RECENT ENGLISH CASES ON SETTING ASIDE JUDGMENTS ON THE GROUNDS OF FRAUD

Kuwait Airways Corp v Iraqi Airways Corp (Perjury II Action) [2005] EWHC 2524 Comm

The Claimant ("KAC") claimed that previous decisions of the Court, in which KAC had failed to establish that Iraqi Airways ("IAC") was liable for wrongful interference in relation to four of its aircraft, had been obtained by the fraud of IAC.

On 2 August 1990, Iraq invaded Kuwait. Occupation was complete by 5 August 1990, including of Kuwait Airport. Ten aircraft belonging to KAC there were flown to Iraq for 'safe keeping'. The proceedings concerned KAC's attempts to obtain damages from IAC for wrongful interference and usurpation of four of KAC's aircraft, which were flown to Mosul in Iraq on or about 5 August 1990.

On 17 September 1990, Resolution 369 of the Revolutionary Command Council of Iraq came into effect, dissolving KAC and transferring KAC's rights and assets to IAC. By 17 November 1990, the four aircraft were located at Mosul in their KAC livery. Later in the war between the allies and Iraq, the Mosul four were destroyed or damaged beyond repair.

KAC issued proceedings against IAC and the Republic of Iraq, these proceedings becoming known as 'the main aircraft action'. In November 1991, Justice Evans heard a number of applications. The material one for present purposes was in relation to sovereign immunity. IAC alleged that, after supplying pilots under order of the Minister to fly the planes to Iraq on or about 5 August 1990, IAC had no further involvement prior to resolution 369 being passed. IAC argued that, during this period, the company's only involvement with the four aircraft had been in consequence of obeying orders from the Saddam Regime, and therefore the company, could take advantage of sovereign immunity. Against this, KAC alleged that prior to 17 September, IAC had made attempts to repaint the four aircraft in IAC livery, had sought to hire KAC engineers and had been seen loading KAC spares onto IAC freighters (another claim was issued and became known as 'the spares action'). Evans J ordered that the issue of sovereign immunity should be decided as a preliminary issue.

In the trial of the preliminary issue as to sovereign immunity, IAC produced additional documents supporting their argument of non use during the period to 17 September 1990 (these documents later

formed part of 'the perjury l action)'. By contrast, KAC maintained that, from 9 August 1990, the aircraft were absorbed into the IAC fleet and the Resolution of 17 September 1990 merely purported to legitimise what had already been done.

Evans J found in favour of KAC. This was successfully appealed to the Court of Appeal. There was a further appeal to the House of Lords who held in 1995 that the acts of IAC during the period 5 August to 17 September 1990 were protected by sovereign immunity.

Main Aircraft Action

The 'main aircraft action' was split in to a number of trials. In 1998, there was a trial, before Mance J, of whether IAC was liable to KAC for wrongful interference with the four aircraft. Mance J held that, as a starting point, KAC could only rely on conduct after 17 September 1990. IAC had provided a schedule of actions relating to each aircraft from 17 September 1990, which by inference suggested there were no acts prior to this time. Mance J concluded that IAC did interfere with the aircraft. However, as per the Iraqi law of usurpation (being the Iraqi equivalent of wrongful interference), a determination had to be made as to whether the damage would have occurred but for the usurpation. Mance J made the finding that, in the context of good faith, the onus was on KAC to show that the damage would otherwise not have been caused. If the alleged usurper was acting in bad faith, the onus was reversed. KAC conceded that, as IAC had not been aware that they were usurping KAC's property because of Resolution 369, the burden of proof was on KAC.

There was then a trial in 1999 as to the damages that flowed from Mance J's finding that IAC had wrongfully interfered with the four aircraft, the key issues being causation and remoteness of damage. In this trial, before Aikens J, evidence was adduced for the first time showing that IAC had made a number of aircraft movements prior to 17 September 1990. Aikens J held that, on the evidence before him, it was necessary to consider events prior to 17 September 1990 when applying the test under Iraqi law for causation, which in essence was whether the damage would have occurred 'but for' IAC's wrongful act. He concluded that, despite the acts of usurpation that Mance J had found to have occurred, the Mosul four would still have ended up in exactly the same place after 17 September 1990.

IAC appealed Mance J's decision on liability and KAC appealed Aikens J's decision on causation. The appeals were heard together in 2000. The Court of Appeal dismissed IAC's appeal against Mance's decision. KAC's appeal was allowed in part but, in relation to the Mosul four, KAC was held to have been unable to discharge the burden of proving upon KAC that the factual conclusions arrived at by Aikens J were erroneous. Both parties appealed to the House of Lords, who affirmed the Court of Appeal's decision. In

particular, the House of Lords rejected KAC's submission that IAC, rather than the Government of Iraq, had been in control of KAC's aircraft from the outset.

