Case No: CR-2020-MAN-001022
Neutral Citation Number: [2021] EWHC 1952 (Ch)

IN THE HIGH COURT OF JUSTICE AT MANCHESTER
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES (Companies) (ChD)

Manchester Civil Justice Centre (Civil and Family Courts)
1 Bridge Street West
Manchester
M60 9DJ

BEFORE:

HIS HONOUR JUDGE STEPHEN DAVIES

BETWEEN:

NETANEL GALER	**APPLICANT**
- and -	
DAVID EMANUEL MERTON MOND ADMINISTRATOR OF SFPL LIMITED	**(1) RESPONDENT**
BRIGHTER ENTERPRISES LIMITED	**(2) RESPONDENT**

Legal Representation
Mr Steven McGarry (Counsel) on behalf of the Applicant
Mr Duncan Hedar (Counsel) on behalf of the First Respondent
Mr John Waiting (Counsel) on behalf of the Second Respondent

Other Parties Present and their status
None known

Judgment

Judgment date: 15 January 2021
(Start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

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His Honour Judge Stephen Davies:

1. I now give judgment on the first application which is before the Court, which is an application by Mr Netanel Galer, who is the sole director and sole shareholder in the company the subject of this application, for an order declaring invalid the appointment of Mr David Mond as administrator of that company. The application was made on 22 December 2020 and was supported by the first witness statement of Mr Galer, made on the previous day.

2. It is opposed by the company which contends to be the relevant holder of the relevant floating charge, pursuant to which the appointment was made out of court under paragraph 14 of schedule B1 to the Insolvency Act, that is to say, Brighter Enterprises Limited, or BEL for short. Mr Mond, as the administrator, properly takes no active part in dealing with the question of the validity of his appointment save, through his counsel, Mr Hedar, to make some observations on certain grounds also argued by Mr Galer in relation to the achievement of the statutory purpose, his independence, and questions of discretion.

3. I have heard principally from counsel for Mr Galer, Mr McGarry, and counsel for BEL, Mr Waiting, on this issue, although there is a further issue waiting to be resolved which is the question of Mr Mond's requests for information from Mr Galer. But, as all counsel agreed, it is sensible for me to determine this issue first.

4. In addition to the evidence of Mr Galer in support, I have seen witness statements from Mr Frenkel, who is the director of BEL, in response, and I have been taken to a number of relevant documents. Before I go into the specific points that have been argued extremely well by all counsel, I should attempt a very short summary of the relevant circumstances.

5. The company was incorporated in August of 2016 as a vehicle for the acquisition and development of a property in London known as 2 Southfields. As Mr Galer explains, that was on the basis that he would be the active participant, but there would be a group of individuals, resident in Israel, who would invest into the venture. There were certain dealings and problems, which do not need to be recounted here, but the position was reached by January of 2017 that the investors were in place, and it had been agreed that an Israeli lawyer should act as their representative in their dealings in relation to the project, that lawyer being known as Avital Ofek.

6. It is common ground that in March 2017 a number of relevant agreements were entered into. Firstly, a facility agreement, under which Mr Ofek agreed to loan the company the total sum of £1.2 million, divided as to a specified part, £890,000 for the purchase price of the property and the remainder, £310,000, to cover its development costs, with a provision for payment of interest at 20% which is, undoubtedly, high and which is said, by Mr Galer, to be explained as being really a disguised profit. There were detailed provisions for repayment in clause 6, and other provisions which I shall have to consider, particularly a provision in relation to assignment at clause 14.

7. On the same day, a debenture was entered into whereby a fixed and also a floating charge was given by the company to secure the liabilities under the facility agreement. The property was purchased two days later, and the development proceeded.

8. A substantial complaint of Mr Galer is that although the loan relating to the purchase price was provided the remainder relating to the development costs were not fully provided, despite requests by him. He explains in his witness statement that, at the suggestion of one of the investors, a Mr Greenberger, he approached a bridging loan company, run by a relative of Mr Greenberger known as Tempus, who agreed to advance monies to the company to complete the building works on the basis that they would obtain a first charge over the property, which had to be agreed to and was.

9. However, as Mr Galer explains, the property still was not completed because of a number of problems, principally to do with problems with the building company and a collapse, which has led to an insurance claim being made against the building company's insurers which is still in progress. Eventually, Tempus was not prepared to advance further monies to enable the works to be completed, even though Mr Galer says in early 2020 he had obtained offers to purchase the property, once completed and split into two separate houses, which would have achieved £2 million by way of purchase price.

