Neutral Citation Number: [2021] EWHC 1151 (Ch)

Case No: CR 2017-007339

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 April 2021

Before :

John Kimbell QC, sitting as a Deputy High Court Judge

- -

Between :

(1) Adrian Charles Hyde **Applicants**
(2) Kevin Anthony Murphy
(As Joint Liquidators of One Blackfriars Limited)

- and –

(1) Anthony David Nygate (in his capacity as representative of the estate of James Joseph Bannon, Former Joint Administrator of One Blackfriars Limited Appointed under CPR 19.8(1))
(2) Sarah Megan Rayment
(As Former Joint Administrators of One Blackfriars Limited)

Respondents

- -
- -

Justin Fenwick QC and Ben Smiley (instructed by **Mayer Brown**) for the **Applicants**
Simon Davenport QC and Tom Poole (instructed by **Humphries Kerstetter**) for the **Respondents**

Hearing date: **12th April 2021**

- -

APPROVED JUDGMENT (ON APPLICATOIN FOR PERMISSION TO APPEAL)

John Kimbell QC, sitting as a Deputy High Court Judge:

1. This is my judgment on an application for permission to appeal which has been made by the Applicants.

   The Grounds of appeal

2. The grounds on which permission to appeal the order dismissing the Applicants' claim arising out of my judgment dated 23 March 2021 ('**the Judgment**') is sought are set out in a quite lengthy document of 21 pages.

   The legal test

3. The overriding question is, of course, that set out in CPR 52.6, which is that the permission to appeal may only be given if the court before whom the application is made considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. In this case, as I understand it, it is only 52.6(1)(a) that is relied upon. It is said by the Applicants that an appeal would have real prospects of success.

   The principles

4. The principles that I have to apply in dealing with the application are those set out in the decision of the Court of Appeal in Wheeldon Brothers Waste Limited v Millennium Insurance Co Limited [2018] EWHC Civ 2403. That case deals with the proper approach by both the Court of Appeal in deciding whether to give permission to appeal and to applications made to the lower court for permission.
5. A summary the principles set out in the judgment of Coulson LJ from that case is provided in the White Book 2021 at page 1838. This states (so far as relevant):

   (a) There is a single test under the CPR for permission to appeal which is applicable to all claims irrespective of the court or specialist court from which they originated; and

(b) that applications for permission to appeal on questions of fact or, on the evaluation of expert evidence, must meet the high threshold summarised in Grizzly Business Limited v Stena Drilling Limited [2017] EWHC Civ 94 at 39 to 40, and Thomson v Christie Manson & Woods Limited [2005] EWHC Civ 555 at paragraph 141.

6. In Wheeldon Brothers Waste Limited v Millennium Insurance Co Limited [2018] EWHC Civ 2403 at [10] Coulson LJ said this:

> "In short, to be overturned on appeal, a finding of fact must be one that no reasonable judge could have reached. In practice, that will usually occur only where there was no evidence at all to support the finding that was made, or that the judge plainly misunderstood the evidence in order to arrive at the disputed finding."

7. In relation to appeals and/or applications for permission to appeal which turn on assessment of matters of expert evidence, the following is said in paragraph 11 from the same judgment under the heading "Appeals on Matters of Expert Evidence":

> "A first instance judge's assessment of, or evaluations based upon, expert evidence adduced at trial must be approached by an appellate court with similar caution. Whilst it has been said that a reconsideration of an expert's opinion may be slightly easier than a finding of fact, because the underlying report will be in writing ... the same case also provides a salutary warning that, since the evaluation of expert evidence is likely to be bound up with a wider evaluation of matters of fact, an appellate court will still be very slow to intervene. At paragraph 141 of his judgment in *Thomson*, May LJ said:
>
> > "But, even accepting that individual points such as these are amenable to judicial appellate evaluation whatever the expert opinion, no appellate court should cherry pick a few such points so as to disagree with a composite first instance decision which, in the nature of a jig-saw, depended on the interlocking of a very large number of individual pieces, each the subject of oral expert evidence which the appellate court has not heard."

8. I refer to those two paragraphs in particular because the conclusions that I reached, as summarised in paragraphs 465 of the Judgment, are almost exclusively either findings of either fact, or they are conclusions based on an evaluation of rival expert evidence, in particular in relation to insolvency practice and the evidence of the sales and marketing experts. Sometimes it is a combination of two and sometimes it is purely one or the other. In the circumstances, applying the law as set out above, in order to have reasonable prospects of success, the Applicants have to persuade me on this application that either I had made findings of fact that no reasonable judge could have reached; alternatively that I had reached conclusions on expert opinion evidence that no reasonable judge could have reached.

