Neutral Citation Number: [2024] EWHC 392 (Ch)

Case No: CH-2023-000100

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

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

Date: 23/02/2024

Before :

MR JUSTICE ADAM JOHNSON

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Between :

(1) BRIAN BURKE
(2) SEAN BUCKNALL
(3) ANDREW ANDRONIKOU
(IN THEIR CAPACITY AS JOINT SUPERVISORS OF THE CVA OF MIZEN DESIGN/BUILD LTD) **Appellants**

- and –

PEABODY CONSTRUCTION LIMITED **Respondent**

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Matthew Weaver KC (instructed by **Shoosmiths LLP**) for the **Appellants**
Andrew Mace (instructed by **Devonshires Solicitors LLP**) for the **Respondent**

Hearing date: 13 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 23 February 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

Mr Justice Adam Johnson:

Introduction

1. This is an Appeal against a decision of ICC Judge Prentis dated 27 April 2023, by which he awarded costs against the joint supervisors of a CVA, Messrs Burke, Bucknall and Andronikou (the "*Joint Supervisors*" or the "*Appellants*"). The CVA in question had been promoted by Mizen Design/Build Limited (the "*Company*"), but was challenged in proceedings brought by two creditors, Peabody Construction Limited ("*Peabody*") and Newlon Housing Trust ("*Newlon*"). The Joint Supervisors were named as Respondents to the proceedings, together with the Company. They were represented by the same solicitors and counsel, namely Shoosmiths and Mr Matthew Weaver KC.

2. In his Judgment following trial dated 24 January 2023, ICCJ Prentis upheld Peabody's challenge but rejected that made by Newlon (see [2023] EWHC (Ch) 127). ICCJ Prentis made an Order dated 24 January 2023 which, among other matters, directed the parties to seek to agree any consequential matters, failing which there would be a hearing. The Company then appealed the decision in favour of Peabody, but the appeal was dismissed by Sir Anthony Mann by means of his Judgment delivered on 19 April 2023.

3. Consequential matters arising from the trial were not agreed, and a consequentials hearing was fixed before ICCJ Prentis on 27 April 2023. The day before, however, on 26 April 2023, steps were taken to place the Company into administration by way of an out of court appointment. In the event, no-one turned up at the consequentials hearing representing either the Company or the Joint Supervisors. But Peabody and Newlon appeared and sought appropriate consequential Orders anyway, including an Order revoking the CVA (which was readily granted, although strictly may have been unnecessary since the Company's position is that it was terminated before then), and Orders for costs.

4. As to costs, ICCJ Prentis had no real hesitation in making an Order against the Company in respect of Peabody's costs, since Peabody was the successful party on its application. He made no Order for costs however against Newlon even though its application had failed. I will comment on that further below.

5. It is a further aspect of ICCJ Prentis' approach which is the focus of the present appeal. As well as making an Order for the Company to pay Peabody's costs, he also decided that the Joint Supervisors should be jointly and severally liable for those costs, at least from the point of the trial onwards. Thus, his Order provided as follows at para. 3:

> "*The [Company] of the one part and the [Joint Supervisors] on the other are jointly and severally liable to pay [Peabody's] costs of its application from trial onwards to be subject to detailed assessment if not agreed and are to pay £28,000 on account of those costs within 14 days*."

6. It is this aspect of the Order that the Joint Supervisors seek to appeal.

The Judge's Reasons

7. The Judge's reasons are explained in two Judgments delivered during the consequentials hearing, both dealing with Peabody's claim for costs. These are headed "*Third Judgment*" and "*Fourth Judgment*" respectively. The Third Judgment was a short ruling, as follows:

> "*In respect of the claim for costs against the supervisors, it is not clear to me at the moment when their position shifted from neutrality to positive opposition. It plainly had by the time of Mr Weaver's skeleton. But that is the first indication I have got, on what I have at the moment. And therefore it seems to me that the joint and several liability ought to cover the trial costs and argument*."

