



Neutral Citation Number: [2022] EWHC 3184 (Ch)

Appeal Reference No: CH-2022-000116

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

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

Date: 13 December 2022

**IN THE MATTER OF DEBENHAMS PLC (COMPANY NO. 5448421) (IN**  
**COMPULSORY LIQUIDATION)**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN:**

**FRASERS GROUP PLC**

**Applicant/ Appellant**

**and**

**(1) THE OFFICIAL RECEIVER**  
**(2) GEOFFREY ROWLEY AND ALASTAIR MASSEY**  
**(IN THEIR CAPACITY AS ADMINISTRATORS OF DEPARTMENT STORES**  
**REALISATIONS (PROPERTIES) LIMITED**  
**(3) LUCID TRUSTEE SERVICES LIMITED**  
**(4) SILVER POINT CAPITAL LP**  
**(5) GLAS TRUST CORPORATION LIMITED**  
**(6) GLOBAL LOAN AGENCY SERVICES LIMITED**

**Respondents/ Respondents**

**AND BETWEEN:**

**FRASERS GROUP PLC**

**Claimant/ Appellant**

**and**

**(1) GEOFFREY ROWLEY AND ALASTAIR MASSEY**

**(IN THEIR CAPACITY AS ADMINISTRATORS OF DEPARTMENT STORES  
REALISATIONS (PROPERTIES) LIMITED  
(2) LUCID TRUSTEE SERVICES LIMITED  
(3) SILVER POINT CAPITAL LP  
(4) GLAS TRUST CORPORATION LIMITED  
(5) GLOBAL LOAN AGENCY SERVICES LIMITED**

**Defendants/ Respondents**

**Before:**

**SIR PAUL MORGAN**  
**(Sitting as a Judge of the Chancery Division)**

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**Adrian Beltrami KC and Lloyd Tamlyn (instructed by Clarion Solicitors Limited) for the  
Appellant**

**Tom Smith KC and William Willson (instructed by Kirkland & Ellis International LLP)  
for Silver Point Capital LP**

**Charlotte Cooke (instructed by DLA Piper UK LLP) for GLAS Trust Corporation Limited**

Following written submissions

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**Approved Judgment**

This judgment was handed down remotely on 13 December 2022 by circulation to the parties  
or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**SIR PAUL MORGAN:**

1. This judgment deals with matters which are consequential on the judgment I handed down in this case on 29 November 2022, the neutral citation of which is [2022] EWHC 3028 (Ch).
2. The parties have put forward two rival versions of the draft order which I am now asked to make. It is agreed that I should make an order which allows the appeal and dismisses the Respondent's Notices and I will do so.
3. I am also asked to give directions in the underlying proceedings in the light of the fact that I am permitting Frasers to amend its claim against Silver and GLAS. I will first consider the time properly needed for GLAS to serve its Defence. GLAS had not previously served a Defence as it had decided that it did not need to take an active role in the proceedings. Now that GLAS is facing an allegation that it has committed a criminal offence, it wishes to plead a defence to that allegation. I consider that it is reasonable to direct that GLAS serves its Defence by 4 pm on 13 January 2023. That Defence is to be limited to a defence to the matters raised by Frasers by way of amendment. In view of the fact that I am permitting GLAS to serve its Defence by 13 January 2023, I will allow the same period to Silver for it to serve its amended Defence and, again, the permission for Silver to amend its Defence is restricted to dealing with the matters raised by Frasers by way of amendment. Frasers may serve a Reply (in the case of GLAS) and an amended Reply (in the case of Silver, dealing with the new material) by 4 pm on 3 February 2023.
4. On 4 July 2022, the ICC Judge ordered disclosure in these proceedings. His order was made following three hearings which considered the issues as to disclosure. When he made his order, the proceedings included an allegation against the Joint Administrators based on section 164 of the Insolvency Act 1986 but he did not permit such an allegation to be made against Silver and GLAS. Frasers now contends that I should extend the order for disclosure previously made so that Silver and GLAS are ordered to disclose documents relating to the issue whether Silver and/or GLAS committed an offence under section 164.
5. Silver and GLAS submit that I should not make the order for disclosure which is now sought. Their reasons include:
  - i) any further application for disclosure should be made to ICC Judge Jones in view of his detailed involvement in giving directions in this case;
  - ii) although the proceedings involved an allegation against the Joint Administrators based on section 164, the previous order for disclosure did not include the issue as now drafted by Frasers;
  - iii) instead, the previous order for disclosure had a more general statement of the issue by reference to the state and mind and motive of the parties to the various agreements including the Claims Release Deed (Issue 1); as regards Silver, it has given the disclosure which had been ordered and it says that no further documents would be forthcoming if the disclosure sought by Frasers was ordered;

