



Neutral Citation Number: [2019] EWHC 327 (Ch)

Case No: CH-2018-000273

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
ON APPEAL FROM DISTRICT JUDGE MATTHEWS IN THE COUNTY COURT AT
PETERBOROUGH
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 21/02/2019

Before :

MR JUSTICE MANN

Between :

(1) SANDRA RENE LYGOE
(2) NICHOLAS LYGOE
(3) LEXOCO LIMITED
- and
STEPHEN JOHN HUNT -

Appellants

Respondent

Mr Andrew Brown (instructed by **Isadore Goldman**) for the **Appellants**
Mr James Pickering (instructed by **Summit Law LLP**) for the **Respondent**

Hearing dates: 12th February 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

1. This is an appeal from a decision of District Judge Matthews given in the County Court at Peterborough on 28 September 2018. In it he refused an application by the second respondent (“Nicholas Lygoe” or “Nicholas”) to strike out claims against him based on dishonesty and allowed the claim by the respondent to this appeal to amend his application notice. In circumstances which will appear, the respondent does not seek to sustain the second of those decisions by the district judge but he renews his application to amend to this court, inviting the court to take a decision de novo.
2. The factual background to this matter is not straightforward. The applicant in the overall proceedings is the trustee in bankruptcy of Jeffrey Peter Lygoe, a former solicitor. The first respondent is his wife, and the second respondent, Nicholas, is his son. The third respondent (“Lexoco”) is a company incorporated by the bankrupt not very long before his bankruptcy. Nicholas was at the material times a director of that company; the bankrupt was not.
3. On 28 February 1997 the bankrupt bought a property at Victoria House, 1 Victoria St, Cambridge CB1 1JP (“Victoria House”). It was bought in his sole name with the assistance of a mortgage. He practised as a solicitor and the Law Society conducted three investigations into him between August 2003 and April 2005. After the first investigation had started, the bankrupt arranged for Victoria House to be transferred from his sole name into the joint names of himself and his wife. That gives rise to the first claim in these proceedings, which is a claim that that transfer was one done with an intention to defraud creditors for the purposes of section 423 of the Insolvency Act 1986.
4. In May 2006 the bankrupt was struck off the roll of solicitors. In 2008 and 2009 he accumulated a couple of County Court judgements and in August 2010 the Law Society obtained a final charging order over Victoria House arising out of unpaid costs from the Solicitors Disciplinary Tribunal.
5. In September 2010 Victoria House was put on the market for sale. A buyer was not found for almost a year and contracts for its sale were exchanged on 23 September 2011 for the sum of £1,250,000. Three days later, on 26 September 2011, Lexoco was incorporated, with its shareholding owned as to 50% by the wife and 50% by Nicholas. The wife was appointed company secretary and Nicholas was its sole director. On 28 September 2011 the bankrupt purported to enter into an agreement with Lexoco under which the bankrupt agreed to lend Lexoco the sum of £100,000 from the proceeds of sale of Victoria House. Completion of the sale of Victoria House took place on 12 October 2011; the net proceeds of sale were £480,806.18,

which were paid into an account in the sole name of Mrs Lygoe despite the fact that the property was in joint names. That is the subject of the second claim in this matter, a claim that the transaction was done with a view to defrauding creditors within section 423, or a transfer at an undervalue. Six days later, on 18 October 2011, Mrs Lygoe transferred £230,000 of those proceeds to Lexoco; it is said that that was done at the bankrupt's request. Some of the money was paid to fund some transactions involving leases of another property in Cambridge, details of which are unnecessary for the purposes of this judgement.

