



Neutral Citation Number: [2011] EWHC 2801 (Ch)

Case No: 9863/2010

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2011

Before:

MR. JUSTICE MORGAN

Between:

PINKLETON PROPERTIES LIMITED

Applicant

- and -

DORCHESTER HOLDINGS LIMITED

Respondent

MR. RICHARD BREEN (director of **Pinkleton Properties Limited**) for the **Applicant**
MR. ADAM ROSENTHAL (instructed by **IBB Solicitors**) for the **Defendant**

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court
Chancery Lane, London WC2A 1HP.
Tele No: 020 7067 2900, Fax No: 020 7831 6864, DX: 410 LDE
Email: info@martenwalshcherer.com
Website: www.martenwalshcherer.com

MR. JUSTICE MORGAN:

1. This is an application by Pinkleton Properties Limited against Dorchester Holdings Limited to restrain Dorchester Holdings Limited from presenting a petition for the winding up of Pinkleton Properties Limited based on an alleged debt, the precise figure is £55,221.14, which was the subject of a statutory demand dated 4th November 2010 served on Pinkleton Properties Limited on or about 11th November 2010. The statutory demand which is referred to in the application gave particulars of the debt which I should read. The particulars are in these terms:

"By an agreement ('the agreement') made between the debtor and the creditor in or about 2004, it was agreed that the properties known as 41, 52 and 75 Centenary Plaza, Holiday Street, Birmingham ('the properties') - which had been purchased pursuant to an earlier joint venture agreement - would be retained rather than sold and, whilst retained, the debtor would, inter alia, meet any shortfall between the income derived from the properties and the expenditure incurred on the properties. In 2006 the creditor was obliged to issue proceedings in the Clerkenwell & Shoreditch County Court (claim number 6EC03613) against the debtor following its failure to meet the shortfall of £19,810.10 that had arisen between September 2005 and July 2006. Judgment for an amount to be decided by the court was obtained on 5 December 2006 following which the debtor paid the shortfall. A further shortfall of £54,221.14 (particulars of which are attached) has arisen since March 2008 between the income derived from the properties and the expenditure incurred on the properties. In breach of the agreement, the debtor has refused or otherwise failed to meet the shortfall and it is therefore indebted to the creditor in the sum of £54,221.14.

The claimant reserves the right to claim statutory interest on such part or parts of the sum of £54,221.14 and for such period or periods as the court considers just."

2. Pinkleton's application is supported by a witness statement of Mr. Breen. That was in turn responded to by a witness statement of Mr. Silver on behalf of Dorchester Holdings Limited and then, finally, Mr. Silver's statement was itself the subject of a responsive statement from Mr. Bateman. It is fair to say from the material I have seen that the individuals who were most involved with the arrangements now in question were Mr. Silver and Mr. Bateman rather than Mr. Breen himself.
3. As the statutory demand indicates, the underlying basis of the claim which is made against Pinkleton is an oral agreement. That oral agreement is described in Mr. Silver's witness statement in paragraphs 10, 11 and 12 and in particular in paragraph 10. I will read paragraph 10 which is in these terms:

"Due to an oversupply of residential flats in Birmingham the parties were unable to find sub-purchasers for the block 1 flats. [I interpose that that is a reference to four flats of which three

remain relevant, they are the three which have already been referred to] The parties had a choice of either not completing the purchase of the block 1 flats and forfeiting the deposits or completing the purchase and renting them out. Given that the property market was stable at the time I agreed with Richard Bateman that we should hold the flats until such time as we were able to sell them on to future purchasers. If this was not possible we retain the option to rent the flats out. We further agreed that Dorchester would manage the block 1 flats and find tenants to occupy it and Pinkleton would continue to provide all the capital required to pay the shortfall between rental income and the mortgages to be secured against the block 1 flats and other expenses such as ground rent and service charges."

