Neutral Citation Number: [2020] EWHC 3063 (Ch)

Case No: HC-2017-001469

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

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

Date: 20/11/2020

Before:

MASTER CLARK

- -

Between:

KENNETH DAVIES **Claimant**

- and -

(1) STEPHEN FORD
(2) RICHARD MONKS
(3) GREEN BOX RECYCLING KENT LIMITED **Defendants**

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- -

Chantelle Staynings (instructed by **Dentons UK and Middle East LLP**)
Alexander Cook and **Daniel Kessler** (instructed by Cripps LLP) for the **Second and Third Defendants**

Hearing date: 29 October 2020

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Approved Judgment

This approved judgment, sent to the parties by email on 20 November 2020, is deemed to be handed down on that date and is to be treated as authentic.

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Master Clark:

Application

1. This is the application of the second defendant, made at the second CCMC, to adduce expert evidence in the quantum trial of the claim.

2. The claimant, Kenneth Davies, is the assignee of the causes of action of Green Box Recycling Limited ("GBR") in this claim. GBR traded as a waste management business until it was dissolved on 18 October 2011.

3. The first and second defendants, Stephen Ford ("D1") and Richard Monks ("D2"), are former directors of GBR. The third defendant, Green Box Recycling Kent Limited ("GBRK") is a company set up by them which traded (and continues to trade) as a waste management business at the same site ("the Ashford site") where GBR traded. The first defendant has not played an active part in the claim and, except where the context otherwise indicates, I refer to D2 and GBRK as "the defendants".

4. The claimant succeeded at the liability trial in showing that D1 and D2 had dishonestly diverted GBR's business to GBRK. The order dated 24 March 2020 of the Deputy Judge, Adam Johnson QC, included orders that:

> "2. Judgment be entered for [the claimant] (i) against [D1] and [D2] for equitable compensation; and (ii) against GBRK for knowing receipt.
>
> 3. The nature, extent and quantum of (i) equitable compensation payable by [D2] and GBRK; any equitable allowance granted to [D2]; and (iii) the proprietary and/or personal remedy to be granted to the claimant in respect of the business conducted by GBRK be determined at a further trial."

5. At the first CCMC on 15 July 2020, the parties were agreed that permission should be granted for an accountancy expert, but not agreed as to the issues that should be addressed by the expert. The defendants sought an order that the expert address:

> "The profits which GBR would have made in the period from 30 November 2010 to 18 October 2011 had [D2] not committed any of the breaches of duty found in the judgment of Adam Johnson QC dated 24 March 2020."

6. In support of his submission that the expert should address this issue, the defendants' counsel said that their position was that GBR would not have made any profits. My response was that the judge would not need expert accountancy evidence to conclude that GBR would not have made any profits, if the factual allegations made by the defendants were established (summarised at para 27 below). I therefore refused to include the issue as one to be addressed by the accountancy expert.

7. As directed at the first CCMC, the parties filed Points of Claim, Points of Defence and Points of Reply, and on 22 September 2020 agreed a List of Issues in the quantum claim. These include the following:

"How much equitable compensation (if any) is payable by [D1] and [D2]? In particular:

…

(c) Having regard to the issues determined at the trial on liability, is it open to [D2] to argue at the quantum trial that GBR would not have built a waste management business at the Ashford Site (the "Counterfactual Defence") or is that barred by res judicata and/or abuse of process (as asserted by [the claimant])?

…

(e) If the Court finds that it is open to [D2] to rely on the Counterfactual Defence and to the extent that the issue is legally relevant, would GBR in fact have built a waste management business at the Ashford Site? If so, should the Court impose a restriction on [D2]'s liability to pay compensation similar to the approach of *Warman International Ltd v Dwyer* [1995] HCA 18, and if so, what should this restriction be and what award is proper compensation?

(f) Is it relevant how much remuneration and benefits have [D1] and [D2] received from GBR and GBRK, (as contended by [the claimant]), or is the proper measure of equitable compensation the net profits GBR would have made had [D2] performed his duties, without any assessment of [D2]'s personal benefits (as contended by [D2])?"

