IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

**[2014] EWHC 4499 (Ch)**

No.HC13B02648

Rolls Building

Friday, 19th December 2014

Before:

THE HON. SIR WILLIAM BLACKBURNE

(Sitting as a Judge in the High Court)

B E T W E E N :

PATLEY WOOD FARM LLP — Claimant/Applicant

- and -

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE — Defendants/Respondents

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MR. J. GAVAGHAN (instructed by Lester Aldridge, Bournemouth) appeared on behalf of the Claimant/Applicant.

MR. E. PETERS (instructed by Michelmores) appeared on behalf of the Defendants/Respondents.

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# JUDGMENT

(As approved by the Judge)

SIR WILLIAM BLACKBURNE:

1 I have before me two applications of the claimant (which I shall call "the LLP"), one for an order under section 44 of the Arbitration Act 1996, and the other for the committal to prison of the defendants, Mr. and Mrs. Brake, (whom I will refer to as "the Brakes") for contempt of court. There is also before me an application by the Brakes which, however, they have withdrawn, but in respect of which there is an issue as regards costs.

2 The background to these applications is as follows. In 2010 the Brakes entered into a partnership with the LLP. The partnership was governed by a written partnership agreement dated 19th February 2010. The partnership operates a business providing luxury self-catering stays for holidays and special events under the name "Stay in Style". It does so from a property known as the "West Axnoller Farm" which is in Dorset (and which I shall refer to as "the Farm"). The Farm forms the principle asset of the partnership.

3 The partnership's bankers, who are Adam & Co. Plc, which I am told is within the RBS Group, have a fixed charge over the Farm. At all material times the Farm has been the home of Mr. and Mrs. Brake and their young son.

4 The Brakes' capital contribution to the partnership was £4 million and the LLP's £2 million. The Brakes' partnership profit share was 67 per cent and the LLP's 33 per cent. The partnership agreement provides that Mrs. Brake is the managing partner and that the Brakes are required to devote themselves full time to its business. The LLP, by contrast, is not so required.

5 In 2012, differences having arisen between the LLP and the Brakes, the LLP sought dissolution of the partnership. The Brakes were opposed to that. Pursuant to an arbitration provision in clause 33 of the partnership agreement, the dispute as to whether or not the partnership should be dissolved was referred to arbitration. That occurred in the spring of 2012.

6 The arbitration provision is governed by the rules of the London Court of International Arbitration. A Mr. Michael Lee was appointed arbitrator. Mr. Lee made a so-called "partial final award" in the arbitration on 21st June 2013. By that award he decided that it was just and equitable that the partnership be dissolved. He found that the Brakes had breached the partnership agreement and that it was not reasonable for the LLP to carry on the business in partnership with them. He found that there had been a complete breakdown of trust and confidence between the partners; that the Brakes had excluded the LLP from the management of the partnership business, which he held amounted to a breach of their duty of good faith; and that the Brakes had failed to provide full and proper financial information to

the LLP, which he held was a breach of their fiduciary duty. He also held that there was evidence of misuse of partnership money by the Brakes, but reserved consideration of the detailed allegations and defences to that claim and the amounts involved. He also found that the Brakes had refused to provide reasonable financial information.

7 Mr. Lee ordered that the partnership should be dissolved. He ordered that as part of the winding up there was to be an orderly sale of the partnership's assets including the partnership property, and that both the LLP and the Brakes should be entitled to bid. He ordered that the partnership business should be sold as a going concern if reasonably practicable within a reasonable time. He ordered that dissolution accounts should be drawn up.

8 On 22nd August 2013, Mr. Lee also made an award in the costs of the partial final award. By that costs award he ordered that the Brakes should pay the LLP's costs in respect of the arbitration in the sum of £518,539.23. The Brakes have not paid those costs.

9 On 12th September 2013, Mr. Justice Birss made a freezing order in support of the claim. He did so on the return date from an interim order initially obtained in July 2013 following the failure by the Brakes to pay the costs awarded by the costs award. Paragraph 6 of the freezing order provided that Mr. Lee's partial final award and his costs award could be enforced in the same manner as a judgment or order of the court to the same effect. The freezing order restricted the Brakes' right to deal with their personal assets both here and abroad up to a value of £850,000 subject to certain exceptions. Those exceptions included a right for the Brakes to spend a reasonable sum on legal advice and representation. Clause 7 of the freezing order restricted the Brakes' right to deal with the assets of the partnership otherwise than in the course of its normal day to day business pending the completion of the winding up of the partnership or further order.

10 The precise terms in which clause 7 is drafted is as follows:

> "Until the partnership is fully wound up and all liability to the claimant [that is to say to the LLP] pursuant to the arbitration being conducted [I omit certain words] by Mr. Lee is met by the respondents [that is to say Mr. and Mrs. Brake] or until further order of the court —
>
> (a) no payment will be made by the respondents out of the partnership bank accounts or any use made of the partnership's credit or debit cards that is outside the normal day to day business expenditure of the partnership without the written consent of the claimant or the order of Mr. Lee or the court. For the avoidance of doubt,

expense on equestrian matters is not within the definition of normal day to day business expenditure of the partnership".

