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Case No: BL-2020-000210

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

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

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Before:

MASTER CLARK

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Between:

(1) OWEN OYSTON **(2) BLACKPOOL FOOTBALL CLUB (PROPERTIES) LIMITED**	**Claimants**
- and -	
(1) DAVID RUBIN **(2) PAUL COOPER**	**Defendants**

- -

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Mr Matthew Collings QC (instructed by **HHB Solicitors**) for the **Claimants**
Ms Madeleine Jones (instructed by **Stephenson Harwood LLP**) for the **Defendants**

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Approved Judgment

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MASTER CLARK :

1. On 15 June 2020 I held a directions hearing to consider whether the order dated 12 May 2020 of Deputy Master Arkush in this claim should be varied to provide that the claim is listed for disposal before Mr Justice Marcus Smith rather than the Master. That issue arises in the following circumstances.

2. On 6 November 2015 Mr Justice Marcus Smith handed down judgment in claim number CR-2015-006989. This was an unfair prejudice petition by a minority shareholder. The claimants in this claim are the unsuccessful respondents to the petition. The judge ordered them to pay over £30 million to the petitioner and to buy out its shares. The enforcement of that order has a long and complex history, including a post judgment freezing injunction, which it is unnecessary to rehearse in detail.

3. On 23 March 2018 the judge made an order which included at paragraph 3 the following:

> "All matters relating to the petitioner's petition which are in the Chancery Division of the High Court, including the post judgment freezing regime and enforcement of amounts owing to the petitioner by the respondents shall be reserved to Mr Justice Marcus Smith."

I note that this order on its face does not confine itself to the petition claim but extends to all matters in the Chancery Division relating to the petition. The judge presided over about 10 hearings dealing with enforcement of the judgment debt and dealt with further applications on the papers.

4. On 13 February 2019 the judge made an order appointing the defendants in this claim as receivers by way of equitable execution over the claimants' assets and making detailed provisions as to their powers. Paragraph 10 of that order provided, so far as relevant:

> "**Receivers' costs and expenses**
>
> The Receivers shall be entitled, pursuant to CPR 69.7(1) and (2), to be paid their reasonable fees, liabilities, costs expenses and disbursements in accordance with the terms set out in the letter from the Receivers to the Petitioner's solicitors dated 11 December 2018."

Paragraph 16 of that order provided for the parties and the receivers and, indeed, Mrs Oyston to have liberty to apply to the judge.

5. Between 27 February and 17 December 2019 the receivers filed 11 progress reports, and receipts and payment reports. On 16 December 2019 a comprehensive settlement was reached between the petitioner and the claimants. This resulted in a consent order on 17 December 2019 reflecting the settlement reached and discharging the receivers. That order included the following provisions. Paragraph 4 provided for the receivers to submit their final account by 20 December 2019. Paragraph 6 provided:

> "The Receivers shall be released and discharged from all claims and issues arising out of their Final Account on 31 January 2019 unless a claim is brought for surcharge and falsification before that date. If a claim is brought for surcharge and falsification the Receivers shall be released and discharged from such claims upon the finalisation of the Final Account or upon such date as the Court may in its discretion direct."

On 20 December 2019, as ordered, the receivers submitted their final account.

6. On 30 January 2020 the claimants issued this Part 8 claim challenging the final account and seeking to falsify and/or surcharge it. On 3 and 7 February 2020 the receivers filed supplementary reports in the receivership. On 7 February 2020 the respondents' solicitors wrote to the judge requesting that the claim should be dealt with and determined by him. On 10 February 2020 the judge's clerk replied:

> "The Judge is more than happy to deal with this matter as you suggest but one point that the Judge feels obliged to point out to the parties is that until the end of June/early July his diary is very full and if the parties were to seek a hearing of any substance before that time there might be difficulties which might make it more appropriate to release the matter to another judge.
>
> The Judge suggests again, subject to anything Mr Oyston may wish to say, that the parties proceed on the basis that the matter will be dealt with by him given the knowledge he has already acquired but that the parties and the Judge will deal with any diary issues if and when they arise."

7. On 11 February 2020 the claimants' solicitors emailed the judge's clerk setting out the grounds of their resistance to what they referred to as the informal transfer of the claim and the informal allocation of it to the judge. On 12 February 2020 the judge's clerk replied:

> "In the light of the email from Mr Oyston's representatives it would plainly be inappropriate for the Judge to deal with the claim absent a successful formal application to transfer the matter."

