Neutral Citation number: [2024] EWHC 1836 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT-2023-000614**

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

PROPERTY TRUSTS AND PROBATE LIST

IN THE ESTATE OF ALEEM HOSEIN DECEASED

MASTER MARSH (sitting in retirement)

Rolls Building

Fetter Lane

London EC4A 1NL

BETWEEN

DAVID EGERTON WEDGWOOD

(As Administrator of the Estate of Aleem Hosein deceased)

Claimant

and

(1) REETA HOSEIN
(2) FFS (2023) LIMITED

Defendants

JUDGMENT

DAVID REES KC and **ROGER LAVILLE** appeared for the **Claimant**

CLARE STANLEY KC and FRANCIS BACON appeared for the **Second Defendant**

The first defendant did not appear at the hearing

Hearing 11 July 2024

Judgment handed down remotely at 10.00 on 24 July 2024

1. Aleem Hosein (Mr Hosein) died on 30 January 2021 aged 47 leaving a will dated 23 December 2019 under which his wife, Mrs Hosein, who is the first defendant, is the sole beneficiary of his residuary estate. The will created a discretionary trust for his children of the nil rate band. Mr Wedgwood was appointed as the Administrator of the estate pursuant to an order dated 20 June 2022 in place of Prakash Patel who was a friend of Mr Hosein's. It has been clear for some time that there is a risk of Mr Hosein's estate being or becoming insolvent.

2. In this Part 8 claim Mr Wedgwood seeks Beddoe relief and approval under section 284 of the Insolvency Act 1986 concerning the administration of the estate and, in particular, the conduct of proceedings brought by the second defendant against the estate. I will refer to the second defendant as EBP which is a contraction of its former name.

3. Mr Hosein was a director and employee of EBP which has brought a claim under claim number BL-2022-000203 alleging breaches of Mr Hosein's fiduciary duties and fraud on EBP. The claim is for approximately £2.5 million.

4. This claim first came before the court on 21 November 2023 when orders were made giving Mr Wedgwood limited approval to the further conduct of the EBP claim. On that occasion David Rees KC and Roger Laville appeared for Mr Wedgwood, Kate Selway KC appeared for Mrs Hosein and Francis Bacon appeared for EBP.

5. At the hearing on 21 November 2023 EBP did not oppose as a matter of principle the grant of Beddoe relief. EBP's submissions were confined to the scope of the Beddoe relief. No submissions were made to the court about the applicable test for an order under section 284 and no objection was made to the order sought under section 284 for both retrospective and prospective approval.

6. The order provided Beddoe relief in the following terms:

   "3. In relation to the EBP Proceedings the Claimant has permission to take the following steps:

   (1) All necessary steps required to amend the Claimant's Defence in the EBP Proceedings in the light of the Second Defendant's proposed amendments; to counterclaim in relation to the proceeds of the Metlife Scheme Group Life policy; and to defend any additional claim brought therein by the First Defendant in relation to the proceeds of the Metlife Scheme Group Life policy;

   (2) To undertake the limited disclosure exercise that has been agreed in principle with the parties in the EBP Proceedings (being disclosure of sample transactions and the data contained on the Deceased's mobile telephone) and to take any reasonable and

proportionate steps that may be required to access / interrogate / analyse any electronic data so disclosed.

(3) Taking any reasonable steps to seek to resolve the EBP Proceedings by alternative dispute resolution.

For the avoidance of doubt the Claimant is not authorised to participate in the CCMC listed in the EBP Proceedings or take any further step therein without the permission of this Court."

7. Two further claims against the estate had been intimated (respectively the Rosenkrantz Claim and the Priti Patel Claim) and approval was given in both cases limited to serving defences.

8. Orders were also made under section 284 of the Insolvency Act 1986:

"6. The costs that have been incurred by the Claimant up to and including the date of this order in:

(1) Administering the estate of the Deceased;

(2) Defending the EBP Proceedings;

(3) Dealing with the Rosenkranz Claim;

(4) Dealing with the Priti Patel Claim; and

(5) Bringing this claim

shall not be void by virtue of the provisions of section 284(1) of the Insolvency Act 1986 in the event of the making of an insolvency administration order under the Administration of Insolvent Estates of Deceased Person's Order 1986.

