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Case No: CH-2019-000281

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
APPEALS ChD
ORDER OF ICC JUDGE PRENTIS DATED 24 SEPTEMBER 2020

7 Rolls Buildings, Fetter Lane;
London; EC4A 1NL

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Before:

MR JUSTICE ZACAROLI
- -

Between:

ZHENG YONGXIONG	**Appellant**
- and -	
GATE VENTURES PLC	**Respondent**

MR MATTHEW PARFITT (instructed by **Zhong Lun Law) f**or the **Appellant**
MR PETER IRVIN (instructed by **Croft Solicitors**) for the **Respondent**

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APPROVED JUDGMENT

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MR JUSTICE ZACAROLI:

1. This is an application by Mr Zheng to amend his grounds of appeal and for permission to appeal if the amendment application succeeds. The appeal is against the order of ICC Judge Prentis dated 11th October 2019, dismissing an application for an administration order which Mr Zheng made against the company, Gate Ventures Plc (the "first application").

2. Judge Prentis concluded that although the company was insolvent on a cash flow basis, but not a balance sheet basis, and although there was a reasonable prospect of the purpose of administration being achieved, as a matter of discretion he refused to make the administration order. He did so, essentially, because he considered that the company had a better prospect of being able to trade out of its cash flow difficulties if it remained outside a formal insolvency process. That was based on evidence presented by the company, including its plans for trading out of its difficulties and a cash flow forecast demonstrating its ability to do so.

3. Permission to appeal against that decision was refused on the papers by Roth J on 2nd December 2019. At a renewed application for permission at a hearing before me on 24th January 2020, I refused permission on the grounds of appeal then relied on. The appellant indicated that he may wish to amend his grounds of appeal to allow evidence that had come to light since the hearing in the first application. He wished to wait, however, to see the company's evidence which had been put forward in a second administration application, to which I will refer in a moment, before deciding whether to amend his grounds of appeal. I therefore did not dismiss the application for permission outright, but gave the appellant the opportunity to consider amending the grounds of appeal.

4. By way of brief background, Mr Zheng is a shareholder in and a creditor of the company. He is owed approximately £2.5 million, which is undoubtedly due for repayment in April 2020.

5. The company's evidence in response to the first application included a witness statement from Mr Carter. He was then a director of the company. The present application to amend the grounds of appeal relates to the contents of Mr Carter's witness statement and certain statements made by the company's counsel at the hearing of the first application.

6. Following dismissal of the first application by Judge Prentis on 28th October 2019 Mr Zheng issued a second administration application in relation to the company (the "second application"). That has been expedited and is due to be heard, again by ICC Judge Prentis, on 11th and 12th March 2020, that is, next week.

7. The appellant's contention at the heart of the amendment application is that the company's evidence presented to the judge on the first application was both wrong and misleading. There are two prongs to the application. First, that there is now new evidence, which corrects the evidence presented by the company and which would have materially affected the judge's exercise of his discretion. Second, the order made on the first application should be set aside on the basis that the company deliberately misled the court.

8. The practical relevance of all of this is now likely to be only in respect of costs. If the court does make an administration order on the second application then no question of making an administration order on the first application following a successful appeal can possibly arise. If the court does not make an administration order on the second application, in which much of the material relied upon on this appeal will be raised, then the likelihood of making one on a re-exercise of discretion following a successful appeal in relation to the first application must be close to zero.

9. The test on both the application to amend and the application for permission if the amendment is allowed is, in essence, that there is a real prospect of success in relation to the proposed new ground of appeal.

10. I address, first, the amendment to rely solely upon the new evidence, leaving aside the question whether the court was deliberately misled. The basis on which the court exercises its discretion to admit new evidence is informed by

the criteria in *Ladd v Marshall* [1954] 1 WLR 1489, although these criteria are now to be exercised in the context of the overriding objective in the CPR.

11. The criteria are, first, the evidence could not have been obtained with reasonable diligence for use at trial. Secondly, the evidence is such that it would probably have an important influence on the result of the case, although it may not be decisive. Thirdly, the evidence must be such as is presumably to be believed.

12. The new evidence relates to monies said to be payable by a company in which the company was a 50% shareholder, Ginger & Moss Limited. Mr Carter's evidence was that Ginger & Moss would be making quarterly payments of £50,000 to the company from August 2019. The payments were shown in a cash flow forecast which Mr Carter described as having been prepared by him on a "worst case scenario" basis. The same cash flow forecast showed no outgoings in relation to Ginger & Moss by the company over the relevant period. When asked by the judge at the hearing (in September 2019) why the first payment (due in August 2019) had not come in, the company's counsel informed the court that it was because of the pending administration application.

13. Evidence obtained subsequent to the hearing of the first application produces a different picture. That evidence has come, firstly, from reports the company was required to produce as a consequence of the order of ICC Judge Prentis, from Ginger & Moss's accounts for the year ending 31st March 2019, which were filed on 24th December 2019, and from a further witness statement of Mr Carter in the second application, dated 31st January 2020.

14. That evidence is to the following effect. First, Ginger & Moss's accounts showed that it was under no contractual obligation to repay anything to the company until 2023 at the earliest. Secondly, the prospect of the quarterly payments of £50,000 being made was merely a possibility being explored at the time of Mr Carter's first witness statement. In fact, Ginger & Moss's accounts reveal it to have no assets with which to repay any part of the loan. Payment in the near future depended upon an investment in Ginger & Moss from a third party, which was something that was being investigated at the time but as to which there was clearly no certainty. In order to be able to make any payments

from its own income, Ginger & Moss required further investment from the company, said to be in a figure of at least £50,000 but, as I have already mentioned, the forecasts presented to the court on the first application did not include any payment to be made by the company to Ginger & Moss. Rather than being a worst case scenario forecast, therefore, Mr Carter's forecast, as he now accepts, was optimistic in relation to Ginger & Moss.

15. So far as the *Ladd v Marshall* criteria are concerned, I am satisfied that this evidence could not have been reasonably obtained prior to the hearing of the first application. I am also satisfied that the evidence is such as is presumably to be believed. The critical question is whether it probably would have an important influence on the result.

16. Mr Parfitt, who appears for the appellant, makes two points. The first relies on the significance of the quarterly payments of £50,000 to the judge's exercise of discretion. As to this, I am not persuaded that the new evidence probably would have had an important influence. That is because in the context of the matters that were weighed in the balance by the judge the amounts that were payable by Ginger & Moss were relatively small. The company's existing indebtedness, which created its immediate cash flow problems, was just short of £300,000, including HMRC. The evidence presented by the company was that this was to be repaid from outside investment in the sum of £340,000.

17. As to the future cash flow of the company, the judge noted that expenses for the period up to June 2020 were forecast to be £306,900, but the anticipated income was over £4.9 million, although this included the £340,000 anticipated from outside investors to be used to pay existing creditors. Even taking that out of account, the forecast indicated expected income of over £4.5 million. In that context, quarterly payments of £50,000 were of little significance.

18. The appellant says that these payments were significant in the context of existing creditors of £291,000. As I have noted, however, these were to be paid off by the outside investment of £340,000. Importantly, it was this outside investment upon which the judge relied in concluding the likelihood of the existing creditors being repaid.

19. Mr Parfitt's second point, however, has much greater merit. He relies on the fact that the judge reached his conclusion by weighing up the cogency of the evidence presented by the company and the cogency of the appellant's evidence as to the funding he would provide to the company in administration. Thus, it is submitted, if the judge had known been aware of the new evidence (which demonstrated the unreliability of the company's evidence relating to the position with Ginger & Moss) then that would have undermined the cogency, more generally, of the company's evidence as to its ability to fund itself outside administration. (This is so, even if it could not be demonstrated that the court was deliberately misled.)

20. I was referred to *Re Bowen Travel Limited* [2012] EWHC 3405 (Ch), a decision of HHJ Simon Barker QC, at paragraphs 19 to 21, where he stressed the importance of the court being provided with reliable evidence, particularly on an application for an administration order. At paragraph 21, he said:

> "Where, as was the case on 25th October, the evidence appears to be contradicted by underlying documents in material respects, and where, as also occurred in this case, important matters were not addressed in the evidence, one likely consequence is a want of confidence in the evidence; this, in turn, is likely to cast a shadow over reliance on the Applicants' witness evidence as the basis for determining the outcome of the application. That the Applicants' evidence is unreliable would not of itself cast doubt on the genuineness of expression of opinion by the proposed administrators, but it may well diminish or negate the weight to be attached to such opinions."