8. The relevant parts of the Fourth Judgment are as follows (using the paragraph numbering from the approved transcript – the Mr Mace referred to is Peabody's counsel):

> "*12. As to the wider order sought, wider in the sense that it seeks to encompass the supervisors, that is an unusual order. But Mr Mace can draw encouragement and support for it from the unusual position adopted by the supervisors. They chose to be represented by the same leading counsel as the company. No distinction that I recall was made in Mr Weaver's submissions between the supervisors' position and that of the company. Indeed, his skeleton argument at trial - presented on behalf of the respondents in the plural - gave in paragraph 3 the respondents' position as follows: 'The respondents deny that the CVA is unfairly prejudicial or that there are material irregularities.' So there is a positive position taken by the supervisors in alignment with the company. More, this paragraph continued in as aggressive form as can be thought, particularly coming from an experienced counsel: 'The applications are without merit and ought properly to be dismissed with the applicants being ordered to pay the respondents' [in the plural] costs of the application.' That was the supervisors' position. For what it is worth, the final paragraph of Mr Weaver's skeleton under 'conclusion' says: 'For the reasons set out above, the respondents [in the plural] deny that the CVA was unfairly prejudicial or materially irregular. The applications ought therefore to be dismissed.'*
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> *13. Having taken such a positive position, notwithstanding the well-known obligation of neutrality in supervisors, I do not think that they can complain - and they have not appeared in court today to set out their position - if, the applications having succeeded against their desire, they are found liable, together with the company, for the applicant's costs*.

> *14. Mr Mace submits that that liability ought to extend back to the date in early August of Mr Burke's first statement. I read that statement, and indeed the one which was admitted at the opening of the trial, this morning. I consider that its overall tone was compatible with neutrality, which indeed Mr Burke expressed at the beginning of that statement. What is plain though is that the supervisors' position shifted into one of aggression, or 'litigation aggression', shall I say.*"

Grounds of Appeal

9. Five inter-related Grounds of Appeal are relied on, which may be summarised as follows: (1) the Joint Supervisors were named as parties in the proceedings only in their capacity as Joint Supervisors, and not in their personal capacities, and so any order against them personally was "*inappropriate*"; (2) the general rule (CPR 44.2(2)(a)) is that costs will be ordered against the unsuccessful party, but here the Company was the unsuccessful party, not the Joint Supervisors - their role in the proceedings was essentially neutral, and it was the Company which had opposed Peabody's challenge not the Joint Supervisors; (3) there was nothing in ICC Judge Prentis' Judgment of 24 January which would have justified any Order being made against the Joint Supervisors given their limited capacity in the proceedings – specifically, there was no criticism of their conduct; (4) the Judge erred to the extent he placed any reliance on the fact that the Joint Supervisors did not attend the consequentials hearing – it was appropriate for them not to in light of the Company having entered into administration and certainly the Judge ought not to have made findings which were critical of them without them having been given the opportunity to be heard; and relatedly, (5) although the authorities support the view that a costs order may in principle be made against a nominee under a CVA or IVA, that is only where there have been findings of personal misconduct, and there was no such finding here and no proper basis for making one.

10. By a Respondent's Notice, Peabody seeks to argue that the Order against the Joint Supervisors should be upheld for additional reasons, all of which in one way or another rely on allegations of misconduct on the part of the Joint Supervisors, arising from or revealed by (1) the Joint Supervisors' own failure to engage in seeking to agree consequential matters and to attend the hearing on 27 April; (2) the inherently flawed nature of the CVA, as shown by the Judgments of both ICCJ Prentis and Sir Anthony Mann; and (3) an attempt made during the appeal before Sir Anthony Mann to vary the terms of the CVA to address one particular flaw (referred to as "*the quirk*"), which showed that the Joint Supervisors lacked independence/neutrality.

Discussion and Conclusions

11. I have come to the view that the appeal should be allowed, and the Order made against the Joint Supervisors set aside.