6. On 30 October 2011 Lexoco entered into what purports to be a loan agreement with Maplehorn Ltd, a BVI company, under which Lexoco was to lend Maplehorn a sum of money between £150,000 and £250,000, that loan to be made in receiving a "call demand".
7. On 19 December 2011 the Law Society served a statutory demand on the bankrupt in respect of unpaid costs arising out of one of the Solicitors Disciplinary Tribunal proceedings and, after a failed application to have it set aside, a bankruptcy petition was presented on 28 February 2012. Two days later, Maplehorn served a call demand on Lexoco pursuant to the loan agreement, and subsequently sums totalling £148,000 are said to have been transferred by Lexoco to Maplehorn. A bankruptcy order was made against the bankrupt on 28 May 2012.
8. The discharge of the bankrupt has been postponed on a couple of occasions so that it is now postponed until 2024. A bankruptcy restriction order was made on 17 January 2014 pursuant to a decision of District Judge Underwood. The content of that judgement is relied on as material which sets out part of the trustee's case in the present application.
9. The application made by the trustee in bankruptcy of the bankrupt was issued on 3 October 2017. As drafted it seeks the following:
 1. A declaration that the 2003 transfer of Victoria House was a transaction defrauding creditors pursuant to section 423 of the 1986 Act.
 2. An order that the payment of the entirety of the net proceeds of sale of Victoria House to the wife also amounts to a transaction defrauding creditors pursuant to section 423.
 3. Further or alternatively, a declaration that the payment of £250,806.18 to the wife amounts to a transaction defrauding creditors. (This is that part of the proceeds of sale of Victoria House retained by Mrs Lygoe after the payment of £230,000 to Lexoco).

“4. That the payment to Lexoco Ltd of the sum of £230,000 also amounts to a transaction defrauding creditors (or alternatively a TUV) such that Lexoco ought to be ordered to repay the above sum to the bankruptcy estate (and/or the Second Respondent ought to be ordered to repay that sum on the ground of dishonest assistance) and/or such other relief as the court thinks fit.”

I have set at paragraph 4 verbatim because its precise terms are capable of being relevant to this appeal.

10. In support of the application the trustee provided a witness statement. It sets out the arrangements that I have referred to above, though in greater detail. It also cross-refers several times to the decision of District Judge Underwood on the bankruptcy restraint order proceedings in a manner which makes it quite clear that the trustee in bankruptcy relies on what is said in that judgement as being part of his case.

11. At paragraph 54 of the witness statement the trustee turns to “The Claims”. He outlines them as being the 2003 transfer of Victoria House into joint names and then:

“(2) the subsequent dissipation of the net proceeds of sale of Victoria House under the transaction defrauding creditors provisions in section 423 of the IA 1986 (or alternatively under the TUV provisions contained in section 339 of the IA 1986 and/or on the ground of dishonest assistance)”

12. The witness statement then goes on to consider the various transactions, but I need only deal with those parts which relate to Nicholas Lygoe. Having referred to the payment of £230,000 to Lexoco, the witness statement says:

“66. Further, in that event, it would follow that the sum of £230,000 ought then to be recoverable from Lexoco and the transaction defrauding creditors provisions (or alternatively under the TUV provisions) and/or from the Second Respondent as its sole registered director on the ground of dishonest assistance.”

13. The witness statement then goes on to quote passages from the decision of District Judge Underwood in which he found that “the investment in Lexoco was done with a view of distancing those monies from Mr Lygoe’s creditors...” and “I do find that the whole arrangement of agreement with Lexoco was a sham”... and “The setting up of Lexoco was clearly set up as a vehicle to prevent his creditors from receiving

payment... the arrangements were, in my judgement, to benefit him and his family...”.

14. Then the witness statement goes on:

“67. In short, therefore, if the District Judge’s reasoning and findings are accepted (which I believe they should) it would inevitably follow that the whole series of arrangements set out above where a sham designed with a view to putting assets beyond the reach of the Bankrupt’s creditors and/or prejudicing their interests. In those circumstances, I am advised and believe, the transferred sum of £230,000 ought to be recoverable from Lexoco as the recipient of those funds and/or from the Second Respondent as the person who procured and/or permitted (and thereby dishonestly assisted) the same.”