4. Paragraph 11 goes on to describe how title to the leases to the flats was taken by individuals connected with Dorchester. Mortgages were entered into by those lessees. Mr. Silver goes on to suggest that the agreement between the parties was confirmed in e-mail exchanges on 30th March 2004.
5. Mr. Bateman responds to that version of the facts in his own witness statement. There is some common ground as to the existence of an agreement of some kind. In paragraph 5 of Mr. Bateman's statement he describes that he did reach an agreement of sorts with Mr. Silver. The agreement was that the flats in question should be purchased -- that is the earlier contracts should be completed -- and the flats would be held until the relevant parties could find future purchasers and while the flats were being held for that reason they would be rented out. It seems implicit, if not more, in what Mr. Bateman says that everyone recognised that there would be outgoings on the flats while they were held but they would also be income in the event that the flats were rented out.
6. Turning to the critical matter of who was to pay in the event of any shortfall, Mr. Bateman says this:

"6. We never made any agreement about the other matters Mr. Silver mentions, i.e. who would manage it, who would provide any shortfall and capital and who would pay ongoing expenses."
7. That is a statement of alleged fact that there was no such agreement. Mr. Bateman goes on to make comments on the situation which I think I should also read. He says this:

"I would never have agreed for Pinkleton to pay 100% of these amounts. It is one thing to agree to pay them in a buoyant property market where the flats would be sold quickly (as was the case with the earlier joint venture); but it is a completely different matter altogether to agree to pay 100% of the losses where it was anticipated we might have to hold the flats for quite some time, and then only share 50% in the profits. I simply would not have agreed to that as it is commercially very unwise."

8. There one has in those witness statements a conflict of evidence as to the terms of an alleged oral agreement. The matter does not, however, stop there. I have been provided as an exhibit to Mr. Silver's witness statement with a considerable amount of written communication, mostly in the form of e-mails, between the parties over an extensive period starting in 2004. The communications of March 2004, which Mr. Silver referred to in paragraph 12 of his witness statement, perhaps do not take the matter very much further as regards the shortfall to which reference has been made. It may be that those e-mails are correctly to be considered as dealing with the start up costs which were indeed to be borne 100% by Pinkleton.
9. However, as time went by there does appear in the communications between the parties a clear course of dealing pursuant to which Pinkleton did pay on demand, albeit belatedly, the amount of the shortfall which was borne in the first instance by Dorchester. That pattern really begins in around September 2005 so far as the written communications go. I will not attempt to discuss every single communication between the parties, but there are one or two that are significant for present purposes to which I therefore ought to refer.
10. On 27th October 2005 Mr. Stoddart, who was connected with Dorchester, sent an e-mail to a Mr. Bateman and it refers to Mr. Bateman having promised a cheque in relation to the shortfall. At page 93 of the bundle there is a further communication in which it is said that Mr. Bateman has indicated his intention to pay on several occasions. So at this stage there is no dispute about the underlying liability of Pinkleton to pay for the shortfall. What is happening is, it seems, that Pinkleton is being tardy in discharging what is an undisputed liability.
11. Moving on through these communications, there is a matter much relied upon by Dorchester. A Mr. Marshall, a solicitor of Marshall Hatchick which firm was either acting for both sides or for Pinkleton alone, it matters not for this particular point, what Mr. Marshall says in an e-mail to Mr. Stoddart of Dorchester is this:

"I have spoken to Richard Bateman about this, and he confirms that money is due to you and Gary in respect of these matters and he will come back to you very shortly."
12. It is clear from the context that this, about which Mr. Marshall had spoken to Mr. Bateman, was the claim by Dorchester to be reimbursed in full the amount of the shortfall. What the solicitor is saying on behalf of Mr. Bateman, that is on behalf of Pinkleton, is that there is a confirmation that the money is due.
13. As I have indicated, although there was no dispute about the underlying liability to pay there was considerable difficulty in the form of collecting the monies. On 9th August 2006 a different firm of solicitors, Richard Pearlman & Co., acting for Dorchester wrote to the directors of Pinkleton Properties. The letter set out the allegation about the arrangement made in 2004 that Pinkleton should bear the extent of the shortfall. The letter also refers to a statement made by Mr. Bateman that Mr. Bateman or, I dare say Pinkleton more accurately, would reimburse Dorchester by sending a cheque the next day. The cheque was not sent.
14. That letter did not, it seems, lead to payment of the sum claimed. Dorchester did not let the matter go. They brought proceedings in the Clerkenwell and Shoreditch

County Court against Pinkleton. I have been shown the particulars of claim that were served in those proceedings. Paragraph 4 of the particulars of claim pleads the agreement essentially in the same terms as is now put forward by Dorchester. It is then said in paragraph 5 of the pleading that Pinkleton did not pay, thereby broke the agreement and the remedy which is claimed for that is an award of damages for breach of contract.