Perjury I (2003)

There had previously been very little in the way of documentary disclosure by IAC for the purposes of the sovereign immunity issue.

In the later applications referred to above and in the spares action, documents had been disclosed which brought into question the accuracy of IAC's evidence that the company had taken no action, save on the orders of the regime, prior to 17 September 1990 in relation to the four aircraft.

Drawing the strands together, KAC made an application to the House of Lords in May 2000 for a variation of that court's earlier order, so as to deprive IAC of sovereign immunity between 9 August and 17 September. KAC's application was made on the basis that the factual basis for the House of Lords' decision had been founded on false and perjured evidence. In particular, KAC alleged that IAC's evidence that certain acts carried out between 9 August and 17 September 1990 had been in the nature of general maintenance had been given with the intention of deceiving the court.

The House of Lords held that, while the issues raised were 'prima facie relevant, serious and substantial' they should not be pursued in that manner, but by a separate claim alleging fraud.

This further claim was heard by Steele J in 2002. His judgment was delivered in 2003. Steele J held that the new evidence entirely changed the nature of the case of sovereign immunity and KAC should not be bound by the finding of the House of Lords that accorded IAC sovereign immunity from 9 August onwards. Permission to appeal was refused.

Perjury II (2005)

KAC's position was now that there had been a fraud on the court in the form of deliberate concealment of a large amount of relevant documents including numerous incriminating letters and a diary containing a large number of references to activities involving the aircraft. In uncontested evidence in 'the spares action', IAC's "secret affairs" officer had given evidence that IAC's legal advisor gave him a box of documents for safe keeping until the UN had concluded their work with Iraq. The new documents were said by KAC to be important to the case between KAC and IAC relating to wrongful interference and could seriously damage IAC's defence.

Further, a memorandum dated 20 June 2001, prepared by the legal advisor to IAC and signed by the Director General of IAC, was produced, to the effect that a statement should be drawn up for submission to the court stating that no documents or files existed. There was no pleaded response to this by IAC until the evening before the trial, when it was alleged that the non-disclosure was inadvertent, the vast majority of the documents were irrelevant and the disclosure was late, but not consistent with concealment. Following extensive cross examination, on day 6 of the trial IAC withdrew witness statements and amended its defence, albeit no admission of deliberate concealment was made.

Steele J concluded that the evidence was overwhelming that IAC had throughout the litigation pursued a deliberate and sophisticated policy of non-disclosure, suppression and concealment of relevant documents.

In considering whether the perjury and concealment was material in that it *"entirely changed the nature of the case"*, Steele J held that he must be persuaded that IAC had *"dishonestly obtained the fruits of victory"*. Steele J held that this had been the case in the trials before both Mance J and Aikens J. He held that the decisions should be set aside. His concluded that:

1. The correct approach in the instant case was for KAC to prove that evidence had been withheld and/or that specific lies had been deployed which undermined the basis on which relevant conclusions were based. Once that had been made out, KAC had to establish findings based on all the evidence.

2. There had been a fraud on the court by way of a deliberate concealment of evidence.

3. The impact of the new evidence changed the nature of the case. KAC's concession that it bore the burden of proof on causation was based on a false premise induced by false evidence from IAC that no acts of usurpation occurred until after the decree was operative.

4. It was clear that the previous trial had proceeded on a false basis and it was proper to set aside the original findings as to where the Mosul four would have been located but for the usurpation.

5. The new evidence showed that the decision to incorporate KAC's aircraft into IAC's fleet had been taken soon after the invasion and acted on before the decree. The whole idea of the decree came from IAC and was part of the absorption of KAC's fleet. IAC engaged in acts of wrongful interference including taking steps to repaint, register and insure several aircraft. IAC had acted in bad faith for the purpose of identifying the burden of proof and thus the burden now lay on IAC.

6. IAC had failed to show that the aircraft movements were made on government instructions, it was unclear what would have been done with them but for usurpation, and IAC had not proved the aircraft would have ended up where they did.

Royal Bank of Scotland Plc v Highland Financial Partners LP and others [2013] EWCA Civ 328

This case is a tale of consequences of actions taken by employers of RBS who used a change in the International Accounting Standards IAS/39 to augment the value of RBS' banking book during the financial crisis. The result was a lot of litigation between RBS and the Highland group, resulting in three judgments from Burton J in January 2010, December 2010 and May 2012, the third being a result of Highland attempting to bring further proceedings in Texas. This case concerned an appeal by RBS of Burton's third judgment where he refused to grant anti-suit injunctions. There was also a cross-appeal of Burton J's dismissal of the claim to set aside Burton J's first judgment in the series, 'the liability judgment' which Burton J made in favour of RBS for summary judgment on liability only.

