Neutral Citation Number: [2019] EWHC 3287 (Ch)

Case No: CH-2019-000192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

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

Date: 04/12/2019

Before:

MR JUSTICE ROTH

- -

Between:

KAREN MULVILLE	**Respondent**
- and -	
JONATHAN SANDELSON	**Appellant**

- -
- -

Jeremy Goldring QC (instructed by **Harbottle & Lewis LLP**) for the **Respondent**
Peter Shaw QC (instructed by **Memery Crystal LLP**) for the **Appellant**

Hearing date: 15 November 2019

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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 ROTH

MR JUSTICE ROTH:

Introduction

1. This is an appeal from the order of Chief Insolvency and Companies Court Judge Briggs refusing to strike out a bankruptcy petition issued by the Respondent, Ms Karen Mulville ("KM"), against the Appellant, Mr Jonathan Sandelson ("JS"). The appeal is brought with permission granted by Fancourt J.

2. The financial obligation (to use a neutral term) which gave rise to the petition derives from an agreement dated 10 January 2019 ("the Agreement") between KM and JS along with another party Mr David Meagher (JS and Mr Meagher being referred to as "the Other Parties"). Under the Agreement, JS has an obligation to pay KM the sum of £1.25 million. It is not in dispute that no part of that sum has been paid.

3. Pursuant to section 267(2)(b) of the Insolvency Act 1986, a debt can only be the subject of a bankruptcy petition if it is for a liquidated sum. Accordingly, it is only if this financial obligation under the Agreement gives rise to a liability on the part of JS in debt as opposed to damages for breach that a bankruptcy petition can properly be brought. That in turn depends on whether the financial obligation gives rise to what is generally termed an independent or unqualified obligation under the Agreement. The judge below held that it did give rise to an independent obligation and JS accepts that if that is correct, this appeal must fail. Equally, KM very properly accepts that if it gives rise to a dependent or qualified obligation, then the bankruptcy petition cannot stand and the order below must be set aside.

4. The terms "dependent" and "independent" obligations or promises are explained in *Chitty on Contracts* (33rd edn), Vol I, at para 24-036:

> "Promises are said to be independent when the obligation of one party is absolute and not conditional upon the performance by the other on his part of the bargain. They are said to be dependent when the obligation of one party depends on the performance, or the readiness and willingness to perform, of the other."

Further, in *Tito v Waddell (No.2)* [1977] Ch 106 at 297, Sir Robert Megarry V-C explained the position as follows:

> "If an instrument grants rights and also imposes obligations, the court must ascertain whether upon the true construction of the instrument it has granted merely qualified or conditional rights, the qualification or condition being the due observance of the obligations, or whether it has granted unqualified rights and imposed independent obligations. In construing the instrument, the more closely the obligations are linked to the rights, the easier it will be to construe the instrument as granting merely qualified rights. The question always must be one of the intention of the parties as gathered from the instrument as a whole."

5. Both sides agree that this appeal accordingly depends upon the proper construction of the Agreement. Neither side sought to rely on any surrounding circumstances outside

the terms of the Agreement itself as an aid to construction. Although the issue raised is a narrow point, that does not in itself make it a simple point. The appeal was ably argued by Mr Peter Shaw QC for JS and Mr Jeremy Goldring QC for KM.

The Agreement

6. The Agreement is made in the form of a deed headed "Settlement Deed". The background and context emerge from the recitals:

> "(A) KM and JS agreed to collaborate in the development of a luxury care home business. The 'Auriens' brand was established and used for this purpose."
>
> (B) In very broad terms: KM provided finance for the venture and her focus was in developing the branding and the care business itself; JS also provided finance for the venture and his and DM's focus was on sourcing suitable sites for the development of care home facilities.
>
> (C) The broad agreement between KM and JS was that, as 'founders' of the venture, they were to have equal financial interests in it, equal equity stakes in the relevant corporate entities through which it was to be run, and to draw equal financial benefit from it. This broad agreement and further detail was captured in a series of agreements and draft agreements between the parties and their Related Parties and the Leopard companies (including shareholder agreements) (the **Agreements**)
>
> (D) A dispute has arisen as to whether in fact KM has received the equal treatment agreed and regarding certain other specific matters, including regarding certain payments made to JS and companies connected to him (without equivalent payments having been made to KM) and as to whether certain projects should have been conducted within the Auriens corporate umbrella or not (the **Dispute**).
>
> (E) The parties have agreed to settle the Dispute without admitting any fault or liability on the part of any Party, and on terms set out in this Deed."

