Neutral Citation Number: [2020] EWCA Civ 641

Case No: A4/2019/0790

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QUEEN'S BENCH DIVISION)
Mr Justice Robin Knowles

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 May 2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE MOYLAN
and
MR JUSTICE MORGAN

- -

Between:

SUPER MAX OFFSHORE HOLDINGS	**Claimant/ Respondent**
- and –	
RAKESH MALHOTRA	**Defendant/ Appellant**

- -
- -

Philip Marshall QC and Dan McCourt Fritz (instructed by **Fladgate LLP**) for the **Appellant**
Camilla Bingham QC and Amy Rogers (instructed by **Clifford Chance LLP**) for the **Respondent**

Hearing date: 23 April 2020

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Approved Judgment

Lord Justice David Richards:

1. This appeal, brought with permission granted by Males LJ, is against an order whereby Robin Knowles J found that the appellant, Rakesh Malhotra, was in contempt of court. The contempt comprised a breach of an order made by Popplewell J on 27 March 2018 (the Order), which prohibited Mr Malhotra from communicating with any Trade Contact (as defined in the Order) "in terms that are disparaging of any of the Relevant Management" (as so defined). He was found to have breached the Order by a letter dated 29 June 2018 to the Assistant General Manager of Punjab National Bank in Mumbai (the Bank).

2. Robin Knowles J imposed, as the penalty for the contempt, an order that Mr Malhotra pay the Claimant's costs of the application on an indemnity basis, summarily assessed at £250,000. Males LJ refused permission to appeal separately against this penalty.

3. The Order was made following judgment given by Popplewell J on 13 December 2017 ([2017] EWHC 3246 (Comm)) in an action brought by the Claimant against Mr Malhotra. As Popplewell J recorded in his judgment, the action arose out of a fall-out from a shareholder dispute and the central dispute was whether Mr Malhotra's service contract as executive chairman of the Claimant and its subsidiaries had been validly terminated.

4. The Claimant is the holding company of the Super-Max group of companies, whose business is principally based in India and the Middle East. The business was founded by members of Mr Malhotra's family and it remained wholly owned by the family until 2011 when Actis LLP, a private equity investment business, invested US$225 million through a special purpose vehicle, Actis Consumer Grooming Products Limited (ACGPL) which became the holder of just over 40 per cent of the equity capital of the Claimant. Under the terms of a shareholder agreement, Mr Malhotra became the executive chairman. A group chief executive officer was appointed, who could not be removed without the consent of ACGPL. Other senior officers were appointed. In 2016, Mr Malhotra purported to suspend the chief executive officer and to remove or suspend other senior officers. Actis and ACGPL obtained interim injunctions to restrain these actions and terminated Mr Malhotra's service contract as executive chairman. Mr Malhotra remained a director.

5. Popplewell J held that Mr Malhotra's service contract had been lawfully terminated and granted consequential injunctive relief, including the relevant injunction on this appeal in paragraph 9 of the Order. The evidence before Popplewell J established a pattern of disparaging communications from Mr Malhotra to those dealing with the group and a substantial threat that such communications would continue in breach of his duties as a director, unless restrained by injunction.

6. Paragraphs 9 and 10 of the Order provided:

> "9. [Mr Malhotra] must not communicate directly or indirectly with any Trade Contact or Regulator of the Group in terms that are disparaging of any of the Relevant Management or calculated or likely to undermine their authority in their respective positions, save as specifically permitted by paragraph 10 below:

> a. for so long as he is a Director of the Claimant or any Group Company; and
>
> b. thereafter, during the six-month period beginning upon the date when he ceases to be a Director of the Claimant or any Group Company, insofar as such communication makes use of Confidential Information.
>
> 10. [Mr Malhotra] shall be permitted to communicate with Trade Contacts and Regulators:
>
> a. with the prior written consent of the Chief Executive Officer of the Group;
>
> b. with the prior written consent of each member of the Group Advisory Board;
>
> c. with the prior written consent of each shareholder of the Claimant; or
>
> d. by Order of the Court."

