Contractual rights of disclosed principals (Filatona Trading Ltd v Navigator Equities Ltd)

11/02/2020

Dispute Resolution analysis: The Court of Appeal addressed in this case the interesting question of when it might be possible to exclude the right of a disclosed principal from enforcing and/or relying on the terms of a contract which does not expressly exclude such a principal from its remedies. The court considered the rare circumstances in which that might be a possibility, noting that they are rare indeed, as there is a strong presumption against finding that a disclosed but unnamed principal has given up their contractual remedies. Written by Adam Heppinstall, barrister, Henderson Chambers.

Filatona Trading Ltd and another v Navigator Equities Ltd and others; Danilina v Chernukhin and others [2020] EWCA Civ 109

What are the practical implications of this case?

If you want to ensure that the person you are contracting with, named on the contract, is the only and true counter-party, then you need to use very clear and unambiguous words in the contract to exclude a principal from the rights and remedies set out in that contract. Such boilerplate words are set out at para [90] of this judgment. Be extra vigilant where there is not just a principal, but a known and disclosed principal.

Where one party knows full well that the counter-party is a nominee/agent, then the words used by the contract to exclude that principal must be very clear indeed, as they will pull against the very strong common law presumption that parties are not taken to have abandoned their rights and remedies under a contract. This is particularly the case where asserting that the known and disclosed principal should be excluded is an unreal or fantastical proposition, because everybody knew that without that principal the contract would not have been performed. Anglo-Saxon commercial law usually 'follows the money' and if the contract calls for large payments of money, which are made, but which the 'party' to the contract does not have but which have been made by a known and disclosed principal, then it is going to take a herculean legal effort to persuade the court that such payments/investments were made at the same time as abandoning the rights and remedies set out in the contract which requires those payments to be made. The law presumes against such altruistic generosity and presumes that a principal paying such monies does so on the basis that they are a party to the relevant contract under which they are made.

What was the background?

Vladamir Chernukhin, a Russian banker and (then) member of that country's government entered into a joint venture with Oleg Deripaska, another well known Russian businessman. Mr Chernukhin wanted to keep his involvement with the venture quiet, so his partner (in life), Lolita Danilina, entered into the relevant shareholder agreement. Things went wrong, including an intervention by armed men, and Mr Chernukhin sought to rely on a London Court of International Arbitration (LCIA) arbitration clause, but the other parties objected on the grounds that Ms Danilina was the party to the contract, not Mr Chernukhin.

The arbitral tribunal made a partial final award on 16 November 2016, in which it dismissed the objections and concluded that it had jurisdiction to determine Mr Chernukhin's claims. On 14 December 2016, the other parties challenged the tribunal's determination as to its jurisdiction by way of an application under Arbitration Act 1996 (AA 1996), section 67.

At first instance, Teare J had found that Mr Chernukhin was a disclosed (but unnamed on the contract) principal. In other words, the parties to the contract knew that Ms Danilina was the contracting agent for Mr Chernukhin. In particular, everyone had understood that Mr Chernukhin had provided the funds necessary for half the joint venture since Ms Danilina would not have been in a position to do so. That finding was not on appeal. The Court of Appeal also noted that Teare J had made the finding that none of Messrs Deripaska, Chernukhin or Ms Danilina could be relied upon to give truthful evidence (see para [34]). In particular, the judge had found that Mr Deripaska had given

dishonest evidence before both the court and the arbitrators, as had Ms Danilina. The appeal focused on whether the terms of the contract and the surrounding circumstances operated to exclude a disclosed party from the contract.

What did the court decide?

The court accepted that it was possible for a contract or its surrounding circumstances to exclude a disclosed but unnamed principal from relying on its terms, but Simon LJ (giving the main judgment) noted that 'the parties were not able to identify any case' where that had happened (para [38]). This is largely because the common law has a huge inbuilt bias against excluding parties from their contractual rights, unless there is very clear evidence that this was agreed. This is the 'beneficial assumption' which is derived from Diplock LJ's judgment in *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 at 555. Lord Diplock (as he later became) stated in *Gilbert-Ash v Modern Engineering Ltd* [1974] AC 689 at 717G that '…one starts with the presumption that neither party intends to abandon any remedies for its breach arising from operation of law, and clear express words must be used in order to rebut this presumption'.

Simon LJ could think of three circumstances where the presumption might be rebutted, first where an express clause actually excludes the principal (for example, see the boilerplate clauses cited at para [90]), second where only the named party can perform the contract (such as a named painter party contracting to paint a portrait of the other party), and thirdly where the contractual terms and circumstances make it very clear that the principal is to be excluded.

The court refused to disturb Teare J's finding that here the terms and circumstances did not operate to exclude Mr Chernukhin from the contractual terms, including the arbitration clause, not least because the joint venture could only have been viable if 'Mr Chernukhin was a party, providing half of the funding for the TGM acquisition' (para [92]). Simon LJ found that there is a 'heavy burden of persuasion on a party who seeks to argue that a known and identified principal is to be excluded from a contract' and in this case 'there is nothing in the background or the contractual terms sufficient to demonstrate a clear intent to exclude him from exercising his rights or incurring obligations…' (para [101]).

The appeal against Teare J's decision on the AA 1996, s 67 challenge to the LCIA arbitral tribunal's award on jurisdiction was thus dismissed.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Lewison, Simon and Males LJJ
- Date of judgment: 06 February 2020

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