Summary

9. In summary, my conclusion is that, having looked at each of the grounds of appeal and also considered what is described as the overview, I am not persuaded that an appeal has real prospects of success. However, in deference to the lengthy document I have been presented with I proposed to comment briefly on each individual ground of appeal.

Para 10

10. It is said that I was plainly wrong to find at paragraph 337 of the Judgment that the Former Administrators were entitled to choose what strategy they were going to pursue before or in place of choosing the statutory objective. I do not accept that that is an accurate description of the finding in paragraph 337 of the Judgment. What I found was that the Former Administrators did consider Objective 1. I accepted their evidence that they considered it and dismissed it as unrealistic at a very early stage - see the findings at paragraph 336 and 332(5) of the Judgment.

11. I do not accept either that there was a failure to assess and determine what thinking lay behind the statutory objective, as suggested in para 10(b). My findings in relation to that are set out at paragraphs 335 to 346 under the heading, "Was there a failure to think about the statutory objective?" In the circumstances, I do not consider that there is any reasonable prospects of persuading Court of Appeal that there was a failure to assess and determine what thinking lay behind the choice of statutory objective when it has clearly been set out in the judgment.

12. As to the suggestion in para 10 (c) that I fell into error by failing to appreciate the requirement for valuation evidence to enable the Former Administrators to determine their statutory objective as set out above, that is dealt with in a section of its own, section H(iii) of the Judgment at paragraphs 307 to 323, and section H(iv) at paragraphs 324 and following. As far as that is concerned, it seems to me that it was fully dealt with both as a matter of fact and as a matter of assessing the relevant expert evidence, in particular, of the insolvency practitioners so an appeal based on this point has no real prospect of success.

Para 11

13. As to the next head, which is paragraph 11 in the document, it is said that there was a plainly incorrect finding at paragraph 322 that it was permissible for the Former Administrators to proceed without a valuation. However, this point is dealt with at paragraphs 307 and following in the judgment, where I make findings of fact as to the information that the former administrators had, how they assessed that information as to valuation and why they chose not to proceed to obtain a further valuation of the site.

14. As to whether it is permissible, what I understand that to mean is whether there was a breach of duty. That it seems to me is a matter to a large degree of assessing the insolvency practitioner expert evidence. I heard and had to decide between the rival experts' views on whether it was in appropriate to proceed without a further evaluation, and came to the conclusion at paragraph 322, which itself

contains eight subparagraphs, as to my reasons why it was not a breach of duty to proceed as the former administrators did.

15. So, given the test that I have to apply in relation to both findings of fact and to assessment of expert evidence, I do not find that ground 11 has real prospects of success.

Para 12

16. It is said under this ground that there was a failure to address the value of the Site in 2010. It is said that this was an important aspect of the Joint Liquidators' case and an issue for determination. In relation to that, that it seems to me does not have any real prospects of success for a number of reasons:

    a. First of all, I found, that the Site was sold at its market value following a properly conducted sales and marketing exercise. Far from failing to address the value of the site on October 2010, I made a finding of fact that the Site was sold at its market value - see the second sentence in paragraph 465(20) in the Judgment.

    b. Secondly, insofar as it was a matter of conflicting valuation evidence between Mr Fourt and Mr Clarke as to the value of the site in October 2010, I have given my reasons for strongly preferring the evidence of Mr Fourt over Mr Clarke's evidence. Mr Fourt's evidence was consistent with my finding of fact that the Site was ultimately sold at its market value and not below.

17. I therefore do not consider that this ground of appeal any real prospect of success.

Para 13

18. Under the next ground, number 13, is it is said that there was a failure to address what the Former Administrators *thought* the value of the site was in October 2010.

19. I do not accept that is correct. Paragraphs 308 to 313, in particular 312, set out my findings of fact as to what both Mrs Rayment and Mr Bannon actually thought about the value of the Site. In short, I accepted the evidence of Mrs Rayment and the evidence of Mr Bannon by way of hearsay evidence

as to what they thought about the value of the site at various points from the information they had available.