7. Any payments made by the Claimant from the date of this order in respect of the costs of:

(1) Administering the estate of the Deceased;

(2) Defending the EBP Proceedings and pursuing the Counterclaim therein in accordance with the directions set out above; and

(3) Dealing with the Rosenkranz Claim in accordance with the directions set out above;

(4) Dealing with the Priti Patel Claim in accordance with the directions set out above;

(5) Dealing with this claim.

shall not be void by virtue of the provisions of section 284(1) of the Insolvency Act 1986 in the event of the making of an insolvency administration order under

the Administration of Insolvent Estates of Deceased Person's Order 1986."

9. The orders made under section 284 were therefore both retrospective and prospective. The costs of both defendants were ordered to be paid from the estate.

10. On 11 July 2024 I heard a further application for approval by Mr Wedgwood both under the Beddoe jurisdiction and under section 284. This time the application related solely to the EBP claim. Mr Wedgwood sought approval (prospective only) to enable him to continue to defend the EBP claim up to and including the hearing of the CCMC.

11. Mr Rees KC and Roger Laville represented Mr Wedgwood. EBP was represented by Clare Stanley KC and Francis Bacon. Mrs Hosein did not appear at the hearing, no doubt because she had failed to serve her defence to the EBP claim in time and judgment in default had been entered against her. Her application to set aside the judgment is opposed by EBP and will be determined at a later date. Unlike at the first hearing, Ms Stanley submitted that the court should not make any order under section 284 for reasons I will come to.

12. Having heard submissions from Mr Rees and Ms Stanley I made an order granting Beddoe approval and approval under section 284 albeit in a more limited form to that sought by Mr Wedgwood. The order I have made provides:

*"**Directions as to the EBP Proceedings***

1. Subject as provided for in this order the Claimant as personal representative of the estate of the Deceased has permission to continue to defend the EBP Proceedings (including the counterclaim brought by Reeta Hosein) and to pursue his own counterclaim but may not take any steps to prepare for or participate in the Costs and Case Management Hearing therein without further order. Without prejudice to the generality of the foregoing the Claimant has permission;

(1) To resist elements of the application that has been intimated by the Second Defendant to re-amend their Particulars of Claim and (if such amendments are permitted) to file a re-amended Defence in answer thereto;
(2) To apply to (a) re-amend the Defence and to (b) strike out elements of the Amended Reply and Defence to Counterclaim;
(3) To apply for an order that the proceeds of the Metlife insurance policy scheme currently held by the Second Defendant are paid to the Claimant and Second Defendant or alternatively into court; and
(4) To take any reasonable steps to resolve the EBP Proceedings by alternative dispute resolution.

Orders under section 284 Insolvency Act 1986

2. Any payments made by the Claimant from the date of this order in respect of the costs of:

(1) Administering the estate of the Deceased;

(2) Defending the EBP Proceedings and pursuing the Counterclaim therein in accordance with the directions set out above; and

(3) Dealing with this claim.

shall not be void by virtue of the provisions of section 284(1) of the Insolvency Act 1986 in the event of the making of an insolvency administration order under the Administration of Insolvent Estates of Deceased Persons Order 1986."

13. The order also made provision for the costs of the hearing. EBP's costs assessed at £20,000 were ordered to be paid from the estate with a provision that payment to EBP would not be caught by section 284.

14. At both hearings the court has considered, as is conventional where Beddoe relief is sought, extensive privileged and/or confidential material about the estate, the conduct of a defence to the EBP claim, the advice provided to Mr Wedgwood by his solicitors and counsel on the merits and settlement offers made. The court has also been told about two mediations that have taken place which have not led to a settlement of the EBP claim.

15. This judgment concerns principally the court's reasons for making orders under section 284 although it is necessary to consider those reasons alongside the reasons for making the Beddoe orders. It is inevitable that the court is constrained about what can be said in a judgment that is the outward expression of a decision substantially based upon privileged and/or confidential material.

16. I note in passing that both Mr Wedgwood and Ms Lees (who provided a statement on behalf of EBP) refer to the two mediations that have taken place and to offers made at those mediations. They both go further than merely noting that the mediations took place and no settlement resulted. Although as matters turned out there were no adverse implications for the hearing, parties to a Beddoe application should consider carefully the effect of both the without prejudice privilege and confidentiality which cloaks a mediation.