11 Clause 14 of the order provided that:

> "The respondent's solicitors shall provide to the claimant's solicitors on a monthly basis:
>
> (a) a list of all payments made from the partnership's business accounts each month together with accompanying invoices where issued (no such invoices being issued in respect of regular direct debits); and
>
> (b) up to date copies of the 'red sales ledger' detailing the receipts of the partnership each month.

12 Clause 16 of the order provided that:

> "No payments of remuneration or other drawings are to be made from the partnership bank accounts to the respondents unless approved in writing by the claimant or by Mr. Lee or the court in advance of payment".

There is then a parenthesis I do not think I need read.

13 And then the last clause that I think I need read is clause 25 of the order which says:

> "Nothing in this order prevents the respondents from —
>
> (a) spending up to £5,500 a month in total between them towards their ordinary living expenses and also a reasonable sum on legal advice and representation provided that no such payment should be made from the partnership bank accounts without the consent of Mr. Lee".

14 The Brakes subsequently sought to challenge Mr. Lee's partial final award and his costs award. They applied to have him removed as arbitrator. That claim was heard by Mr. Tim Kerr QC between 4th-7th March 2014. Mr. Kerr dismissed the claim by a reserved judgment handed down on 25th April 2014. On 27th June 2014 Mr. Kerr ordered the Brakes to pay costs assessed in the sum of £30,000.

15 The arbitration accordingly proceeds with the winding up of the partnership pursuant to the terms of Mr. Lee's partial final award. He has appointed a firm

of accountants, Safferey Champness, to draw up dissolution accounts of the partnership and it is envisaged that there will be a sale of the partnership assets including, importantly, the Farm. I am told that draft accounts have been produced but not yet finalised. There have been applications both to Mr. Lee and to the court in relation to that process, leading to making of a peremptory order on 12th November 2013. That order was subsequently challenged, and the challenge failed, before Mr. Justice Peter Smith on 18th October of last year.

16 On 24th October of this year, the partnership's bank, Adam & Co, Plc, appointed receivers under its fixed charge over the Farm. On 19th November of this year, Mr. Lee acting on an application by the LLP, made a direction excluding the Brakes from carrying out certain actions in connection with the sale of the property. On 26th November Mr. Lee gave reasons for that direction. I will return to those directions and the reasons for giving them later in the course of this judgment.

17 Against that background, I come to the various applications. I deal, first, with the application made by the Brakes, that is to say an application which is dated 24th June 2014.

18 The first limb of the Brakes' application was for the court's consent pursuant to the terms of the freezing order to enable them to create a charge over their personal beneficial interests in the assets of the partnership. They wish to create such a charge in favour of their solicitors, Michelmores, in order to provide security for the payment of legal fees. The second limb of that application sought the court's consent under the terms of the freezing order to make certain payments to themselves from the funds of the partnership. One part of that was for the Brakes to reimburse themselves from partnership's funds for a payment of I think £5,000 which they had paid on behalf of the partnership in respect of legal fees, and another element was for them to pay themselves £5,500 per month from partnership funds for their reasonable living expenses.

19 However, the Brakes discontinued that application by letters both to the court and to the solicitors, Lester Aldridge, acting for the LLP dated 11th December, so that is just over a week ago. But that left the costs of that application to be dealt with. The Brakes have proposed that there should be no order as to costs. They submit through Mr. Peters that their application was discontinued as a result of a supervening event, namely the appointment by the bank of the receivers.

20 Mr. Gavaghan, who appears for the LLP, submitted that that would be quite inappropriate. He submitted that, having made and then abandoned the application, the ordinary costs consequence should flow – namely that the

Brakes should pay the LLP's costs. He submitted that the application never had any prospect of success. He drew my attention to clause 13.1(j) of the partnership deed which prohibited any partner charging his rights or interest in the partnership without the written consent of the other partners; that such consent was not forthcoming, and that the application so far as it sought an order permitting the Brakes to charge their interest in the partnership was an attempt to go behind that provision. In any event, he submitted, its purpose was to give Michelmores a preference over others with a claim against the Brakes, and that given the Brakes' failure to pay various costs orders and their protestations of lack of means, it would have been quite wrong for the solicitors to have been given such a preference by the court.

21 As regards the balance of the application, again, he submitted, the Brakes were seeking to go behind Mr. Lee's award of 21st June 2013, when he had found that partnership remuneration could only come out of partnership profits, of which there were not any – or none has yet been established. In any event, the evidence suggested that the partnership lacked the requisite free cash to make the payment sought.

22 Mr. Peters, by contrast, submitted that the application was far from hopeless. He submitted that the court might have been able to sanction the grant of relief under s.14 of the Trust of Land and Appointment of Trustees Act 1996, notwithstanding clause 13.1(j) of the partnership deed. He submitted that the case for varying the terms of the freezing order to permit some limited payments to the Brakes out of partnership monies and to reimburse them for past payments of partnership expenses was arguable. He submitted that it was really the appointment by the bank, Adam & Co, of receivers over the Farm on 24th October that rendered pointless the further pursuit of the application.

23 I am satisfied that the Brakes should pay the LLP its costs of the application. The relief claimed by that application from what I was told of the matter was, to put it mildly, optimistic, for all of the reasons which Mr. Gavaghan submitted. The plain fact is that the application was abandoned and that I was given no good reason why the usual costs consequence should not follow.