20. Therefore, unless I am satisfied that there was no evidence on which I could have come to that conclusion, and no reasonable judge could have reached that conclusion, I cannot give permission to appeal on that basis, and I decline to do so, because I believe that there was, first of all, evidence submitted both by Mrs Rayment and by Mr Bannon as to what they thought, and it was evidence that I ultimately accepted. Therefore, this ground of appeal has no real prospect of success.

Para 14

21. Under this ground it is said that there was a failure to address the evidence of "planning gain". There are a number of reasons why it seems to me that that this ground does not have real prospects of success.

22. First, it is not satisfactory to advance a ground of appeal which does not refer to a pleaded issue. Simply saying there was a failure to address the evidence of planning gain without tying it to a pleaded issue seems to me to be prima facie inadequate.

23. Planning gain was a feature of a number of issues. I dealt with it as part of the allegation that there was failure to gather information about the value of the Site – that is dealt with in paragraph 307 of the Judgment.

24. Also, planning gain was part and parcel of the bidding process, see my findings at paragraph 322(6) of the Judgment. Essentially the point was that I found that CBRE and the Former Administrators considered that, to the extent that planning gain was to feed into the value of the Site to be realised, it was a matter for each of the individual bidders to form their own view as to what that might be, depending in particular on their own needs. That was in the context in particular of Mrs Rayment's evidence, which I accepted, that when she sat down with the first round bidders, it struck her how different all of their approaches or intentions were in relation to the Site.

25. So there was no single planning gain that one could identify; there were just a number of different potential planning gains depending on (a) the needs of the party interested in bidding or purchasing the site, and (b) their own assessment of what their chances were of obtaining permission for any amended consent to realise that potential planning gain. I am therefore not persuaded there is a real prospect of success based on an argument that it has not been addressed. It has been addressed, both in the context of alleged failure to collect information, and again as part and parcel of the bidding process.

26. Another issue which involved potential "planning gain", as I had understood the case that was being advanced, was that there was an alleged failure to investigate properly, or to investigate the possibility of the Former Administrators themselves pursuing modified planning consent and thereby realising planning gain. That is dealt with at paragraphs 352 and following in the Judgment.

27. I dealt with that allegation in some detail, in particular in light of the changing advice from DP9 as matters progressed. It seems to me that the conclusion I reached there were partly conclusions as to fact as to how the Former Administrators saw matters, where they found themselves in the administration and also the risks and benefits of taking that step, and in part it depended on the expert evidence which I found that led me to the conclusion it was not a breach of duty.

28. Finally, on the topic of planning gain, there was, as I understand it, a suggestion that there was a failure to pursue a planning "underwrite", as it was referred to. Insofar as that was advanced in submissions, I deal with it in paragraph 408 of the Judgment.

29. For all of those reasons, I do not accept there is a reasonable prospect of success of an appeal based on an allegation there was a failure to address evidence of planning gain, when it was addressed, it seems to me, in at least five different respects in the judgment, and respects in which, as I understood it, corresponded with the way that the Joint Liquidators put their case.

Para 15

30. It is said here that there was an error of law in the finding at 277 in the judgment that it was permissible, for the Former Administrators to agree an outline strategy with the secured creditors prior to appointment. That it seems to me to be a misrepresentation of paragraph 277 of the Judgment.

31. Paragraph 277 contains a finding of fact. I accepted Mrs Rayment's evidence that it was not unusual for an outline strategy of that sort to be agreed, subject, of course, to the administrators considering matters when they enter into the appointment itself and thereafter keeping matters under review.

32. As to the suggestion at paragraph 15(b) that there was a reliance on the obviousness of objective 1 not being possible without addressing value and planning value, again it seems to me not to correspond to the Judgment. What I found is that the Former Administrators *did* consider Objective 1 and did, both of them, form the view that it was not realistic in the circumstances of that case. That is not the same as a finding that they are entitled now to rely on it being obviously impossible. I found as a matter of fact they considered it and took the view that it was not realistic.

33. But I also found as a matter of fact that they kept an open mind as to whether it might become realistic. In particular, the way the strategy was agreed created quite a wide window of opportunity for any potential investor to come in and invest and take the company out of administration. That seems to me, part of what informed the meeting on 13 October, the date before the administrators were appointed. I do not therefore consider that an appeal on this ground has a real prospect of success.

Para 16

34. Paragraph 16, it is said that there was an error of law in paragraph 211 of the judgment in accepting the deferential approach in Re Charnley Davies Limited. I am not sure that that is an accurate representation of what is decided in paragraph 211.

