NEUTRAL CITATION NUMBER: [2021] EWHC 3656 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

CHANCERY APPEALS (ChD)

On appeal from the Business and Property Courts (Insolvency and Companies List) against the order of ICC Judge Jones dated 31 March 2021

Claim No: CR-2018-002807

Appeal No: CH-2021-00116

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

Thursday, 2nd December 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) ANTHONY CARLELLO NORRIS

(2) OAKSMORE PORTFOLIOS AIFM LIMITED

(3) GALLIUM FUNDS SOLUTIONS GROUP LIMITED

Intended Appellants

-and-

PETER DOOLEY

Proposed Respondent

MR RICHARD EGLETON appeared on behalf of the Intended Appellants

MRS DOOLEY appeared for the Proposed Respondent, Mr Peter Dooley, as an observer.

Approved Ruling on a Renewed Application for Permission to Appeal

Mr Justice Marcus Smith:

1. I have before me an application for permission to appeal an order of ICC Judge Jones dated 31 March 2021 (the **Order**). The Order was consequential on his judgment, also dated 31 March 2021 (the **Judgment**). The Judgment was a reserved judgment and it records the Judge's findings after an eight-day trial, at which both significant witness and expert evidence was heard.

2. The trial was of a petition under section 994 of the Companies Act 2006 concerning unfair prejudice, and the essence of the appeal against the Judge's Order is less in relation to the finding of unfair prejudice and more in relation to the valuation that the Judge reached.

3. Cutting to the chase, the Judge made an order requiring Mr Norris, the respondent to the petition, to buy out Mr Dooley, the petitioner, for a sum of money some way north of £1 million, about £1.2 million. I do not need to provide the precise figure.

4. This is the renewed oral application for permission to appeal the Judge's Order. The matter was considered on the papers by Fancourt J on 8 August 2021. Fancourt J helpfully set out the reasons, in a detailed, reasoned order, as to why he considered that permission to appeal should be refused.

5. I am very grateful to Mr Egleton, who appeared for Mr Norris, for the measured and careful way he has articulated the grounds of appeal. The fact is, as I think he recognised, Mr Egleton faces a substantial burden in this regard because of the factual and detailed nature of the Judge's decision. Unsurprisingly after an eight-day trial, the Judge evaluated the evidence before him in some detail and with great care. The Judgment runs to several hundred paragraphs, and it is fair to say that the Judge goes into great detail as to the basis for his decision.

6. No suggestion is made that the Judge erred in the law. Rather, the suggestion is, essentially, on ground one, that the Judge failed to adopt the correct approach in relation to the valuation evidence that was before him. On this he heard from both experts. It is fair to say, as the Judge makes clear in his Judgment, that the Judge's job was made rather harder by the fact that the experts did not cooperate in the way they should have done in terms of narrowing the issues between them. As a result, the Judge was faced with a less satisfactory evidential record than he was perhaps entitled to see. He is, in his Judgment, very frank about these difficulties and equally clear in his reasoning process to get into a result, which, unsurprisingly, the proposed appellant, Mr Norris, does not like.

7. It does seem to me, however, that these are all points which might be said to amount to criticisms of the experts but cannot possibly amount to criticisms of the Judge or his Judgment. It seems to me that the Judge made a careful evaluation of the material before him, including the expert material, and he reached a conclusion which cannot be said to be outside the evaluative discretion that a Judge has when considering factual matters like valuation. It seems to me that the Judge reached a conclusion that he was entitled to on the evidence, he set out his reasoning in full, and, like Fancourt J, I cannot see any basis for ground one having any real prospect of success.

8. Grounds two and three are, to an extent, related to the overall valuation process undertaken by the Judge. I can, therefore, deal with them reasonably quickly in the sense that they fail for the same reasons that I have articulated in relation to ground one. The Judge was forced, because of the divergence in view between the experts, to reach his own conclusion in light of all of the evidence and that is exactly what he did. He adopted a methodology which I find was open to him to adopt and he then proceeded to flesh it out by reference to the evidence, and it seems to me the approach he took in relation to the add-backs or the multiplier were all questions which arose out of the methodological approach that he chose to adopt. On these points, he was entitled to reach the view that he did. Therefore, for those reasons, which are closely related to my rejection of the application for permission to appeal in relation to ground one, I decline to give permission to appeal in relation to grounds two and three.