Grounds of Appeal

12. To start with, Mr Weaver KC accepted during his submissions that the Joint Supervisors, as named parties to the proceedings, were in principle susceptible to having a costs Order made against them under CPR, rule 44.2, even though the rationale for their joinder was only to ensure they were bound by any Order made in relation to

the CVA. The real question therefore is whether there were proper grounds for ICCJ Prentis making the Order he did.

13. Such cases are rare. Logic and principle suggests that some element of personal misconduct is needed to justify a costs Order against a nominee, and even that may not be enough. The possibility of a costs order against a nominee was noted by Hoffmann J in Re Naeem (A Bankrupt) (No. 18 off 1988) [1990] 1 WLR 48 at p, 51, but he did not make any such Order. Harman J did make one in Re a Debtor (No. 222 of 1990) ex parte Bank of Ireland (No. 2) [1993] 1 BCLC 233, but the case was exceptional and the conduct of the nominee had fallen very far below the proper standard of duty required of a professional licensed insolvency practitioner. In Carraway Guildford (Nominee A Limited) & Ors v. Regis UK Limited & Ors [2021] EWHC 2064 (Ch), Zacaroli J. declined to make an order against a nominee under a CVA even though his conduct had (in one respect at least) fallen below the standard required, because in the context of the case as a whole the conduct was not so egregious as to attract a costs order against him (see at [11]).

14. Here, I think it clear that the rationale for the Judge's conclusion that the Joint Supervisors were guilty of misconduct was the fact that he considered they had moved, as he put it, from a position of neutrality to a position of "*litigation aggression*", at least from the point of Mr Weaver KC's trial Skeleton onwards. In reaching that conclusion, however, I respectfully consider that the Judge misdirected himself, as follows:

    i) The Judge thought it significant (see [12] of the Fourth Judgment) that the Joint Supervisors had instructed the same solicitors and counsel as the Company. For myself, however, I do not consider that that was necessarily a signal that they were moving from a position of neutrality to one of litigation aggression. Mr Weaver KC told me it is a common practice for the company and nominees who are added to proceedings in order to be bound by the outcome to be represented by the same legal team, and Mr Mace for Peabody did not disagree. Likewise, I consider it is reading too much into the form of Mr Weaver KC's submissions to say that the positions of the Company and the Joint Supervisors were by that stage necessarily the same and were both equally hostile to Peabody and Newlon. There is an alternative interpretation, which is that aspects of Mr Weaver's Skeleton were perhaps infelicitously expressed in a manner which failed clearly to reflect the different positions of his clients. Given that, I think caution was needed in deciding that there was misconduct on the part of the Joint Supervisors, at least in the absence of other corroborating evidence.

    ii) In fact, the other evidence available indicated there had been no movement to a position of litigation hostility. I have in mind the Witness Statement of Mr Burke referenced in the Fourth Judgment at para. [14] (see above at [8]). As to that, the Judge rightly accepted that it was a proper Statement for a nominee to have provided, and accepted the evidence of Mr Burke (at para. 8 of the Statement) that the position of the Joint Supervisors was neutral. I respectfully think it was a misdirection for the Judge to conclude there had been a shift away from that accepted position of neutrality by means of service of Mr Weaver KC's Skeleton, not least because Mr Burke would have reaffirmed his evidence at the start of the trial (i.e., after the date of Mr Weaver's trial Skeleton), and there was no finding that when he did so he was untruthful.

iii) Perhaps the high water mark of the case against the Joint Supervisors is the reference in Mr Weaver KC's Skeleton to the idea that the Joint Supervisors would seek an Order for their costs against Peabody, were its challenge to be successfully resisted. The Judge singled this point out for special mention. Again, however, and although certainly in one sense a threat, this does not seem to me to be sufficient to say, in a manner that cuts across Mr Burke's evidence, that the Joint Supervisors had moved improperly into a position of open hostility. Mr Weaver explained, and again I did not understand Mr Mace to disagree, that it is not unusual for supervisors, to the extent they have incurred costs in connection with a failed challenge to a CVA, to seek to recover them from the unsuccessful applicant. The reason is simple: it is that if the applicant does not pay, the supervisors' costs will have to be borne by the company, and thus (indirectly) by its creditors, who will thus be worse off. The logic of that explanation seems to me to be sound, and of course is consistent with the supervisors having an ongoing position of neutrality, because it is reasonable for supervisors, acting neutrally, to seek to protect the position of the company's creditors. Since the point can be explained in that way, I respectfully think the Judge was wrong to read it as a clear signal that, contrary to Mr Burke's evidence, there had been a move by the Joint Supervisors to an improperly aggressive litigation posture.

15. The result is that I think the Judge erred in principle. Plainly, he was not helped by the fact that the Joint Supervisors were not there to help him with their own submissions, but all the same I consider he fell into error in concluding that the Joint Supervisors' position had plainly shifted from neutrality to one of litigation aggression.

Respondent's Notice

16. Neither do I think that the matters relied on by way of the Respondent's Notice justify that conclusion, or the conclusion that the Joint Supervisors had fallen below the required standard of conduct in some other way which was sufficiently serious to warrant the making of a costs Order against them personally.

Failure to Engage and Non-Attendance

17. The first point concerns the failure of the Joint Supervisors to engage in seeking to agree consequentials and their failure to attend the hearing on 27 April. Here I think it useful to refer to another of the *extempore* Judgments – the "*Fifth Judgment*" – delivered by the Judge at the hearing. This is the Judgment dealing with the question of the costs of Newlon's failed application (mentioned above at [4]).

18. The Judge refused to make any costs Order in favour of the Company against Newlon (relying – among other matters – on its failure to engage and its non-attendance at the hearing). What is also apparent from the Fifth Judgment is that the Judge took at face value the assertion in Mr Weaver KC's Skeleton Argument that the Joint Supervisors would seek to recover their own costs of any failed application (see above at [8]), and so he considered whether – in addition to any costs Order in favour of the Company – the Joint Supervisors should be entitled to an Order for costs in their own right. He decided not in light of various factors (see at [30]), most particularly the Joint Supervisors' failure to maintain a position of neutrality, their lack of attendance which meant that any costs argument was not being pressed anyway, and also the related point

that the lack of engagement meant that the Court had no costs breakdown and could not distinguish between what had been spent by the Company and what had been spent by the Joint Supervisors.

19. The Respondents essentially argue that the same or similar points can equally well be used to justify the Judge's decision to award costs on a joint and several basis *against* the Joint Supervisors, but I disagree. For one thing, the Judge's reasoning starts from the assumption that the Joint Supervisors had moved away from a position of neutrality to a position of open hostility vis-à-vis both Peabody and Newlon, but I have already indicated that I disagree on that point. For another, as I have noted, the authorities indicate that some degree of serious personal misconduct is necessary to justify a costs order against a nominee (see above at [13]). Failure by the Joint Supervisors to engage and to press for recovery of their own costs against an unsuccessful applicant (Newlon) does not seem to me obviously to qualify as misconduct of such a serious type as to justify the making of a costs Order *against* the Joint Supervisors by another party (Peabody). There may well have been good reasons for the Joint Supervisors deciding not to press for any independent costs recovery against Newlon, so misconduct is not a given. Even if that is wrong, any such misconduct did not disadvantage Peabody, which was not affected by the costs position as between the Joint Supervisors and Newlon. And neither for that matter did it disadvantage Newlon, which was better off as a result.

20. I think it significant that the Judge, in dealing with the costs position as between Peabody and the Joint Supervisors, focused only on the perceived lack of neutrality of the Joint Supervisors as justifying the making of a costs Order against them (see his Third and Fourth Judgments, above). He plainly saw that as sufficiently serious, if proven, to justify the conclusion that there was misconduct sufficiently grave to warrant the making of a costs Order against them as nominees. He did not mention their failure to engage or attend the hearing, and I think was correct not to do so. Thus, I do not consider that the first of the points in the Respondent's Notice is of any assistance to Mr Mace in seeking to uphold the Judge's Order.