10. It was at this time, in February 2020, that BEL was incorporated, with Mr Frenkel, as I have said, as its sole director, and his wife as its sole shareholder. It was also around this time, the precise date is not known, that Tempus appointed a receiver under its security, and, in April 2020, it completed a sale of the property to BEL for £1.2 million. Mr Galer complains that such a sale was prima facie at an undervalue when compared with the offers which had been obtained. That may or may not be right, as Mr Waiting has submitted. One can see that the offers were subject to the works being completed to a requisite specification and by a specified time, and, of course, that would have required monies to be laid out to achieve.

11. What, however, is known is that, on sale, Tempus was paid out the amount apparently due to it, with the balance of some £403,000 of the net proceeds being paid to the Israeli lawyer. Mr McGarry has rightly reminded me that there is a lack of clear evidence as to whom the payment of £403,000 was made. The completion statement simply refers to it as a payment to the second charge entitlement.

12. The deed of assignment took place on 7 April 2020, and involved an assignment under clause 2 of all of the assignor's rights, title, interest and benefits in and to the debt, and the facility agreement, and the security. Again, I will have to refer to the details of that document in due course but, on the face of it, it was intended to operate as an absolute legal assignment. Notice of that assignment was duly given on 16 April to Mr Galer. No action was apparently taken by him to contest any of this at the time.

13. On 25 September, a part 8 claim form was issued by solicitors acting on behalf of Mr Ofek seeking the transfer of the shareholding from Mr Galer to Mr Ofek on the basis of the terms of the facility agreement, without making any reference to the relevance or the impact of the assignment of the facility agreement. Mr Galer put in evidence in response, making the point that if the notice of assignment were right, and by that time he had not seen the deed of assignment itself, Mr Ofek would appear to have had no right to make that claim.

14. No further steps have been taken in relation to that litigation but, on 15 December, a letter of demand was written to the company by solicitors instructed by BEL, and on 17 December a notice of appointment was produced and filed, which is in the prescribed form, and contains a statutory declaration, which is signed by Mr

Greenberger, to who I have already referred, in the form prescribed by the Statutory Declarations Act. He records that he is resident, as I have already said, in Israel which is where he made the declaration, and it is recorded that it was made before Mr Roger Ashley Rubin, solicitor of Manchester, who is the same solicitor with the same firm who acts for Mr Ofek in the part 8 litigation.

15. It is convenient now then to turn to the first issue which has been argued before me, which is whether or not the notice of appointment is invalid because the declaration purports to have been witnessed by Mr Rubin. It now appears from the evidence produced that he was also in Israel at the time. However, Mr McGarry takes the point that it is not open to an English qualified solicitor, there being no evidence that Mr Rubin has any qualification in Israel as a lawyer, to witness an oath in Israel.

16. The argument in that respect has focussed on the impact of the Commissioners For Oaths Act of 1889. Mr McGarry submits that by section 3(1) of that Act, headed taking of oaths out of England, any statutory declaration may be taken or made in any place out of England only before any person having authority to administer an oath in that place. He submits that this means that in this case, where that happened in Israel, it could only be done before someone who had authority in Israel to administer an oath.

17. Mr Waiting submits that this argument is wrong, because of the provisions of section 1(2), which provides that a commissioner for oaths may, in England or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England. His submission is that this section expressly permits to happen that which has happened in this case, namely, that Mr Rubin, as an English qualified solicitor, was perfectly entitled to administer an oath in Israel because that was permitted by section 1(2) of the relevant act.

18. It seems to me that this is a submission to which there is really no answer. It is a clear provision which has clear effect, and section 3, upon which Mr McGarry relies, could only properly be construed as being subject to that provision. In my judgment, that is fortified by subsection 2 of section 3 which provides that, in the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice shall be taken of his seal or signature, affixed, impressed or subscribed to or on any such oath or affidavit, so that in this case it can be seen that Mr Rubin witnessed the declaration in his capacity as an English qualified solicitor. I am, therefore, satisfied that this objection has no merit.

19. A further point would have arisen had I concluded otherwise, which is whether or not, under the discretion given to the Court by the Insolvency Rules, the Court would have had the jurisdiction to waive the defect. I have been referred to the temporary insolvency practice direction, which makes provision for the consequences of the pandemic upon insolvency matters, and which permits a statutory declaration to be made by remote means. It records in paragraph 6.1 that:

> "A statutory declaration that is made otherwise than in person before a person authorised to administer the oath may constitute a formal defect or irregularity. Pursuant to rule 12.64 it is open to the Court, on objection made, to declare that such a formal defect or irregularity shall not invalidate the relevant insolvency proceedings to which the statutory declaration relates, unless the Court considers that substantial injustice has

been caused by the defect or irregularity which cannot be remedied by any order of the Court."

