

CA on appeal from Commercial Court (Mr Justice Morison) before Waller LJ; Laws LJ; Gage LJ. 24th October 2007

Lord Justice Waller :

1. This is an appeal from a decision of Morison J dated 21st December 2006, whereby he refused an application on the part of the appellant to set aside an order for the enforcement of an arbitration award of the London Beth Din, dated 20th December 2002.
2. The arbitration giving rise to the award arose out of the financial affairs of Mr I S Kohn, who died intestate on 21st August 2001. He was twice married. His first wife predeceased him in December 1986, leaving four daughters (including the two appellants) and one son, the respondent. His second wife, whom he married in 1989, Mrs Sarah Beinhorn, had two children from a previous marriage.
3. After the death of I Kohn his daughters, including the appellants, discovered that he had executed certain share transfers in their favour. That gave rise to a dispute between the sisters and the brother as to whether it was the true intention of the deceased to gift the shares in their favour. The share transfers would have indicated that the shares were to be divided 20% to each sister and 20% to the brother. It was, however, the brother's case that there was no intention to transfer the shares in those proportions to the children. It was the brother's case that he, as the heir, was intended to receive the shares, but that he would have a moral obligation resulting in him holding 50% of the shares and the other 50% being held by his sisters. There were four sisters and only two are appellants. One sister, it seems, never wished to challenge her brother's claim. Three sisters did challenge the brother's claim but, having lost before Morison J, only two have brought this appeal.
4. An arbitration agreement was entered into on 6th March 2002 and one issue submitted to arbitration was the ownership of the shares in the various companies. There was a further arbitration agreement confirming the first and extending the issues to be arbitrated made on 2nd September 2002.
5. The brother's statement of case asserted that I Kohn never had any intention to gift the shares to his daughters and suggested that the production of the share transfers was in order, amongst other things, to save inheritance tax. In the statement of case put in on behalf of the sisters, they challenged the assertion that their father had no intention to gift the shares. Furthermore, they asserted that, if it was his intention simply to evade tax, that would be something that "as a matter of English law" he was not entitled to do.
6. The Beth Din produced an award in December 2002. That award concluded that, as a matter of Jewish law, the sisters had failed to establish that their father had any intention to make a gift of the shares. The award recognised that it was somewhat perplexing that, if the deceased had intended to save inheritance tax and had intended the shares to be divided 50% between the brother and 50% between the sisters, the deceased had not produced share transfers in those proportions to the relevant persons. The award also clearly concluded that the object of the execution of the share transfers was to evade tax, i.e. to produce documents, which could be shown to the Revenue to persuade the Revenue that the shares were not part of the deceased's estate at his death.
7. The conclusion by paragraph 32 of the award was:-
"We have therefore come to the conclusion that the deceased did not intend at any time for the share transfers actually to effect the transfer of the shares for the benefit of the respondents (the sisters) and the purpose of the share transfers was to avoid tax by the submission of documents that purportedly transferred the shares."
8. The award concluded that the applicant is:-
"(1) entitled to the deceased's shareholding in the companies and in Erne Investments Ltd and is entitled to the deceased's property at 34 Cranwich Road London N16. (2) the applicant is entitled to an account of monies withdrawn by the respondents from the companies since the deceased's death and payment by the respondents to him any sums found due. (3) The applicant conceded, (paragraph 8), that his father's wishes had been to distribute 50% of his estate between his daughters. This was partially corroborated by Mrs Wagschal (paragraph 19). Whilst this cannot be enforced in Halachah, since a commandment to comply with a deceased's wishes applies only where the money was deposited with a third party, nevertheless we would expect the applicant, to honour his late father's intention."
9. The sisters did not accept the award. They sought to produce further evidence and place the matter again before the Beth Din. However, the Beth Din, by a further award dated 16th September 2003, confirmed their previous award and made clear that the brother should comply with his moral obligation.
10. That award was initially accepted by the sisters. Manuscript documents at pages 146, 147 and 148 of the bundle, all, it would appear in October 2003, registered that acceptance.
11. However, the Beth Din had to rule on a further transfer to the son and one sister, which had occurred some years prior to 1st July 1996. They ruled that transfer effective and that seemed to reignite the attack by the sisters on the award. There are references to a possible appeal to a Beth Din in Jerusalem and clearly the sisters, with the assistance of their lawyers and, still being registered at Companies House as owners of the shares, took steps to act as if they were the beneficial holders of the shares. That led to the Beth Din warning the sisters in relation to their non-compliance with the award in November 2004. That, it seems, did not have the desired effect and ultimately on 28th June 2006 the Beth Din gave permission to the son to apply to the English court to enforce the award.

