Neutral Citation Number: [2024] EWHC 1380 (Ch)

Case No: CH-2023-000237

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

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

Date: 07/06/2024

Before :

MR JUSTICE ADAM JOHNSON

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Between :

JOHN SENESCHALL — **Appellant**

- and -

(1) TRISANT FOODS LIMITED
(2) MARKET FRESH LIMITED
(3) LYNNE JONES
(4) DAVID MARSHALL
(5) DAVID McCORMICK — **Respondents**

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Philip Shepherd KC (instructed by direct access) for the **Appellant**
The **Respondents** did not appear and were not represented

Hearing date: 20 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson:

Introduction

1. In Daniels v. Walker (Practice Note) [2000] WLR 1382, one of the early cases under the Civil Procedure Rules, Lord Woolf MR set out some detailed guidance about the approach the Court should take, when a single joint expert has been appointed, but then one of the parties wishes to rely on evidence from their own, independently appointed expert.

2. Even in cases where a substantial sum of money is involved, Lord Woolf suggested (p. 1387G) that the starting point, wherever possible, should be for a joint report to be obtained. His hope (p. 1387D-E) was that in the majority of cases, appointment of a single expert would be not only the first step but the last step.

3. All the same, Lord Woolf was realistic enough to accept that that would not always be so. He said at p. 1387 C-D that just because a party may have agreed to instruction of a joint expert, that should not prevent a party from being allowed facilities to obtain a report from another expert or, if appropriate, rely on such a report.

4. Lord Woolf though emphasised the benefits of a staggered approach (see at p. 1387H-1388A).

5. To begin with, he suggested *"there would be an issue as to whether to ask questions or whether to get your own expert's report"* (p. 1387H). As I understand it, this was an encouragement to see first whether asking questions of the joint expert might solve the problem.

6. Lord Woolf though went on: *"If questions do not solve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called"*. Consistent with his idea of a staggered approach, Lord Woolf sounded a note of caution about the appropriate timing of such a decision. He said at p. 1388A: *"That decision should not be taken until there has been a meeting between the experts involved."*

7. It seems to me clear that the reason for Lord Woolf's suggested approach was to give maximum opportunity for agreement, or at least for the narrowing of issues, before finally deciding whether to require attendance of experts for examination at trial. One can see that from the following passage, at p. 1388A-B:

> *"It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept it is necessary for oral evidence to be given by the experts before the court. The cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive."*

The present case

8. The present case is a Petition under s. 994 Companies Act 2006 – an unfair prejudice Petition. The Petitioner is Mr John Seneschall. He is a minority shareholder in a

company called Trisant Foods Limited ("*Trisant Foods*"). In May 2023, he obtained a judgment on liability against four Respondents, including the majority shareholder in Trisant Foods, Market Fresh Limited ("*Market Fresh*"), a company under the control of one of the other Respondents, Mr David Marshall.

9. Mr Marshall had agreed to invest substantial sums into Trisant Foods in 2019. Trisant was a new, start-up venture, but all the same by October 2019, Market Fresh was already a 17% shareholder in the business. Under Heads of Terms signed on 7 October, it agreed to subscribe for a further 30% holding, bringing its total investment in the business to some £1.8m, and making it the majority shareholder.

10. The parties then fell out, however. Among other claims, Mr Seneschall said he was unfairly excluded from the business. The Judge who dealt with the liability trial, ICCJ Greenwood, found that Mr Seneschall's case was made out. As I have said, that was in May 2023.

11. There remained though the question of remedies. There had to be a separate trial dealing with remedies. This was also to be before ICCJ Greenwood, and was set down for hearing over five days in mid-November 2023.

12. One of the remedies sought by the Mr Seneschall was an order requiring Market Fresh to buy his minority shareholding. That required a valuation, and it is in that context that in ICC Judge Greenwood gave a direction for appointment of a single joint expert. A Mr Haddow was identified. Instructions were provided in July 2023, and the parties made written representations.

13. Mr Haddow produced a report dated 6 September 2023, but this appeared to be bad news for Mr Seneschall, because although Mr Haddow relied on several different valuation methodologies (Dividend Yield, Capitalisation of Earnings, Discounted Cashflow and a Net Asset Valuation), they all produced the same outcome – which was a £nil valuation for Mr Seneschall's minority shareholding, whatever valuation date was taken.

14. Mr Seneschall felt he could not accept Mr Haddow's opinion: he could not square the idea that his shares in Trisant Foods were worth nothing, with the idea that Mr Marshall had been willing to commit £1.8m for a majority stake in the same company. Neither could he square it with the fact that, as he saw it, the Respondents had worked so hard to exclude him from the business: as Mr Shepherd KC put it in his submissions before me, why try and steal a business which is worthless?

15. Against that background, Mr Seneschall, via his then solicitors, sought advice from another expert. A Mr Nissan was identified, and was able to help.

16. Mr Seneschall's solicitors did what Lord Woolf in Daniels v. Walker had encouraged. They tried a staggered approach.

17. They initiated correspondence with Mr Haddow, and sent him questions on 20 September 2023. They asked, for example, about Mr Haddow's experience in valuing start-up businesses. Further correspondence followed between 20 and 26 September. Mr Haddow provided replies on 11 October, but these were unsatisfactory to Mr Seneschall and his solicitors, who felt that Mr Haddow had in fact only answered 11

out of the 19 questions posed. In any event there remained a basic dispute as to whether he had properly allowed for the fact that Trisant was a start-up.

18. Time was tight with the trial date fast approaching in mid-November, and so on 10 October, while still awaiting replies from Mr Haddow to the questions put to him, Mr Seneschall went ahead and instructed Mr Nissan to produce a summary report. This was provided on 16 October. Mr Nissan advocated a more specialist approach to the valuation of a start-up company, and said the most common approaches were the Cost Approach, the Fixed Ranges Approach, the Scorecard Method, and the Venture Capital Method (none of which had been dealt with by Mr Haddow). He also said that if there were comparable transactions, then what he called the Market Approach could also be used.

19. On the facts before him, Mr Nissan thought it was appropriate to use the Market Approach, given the fact that between October 2019 and June 2020, Market Fresh itself had acquired shares in Trisant Foods effectively for £1,585 per share (that was the implied value flowing from the additional investment agreed under the October 2019 Heads of Terms). Using the Market Approach, Mr Nissan put the value of 100% of the equity in Trisant Foods at £2.55m at each of the competing valuation dates. Using the Venture Capital Method, he came out with lower (but still substantial) figures, in a range between £1.3m and £1.14m.

20. Against that background, Mr Seneschall issued an application. He sought an Order directing that (1) he be permitted to rely on Mr Nissan's summary report; (2) he be permitted – if so advised – to instruct Mr Nissan to produce a more detailed report; (3) Mr Nissan meet with Mr Haddow to try and reach agreement; and (4) in the event of there being no agreement, the parties be permitted to call the experts for oral examination at the trial listed for 13 to 17 November 2023.

21. Following hearings on 18 and 27 October 2023, ICCJ Greenwood dismissed that application by his Order dated 30 October 2023 Consequently, the experts did not meet, Mr Nissan's report was not introduced into evidence, and he did not appear at trial. Only Mr Haddow gave evidence. It is ICCJ Greenwood's Order of 30 October 2023, dismissing Mr Senechall's application, that is now under appeal. I will refer to that as the "*October Order*".

22. To complete the picture, I should mention that Leech J gave permission to appeal against the October Order at a hearing on 19 March 2024. Very shortly before that, on 11 March 2024, ICCJ Greenwood had delivered his judgment following the remedies trial the previous November (the "*Remedies Judgment*"). In the Remedies Judgment ICCJ Greenwood dealt with a number of forms of relief sought by Mr Seneschall, consequent on the liability findings in his favour. In dealing with the question of valuation of Mr Seneschall's shareholding, ICCJ Greenwood accepted the evidence of Mr Haddow, and so ascribed a value of £nil to that shareholding, at what ICCJ Greenwood held to be the correct valuation date (30 November 2019).

23. In such circumstances, when Leech J gave permission to appeal against the October Order a few days later, he made that permission conditional on Mr Seneschall also being given permission to appeal against the Remedies Judgment in due course. In fact, at a later hearing on 26 April 2024, to deal with consequential matters following the Remedies Judgment, ICCJ Greenwood, who by then had been made aware of the

conditional permission to appeal granted by Leech J against October Order, himself granted permission to appeal against his finding in the Remedies Judgment that the price to be paid for Mr Seneschall's shares in Trisant Foods was £nil. So Leech J's condition having been fulfilled, the appeal against the October Order now falls to be resolved. The question of the appeal against the Remedies Judgment will need to be dealt with separately, in light of the outcome of the present appeal.