15. The witness statement ends by inviting the court to find that the payment to Lexoco of the sum of £230,000 amounts to a transaction defrauding creditors (or alternatively a TUV) “such that Lexoco ought to be ordered to repay the above sum to the bankruptcy estate (and/or the Second Respondent ought to be ordered to repay that sum on the ground of dishonest assistance).”
16. I have set out above those passages from the witness statement verbatim because they are the passages which implicate, and indicate the claims against, Nicholas.
17. Before the judge below, Nicholas, represented by Mr Andrew Brown of counsel (who also represented him on this appeal before me) submitted that the pleading of the claim against Nicholas was inadequate, particularly bearing in mind that it involved a pleading of dishonesty. He essentially sought to have it struck out on that basis. In response to that the district judge below held as follows:

“8. These are allegations, and I do not doubt that the passion with which Mr Nicholas Lygoe disputes the allegations, but I am not going to allow his application today to strike at paragraph 4 of the application notice or indeed to give summary judgement in his favour in respect of that paragraph. This is the first hearing of the Trustee in Bankruptcy’s claim and, having considered carefully all of the submissions that had been made to me today, I do consider that it is premature for there to be a summary disposal of these very serious matters. What I’m going to do is to direct that there should be full and

formal pleadings of the claim that the applicant must set out in detailed particulars of claim in its case against the Second Respondent and I would then anticipate the usual directions for the filing of a defence and a reply to the defence.”

18. The first ground of appeal in relation to that finding is that the district judge failed to give adequate reasons for his decision. This ground, in my view, fails. It is true that the district judge did not go into details as to how good or bad the claim was in terms of pleading (or otherwise), but he did not have to in the circumstances of this case. He took the procedural view that the claim was not yet fully formulated and the appropriate course would be to have it properly formulated. Those were his reasons, and it is the validity of those reasons which have to be considered.

19. In my view that is a perfectly tenable and sustainable approach to this matter. It is a familiar course for a trustee in bankruptcy to commence proceedings such as these by an application notice plus a supporting witness statement, and to expect to have to provide particulars of claim in the event that that claim is disputed. The trustee will not necessarily be expected to put forward a full claim in those documents in the event that pleadings are likely, and it would not necessarily be appropriate to treat the initial documentation in such a case as being an exhaustive particularisation of the case (though in some respects the evidence would be likely to be fuller than a pleading would be). The worth of the trustee’s case will not usually be measured purely by that initial documentation, unless the trustee adopts a course which would require that (for example, by applying for a judgment in the absence of a response from the other side). If challenged on the adequacy of the case appearing in those documents it would in many cases be sensible and fair to allow the trustee to elaborate the case, or (in cases involving dishonesty or serious disputes of fact) to direct pleadings.

20. That is what the judge below gave effect to in the present case. He took the view that it would be premature to consider that the trustee had nothing more to say than appeared in the application notice and witness statement, and that the case should be developed more fully. That was a view and course open to him, and in my view a very sensible view and course. I would agree that the dishonesty case was thinly referred to, and I also agree that dishonesty must be clearly alleged with proper particulars. The present documentation arguably does not do that (though I do not decide that) but in any event the course of having some pleadings is the proper way of dealing with the point. Mr Brown made much of the seriousness of the dishonesty allegation, particularly for his client who has a position in the City in which reputation is very important, but that does not mean that the trustee should not be able to develop his case at this stage. This first ground of appeal therefore fails.

