Neutral Citation Number: [2020] EWHC 2917 (Ch)

Case No: CR-2019-MAN-000068

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM THE ORDER OF DJ MATHARU DATED 7 JANUARY 2020

Rolls Building,
Fetter Lane,
London, EC4A 1NL
Date: 2 November 2020

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF TOTALBRAND LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

CAGE CONSULTANTS LIMITED

Claimant/ Respondent

-AND-

(1) NAVEED IQBAL
(2) REHANA KAUSAR IQBAL

Defendants/ Applicants

- -

Steven McGarry (instructed on a **Direct Access basis**) for the **Applicants**
The Respondent was not represented

Hearing date: 20 October 2020

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 11.00 a.m. on 2 November 2020.

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MR JUSTICE SNOWDEN

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Introduction

1. On 20 October 2020 I heard a renewed application by Naveed and Rehana Iqbal (the "Applicants") for permission to appeal against a decision of District Judge Matharu made on 7 January 2020 whereby she dismissed an application by the Applicants to dismiss or stay the proceedings against them.

2. The Respondent ("CCL") brings those proceedings as assignee from the liquidator of Totalbrand Limited (the "Company") of various rights of action including statutory rights of action (e.g. for transactions at an undervalue and preferences) conferred upon an office-holder under the Insolvency Act 1986 (the "1986 Act"). The Applicant's application raised a point of principle in relation to the effect of an assignment of such office-holder rights of action pursuant to s. 246ZD of the 1986 Act.

3. In short, Mr. McGarry, who appeared for the Applicants, contended that the power to assign office-holder rights of action under s. 246ZD cannot be exercised in a way that confers the sole entitlement to the proceeds of such rights of action on an assignee. Rather, he submitted, the wording of the sections which create the rights of action must be given overriding effect, so that even after an assignment under s. 246ZD, any order under the relevant sections has to provide for a payment to be made to the assets of the insolvent company for the benefit of its creditors. It follows, said Mr. McGarry, that the company needs to be kept in existence to act as the vehicle to which the court must direct the proceeds of any successful action to be paid. Thus, he argued, in a case like the present where the Company has been dissolved after assignment of the claims by the liquidator, CCL as assignee cannot pursue the claims unless or until the Company is restored to the register of companies.

4. I gave brief reasons for refusing permission to appeal at the conclusion of the hearing before me and indicated that my full reasons would follow in writing. These are those reasons.

Relevant Background

5. The Company entered into creditors voluntary liquidation on 28 July 2016 and was dissolved on 24 September 2019.

6. At some point during the liquidation, the liquidator assigned a number of rights of action to CCL. In addition to certain misfeasance claims which the liquidator might have sought to bring pursuant to s. 212 of the 1986 Act, the assigned rights of action included claims against the Applicants under section 213 (fraudulent trading), 238 (transactions at an undervalue), and 239 (preferences) which were assigned pursuant to the power conferred by s. 246ZD of the 1986 Act.

7. CCL now pursues the following claims:

    a. against the First Applicant, who was a director of the Company, claims in misfeasance and for fraudulent trading pursuant to s. 213 of the 1986 Act; and

b. against the Second Applicant, claims for recovery of payments from the Company that are said to amount to either a transaction at an undervalue or a preference under ss. 238 and 239 of the 1986 Act respectively.

8. On 7 January 2020, CCL's application came before the District Judge for directions and case management. From the recitals to the order she made on that date, it seems that the Applicants made an oral application that the proceedings against them should be dismissed or stayed on the basis outlined in paragraph 3 above. The District Judge dismissed the application in a short *ex tempore* judgment, holding that on its plain wording, s. 246ZD gave an office-holder a power to assign an office-holder's right of action and its proceeds outright; and that was what had happened in this case. The District Judge refused permission to appeal.

Section 246ZD of the 1986 Act

9. Prior to the insertion of s. 246ZD into the 1986 Act, there was a limit to the causes of action that insolvency officer-holders could assign to third parties. In particular, it was thought that although office-holders could assign rights of action which vested in and formed part of the assets of the company (such as the misfeasance claims in the instant case), they could not assign statutory rights of action that were conferred upon the office-holder by virtue of the 1986 Act. These latter claims included claims under ss. 213 (fraudulent trading), 214 (wrongful trading), 238 (transactions at an undervalue) and 239 (preferences).

10. This view followed from the judgment of the Court of Appeal in Re Oasis Merchandising Services Ltd [1998] Ch. 170. In Oasis Merchandising, the company's liquidator had commenced a wrongful trading claim under s. 214 of the 1986 Act against the directors. The company had no assets and the creditors were unwilling to assist in funding the proceedings. The liquidator therefore purported to assign the future proceeds of the proceedings to a litigation funder in return for support in bringing the claim. The principal question for the court was whether the proceeds of the claim were "the company's property" such that the liquidator could dispose of them pursuant to his powers under paragraph 6 of Schedule 4 to the 1986 Act. The Court of Appeal drew a distinction between assets which were the property of the company at the time of the commencement of the liquidation, and assets which only arose after the liquidation of the company and were recoverable only by the liquidator pursuant to his statutory powers. Only the former came within the definition of "the company's property". The Court of Appeal held that a claim under s. 214 of the 1986 Act belonged to the latter category and its proceeds were therefore not capable of assignment pursuant to the power in paragraph 6 of Schedule 4.