7. Thus, the Agreement sets out the terms of a settlement of a dispute regarding KM's rights under what was in effect a joint venture with JS.

8. Operative clause 2 is at the heart of the issue. Clause 2.1 states:

> "JS will pay to KM the sum of £1,250,000 (the **Settlement Sum**) by no later than 31 January 2019 (without any set-off, deduction, counterclaim, reduction or diminution of any kind or nature)."

9. Clause 2.2 states that time for payment of the Settlement Sum shall be of the essence and provides for payment to be made by bank transfer to a specified account of which KM was one of the two account holders (and the other appears to be her husband).

10. Clauses 2.3-2.4 provide as follows:

> "2.3 Without prejudice to Clause 2.2, if JS fails to make, or procure, payment of the Settlement Sum, or any part of it, to KM by the date specified above, then he shall be liable to pay interest to KM on the overdue amount at the rate of 4% per annum above the base rate of Barclays Bank Plc from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. JS shall pay the interest together with the overdue amount. This provision shall survive any termination of this Deed (unless expressly agreed otherwise in writing).
>
> 2.4 In the event that at any time prior to 31 January 2019 JS is unable to pay his debts as they fall due, is the subject of a bankruptcy petition, is declared bankrupt, enters into any arrangement with creditors or is otherwise subject to any insolvency procedure or process, the Settlement Sum shall become due and payable to KM immediately and in full."

11. Clause 3 is headed "Termination" and provides, insofar as material:

> "3.1 The parties hereby agree that:
>
> 3.1.1 KM shall be released from all obligations (including future and contingent obligations, whether under the Agreements or otherwise) to the Other Parties (as applicable) from the date set out at the beginning of this Deed;
>
> 3.1.2 The Other Parties (as applicable) shall be released from their obligations (including any future and contingent obligations, whether under the Agreement or otherwise) to KM from the date of receipt by KM of the entire Settlement Sum";…

12. Clause 4 is headed "Release" and it is appropriate to set out sub-clauses 4.1 and 4.2 in full:

> "4.1 This Deed is entered into in full and final settlement of the Dispute, and:
>
> 4.1.1 Subject to and with effect from the date of KM's receipt of the entire Settlement Sum, KM releases and forever discharges (and shall procure that her Related Parties release and forever discharge) all and any actual or potential causes of action, claims, rights, liens, debts, demands and set-offs, whether in this jurisdiction or any other, whether or not currently known or unknown to any of the Parties or to the law, whether in law or

equity and of whatsoever nature, that she, her Related Parties or any of them ever had, may have or hereafter can, shall or may have against the Other Parties and/or their Related Parties, or any of them, which arise out of, or are connected with:

(a) The Dispute;

(b) The Auriens Business and the Companies (and (as applicable) the Other Parties' performance of their roles as directors or as shareholders of the Companies); and/or

(c) The Agreements

save that the above shall not include any causes of action, claims, rights, liens, debts, demands or set-offs which arise out of any of the provisions of this Deed.

(individually and together, the **KM Released Claims**)

4.1.2 The Other Parties hereby release and forever discharge (and shall procure that their Related Parties release and forever discharge) all and any actual or potential causes of action, claims, rights, liens, debts, demands and set-offs, whether in this jurisdiction or any other, whether or not currently known or unknown to any of the Parties or to the law, whether in law or equity and of whatsoever nature, that they, their Related Parties or any of them ever had, may have or hereafter can, shall or may have against KM and/or her Related Parties, or any of them, which arise out of, or are connected with:

(a) The Dispute;

(b) The Auriens Business and the Companies (and (as applicable) the Other Parties' performance of their roles as directors or as shareholders of the Companies); and/or

(c) The Agreements

save that the above shall not include any causes of action, claims, rights, liens, debts, demands or set-offs which arise out of any of the provisions of this Deed.

