Civil Procedure: Summary Judgment and Reasonable Doubt

The Case of *E-Clear (UK) plc –v- Mrs Mili Elia & Others* [2013] EWCA Civ 1114

The Facts

Mr Elia was a director of E-Clear (UK) plc ('the Company') which was mostly owned by E-Clear Global Ltd which, in turn, was owned by Mr Elia.

The Company processed electronic payments made by credit card customers to merchants in the travel sector. In order to process the payments, the Company used services provided by Pago eTransaction Services GmbH ('Pago'). If a credit card customer did not receive the services they had paid for, Pago would refund the customer and, in turn, the Company would refund Pago.

In September 2008, two merchants in the travel sector went into administration (Zoom Airlines Inc and XL Leisure Ltd) resulting in Pago making a number of refunds to their customers in respect of cancelled flights. This resulted in the Company refunding approximately £57 million to Pago.

Until then, the Company had been profitable and it appears that Mr Elia may have lent €5 million to the Company in October 2008.

On 15 January 2009, Mr Elia agreed to purchase a flat at 29 Rutland Court, Rutland Gardens, London, SW7 for £4 million ('the Flat'). On 4 February 2009, the Company paid £425,000 as a deposit for the Flat and, on 4 March 2009, the Company paid a further £993,741 to complete the purchase. The balance was paid for by a mortgage loan.

It appears that Mr Elia may have lent a further €1.9 million to the Company in May 2009.

However, in June 2009, the Company's accountant prepared the Company's management accounts for the year ending 28 February 2009 that showed an operating loss after tax of £44 million and liabilities over assets of £28 million.

On 19 January 2010, the Company was placed in administration and, on 22 July 2010, the Company's administrators commenced proceedings against Mr Elia claiming he acted in breach of his fiduciary duties to the Company when he arranged for the Company to make payments for the purchase of the Flat at a time of actual or impending insolvency. The administrators sought to trace the Company's money into the Flat and so it claimed that Mr Elia owned the legal title to the Flat on trust for the Company.

Mr Elia defended the claim on the ground that the payments he arranged the Company to make for the purchase of the Flat were to discharge the debts payable by the Company to him.

The administrators replied by stating that, if the Company's payments were made to discharge debts due to Mr Elia, then those payments were '*preferences*' because they were made to put him in a better position than he would be in the event of the insolvent liquidation of the Company.

Mr Elia had anticipated the administrators' reply and so his defence already included a statement that he was confident at all times that insolvent liquidation would be avoided since he had reasonable grounds for believing the Company would be refinanced by a bank.

To complicate matters, Mr Elia transferred his interest in the Flat to his mother, Mrs Elia, on 30 July 2010 for £25,000 but subject to the bank's mortgage. However, if Mr Elia owned the legal title to the Flat on trust for the Company, then Mrs Elia would acquire the Flat subject to the Company's beneficial in interest because she could not receive a better title to the Flat than Mr Elia.

On 27 April 2011, a bankruptcy order was made against Mr Elia. In the circumstances, Mr Elia's trustee-in-bankruptcy ('the Trustee') was joined as a party to the proceedings and Mr Elia ceased to have any further part. On 12 October 2011, the Trustee agreed to a consent order containing a declaration that the Company beneficially owned 35.5% of the Flat and providing for its sale.

By this time, however, Mrs Elia had been joined as a party to the proceedings and she defended the administrators' claim on the following grounds:

1. The payments Mr Elia arranged the Company to make for the purchase of the Flat were to discharge the debts payable by the Company to him.

2. Mr Elia was confident at all times that insolvent liquidation would be avoided and so he did not act in breach of his fiduciary duties and the payments made by the Company were not preferences.

3. In any event, the administrators cannot trace the Company's money into the Flat.

The administrators applied for summary judgment on the ground that Mrs Elia did not have a real prospect of defending its claim. As such, the administrators' application was determined on documentary evidence only and without any witnesses giving oral evidence. His Honour Judge Mackie QC granted summary judgment, declared that the Company was the beneficial owner of 35.5% of the Flat and ordered its sale.

