TRANSCRIPT OF PROCEEDINGS

Ref. CR-2017-003513

Neutral Citation Number: [2021] EWHC 1106 (CH)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(COMPANIES COURT)

7 Rolls Building
Fetter Lane
London

BEFORE THE HONOURABLE MRS JUSTICE JOANNA SMITH

IN THE MATTER OF

MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)

MR R COMISKEY appeared on behalf of the Applicants
MISS C STANLEY QC appeared on behalf of the Respondents

JUDGMENTS
21st APRIL 2021
(AS APPROVED)

DISCLAIMER: The quality of audio for this hearing is the responsibility of the Court. Poor audio can adversely affect the accuracy, and we have used our best endeavours herein to produce a high quality transcript.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Transcribed from the official recording by eScribers
Central Court, 25 Southampton Buildings, London WC2A 1AL
Tel: 0330 100 5223 | Email: uk.transcripts@escribers.net | auscript.com

MRS JUSTICE JOANNA SMITH:

1. Further to the judgment that I have just handed down in this matter, Ms Stanley QC, on behalf of the MBI Respondents seeks permission to appeal. She has provided me with Draft Grounds of Appeal, containing six grounds, but for present purposes she invites me to deal only with Grounds 1 and 2, which directly concern my decision in relation to the question of whether the principle of witness immunity from suit applies to section 236 examinations under the Insolvency Act 1986. Grounds 3 to 6 address pleading issues, in respect of which an application for permission to appeal can properly be adjourned to be dealt with after the trial (should that become necessary).

2. Ground 1 deals with the essence of my decision as to witness immunity and Ground 2 deals with a specific point in relation to paragraph 55F of the amended pleading.

3. In considering the question of whether to allow permission to appeal I must have regard to the test set out in CPR 52.6 to the effect that: "Permission may only be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard."

4. In support of her application for permission, Ms Stanley points me to various paragraphs in my judgment in which I identified that I had found the issue with which I was concerned to be difficult, that it was novel and that there were no authorities specifically on point, and she makes the submission that, in light of those features, her proposed appeal in relation to immunity from suit under Ground 1 has a real prospect of success. In particular, she says that I was wrong in law in holding that an examination under section 236 of the Insolvency Act 1986 was not a judicial proceeding for the purposes of the principle of witness immunity from suit.

5. On balance, I agree with Ms Stanley that there is a real prospect of success on appeal. I did not find the question an easy one to answer. Doing my best on the basis of the existing authorities (which were all concerned with different factual circumstances), I arrived at a decision which I believe to be correct, but I cannot discount the possibility that the Court of Appeal would take a different view on the law.

6. As to the question of whether there is some other compelling reason for the appeal to be heard, I accept from Ms Stanley that the impact of this decision may be far-reaching in relation to the insolvency community and that it is therefore potentially a matter of real public importance which the Court of Appeal should have the opportunity to consider.

7. Accordingly I grant permission to appeal in relation to Ground 1 of the Draft Grounds of Appeal (albeit noting that insofar as it is suggested in paragraph 1(b) of draft Ground 1 that I may have found that the alleged false representations by the Sheikh were not made in the course of existing insolvency proceedings, I did not make such a finding. The Judgment accepts that statements made at a section 236 examination are made under the umbrella of such proceedings).

8. However, I refuse permission to appeal in relation to draft Ground 2 dealing with paragraph 55F of the amended pleading, on the basis that I do not see any need for that paragraph to be considered by the Court of Appeal, as I suspect that the issue raised will 'come out in the wash' when the Court of Appeal makes its determination in relation to Ground 1. When I raised this point with Ms Stanley I understood her to agree with me that a

more streamlined appeal concentrating solely on Ground 1 would be preferable in all the circumstances of this case and I did not understand her to seek to insist that I considered whether Ground 2 satisfied the necessary requirements for the grant of permission to appeal.

9. Mr Comiskey, acting on behalf of the Liquidators, addressed me as to concerns that his clients would have about the possible derailment of the trial in this matter if permission to appeal is granted. However, as Ms Stanley rightly says, the question of what happens to the appeal once I have given permission for it to be heard is not a matter for me. As things stand, Ms Stanley wishes to seek expedition of the appeal so that it can be heard prior to the trial. If Mr Comiskey is of the view that there is in fact no urgency surrounding the appeal (as he submitted during the hearing before me) and that it should go off until after the trial, he can make that clear. I express the tentative view that, given the nature of the issue raised on the appeal, it would be preferable if the appeal could be heard before the second half of the trial takes place (at the end of July), but that is not ultimately a matter for me to decide.

10. As for Grounds 3-6 of the draft Grounds of Appeal I will make an order in the form set out in Mr Comiskey's draft order at paragraphs 5 and 6 that the question of permission to appeal in relation to those grounds should be adjourned until the end of the trial.

(There followed further submissions – please see separate transcript)

MRS JUSTICE SMITH:

11. Further to my judgment, I must now deal with the question of costs. It has been agreed that the costs of, and occasioned by, the amendments should be reserved to the conclusion of the trial, therefore the question of costs now simply concerns the costs of the application to amend, in respect of which Mr Comiskey contends that his clients should have their costs.

12. Mr Comiskey says that his clients won the application to amend and that costs should follow the event in the usual way. Ms Stanley says that the costs should be reserved until after the trial.

13. Having heard submissions from the parties, on balance I consider the fairer course to be to reserve the costs until after the trial. Whilst I accept that this application was dealt with as a freestanding application and that, in the ordinary course, an order for costs would be made following such an application, nevertheless I agree with Ms Stanley that the outcome of the application is not as straightforward as Mr Comiskey suggests. That is not only because there were complications around which party was in fact the overall "winner" following my first judgment (which accepted the principle of amendment but not the amendments themselves owing to lack of particularity), but also because some additional costs will have been incurred by reason of Mr Curl's unfortunate inability to continue in the proceedings and I do not consider that I am in a position properly to identify the level of any interim costs order. I note also that although this turned into a freestanding application, it should have been (and ordinarily would have been) dealt with as part of the extant trial and there would have been no question of a costs order being made until the trial was complete.

14. In my view this is a matter that would be better dealt with following the trial and so I am going to reserve the costs.

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

This transcript has been approved by the Judge