20. Mr Waiting submits that, if I had needed to, I ought to be satisfied that, by a parity of approach, I should make such an order in this case on the basis that if the only defect was that Mr Rubin did what he did in Israel when he could have done it either by arranging for Mr Greenberger to come to this country to do it, or possibly remotely whilst he was in Manchester, then there could be no objection. Mr McGarry has submitted that this was a fundamental non-compliance to which rule 12.64 was not intended to and should not apply. It seems to me that, if the objection is purely that although the oath was in the right form and although it was administered in the presence of someone who would, if in this country, have been entitled to do it, the fact that it was done in a foreign country would be a defect which is not fundamental to the Act, and, therefore, I would have exercised my discretion. However, I do not need to given the first conclusion I have reached.

21. The further points which have been argued turn on the proper construction of, firstly, the facilities agreement. The argument advanced on behalf of Mr Galer is that, although it does not say so expressly, the facility agreement, on its proper construction, required the full amount of the £1.2 million to be advanced to the company as a precondition for Mr Ofek, as the lender, to have the right to exercise any security provided by the facility agreement and the security documents referred to in it. It is said that, on that basis, because the £1.2 million was not fully provided, there was no right to exercise the right to make demand and to appoint an administrator.

22. Mr Waiting submits that it is commercially unrealistic and contrary to the clear terms of the facility agreement for there to be such a construction. He makes the point, which he submits, and I agree, is a fundamental point, that if Mr McGarry's argument was right, there would be no warrant for simply limiting it to the exercise of this particular form of security, but it would appear to me that the lender would not be able to enforce any rights at all, for example, even to sue for the balance of monies outstanding. He submits that if one looks at a number of other clauses in the facility agreement, they all make it clear that rights, for example, to charge interest or for a notice of default to occur, all arise in circumstances where not just the whole but a part of the monies outstanding are outstanding.

23. It seems to me that, on any proper approach to the contractual principles of construction, it cannot realistically or credibly be argued that there is some implied condition precedent, such as is alleged by Mr Galer. Instead, the obvious position is that if there had been a breach in a failure to provide the balance, then that would have entitled Mr Galer, had he regarded it as sufficiently serious, to treat the agreement as at an end. He would have been entitled to withdraw from the agreement, but a consequence of that, of course, would have been that he would have had to repay what the company owed. He might have been able to set off any claims for loss against that amount, but what he would not have been entitled to do was simply to say you are in breach, I do not have to repay anything, and you cannot enforce any security. In my judgment, that argument is simply not realistically open to him.

24. The further argument which is advanced relates to the deed of assignment. There are two issues which arise here. The first is as to whether or not the deed was an effective, absolute assignment. The second is whether or not, in any event, it was prohibited by one of the particular terms of the facility agreement.

25. So far as its effectiveness is concerned, the position is that, as I have said, any steps taken by Mr Ofek to seek to rely upon the facility agreement by bringing the part 8 claims are of no relevance to the question of construction of the deed of assignment, namely, did it extend to assigning the debts due under the facility agreement, and the rights under the facility agreement, and the security documents, as it specifically said. In my judgment, anything said or done by Mr Ofek after that date, such as the part 8 proceedings, can have no legal relevance to the question of the proper meaning and construction of the deed. Mr McGarry rightly accepted that point when it was put to him.

26. There is no suggestion in this case, for example, that there was some further or other agreement which took away anything in the deed of assignment itself. Although Mr McGarry has striven, valiantly and ingeniously, to point to various parts of the deed of assignment which might suggest some conditionality, in my judgment and on proper analysis they do no such thing. The fact is that by clause 2 there was a clear, absolute assignment of everything relevant to this case, and clause 7 said in terms that the parties agree that, from the assignment date, the assignor no longer has any rights in relation to the debt and the assigned documents.

27. The provisions in relation to deferred consideration and the provisions in relation to long stop date have no relevance to this particular point, and I am satisfied that the deed of assignment does, as one would expect, constitute an immediately effective assignment. I therefore am satisfied that this first point has no merit.

28. The second point, as I say, relates to a restriction on assignment contained in the short form facility agreement at clause 14. What it provides, by 14.6, is, under 14.6.1:

> **"The lender may assign any of its rights under this agreement, and the security documents, or transfer all its rights or obligations by novation to another bank or financial institution or independent lender."**

Mr McGarry submits, on behalf of Mr Galer, that that means that there may be no assignment and no novation, save to a bank, financial institution, or independent lender. Mr Waiting submits that that restriction only applies to a transfer of all of the rights and obligations by novation, and does not apply to an assignment.

29. I consider that Mr Waiting is clearly right in that submission for two reasons. Firstly, because there is a clear separation of assignment and novation, which means that the final words:

> **"Another bank, financial institution, or independent lender."**

As a matter of syntax, only apply to novation. But, secondly, because that construction makes obvious commercial common sense, it is obvious that the borrower would not want to have the whole contract novated to another entity who was not a substantial entity and who might not be independent. Whereas it would be a matter of commercial indifference to the borrower whether or not individual rights under the agreement were assigned, or at least if not complete indifference, it would be less important because it would leave the lender's obligations to be provided, performed by the original person, in this case Mr Ofek.