(individually and together, the **OP Released Claims**)

4.2 Subject to her receipt of the entire Settlement Sum, KM agrees, and shall procure that her Related Parties agree, not to sue, commence, prosecute or cause to be commenced or prosecuted or assist or voluntarily aid in any way a third party to sue, commence or prosecute any action, claim, suit, demand or other proceeding of any nature in any jurisdiction against the Other Parties or the Companies or any of their Related Parties, or any of them, in connection with the KM Released Claims save

> for the purposes of exercising or enforcing her rights and remedies under, pursuant to or arising from the terms of this Deed."

13. The effect of clauses 4.1.1 and 4.2 is effectively emphasised by clause 4.5:

> "4.5 For the avoidance of doubt, the release and waiver of the KM Released Claims contained in Clause 4.1.1 above and the agreement not to pursue such claims contained in Clause 4.2 are conditional upon KM's receipt of the entire Settlement Sum. In the event JS fails to make payment of the entire Settlement Sum in accordance with Clause 2.1, the release and waiver of the KM Released Claims provided for at Clause 4.1.1 shall not come into effect, and KM (and her Related Parties) shall be at liberty to pursue the KM Released Claims."

14. Finally, it is necessary to set out clause 6, on which Mr Shaw placed considerable reliance:

> "6. KM DIRECTORSHIPS & SHAREHOLDINGS
>
> 6.1 Within 5 Business Days of receipt by KM of the entire Settlement Sum KM shall cause to be delivered to the board of directors of each of the Companies a written resignation as director of the relevant Company with immediate effect…
>
> 6.2 In connection with the passing of the Special Resolutions, a separate agreement or agreements in respect of the release of claims as between JS and the Companies and/or the Leopard Companies are to be entered into by those parties.
>
> 6.3 Subject to the passing of the Special Resolutions (of which passing JS agrees to notify KM) and KM having received the entire Settlement Sum, KM shall, within 5 Business Days of notification by JS deliver to JS duly executed stock transfer forms for the transfer of the Shares to such party as JS shall direct with the share certificates (if available) for the Shares.
>
> …
>
> 6.5 Subject to Clause 6.6, in keeping with the forgoing settlement terms, KM waives and foregoes any rights or claims of whatever nature attaching to the Shares (including without limitation any right to receive dividends) and agrees that she shall not be entitled to exercise any such rights or bring any such claims pending the transfer of the Shares pursuant to the mechanism set out at Clause 6.3
>
> 6.6 KM:...
>
> …

> 6.6.2 subject to her receipt of the entire Settlement Sum in accordance with Clause 2.1.1, assigns to JS absolutely all rights, title, interest and benefit as she may have to recover and receive from any of the Companies and/or the Leopard Companies all sums of money (including without limitation the repayment of loans) and/or property and/or benefits under the Loan Agreements; such assignment taking effect immediately following receipt by KM of the entire Settlement Sum in accordance with Clause 2.1.1

15. Among the definitions in clause 1.1, the "Companies" are defined as meaning five specified companies, including two of the companies which operated the Auriens Business and a company called K&J Brompton Ltd ("K&J Brompton"). The "Leopard Companies" are separately defined as four other companies but that is not material for present purposes. "Loan Agreements" are defined to mean the loan agreements entered into between KM and two of the companies which operated the Auriens Business. "Special Resolutions" are defined as meaning a special resolution of the shareholders of two of the companies conducting the Auriens Business, disapplying pre-emption rights in relation to the specified transfer of shares in those companies from KM to JS, and the unanimous consent of the shareholders of K&J Brompton for the specified transfer of shares in that company by KM to JS, in accordance with that company's articles of association.

Arguments of the parties

16. Mr Shaw submitted that the Agreement imposed four distinct obligations on KM:

    (a) the release of any claims or demands which she may have against the Other Parties: cl 4.1.1;

    (b) the assignment of any benefits or sums she was entitled to receive under the Loan Agreements: cl 6.6.2;

    (c) her resignation as director of each of the Companies: cl 6.1; and

    (d) the transfer of her shares: cl 6.3.