7. "Relevant Management" is defined in paragraph 12(n) of the Order:

> ""Relevant Management" shall mean:
>
> i. Anindo Mukherji (Super-Max Group Chief Executive Officer);
>
> ii. Ketan Desai (Super-Max Group Chief Financial Officer);
>
> iii. Kenny Abraham (Super-Max Chief Executive Officer, India);
>
> iv. R Sreeram (Group Chief Supply Chain Officer); or
>
> v. any individual appointed in those roles from time to time;
>
> Each a "Relevant Manager" and together "Relevant Management";"

8. As Mr Marshall QC, appearing for Mr Malhotra, commented, the focus in the definition is principally on the listed offices and their holders from time to time, rather than on the named individuals.

9. I set out in the appendix to this judgment the text of the letter dated 29 June 2018 (the Letter), with the paragraph numbers that the judge added for convenience. It is accepted that the Bank was a "Trade Contact", as defined in the Order.

10. The application notice issued by the Claimant on 10 July 2018, seeking Mr Malhotra's committal for contempt, alleged contempt as follows:

> "On 29 June 2018 the defendant wrote to SPCPL's principal financer – Punjab National Bank – in terms which were disparaging of Relevant Management. In particular by his letter the Defendant among other things described the Supermax group's management as "erratic" and "inept", he accused the Relevant Management of having destroyed the value of the Supermax group of companies and he alleged that there was "complete anarchy in the management of SPCPL."

11. The judge rightly treated the application notice as containing three (and only three) allegations of contempt, being those particularised in the second sentence quoted above. CPR 81.10(3)(a) requires that the application notice must "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt". In the present case, it required the Claimant to specify the respects in which the Letter was alleged to be disparaging of the Relevant Management. It was not sufficient simply to allege that the Letter was disparaging of the Relevant Management.

12. I mention this because in a respondent's notice the Claimant sought to rely on an allegation of breach in respect of the subject heading of the letter as a further ground for upholding the judge's finding of contempt. This had not been particularised in the application notice as a ground for committal and the judge did not treat it as a ground for committal. It was clearly impermissible to rely on this ground on an appeal, and accordingly we refused to allow the Claimant to do so.

13. Of the three allegations of contempt, the judge rejected two but upheld the allegation that the statement in paragraph 8 of the Letter that "there is complete anarchy in the management of SPCPL" was disparaging of Relevant Management.

14. SPCPL was the defined term used in the letter for Supermax Personal Care Private Limited, a subsidiary of the Claimant incorporated and carrying on business in India. The definition of Relevant Management includes "Super-Max Chief Executive Officer, India". The judge recorded in his judgment at [14] that it was not in dispute that Super-Max "India" was a reference to SPCPL. In the course of his oral submissions, Mr Marshall QC for Mr Malhotra took issue with this, but it was not a ground of appeal nor was it mentioned in his skeleton argument, nor had it been raised with the judge when he circulated his judgment in draft. As it was a new point, raised very late and requiring investigation of what had been in issue before the judge, we declined permission for it to be taken.

15. The judge gave his reasons for accepting the allegation as regards paragraph 8 of the Letter at [18]-[21] of his judgment:

> "18. However, paragraph [8] of the Letter goes on to state "… there is complete anarchy in the management of SPCPL".
>
> 19. Of this, Mr Malhotra submits by his Leading Counsel that this "does not relate to 'Relevant Management' and is not

> disparagement". However the Court finds that there is no room for doubt that this statement at paragraph [8] of the Letter does disparage and does include "Relevant Management" in that disparagement, and in doing so directly breaches the Injunction. It may also disparage others including Actis LLP (who, for example, are said at paragraph [4] to have created an "artificial deadlock" at SPCPL's Board), but that is neither here nor there if the statement at paragraph [8] disparages "Relevant Management" too.
>
> 20. The statement criticises or censors the management of SPCPL, and does so in a way that conveys that that management is ineffective and does not deserve to be held in respect or good opinion. The reference to "complete" anarchy in the management of SPCPL, and the nature of a reference to anarchy in management, leave no room for a suggestion that the statement did not include the Chief Executive Officer of SPCPL, in that capacity, and thus "Relevant Management". The statement is not saved by the preceding phrase "[i]n the circumstances afore-stated" as that phrase refers, in terms, to circumstances rather than to respects.
>
> 21. The Court is sure that Mr Malhotra's action in this respect was intentional and that he carried it out with knowledge of the Injunction."