8. The application I am now asked to determine is a response to my decision at the first CCMC. The defendants no longer seek to adduce expert accountancy evidence, but evidence from a "waste management consultant" on the following issues:
   (1) whether it would have been possible for GBR to continue trading given its regulatory and financial position in early 2011 (and, if so, for what period); and
   (2) if GBR had been able to trade, what its net profits would have been by (i) 18 October 2011; and (ii) 1 January 2013.

   ("the proposed issues")

9. The application was not made by application notice, and there is no formal evidence in support of it. The only evidence before me was the CV of the proposed expert, Stephen Bell, to which I will return. Mr Bell has quoted a fee of £20,000-£25,000 for the preparation of a report, excluding VAT and expenses. He has quoted £30,000 to act as a single joint expert.

Principles applicable to this application

10. CPR 35.1 provides:

> "Expert evidence shall be restricted to what is reasonably required to resolve the proceedings."

11. The first task for the court is to determine whether the proposed issues are issues arising on the statements of case. CPR 35.1 does not refer to issues, but only to proceedings. However, as noted by Warren J in *British Airways Plc v Spencer*

[2015] EWHC 2477 (Ch), [2015] Pens. L.R. 519 at [68], if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings.

12. If the proposed issues do arise on the statements of case, then the next question is whether the evidence is admissible:
    (1) Is there a recognised expertise governed by recognised standards and rules of conduct relevant to the proposed issues?; and
    (2) Does the expert have sufficient familiarity with and knowledge of the expertise in question to render their opinion potentially of value in resolving any of those issues?

    See *Barings Plc v Coopers & Lybrand* [2001] PNLR 22, at [45].

13. If the evidence is admissible, then as set out in *The RBS Rights Litigation* [2015] EWHC 3433 (Ch), the position is as follows.

14. In determining whether particular evidence is reasonably required a key question will be:

> "…whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area."

    See *R v Bonython* (1984) 38 SASR 45 at 46, cited in *JP Morgan v Springwell [2007] 1 All ER (Comm) 549; [2006] EWHC 2755 (Comm)* at [20] and *Barings* at [38].

15. The burden of establishing that expert evidence is both (i) admissible and (ii) reasonably required (i.e. not just potentially useful) is on the party which seeks permission to adduce the evidence concerned (see *JP Morgan Chase* at [19], Aikens J (as he then was)).

16. In *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) Warren J (at [68]) set out a three-stage test for the application of CPR 35.1 which brings out the sliding scale implicit in the assessment of what is "reasonably required", from the essential to the useful (emphasis as in the original):

> "(a) The first question is whether, looking at each issue, it is <u>necessary</u> for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.
>
> (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary."

17. As to Warren J's reference to paragraph 63 in his judgment, he there said this:

> "A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."

Whether the proposed issues arise on the statements of case

18. I turn therefore to consider the statements of case, and the issues arising in this part of the claim.

The defendants' case in their Points of Defence

19. Para. 9 of the Points of Defence ("PoD") states:

> "9. [D2]'s primary case is that, for the purposes of ascertaining equitable compensation, it is necessary to enquire what GBR's position would have been, had [D2] not breached his duties. It is [D2]'s case that GBR would ultimately have ceased trading entirely due to: (i) regulatory constraints; and (ii) GBR's financial position. In other words, GBR would have made no profits even if [D2] had performed his duties and not breached them. Accordingly, no compensation (or, in the alternative, very limited compensation) is due."

Regulatory constraints

20. Para 10 of the PoD sets out GBR's regulatory difficulties, which can be summarised as follows:

(1) it did not have an operating licence ("O Licence"), and could not lawfully have used HGVs (necessary for trading) without one; it could not have obtained one until 10 March 2011 (the date when GBRK obtained one);

(2) it did not hold a waste management licence ("WML") and could not lawfully carry out waste management operations without one; it could not have obtained one until 26 April 2011 (the date when GBRK obtained one);

(3) it could not lawfully have traded from the Ashford site until it had been cleared; and this could not have been done before April 2011 (the date when GBRK cleared the site, using £170,685.88 of GBR's money).

