appointing a receiver where there are no assets within the scope of the receivership.

Comity

- [14] The learned trial judge's conclusion on the question whether the appointment of a receiver in the circumstances of this case is a breach of international comity is quoted at paragraph 7 above. Her reasoning to arrive at that conclusion is captured at paragraph 50 of her judgment:

"Clearly, an anti-suit injunction acts in personam and does not give or purport to give any directions to a foreign court or body. Nevertheless, its undoubted effect is to interfere with another system indirectly. So here, arguing by analogy, it is readily apparent that what we have empowered the receiver to do amounts to an indirect interference with the procedures of the Kyrgyz Republic court and having regard to the power, even duty say, to take steps to nullify the Bishkek Order, I would go so far as to say that it is a specific authority for direct interference which cannot be justified in these circumstances as there is nothing before this court to even hint at the Bishkek Court, which applies the civil system of law, not meeting international standards. I would even say that the evidence here is to the contrary as the court has treated our orders with much more respect than we have inadvertently and indirectly meted out to theirs by allowing our receiver to take part in the proceedings merely on the strength of our orders without more."

- [15] With the greatest of respect to the learned trial judge, I am of the view that there were two errors of logic in her analysis. Firstly, no account was taken by the learned judge of the fact that the BVI Orders were orders of the Court rendered by consent of the parties, and in particular of the respondent. In other words, the respondent agreed not to enforce or seek to enforce any rights obtained pursuant to the Bishkek judgment. The respondent's concession that the anti-suit injunctions granted by the BVI do not offend against the principles of comity could only have been given in the context of the fact of its consent to the BVI Orders.

[16] In *Credit Suisse Fides Trust SA v Cuoghi*⁴ the plaintiff company commenced proceedings in Switzerland against the defendant who was resident and domiciled in England alleging his complicity in the misappropriation of some \$21 million by one of its employees. The plaintiff company applied for and obtained a world wide Mareva injunction against the defendant in aid of the Swiss proceedings. In the course of his judgment Lord Bingham of Cornhill CJ⁵ said the following:

“Was it therefore inexpedient to grant such relief because the court had no jurisdiction in relation to the subject matter of the proceedings in question apart from s. 25?

Like the judge I do not think so. The order which the judge made was one the Swiss court could not have made. It did not conflict with any order the Swiss Court had made. It was made on terms which obviated any risk of conflict with any other court. It was made in personam against a defendant domiciled and resident here, and amenable to the enforcement of the order. It did not seek to assert jurisdiction over any person or asset outside the territorial jurisdiction of the court. It gave rise to no jurisdictional disharmony or confusion.”

[17] The parallels in that case and this one go sufficiently far as guide my thinking. I see no jurisdictional disharmony in using a method of enforcement available to this court to enforce an undertaking given to this court not to pursue proceedings in another jurisdiction. The enforcement is made in personam against the respondent whose place of incorporation, if not domicile, is the British Virgin Islands and it does not seek to assert jurisdiction over any person or asset outside of the territorial jurisdiction of the court.

[18] The second lapse of logic in the learned trial judge’s reasoning in arriving at her conclusion was in her assumption that the receivership order could be seen as an attack on the Bishkek court. Nothing could be further from the reality. As stated above the order was in personam and not directed at the Bishkek court. A rather prosaic example might clarify the position. A parent prohibits its child from going to a party. In doing so it cannot be assumed that the parent casts any aspersions against the giver of the party. Rather it might simply be that the child had

⁴ [1997] 3 All ER 724

⁵ At page 734

previously agreed that this was a period of intense revision or even that the child was grounded.

- [19] In conclusion I find that the appointment of a receiver in the terms of the Receivership Order did not offend against the principles of comity. Having found as I have done, the corollary is that when the learned trial judge determined to discharge the Receivership Order, she was acting on a wrong premise and if she was exercising a judicial discretion, then such decision, being wrongly based, is openly reviewable by an appellate court applying its own discretion.