Approved Judgment

- iv) as regards GLAS, the order for disclosure against it was limited to it giving disclosure relevant to its case that it acted on instructions and without any other purpose; further, as regards GLAS, Fraser's was given permission to seek further directions having considered GLAS's disclosure;
  - v) Fraser's draft of the issue for disclosure is inappropriate as it is expressed in the form of legal question not a factual matter;
  - vi) any issue as to further disclosure should be considered after the further pleadings are closed in relation to the new allegation made against Silver and GLAS.
6. I will not order further disclosure in relation to the issue as drafted by Fraser's. It appears to be unnecessary in the case of Silver given the previous order in relation to Issue 1. In any case, I would not order disclosure in the terms drafted by Fraser's for the reasons given by Silver and GLAS. As regards GLAS, the existing order for disclosure permits a further application in relation to GLAS. The right time for any further application is after pleadings are closed in relation to GLAS. I will not attempt to predict whether a further application would be appropriate. If a further application is made, it will be dealt with on the merits by ICC Judge Jones.
7. The next disputed matter which I need to consider relates to the costs of the appeal. Fraser's submits that I should order Silver and GLAS to pay its costs on the basis that Fraser's has succeeded on its appeal and that costs should follow the event.
8. In response to Fraser's application for costs, Silver and by GLAS make points which I can summarise as follows:
- i) the costs of the appeal should be reserved, on the basis that a fair decision as to the costs of the appeal can only be made at the end of the trial when it will be known if Fraser's has been successful or unsuccessful in relation to the contentions it puts forward in its amended pleading;
  - ii) it is said by GLAS that since Fraser's will have to pay the costs of GLAS serving its defence to respond to the amended claim and since GLAS's costs will only be assessed at the end of the trial, then the costs of the appeal should not be assessed at this point but should be reserved;
  - iii) Fraser's succeeded on a narrow point because the court thought that a point made by Silver and GLAS was "not obviously right";
  - iv) an appeal was necessary in any event because the ICC Judge had decided the case on the basis of a point not taken by Silver or GLAS;
  - v) Fraser's was acting in breach of the Claims Release Deed and if Fraser's lost at trial this would be established and Fraser's would be ordered to pay the costs of the claim on an indemnity basis.
9. I consider that the right order for costs is that Silver and GLAS should pay Fraser's costs of the appeal. The appeal was a distinct interlocutory step in the proceedings. The appeal has had a clear outcome; Fraser's has succeeded and Silver and GLAS have failed. It is usual for the court to deal with the costs of distinct interlocutory

Approved Judgment

steps as it goes along rather than reserving those costs. It is not unfair to decide the question as to the costs of the appeal irrespective of knowing the outcome of Frasers' contentions following a trial. The present case is not comparable to the case of a split trial where, following a trial on liability and before a trial on quantum, it is sometimes right to reserve the costs of the trial on liability. Nor am I assisted by being shown one example of a case where summary judgment was refused and the judge reserved the costs. Instead, I will follow the completely usual practice of dealing with the costs of interlocutory applications or interlocutory appeals by reference to success and failure on the application or the appeal.