Financial constraints

21. GBR's financial position is dealt with in para 11.

Ashford site

22. Para 11.1 deals with clearing the Ashford site as follows:

(1) the cost of clearing the Ashford site was not less than £250,000 plus VAT;
(2) GBR did not have the funds to clear the site, and could not earn them by trading – because the state of the site and the regulatory issues prevented it from trading;
(3) a connected company of GBR, SIK, could not lawfully have lent it funds because it was insolvent.

Equipment

23. Para 11.2 deals with equipment necessary to trade as follows:
(1) GBR had no vehicles, plant, or equipment of its own;
(2) GBR would have needed to make a capital investment in equipment to trade;
(3) the costs of repairing, maintaining, and leasing the necessary equipment are set out.

Sources of finance

24. Para 11.3 sets out that GBR's factoring agreement expired on 31 March 2011 and could not have been extended unless GBR continued to trade.

25. Para 11.4 alleges that it would have been impossible for GBR to have obtained further finance externally, and in any event, without the provision of a personal guarantee, for 2 reasons:
(1) it had no assets to offer as security;
(2) it was "tainted" through its association with the claimant who was disqualified director.

26. Paras 11.5 to 11.7, in summary, set out that GBR could not have afforded either to pay the mortgage on the Ashford site, or to pay the rent of a lease of it.

Summary of the defendants' position

27. The defendants' position is summarised at para 12:

> "in order to trade legally and profitably, GBR would have needed to have: (i) cleared the Ashford Site; (ii) purchased and/or repaired the necessary equipment; and (iii) regularised its regulatory position. Due to its ongoing liabilities, this (as well as any continued trading) would have required a

significant amount of capital resource, which GBR neither possessed, nor had access to via related companies or external third parties."

28. Paras 13 and 14 set out that D2 provided a personal guarantee to enable GBRK to secure funding and made significant loans to it; and that without these GBR would not have traded profitably in the period up to 18 October 2011 (when it was dissolved).

29. Para 15 alleges that had GBR attempted to trade beyond that time, it would have become insolvent. Para 16 sets out, in respect of the breaches found by the Judge, that none of them give rise to compensation, because GBR would not have made any profits.

30. As to the period beyond 18 October 2011, the defendants' case is that no compensation is due because GBR had been dissolved and ceased to exist. However, their alternative case is
    (1) GBR would have ceased trading by the end of 2011; or
    (2) in order to prevent unjust enrichment, the court should apply a time limit of, at most, 2 years to any such compensation.

31. Finally, para 20 alleges that any equitable compensation in respect of profits which GBR would have made should be measured by its net profits, after accounting for the capital investments which would have been required in order for it to do so.

32. The defendants' case can therefore be summarised as follows:
    (1) GBR would not have made any profits;
    (2) If and to the extent that it is to be treated as having done so, these must be calculated on the basis that it expended the same amount as GBRK did to make those profits.

33. The key issue arising in the PoD is therefore whether GBR would have traded. There is no allegation that, if it had traded, GBR's trading income would have been less than GBRK's, or that its outgoings would have been greater. The corollary of this is an implied acceptance that if (which is denied) GBR could have traded, its profits would have been the same as GBRK's were – nothing is alleged that would distinguish their positions in that regard. The core of the defendants' case is that GBR had neither the relevant licences nor the financial resources so to trade.

The Claimant's case

34. The claimant's case is that GBR could have, and would have, earned the profits in fact earned by GBRK: para 7.3 of the Points of Reply.

Regulatory constraints

35. The claimant's case (para 8) as to these is that:
    (1) GBR is to be treated as trading on the same basis as GBRK in fact traded;
    (2) if D2 had acted in accordance with his duties upon his appointment as director on 30 November 2010, then the regulatory requirements would have been met by the end of the third week of January 2011;
    (3) in any event, trading continued at the Ashford site throughout.