16. Mr Marshall submitted that the judge was wrong in this finding, essentially because the assertion of complete anarchy in the management of SPCPL referred to the situation brought about by the actions of Actis and ACGPL and was not an attack on, or otherwise disparaging of, the members of the management of SPCPL, including its Chief Executive Officer.

17. Mr Marshall submitted that the clear focus of the Letter was upon Actis and ACGPL. In this respect, he first drew attention to paragraph 2, which explained to the Bank that the Supermax group was a joint venture with Actis and ACGPL. He then drew attention to paragraph 3 ("Actis LLP, however, destroyed the value of the group…" and "Actis LLP succeeded in reducing the value of the group…"), paragraph 4 ("Actis LLP frustrated the working of SPCPL creating an artificial deadlock upon refusing to participate in the Board meeting with SMM's nominees being in majority. As it significantly affected the functioning of the company and amounted to oppression of SMM and Malhotra parties…"), and paragraph 5 ("every attempt has been made by Actis LLP and/or ACGPL…to stop the functioning of TMPL by, inter alia, seeking to seal its manufacturing machinery….Actis LLP and/or ACGPL have thereby acted against the interest of the group and are continuing to do so.").

18. Paragraph 8, containing the passage found by the judge to amount to a contempt, begins with the words "In the circumstances aforesaid", referring back, it was submitted, to the passages quoted above and to similar criticisms of Actis and ACGPL in the Letter. It was submitted that the Letter contained no complaints against or

criticisms of the Relevant Management, whose names or offices are nowhere mentioned in the Letter. The "anarchy" mentioned in paragraph 8 was a reference to the deadlock in the operation of the Board of SPCPL created by Actis as set out in the Letter and to its attempt to reconstitute the Board. There could be deadlock and hence "anarchy" in the Board without any criticism of the CEO or indeed other individual board members. The Letter was not saying that they had brought about the state of anarchy, but that Actis and ACGPL had done so. The Letter was reasonably read as saying that the CEO was, in effect, the innocent victim of the activities of Actis and ACGPL. This was borne out by the second sentence of paragraph 8, in which Mr Mahrotra explained that he was not willing to guarantee SPCPL's bank borrowings, because "SPCPL [which was accepted to be a misprint for Actis or ACGPL] has proceeded to wrongfully and illegally take control of the Board of SPCPL, inter alia, by removing nominated Directors of SMM from the same".

19. It was accepted by the Claimant that, if any part of the Letter said to breach the Order could reasonably be read as not disparaging the Relevant Management, the allegation of contempt as regards that part was not established. It was submitted for Mr Malhotra that, at the very least, the words in paragraph 8 found to be in breach of the Order were reasonably capable of being read as directing criticism at Actis and ACGPL and not as disparaging the CEO.

20. It was submitted that the judge had not taken proper account of the opening words of paragraph 8 ("In the circumstances aforesaid") and that, by dismissing them on the basis that the phrase referred to "circumstances" not to "respects", the judge had engaged in "a remarkably technical textual analysis". The phrase referred back, or at least was reasonably capable of referring back, to the facts and matters stated earlier in the Letter, so that the assertion of anarchy was based on those facts and matters. As those facts and matters were restricted to criticisms of Actis and ACGPL, it followed that paragraph 8 was a criticism of them, not the management.

21. Alternatively, even if the only reasonable reading of paragraph 8 involved a criticism of the CEO, it was not disparaging, a word which counsel described as nebulous and uncertain.

22. In my judgment, Robin Knowles J was right to find that paragraph 8 was disparaging of the CEO of SPCPL. Whatever criticisms of Actis and ACGPL are contained in the Letter, paragraph 8 cannot reasonably be read as anything other than an attack on the members of the management, which are bound to be read as including the CEO. It is not a reasonable reading of "there is complete anarchy in the management of SPCPL" to say that it refers, or refers only, to the deadlock created by Actis and ACGPL or its attempts to reconstitute the Board. Any recipient of the Letter would read it, as the judge said, as a criticism of the management as ineffective. Indeed, it is somewhat stronger than that, suggesting that the management is in a state of chaos. The judge was right that it conveys that the management "does not deserve to be held in respect or good opinion".

