IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2021] EWHC 3710 (Ch)

Appeal Ref.: CH-2021-000105

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

Thursday, 16 December 2021

Before:

MR JUSTICE FANCOURT

B E T W E E N :

THE OFFICIAL RECEIVER — Claimant/Respondent

- and –

NDUKA OBAIGBENA — Defendant/Appellant

THE CLAIMANT/RESPONDENT did not appear and was not represented.

MR H. SIMS QC (instructed by Francis Wilks & Jones) appeared on behalf of Defendant/Appellant.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE FANCOURT:

1 This is a renewed application by Mr Obaigbena for permission to appeal against the order of Deputy Insolvency and Companies Court Judge Agnello QC on 8 April 2021. By her judgment she found that the allegations against Mr Obaigbena, as a director of the company Arise Networks Limited, were established and found that he was unfit to be a company director and disqualified him from acting as such for a period of seven years under the Company Directors Disqualification Act 1986.

2 The appeal has been advanced by Mr Sims QC on behalf of Mr Obaigbena in relation to five separate grounds of appeal. In relation to the first ground, which is that the judge applied the wrong legal test and, therefore, failed to make a necessary finding against Mr Obaigbena, I have already indicated that I grant permission to appeal, subject to the ground being formally redrafted to reflect the way in which the matter was put before me in amended draft. I find it extremely difficult to understand from the existing ground the reason why it is said that the judge's decision was wrong, but, with the benefit of oral argument, it is absolutely clear what the argument is and Mr Sims agrees that he will recast the ground to reflect the way the matter was put in argument.

3 The second ground, taking it slightly out of order, ground 2A, was also introduced in proposed amended grounds of appeal for which Mr Obaigbena seeks permission. That ground is that the judgment was made on the basis of inaccurate information relating to creditors and/or information which was presented in an unfair and misleading manner, so as to render the findings of unfitness and/or as to the period of disqualification unsafe. What that refers to is evidence given on behalf of the Official Receiver by Mr Hannan at the trial. Mr Hannan was cross-examined at the trial and the matters that are now raised by this proposed ground of appeal are not ones that were canvassed in evidence because the criticism of Mr Hannan's analysis that is now advanced was not identified at the trial. It was therefore not put to Mr Hannan in cross-examination and, of course, the judge did not deal with it because no issue was raised. It is, therefore, a new challenge to the evidence relied upon that is sought to be raised on appeal. It is an attempt to argue a case that was not argued below.

4 Some detailed new evidence was put forward in support of the proposed ground in a witness statement from Mr Downie of Mr Obaigbena's current solicitors. Mr Downie was formerly a chartered certified accountant and, before that an employee of the Insolvency Service, dealing with directors' qualification applications on behalf of the Official Receiver. The witness statement of Mr Downie runs to some 89 paragraphs, supported by an exhibit of over 50 pages, and necessitating a supplementary bundle which was put before me running to over 1,000 pages. The witness statement of Mr Downie, despite what he says in it and despite his recognition that he is not a witness in the case, nevertheless consists mainly of argument, his opinions and assertion. He re-analyses Mr Hannan's evidence and suggests that evidence advanced at the trial was unfairly biased evidence. There is also a criticism of Mr Hannan for not presenting details of claims made from the liquidator's records.

5 Mr Sims frankly accepts that these were not matters that were raised at the trial. In any ordinary circumstances, that would mean that there could not be permission to raise them on an appeal, but Mr Sims submits that, given the public interest element of these proceedings (they are not simply private proceedings), if there is unfairness in the way that the evidence on behalf of the Official Receiver is presented then there should be an opportunity to remedy

that. He says the critical question will be whether the Official Receiver accepts that there was inaccuracy in the way that the facts were presented by Mr Hannan. It is not yet known whether the Official Receiver will accept that. Mr Sims says the appeal judge will be in as good a position as the judge to deal with it and that no further evidence from Mr Hannan will be necessary.

6 I am afraid I disagree with that in view of the nature and tone of the criticisms that have been made against Mr Hannan in the evidence of Mr Downie. It would be inappropriate to deal with the matter without the opportunity to have Mr Hannan address the criticisms that are made of him. It is not simply a matter which can be dealt with on the papers, backed by Mr Downie's own opinion of what the documents show. The criticism that was made, as explained to me by Mr Sims, is a relatively straightforward criticism and it seems to me that it is something that could and should have been raised at the trial if it was going to be pursued. I do not see how it could fairly be dealt with on appeal without hearing further evidence from Mr Hannan, and there is no such application. I, therefore, refuse permission to appeal on ground 2A.

7 Grounds 2 and 4 I think I can deal with conveniently together because they both relate to an aspect of the evidence relating to something called the EPG asset, which Mr Obaigbena says is an asset that exists and is owned by a related company of Arise Networks Limited. This is an item which emerged in the course of Mr Obaigbena's cross-examination and had not previously been raised on his behalf as being an asset that might be available for the benefit of the creditors of the company. The judge was distinctly unimpressed by Mr Obaigbena's evidence in this respect, and in another number of other respects which she itemises in her judgment. She considered that the asset that was referred to by Mr Obaigbena was an "apparition". I am not clear whether she meant by that something that had simply appeared for the first time or whether it was something that was invented. However, para.48 of the judgment indicates that she reached the factual conclusion not just that the asset was something that was not to be made available for the benefit of the company's creditors, but that it did not even exist. Her conclusion that it did not even exist may well have been wrong, though the judge cannot be criticised for that because there had been no previous reference to the existence of the asset or any evidence or disclosure in relation to it.

8 The question is whether the possible conclusion that Mr Obaigbena had not simply raised for the first time the EPG as being potentially an asset available for the benefits of company's creditors but had invented it is a factual finding that infected the judge's mind and made her willing to find against Mr Obaigbena on the principle of his unfitness to be a company director, or, alternatively, that adversely influence the sentence that the judge imposed.

9 Reviewing the matter in the context of the judgment as a whole, I am not persuaded that there is any realistic argument that the additional finding that the asset in question did not exist itself led the judge to make findings against Mr Obaigbena that she would not otherwise have made or led her to impose a higher sentence as a consequence. It is obvious from the judgment that the judge's conclusions and view of the seriousness of the matter were not affected by whether Mr Obaigbena had invented the EPG or simply wrongly suggested that it was an asset for the company's creditors. For those reasons, I refuse permission to appeal on grounds 2 and 4.

10 Ground 3 is an appeal against the length of the sentence that was imposed. It seems to me to be arguable, to the extent of the requisite test for the grant of permission to appeal, that the

judge started with too high a bracket on the facts of this case; or, alternatively, if this was nevertheless a middle bracket case, that she failed, in imposing a sentence of seven years, to take account of all the mitigating circumstances of the case. Of course, I conclude at this stage nothing more than it is reasonably arguable that the judge erred in principle in imposing a sentence of seven years, but I grant permission to appeal on ground 3.

CERTIFICATE

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Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.