35. In paragraph 211 of the Judgment I decided between the two rival formulations of the test advanced by the parties. I did not understand there to be submissions as to there being a conflict between Re Charnley Davies and the unnecessarily harm requirement as set out in Snowden J's decision in Davey

v Money. The submissions that I understood that were being made in this respect are those set out at paragraph 239 of the judgment.

36. I do not accept the suggestion in paragraph 16(d) a test of irrationality has been applied. What was applied was standard tests of breach of duty of care and the standard to be applied to breach as described in paragraphs 208 and 211 of the Judgment. So I do not accept that there is a reasonable prospect of success on that basis either.

Para 17 -22

37. What is said paragraph 17, is that I erred in holding that I was bound by a previous decision of the High Court unless I was persuaded that the decision was "plainly wrong".
38. What is said in paragraph 217 is not a finding in the usual sense. That is because there was no dispute between the parties as to the rules of precedent. What I am referring to in paragraph 17 are Mr Fenwick's submissions (as to which there was no dispute). However, it is that the case that unfortunately paragraph 217 misrepresents his submissions. The submission that Mr Fenwick made in writing in his closing submissions on behalf of the Former Administrators was as follows:

> "While a prior decision of a High Court judge is not binding, it remains persuasive authority, as described in Halsbury Laws of England, volume 11, paragraph 32:
>
> "'Where a judge at first instance after consideration has come to a definite conclusion on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that the second judge at first instance of coordinate jurisdictions should follow that decision and the modern practice is that a judge at first instance will, as a matter of judicial comity, usually follow the decision of another judge at first instance unless he is convinced that the judgment was wrong."

39. Then Mr Fenwick also referred me to a case of Gloster J, as she then was, in Lornamead Acquisitions v Kaupthing Bank HF [2011] EWHC 2611 (Comm), in which she expressed doubts as to the correctness of an earlier High Court decision and was impressed by certain submissions attacking it.

However, she decided to follow that decision nevertheless on grounds of judicial comity. Mr Fenwick went on to say it is open to the court to depart from a prior High Court decision; however, that should and does happen rarely.

40. In summary, Mr Fenwick submitted that I ought to follow the decision of Snowden J in Davey v Money decision unless I was convinced that he was wrong, and that is exactly the same test as Mr Davenport sets out in paragraph 17(a) in the grounds of appeal.

41. So the question is whether the inaccurate representation of Mr Fenwick's submissions, regrettable as it is, gives rise to a ground of appeal with real prospects of success. I do consider it does for the following reasons:

    a. First, it seems to me quite clear from my analysis in paragraphs 208 and following of the Judgment that I considered and dealt with each and every one of Mr Davenport's suggestions as to why Snowden J's decision should not be followed and I was not persuaded of any of them.

    b. Secondly, the question of substance is: is this the sort of case where the judge has applied the wrong test and, had she or he applied the correct test, would he/she have reached a different result? The answer, it seems to me, is plainly no, because I was not persuaded of any of reasons suggested for departing from the decision of Snowden J.

    c. I was positively persuaded that the decision in Davey v Money ws correct. See paragraph 222 of the judgment, where I conclude:

> "For all of those reasons, I am satisfied I should follow Snowden J's decision in Davey v Money ... in declining to extend the rule of non-delegability to administrators."

d. In terms of the standard of review, I again considered each of the points made by Mr Davenport and dismissed each of them. That is clear from paragraphs 240 to 248, where I say that there is nothing objectionable, still less anything plainly wrong, with considering what standard rule is applied to decisions by administrators or liquidators in other insolvency contexts. I reached the conclusion that the Joint Liquidators had not persuaded me that Snowden J's decision of the standard of review was wrong, and I then added "let alone plainly wrong". But it seems to me given my conclusion in paragraph 250 that the Joint Liquidators did not persuade me that Snowden J's decision was wrong, that constitutes an application of the correct test, and the fact that I added in superfluous further comment about the conclusion not being plainly wrong cannot make any difference.

42. So, whilst there was a regrettable misdescription of Mr Fenwick's submissions in the Judgment, this does not give rise to a ground of appeal with real prospects of success.

Para 23

43. Turning to paragraph 23 in the grounds of appeal, under the heading "CBRE", it is said that there was a mistaken concluding that CBRE had “previously” acted for the Syndicate.

44. It was common ground that CBRE had previously acted for the Syndicate: see paragraph 294 and following in the Judgment. The issue that I had to decide was whether there was an actual or apparent conflict such that it was inappropriate for CBRE to be appointed given that had in fact previously acted for the Syndicate.