Financial constraints

Ashford site clearance

36. The claimant's case (para 9) is that:
    (1) he denies that the cost of clearing the site was £170,685.88 "or any greater sum";
    (2) GBR was well able to fund any costs through funds lent to it by SIK, and its own trading income;
    (3) D2 is issue estopped from alleging SIK was insolvent;
    (4) if further working capital had been required, it could have been obtained through raising finance against plant and equipment (noting that on his own case, D2 raised over £170,000 against a piece of equipment called the Trommel System in May 2011).

Equipment

37. The claimant's case (paras 9.5, 9.6) is that the relevant equipment was either not broken, or if and the extent it was, this would not have prevented GBR from trading because alternative equipment was available. He relies on the fact that GBRK did not cease trading because of broken equipment.

Sources of finance

38. The claimant's position (para 9.7) is that GBR could have entered into the finance agreements instead of GBRK; and (para 9.8) that if D1 and D2 had caused GBR to trade, then the factoring arrangements would have been extended.

39. The claimant's case (para 9.9) is that GBR would have been able to raise necessary funds through bank or other financing secured against plant and equipment; and that potential lenders would not have been concerned that the controlling shareholder in GBR, who was, by then, living overseas and had no involvement in the management, was disqualified from acting as a director.

Response to summary of the defendants' position

40. The claimant's response (in para 10) to the summary at para 12 of the PoD is:
    (1) GBR had the financial resources to clear the Ashford site; and if D1 and D2 had acted in accordance with their duties as directors, the site would have been cleared in December 2010;
    (2) If D1 and D2 had acted in accordance with their duties, GBR would have acquired a WML by the third week of January 2011;
    (3) GBR did not need to purchase or repair equipment;
    (4) GBR could have traded from the date of D1 and D2's appointments as its directors; and D1 and D2 never ceased trading at the site in order to address regulatory issues;
    (5) GBR did not need significant capital resources; alternatively, if it did, it could have funded capital investments from trading income and/or raising finance against plant and equipment.
    (6) GBR could have traded throughout the entire 2010-2011 period. D1 and D2 did not halt trading at any time; instead, they diverted trading from GBR to GBRK.

41. No admissions are made by the claimant as to whether D2 gave a personal guarantee to HSBC in March 2011 (para 11). He denies (para 12) that GBR would

not have traded profitably without the alleged investments and a personal guarantee provided by D2; and denies that it would have been insolvent by the end of 2011.

42. As to profitability, the claimant relies (para 11.2) on the fact that D2's loan account at the end of 2011 included £51,000 in respect of dividends not paid, which are said to demonstrate that GBRK traded profitably in 2011, and generated substantial realised profits for distribution.

43. The claimant's general position (in para 7.2) is that the equitable compensation payable by [D1] and D2 in respect of their breaches of duty is not based on the "loss" suffered by GBR; rather these individuals are liable to re-constitute the "trust" (GBR's assets) by restoring the value of property that should have been acquired for GBR.

44. However, his alternative position (para 14) is that if D1 and D2 had acted in accordance with their duties, GBR would have commenced profitable trading at the beginning of February 2011.

45. At para 15, the claimant denies that GBR's dissolution affects its right to compensation. His case is that D1 and D2 denied GBR the opportunity to earn the very substantial profits in fact earned by GBRK since its incorporation; and are therefore liable to compensate him in respect of those profits.

46. He denies that:
    (1) GBR would have ceased trading by the end of 2011; or
    (2) in order to prevent unjust enrichment, the court should apply a time limit of, at most, 2 years to any such compensation.

47. Finally, the claimant accepts (para 17) that in determining the profits that GBR would have made, had D1 and D2 not diverted business to GBRK, it is necessary to take into account the costs that GBR would have incurred, including any costs in clearing the Ashford Site.

Discussion and conclusion

48. I have sent out the parties' contentions in their statements of case at such length to demonstrate the nature and extent of the issues between them in this part of the claim. They are, in my judgment, primarily factual.