24 The only remaining question is whether over and above giving the LLP its costs, the LLP is entitled to have those costs assessed on the indemnity basis. Mr. Gavaghan submitted that they should be. He submitted that so far from abandoning the application when the receivers were appointed, the Brakes persisted with it for another six weeks during which further costs were incurred. He pointed out that at least two court hearings in the course of November, the Brakes had made it clear that they were pursuing their application. They had spurned an earlier invitation to abandon the application.

25 I am of the view that the case for an assessment on the indemnity basis is established, but only in respect of the costs incurred by the LLP from or after the appointment of the receivers on 24th October. From that time onwards, as it seems to me, the case was "out of the ordinary", as the expression has it, such as to justify an assessment on this basis. From that time, if not earlier, the application was doomed on any view of the matter. I am not satisfied that a sufficient case has been made for indemnity costs prior to the appointment. I shall therefore so order and direct.

26 That brings me to the LLP's two applications. I deal first with the application to commit the Brakes to prison for breach of the freezing order made by Mr. Justice Birss on 12th September 2013. I have set out the relevant terms of that order.

27 The LLP alleges that the Brakes made payments in breach of clause 7(a) of the order, and failed to comply with clause14 by failing to provide, at any time since November 2013, either a list of all payments made from the partnership's business accounts, with accompanying invoices where they were issued, or with up to date copies of the partnership's red sales ledger detailing partnership receipts.

28 I deal first with the payments. They are of two kinds:

1 payments to Marriott Harrison and Michelmores, the latter being the Brakes' current solicitors. Marriott Harrison were, as I understood it, solicitors who previously advised them; and

2 payments to Close Brothers Asset Finance of instalments due under a financing agreement in relation to a horse box used by the Brakes.

Mr. Peters submitted that the payments to the solicitors were properly made as being business expenditure of the partnership, in that they related to legal advice and assistance provided by those firms in connection with separate court proceedings in the case of the payments to Michelmores, and in anticipation of those proceedings in the case of the payment to Marriott Harrison. Those were proceedings contemplated and then brought against Mrs. Brehme, who is the moving spirit behind and principal partner in the LLP, to enforce or otherwise claim relief arising out of her failure to honour a loan agreement which she made, as it is alleged, with the Brakes for the further funding of the partnership.

29 I should say that those proceedings also include a separate claim, this one brought against the LLP, concerned with a cottage which either adjoins or is near to the Farm.

30 Mr. Peters submitted that the claim was brought on behalf of the partnership with the Brakes' authority as the majority partners, and as such with power under the partnership deed to authorise the bringing of proceedings. He therefore submitted that the payments in question – they total no more than £4,000 or so – are accurately to be characterised as partnership expenditure.

31 I do not agree. In my judgment, expenses incurred by one or more partners in pursuing what, in substance if not in form, is a claim against his co-partner to enforce an exceptional funding agreement is not accurately to be described as "business expenditure of the partnership". But, even if I were wrong about that, the payments in question cannot by any reasonable stretch of the imagination be described as "normal day to day business expenditure of the partnership", which alone is what clause 7 permits. In short, the payments were in breach of clause 7(a) of the freezing order.

32 So also, in my judgment, were the payments, totalling £27,851 made to Close Brothers Asset Finance between October 2013 and November 2014 in respect of the horse box. The short point here is that clause 7(a) in terms states that:

> "Expense on equestrian matters is not within the definition of normal day to day business expenditure of the partnership".

Expenditure on a horse box, in my view, is plainly expenditure in relation to an equestrian matter.

33 It is nothing to the point that, prior to the making of the freezing order, Mr. Lee had sanctioned payments of instalments due under the funding agreement for August and September of 2013. On the latter occasion it is to be noted Mr. Lee made it clear that,

> "Future payments may not be authorised from the partnership account".

34 It is equally nothing to the point that the Brakes believe that the horse box was and is a partnership asset and that the partnership had re-claimed VAT on the payment of past instalments.

35 I am also satisfied that the other complaint, the Brakes' failure in breach of clause 14 of the freezing order, to deliver list of payments or red sales ledger entries of partnership receipts, is established. It is as good as conceded that they did not. Instead, or as it would seem to me in mitigation of this failure, it is pointed out on their behalf that they made available as required by another term of the freezing order copies of the partnership's bank statements from which the payments and receipts are evident. Unusually, the bank statements set out a brief narrative explanation against each entry in the statement. Mr. Peters drew attention to that.

36 Those matters, as it seems to me, go more to the gravity of the breach. They do not amount in my judgment to a refutation of the existence of the breach. Belatedly I should add a number of the copy invoices have been supplied, but until now none of the lists have been supplied as required by the order.

37 I am therefore satisfied that all of the breaches particularised in the application to commit are established.

38 What now must be done? And what, if any, penalty should I impose? I will hear counsel on this, but my current view is that the wrongful payments must be restored to the partnership and the list of payments and ledger entries of the receipts supplied by a date being a date yet to be determined.