15. I can indicate at this point that if there had been an agreement and a liability to pay a specified sum then the claim should have been a claim in debt and not a claim for damages for breach of contract. However, that is how matters were described in the particulars of claim.
16. The claim was not defended and on 5th December 2006 upon receiving a request for a judgment District Judge Marin sitting in the county court ordered that judgment be given for the claimant for an amount to be decided by the court. There is then some correspondence, not all of which I need refer to. It is sufficient if I describe that Marshall Hatchick came on the scene, they did not go on the record in the county court proceedings. They did not formally act for Pinkleton, but they appeared to have acted as an intermediary or a go-between between Pinkleton and Dorchester.
17. It is clear from correspondence that Pinkleton was aware of what had happened in the proceedings and it was also clear from the correspondence that Pinkleton's response was not to apply to set aside the judgment, was not even to contend in correspondence that there was no liability, but rather the communications are on the basis that the money will be paid and, indeed, the sums up to the date of issue of the proceedings were paid.
18. On 5th April 2007 there is a letter from Mr. Breen, a director of Pinkleton, who prepared a witness statement in these proceedings. That letter is sent to Richard Pearlman for Dorchester. Mr. Breen raises various points about the underlying information to substantiate the calculations of the sums due. He refers to a meeting which he describes as constructive. He also acknowledges, and I quote: "There had been some delays on our part for which we apologise". There is no suggestion there, indeed the contrary is the case, that Pinkleton is under no contractual liability to pay a properly computed sum by way of reimbursement.
19. I go forward to the early part of 2008. In February 2008 someone acting on behalf of Dorchester sent to Mr. Bateman acting on behalf of Pinkleton a further statement as to sums to be reimbursed. The sum claimed was a little under £13,000. Later, on 9th April 2008, Mr. Bateman sent a cheque for the sum claimed. There was no statement that the sum was not payable or that the liability did not exist.
20. In May 2008 Dorchester wrote again to Mr. Bateman sending a further statement. Although I do not have the statement the covering e-mail refers to the amount outstanding up to April 2008 being £8,350.85. It seems that that payment as demanded was not made.
21. In September 2008 Dorchester wrote again, I think this time not to Mr. Bateman but to other representatives in Dorchester referring to a difficulty in contacting Mr. Bateman. There does not appear to have been any further relevant communication between the parties prior to the service of the statutory demand. As I have described

that was dated 4th November 2010 and I think Dorchester accept they received it on or about 11th November 2010.

22. In order for the court to grant the relief which is sought by Pinkleton, namely an order restraining Dorchester from presenting a winding-up petition, the court has to be satisfied on that material that there is a bona fide dispute as to the existence of a debt and the dispute which is put forward is on substantial ground. I have indicated that the underlying entitlement asserted by Dorchester is based on an oral agreement. I have also indicated that the two gentlemen who made the oral agreement disagree in their witness statements as to what the oral agreement provided. In many cases those facts alone would lead to the conclusion that the matter would have to be resolved in court by the prosecution of a debt claim and that it was not appropriate to bring winding-up proceedings in the companies court in which the existence of the debt remained to be decided.
23. However, this case I find is different from the normal case which I have described of a disputed oral agreement. It is true I have two distinct versions of the oral agreement but I feel I can confidently decide which of those versions is correct. That is because for some years since the alleged oral agreement was made the parties have consistently acted on the basis of one version of that agreement and not on the basis of the suggested rival version. The parties' conduct is consistent only with Mr. Silver's version of the agreement. The parties conduct is inconsistent with Mr. Bateman's version of the oral agreement.
24. In my judgment any court asked to resolve this question as to the terms of the oral agreement would inevitably come to the view that Mr. Silver's version is the correct one as it is corroborated to convincingly and over such a period by the conduct of the parties. Further, even if there was a certain lack of detail, or lack of particularity, some ambiguity even about the oral agreement made in 2004, one has very clearly here a course of conduct which is consistent with the parties having agreed by their conduct to a situation where Pinkleton is obliged to make good the shortfall which is borne in the first instance by Dorchester.
25. Over and above those considerations there is a legal point which is urged on behalf of Dorchester. It is said that the default judgment to which I have referred carries with it an issue estoppel which will prevent Pinkleton in a later case, such as the present, contending something contrary to that which was the fundamental basis of the judgment obtained in default. It does seem, as a matter of fact, to be the case that the judgment in default here was based on three essential points. The first essential point was that there was an agreement between the parties as pleaded in paragraph 4 of the particulars of claim. The second essential point is that there was a breach of that agreement. The third essential point was the remedy available to the creditor was damages for breach of contract. The second and third essential points are not so material but the first essential point is, that is that there was an agreement on the terms pleaded in paragraph 4 of the particulars of claim.
26. That gives rise to the question whether a default judgment can create an issue estoppel binding a litigant in later proceedings. Mr. Rosenthal of counsel, who appears on behalf of Dorchester, has drawn my attention to some of the leading and some of the less leading authorities on that point. He has shown me first of all a decision of the House of Lords in *New Brunswick Railway Company v. British and French Trust*

