Neutral Citation Number: [2019] EWHC 2697 (Ch)

Case No: CR-2012-007914

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

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

Date: 11 October 2019

Before :

Mr Justice Nugee

- -

Between :

Geoffrey Lambert Carton-Kelly (As Additional Liquidator Of Comet Group Limited (In Liquidation))	**Claimant**
- and -	
Hailey Acquisitions Limited	**Respondent**

- -
- -

Mr Tiran Nersessian (instructed by **Jones Day**) for the **Claimant**
Adam Al-Attar (instructed by **Akin Gump**) for the **Respondent**

Hearing dates: 11th October 2019

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DRAFT JUDGMENT

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Mr Justice Nugee Friday, 11th October 2019

(3.39 pm)

Judgment by MR JUSTICE NUGEE

1. I have had very detailed and very cogent submissions from both sides, and I cannot possibly, at this time on a Friday afternoon in the Applications Court, do justice to all the submissions, but I will preface this judgment, unpolished and ex tempore as it is, with saying that I have listened with great interest and care to what has been said on both sides, and the fact that I do not reference all the submissions that were made does not mean I have not sought to take them into account.
2. I am not going to recite the background, which is well known to the parties. I will go straight to the issues.
3. The way in which the application has been advanced on behalf of the applicant by Mr Nersessian is to draw an analogy with Beddoes proceedings, and it is implicit in that, indeed explicit, that one of the things that the applicant liquidator will need to put before the court is an honest, "warts and all," assessment of the strengths and weaknesses of the proposed action, the best vehicle for that being counsel's advice on the merits in the form of a merits opinion, which is of course privileged, and that therefore, that being what should be put before the court, the practice which is well-established in relation to Beddoes proceedings and has been for very many years should be followed by analogy.
4. On behalf of the respondents, Mr Al-Attar has said that the analogy is not a true one because the real question for the court on the application under Rule 6.48 of the Insolvency Rules is not whether the claim is a good one or not, or is a claim worth pursuing or not, but is whether there is other funding available such that the real question is whether the claim will be stifled unless recourse can be had to the floating charge assets.
5. The difficulty I am faced with is that there is therefore a fairly fundamental difference between the parties as to what the exercise is that the judge hearing the 6.48 application should he or she

be embarked on. Should he or she be looking primarily at whether the case would be stifled, by analogy, as Mr Al-Attar says, with a claim for security for costs; or should he, as Mr Nersessian says, be weighing up the justice of the case by having regard, among other things, to a close assessment of the merits of the underlying claim?

6. But neither counsel, and they are agreed on this, has asked me to resolve that question, that being one of the questions which the parties will invite the judge hearing the 6.48 application to resolve.

7. But, as I put to Mr Al-Attar, it does seem to me that much of the respective arguments that I have listened to has been driven or at any rate heavily influenced by the perception of what is the exercise on which the judge is embarked. If Mr Nersessian is right, and it is a significant part of that judge's assessment of the justice of a case to have regard to the merits, then I think the analogy with the Beddoes procedure would be, not an exact one, but a relatively close one.

8. In each case, a court is being asked by a person with no personal interest in the outcome of litigation to sanction the bringing of litigation at the expense of somebody else. In the Beddoes case, at the expense of the beneficiaries; in the instant case, at the expense of the specified creditor, in this case the floating charge holder. If it is a relevant consideration on that application for the judge to have close regard to the merits and demerits, the strengths and weaknesses, the good points and the warts of the underlying claim, then it necessarily follows that it is the duty of the office holder, (liquidator in this case, trustee or executor in the case of Beddoes applications), not just to submit that he has a good case, but to disclose in a completely candid and frank way, and in the way described in the authorities, the pros and cons of taking action.

9. If that is what he should be doing, it seems to me to be inevitable that he should not be disclosing that to the other side for all the reasons given in the Beddoes cases, where the practice, (not only in my own experience but, judging from Re Moritz [1960] Ch 251, a practice

that was already an old one in 1959) is to not show the prospective defendant that candid analysis of the merits and therefore not permit that prospective defendant to be present when the merits are candidly debated between the office holder and the court. That is the process described in Re Evans [1986] 1 WLR 101 as an informal domestic application.