39 What of the fact that these are breaches of the freezing order to which a penal notice was attached? It is to be noted that these breaches have not occurred covertly or, as it seems to me, in the hope that no-one would notice, much less in conscious defiance of the freezing order. The payments to Michelmores were made on that firm's advice. Having been reassured by them that such payments could properly be made, it is not altogether surprising that the payment to Marriott Harrison was also made. There is some suggestion also that the Safferey Champness the accountants appointed by Mr. Lee, had regarded some or all of these payments as partnership expenses. The payments to Close Brothers Asset Finance were by standing order, and the fact that they were made was plain from the face of the bank statements. As for the failure to supply monthly the list of payments and copies of the red sales ledger, the point is made that no-one on the LLP side even noticed that these lists were not being supplied until very recently.

40 Provided the breaches are made good, I am not inclined to exact any particular penalty to mark the court's disapproval. I certainly do not consider that I should impose a fine, much less commit to prison. But I will hear counsel on what costs order I should make and on the precise form of the order to make good the breaches.

41 But before that happens, I should deal, finally, with LLP's application for an order pursuant to section 44 of the 1996 Arbitration Act, that the Brakes comply with the directions given by Mr. Lee on 19th November 2014.

42 The directions which Mr. Lee made were in the following terms:

> "Until further order or the written consent of the claimant [that is the LLP] or the tribunal [that is effectively himself] the respondents [that is to say Mr. and Mrs. Brake] and each of them shall not whether by themselves their servants or agents directly or indirectly or howsoever,

(a) enter into or carry out any agreement to purchase the property at West Axnoller Farm;

(b) enter into or continue with any negotiations to purchase the said property;

(c) enter into or carry out any agreement to provide services directly or indirectly with any purchase of the property;

(d) enter into or carry out any agreement which involves an option to buy or lease the property back from a purchaser;

(e) enter into or continue any negotiations with or provide information to a potential purchaser.

I also direct that the claimant has permission pursuant to section 44(2) and 44(4) of the Arbitration Act 1996 to apply to the court for interim injunctive relief to support these directions".

43 It is to be noted that by his last direction, Mr. Lee thought it appropriate that this court should consider whether to make an order under section 44. I proceed on the footing that he would scarcely have made that direction if he had not thought that the court's support was appropriate.

44 I note too that it has not been suggested by Mr. Peters that Mr. Lee had no jurisdiction to make those directions. The circumstances in which the LLP sought the directions and the reasons why Mr. Lee acceded to the application and made the directions – which I should say are precisely in the terms that the LLP had originally sought – are conveniently set out in Mr. Lee's written reasons for his order. I read from those reasons starting at para.2. For reasons of clarity I have changed references to "the claimant" to "the LLP" and references to "the respondents" to "the Brakes":

> "2. The grounds for the LLP's application were that, 'There is real concern that the Brakes have engineered the intervention of the bank and that they intend to purchase the property either directly or indirectly through a nominee at a low sum sufficient to satisfy the bank but to the detriment of the partnership and its creditors'. Whilst the LLP acknowledged that this would be a breach of the freezing injunction, the LLP submits that it would also be a breach of the Brakes' fiduciary duties as well. Even if the Brakes did not seek to purchase direct or via an intermediary, the LLP was concerned that the Brakes might divert opportunities from the partnership in breach of their duty of good faith,

including the duty not to put themselves in the position of conflict or to take a secret profit".

"3. The particular matters on which the LLP relied in support of its application were as follows:

1 That the Brakes had in the past referred to them offering to run the business for a third party purchaser. The LLP argues that if the Brakes' intentions were to be carried out, there is a real and substantial risk of deferred or concealed consideration being obtained by them, for example, that they were paid above market rate for running the business at a later date and that the partnership would not receive the genuine consideration payable. The LLP says that there is a substantial risk that the Brakes will seek to divert all assets if at all possible to themselves and away from the LLP and the partnership.

2 An offer to purchase the business had been made by a Mr. Desmond Phillips, who was apparently a business associate of the Brakes' solicitor, Mr. Peter Williams. The LLP says that in the past Mr. Phillips offered arrangements whereby he or a third party with whom he is connected purchases property but with an option being agreed that the current owner later buys back the property. Such a transaction was under consideration by the Court of Appeal in the case of *Michael v Miller* [2004] 2 EGLR 151. In that case an offer was made by Mr. Phillips to buy an estate for £2·15 million, of which £1·475 million was to be payable on completion, and the balance of £675,000 was to be left outstanding. The vendors had an option to buy back the estate for £2·4 million and if the option was not exercised the estate could be sold and any excess over £1·725 million split on an equal basis between Mr. Phillips and the vendors. The Court of Appeal said that 'It would appear that Mr. Phillips' offer was designed to provide the vendors with a degree of financial assistance'. The LLP argues that if that sort of arrangement was to occur in this case, the Brakes would be diverting an opportunity for the partnership to buy back the business themselves at a later date".

45 After making an interim order in the terms sought, Mr. Lee gave the Brakes an opportunity to respond to the directions and advance reasons why they should be amended or withdrawn. All of that is dealt with in the succeeding paragraphs of his reasons.

46 Mr. Lee then summarises the exchanges that ensued, and at paras.14-17 he sets out the reasons why following those exchanges, and in particular a telephone conference during which the matter was argued, he confirmed the directions which he had previously given.