Corporation Limited [1939] AC 1, *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, a decision of the Privy Council and I have also been shown the decision in *Hume v. Munro* (1942) 42 S.R. (N.S.W.) 218.

27. The legal principle which I take from those authorities is the legal principle summarized by Viscount Radcliffe in the *Kok Hoong* case, in particular the passage in his judgment at page 1012. He refers to earlier authorities and the reinterpretation in the *New Brunswick Railway* case of earlier statements of principle. He then puts the matter in these terms:

"This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC, they can estop only for what must 'necessarily and with complete precision' have been thereby determined."

That is the end of the quotation from Viscount Radcliffe.

28. Applying that statement of the legal principle to the facts of this case it seems to me that the conclusion I should reach is that Pinkleton is estopped in this present application from contending that the agreement was different from the agreement pleaded in paragraph 4 of the particulars of claim in the county court proceedings. So whether I reached the conclusion on the facts of the case or by reason of that legal principle, the conclusion I do reach is that there was an agreement here on the terms put forward by Mr. Silver in paragraph 10 of his witness statement.
29. That means that I will proceed on the basis that Pinkleton is liable to pay to Dorchester by way of reimbursement the sums initially paid by Dorchester in respect of the shortfall arising in the way which I have described. The creditor, Dorchester, is not entitled to be paid until it notifies Pinkleton of the sum which is due. Upon Dorchester notifying Pinkleton of the sum which is due a present debt comes into existence. Of course it may be open to Pinkleton to contend that the debt has not been computed correctly. There may be a dispute about that, it may be necessary to have a further investigation and further documents to quantify the precise amount. That, however, does not prevent Dorchester demonstrating in this court today that it is a creditor and it is owed a substantial sum.
30. As to the quantification of the sum I can say a certain amount. Dorchester has put forward some information as to how the sums have been computed. I have not been given any material from Pinkleton which challenges the mathematics, the calculation or even the legal approach which has been adopted. What Pinkleton does say is that it has not seen the underlying documents. That, in my judgment, does not prevent Dorchester saying it is a creditor for the amount claimed. There is no material before me on which I could find that the debt will be reduced to modest proportions or even below the figure of £750.
31. Mr. Rosenthal accepts that if the debt was only a sum under £750 he would not be in a position to serve a statutory demand and proceed to wind up the company. Whether that is the case or not I am quite satisfied that it is not necessary for me on this

application to determine the amount of the debt. I am able to say that there is a substantial debt. Any dispute about the amount of the debt does not justify the court restraining a petition as claimed. There is well-established authority to that effect, in particular the decision *In re Tweeds Garages Limited* (1962) 1 Ch 406 followed more recently in *Taylor's Industrial Flooring Ltd v M&H Plant Hire (Manchester)* [1990] BCC 216, the latter case being a decision of the Court of Appeal.

32. I have in the course of argument given some attention to the question as to how long this liability to fund the shortfall will continue to fall upon Pinkleton. It is not relevant for me to come to any final view on that point. Even if Pinkleton were in a position to give a notice to terminate its liability or even if it were in a position through ownership of a share in Brum Estates Limited to bring matters to a head, to bring these arrangements to a conclusion, none of those steps have been taken in the past, none of those steps, therefore, have prevented the coming into existence of the liability which is the subject matter of the statutory demand.
33. In those circumstances I consider it is safer for me not to discuss in any inconclusive way, possibly unhelpfully, the circumstances in which Pinkleton might take action in the future to change the state of its legal liability in these respects.
34. Standing back, I have held that there is no substantial dispute as to the existence of a debt. Dorchester has demonstrated that it is a creditor. It is entitled to petition for the winding up of Pinkleton and in those circumstances I refuse to grant the relief which is sought by Pinkleton. Subject to hearing argument on it, it seems to me the correct course is for me to dismiss the application that has been brought.