9. Grounds four and five are not pursued before me now. I will briefly articulate why that is. The position was that the Judge's order required the respondent, Mr Norris, to pay the amount for the shares. Paragraph one of the order obliged the respondent, Mr Norris, to pay to Mr Dooley the sum of £1.22 million by 28 April 2021, a period of around four weeks. Mr Norris makes the point that that is a very short period of time in which to find so large a sum of money and I have some sympathy with that. That said, it is a truism that after a resolution of a dispute, the orders made by the Court need to be met within a pretty stringent timeframe and a period of 14 days is standard; 28 days is actually generous. Of course, one can extend the period, but it does seem to me that the Judge's provision in paragraph two of his order permitting Mr Norris to apply to extend the date for payment was precisely what the Judge should have ordered in this case. It obliged Mr Norris to make clear the hardship that he was suffering in meeting the timetable set out in paragraph one and that only if he could justify an extension of time would such an extension be made. Otherwise, Mr Norris would be faced with enforcement action by Mr Dooley, and it seems to me that that was the right course, and grounds four and five even if they had been pursued, I would have rejected as bases to appeal the order of the Judge below.

10. I turn then to the last three grounds, grounds six to eight, which I can deal with together. They relate to the question of the costs that were ordered to be paid by the Judge. The difficulty that we all have here is that for technical reasons, there is no transcript recording the basis upon which the Judge made the order that he did. The order that he made was essentially that Mr Norris should pay Mr Dooley's costs to be subject to a detailed assessment, if not agreed, and that pending such detailed assessment, an interim payment or payment on account of costs in the amount of £200,000 should be made.

11. The difficulty that we all have is that there is no transcript setting out the reasons for the Judge's decision. There were reasons, we infer, because there was a transcript. That much we know. But we are not going to be able to work out anything more because, as Mr Egleton helpfully told me, the recording simply freezes and there is no way of recovering what was said both by counsel and the Judge on this occasion.

12. It seems to me that it would be entirely wrong to prejudice Mr Norris by reason of a technical failing in recording that is nothing to do with him. But, equally, it would be wrong simply to say that because the reasons for the Judge's order are not apparent because the recording does not exist, I should give permission to appeal on this point.

13. It seems to me that the proper approach is to look at all of the facts as they appear now

and as they appeared before the Judge and for me to consider whether it can arguably be said that the Judge has moved outside the very broad discretion that he has on questions of costs. It seems to me that applying that test, it cannot be said that the Judge erred in the exercise of his discretion. Generally speaking, costs follow the event. Here, although the valuers on both sides straddled the value that the Judge ultimately found the company or Mr Dooley's share within the company to be worth (one expert, unsurprisingly the petitioner's, was too high, the other expert's was too low), the outcome was that the petitioner beat the assessment of value by the respondent's expert. The Judge was entitled to conclude, as he did, that costs, effectively, should follow the event, in that Mr Dooley had been successful and Mr Norris had essentially failed.

14. The other point that is made in relation to costs is that a number of parties, those apart from Mr Norris, should not have been joined to these proceedings: people like Mrs Norris. It is said that this is a question of costs that was not taken into account. It does seem to me that there is something in this but that is something which I consider can appropriately be dealt with on a detailed assessment. The Judge ordered such an assessment, and it does seem to me that any fat in the costs that Mr Dooley seeks to recover from Mr Norris will be dealt with appropriately by the Costs Judge on a detailed assessment.

15. In those circumstances, it seems to me the Judge, in making an order for an interim payment of £200,000, has gone for a lower than the usual percentage payment on account. It is around 50%. That, I think, reflects the fact that there may well be found to be fat in Mr Dooley's costs, which will be reflected in the detailed assessment.

16. Therefore, again, it seems to me that the Judge's order – applying the test in the absence of the transcript that I have described – was, again, something which lay within his reasonable discretion and is not something on which I should give permission to appeal.

17. Therefore, for all those reasons, I essentially affirm the order of Fancourt J and, on this renewed oral application, refuse permission to appeal.