21. So far as Mr Brown's attack on the amendment decision is concerned, I have already indicated that the trustee does not seek to defend that decision. The application to amend was (as described in the judgment) an application to amend the application notice to add a claim against Nicholas Lygoe in unlawful means conspiracy in relation to the Maplehorn loan. Mr Brown took the point that that application was one to add a claim outside the limitation period, which the trustee in bankruptcy accepted, and that it should not be allowed in under CPR 17.4. There was argument about that. In paragraph 6 of his judgment the district judge simply announced that he would allow that amendment application, whilst at the same time making it clear that was making no findings and rulings on the limitation point, leaving the parties free to "explore and argue" those points as the litigation continues.
22. Mr Pickering accepts that that was not the correct way of dealing with the point. The limitation-related issues ought to have been dealt with by the district judge in his judgment. If matters stopped there the appeal would be allowed and the matter remitted to the county court to reconsider the point. However, Mr Pickering invited me to deal with the matter myself, as being the most sensible and cost-effective approach. I agree that that is what should happen. There is nothing to be gained from sending the matter back, and since I had all relevant material before me I heard argument on the point.
23. Mr Pickering's application seems to have various objectives, which were sometimes elided in argument. First, it seeks to introduce an unlawful means conspiracy claim in relation to the Maplehorn loan, identified above. He accepts that that is a new claim and he must satisfy the provisions of CPR 17.4 if it is to be introduced. Second, it seeks to make it clear that there is a dishonest assistance in a breach of trust claim in relation to that loan. Mr Pickering says that that claim is already in the case, but insofar as it is not he seeks to amend to introduce it. He does not accept it is a new claim within CPR 17.4, but if and insofar as that is wrong he says he comes within it. Third, he seeks to introduce an unlawful means conspiracy claim in relation to the transfer to Lexoco. Again, I think he accepts that that is a new claim, but he says he satisfies the requirements of CPR 17.4.
24. The form of the amendments that he seems to introduce are as follows. He seeks to introduce the words "and/or unlawful conspiracy" into paragraph 4 of the application notice (set out above) after the words "dishonest assistance". The actual form of amendment placed before me actually deletes the words "dishonest assistance" and also deletes the words "and/or" (which are actually not already there), but I take those matters to be a mistake. It is obvious that Mr Pickering was seeking to add, not take away, a claim, and the dishonest assistance claim in relation to the Lexoco is what Mr Pickering has been trying to defend in the strike-out application.
25. Then Mr Pickering seeks to add a paragraph 4A in the following terms:

“4A [An order] That the payment by Lexoco to Maplehorne Limited of the sum of hundred and £148,000 amounted to a breach of trust in respect of which the Second Respondent dishonestly assisted and/or that payment amounted to an unlawful means conspiracy in respect of which the Second Respondent was a participant and accordingly the Second Respondent is liable to pay the above or such other sum as the court thinks fit.”

26. I will deal first with the question as to whether a dishonest assistance claim in relation to the Maplehorn loan is already pleaded. Mr Pickering accepts that it would require an extended construction of the application notice and the evidence in order to achieve that, but he says that on the proper construction of that material the point is already in play. He maintains it is therefore not a new claim. This is, in my view, a short point. I do not consider that that claim is made already in the action. There is no construction of the application notice by itself which would even begin to raise that possibility since the unamended form of notice contains nothing at all which might be a reference to it. When one turns to the evidence of the trustee, it is true that the loan is referred to, but looking at the way in which the case is put it really reproduces what is claimed in the application notice. The references to the Maplehorn loan occur in the context of an overall view as to the pattern of dishonest behaviour which is alleged in the case. While the claim in relation of the transfer to Lexoco is clearly referred to in terms which make that transfer the subject of the claim, subsequent dealing is not made the subject of a separate dishonest assistance claim. I am therefore against Mr Pickering as to what claims are currently in and outside the scope of the commenced proceedings.
27. That means that the dishonest assistance claim in relation to Maplehorn, and the new conspiracy allegations, are all new claims for the purposes of limitation. They should only be allowed in if the provisions of CPR 17.4 are fulfilled. That rule provides:
- “17.4(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”
28. The question which falls to be decided is therefore the “same facts or substantially the same facts” issue.

