Neutral Citation Number: [2024] EWHC 1307 (Ch)
Case No: CH-2023-000203

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Wednesday, 17 April 2024

BEFORE:

MR JUSTICE MEADE

BETWEEN:

ALBERT COURT (WESTMINSTER) MANAGEMENT COMPANY

Claimant

- and -

VICTORIA FETAIMIA

Defendant

MR WIGLEY appeared on behalf of the Claimant
MR McPHERSON appeared on behalf of the Defendant

APPROVED JUDGMENT

MR JUSTICE MEADE:

1. Today's hearing was directed by Michael Green J by his order of 16 January 2024 to be a one-hour hearing to give initial consideration to the appellant's application for permission to appeal, and he made that direction on the basis that if he were to have dealt with the matter on paper, there would have been an inevitable application by the appellant, Mrs Fetaimia, for oral renewal and that it was quicker to bring the matter to a hearing today, and he went on to say that his direction of an oral hearing should not be seen as an encouraging sign for the appellant. That I mention simply as part of his reasons for taking the course he did, but the matter having now come before me today, I must deal with it on the conventional basis for deciding whether permission to appeal ought to be given, which essentially is a question of inquiring whether there is a real, as opposed to fanciful, prospect of success of the appeal, if permission is given to argue it.

2. In fact, today's hearing has changed in its content because Mr McPherson, who appears for Mrs Fetaimia, puts at the forefront of his argument a request, or at least a suggestion, for a stay of these proceedings, his suggestion being first of all that I should give permission to appeal and then make a stay of the bankruptcy order to allow Mrs Fetaimia to obtain representation in the BVI proceedings, and I will explain what those are in a moment; or secondly, that this hearing should be adjourned to a roll-up hearing after 23 May this year, 23 May being a relevant date because I am told on instructions today by Mr McPherson that a hearing yesterday in the BVI led to an order that the appeal, which I will also explain in a moment, should take place on 22 May, and at the end of today's hearing Mr McPherson fortified that point by suggesting to me that I should reserve my decision until I have the written order of the BVI court coming from yesterday's hearing. It is fair to record that Mr McPherson was instructed very shortly before this hearing and is therefore not in command of all the details of this long and complex litigation, but his assistance has been very focused and helpful to me today.

3. I said a few moments ago that I would explain what the BVI proceedings were and the appeal in the BVI, but I do that simply by reference to the two judgments of District Judge Wilkinson, one of 18 July 2023 and one of 15 August 2023 which was given after some time for consideration, in which she sets out the procedural history

and in particular, in some detail in paragraphs 2 to 13 of her 15 August 2023 judgment. I will first of all deal with the stay in its procedural context. There have been, so far as I can tell, four previous applications for a stay of the bankruptcy by Mrs Fetaimia, and I can see the first three on the face of an order of Michael Green J of 15 December 2023 in the second recital, where he records that applications had been made to Zacaroli J in October 2023, to him (that is to say, Michael Green J) in November 2023 and again to Michael Green J later in November 2023, the last of which he had refused and declared to be totally without merit. Then I understand today from Mr Wigley, who appeared for Albert Court on instructions, that a further application for a stay was refused earlier this year.

4. If there was to be an application for a stay today, even allowing for Mr McPherson's late instructions, which mean that no blame attaches to him personally, but if there was to have been an application for a stay today, it needed much greater detail and candour from Mrs Fetaimia herself, and she would have needed to satisfy me that it was right to even consider an application for a stay on such extremely short notice and in the context of the previous refusal of four applications, including one which was determined to be totally without merit. Even with the limited procedural background that I have, I am confident in reaching the view that the previous applications for stays have all been refused in circumstances where a hearing in the BVI was said by Mrs Fetaimia to be in the near future, and that picture has not changed, and that would be a sufficient reason to refuse the application for a stay, but in addition, no notice has been given to the official referee or to the trustee in bankruptcy and no serious attempt has been made to deal with at least the possibility of harm to the creditors, which is always inherent in granting a stay of a bankruptcy which has been initiated, and on instructions again from Mr Wigley today, some steps, at least by the trustee in bankruptcy, have been taken.