17. Caution should be exercised before there is any encroachment upon the confidentiality of a mediation, which will be governed by the mediation agreement. It may be permissible, depending upon the express or implied terms of the agreement, to refer to offers made during the mediation; but even this cannot be taken for granted. Offers made outside of mediation can be referred to in the context of a Beddoe application but it does not necessarily follow that the court may be referred to offers that are made within the scope of the mediation agreement.

18. The parties to a Beddoe application will need to consider the contractual obligations they have entered into carefully before referring to any aspect of the mediation. Unless the agreement expressly permits a party to reveal, to a greater or lesser degree, confidential information relating to the mediation, it will be wise for consent to be

sought from all parties to the agreement, including the mediator. The position is even more sensitive concerning information shared or discussions in open or private sessions during the mediation. It is doubtful whether it will ever be appropriate, even with full consent, to place such matters before the court.

EBP Claim

19. Ms Lees says in her witness statement that EBP is seeking two broad strands of relief:

"13.1 A money claim for £2,432,020.07 (being £2,625,418.07 misappropriated by Mr Hosein less credit for payments received from existing or former employees amounting to £193,398) ("the Money Claim");

13.2. Declaratory relief in respect of the death in service benefit of £1 million paid by American Life Insurance Company trading as MetLife in respect of an occupational pension scheme of which Mr Hosein was a member ("the Death Benefit" and "the MetLife Scheme" respectively)."

20. The Money Claim is based upon a report commissioned by EBP from Versant and has a number of different elements. It would be inappropriate to analyse them in detail and review their merits because the court is only in a position to refer to EBP's analysis, Mr Wedgwood's analysis being subject to privilege.

21. Needless to say, Mr Wedgwood has no first-hand knowledge about the allegations of breaches of fiduciary duty but has been able to serve a defence. EBP relies heavily on the fact that Mr Wedgwood has only be able to provide non-admissions in respect of claims amounting to approximately £1.3 million.

22. Mr Wedgwood relies upon the *Re Duomatic* principle in respect of payments that are said to comprise part of the euphemistically described 'Tax Saving Plan' which amounts to circa £650,000. EBP asserts that the *Duomatic* principle does not apply because either the plan was not honest (vis à vis EBP) or Mr Stead, who was the controlling shareholder, was unaware of it.

23. Mr Wedgwood pleads a positive case in relation to invoices totalling £214,819.27 and a limitation defence in relation to payments pre-dating 2 February 2016 in respect of sums totalling £631,644.39.

24. Mr Wedgwood counterclaims for unpaid net salary of £459,078.73 and to set that sum against EBP's claim. He is seeking permission to amend the unpaid salary claim to recover the gross unpaid salary amounting to £873,011.74, no doubt having regard to the estate's potential liability to HMRC if tax is not paid by EBP.

25. Ms Lees provides an evaluation of the benefit to the estate of the litigation and has provided what she describes as a best case and a worst case scenario. These include adjustments she has made to the value of the estate. EBP's calculations result in a deficiency on both analyses. However, both calculations are premised upon the claim and counterclaim proceeding to trial. That is of course a relevant analysis but it is not the only analysis the court should consider given the scope of the approvals that are sought.

26. The second strand of the claim relates to the death in service payment of £1 million made by MetLife. Currently the position is that payment has been made to EBP of that amount and it is held by EBP on trust for the estate. EBP asserts in its claim that it is entitled to set off the sum it holds against the estate's liability in the claim, albeit the basis of set off is not pleaded. Clearly whether or not the MetLife payment forms part of the estate is a highly material consideration. Mr Wedgwood has pursued a counterclaim to recover that sum plus interest from EBP. Mrs Hosein also pursues a claim in relation to the MetLife money on the basis that either she is entitled to it beneficially or that EBP is liable to pay her an equivalent sum for breach of trust. As matters stand at present Mrs Hosein's defence and counterclaim are unable to proceed.