29. The first point which falls to be dealt with is the source of the facts which fall to be assessed for these purposes. The application notice itself has what is in effect just a general endorsement, from which one can glean few facts. Mr Pickering took me to *Carr v Formation Group plc* [2018] EWHC 3575 as demonstrating that the court can look at Particulars of Claim in order to “construe” a claim form but the notion of “construing” the application notice in this case does not seem to be the correct one. I think there is a straightforward answer to this point which turns on the express wording of the application notice. Its wording presupposes that there is accompanying material which makes sense of the form. Paragraph 1 refers to “the 2003 transfer of Victoria House” as being a transaction in fraud of creditors; paragraph 2 refers to “the entirety of the net proceeds of sale of Victoria House”; paragraph 3 refers to “the sum of £250,806.18”; paragraph 4 refers to “the payment to Lexoco of the sum of £230,000”. None of those expressions makes sense in the context of the application notice by itself. They presuppose that they make sense when read with something else. That something else is the witness statement which accompanied (and pre-dated) the application notice. The documents have to be read together, and it is from those documents that one finds the facts which underpin the application and from which one can judge whether the new causes of action arise out of the same facts as, or substantially the same facts as, those said to give rise to the claim.
30. Turning to the witness statement, it sets out the facts as outlined above (together with other details which I have not provided). The trustee does not seek to rely on any other facts. The conspiracy claim in relation to the Lexoco payment is not articulated as a conspiracy claim, and the co-conspirators are not identified as such. However, if (which is to be presupposed, as a matter of common sense) the conspirators are Nicholas Lygoe and the bankrupt (perhaps with the first respondent, but that does not matter for these purposes) I consider that facts appear in that witness statement, as part of the basis of the existing claim, which are also the fact, or most of the facts (substantially the same) as underpin the conspiracy claim. The conspiracy claim is another way of looking at the same area of claim. In my view the proposed conspiracy claim in relation to the payment to Lexoco falls within CPR 17.4.
31. A little more analysis is required in relation to the payment to Maplehorn. The proposed claim here is not, as a claim, another way of looking at a claim already made, on the basis of the same facts. There is currently no separate claim relating to the Maplehorn payment. However, when properly viewed the facts said to give rise to the existing claims do include the facts and circumstances of the Maplehorn payment. That payment is said to be part of the facts which give rise to the inference that preceding payments were based on an intention to defraud creditors (or make a payment at an undervalue). The whole package of events (the incorporation of Lexoco, the payment of money to Lexoco, the tenancy transaction and the Maplehorn payment) are presented as an overall package of evidence pointing in the trustee’s favour. That is plain from the way the evidence as a whole is structured, and is particularly apparent from a recitation of the finding of District Judge Underwood in the earlier case that, as a result of the Maplehorn payment, the moneys had fallen into a “black hole”. The Maplehorn payment is not referred to as an interesting after-

event. It is presented as part of a pattern of dishonest behaviour. They are well within the facts which the court will be investigating anyway on the existing claims – see *Lybian Investment Authority v Warwick St (KS) LLP* [2018] EWHC 2877 at para 26.

32. As a result of that, the proposed Maplehorn claims so arise out of the same facts or substantially the same facts as claims already in issue in the proceedings. These claims too, therefore, fall within CPR17.4(2).

33. That deals with the first debate on the amendment application. Mr Brown had a separate but possibly allied point. He said that it was not possible to say that a claim arises out of the same facts as an existing claim if there are not any facts relied on which would justify the pleading. That seems to me to be a point relating more to strike out than amendment. I agree that a court would not allow an amendment which would introduce a claim for which there are inadequately pleaded facts. It would strike out a pleaded claim for the same reason. However, in my view that does not apply to the present documents, for largely the same reasons as those identified above in relation to his strike-out application. In my view, looking at the witness statement and the facts relied on by the trustee in bankruptcy, there are enough facts pleaded to justify a generalised, but sufficiently indicated, pleading of the dishonest assistance and/or conspiracy in relation to Maplehorn to allow the claim to be made. They will be (and should be) properly identified in a pleading (as Mr Pickering accepted) but there is, in my view, enough there at the moment. The background to the transactions, and the circumstances of the transactions, are all set out in sufficient detail that the claims can be identified as proper for present purposes.

34. Once those points are out of the way no further objections to the amendments were advanced, and I have not identified any. I consider and determine that the amendments should be allowed.