8. On 13 March 2020 the receivers applied to the Master for the claim to be allocated to case management and trial by judge and reserved to Mr Justice Marcus Smith ("the allocation application"). This was supported by a witness statement of Stuart Frith of the same date. The receivers asked for the application to be determined on the papers. The claimants opposed the application and filed a witness statement dated 1 April 2020 of Richard Bell in opposition.

9. On 12 May 2020 Deputy Master Arkush made an order listing the claim for a disposal hearing before a Master. On 28 May 2020 the receivers issued an application ("the declaration application") in the petition claim seeking, pursuant to the liberty to apply

in paragraph 16 of the order dated 13 February 2019 (i.e. the order appointing them), various declarations as to their entitlement to fees and expenses and seeking the listing of that application before Mr Justice Marcus Smith. In these circumstances, I therefore listed this directions hearing to revisit the issue of whether this claim should be determined by the Master or Mr Justice Marcus Smith.

Principles

10. The question of whether a claim should be tried by a Master or a judge is on the cusp of case management decisions on the one hand, and the court's administrative decisions on the other. High Court judges and Masters are both judges of the High Court, and since 2015 have virtually concurrent jurisdictions. This is demonstrated by paragraph 13.2 of the Chancery Guide, which sets out that an application in any claim must initially be made to the Master, who may then decide to release it to the High Court judge:

> "It is not for the parties to decide upon the allocation of work; it is for judicial decision. The refusal to release an application to a judge may be informally reviewed by a triage judge on an application in writing by a party and overruled."

11. So far as Part 8 claims are concerned, paragraphs 15.9 and 15.10 of the Chancery Guide provide, so far as relevant:

> "15.9 All Part 8 claims are referred to a Master when an acknowledgment of service is filed or if time for filing an acknowledgment expires without one being filed …
>
> 15.10 If an acknowledgement has been filed, the Master will normally fix a hearing for directions. However, in some cases it may be possible as part of the file work to give directions and to fix a disposal hearing."

12. There is no general rule that Part 8 claims are determined by Masters, although they often are, because Masters have an established expertise in the subject matter of a range of Part 8 claims. The claim is initially referred to the Master to decide the appropriate level of judge.

13. There is a general rule contained in CPR PD 40A, paragraph 9 that accounts are taken before the Master, but the court has power to order otherwise. I note also that this claim is not to take an account, but to surcharge and falsify an existing account.

14. It is common ground between the parties:

    i) The claim will not require intricate line-by-line analysis;

    ii) The claim will require determination of significant issues of principle, including those set out in the declaration application notice;

    iii) The declaration application should be determined with the Part 8 claim.

The receivers say that the claim and the declaration application should be listed before the judge, the claimants say the Master.

15. Two issues therefore arise for determination:

    i) Can the court properly revisit and vary Deputy Master Arkush's order?

    ii) If so, should it be varied as the receivers contend?

Power to vary

16. The court has power to vary its own orders under CPR 3.1(7) and the principles governing that power are set out in *Tibbles v SIG Plc* [2012] 1 WLR 2591, although neither side referred me to any authority on this issue. In *Tibbles* it was held that the circumstances in which the discretion to vary may be appropriately exercised include where there has been a material change of circumstances since the order was made.

17. In this case there have been the following material changes of circumstance:

    i) The receivers have issued the declaration application;

    ii) The judge has indicated he can make himself available to hear the claim in July, which is the period sought by the parties, so there will be no delay occasioned by his hearing it;

    iii) The receivers, having previously indicated that their counsel was unavailable in July, have now instructed alternative counsel so that the disposal of the claim can be listed then.

18. The claimants' counsel accepted that the second and third factors were changes of circumstances, but submitted they were not sufficient to justify varying the order. I disagree. The allocation of the level of judiciary is a highly practical matter in which delay, or the absence of it, in the determination of the claim is a material circumstance. These factors would, in my judgment, be sufficient in themselves to justify considering varying the Deputy Master's order.

19. As to the declaration application, the claimants' counsel submitted that it could not be a material change of circumstance for several reasons. First, he submitted the declaration application is an abuse of process because it requires determination of the same issues as arising in the Part 8 claim. In my judgment, this is insufficient to show abuse of process, particularly when the petition preceded the Part 8 claim. The reality is that this claim is closely linked to, and a continuation of, the enforcement part of the unfair prejudice claim. As mentioned, both the orders appointing the receivers and discharging them as receivers provided for liberty to apply, and the application is made under that provision in the order of 13 February 2019.