Factual background

In 2006, the Highland group launched a Collaterised Debt Obligation ("CDO") investment product. The plan was that "the Issuer" (a company formed for the purpose) would acquire an investment portfolio consisting principally of senior secured loans called 'the Acquired Loans'. The loans provided security for certain Notes issued by the Issuer pursuant to the CDO product. The Notes were marketed and offered by RBS, the objective being for RBS to reimburse itself in respect of the cost of acquiring the underlying loans. During the crisis that overtook the financial markets as of 2008, RBS terminated the agreements relating to the CDO product, as RBS was entitled to do, and went about recovering the sums that it had advanced to finance the purchase of the portfolio of loans that comprised the Acquired Loans. Two individuals at RBS were principally involved in the process of recouping the sums: Sam Griffiths (SG), a distressed credit trader in RBS' Special Situations Group, and Stewart Hall (SH), an in-house lawyer at RBS.

An email was sent on 6 November 2008 to begin a process which RBS consider to be 'commercially reasonable'. That was, to obtain indicative prices for the Acquired Loans to gauge their market value. They then proposed to send a list of Acquired Loans to market participants and seek bids. RBS was also entitled to bid. If there was no bid, RBS would purchase the loans at a fair market value. RBS was granted a Power of Attorney by the Issuer to act on its behalf in relation to the sale of the Acquired Loans. Subsequently RBS 'purchased' all of the Acquired Loans in this manner.

The liability issue – 2010

By 16 March 2009 RBS claimed that, having gone through the sale process described above, all amounts that could be realised under the terms of the CDO agreements had been recouped. There was still a shortfall of EUR30.5m. RBS demanded payment of the shortfall from Highland and sent a letter before action. In an email of 26 March 2009, responding to a query from Highland, SH said that, in coming to the prices that RBS had identified for the purposes of calculating the shortfall, the bank had followed the process referred to in the 6 November 2008 email and, where there was no third party bid, the RBS mark had been used as the traded price.

On 10 February 2010, Burton J ordered that judgment be entered for RBS on all issues of liability arising on its claims. Highland appealed the summary judgment, and the appeal was dismissed on 14 July 2010.

The quantum issue

Highland subsequently learned that on 13 October 2008, prior to embarking on the process of realising the security described above, RBS had in fact taken advantage of an amendment to the IAS/39. This had permitted banks to transfer on a one-off basis certain assets on their trading books to their banking book.

RBS had transferred 36 of the most 'bullet proof' Acquired Loans on to their banking book, thereby increasing RBS' asset value for the purposes of its accounts. This was done before Notice of Termination had been given to Highland, and without informing Highland. The liquidation process of the Acquired Loans, involving the inviting of bids to ascertain the market value of the property, had accordingly been a sham to the extent that RBS had already decided to acquire, and had acquired, 36 of the loans.

Burton J held that the process followed by RBS had not been not commercially reasonable, and should have been disclosed to Highland. For his process in the deception, SG was issued with a Final Written Warning.

The Texas litigation

Highland issued proceedings in Texas against RBS, SG and SH for fraudulently misrepresenting the facts. On 15 April 2011, RBS made a without notice application in the context of the 2009 claim for an anti-suit injunction against Highland, claiming that the Texan proceedings were oppressive and vexatious. On the same date, RBS issued new proceedings against Highland (the 2011 claim). Burton J granted the injunctions until the trial of the 2011 claim and the applications in the 2009 claim were concluded.

At a subsequent Case Management Conference, Highland was given permission to amend its Defence in the 2011 claim to make a Counterclaim that the liability judgment should be set aside, as having been obtained by fraud.

Counterclaim to set aside for fraud – 2013

At trial, Aikens J found there was ample evidence to conclude that, but for the deliberate, conscious and dishonest suppression of the fact that 36 loans had been transferred to RBS' banking book, up to and including the Liability hearing, there would have been no summary judgment on liability in 2010. He further concluded that the Court of Appeal judgment on Liability and the judgment on Quantum should also be set aside.

Anti-suit Injunction

Aikens J refused to continue the anti-suit injunction originally ordered by Burton J, as the trials were sufficiently close and Highland could rely on the defence of 'unclean hands' to prevent RBS obtaining the injunctions.

Aikens J held that the principles on which a judgment must be set aside because it was obtained by a party's fraud are as follows:

1. There was a *"conscious and deliberate dishonesty"* in relation to the relevant evidence or action, which is relevant to the judgment (*Ampthill Peerage case [1977] AC 547*).

2. The relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be *"material"*. Accordingly, the dishonesty must be causative of the impugned judgment being obtained in the terms it was (*Sphere Drake Insurance plc and another v Orion Insurance Company plc [1999] EWHC 286 (Comm)* and *Tuvyuhu v Swigi, unreported, 26 October 1998*).

3. Materiality is to be assessed by reference to its impact on the evidence supporting the original decision (*Kuwait Airways Corporation v Iraqi Airways Corporation (Perjury II) [2005] EWHC 2524 (Comm)*).

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