> "14. The first point which I should emphasise is that the directions which I have given are in no way intended to prevent the Brakes – or indeed the LLP – concluding an agreement for the purchase of West Axnoller Farm from the receivers on an arm's length basis at a proper price, having regard to the interests of the partnership. The partial final award clearly gives the Brakes the power to do so and I have confirmed this on several occasions. What the directions are designed to do is to ensure that there is transparency, and that the LLP and I are kept fully informed of any such negotiations so that an informed decision can be made as to whether such a sale would be in the interests of the partnership.
>
> "15. The Brakes have disputed my jurisdiction to give the directions which I have made…".

47 He then dealt with that issue and concluded that he had the necessary jurisdiction. And, as I have mentioned, there is no challenge to that jurisdiction. He then continued:

> "16. In reaching my decision I have considered whether in all the circumstances there is a risk that the Brakes might attempt to purchase the property directly or indirectly in a manner which will be in breach of their fiduciary duties to the partnership as alleged by the LLP. In doing so, I have taken into account the findings which I made in the partial final award as to the Brakes' conduct in attempting to exclude the claimant from the partnership and their other breaches of fiduciary duty. I have also considered the Brakes' conduct since the final partial award was issue. The Brakes failed to disclose information to the accountants whom I had appointed, Safferey Champness, until faced with the possibility of a contempt order. More recently and in my view significantly there was, I consider, failure on the Brakes' part to give frank and open disclosure of the financial condition of the partnership. In particular, the Brakes' statement in Mr. Williams' letter of 7th August 2014 that the partnership had 'an overall credit position with the bank of £3,858.81' and that the business was able to afford to pay the Brakes the back-dated drawings which they sought was clearly misleading. The reality was that at that time the bank was owed around £250,000 and the holiday which the bank had granted had expired some months previously. Shortly after that statement was made, the bank issued a notice of default and appointed the receiver. Mr. Williams, [he is the

Brakes' solicitor], contends that the reason for the issue of the notice of default and the appointment of the receiver was because of the LLP's conduct. I do not accept that this is the case. In the notice of default dated 4th September 2014, the bank lists three events of default, the first of which is a failure to pay the contracted payments due under the loan agreement. It is true that the bank also lists the arbitration by the LLP and 'the outcome of the arbitration' and the failure to receive signed accounts for the business since the 2010 accounts as events of default, but I have no doubt that the principal reason for the bank giving notice of default is the failure to meet the loan payments".

"17. In reaching my decision I have also considered where the balance of convenience lies in this case. I consider that it lies firmly in favour of the LLP. As I indicated above, my order does not prevent a sale by the receiver to the Brakes. If the Brakes do wish to negotiate with the receivers, they must obtain the consent of either the LLP or myself to do so. If such negotiations are genuinely at arm's length and full disclosure is made to the LLP and myself, it is likely that consent will be given. The purpose of the order is simply to ensure that the interests of the partnership are fully protected in any sale to the Brakes".

48 This brings me to section 44 of the Arbitration Act 1996 and the basis upon which the court should exercise its powers under that section. So far as material, section 44 reads as follows:

"(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are [and I can skip over the first two] —

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings —

(i) for the inspection, photographing, preservation, custody or detention of the property ...".

I need read no further in that sub-paragraph. And then

"(e) the granting of an interim injunction or the appointment of a receiver".

Subsection (3) is concerned with cases of urgency and is inapplicable. Subsections (4) and (5) reads as follows:

> "(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".

49 I notice that whereas Mr. Lee's directions gave the LLP permission to apply for interim injunctive relief to support his directions, which would appear to be a reference to section 44(2)(e), the application to the court is grounded on the assertion that the court's assistance under section 44:

> "...has been deemed necessary or desirable by the arbitrator, in particular in order to protect the assets of the partnership".

This would appear to be a reference to section 44(2)(c)(i).

50 The matter was argued on the basis that it was section 44(2)(c)(i) which was in point. I do not, as it happens, think that the difference matters as I take the view that subject to what I shall shortly come to, the order is capable of being grounded under either provision

51 How then is the court to approach the exercise of its jurisdiction under section 44? Mr. Gavaghan submitted that the court should by analogy follow the approach adopted to the exercise of the court's jurisdiction under section 42 of the Act. Section 42 empowers the court to make an order requiring a party to an arbitration to comply with a peremptory order made by the arbitral tribunal. The court may not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of the failure to comply with the tribunal's order, which in some ways is similar to the restriction contained in section 44(5).

52 In *Emmott v Michael Wilson & Partners Limited* (No.2) [2009] EWHC 1 (Comm) which involved an application to the court for an order under section 42. In the course of his judgment Mr. Justice Teare said this, and I read from para.59:

> "I also accept as submitted on behalf of MWP [MWP was the respondent to the application in that case] that section 42 confers a discretion upon the court and that it would be inconsistent with the exercise of a discretion that the court should act as a rubber stamp on orders made by the tribunal. However, I do not accept that the court must in every case satisfy itself that the case is a proper one for the order which is sought if by that is meant that the court must review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question. The reasons that I do not accept that submission are as follows:
>
> i) It is inconsistent with general principle (c) in the context of sections 33 and 40 of the 1996 Act".

Pausing there, principle (c) is that referred to in section 1 of the 1996 Act.

> "In matters governed by this part, the court should not intervene except as provided by this Part".

And that is a reference to the relevant Part of the 1996 Act. Continuing with his judgment, Mr. Justice Teare said this:

> "ii) The 1996 Act confers on the court limited powers to rehear or review decisions of the tribunal. It would be surprising if a power to rehear or review was hidden within section 42.
>
> iii) It is true that the making of an order under section 42 exposes the party against whom the order is made to being in contempt of court if he breaches the order. But that is the purpose of section 42. It may only be exercised when the arbitral process is exhausted and the party in question has failed to comply with a peremptory order. I am not persuaded that the exposure of that party to being in contempt of court requires the court to rehear or review the arbitrator's decision to grant the peremptory order".

53 There is then a reference by Mr. Justice Teare to a passage from another textbook which he then comments upon, but I do not think I need read that.

54 He then said, in para.62, the following:

> "In what circumstances then might a court decide not to make an order that a party comply with a peremptory order of the tribunal? In general terms the answer to that question will be where such an order is not required in the interests of justice to assist the proper function of the arbitral process. See p.47, para.212 of the DAC report. This is not the

occasion for a comprehensive list of such circumstances, even assuming it were possible to compile such a list. One example might be where there has been a material change of circumstances after the peremptory order was made. Another might be where the tribunal has not fulfilled its duty to act fairly and impartially between the parties in breach of its general duty to do so. Another might be where the tribunal has made an order which it had no power to make".

55 Section 42 is not the same as section 44. It is more narrowly drawn. It assumes that the peremptory order made by the tribunal has not been carried out and that the applicant has exhausted any other available arbitral process in respect of that failure. The case for the court's intervention is therefore all the more compelling. Under section 44 by contrast there is no or no necessary requirement that the respondent to the applicant be in breach of the tribunal's order. As the marginal headings to the two sections indicate, section 42 is there to assist in 'the enforcement' of the tribunal's order, and then only if it is a peremptory order; whereas section 44 is as the heading indicates to 'support' the arbitral proceedings. It seems to me therefore that the court has a rather wider discretion under section 44 than it has under section 42. To my mind the question is simply whether in all the circumstances the court considers it appropriate to exercise its powers under the section in support of the arbitral proceedings.

56 That said, I am in entire and respectful agreement with what Mr. Justice Teare said in para.59 of his judgment, that whereas the court should not simply act as a rubber stamp on orders made by the tribunal, it is not required to review the tribunal's decision and consider whether the tribunal ought to have made the order in question. Like Mr. Justice Teare, and as Mr. Gavaghan forcefully submitted to me without, so far as I could discern, any particular disagreement on the part of Mr. Peters, the general philosophy of the 1996 Act is to honour and give effect to the arbitration agreement which the parties have entered into for the resolution of their disputes, so that the court's approach, be where the arbitrator has acted fairly and within the scope of the arbitral powers conferred upon him, should be to adopt a noninterventionist approach but, where its aid is sought, to act in support of that arbitral process. Relevant to this is that, as Mr. Gavaghan reminded me, an arbitrator has no power to make an order binding on a stranger to the arbitration or to add a penal notice to his order in order to add teeth to it – the expression used by Mr. Gavaghan – so that the order made can be rendered more effective.

57 Although none of this was a matter of controversy between the parties, there was nevertheless a very determined attempt by Mr. Peters to challenge Mr. Lee's reasons for making his directions with a view to persuading me that his reasons, as set out in para.16 of the written reasons, were either factually wrong or of little or no relevance to the directions which he made. I listened to

Mr. Peters' submissions and to Mr. Gavaghan's responses to them not because I see it as my role to review or second guess Mr. Lee's function, but to satisfy myself that in making his directions Mr. Lee had not proceeded on some wholly mistaken basis, or that the exercise by him of his power to make the directions was not fatally undermined in some fundamental respect. I was so satisfied. That is not to say that Mr. Peters did not advance some powerful criticisms, but as Mr. Gavaghan reminded me, Mr. Lee has had the advantage which this court has not had of a prolonged and detailed examination through the arbitration of the ins and outs of this dispute and a close involvement over very many months in the many factual issues that it has thrown up.

58 I therefore proceed on the basis that Mr. Lee had good reason to make the directions which the LLP now seeks to have supported, with Mr. Lee's explicit permission and I think encouragement, by an order under section 44. The question, then, is whether I should accede to the application by making the order sought to give teeth to Mr. Lee's directions.

59 As I made clear to Mr. Gavaghan, I have felt a difficulty in simply making the order sought. This is because, although Mr. Lee rejected any intention by his directions to prevent the Brakes from purchasing the Farm when, as it certainly will be, it is put up for sale by the receivers appointed on 24th October last, the effect of the directions as it seems to me is bound to inhibit the Brakes in following that course. Paragraph (a) of the directions in terms prohibits them from purchasing the Farm, and paragraph (b) prohibits them from undertaking any negotiations of any kind with a view to its purchase. Paragraphs (c)-(e) are directed to any dealings by them including even any negotiations with any purchaser or potential purchase of the Farm.