20. The issues in the declaration application arise out of the receivership enforcement part of the petition and, in particular, the effect, in the events that happened, of the judge's order of 13 February 2019, which provided both for the powers of the receivers and for their remuneration. They are issues which can, in my judgment, properly be raised in those proceedings and which, indeed, the judge who made the order is best placed to determine. The fact that they are issues, the determination of which will be

necessary also in this claim, merely reflects the fact that this claim follows on from the receivership.

21. The claimants' counsel's second submission was that the declaration application is designed to circumvent the need to appeal the Deputy Master's decision and is a collateral attack on it. Linked to this was a submission that the petition proceedings are at an end as a consequence of the settlement reached between the parties in that claim, which means that no further enforcement will take place.

22. However, as the receivers' counsel pointed out, the proceedings continue for certain purposes. Paragraph 2 of the order of 17 December 2019 provides:

> "The receivers shall be at liberty to register a caution against the property, Travelodge, Seasiders Way, Blackpool, FY1 6JJ, in respect of the lien securing the fees, liabilities, costs expenses and disbursements of the receivers."

This reflects the fact that the receivers' fees, liabilities, costs expenses and disbursements once finalised will be payable by the claimants and the lien secures that payment. I was informed by the receivers' counsel, and no objection was taken to this by the claimants' counsel, that the judge has indicated that if the claimants do not pay, he would reappoint the receivers as receivers over the Travelodge so that they could realise it in order to pay their outstanding fees etc.

23. In addition, paragraph 6 of the order of 17 December 2019, which I have already read out, prevents the release and discharge of the receivers from claims and issues arising out of the final account if a separate claim for surcharge and falsification is made, and provides for further directions by the court as to the date of release and discharge. That must be, in my judgment, the court in the petition claim. I do not therefore accept that the petition proceedings have come to an end for all purposes, and I do not accept that the application cannot properly be brought in the petition proceedings.

24. The claimants' counsel's third point was that the declaration application is contrary to procedures prescribed by the judge. He relied on the judge's order of 17 December 2019 which provided that a challenge to the receivers' final account by way of surcharge and falsification be brought by claim. This procedural direction does not, in my judgment, preclude points of principle as to the meaning and effect of his order of 13 February 2019 being brought back to the judge in that claim.

25. Fourthly, the declaration application is said to have been issued in an irregular manner direct to the judge. However, the judge reserved all proceedings in the petition to himself without a doubt, and the application was expressly made under the liberty to apply in paragraph 16 of the order dated 13 February 2019 and raises issues in respect of orders made in those proceedings. It was not therefore, in my judgment, irregular.

26. I therefore reject the claimants' counsel's submission that in deciding whether there has been a material change in circumstances the declaration application is to be disregarded.

Whether the claim should be determined by the Master or Mr Justice Marcus Smith

27. The issues arising in this claim fall into two main categories:

    i) The meaning and effect of the judge's order of 13 February 2019;

    ii) Whether the respondents' fees are reasonable and proportionate in all the circumstances within the meaning of CPR 69.7(4) taking into account:

        a) the time properly given by the receivers and their staff to the receivership;

        b) the complexity of the receivership;

        c) any responsibility of an exceptional kind or degree which falls on the receivers and consequence of the receivership;

        d) the effectiveness with which the receivers appear to be carrying out or to have carried out their duties; and

        e) the value and nature of the subject matter of the receivership,

    (that being an adapted quote from the relevant rule).

28. As to the meaning and effect of the order of 13 February 2019, the claimants' counsel submitted that a court order is to be interpreted with well known principles, of which the first is to consider the natural and ordinary meaning of the words in issue. Unless there is lack of clarity then, he submitted, it is unnecessary to go further. The judge would therefore, he submitted, be in no better position than the Master in carrying out that task. He particularly relied upon a provision that the receivers are entitled to 5% of realisations as being an instance of a manifestly clear provision the meaning of which could equally well be determined by the Master as by the judge.

29. As to this, the relevant principles applicable to construction of written documents, including court orders, are conveniently set out in the judgment of Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2, [2015] A.C. 129 at [19]:

> "the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

I also refer to *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [21] where Lord Clarke said:

> "The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the

> time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

These passages make it clear that the ordinary natural meaning is not, as the claimants' counsel submitted, the only relevant consideration when construing an order. The factual circumstances in which the order was made will also be relevant.