27. EBP is seeking permission to amend its particulars of claim to assert that it is entitled in equity to the MetLife money on the basis that (a) Mr Hosein was under a duty to disclose his own wrongdoing, (b) had he done so he would have been dismissed and (c) he would then have ceased to be a member of the Metlife scheme and no benefit would have been paid. EBP's proposed claim goes on to assert that Mr Hosein profited from his breach of fiduciary duty by having rights under the scheme and therefore the MetLife money is the traceable product of his breach of duty and either EBP has a proprietary right in the money or it is held on constructive trust for EBP.

28. The order I have made permits Mr Wedgwood to oppose EBP's proposed application to amend. The material I have considered in that connection is privileged.

Re Beddoe and Section 284

29. There is a limited amount of authority about applications under the Beddoe principle and none was cited to me for the purposes of this application. No doubt the lack of authority is due to the court applying a pragmatic case by case approach having considered confidential material to which reference cannot be made in a judgment. It is not in doubt however that the court is required to consider, absent concern about the estate being insolvent, what is in the best interests of the beneficiaries as a class. Where there is contested litigation, the court will have to consider the degree to which the assets of the estate should be put at risk.

30. Paragraph 7.6 of Practice Direction 64B specifies the evidence that must be provided to the court and requires that "full disclosure of relevant matters". Paragraph 7.7 requires the evidence provided to the court to explain what consultation there has been with beneficiaries. I note in passing that there may be circumstances in which one or more beneficiaries should be asked whether they are willing to fund a contested dispute. Paragraph 7.8 contemplates that the court may give approval to the conduct of litigation on an iterative basis.

31. The task of the court on a Beddoe application in which the estate seeks to bring or defend a claim involving material uncertainly is not an easy one. The interests of the beneficiaries may not be homogenous and an assessment about what may be of benefit to them as a class may call for a fine judgment. There is then the question of what degree of risk is acceptable to the estate. It will need to be assessed in a proportionate way. The smaller the claim relative to the size of the estate the less significant the risk of failure becomes. Conversely, a large claim relative to the value of the estate will involve substantial risk. All the more so if there is doubt about the value of the estate.

32. Those involved in litigation have to grapple with the prospects of success or failure, to a greater or lesser degree, throughout the life of a claim. It is well understood that only a small proportion of claims reach a contested trial and an assessment of litigation risk may vary at different stages of the claim in light of a range of factors such as information that becomes available or the outcome of an interlocutory hearing. The prospects of entire or substantial success at a trial may not be the best measure of risk at an earlier stage in the claim.

33. For my part I consider it is helpful on a Beddoe application to consider, with the benefit of the privileged material, what a reasonably minded litigant, fully advised and with a cautious approach to risk would do in the circumstances. By 'cautious' I have in mind the sort of risk that an ordinary person or entity with resources similar to the net value of the estate would accept.

34. Where there is concern about possible insolvency section 284, as it is amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, must be considered alongside a Beddoe application. A prospective application for approval will always be wise.

35. Ms Stanley submitted that the correct approach to an application under section 284 is set out in paragraph 12.8.8 of the Practice Direction which governs Insolvency Proceedings. It provides that:

> **"12.8.8** The Court will need to be satisfied by credible evidence that the debtor is solvent and able to pay their debts as they fall due or that a particular transaction or series of transactions in respect of which the order is sought will be beneficial to or will not prejudice the interests of all the unsecured creditors as a class."

36. Mr Rees submitted that the test applicable under section 284 is the same test that is applied for the purposes of a Beddoe application and relies upon *National Westminster Bank plc v Lucas and others (re the Estate of Jimmy Savile)* [2014] BPIR 551.

37. If Ms Stanley is right, Mr Wedgwood has to show that either the expenditure in legal fees will be beneficial to unsecured creditors as a class or will not prejudice their interests. It would follow that the court is not entitled to have regard to the interests of the beneficiaries.

38. In *Sleight v Callin* [2022] BPIR 273 HHJ Klein dealt with, inter alia, an application for a validation order made orally by the defendant acting in person in her closing submissions. The judge stated that the test he had to apply was that contained in paragraph 12.8.8 and refused the application for retrospective approval of payments made for policy premiums on the basis that they prejudiced the estate's creditors.

39. However, and with great respect to the judge in that case, I do consider that the test in paragraph 12.8.8 applies in the circumstances I am dealing with. Indeed, I doubt whether the paragraph sets out the test that is to be applied where the court is considering whether to grant Beddoe relief and grant approval under section 284. A bankruptcy petition has not been issued.