The language of the Receivership Order

- [20] The respondent in his Counter-notice complained in the following terms:
- “To the extent that the learned judge rejected the Respondent’s arguments that the scope of the order sought by the Appellants was too wide and ambiguous she should not have done so. The learned judge should have found either that the order should be discharged or that it should be amended on the basis that (i) in requiring the receiver to ensure that the judgment in the Bishkek Inter-District Court dated 15 April 2005 should be annulled it went further than the scope of the anti-suit injunction and had the effect of making this order a mandatory injunction, (ii) the order could be interpreted as permitting the receiver to intervene on behalf of the Respondent in proceedings other than the ongoing proceedings in Bishkek between the parties, in particular, in the BVI and English proceedings, proceedings in aid of the arbitration and proceedings against third parties relating to the registration of the Bitel shares in the name of Reservspetsmet, (iii) the order was not limited to proceedings brought by the Respondent against the Appellants, (iv) the order was vague and ambiguous in its reference to permitting the receiver to take steps in “managing and administering legal and other procedures” regarding the ownership and re-registration of the BITEL LLC shares; and (v) the order should have provided for security to be provided by the receiver at a much higher level.”

- [21] It becomes necessary to consider the precise terms of the order appointing the receiver dated 29th September 2005 and the relevant part of the order is reproduced below:

“IT IS HEREBY ORDERED:

1. The order of Mr. Justice Rawlins dated 13th May 2005 (as amended by the order of Mr. Justice Rawlins dated 5 July 2005) (the “Amended 13 May Order”) and the order of Mr. Justice Rawlins dated 5 July 2005 (collectively, the “BVI Orders”) be enforced against the First Defendant by the appointment of Mr. Glenn Harrigan as receiver over the First Defendant, Fellowes International Holdings Limited, for the limited purpose of ensuring its compliance with the BVI Orders with power to manage and administer the legal and other procedures regarding the ownership and re-registration of the BITEL LLC shares (the “Shares”) so as to ensure that

(1) The 15th April judgment obtained by the First Defendant from the Bishkek Inter-district Court in Matter ED-144105MDcl or ED144/05MBsl (the “Bishkek Judgment”) is nullified; and

(2) No further steps are taken for the re-registration of the Bitel LLC Shares in the name of the First Defendant and/or Alpha Telecom Limited or any agent or representative or legal successor of the First Defendant, including but not limited to, the giving of instructions to the First Defendant’s lawyers to stop any and all procedures for such re-registration of the Shares, including, without limitation, the withdrawal of the First Defendant’s Objection filed at the Panel for Administrative and Economic Matters of the Bishkek City Court on 24 August 2005 (“the Objection”) to the Claimants’ Cassation Complaint which had been filed at the Court on 15 July 2005 to nullify the Bishkek Judgment.

2. The Receiver shall enter security under Part 51.4(4) of CPR 2000 in the sum of \$15,000.00.”

[22] In so far as paragraphs i – iv of the complaints reproduced at paragraph 20 above are concerned I find these entirely without merit. The Receivership Order can be interpreted only within the context of the BVI Orders to which the Receivership Order is made specifically referable. The BVI Orders are, it is to be remembered, consent orders. Thus, in the context of an admitted breach of the consent injunctive orders, the terms of the appointment of the receiver can, in my view, not be seen to be objectionable. Should the receiver seek to exercise any powers that do not flow from the BVI Orders, then undoubtedly the respondent will find itself in court to prevent such action and seeking damages.

[23] In so far as the fifth complaint of the Respondent as set forth at paragraph 20 above is concerned, namely that the security to be provided by the receiver should have been set at a much higher level the learned trial judge addressed this issue at paragraph 59 of her judgment. The trial judge expressed the view that if she were minded to continue the receivership she would have ordered an increase in the security from \$15,000.00 to \$2,050,000.00. Learned Queens Counsel for the appellants resists any increase in the security.