60 It is quite true that there is a let out in that they may do any of the otherwise prohibited things if they have either the LLP's consent or the consent of Mr. Lee as the arbitrator. However, as the LLP and the Brakes are not only at daggers drawn on just about every issue that has arisen in the course of this dispute, which encompasses at least two other sets of proceedings and a separate arbitration; but they are also or may very well be rival purchasers for the Farm. This let out is more apparent that. On the other side, the Brakes have, it is pointed out, a particular interest in purchasing the Farm because it is where, for quite some time now and from well before the partnership was entered into, they have made their home. The power which Mr. Lee reserves to himself to consent to the Brakes doing any of the otherwise proscribed acts by his directions is of course important, and the directions can always be reviewed by him. That said, it does seem to me, to put it no higher, that the directions put the Brakes at a disadvantage in their wish to acquire the farm which the LLP or for that matter a third party bidder, does not face. The question is whether the court should bless and support that position by making the order sought.

61 In urging that I should Mr. Gavaghan submitted that in a number of respects the Brakes had abused their position by divulging matters to the receivers or those acting for them relevant to the Farm when they should not have done, and by running the Farm down in various respects so that, as he put it, "The well has been poisoned", with the consequence that the Farm has become, in his phrase, "blighted" in the receivers' eyes. I am in no position to reach any conclusion on that. On the other side of the argument Mr. Peters has submitted that the sale of the Farm is in the hands of the receivers appointed by the bank and not Mr. Lee – much less the partners of the now dissolved partnership – and that there can be no question concerning either the integrity of the receivers or of the bank or their competence; or because it has been pointed out to them their duty to obtain the best price reasonably obtainable for the Farm. Mr. Peters pointed out that the receivers are well aware that the LLP and not just Mr. and Mrs. Brake are interested purchasers or, at the very least, in the case of the LLP, is concerned to ensure that the best price is paid. They are also aware, he said, of the freezing order and therefore of the restrictions that that order imposes on the freedom of the Brakes to dispose of their assets. All this (and I do no more than summarise his submissions) shows, he said, that the LLP's concerns reflected in Mr. Lee's directions are beside the point. Provided the receivers sell for the best price that the Farm can reasonably obtain, it matters not, he submitted, what negotiations the Brakes may carry out. I see the force of all of that.

62 In para.14 of his written reasons, Mr. Lee stated that his directions were designed to ensure that there is "transparency", and that he and the LLP are kept fully informed of any negotiations by the Brakes. In a course of email exchanges which followed the making of Mr. Lee's directions and the statement of his reasons for making them, the Brakes through their solicitors took up with Mr. Lee how they were now to proceed, given the restrictions on their freedom of action caused by the directions.

63 In an email of 8th December, sent in response to those and other points made to him by Michelmores on behalf of the Brakes and Lester Aldridge on behalf of the LLP, Mr. Lee reiterated that, as he put it:

> "The purpose of the order which I made at the claimant's request was not to prevent the respondents from bidding for the property, but to ensure that if the respondents did intend to bid there should be full transparency. Whilst I accept that the sale of the property is now in the hands of the receiver, it does seem to me that the fact that the receiver may intend to sell without vacant possession necessarily affects the business of the partnership".

64 I pause there to say that the idea of a sale without vacant possession was floated by the receivers, but opposed – not surprisingly – by the LLP and as I understand it that possibility no longer features. I continue with the email:

> "I appreciate that the offer which the respondents may wish to make for the property and the terms of the acquisition may be commercially confidential, but they are matters which in my view are highly relevant to the concerns expressed by the claimant. I invite the parties' comments as to how the order may be varied so as to ensure the transparency of the bidding process whilst protecting its confidentiality. The parties will appreciate that I have no jurisdiction over the receiver. In the meantime my order continues in force".

65 So, Mr. Lee was envisaging that his directions would be varied so as – to use his expression – "to ensure transparency of the bidding process whilst protecting its confidentiality", he appears to have envisaged a mechanism for achieving this.

66 I confess that I have had considerable difficulty in understanding quite what is meant by "transparency", where competitive bids for a property are concerned. Michelmores entertained a similar difficulty. Thus, the following day, 9th December, they emailed Mr. Lee. And I read relevant parts of that email:

> "I [that is Mr. Williams] have to say that I am rather struggling to come up with a mechanism primarily because I am not sure what it is that you need us to address. As you have correctly identified, there is a need to protect commercial confidentiality in relation to a process where my clients and the LLP are in competition".

67 And then later: in the same email:

> "It would be helpful to have from you what it is that you want the mechanism to address so that we can try to address it. What are your particular concerns? What are the questions which you require my clients to answer to enable them to bid?...Lastly, given that my clients are in competition with the LLP, until this is sorted out, should your award restraining my clients from bidding also extend to the LLP?"

68 Mr. Lee responded promptly later that same day. He said this:

> "You refer in your last sentence to a restraint from bidding. But I was at pains to emphasise in my email yesterday and also in my reasons for order, the purpose of the order is not to prevent either party from bidding, but to ensure that if your clients do intend to bid for the property there is full transparency, and that the interests of the

partnership are protected and to meet the concerns expressed in para.16 of my note that the respondents do not act in breach of their fiduciary duties. It is to meet that concern that I suggested that a mechanism should be found. I think this is a matter which should be capable of being agreed between the parties so that a sale of the property on terms which will be of benefit to the partnership as a whole, as distinct from the respondents alone, is not lost".