40. The correct approach in my judgment, as Mr Rees submitted, is that adopted by Sales J in *Re Savile* as approved on appeal at [2015] BPIR 450. In *Re Savile* the court dealt with an application to remove the Bank as executor of the estate (which failed) and two applications made by Bank. First the Bank sought approval to a scheme for the distribution of the estate in

light of large number of personal injury claims faced by the estate and secondly approval under section 284 to legal expenditure incurred by the Bank. At first instance the court held:

> "71. In light of the claims against the estate, and the real risk that it may prove to be insolvent because of them, the Bank is obliged to have regard to the interests of the class of claimants against the estate as well as to the interests of the beneficiaries under the will."

41. After considering the decision of Chief Registrar Baister in *Re Vos* [2006] BPIR 348, Sales J said:

> "74. Thus, the Chief Registrar makes the important point that a person administering an estate has an obligation to be fair to those who may have good claims against the estate. It should, however, be noted that one cannot transpose everything he said to the circumstances of the present case. Since, as explained above, the rights of claimants against the estate and the rights of beneficiaries under the will cannot be known with any certainty at the moment, depending as they do upon the contingency referred to, it cannot simply be said that the estate should be administered as if it is insolvent and the beneficiaries under the will have no relevant interest. Mr Feltham correctly acknowledged that the Bank should have regard not only to the interests of claimants against the estate but also to the interests of the beneficiaries under the will."

42. Importantly, the judge went on to say:

> "75. In my judgment, the person with the primary responsibility for balancing these different and competing interests which ought to be taken into account is the executor, the Bank. In the context of this case, this requires emphasis. It is not for the court to intervene to "second guess" the Bank's decision to negotiate and implement the Scheme, unless the Bank has acted in breach of its duties. The weight to be given to the respective interests in deciding how to proceed is a matter for evaluative assessment by the executor, taking a range of factors into account such as the apparent strength of the claims against the estate (so far as that can be assessed at this stage), the potential extent of the liability of the estate to the claimants, the interest on all sides in minimising the costs of dispute resolution and the appropriate means to be adopted to ensure fair scrutiny of the merits of the claims made while avoiding the exhaustion of the estate in legal costs."

43. On appeal at [103] Patten LJ cited with approval paragraph [74] of the judgment of Sales J and went on to say:

> "104. I think the judge was entitled to proceed on this basis. On the figures then available to him, the estate was not actually insolvent in that its assets far exceeded its proven liabilities. Although the PI claims and their associated costs could not be measured with any accuracy, there was a reasonable possibility that many of the claims would ultimately be rejected (as they have been) with the result that the liabilities to creditors would be discharged in full."

44. The facts in the current case are clearly different to those before the court in *Re Savile*. In this case there is one live claim that creates a risk of insolvency as opposed an unknown class of claims in relation to which a settlement scheme was approved. It can fairly be said that the

risk of insolvency in this case is rather more pressing than in *Re Savile*. On the other hand, Mr Wedgwood is seeking prospective approval in respect of fees for limited steps having earlier obtained approval to the steps undertaken up to the date of the second hearing. It does not seem to me, however, that these differences affect the test to be applied.

45. Crucially, based upon *Re Savile*, it not appropriate to give consideration solely to the interests of creditors, as the test under paragraph 12.8.8 of the Insolvency Practice Direction requires, but rather to have regard to the interests of both creditors and the beneficiaries. The administrator of the estate is required to adopt a balanced approach to their respective interests as is the court when asked to provide Beddoe relief and approval under section 284.

46. I should add that I was not addressed about whether at the time of the decisions in *Re Savile* an earlier version of the Insolvency Practice Direction contained a provision that is similar to paragraph 12.8.8 of the current Practice Direction, although my understanding is that the provision is not new. However, there is no reference to the Practice Direction or to the approach to be adopted at the hearing of an application for an approval order within the context of a bankruptcy petition either at first instance or the Court of Appeal.

47. I conclude therefore that *Sleight v Callin* was decided per incuriam on the basis that the decisions in *Re Savile* were not brought to the attention of the court. It is therefore open to me to reach a different conclusion to the judge in that case and decline to apply the test in the Practice Direction.