[24] The proposed security figure was arrived at by the trial judge taking 10% of the balance of the purchase price of \$20.5 million allegedly paid by the respondent to the Kyrgyz authorities. No alternative basis having been placed before us for determining the quantum of security to be provided, I would follow the discretion of the trial judge and order that the receiver is to provide security in the sum of \$2,050,000.00 under Part 51.4(4) of the Civil Procedure Rules 2000.

Remuneration of the receiver

[25] In its Counter-notice the respondent offered as a ground of appeal that the order of the learned judge at paragraph 63 of the judgment requiring the respondent to pay the receiver's costs is wrong in law. The respondent further stated that the remuneration of a receiver does not fall within the costs of the proceedings which a court has jurisdiction to award. What the learned trial judge said at paragraph 63 of the judgment is as follows:

"Fellow[e]s shall pay the Receiver's proper and necessary costs consequent upon his appointment to date, such costs to be assessed by the court if not agreed. I think this is only just and equitable as Fellowes knew or ought to have known that it's lodging of the objection was in clear breach of the BVI Orders and it was given every opportunity to withdraw it before the Claimants filed this application. Since his appointment the Receiver has incurred costs in doing what Fellowes was obliged to do by the BVI Orders. Had Fellowes complied, a receiver would not have been appointed to do what it was obliged to do in the first place."

[26] The learned trial judge's award in paragraph 63 is not as felicitously expressed as it might have been, in that it could refer to remuneration, reimbursable costs incurred or costs in these proceedings of the receiver. Learned Queen's Counsel for the respondent referred us to Halsbury's Laws of England Vol 39(2)⁶ at page 255 paragraph 436 which reads as follows:

"A receiver appointed by the court is allowed such proper remuneration, if any, as may be authorized by the court, but his right is limited to the assets (in other words the assets subject to the receivership whether or not he gets possession of them) and in case of deficiency cannot be enforced against the plaintiff or other parties personally."

Authority for that proposition is stated to be the case of *Boehm v Goodall*⁷ in which, Warrington J said the following:

"I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control. But the receiver here says that this is not the ordinary case, because the judgment appointing him was by consent and, by consenting, all the parties have impliedly requested him to incur these liabilities. In my opinion that fact makes no difference at all. If I were to accede to that argument, I should have to hold in every case that the person who puts the Court in motion and gets a receiver appointed would have to indemnify the receiver. The fact that the order was made by consent does not, in my opinion, distinguish this case from the numerous cases in which orders have been made without consent."

[27] *Boehm v Goodall* was a first instance case but was approved by the court of Appeal in *Evans v Clayhope Properties Ltd*⁸ and a number of other cases. I consider the principle well settled in England and, absent legislative change, this court has no hesitation in following the stated jurisprudence. In the circumstances, without allowing the appeal by the respondent, I take the opportunity to restate what it must be assumed the learned trial judge must have meant, namely that the

⁶ 4th Edition Reissue 1998

⁷ [1911] 1 Ch 155

⁸ [1988] 1 WLR 358

respondent, Fellowes, shall pay the legal costs of the receiver incurred in the Court below. The Receiver not having appeared before this court either by himself or by counsel, no order as to costs in this appeal need be considered.

- [28] In the circumstances I would allow the appeal and reinstate the Receivership Order until further order and, by implication confirm the BVI Orders. The costs of this appeal and of the court below are to be paid by the respondent to the appellants. All costs awarded by this judgment are to be assessed by the court if not agreed.

Michael Gordon, QC
Justice of Appeal

- [29] BARROW, J.A.: I agree with the order proposed by my brother, Gordon JA. I agree with the view that the order that the judge made as to the costs of the Receiver was intended to refer to the costs of the Receiver incurred in the court below. I do not understand that there was any claim for remuneration for the Receiver. Accordingly, I do not find it necessary to express any view, on this appeal, as to whether the exceptional circumstances of the Receiver's appointment, which involves no control whatever over assets out of which he can be indemnified, require the creation of an exception to the general rule that a Receiver's remuneration may not be recovered from the other parties to proceedings.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal