

Will he or won't he?

Can a corporate litigant plead impecuniosity when its controlling shareholder has the means to make a payment ordered by the English courts?

English courts recognise that shareholders hold a separate legal personality from the body corporate they own a stake in and will only go behind the corporate veil in limited circumstances. In the recent case of *Onur Air Taşımacılık AŞ v Goldtrail Travel Ltd (In Liquidation)*¹, the Court of Appeal considered whether the financial means of the appellant's wealthy controlling shareholder could be taken into account when making an order that the appellant had to make a substantial payment into court as a condition of being able to pursue its appeal. The correct test to be applied was not whether the controlling shareholder *could* make the payment into court but whether he *would* in fact do so. In this case, although the controlling shareholder had apparently stated that he was not willing to provide the funding for the appellant to make the payment into court, Patten LJ found that in reality he would do so when the alternative was that the appellant would not be able to pursue its appeal, resulting in the judgment debt becoming immediately enforceable and potentially leading to the company's liquidation.

Background

In June 2015, *Onur Air Taşımacılık AŞ* ("**Onur Air**") was ordered to pay £3.64m to Goldtrail Travel Limited ("**Goldtrail**") as compensation for dishonestly assisting Goldtrail's former director in various breaches of fiduciary duty.

Onur Air was granted permission to appeal that judgment but with the condition that it paid a costs order against it, provided security for costs that would be incurred by the appeal, and paid the judgment sum of £3.64m into court by 9 July 2015, on the basis that Onur Air had no readily identifiable assets within the jurisdiction which would be available to satisfy the judgment if its appeal failed. However, Onur Air failed to comply with these conditions and thus the appeal was, in effect, stayed indefinitely until a further order was made.

Faced with an application by Goldtrail to dismiss the appeal, in December 2015 Onur Air made an application to remove the payment condition on the grounds that it could not pay and the order would stifle its appeal. The application was dismissed. The court found that Onur Air's wealthy financial backer, Mr Bagana - who was also its controlling shareholder, Chairman of its Board of Directors and a secured creditor - had "*a more than usually close relationship with the company*"² and *could* afford to make the payment into court. In fact, the evidence was that Onur Air was only continuing to trade because of financial support it was receiving from Mr Bagana.

Mr Bagana did not give evidence himself but the court was told that Mr Bagana believed that if the court were to strike out Onur Air's appeal because he had failed to lend money to the company to make the payment into court, that would be a breach of his and Onur Air's rights under the European Convention of Human Rights.

The court dismissed Onur Air's appeal.

¹ *Onur Air Taşımacılık AŞ v Goldtrail Travel Ltd (In Liquidation)* [2017] EWCA Civ 1830

² *Goldtrail Travel Ltd (In Liquidation) v Aydin* [2016] EWCA Civ 20, para 28

Supreme Court

Onur Air appealed to the Supreme Court. By majority, the Supreme Court held that the wrong test had been applied in determining whether the payment condition had stifled the appeal. The correct inquiry was not whether the third party *could* provide the necessary finance, but whether he *would* do so in the particular case. A necessary part of this inquiry would involve looking at the appellant's relationship with that third party and the extent to which it was supporting it in financial terms. The burden then rested on the appellant to demonstrate, on the balance of probabilities, that no such funds would be available to make the payment and therefore the imposition of the payment condition would stifle the appeal.

Court of Appeal

The application was remitted back to the Court of Appeal. The question for Patten LJ to consider was whether Onur Air's controlling shareholder *would* make the payment into court.

Patten LJ found that the reasons put forward as to why Mr Bagana would not lend Onur Air the money to make the payment into court were "*not tenable*". Mr Bagana had made a substantial investment and it was unrealistic to suppose he would put that investment at risk by allowing the appeal to be dismissed - with the consequence that Goldtrail's judgment against Onur Air for £3.64m would become immediately enforceable - for want of a sum which, on the evidence, he could easily pay.

Although Onur Air told the court that Mr Bagana's position was that he would only make further advances "*in the most exceptional circumstances and if they are commercial payments necessary to keep the company in business*", there was also evidence that he was providing "*continuous funding*" without which the company could not continue in business. Patten LJ saw no reason why the payment of the sum into court would not fall into the category of "*continuous funding*" that the shareholder would ordinarily pay.

Patten LJ was also critical of the fact that Onur Air exercised what could be seen to be "*delay brinkmanship*" given that it alleged that the payment condition stifled the appeal only when it was faced with an application to dismiss the appeal at a much later date.

Comment

The court did not rely on what Mr Bagana himself had allegedly said that he would or would not do but rather considered objectively whether it would be in Mr Bagana's interests to provide the funding to make the payment into court and thus drew a conclusion as to what he would actually do when faced with the alternative of Onur Air's appeal being struck out.

When determining whether a payment condition will stifle an appeal, the court will not simply look at the means of any closely associated party but will also need to consider whether, on the balance of probabilities, the associated party *would* provide the requisite funding by reference to the underlying reality of the appellant's financial position. Whilst this class of associated party is likely to be narrow for most companies, this case serves as a reminder that any reasons put forward as to why a third party would not make payment on a litigant's behalf need to be plausible in the context of the underlying relationship that exists between the litigant and the third party.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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³ *Onur Air Taşimacılık AŞ v Goldtrail Travel Ltd (In Liquidation)* [2017] EWCA Civ 1830, para 23.