10. Suppose, however, that Mr Nersessian is wrong and Mr Al-Attar is right, and that the real task of the judge hearing the application is not to weigh nicely the merits, but to look closely at the funding opportunities available to the applicant with a view to forming a decision whether the claim (which Mr Al-Attar says he will accept has sufficient merit in it to reach the stage of an arguable case and cannot at this stage, before it has been pleaded, be demonstrated to be hopeless and without foundation) is to be funded out of his assets, at his expense, or is to be funded in some other way. And, as he would have it, that the applicant should only succeed, that it should only be found to be just for his assets to be resorted to funding a claim against him, in circumstances where the office holder, the liquidator, has demonstrated convincingly that no other course is possible.
11. If that is the correct approach of the court hearing the 6.48 application, it can be seen that there is no need, indeed no place, for putting before the court a detailed analysis of the pros and cons of the action.
12. The difficulty that I have is that the parties being agreed that I should not resolve which approach is right, it seems to me to make it very difficult to resolve the appropriate approach on this application.
13. I have not lost sight of the fact that Mr Nersessian and Mr Al-Attar are agreed that ultimately what is in issue before me is a question of construction of the Insolvency Rules, specifically Rule 6.48(6), and that Mr Al-Attar's primary submissions, based on jurisdiction, are that there is nothing in the rules which permits the procedure which is sought to be adopted, to be adopted having regard to the general principles exemplified in Al-Rawi v Security Service [2011] UKSC

34 under which it is established at Supreme Court level that the common law does not permit of an ordinary claim in ordinary litigation being tried with a closed material procedure without statutory authority.

14. But it seems to me that Mr Nersessian is right that Al-Rawi cannot provide an answer to the question I am faced with, because Al-Rawi makes it clear, as I was shown by reference to the judgment of the court in the Court of Appeal given by Lord Neuberger, and to the judgment of Lord Dyson in the Supreme Court, that there are exceptions for applications which are not simple claims for damages of an ordinary civil litigation nature. It is not necessary for me to refer to the particular paragraphs to which I was referred, but Mr Nersessian showed me that both the Court of Appeal and the Supreme Court accepted that in some types of case exceptions to the general rule applied.

15. Whether they apply in this case depends largely on how one characterises the exercise that the judge is embarked on. Mr Al-Attar would have it that this is a simple entirely adversarial process in which one party is seeking to use another party's assets for litigation, whereas Mr Nersessian would have it that this is a case which involves a public interest and a triangulation of interests, and therefore falls outside the strictures of Al-Rawi.

16. What I propose to do in the circumstances is going to sound as if I am ducking the question in a way which is unsatisfactory, but I have decided that it is in fact the most sensible way forward, and that is this. I will permit Mr Nersessian to file evidence exhibiting confidential material of the type that he wishes. That is an opinion on the merits and any other matters which he claims to be privileged, it again being common ground between the parties that neither side is asking me to resolve today what is or is not privileged, and it being perfectly apparent that there is or may be a significant dispute between the parties as to the extent to which communications with potential or actual funders are or may be privileged but which I am not to resolve today. And I

will permit him to file that evidence with confidential exhibits on terms that it is not at this stage to be shown to the respondents.

17. But I will direct that although it should be filed with the court, it should be in an envelope marked "Not to be opened save with the authority of the judge hearing the 6.48 application", and I will leave it to the parties to address the judge hearing that application as to the approach that the judge should adopt, with the expectation that if the judge accepts Mr Al-Attar's submissions that what is really in issue is the availability of funding and the merits do not really come into it, the court will not think it appropriate to have regard to the merits of the underlying action in the way that the opinion on merits would disclose, and in those circumstances the confidential material, I expect, would not be looked at.

18. But if Mr Nersessian persuades the judge hearing that application that what he or she should have in mind is the public interest in bringing delinquent directors and their associates to book on behalf of the unsecured creditors of this insolvent company, and that for that purpose the court ought to have a look at the opinion on the merits and the like, then I anticipate that that judge will permit Mr Nersessian to put that material before him and to proceed as if it were a Beddoes application.

19. So far as the question of statutory construction is concerned, I prefer the submissions of Mr Nersessian. The rule provides that the respondent is to attend the hearing, save where the court orders otherwise. That does seem to me, as a matter of ordinary construction, to be amply wide enough to permit the court to order otherwise in the sense of attending part of the hearing and not another part of the hearing. But whether the court thinks it appropriate to hear anything in the absence of the respondent will, I think, be very heavily influenced, if not dictated, by the court's understanding of what the exercise is that it is engaged upon.

20. I think I have probably said enough to make it clear what my view on the main application is. The cross application largely is the counterpart of that. There is one element of the cross

application which is to direct the filing of evidence, updating evidence, by the liquidator. My understanding is that although Mr Nersessian resists being ordered as to what evidence to provide, he has accepted that any further evidence which the liquidator files shall be disclosed in the normal way to the respondents, save insofar as it consists of privileged material, and in those circumstances I agree with the submission that it is not for the court to dictate what evidence an applicant chooses to lead, with the warning (which does not need to be spelt out) that if the court considers that the applicant cannot succeed without certain evidence, and the evidence has not been filed, the applicant will fail.

21. I think that is probably sufficient to deal with the applications but I will hear from counsel if there are any points which I have not ruled on that need ruling on. As I have said, I am very conscious that I have not gone through the cases in detail or dealt in any detail with all the submissions that I have heard, but I hope that this short judgment is sufficient to explain why I have adopted the course I have.