17. The first two of these obligations are performed automatically under the terms of the Agreement upon the receipt by KM of the Settlement Sum. Obligations (c) and (d) require certain action on her part. Payment of £1.25 million was the primary consideration from JS in return for those four obligations. Accordingly, it was not an unqualified promise by JS but was dependent upon the promises and obligations of KM. There was no indication in the Agreement as to what each of the four obligations may be worth and it could not be said that the £1.25 million related only to obligations (a) and (b). Mr Shaw submitted that it would be unprincipled for KM to be entitled to sue for payment of the full Settlement Sum in debt while her obligations were unperformed and, particularly, when obligations (c) and (d) might possibly not be performed.

18. Mr Shaw relied strongly on the Court of Appeal decision in *Doherty v Fannigan Holdings Ltd* [2018] EWCA Civ 1615. That case concerned a statutory demand served on Mr Doherty for payment of £2 million due under a share sale agreement as the price

for the transfer by the respondent ("FHL") of shares in a particular company. The question there, as here, was whether that breach resulted in Mr Doherty incurring a liability in debt for a liquidated sum, such that FHL was entitled to serve a statutory demand. In his judgment (with which the other two members of the court agreed), Sir Colin Rimer said:

> "[31] The only question is whether Mr Doherty's obligation to pay the £2m purchase money and FHL's obligation to transfer the shares to him in exchange were dependent or independent obligations. If they were dependent obligations, FHL is not entitled to the payment of the price except against its transfer of the shares. If they were independent obligations, I would agree that Mr Doherty's failure to pay the £2m on 1 July 2015 exposed him to an immediately enforceable claim in debt for £2m.
>
> [32] The Registrar held that they were dependent obligations, although he did not use that term in describing their nature. The judge preferred the view that they were independent obligations, although he too did not so describe them. What counted in his view was that the agreement showed that Mr Doherty had to pay the £2m *before* FHL had to transfer the shares. It follows from the judge's view that, had it chosen to do so, FHL could have sued Mr Doherty to judgment for £2m and then sought to enforce the judgment. If the maximum to which it was able to enforce it was less than £2m (say only £1m), FHL would presumably claim to be entitled to keep both the £1m and the shares. Many might view such an outcome as surprising.
>
> [33] I consider, with respect, that the judge was wrong to regard the parties' obligations as independent. I regard it as clear from the terms of the agreement that their respective obligations of payment and delivery were intended to be dependent. Their intention was that completion of the sale and purchase of the Tranche E shares was to take place on the same day and at the same time; and that the making by Mr Doherty of his payment was dependent upon his receiving the transfer documents in exchange, just as the performance of FHL's obligation to transfer the documents was dependent upon receiving the price. That, in my judgment, is how the reasonable person would interpret the parties' obligations under the agreement."

19. Having held that the parties' respective obligations in relation to the shares were dependent obligations, Sir Colin Rimer concluded:

> "[43] It follows that, whilst Mr Doherty breached the contract by failing to make the £2m payment of the price, he did not thereupon become a debtor for the price. FHL could sue him for specific performance or damages …What, however, it could not do was to sue him for the price or serve a statutory demand."

20. Mr Shaw submitted that *Doherty* shows that the order in which the obligations are to be performed is irrelevant. The relevant question is: what is it that KM is being paid for? The answer is that she was being paid for four distinct obligations, and some of them were not automatic but required active steps to be taken (i.e., the passing of the Special Resolutions) which might take some time. Applying the dictum in *Tito v Waddell*, the performance by KM of those obligations was therefore linked to her right to receive the payment and the Agreement should be interpreted as giving her only a qualified right, and thus imposing a dependent obligation. Moreover, as in *Doherty*, it would be surprising if KM could retain her interest in the shares if she received only part payment of the Settlement Sum.

21. Mr Goldring, by contrast, submitted that it was clear from the express terms of the Agreement that following 31 January 2019, JS was to become a debtor for the Settlement Sum. The terms of cl 2.1 could not be clearer. When proper regard is paid to the words in brackets, the clause makes it plain that from the specified date JS owes a debt in that sum to KM and that this was an unconditional obligation. The additional provisions in cls 2.2-2.4 confirm that there is no qualification or condition of any kind to which the obligation is subject.