11. Section 246ZD of the 1986 Act was inserted into the 1986 Act by s. 118 of the Small Business, Enterprise and Employment Act 2015 (the "2015 Act") and was plainly designed to change this position. Section 246ZD provides as follows:

> "246ZD Power to assign
>
> (1) This section applies in the case of a company where –
>
> (a) the company enters administration, or
> (b) the company goes into liquidation;

> and "the office-holder" means the administrator or the liquidator as the case may be.
>
> (2) The officer-holder may assign a right of action (including the proceeds of an action) arising under any of the following –
>
> (a) section 213 of 246ZA (fraudulent trading);
> (b) section 214 or 246ZB (wrongful trading);
> (c) section 238 (transactions at an undervalue …;
> (d) section 239 (preferences …);
> …"

12. The explanatory notes to the 2015 Act in relation to s. 246ZD read as follows:

> "Section 118: Power for liquidator or administrator to assign causes of action
>
> 712. This section amends the Insolvency Act 1986 to allow a liquidator or administrator ("the officer-holder") to assign causes of action that arise on a company going into liquidation or administration.
>
> 713. The causes of action to which the section relates are actions which already exist within insolvency law … whereby liquidators and administrators can take action on behalf of the body of creditors to recover monies or reverse certain transactions where the directors and others have acted in a way that has caused harm to creditors.
>
> 714. The section allows the office-holder to assign not only the right to bring the action itself but also the proceeds of such an action."

13. The legislative policy behind s. 246ZD is also clear from the Economic Impact Assessment (IA No. BIS INSS007) produced by the Insolvency Service on behalf of the Department for Business Innovation and Skills on 16 April 2014, which accompanied the proposals for what became s. 118 of the 2015 Act (the "EIA"). I was referred to the EIA by the Applicants.

14. The EIA identified that there was a problem that not many claims for fraudulent or wrongful trading, transactions at an undervalue or preferences had been brought against "miscreant directors" between 1986 and 2013. It suggested that this might be due to insufficient funds in the insolvency estate to fund such actions, a reluctance on the part of creditors generally to fund such claims, a high evidential bar in fraudulent trading claims, coupled with a lack of director's assets against which to enforce a successful claim.

15. Two options were considered. The first was to do nothing. The second (preferred) option was described as follows,

> "To introduce a right for administrators to be able to bring claims for fraudulent and wrongful trading and to permit liquidators and administrators the statutory right to sell or assign officeholder claims to

> any third party. Unsecured creditors would benefit from the proceeds of the sale and officeholder claims would be more likely to be pursued. We anticipate that a market in these actions would develop, and increase the prospect of actions being taken against directors. This would occur if [Insolvency Practitioners] prefer the certainty of having up front funds or do not want to take the risk of pursuing funds or fighting a case that might involve litigation and uncertain costs that could be difficult to recover in full."

16. The EIA went on to discuss that preferred option, including the following observations,

> "24. We propose to grant liquidators and administrators and administrators the statutory right to sell or assign any officeholder claims, i.e. those claims which only a liquidator or administrator can bring in their own right, not on behalf of the company. This would enable an officeholder to sell the claim on to an individual creditor, group of creditors, a former director or any third party. Subject to the terms of the assignment, the purchaser could take all the risk and bear all the cost of pursuing the prospective claim, but would stand to gain fully from potential benefits arising from the action.
> ….
>
> 29. The proceeds from any assignment or sale of the action would become assets for the distribution in the insolvency so unsecured creditors should thereby benefit. We anticipate that a market in these actions would develop, and increase the prospect of actions being taken against directors more frequently where there has been misconduct. Once directors realise that the threat of action is more likely, long-term changes to behaviour (i.e. less detrimental conduct) could potentially result.
>
> 30. There may be practical barriers which affect a purchaser's ability to pursue a claim. For example, the purchaser would not have the same access to information (such as the company's records) or the statutory right to make enquiries that a liquidator, for example has. This would limit to some extent the likelihood of claims being pursued, but we will continue to explore ways in which these issues could be overcome."

The Issue

17. Notwithstanding the apparent legislative policy behind s. 246ZD, Mr. McGarry submitted that if s. 246ZD was read in conjunction with the sections which give rise to the office-holder causes of action, there was a fundamental difficulty with the pursuit of such claims in the instant case by CCL after the Company had been dissolved.

18. Mr. McGarry pointed out that under the terms of ss. 213, 238 and 239 the court was only empowered to order a respondent to the application to make a contribution to the assets of the company or to make some other order which would have the effect of restoring the position of the company. He referred, for example, to s. 213(2) which provides:

> "The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in manner above-mentioned are liable to make such contributions (if any) to the company's assets as the court thinks proper."