The Flawed Nature of the CVA

21. I can deal with this point more briefly. The proposition is that the flawed nature of the CVA is consistent with the Joint Supervisors being in breach of their duties as nominees. The problem with this is that it is an attempt to re-run an argument that failed before ICCJ Prentis. One can see that from the transcript of the 27 April hearing. Mr Mace sought to say that the wholesale failings in the CVA proposals might have justified an argument that the conduct of the Joint Supervisors fell below the required standard. He was cut off by the Judge, who said – rightly in my view – that such an argument might have been available to Peabody had it been raised as part of its original application, as it often is where appropriate. The point was not developed further, and did not appear as part of the Judge's reasoning.

22. I see no good reason to depart from the approach taken by the Judge. He was rightly cautious about proceeding on the basis that there had been breaches of duty by the Joint Supervisors when none had been alleged or fairly tested at the trial. It is one thing to say that a CVA is flawed, and quite another to say that its supervisors are guilty of professional misconduct in having supported it. The one does not follow from the other, and if allegations of misconduct are to be made they must be properly identified and fairly put. The view of the Judge, who was in the best position to be able to form a

view about it, was that that had not happened, and so the point was not one to be developed or relied on. I consider that was entirely correct, and consequently do not think it right to allow the same point to be resurrected in this appeal.

Variation of the CVA/the "quirk"

23. This is a related point. The argument is that steps taken by the Joint Supervisors to address what was described as the "*quirk*" in the CVA are consistent with a lack of independence on the part of the Joint Supervisors. I do not find this persuasive.

24. The "*quirk*" was essentially a problem (or series of problems) with the calculation of the figures in the Estimated Outcome Statement included as part of the CVA proposal. One particular aspect was that the CVA suggested that so-called "*Guarantee Creditors*" would recover 7.5% of their "*Allowed Claims*", and said that their recoveries would come out of the "*Fund*" to be established under the CVA. The problem was that other terms of the CVA gave the impression that the Fund would in fact be entirely used up in generating a return of 1.3% for the "*Non-Critical Creditors*", leaving nothing for the Guarantee Creditors. These issues emerged during the hearing of the Appeal before Sir Anthony Mann: they had not formed part of Peabody's challenge before Sir Anthony Mann raised them. In response, in a letter to "*All Creditors*" dated 5 April 2023, the Joint Supervisors set out certain variations to the CVA, proposed by the Company. These included a new provision requiring the Company to make additional sums available if required in order to ensure a return to the Guarantee Creditors of 7.5% and a return to the Non-Critical Creditors of 1.3%.

25. I need not explain the point in any more detail, or seek to examine whether the revised mechanism would in fact have worked. The point taken on costs is simply that in taking measures to vary the CVA proposal, the Joint Supervisors were evidencing their lack of independence and neutrality. I do not agree. If a flaw in a CVA proposal is identified, it does not seem to me to follow that communicating a possible solution to it is evidence of a lack of independence or neutrality. I certainly do not think it is evidence of the Joint Supervisors failing in their duty in a manner which suggests personal misconduct. If anything, it suggests the opposite, because to allow the quirk to remain unaddressed would have been irresponsible.

Conclusion

26. Some element of personal misconduct is necessary to justify the making of a costs Order against a nominee. Here, there were no findings of misconduct in the Judgment of ICCJ Prentis following the trial, because no misconduct was alleged, notwithstanding the deficiencies in the CVA which in the end allowed it to be set aside. The Judge's later conclusion when dealing with costs that there had been misconduct, namely a move to an impermissible position of hostility, was based on the mistaken assumption that the joint Skeleton Argument of Mr Weaver KC necessarily signalled an adverse and hostile litigation posture on the part of the Joint Supervisors. With all due deference to the Judge, in my opinion he was wrong to read the Skeleton Argument that way, and thus misdirected himself and wrongly took into account in exercising his discretion on costs a factor which was not an available or relevant factor. I would thus allow the appeal.