22. *Doherty* was a contract specifically for the sale of shares whereas here the contract was a settlement argument whereby upon payment of the Settlement Sum KM automatically gives up any claims against JS. The other provisions in the Agreement were, as Judge Briggs held, the steps necessary to disentangle KM from the joint venture. Moreover, as regards the transfer of the Shares pursuant to clause 6, that can take place considerably later; there was no time period for the passing of the Special Resolution specified under cl 6.3.

Discussion

23. Guidance as to the approach to contractual construction has been given by the Supreme Court in a number of recent cases. In particular, in *Arnold v Britton* [2015] UKSC 36 Lord Neuberger set out general principles for construction in his judgment (with which Lords Sumption and Hughes agreed) at [15]-[23]. That case concerned the construction of a lease, but the principles are clearly of general application. Lord Neuberger said that the meaning of the relevant clause:

> "… has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intention."

It is unnecessary in this judgment to quote of the further factors that Lord Neuberger emphasised, save to note that at [20] he said:

> "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed".

24. To that I would add the further observations of Lord Hodge, giving the judgment of the Supreme Court in *Barnardo's v Buckinghamshire* [2018] UKSC 55*,* at [13]:

> "In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument."

He proceeded to hold that its relevant that the instrument is a formal legal document prepared by specialist legal draftsmen.

25. The Agreement here has clearly been professionally drafted and indeed includes an "entire agreement" clause: cl.8. It is trite to observe that, save where it is standard form, every contract is different and falls to be interpreted on its own terms.

26. The starting point is the express wording of the payment obligation in cl 2.1, which for convenience I repeat:

> "JS will pay to KM the sum of £1,250,000 (the **Settlement Sum**) by no later than 31 January 2019 (without any set-off, deduction, counterclaim, reduction or diminution of any kind or nature)."

The wording in brackets is clearly deliberate and, in my judgment, significant. It is not primarily wording one would expect if there was an intention to create a conditional obligation. Moreover, the description of the payment as a "Settlement Sum" indicates that it is not a consideration for the Shares or for assignment of the loans but for the settlement of the Dispute.

27. Looking at the Agreement as a whole, it clearly provides for the payment by JS to be made first and no steps are required of KM to give rise to that obligation. The requirement to pay is expressed as a discrete obligation which has to be fulfilled within 21 days of the making of the Agreement.

28. Although Mr Shaw suggested that the judge below based his conclusion largely on the timing of the share transfer arrangement under clause 6, I do not think that does justice to the judge's careful reasoning and, in any event, it indeed may reflect the way the arguments before him were addressed. Since Mr Shaw on appeal also relied on the share transfer provisions, I think the timing point is significant. In *Doherty,* Sir Colin Rimer emphasised that the intention under that agreement was that the sale and purchase of the relevant shares was to take place on the same day. Sir Colin Rimer stated at [36]:

> "I regard as irresistible the inference that the intention of clause 5.1 is that there is to be an immediate delivery of such documents upon receipt of the price and that the parties' objective was to achieve what would in practice be a simultaneous exchange… No purchaser of the shares is going to part with £2m to the vendor except against the receipt of the share transfer documents, any more than the vendor is going to part with the documents except against the receipt of the £2m."

That is in sharp contrast to the interval to which Mr Goldring referred in the present case between the time for payment and the transfer of the Shares under cl 6.

29. Moreover, the circumstances of the agreement in *Doherty* were fundamentally different, as Judge Briggs rightly emphasised. That was a pure share transfer agreement. Here, the Agreement is a settlement agreement. That emerges from its title ("Settlement Deed") and its background and purpose as set out in recitals (C), (D) and (E).

30. I therefore do not regard it as surprising in this case if KM could retain her shares in the event that the full settlement amount was not paid. On the contrary, I accept the submission of Mr Goldring that this was essentially an ancillary provision. It is only if KM received the specified compensation for giving up her claims that she would withdraw all involvement with the Companies. If she was not paid in full, it might be expected that she could retain her involvement.

31. The constant refrain in the wording of KM's obligations under the Agreement is that they are "subject to" KM's receipt of the entire Settlement Sum. In my judgment, cl 2.1 creates a prior and unqualified obligation on JS to pay the £1.25 million. Accordingly, in agreement with the judge below, I find that it is an independent obligation and this appeal is therefore dismissed.