30. In addition, there will be issues in the claim as to the effect of the judge's order and the documents incorporated into it in the events occurring after the order. One example is the effect of the provision that the receivers are entitled to 5% of realisations in circumstances where the receivers' incurred costs and expenses in the sale of an asset, which sale was aborted at the last moment because the claimants settled with the petitioner. The question will then be whether as a matter of construction, alternatively implication of terms, the receivers are entitled to fees in respect of the aborted realisation.

31. In my judgment, the judge's detailed knowledge of the receivership means he is best placed to decide this type of issue. By contrast, the Master will need extensive education, both as to the circumstances in which the order was made and the factual circumstances in which its effect falls to be considered.

32. As to what is reasonably proportionate, the receivers submitted that that will depend on understanding the complex circumstances of the receivership. Since the judge not only appointed the receivers, but was also the judge for whom reports were made and issues raised, he was, they submitted, best placed to determine this issue. I agree.

33. The reasonableness and proportionality of the receivers' fees and costs will have to be determined by very detailed reference to the conduct of the receivership and the parties over the period of the receivership. That task will require detailed examination of the steps taken by the receivers and their agents, including their solicitors. The judge already has considerable knowledge of these matters, and will need a far shorter time to familiarise or re-familiarise himself with the relevant facts. It is a far more effective use of judicial resources for him to deal with this claim.

34. In this respect, this claim differs from *Schumacher v Clarke* [2019] EWHC 1031 (Ch) which was relied upon by the claimants. This was a claim under section 50 of the Administration of Justice Act 1985 and the inherent jurisdiction of the court to remove the defendants as personal representatives and trustees. Masters have an established expertise in these claims. The defendants in that claim sought in a directions hearing (and I note that no formal application was made) that the claim be listed for trial before a judge of the High Court.

35. The grounds on which a High Court judge was said to be more suitable were:

> "(i) that the claim involves allegations of bad faith, and that they are made against persons of standing who have high profiles, particularly in the art world;

(ii) There are factual and legal complexities which underlie the claim;
(iii) The trial is likely to attract media interest;
(iv) The deceased had a high profile;
(v) The value of the estate is substantial; and
(vi) on the defendants' counsel's analysis the trial was likely to take more than five days."

36. The Chief Master rejected that submission and his reasons can be summarised as follows:

i) The claim was not a category A case;

ii) In reality, it was likely to be heard by a deputy judge;

iii) The relevant jurisdiction is exercised by Masters in the vast majority of cases;

iv) The area was one in which Masters have a considerable expertise;

v) The value of the estate was not especially large and lower than many dealt with by the Masters;

vi) The case did not involve many complex issues;

vii) The fact that the deceased was a well known public figure and the parties had high profiles was irrelevant to allocation of judiciary.

37. The only feature which this claim shares with *Schumacher* is that Masters generally deal with accounts and have an established expertise in them. It differs from *Schumacher* in that the receivership was particularly complex and the receivers encountered a number of difficulties in the course of their work, which are summarised in the receivers' counsel's skeleton argument, but which it is not necessary for present purposes to set out. The most important difference is, however, that the key factor in this case, namely the judge's extensive knowledge of the background matters to the claim, was entirely absent in *Schumacher*.

38. Finally, the claimants' counsel placed great reliance on the fact that in correspondence the judge did not accept that this claim was reserved to him, although that proposition was advanced to him by the receivers' solicitors. That is correct but the question I am deciding does not turn on whether the effect of the judge's order of 23 March 2018 was to reserve this claim to himself. In any event, the judge has never been asked to determine whether it did, nor has he done so.

39. However, the correspondence, in my judgment, speaks for itself. The judge was "more than happy to deal with the matter" and suggested "that the parties proceed on the basis that the matter will be dealt with by him given the knowledge he has already acquired" subject, of course, to anything the claimants might wish to say. The clear inference to be drawn is that the judge himself regards himself as more suitable than a judge or Master with no knowledge of this complicated case.

40. For these reasons, therefore, I will direct that the claim be further case managed and tried or disposed of by Mr Justice Marcus Smith and that the parties seek, as soon as practicable, a listing of the disposal hearing before him.

(For proceedings after judgment see separate transcript)

41. I have been referred by the claimants' counsel to a number of passages in the Chancery Guide to the effect that it is not, in fact, within my power to nominate a specific judge to deal with this claim. They include 14.10, 15.9, 15.10 and 17.8 and he submits that I should refer the question of the judge to which this claim should be nominated to the Chancellor.