30. Indeed, it seems to me that, in all probability, this clause is boilerplate which has been taken from another agreement because it would only be apposite if, in fact, the original lender had been a bank or financial institution, which, of course, was not the case here. The lender was Mr Ofek. But, in any event, it seems to me that this argument fails on that point of construction.

31. If I had agreed with Mr McGarry's case, I would have had to consider what independent lender meant in this context, and that picks up the next point which Mr McGarry raised, which was the general question of the connection between various of the entities involved in this case, because what has been submitted by Mr McGarry is that Mr Greenberger appears to have performed a number of roles in this case. Firstly, his accepted role as one of the investors represented by Mr Ofek. Second, his role as the introducer of the finance company, Tempus, and his relationship to the man behind that company. Thirdly, the fact that, on any view, he has some role in relation to BEL because he was used, as I have said, to make the statutory declaration in this case.

32. There is, as I have said, a lack of hard information about all of this. On the face of it, it might be said that his involvement in Tempus was really neither here nor there. The only evidence is that he was the introducer and has a family relationship with the man who runs it.

33. In relation to BEL, it might be said that he simply does no more than help out, which I think is what Mr Frenkel said in his evidence, and that he has no formal role as director or as shareholder. On the other hand, it is right to say that there clearly is a temporal connection, at least, between the decision by the bridging loan company to sell the property and the decision to assign to BEL, and the circumstances in which all of that happened, and it might be said that there is some evidence at least of some connection. If I had to decide this point, I think I would have been inclined to find that BEL was not an independent lender if that point had to be decided. But, for the reasons I have given, I do not have to decide that point.

34. The further point though which I do have to deal with is Mr McGarry's submission that the role of Mr Mond in the current circumstances is such that his ability to act with complete independence as an administrator, given the circumstances of his instructions, is called into question. Mr McGarry made it very clear, and I wish to emphasise, that he makes no allegation of any impropriety against Mr Mond at all personally. He does not suggest that there is any reason to believe that Mr Mond would not act in his capacity as officer of the Court and as administrator.

35. What he does seek to submit is that the interrelationship, as I have already explained it, between the individuals and the companies, and, to some extent at least, the solicitors involved, suggests a connection and that this connection has fed into the circumstances in which Mr Mond was put forward as nominator. He submits that, in circumstances where one of the issues which the administrator will have to consider, which is the sale of the property to BEL and whether that is a sale at an undervalue, that will put Mr Mond in a difficult position when he has to investigate that issue.

36. He also submits more widely that this means that the statement by Mr Mond that the statutory purposes of the administration can be met should be treated with some circumspection on the basis I have described, not just in relation to the sale at an undervalue claim but also in relation to the insurance claim.

37. Both Mr Waiting and Mr Hedar have submitted that there is no basis or foundation for these arguments. In particular, Mr Hedar has made the point that, given the clear independence of Mr Mond as an administrator, there is no proper basis for suggesting that his conduct could be influenced by the manner of his appointment, even if there was anything untoward about that.

38. It is also submitted that there is no reason to think that Mr Mond would not be entitled and would not wish to investigate the sale at an undervalue claim on an independent basis nor, assuming proper cooperation by Mr Galer with him in his role as administrator, to progress the insurance claim perfectly effectively. In my judgment, those submissions are compelling.

39. It is not, in my judgment, acceptable for someone who does not like the fact that an administrator has been appointed to seek to persuade the Court to declare his appointment invalid by raising a smokescreen of general allegations when there is simply no hard evidence at all to suggest that this administrator would do anything other than act as any administrator would, namely with independence and integrity. I am satisfied that, on the evidence before me, any allegation that the appointment of Mr Mond would not be in accordance with the statutory purposes of administration, or that there would be any risk of a lack of independence, ought to be and is rejected by me out of hand.

40. An interesting point of law might arise, which I do not need to express any opinion on because of the conclusion I have reached on the facts, which is whether or not this Court, sitting on this application, ought in any event to be considering general matters of statutory purpose, independence, or discretion because, unlike the Court in the High Street case, to which I have been referred, this is not an application to the Court for the appointment of an administrator under paragraph 35 where the Court is required, so held Mr Andrew Sutcliffe QC, sitting as a deputy High Court judge, to consider for itself whether one of the statutory purposes has a real prospect of being achieved, nor is there any general discretion in the Court whether or not to appoint an administrator. But, as I say, I do not need to go into all that.

41. So, for all of those reasons, I am satisfied that the application by Mr Galer must fail. That concludes my judgment on that matter.