69 I have to say that, given the deep animosities and mutual suspicions which divide the parties, Mr. Lee's hope that the parties can agree a mechanism to give effect to the transparency which Mr. Lee is anxious to achieve seems unrealistic. Failing such a mechanism the directions stand and the Brakes are subject to the prohibitions set out in them. In the meantime, the receivers are preparing for a sale although quite when is unknown.

70 Michelmores responded at some length to Mr. Lee's email three days later on 12th December, which is last Friday. And this is what they wrote – and again I do no more than refer to certain passages:

> "You say that you have no objection to my clients bidding to acquire West Axnoller Farm from the receivers. The same obviously applies to the LLP. You state that there must be full transparency and that the interests of the partnership are protected. You go on to refer to your concerns that my clients do not act in breach of their fiduciary duties. Exactly the same must obviously apply to the LLP...The difficulty that I have in this is establishing what it is that you have in mind to assist in relation to any of these matters at this stage. The starting point is that the mechanism for dealing with the disposal of West Axnoller Farm has been chosen by the receivers acting on behalf of the bank. My clients have no say with regard to that. They must act in accordance with the requirements of the receivers...You have recognised that the parties must protect their respective commercial positions and therefore plainly there will not be transparent bidding. Indeed, that is not part of the receivers' preferred sale mechanism. The receivers do not have to sell to either my clients or to the LLP. You are aware that the receivers have made it clear that they are not prepared to commit the sale to anybody... If there is a particular matter which you want my clients to address in relation to the bidding process and their desire to acquire Axnoller Farm, then we will address that. However, I cannot see what it is that can be done or what issue needs to be addressed in what is now a straightforward competition between the LLP and my clients in respect of a structure which is governed by independent third parties, namely the receivers, on behalf of the secured lender. Further, it is in circumstances where the receivers (and therefore the bank), are not prepared to commit to sell to the LLP or my clients. What that structure creates is a fair

competition in relation to which my clients may not succeed. However, they are being undermined in their ability to participate in that fair [competition I think it means] by the continuation of the restraint order in circumstances where I do not consider that there is now anything that needs to be done or can be done against the backcloth that the receivers are going to sell the property and the partnership's trading will cease as a consequence. Lester Aldridge on behalf of the LLP have told you that they are applying to the court next week. I therefore invite you to confirm exactly what questions you wish us to address in order that we may meet your requirement for "transparency" or, if you agree that there is nothing now that needs to be addressed in respect of the sale mechanism as put forward by the receivers, the restraint can be lifted to enable my clients to proceed within the very tight constraints set by the receivers. As you have already said that they can bid for the property, it is their contractual and legal right. With respect, this is at odds with the restraint, given the timetable and lack of clarity in relation to what it is you wish to have addressed and is in effect a barring of my clients in taking part in the sale mechanism adopted by the receivers which is out of the parties' hands".

71 Mr. Lee's response was commendably sent later that same day, and he said this:

> "I am away from the office today and on Monday and will not be able to respond to your letter before the hearing of the claimant's application which I understand is fixed for Tuesday. I suggest therefore that you raise these matters on the hearing of the application".

72 The position, to say the least, is in my judgment very unsatisfactory. The Brakes wish, quite reasonably, to know what they must do to enable them to engage fairly in bidding for the Farm with having to apply to Mr. Lee, or optimistically to their rival, the LLP, for permission to proceed. The directions are not of their making. Yet the most that they are told is to go and reach some agreement with the LLP. Mr. Lee appears to recognise that his directions require refinement to enable the Brakes fairly to bid while ensuring that the LLP's concerns are met. It is these directions in their unvaried state that I am asked to translate into an order of the court backed by a penal notice. In the exercise of my discretion under section 44 and mindful of the court's concern where it properly can to support the arbitral process, I am not willing to do so.

73 It appears to me that at the end of the day there are really two matters which are a legitimate concern to the LLP. The first is the concern that if they bid for the Farm, the Brakes are able to demonstrate that they have the ability to fund their purchase without breaching the terms of the freezing order. Specifically, that order prevents them from disposing of, dealing with or diminishing the

value of their assets up to the value of £850,000. The second is to establish precisely what information the Brakes or their advisers have communicated to the receivers or to the bank or to those representing them or to their respective agents or advisers about the Farm and its saleability.

74 I am inclined to think that provided the receivers obtain a full price for the Farm, and provided there is no breach by them of the freezing order, it may not matter what if any deal the Brakes enter into with the purchase of the Farm if they, the Brakes, are not themselves successful in acquiring it.

75 I also consider, though I do not think that this is any longer a matter of controversy, that the Farm should be sold with vacant possession. That particular point is outside Mr. Lee's power to achieve, but he can certainly make directions binding the Brakes to ensure that they give vacant possession if on a sale a third party is the successful purchaser.

76 What it comes to is this, if I am to give teeth to any directions which Mr. Lee makes under the powers conferred by section 44, I must be persuaded that the directions are workable and achieve what it is that Mr. Lee has in mind. As matters currently stand I am not so persuaded. I decline therefore to make the order sought.

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