Discussion

24. Leech J gave very detailed reasons for his decision to grant permission to appeal (see [2024] EWHC 1049 (Ch)). It appears from [25] of his Judgment that he would have been minded to resolve the substance of the appeal itself on the same grounds, and decided not to do so largely as a matter of convenience for the Respondents, as although the Respondents were all present before him (attending remotely), only Mr Marshall made submissions and none of the Respondents was represented. Leech J plainly wanted to give the Respondents more time to organise themselves, and to instruct solicitors and counsel if they were able to.

25. In the event, however, none of the Respondents appeared at the appeal hearing before me, either in person or by counsel. The appeal against the October Order was therefore unopposed. Nonetheless, before allowing the appeal, I still have to be satisfied that the decision of the lower Court was wrong (see PD52A, para. 6.4).

26. Although I am entirely sympathetic to the position of the Judge, who had to make a difficult decision in the face of a fast approaching trial, I am so satisfied. That is essentially for the reasons given by Leech J in his Judgment giving permission to appeal at [22]-[24]. To express the matter in my own words, however, I would particularly emphasise the following points.

27. First, in reaching the decision he did, it seems to me that the Judge was focusing on the wrong question, and acted prematurely.

28. His overall conclusion is set out in para. 21 of a document prepared by the Judge, referred to as his "*Note of Judgment*". This provides:

> *"Ultimately the matter is one of case management, of the overriding objective and of the principles under Pt 35. In this case, taking all of the factors explained above, in my view it would be plainly wrong to allow P to adduce the Summary Report of Mr Nissan and for that purpose to adjourn the forthcoming trial. In all the circumstances of this case, fairness to P in relation to the views of Mr Haddow and the value of the shares is sufficiently secured by virtue of the ability of counsel to cross-examine and prove relevant matters of underlying fact. I will therefore dismiss the application of 16/10."*

29. In my opinion, in focusing straightaway on the question whether the trial would need to be adjourned if Mr Nissan were allowed to give evidence, and in concluding that it would, the Judge was asking the wrong question and necessarily came to a premature conclusion about it, without all the information needed to make the decision effectively. To put it another way, the Judge did not follow Lord Woolf's suggestion of a staggered

approach. It seems to me, respectfully, that he should have done, and had he done so, he might well have come to a different conclusion.

30. The staggered approach would have involved, as a next step, the experts meeting, in order to see what common ground there was between them. That did not happen, although it is one of the things Mr Seneschall's application asked for. As I have explained, it is also what Lord Woolf recommended as a second step where – as in this case – questions have been put to a single joint expert but have not resolved the issues arising from his report. Here, those issues were serious, and were certainly not "*fanciful*" (to use Lord Woolf's own formulation from Daniels v Walker at p.1387D-E). At their heart was a basic, and material, difference about methodology, and specifically about whether a different sort of methodology was required to that used by the single joint expert, when valuing a start-up business. Reinforcing that point was Mr Seneschall's intuitive, but I think legitimate, feeling that a £nil valuation of his interest sat rather uncomfortably with the significant investment in Trisant Foods made by Mr Marshall, and his efforts to take control of it. The conceptual and technical question this gave rise to was a critical point of difference between the parties, and in my view deserved investigation in order for the case to be dealt with fairly and properly.

31. In my opinion, the failure to take things in stages, and to direct the experts to meet, necessarily meant that the Judge did not have available to him all the information he needed to make a reliable decision about whether the trial would in fact need to be adjourned, and if so on what terms and for how long. Leech J had the same view of it when giving permission to appeal, because at [22(4)] of his Judgment he said: "*If [the experts] had been able to reach agreement on a number of matters, it is quite possible that the trial could have proceeded and that Mr Nissan could have given evidence based on his summary report alone*".

32. I agree with the ICC Judge Greenwood, that ultimately the matter for him was one of case management; and it is also true that an appeal Court should be slow to interfere with case management decisions made by Court below. But one of the grounds on which it will do so is if, in making its decision, the Court below did not take into account all the information relevant to that decision. I think that describes the present case, and necessarily so, because the Judge was not in a position to know clearly what the effect would be of permitting reliance on Mr Nissan's proposed evidence, until after the experts had met. I think that is why, in Daniels v. Walker at p. 1388A, Lord Woolf said: "*That decision should not be taken until there has been a meeting between the experts involved*." The decision Lord Woolf was referring to was just the decision the Judge was faced with here: i.e., whether or not to admit further expert evidence, in a case where there was already a report from a single joint expert. The reason for deferring the decision is so that the output of the experts' discussion can be known, before a final view is taken. In this case, following the staggered approach advocated by Lord Woolf would have allowed that to happen, and then a fully informed decision could have been made – albeit very close to the start of the trial – about what case management consequences should follow, having regard to the overall need to deal with the case justly and at proportionate cost. Such consequences need not necessarily have involved having to adjourn the whole of the trial on remedies: other permutations might have been available, for example adding an extra day or half-day of hearing time, depending on the nature of the disagreement between the experts.