Disposal

48. Ms Stanley made three submissions in relation to section 284:

(1) Mr Wedgwood is unable to satisfy the test contained in paragraph 12.8.8 of the Insolvency Practice Direction. I have concluded that this is not the correct test.

(2) Mr Wedgwood is applying for approval not for his benefit but for the benefit of his firm whom he employs to conduct the litigation. She says that, in effect, approval is sought for Anthony Gold LLP, the firm in which Mr Wedgwood is a member and which has conduct of the EBP claim and provides legal services to Mr Wedgwood. In my judgment, this is a submission without any merit. Mr Wedgwood was appointed by the Court to the office of Administrator of the estate as a suitable person to administer the estate. He is a client of Anthony Gold LLP and liable in the first instance for their fees, subject to his entitlement to an indemnity. I would add that if the submission were correct, and he is not able to seek approval as the office holder, solicitors would rarely be willing to be put forward to accept an appointment as Administrator. The correct analysis is that Mr Wedgwood himself obtains the benefit of the order.

(3) Mrs Hosein as the principal beneficiary of the estate should indemnify Mr Wedgwood. The difficulty with this submission is that Mrs Hosein has placed herself in a position of conflict with the estate. She wishes to put forward a counterclaim (and will be able to do so if she sets aside the default judgment against her) seeking the benefit of the MetLife payment. It is quite impossible in practice for Mr Wedgwood to

require her to indemnify him in relation to the conduct of litigation in which he seeks to recover the benefit of the MetLife payment for the estate.

49. Having determined that the correct test for the purposes of section 284 involves a consideration of the interests of both the creditors and the beneficiaries I am satisfied that the limited approval I have granted properly balances their respective interests. I have in mind a number of considerations including:

(1) The EBP claim has not yet reached a point at which there is clarity about the issues, particularly about the MetLife money, and therefore the size of the estate. £1 million is plainly a material sum in the context of an estate with a net value of circa £1.8 million if the MetLife money is included. Currently, subject only to a lien of doubtful validity and Mrs Hosein's putative claim, the MetLife money belongs to the estate. There will only be an issue about whether the money may be held in equity for EBP if EBP obtains permission to amend its claim. On any view Mr Wedgwood's ability to claim the MetLife money for the estate is highly material from both the point of view of the beneficiaries and creditors.

(2) There is a properly arguable point about whether EBP should be given permission to amend its claim and the proposed application to strike out certain paragraphs of the reply is the mirror image of opposing the grant of permission to amend. Although permission is given to make an application for an order for payment into court of the MetLife money it is very unlikely that such an application will be needed because EBP accepts that it should no longer have unrestricted access to the money.

(3) Mr Wedgwood should be able to apply to claim the gross amount of unpaid salary and make consequential amendments to his defence and counterclaim.

(4) The factors set out in the witness statement of Ms Lees require careful consideration against the privileged information the court has considered. They carry significant weight but are not of such force make as to it inevitable that the relief sought has to be refused. I do not accept that currently it is inevitable the estate is or will be insolvent.

(5) The scope of the approval given by the court is very limited and does not extend, as was sought in the application, to work preparing for and attending the CCMC.

(6) Mr Wedgwood should be given permission to take reasonable steps to resolve the EBP claim by ADR. Two mediations have failed but if there is clarity about whether EBP is able to pursue a claim to the MetLife money and the salary claim there may be a prospect of agreement being reached. Indeed, short of refusing to approve any further expenditure, the court is bound to facilitate the resolution of disputes by ADR.

(7) The further costs for which approval has been given cannot be precisely calculated but are small in the context of the costs incurred to date. The benefit to the beneficiaries of those costs being incurred outweighs the potential detriment to creditors.

(8) I consider that a reasonably minded litigant, fully advised and with a cautious approach to risk would be willing to incur the proposed expenditure.

(9) If section 284 approval were refused but, in principle, approval were to be given to Beddoe relief, or vice versa, the court would not be giving proper consideration to the interests of both the beneficiaries and the creditors because such a decision would place Mr Wedgwood in an impossible position. A harmonious resolution has to be found that places the respective interests in balance.