And he further referred to ss. 238(3) and 239(3) which provide:

> "Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not [entered into that transaction] [given that preference]".

19. Based on the wording of these sections, Mr. McGarry's contention was that even where an office-holder cause of action has been assigned to a third party under s. 246ZD so as to be capable of being pursued by the third party rather than by the office-holder, any order resulting from the proceedings could only be made in favour of the company or to restore the position of the company. Hence, he argued, if the company had ceased to exist, any such claim pursued by an assignee would be incapable of resulting in any order, and ought therefore to be dismissed, or at least stayed until the company had been restored to the register.

20. Alternatively, Mr. McGarry submitted, the intention of s. 246ZD was to benefit, rather than bypass, the creditors of the insolvent company. He submitted that this was achieved in part by providing a mechanism for office-holder claims to be pursued by assignees, but that the policy of benefitting creditors would be defeated unless the assignee was to hold any monies recovered subject to an obligation to pay them into the general assets of the company for distribution to creditors. Hence, he said, unless and until CCL took steps to put itself into a position to do this by applying for the restoration of the Company to the register, it should not be permitted to proceed with the claims.

Analysis

21. I consider, for the following reasons, that the District Judge was right to refuse the Applicants' application, and that Mr. McGarry's contrary argument has no prospect of success on appeal.

22. First, as the District Judge held, Mr. McGarry's argument flies in the face of the plain wording of s. 246ZD(2) itself, which makes clear that it permits the assignment of the right of action "including the proceeds of an action". Although the terms of any individual assignment may doubtless make alternative provision for sharing the proceeds of any claim in an particular case, the statute is in unqualified terms. On its plain wording it envisages an outright assignment of the entire right of action and all proceeds to the assignee.

23. That interpretation would be entirely in accordance with the comments in paragraph 24 of the EIA, namely

> "Subject to the terms of the assignment, the purchaser could take all the risk and bear all the cost of pursuing the prospective claim, but would stand to gain fully from potential benefits arising from the action."
>
> (my emphasis)

24. Secondly, it would not be the case that creditors would be deprived of any benefit if an office-holder assigned the entire right of action and all of the proceeds to a third party. The assignment would doubtless be for a price, the sale of the rights of action and all of proceeds would logically command the highest price, and hence (subject to the costs of the insolvency) the creditors would benefit from the assets of the insolvent company being increased to that extent. That is consistent with the point made in paragraph 29 of the EIA,

> "The proceeds from any assignment or sale of the action would become assets for the distribution in the insolvency so unsecured creditors should thereby benefit."

25. Thirdly, it is already obvious that s. 246ZD requires a purposive and non-literal interpretation to be given to the sections creating the office-holder rights of action. Those sections only refer to claims being brought by the relevant office-holder. So, for example, ss. 238 and 239 each expressly provide that it is the relevant office-holder who is given the right to apply to the court. But if the power to assign a right of action in section 246ZD is to be given any practical meaning whatever, those references in ss. 238 and 239 must be interpreted purposively by notionally adding words to the effect that the right to apply to the court is given to the office-holder "or his assignee following an assignment of the right of action pursuant to s. 246ZD". But if that deviation from the literal meaning of the sections creating the rights of action is required, there is no reason why the provisions for relief in the same sections should not also be read purposively so as to permit payments to be ordered to be made to the assignee rather than to the company or office-holder.

26. Fourthly, Mr. McGarry's interpretation would deprive s. 246ZD of its practical utility for office-holders and thereby frustrate the clear legislative purpose. If Mr. McGarry were right and an assignee could only pursue a claim for the purposes of obtaining an order that the proceeds should be paid to the company, the assignee would presumably have to bear all the costs of pursuing the claim, it would not stand to obtain any direct benefit but would be dependent upon receiving a distribution of part of the proceeds in some way via the insolvency, and it would be at risk of a full adverse costs order if the claim were to fail. It is unlikely that such a prospect would appeal to many prospective purchasers of claims. Thus the changes made in 2015 would not achieve the purpose of providing an alternative mechanism by which creditors could benefit from the proceeds of sale of such claims, and the number of claims brought against miscreant directors (so as to bring about long-term improvements in the behaviour of directors generally) would not be increased.

27. Further, after the right of action was assigned by a liquidator or administrator, the company would have to be kept artificially alive and the insolvency proceeding kept open whilst the claim was on foot so as to provide a vehicle and mechanism for receipt and distribution to creditors of any proceeds of the action pursued by the assignee. That would be a speculative exercise, would likely lead to a delay in bringing the insolvency to a conclusion, and would result in further costs being incurred to the detriment of creditors. I see no reason to attribute such an impractical and unlikely intention to Parliament.

Disposal

28. For these reasons, I refused permission to appeal. The District Judge was plainly right and the claims by CCL against the Applicants ought to proceed.