12. The son applied under s.66 of the Arbitration Act 1996 to enforce the award and did so, in accordance with the practice under that section, without notice to the sisters. By an order made on 28th September 2006, Colman J granted leave to enforce the award.
13. By application notice dated 16th October 2006 the sisters applied to set aside the 28th September 2006 order and initially that application was dismissed by Morison J on paper by order dated 19th October 2006. The application was renewed and was then heard on 14th December 2006. By order of 21st December 2006 Morison J dismissed the application.
14. The judge refused permission to appeal but Richards LJ granted permission in relation to one point. He said this:-
*"I find the illegality issue more problematic than the judge considered it to be. Although this case is not directly analogous to the situation under consideration in **Soleimany** (enforcement of an award based on an illegal contract), it is nonetheless arguable that enforcement of the award would be contrary to public policy, on the basis that the case successfully advanced by the claimant in the arbitration relied on matters amounting to a conspiracy to defraud in order to displace the apparent effect of the share transfers."*
15. Thus it is that the issue raised on this appeal is whether the finding of the Beth Din that the object of the deceased was to evade tax by the production of documents to be used to deceive the Revenue is a finding of illegality such that the English court should not enforce the award.
16. As Richards LJ pointed out the case is different from **Soleimany v Soleimany** [1999] QB 785. In **Soleimany** the contract which was sought to be enforced was a contract the performance of which involved infringing the criminal law of Iran. Thus the English court was being asked to use its executive powers to enforce an illegal agreement. In this case, what the Beth Din have ultimately ordered involves the shares being returned to the estate of the deceased and involves preventing the illegality, which the deceased is said to have intended in evading tax. *Prima facie* thus, the English court is not being asked to use its executive powers to order the doing of an illegal act such as the performance of an illegal contract
17. Mr Clive Freedman QC, however, argues that the English court should not ignore what would have been the position if the case brought by the son had been fought in the English court. He submits that, by reference to a long line of cases such as **Gascoigne v Gascoigne** [1918] 1 KB 223, the son would have been unable to answer the sisters' case that the documents showed a transfer to them by reference to a plan to deceive the Revenue. I should say straight away, as it seems to me, if the matter had been one of English law, that contention of Mr Clive Freedman's would have been well founded subject to one point. The one point relates to the question whether the English court would have taken the view that the son was now repenting of his father's and his illegal motives and seeking to put that right by bringing the shares back to where they belonged [see for example **Tribe v Tribe** [1996] Ch 107 particularly the passages in the judgment of Millett LJ at 134-135]. I do not find it necessary to decide whether the English court might have taken that view. I say that because the very issue which these parties desired to be arbitrated was the issue whether the father's execution of the documents involved a gift of the shares to the daughters. The very issue before the Beth Din was whether the fact that the son said that these documents were executed for the purpose of deceiving the Revenue affected the question, under Jewish law, whether there was a gift of these shares.
18. What the Beth Din have decided is that as a matter of Jewish law there was no evidence of a gift to the sisters. In the result their award takes the shares back into the estate of the deceased. It seems to me that there is no public policy which requires this court not to enforce that award. An English court has at times found difficulty with what should be the result of a case in which illegality of this nature is raised. Should the person relying on the illegality be entitled to have a windfall or is the situation such that the court can both prevent that windfall without seeming to condone illegal conduct?
19. In my view therefore on the illegality issue, the respondent is entitled to succeed as he did before Morison J.
20. There has however been brought to this court's attention one matter of some concern. An application was made to introduce fresh evidence, which ultimately was very properly not resisted by Mr Seymour on behalf of the respondent. That new evidence would seem to support the view that in the negotiations which have taken place between accountants acting on behalf of the estate and the Revenue, tax had continued to be charged on the basis that there was a capital gain in 1996 and that the shares did not form part of the estate at the deceased's death in 2001. Mr Seymour, for the respondent, was not able to assist as to how that might be so, but he accepted that the figures before us lent some support for that view and he could not deny it.
21. Mr Freedman, somewhat belatedly, sought to suggest that disclosure of this evidence gave him a further ground for attacking the award. He suggested that these documents demonstrated that his clients' case had been right all along and that they were the rightful owners of these shares and had always been treated as such by the Revenue. This, he submitted, gave him a basis for seeking to set aside the award on the grounds of fraud. On that basis, he submitted that it would be wrong to enforce the award until his clients had had the opportunity to issue an application under s.68 of the 1996 Act in order to set aside the award. In the alternative, he submitted that in the very least these documents demonstrated that the son and the estate had not repented of their attempt to deceive the Revenue and that, as a matter of English law, there could be no question of the son having a *locus poenitentiae*.
22. So far as *locus poenitentiae* is concerned, that does not seem to have formed the basis of the reasoning of the Beth Din. The Beth Din's decision was that there was no evidence to support any intention on the part of the deceased

to give the shares to the daughters. Their reasoning was not to the same effect as that which English law might have required. Thus, the fact that this evidence would indicate no repentance does not affect my view that this award should be enforced.

23. That leaves the question whether there is an arguable case that this award has been obtained by fraud in the sense which Mr Freedman explained, i.e. that their case had been demonstrated to be right after all. As it seems to me the conclusion which would follow from the fact (if it be the fact) that the Revenue are being shown documents which indicate a transfer of the shares in 1996, is not that there was such a transfer, but simply that the estate is still seeking to deceive the Revenue into thinking that there was. The arbitration award concluded that there was no intention to transfer these shares and there is no reason to think that that conclusion was obtained by fraud. What is important is that the view taken by the Beth Din, and indeed by Morison J, (that the effect of the decision of the Beth Din would be that tax would accordingly be paid, by reference to the shares being part of the estate when he died), should be accurate.
24. The right course, as it seems to me, is to place the relevant documents before the Revenue, so that they can ascertain for themselves whether any deception is being perpetrated on them or whether they have had a full and frank disclosure as to the question whether these shares formed part of the estate of the deceased at his death.

Conclusion

25. In the circumstances I would dismiss the appeal but require that all relevant documents be passed to the Revenue for their consideration.

Lord Justice Laws :

26. I agree that this appeal shall be dismissed for all the reasons given by my Lord Waller LJ. I agree also that all the relevant papers should be passed to the Revenue.

Lord Justice Gage :

27. I also agree.

Thomas Seymour (instructed by Messrs Greenwood & Co) for the Respondent
Clive Freedman QC and Max Mallin (instructed by Messrs Teacher Stern Selby) for the Appellants