5. So for all of these reasons I refuse any application for a stay, and for like reasons I do not consider it necessary to have the written order of the court in the BVI to make that decision. I would have made the same decision even assuming that order to have been all that it has been submitted by Mr McPherson to have been, which was that the appeal hearing would take place on the 22 May this year, absent some extraordinarily strong reason not to do so.

6. I therefore turn to consider the merits of the application for permission to appeal, which has been developed in a somewhat complex way because of Mrs Fetaimia's changing representation over time, but is advanced today by Mr McPherson on the basis of what he calls grounds two and four, which are the allegation of a cross-claim arising from events in the BVI, that is ground two, and ground four, abuse of process, which is dealt with in fact in the 18 July 2023 decision of the District Judge, and ground two, intertwined as it is in fact with the BVI appeal, is the cross-claim which is dealt with in paragraphs 15 to 22 of the District Judge's decision of 15 August 2023. The argument for Mrs Fetaimia is that whilst the District Judge identified the right legal test, she reached the wrong decision in trying to apply that test to the facts.

7. The cross-claim has been elaborated between the parties by a letter of claim and response, but no particulars of claim have ever been served, and in my view the District Judge had in mind, and rightly so, the sketchy nature of the way in which the claim was outlined. It is not just a question, it seems to me, of asking oneself whether in a broad sense there might be facts which could conceivably support some sort of claim, but to look at the substantiation that has been put forward, and part of the relevant background is the unfortunate and incomplete way in which the claim has been sketched out, and, for example, as the District Judge pointed out in paragraph 17 of her August 2023 judgment, Kennedys, acting for the petitioning creditor, sent a lengthy response in January 2022 which has never been responded to, and in my view as a practical matter, it was a difficulty for Mrs Fetaimia to make good the potential force of any cross-claim against that unpromising beginning.

8. The gist of the alleged cross-claim is that there was a claim to be made against Mr Hitt, whose status and involvement with Mrs Fetaimia is set out in the District Judge's August 2023 judgment, and that dishonest assistance was given by the petitioning creditor, Albert Court, to Mr Hitt. The District Judge dealt with that by saying that there was not an adequate assertion that the petitioning creditor had helped Mr Hitt, that there was not a showing of dishonesty because that was based on an allegation of collusion between Mr Hitt and Albert Court, and she came to the conclusion that on the evidence that she had, a claim of dishonesty, or dishonest assistance, was not genuine or substantial.

9. This was an evaluative exercise, and in my view the decision that she reached was at least a reasonable one, and if I had to decide the matter, I would say a correct one. A couple of particular instances of the way in which the argument is now elaborated reinforces this. Mr Wigley has explained to me and given me the references to satisfy myself that the petitioning creditor, Albert Court, put in materials in the BVI recognising the beneficial ownership position, and that is inconsistent with the allegation of dishonesty. It is also, in my view, as the District Judge said, sketchy and extreme to assert that Albert Court actually assisted what it is that it is said that Mr Hitt was setting out to do. But even if that were not enough, in paragraph 22 of her decision the District Judge said that even if she were wrong about the existence of the cause of action, loss and causation were not addressed anywhere in the evidence of the debtor, Mrs Fetaimia, or the letter before claim, and the District Judge went on to say that there was no evidence of the alleged loss put forward of £250,000 let alone, she said, the £3.5 million referred to in the claim form, and the District Judge went on to say, "Given the lack of explanation as to causation and loss, let alone the lack of any cogent explanation or evidence to justify a finding of dishonest assistance, there is no real prospect of success as regards the alleged cross-claim", and she went on to say that that was even more pertinent when one considers the debt owed by the debtor to the petitioning creditor in respect of the very many costs orders which remain outstanding.

10. Now, following that pattern, in his opening submissions before me today, Mr McPherson did not deal with loss and causation either, and only came back to it in reply, and I find the submissions that were made unsatisfying. I accept that it is a complicated position because there are cost orders in both jurisdictions and the petitioning debt is a modest one, but I think the various arguments that were made to me about how these amounts might be set off in due course is nothing to the point. The District Judge's basis for her decision was simply that Mrs Fetaimia had failed to put forward any rational evidence, and that was a finding that was open to her and that hole cannot be plugged by general assertions made in submissions to me today. So even if I had thought that there was a reasonably arguable cause of action, I would have agreed with the District Judge that Mrs Fetaimia simply had not made good that there was a realistic prospect that a useful award, in the sense of one that would justify disregarding the undisputed petition debt, would emanate from the BVI. So I refuse the ground based on the alleged potential cross-claim in the BVI proceedings.