23. Nor is Mr Marshall's submission that the rest of the Letter is concerned only with Actis and ACGPL correct. Their actions in attempting to stop the functioning of TMPL, referred to in paragraph 5, are said to have been undertaken "through SPCPL". Paragraph 7 is concerned solely with SPCPL and its allegedly precarious

right to occupy factory premises in India. These are among the circumstances to which the opening words of paragraph 8 refer.

24. Mr Marshall submitted that it had been accepted before the judge that "disparaging" meant criticism that brought the individual concerned into contempt. I do not read the relevant passage in counsel's submissions as containing an unqualified acceptance of that proposition, nor clearly did the judge, given his use of the words "does not deserve to be held in respect or good opinion" in his judgment at [20]. The word used in the Order is "disparaging" and the judge's interpretation of it is, in my view, correct.

25. Accordingly, I would dismiss the appeal against the judge's finding of contempt.

26. By its respondent's notice, the Claimant seeks to uphold the judge's order on the basis of other allegations of contempt made in the application notice before the judge, namely that in paragraph 3 of the Letter Mr Malhotra stated that "Actis LLP, however, destroyed the value of the group through inept management amongst other things" and that "[i]n course of time through erratic inept management, Actis LLP succeeded in reducing the value of the group to around USD 10 million".

27. Mr Malhotra's case before the judge was that these phrases referred, or at least could reasonably be read as referring, to the actions of Actis, not the Relevant Management. At [17] the judge accepted that on a reasonable interpretation they could be read as an attack on Actis and so rejected the Claimant's case that paragraph 3 of the Letter breached the Order.

28. If paragraph 3 is read on its own, the judge's decision was open to him and was not a decision with which this court would interfere. However, in assessing paragraph 3, the judge does not appear to have taken account of what Mr Malhotra said in the immediately preceding paragraph. In paragraph 2, Mr Malhotra said that Actis had "agreed to bring along with its investment in the group a gold standard management…" and "that Actis LLP through ACGPL, *through the management put in place by it* would ensure sufficient returns which would enable recovery of its investment and of a return on the same" (emphasis added). There can be no doubt that "the management put in place by it" would be understood by any reader as including the senior officers appointed by Actis and ACGPL and listed in the definition of Relevant Management. If paragraphs 2 and 3 are read together, as they must be and as any recipient of the Letter would do, I regard it as inescapable that the references to "inept management" and "erratic inept management" in paragraph 3 at least include those officers. In my judgment, the judge erred in law in not taking paragraph 2 into account when deciding the case made as regards those references. There can be no doubt that these phrases were disparaging of those officers.

29. I would therefore additionally uphold the judge's finding of contempt on the basis that these references in paragraph 3 breached paragraph 9 of the Order.

30. Overall, therefore, I would dismiss the appeal and in addition uphold the judge's order on the grounds that the relevant statements in paragraph 3 of the Letter were also made in breach of paragraph 9 of the Order.

Lord Justice Moylan:

31. I agree.

Mr Justice Morgan:

32. I also agree.

APPENDIX

"Dear Sirs

Sub: False and misleading representation by SPCPL to the Consortium Bankers with malafide intentions and ulterior motives

[1] As you are aware, Supermax Mauritius is the owner of 60% shares of the Supermax Group of Companies through the device of Supermax Offshore Holding (SMOH) and Tigaksha Metallics Private Limited (TMPL).

[2] Actis LLP had through Actis Consumer Grooming Products Limited (ACGPL) had come in as an investor, but had as a condition for its investment required the allotment of both equity in its favour and control of the group. Accordingly, the investment agreement which primarily came to be recorded in a document dated 4th November 2010 termed a "subscription and shareholders deed (SSD) provided for not only the representation of ACGPL in all Group companies and in the Advisory Board of the Group but also provided for the appointment of the Group CEO and Group CFO, amongst other, by ACGPL. This is by reason of the fact that Actis LLP agreed to bring along with its investment in the group a gold standard management which would ensure significant growth of the group and its companies, significant increase in generation of revenue and consequently significantly larger profits. It was accordingly the express term of the agreement that Actis LLP through ACGPL, through the management put in place by it would ensure sufficient returns which would enable recovery of its investment and of a return on the same.