The proposed issues

49. Issue (1) of the proposed issues reflects issue (e) in the List of Issues and does, in my judgment, arise on the statements of case. The issue of the period for which GBR would have traded does arise on the face of the statements of case, but the defendants' primary case is that there were a number of insuperable obstacles to GBR trading at all.

50. As to issue (2), the defendants do allege in the PoD that GBR would not have traded profitably in the period up to 18 October 2011. This is the consequence of, on the defendants' case, the obstacles to its ability to trade at all. As to GBR's net profits as at 1 January 2013, again the defendant's case is that these would have been nil, because GBR would not have been able to trade. In neither case do the defendants

attempt to quantify the position; and its case does not require the judge to do so. Indeed, it is difficult to see how the judge (or an expert) could do so, when there are so many different factors capable of affecting GBR's ability to trade.

The proposed expert

51. Mr Bell is put forward as an expert who would be able to assist the court in determining (i) whether GBR would have traded at all, and (ii) what its profits would have been by the two dates. His expertise is said to be in the waste management industry.

52. The only evidence relied upon by the defendants as to this being a recognised body of expertise was the existence of the Chartered Institution of Wastes Management, which is referred to in Mr Bell's CV and of which he is a member. I have no evidence as the nature and extent of the expertise required to be a member of this body; and its mere existence does not, in my judgment, establish the existence of a recognised expertise governed by recognised standards and rules of conduct.

53. Turning to Mr Bell himself, he has a BSc in Civil Engineering and a Diploma in Management Studies. He describes himself as having over 30 years' experience of the waste management industry. Reviewing his CV, the vast majority of his roles have been in providing technical advice and support. I accept he has expertise in the technical aspects of waste management; he does not have and is not put forward as having expertise in accountancy.

Whether the expertise is relevant to the proposed issues

54. However, the proposed issues are not technical issues. There is no real disagreement between the parties as to the regulatory requirements to be satisfied, and the equipment which GBR would have needed to have traded. The regulatory requirements themselves are matters of environmental law. As to how long it takes to acquire particular permits, this is a matter of fact which could be ascertained by inquiries made of the relevant regulatory authorities, and should be capable of being agreed by the parties.

55. As to the financial constraints alleged to have prevented GBR from trading, these are also matters as to which Mr Bell's technical expertise has no relevance. The defendants' counsel submitted that Mr Bell could give evidence as to whether in waste management businesses, lenders normally require a personal guarantee. This is not, however, an issue on the face of the statements of case; and, in any event, there is no reason to suppose that the relevant banking practice in relation to waste management businesses differs from any other business.

56. The defendants' counsel also submitted that Mr Bell could give helpful evidence as to the likely profits which GBR would have made. However, as discussed above, the defendants' case does not require quantification of those profits. Even if it did, that issue is a marginal one. In addition, Mr Bell's technical expertise does not, in my judgment, equip him to carry out this task – the relevant expertise would be accountancy expertise.

57. I am not therefore satisfied that Mr Bell has expertise relevant to the proposed issues, or indeed, that the proposed issues require any expertise for their resolution.

Other factors

58. Furthermore, if I am wrong about the above, since the evidence is not contended to be necessary, only helpful, it would also be necessary to consider the other factors identified by Warren J in *British Airways* in determining whether it should be admitted.

59. An important factor is the cost of the evidence. A single joint expert would not be appropriate for a contentious issue of this type. The figures quoted by Mr Bell are only for his report, and do not include conferences or giving evidence at trial. To this must be added the parties' lawyers' costs of instructing their respective experts, considering the expert evidence, and attending trial for the additional time that the expert evidence would take. The likely increase in both sides' costs if this evidence is permitted would be (as the parties accepted) about £100,000. This is a substantial amount to add to the costs of this part of the claim, where the parties have already agreed a combined sum of about £250,000 for expert evidence; even taking into account the substantial amount claimed (unquantified but well in excess of £1 million). It is also an excessive amount for evidence which at best would relate to a marginal part of the defendants' case.

Conclusion

60. For the reasons set out above, therefore, I refuse the application.