11. As to abuse of process, as I say, that was dealt with in the decision in July 2023, and an appeal against that would therefore have been out of time when the initial Appellant's Notice was filed, and I am far from satisfied that the initial Appellant's Notice even covers it, and in fact I take the view that it does not. I am extremely dubious whether I would have given permission to mount this ground of appeal out of time, but it does not matter because I conclude that the argument has no reasonable prospect of success and cannot justify permission for appeal being given either. The reasons are essentially those given by the District Judge, she having been cited the decision of Rose J (as she then was) in *Re Maud* [2015] EWHC 1626 (Ch), and I was referred also to the later decision of Snowden J in *Re Maud (No 2)* [2020] EWHC 974 (Ch). The gist of this assertion is that Albert Court can only be pursuing the bankruptcy, not with the hope of obtaining a dividend, but in order to snuff out the possibility of the BVI appeal by depriving Mrs Fetaimia of representation there. Albert Court's case has really two planks to it. One is that it is pursuing the bankruptcy with the genuine aspiration of obtaining a dividend, and secondly, in any event, that the appeal in the BVI will not be snuffed out if it has any merit because the trustee in bankruptcy can take the appeal on him or herself if it is seen to have any merits.

12. Although the situation is an unusual one, I accept that there is a rational case to be made that there is an objective reason for Albert Court to have taken the course that it has done, which is to first begin proceedings for bankruptcy in this jurisdiction in order to recover the substantial amounts due to it, and then separately to conduct matters in the BVI thereby securing all the other debts as an alternative. It may be that this is eventually proved to be misguided and it may be that strategically a better course could have been taken, but in a situation where it is apparent that Mrs Fetaimia may well have assets (indeed her position is that on a balance sheet basis she does) then it cannot rationally be a proper inference to draw, as Mr McPherson invited me to do, that the only basis for Albert Court's action is to bankrupt Mrs Fetaimia so she cannot be represented in the BVI proceedings.

13. That would be sufficient reason in itself and is essentially supportive of the District Judge's decision to refuse permission to appeal, but I also agree in any event, although it is probably more hypothetical than real, that as a matter of analysis, Mrs Fetaimia's claim in the BVI can be pursued and could be if the trustee in bankruptcy took the right

view, and therefore there is something of an unreality about the assertion of stifling. But in any event, in my view there are perfectly proper reasons why Albert Court could be pursuing the bankruptcy route, and I find the argument advanced with force by Mr McPherson that Albert Court has not at any time explained this fully to be very unsatisfying given the very, very short notice of Mrs Fetaimia's argument before it took place below and against the background that there would seem to be no reason for Albert Court to put more evidence in about it during the pendency of this appeal, having won before the District Judge.

14. So in summary, I conclude that although the situation is a complicated one, I am in a position to conclude that the appeal has no real prospect of success and that permission to appeal should be refused, as Michael Green J suspected would be the case when he made his order directing this hearing and as, now having had a chance to investigate matters, I consider to be correct.

[AFTER FURTHER ARGUMENT]

15. I have found Mr Wigley's attendance to be not just helpful but positively necessary in the circumstances. What I am about to say is absolutely no criticism of Mr McPherson, who has done an outstanding job on short notice and in difficult circumstances, but as is so often the case with Mrs Fetaimia, she has caused matters to be transformed at the last minute by the making of new and different applications and by changing her representation, and I have found it extremely important to have Mr Wigley here to give me the correct and complete picture and to deal with matters that have arisen at the hearing itself.

16. For what it is worth, although it is not necessary to my decision on this point, I read paragraph 3 of Michael Green J's order as making it clear that the respondent's attendance might be necessary, might affect the outcome and as a warning to the appellant that she was at greater risk than normal of paying the respondent's costs.

17. So I will direct that Mrs Fetaimia is to pay the respondent's costs of today.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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