[3] Contrary to its obligation Actis LLP, however, destroyed the value of the group through inept management amongst other things. In this context it may be relevant to note that at the time of enjoying with Actis LLP the value of the Supermax group was in the region of USD 700 million. In course of time through erratic inept management, Actis LLP succeeded in reducing the value of the group to around USD 10 million. In the circumstances, we were forced to file a proceeding in the Cayman Island against Actis LLP and ACGPL seeking damages from them for having destroyed the value of the company.

[4] This apart, despite SMM, through [Mr Malhotra] being entitled to nominate four Directors to the Board of Supermax Personal Care Private Limited (SPCPL), Actis LLP frustrated the working of SPCPL creating an artificial deadlock upon refusing to participate in the Board meeting with SMM's nominees being in majority. As it significantly affected the functioning of the company and amounted to oppression of SMM and Malhotra parties under the SSD, [Mr Malhotra] was compelled to file a proceeding before the NCLT, Mumbai seeking reliefs against such acts of oppression and mismanagement including with regard to the holding of Board and general meetings of SPCPL. This was, however, strenuously opposed by Actis LLP and/or ACGPL. In the course of the said proceeding before the NCLT, Mumbai, Actis LLP further contended that it had acquired 80% of the voting rights of the

holding companies of SPCPL through invocation of a pledge of shares. In the circumstances, [Mr Malhotra] and the other petitioners before the NCLT sought an amendment of the petition to bring a challenge to the wrongful acts of Actis LLP and/or ACGPL through the purported invocation of pledge and the purported reconstitution of the Board of SPCPL, amongst others, through such device. Such challenge before the NCLT is also present pending.

[5] Although SMM through its majority in the Board is operating TMPL and is generating profits, every attempt has been made by Actis LLP and/or ACGPL, inter alia, acting through SPCPL to stop the functioning of TMPL by, inter alia, seeking to seal its manufacturing machinery. Actis LLP and/or ACGPL have through SPCPL succeeded in sealing the bulk of TMPL' s machinery which has caused and is continuing to cause its significant loss and damage. Actis LLP and/or ACGPL have thereby acted against the interest of the group and are continuing to do so. In an effort to recommence full scale production with the use of the sealed machinery, TMPL has since applied for unsealing of the same, which application now stands transferred by an order of the Mumbai High Court to the arbitration of Mr Justice Waziftar (Retired).

[6] The value destruction claim made by SMM and [Mr Malhotra] against Actis LLP and ACGPL, amongst other, now essentially stand transferred to Geneva seated arbitration, which SMM, intends to pursue earnestly and which it expects to get a substantial award for compensation against Actis LLP and/or ACGPL. In connection with such arbitration Actis LLP and/or ACGPL have, however, commenced a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996 before the Shimla High Court, which is also presently pending adjudication.

[7] This apart, SPCPL is currently in litigation with one Vidyut Metallics Private Limited (VMPL) which includes disputes with regard to the SPCPL's right to continue to occupy its Plant-1 at Thane, as the said lands were never transferred to SPCPL and as the five years' lease of the plant to lands by VMPL in favour of SPCPL has expired. Litigations concerning the same are presently pending adjudication in or arbitration between VMPL and SPCPL and in applications filed by VMPL and by some other companies, inter alia, against SPCPL in the NCLT, Mumbai. There are also insolvency actions that have been commenced against SPCPL under the Insolvency and Bankruptcy Code, 2016 which also presently pending adjudication before the NCLT, Mumbai.

[8] In the circumstances afore-stated, there is complete anarchy in the management of SPCPL. Since, SPCPL [sic] has proceeded to wrongfully and illegally take control of the Board of SPCPL, inter alia, by removing the nominated Directors of SMM from the same, [Mr Malhotra] did not come forward to execute the renewal of the banking documents earlier executed by him as guarantor.

[9] In the existing circumstance, where he has been wrongfully deprived of his control of SPCPL, there cannot be any question of his executing any documents of renewal of its guarantee as he has no way of ensuring the performance or the profitability of SPCPL.

[10] These are important matters which are required to be brought to the attention of the bankers of SPCPL, to ensure that no misleading or wrongful representation with regard to the current state of SPCPL's affairs is made to the Consortium of bankers.

[11] The attempt of this letter is to briefly summarise the situation on the ground so that the same may receive active consideration of the SPCPL's bankers. SMM and [Mr Malhotra] will at all material times be available to answer all questions if any, to provide any clarification in the mater [sic].”