33. My second reason for allowing the appeal flows from the first, but if anything is a more fundamental point. It is the matter referenced by Leech J at [23] of his Judgment in giving permission to appeal, namely that the potential importance of the new evidence militated very strongly in favour of an adjournment in any event, and the Judge made too little allowance for that fact. The difference of view over the appropriate methodology was of critical importance to a central issue in the case, namely the price to be paid for Mr Seneschall's shareholding. Indeed, it seems clear from the Remedies Judgment that the point was determinative, because at [246]-[247] of the Remedies Judgment, the Judge rejected the suggestion that the Market Approach (as advocated by Mr Nissan) had any relevance, and was not supported by the parties' Heads of Terms, although Mr Haddow himself had said that they might appear material "*at first glance*". The point is though that the Judge reached this view without the contrary opinion being expressed by a different expert, having (legitimately it seems) a different opinion about it. Mr Seneschall was not allowed the opportunity to have that contrary evidence available. In my view, given the central importance of the valuation issue, and the critical importance of the evidence of Mr Nissan to that issue, that gives rise to an injustice.

34. We are again, in examining this second point, in the realm of case management, and so an appeal Court should be wary of intervening, and should not interfere with decisions which have involved consideration of all relevant factors and are within the generous ambit within which reasonable decision-makers may differ – i.e., the Court should only intervene if satisfied that the decision of the lower Court was wrong (see, e.g., see, for example, The Commissioners of Police of the Metropolis v. Abdulle & Ors [2015] EWCA Civ. 1260 at [25], and Piglowska v. Piglowski [1999] 1 WLR 1372B-C, per Lord Hoffmann). All the same, I think doing so is justified in this case. I would put it this way. As I have already explained, I am not persuaded that the decision for the lower Court was necessarily a binary one (i.e., adjourn the whole of the remedies trial or not). But if it was, then in the particular circumstances of this case, in which it seems to me that Mr Seneschall acted with due expedition on receipt of the joint expert's report (see above at [13]-[19]), then I think the Judge did make the wrong choice between the competing alternatives. I agree again with the way Leech J put it in his Judgment giving permission to appeal at [23], namely that the Judge had a difficult decision to make, but if the choice was between refusing to admit Mr Nissan's evidence and the remedies trial going ahead, or allowing it in and adjourning the trial, then the least worst option which carried the least risk of injustice overall was the latter. Consequently, I think the Judge made the wrong decision in choosing the former.

Conclusion

35. For all those reasons, and while fully acknowledging the difficult decision the Judge had to make, I would respectfully allow Mr Seneschall's appeal against the October Order.

36. As to the appeal against the Remedies Judgment, there was some confusion at the hearing before me as to how this should be dealt with. Leech J in his Judgment had indicated (at [27]) that it would be sensible for any appeal against the Remedies Judgment (if permission was given) to be dealt with at the same time as the appeal against the October Order. However, the permission to appeal against the Remedies Judgment given by ICCJ Greenwood, in his Order of 26 April 2024, referred to time for service of an Appellant's Notice in relation to what he called the "*Second Appeal*"

starting to run only after the handing down of the Judgment expected on the pending appeal against the October Order (i.e., the present Judgment). So at the hearing before me, it was unclear what was expected to happen as regards the intended appeal against the Remedies Judgment, and I have seen no Grounds of Appeal in relation to that appeal. Mr Shepherd KC, who appeared for Mr Seneschall, did not press me to deal with it, and I think rightly so in the circumstances. I will ask him to propose further directions so that that appeal can now be dealt with expeditiously. Indeed, in light of the comments made in this Judgment, the parties may well be able to reach agreement about it. I would encourage them to make every effort to do so.

37. Finally, let me express my thanks to Mr Shepherd KC, who appeared for Mr Seneschall acting pro bono. I am very grateful indeed to him for him doing so.