21. That was in the context of evidence to be provided by the applicant. It seems to me the same must apply to any evidence presented on an administration application, whether by the applicant or the company.

22. In my judgment, there is a real prospect of successfully establishing that, had the new evidence been available to the judge at the time of the hearing, it would

probably have had an important influence on the exercise the judge undertook of weighing in the balance the cogency of the evidence either way.

23. Mr Irvin points out that the mere fact that one piece of evidence is shown to be inaccurate does not necessarily taint the whole of the evidence. Remembering at this stage that the test is real prospect of success on appeal, however, it is important to note that the exercise of discretion was reasonably finely balanced (the judge having not accepted the evidence of investment by the appellant at the stage of dealing with the gateways to an administration order, he nevertheless accepted its cogency in exercising his discretion).

24. Moreover, the judge expressly referred at paragraph 99 to balancing the cogency of the evidence on each side in reaching his conclusion. In that context I think there is a real prospect of success in relation to this ground of appeal (before taking account of whether the evidence was deliberately misleading).

25. Mr Irvin also objected that this amendment came simply too late in the day as the appellant had known that the payments were not coming in from Ginger & Moss as early as October 2019. I considered and rejected a similar submission when giving the appellant the opportunity to consider making an application to amend its grounds of appeal, on the last occasion. In any event, given that the appellant was considering an amendment to make an allegation of deliberately misleading the court, I do not think it was wrong for him to wait to see what the company's explanation was for its earlier evidence, that explanation having been promised in evidence which, at the time of the last hearing, was shortly to be served.

26. I turn now to consider the second way in which the argument was put, namely that the court was deliberately misled. When fresh evidence indicates that the original judgment may have been obtained by fraud, the appropriate course for the losing party is normally to commence a fresh action, as opposed to appealing, unless the allegation is admitted or is found by the appeal court to be incontrovertible: see *Noble v Owens* [2010] 1 WLR 2491, per Smith LJ, at

paragraph 27 (having referred to two competing prior lines of authority on this issue):

> "In my judgment, the true principle of law is derived from Jonesco [v Beard] and is that, where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside."

27. Whereas historically this could only be done by way of a separate action, at paragraph 29 Smith LJ went on:

> "Although the old cases say that where there is an issue of fraud to be tried that must be done by commencing a fresh action, I do not think that in this day and age that should always be necessary. All that is needed is that the issue of fraud should be determined. That could be done just as well (if not better) by this court referring the trial of the fraud issue to a High Court Judge pursuant to CPR 52.10(2)(b)."

I note that the relevant rule is now CPR 52.20(2)(b).

28. I record that Mr Carter vehemently denied that the company had deliberately misled the court. This is not an issue I can determine either way without cross-examination. It is clearly not admitted and it is not, in my judgment, incontrovertible. On the other hand I think that there is a real prospect of establishing on appeal at least a prima facie case that the court was misled.

29. Given my conclusion above as to the impact which the true evidence would have had on the second element of the *Ladd v Marshall* test, it necessarily follows that if the court was to find that it was deliberately misled by the company then that would probably have had an important influence on the result.

30. For this reason, it is appropriate to give permission on this ground as well.

31. On the basis of *Noble v Owens*, if this were the hearing of the appeal then the question would be whether the issue whether the court was in fact misled should be determined in a fresh cause of action, or by directing the matter be determined by the trial judge, under the powers in Rule 52.20(2)(b).

32. The question arises whether I could make such a direction now, prior to the appeal being heard. At this stage, I shall limit myself to concluding that permission should be granted on both bases identified in the new grounds of appeal: that is, that the new evidence itself would have led to a different outcome on the exercise of discretion, and on the basis that there is a prospect of showing that the court was misled. I will discuss with counsel, however, whether it would be appropriate to make a direction under Rule 52.20(2)(b) prior to the determination of the appeal.