Mrs Elia appealed on the ground that the Judge had given judgment after considering incomplete documentation and which would be shown to be unreliable if witnesses had an opportunity to give oral evidence.

The Court of Appeal's Decision

Lord Justice Patten gave the Court of Appeal's decision on 6 September 2013 to which Lord Justice Fulford agreed.

LJ Patten examined the incomplete documentation that had been considered by HHJ Mackie QC and various witness statements. LJ Patten stated that, whilst the documentation did not support Mrs Elia's defence, there was little real disparity between the witness statements and those statements were sufficient to raise a seriously triable issue that the Company was indebted to Mr Elia in the sum of €6.9 million.

LJ Patten then considered whether the payments Mr Elia arranged the Company to make for the purchase of the Flat to discharge the debt amounted to breach of his fiduciary duties to the Company. This depended on (a) the actual or imminent insolvency of the Company and (b) Mr Elia's knowledge of its financial position.

LJ Patten's first observation was that the Company had managed to survive the £57 million losses it suffered from the 2008 failure of Zoom Airlines Inc and XL Leisure Ltd taking into consideration it continued to trade until 19 January 2010 when it was placed in administration.

LJ Patten then examined the reasonableness of Mr Elia's grounds for believing the Company would be refinanced by a bank thus avoiding insolvent liquidation. Those reasons were set out Mr Elia's witness statement and the Company's auditor's witness statement.

LJ Patten also noted that, whilst the management accounts for the year ending 28 February 2009 showed the Company was at least balance sheet insolvent, the accounts had not been prepared until after the Company had made payments for the purchase of the Flat and, in any event, an excess of liabilities over assets is not a bar to a company continuing to trade provided it can meets its liabilities as and when they fall due.

LJ Patten concluded that HHJ Mackie QC was wrong to say that the Company's insolvency was beyond reasonable doubt in February and March 2009 when the Company made the payments for the purchase of the Flat.

In the circumstances, LJ Patten allowed Mrs Elia's appeal, set aside the summary judgment and advised that the issues will have to be investigated at a trial when witnesses will give oral evidence and be subjected to cross-examination in the usual way.

Having made that decision, it was unnecessary for LJ Patten to express any further view about (a) whether Mr Elia knew or should have known about the Company's financial position in February and March 2009 or (b) whether the Company's payments were preferences to put Mr Elia in a better position than he would be in the event of the insolvent liquidation of the Company. Nevertheless, LJ Patten commented that the question of whether the administrators can trace the Company's money into the Flat raised difficult legal questions.

The Message

The benefits to a litigant who obtains an early, summary judgment against his / her opponent thereby avoiding the delay and cost of the full litigation process are obvious.

That said, an application for summary judgment carries the risk of it resulting in exactly the opposite of what the litigant seeks to achieve. If the application fails, the litigation process will have become longer and more costly that it otherwise would have been.

In order to obtain summary judgment, the litigant will need to establish that his / her opponent has no real prospects of success.

Although the standard of proof in civil cases is '*the balance of probabilities*', HHJ Mackie QC believed the Company's insolvency was '*beyond all reasonable doubt*' (which is the much higher standard in criminal cases) and, therefore, he felt Mrs Elia did not have a real prospect of success.

However, the factual circumstances of the case were relatively complex and disputed by the parties. Furthermore, the administrators relied on incomplete documentary evidence whereas Mrs Elia relied on consistent witness statements. In my respectful opinion, LJ Patten was correct to conclude that the Company's insolvency was not beyond all reasonable doubt and correct to set aside the summary judgment.

On a final note, even if the Company's insolvency *was* beyond reasonable doubt, the fact that part of the administrators' claim raised difficult legal issues leads me to believe that LJ Patten would have set aside the summary judgment in any event.

Richard Moss Solicitors

18 October 2013