42. As to this, the receivers' counsel responds pointing out that the question of whether or not this claim should be allocated to Mr Justice Marcus Smith is at the heart of this application, and has been a live issue between these parties ever since the receivers applied for the claim to be reserved to him. She submits that if I am wrong as to whether or not I am entitled to do that, that is a matter for appeal. She points out that the claimants could have and should have brought their arguments as to that at the hearing on 15 June. I accept that submission.

43. In addition, I am mindful of the fact that the provisions of the Chancery Guide are not rules of the Civil Procedure Rules, nor are they a Practice Direction. The Guide's status is, as stated at paragraph 1.14, to provide practical information as to the practice in the Chancery Division and, at 1.15, that it does not have the force of law. This is perhaps illustrated by the fact that the of triage judges who are referred to in the relevant paragraph, 14.11, Mr Justice Arnold is no longer a judge of the Chancery Division (having been elevated to the Court of Appeal) and Mr Justice Norris has retired; only Mr Justice Mann remains as a High Court judge.

44. So I am unpersuaded that I should not make the order I have decided to make, namely that the parties seek a listing before Mr Justice Marcus Smith.

(For proceedings after judgment see separate transcript)

45. Costs are, of course, discretionary and the general rule is that the unsuccessful party pays the successful party's costs. I therefore have to focus on whether in this directions hearing, it is possible to identify a successful and unsuccessful party, or whether this is the sort of hearing where it is not: where the court has been making a routine decision as to case management, where the usual order is costs in the case.

46. This hearing was listed on the court's own initiative. The issue that was to be determined at the hearing was made plain to the parties in the listing directions in respect of the hearing, namely whether the order dated 12 May 2020 of Deputy Master Arkush should be revisited in the light of the declaration application.

47. The claimants made vigorous submissions that it was not appropriate to revisit the Deputy Master's order. They argued a number of points, I think five in total, directed at the declaration application, all of which were rejected by me. They also made detailed submissions on the substantive point as to the appropriate level of judge for this case and whether it was right that this claim should be listed before Mr Justice Marcus Smith, or whether it should be listed before the Master.

48. So, in my judgment, it would not be right simply to treat this as a directions hearing. The parties joined issue and the receivers succeeded on the issues that were determined by me. In those circumstances the right order is the usual order, in my

judgment, which is that the claimants as the unsuccessful party should pay the successful party's costs.

(For proceedings after judgment see separate transcript)

49. I am not going to give permission to appeal. This is a paradigm example of a case management decision, in respect of which there are a number of authorities that make it clear that this type of decision is within the ambit of the discretion of the Master and not readily appealable.

50. Turning to the specific points raised by the claimants' counsel, it seems to me that the issuing of the receivers' declaration application was, contrary to his submission, a material change of circumstances. The fact that it was threatened in the evidence before the Deputy Master (a new point) does not mean that when it was actually issued there was no change, and the claimants have no real prospect of arguing the contrary.

51. Similarly, the judge's availability when the allocation application was made meant there was a concern about delay. By the time the application was revisited before me, the fact that the judge was available in July meant that there was no question of delay. The claimants have no real prospect of arguing that this was not a material change.

52. The unavailability of the receivers' counsel was a factor that changed at a relatively late stage. It is a less significant factor than the other 2 factors, but added its own weight to the overall position that there was no delay occasioned by Mr Justice Marcus Smith hearing the case. The claimants have no real prospect of success in arguing otherwise.

53. The position is similar in respect of my finding that the petition claim continues. The claimants' counsel described it as mopping up the receivership. I have given detailed reasons as to why, in my judgment, the proceedings did continue for certain purposes and there is no real prospect of success in showing that reasoning was wrong. In particular, I referred to paragraph 16 of the order of 13 February 2019 which provides for a liberty to apply. There is no real prospect of success in arguing that the application could not be made under that provision.

54. The fourth ground advanced by the claimants' counsel is I made too much of the judge's involvement in the receivership. It seems to me this is hopeless when the judge himself referred to his own knowledge of the claim as being a reason why he should deal with it. So far as whether this claim is reserved to the judge, as I made clear in my judgment that was not the basis on which I made my decision. I made my decision on the basis of the judge being more suitable than a Master with no familiarity with the case.

55. I have already dealt with so far as whether or not I have the power to list the Part 8 claim before a specific judge. For the reasons I have already given when I rejected that submission, I also consider that that line of argument has no real prospect of success.

(For proceedings after judgment see separate transcript)

This judgment has been approved by the Judge.