10. The fact that Silver and GLAS will wait to have an assessment of their costs of pleading to Frasers' amended case is not a sufficient reason to depart from the above approach.
11. As to the suggestion that Frasers only succeeded on the appeal because the court felt that a point raised by Silver was not obviously right, this involves a misreading of the judgment. Silver and GLAS lost on all the points raised in the Respondent's Notices. Silver raised a point at the hearing which had not been made in its Respondent's Notice which, strictly, I did not have to deal with although I did comment that it was not obviously right. The reason that Frasers succeeded on its appeal was that I held that it had a real prospect of success in relation to the draft amendments.
12. It was not inevitable that Frasers would have incurred the costs of the appeal in any event. There is disagreement as to whether Silver and GLAS supported the ground on which the ICC Judge had decided to refuse permission to amend. But even if they did not initially support that ground at the hearing before the ICC Judge, when there was an appeal, they could have, and should have, promptly conceded the point; that may have involved Frasers in some modest costs but a small fraction of the costs incurred by Frasers in dealing with the appeal and the points raised by the Respondent's Notices. I see no sufficient reason to disallow any part of Frasers' costs, and certainly no reason to reserve the costs, on account of the point made by Silver and GLAS.
13. As to the contention that Frasers is acting in breach of the Claims Release Deed, that has not been established and depends on the outcome of the proceedings. This point adds nothing to the suggestion that it would be fair to reserve the costs until the outcome of the proceedings is known, a suggestion which I have already not accepted. Whether Silver and GLAS will ultimately establish that Frasers has acted in breach of the Deed and, if so, what order for costs will then be made against Frasers, is not material to my present decision as to the costs of the appeal.
14. Frasers has applied for a summary assessment of its costs of the appeal. It has submitted a schedule of costs and then a revised schedule of costs. The sums in the revised schedule total some £324,000 although that figure includes VAT of some £54,000 which Frasers now accepts should not be included. Frasers submits that its costs should be recovered in full on the basis that they are reasonable and proportionate.
15. Silver and GLAS submit that I should decline to carry out a summary assessment on the basis that the sum claimed is so high. They also take issue with the hourly rates used, the number of fee earners, in particular, at Grade A, and the time spent on

Approved Judgment

documents. I also have considerable concerns of my own as to the level of fees being charged.

16. The considerable amount claimed by Frasers does not, in itself, preclude me from carrying out a fair summary assessment. However, the amount involved is such that Frasers would have a considerable uphill struggle to persuade me that anything like their figure would be a reasonable and, above all, a proportionate sum. This was a one-day appeal which required the parties to address the court in relation to a draft pleading where the issue was whether Frasers had a real prospect of success in relation to section 164 of the Insolvency Act 1986. There was no issue as to the legal principles to be applied to an application for permission to amend. The underlying documents were not particularly complex and the bundle of documents for the court was not particularly large. The bundle of authorities was excessive and to the extent that Frasers had required authorities to be in the bundle, the costs of their doing so would probably not be allowed. If I had been asked to carry out a summary assessment with oral submissions, where I could put some obvious difficulties to counsel for Frasers, I would have been prepared to do so. However, not only have I been asked to carry out a summary assessment, but I have also been asked to do so on written submissions where the parties have agreed that there would be a single round of submissions. It seems to me that there would be some risk of injustice to Frasers if I were to carry out a summary assessment in those circumstances and thereby to reduce its bill very significantly. I could take the view that Frasers had brought that state of affairs on itself by asking for a summary assessment on one round of written submissions. However, given that Silver and GLAS have asked me to direct a detailed assessment of Frasers' costs, I think it is fair to all parties for me to do so.
17. In the alternative to a summary assessment of its costs, Frasers has asked for an order that Silver and GLAS do pay a sum on account of costs. I will make such an order. I consider that the right sum to order on account of costs, given my real concerns about the size of the bill presented by Frasers, is £75,000, to be paid within 21 days.
18. The parties are agreed as to the orders to be made as regards the costs before the ICC Judge and the costs of and occasioned by the amendments to the pleadings. The ICC Judge had made an order that Frasers was to pay certain costs to Silver and GLAS in relation to Frasers' application for permission to appeal and Frasers did pay the required sum to Silver. The ICC Judge's order will now be set aside and it is agreed that Silver will repay the relevant sum to Frasers. Frasers submits that that sum should be repaid with interest and Silver says that interest should not be awarded. Frasers says that interest should be added at 8% and Silver objects to that rate. I consider that the relevant sum should be repaid with interest at an ordinary commercial rate of 2% above base rate from time to time.