45. What this ground of appeal appears be aimed at is the allegation that CBRE continued to act for the Syndicate and the Former Administrators and that this gave rise to a conflict of interest. However, that was an unpleaded allegation which I declined to deal with.

46. I do not accept that there is a mistake as described in subparagraph (d) of Ground 23. The way I had understood the case to be put was that there was an alleged conflict because CBRE had previously

advised the syndicate, and that is clear from the pleadings and from the submissions, and so I do not accept that this Ground has any prospect of success.

Paras 24 - 26

47. As to paragraphs 24, 25 and 26, it seems to me that those are matters which go to the sales and marketing evidence and to the expert evidence of the insolvency practitioners. In particular, I deal with Mr Laughton's cross-examination at paragraph 299(4) which is the basis for the conclusion that there was nothing to suggest that CBRE's views on valuation were unreliable. That seemed to me to be accepted by Mr Laughton in cross-examination. The points being made in paragraph 26 seem to me to be an attempt to re-argue the case and to undo the damage that was inflicted in cross-examination on Mr Laughton in that respect.

Para 28

48. In relation to paragraph 28, it is necessary to read the whole of paragraph 322, which set out all the reasons why I say it was reasonable for the former administrators to accept CBRE's advice on various points, and I do not find that there is any real prospects of an appeal based on the allegation that there was a wholesale delegation of the FAs' duty to investigate, think and act objectively. I deal with the FAs' own decision-making process and their reasons for doing what they did in paragraphs 304 of the judgment.

49. This again seems to me to be an attempt to re-argue the case which has been decided against the Applicants based on a combination of findings of act as to what the Former Administrators thought and did and what information they had, and secondly in relation to the expert evidence of insolvency practitioners as to what a reasonable administrator would do. I am not persuaded therefore that para. 28 contains a ground of appeal with real prospects of success.

Para 29

50. In paragraph 29 of the grounds it is said to be implicit that CBRE were retained to advise the Former Administrators in relation to valuation matters. I do not accept that is right. It is not implicit in the reasoning. In fact, the express terms of appointment are dealt with at paragraphs 285 to 289 in the Judgment. There and I set out my findings of fact as to what it was that CBRE were asked to do. What is not included in those terms or appointment was to provide a further independent valuation of the Site. So, far from finding it to be implicit that CBRE were retained to advise the Former Administrators, I expressly found that that was not part of their retainer.

51. I do not accept it is right to say that the judgment fails to deal with the scope of and nature of any duties owed by CBRE to the FAs in relation to the views they did provide. As a matter of fact, these are set out at paragraph 296, and which is based on the witness evidence of Mrs Rayment and Mr Bannon. I do not accept that the judgment fails to deal with any matters of any valuation duties owed by CBRE to the FAs because, as I have already said, I have in fact made express findings as to the precise scope of their duties and that did not include providing a valuation.

52. What this seems to me to come back to is the question of whether it was reasonable or not for the Former Administrators to proceed without a further independent valuation. Paragraph 323(8) deals with precisely that question, namely whether a further valuation would have assisted at all, and in relation to that I accepted the expert evidence that it was not necessary and it would not have assisted to do so. I accepted the expert evidence advanced by the Former Administrators that it would have made no difference.

Para 30

53. Finally, in relation to light touch administration, this seems to me to be an attempt to challenge findings of fact. I dealt with the whole issue of whether or not a light touch administration was agreed to and the budget provided for light touch administration, and I dealt in particular with the documents that were produced referring to that term: see, for example, paragraph 266 in the judgment. It is said

there was a failure to address reasons why a light touch administration was impermissible, but I think this is dealt with in full at paragraph 277 of the judgment. Obviously, the Joint Liquidators are unhappy with my finding in relation to that, but it seems to me it is wrong to say that the Judgment fails to address the arguments.

54. I do not therefore accept that there is a failure to address that point at all, and for that reason the ground of appeal set out in paragraph 30 in the document in my judgment has no real prospect of success.

Conclusion

55. For the all reasons given above I decline to give permission to appeal on any of the grounds relied upon.

56. I apologise to the parties for taking quite some long time this morning to go through the grounds of appeal document. I suspect Mr Poole had quite a considerable input into the grounds of appeal and given they were very detailed and long, I thought it was appropriate to at least address each of the headings individually.

57. That concludes my judgment on your application for permission to appeal.