Neutral Citation Number: **[2023] EWHC 3283 (Ch)**

Case No: CR-2023-MAN-001174

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 20 October 2023
Start Time: **14.53** Finish Time: **15.22**
Start Time: **15.30** Finish Time: **15.32**

Before:

HIS HONOUR JUDGE M HALLIWELL

- -

Between:

(1) DEAN McGUINNESS
(2) HITCHAM HOMES LTD (in administration)

Applicants

- and -

(1) EDWARD AVERY GEE
(2) DANIEL RICHARDSON
(as joint administrators of Hitcham Homes Ltd)
(3) GOLDENTREE FINANCIAL SERVICES LTD

Respondents

- -

- -

MR IAN MAYES KC and **MR JOHN-PAUL TETTMAR-SALEH**
(instructed by **Hunters Solicitors LLP**) for the **Applicants**
MR SIMON PASSFIELD (instructed by **Brabners LLP**) for the **Respondents**

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APPROVED JUDGMENT

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HIS HONOUR JUDGE HALLIWELL:

1. Before me, there is an application for an order restraining Hitcham Homes Limited ("**the Company**"), from marketing and selling property at Station Yard, Station Yard, Hungerford, in Berkshire ("**the Property**"). It is made on an interim basis pending the outcome of a substantive claim for declaratory relief.

2. On its face, there are five parties to the application. However, there are issues as to whether the Company has been joined correctly as a party and, by implication, whether the Company is in administration.

3. The administrators were appointed out of court on 21 April this year. They were appointed by the holder of a floating charge and, when they were appointed, the sole director was Mr Dean McGuinness.

4. The application has been issued in the names of Mr Dean McGuinness and the Company itself on the footing that, as sole director, Mr McGuinness was and is authorised to instruct solicitors to issue the proceedings on the Company's behalf.

5. The respondents to the application are Goldentree Financial Services Limited ("**GFS**"), Mr Edward Avery Gee and Mr Daniel Richardson. GFS holds the floating charge. Messrs Avery Gee and Richardson are the administrators.

6. There are issues as to whether Mr McGuinness has standing to issue the application in his personal name and whether the Company can lawfully have instructed the solicitors to issue the application on its behalf. Subject to the issue of whether the application was indeed issued with the Company's lawful authority, Messrs Ian Mayes KC and John-Paul Tettmar-Saleh, of counsel, appear on behalf of the applicants, and Mr Simon Passfield, of counsel, appears on behalf of the respondents.

7. The application first came before his Honour Judge Richard Pearce at a hearing conducted remotely on 26 September. At this hearing Mr Shaman Kapoor appeared on behalf of the applicants and Mr Passfield appeared for the respondents. I am advised that, at the time of the hearing, arrangements had been made for the Property to be subject to auction shortly afterwards and this was drawn to the Judge's immediate attention. In view of the fact that there was insufficient time for him to hear comprehensive argument, the Judge granted a short injunction but listed the application for further consideration today. Mindful that, if he did not grant interim relief this would pre-empt the outcome of the application, the Judge did so without expressing a view about the merits of the application other than to state that, given the limited time available for him to consider the applicants' case, it did not appear to be so hopeless as to prevent him granting short-term relief.

8. I shall now say a little bit about the factual background.

9. By letter dated 23 February 2021, GFS offered the Company a loan facility of £1,966,000 to fund the purchase and development of the Property. As security for the loan, GFS advised the Company that it would require a debenture and first legal charge. It would also require a guarantee from Mr McGuinness in the sum of £550,000 supported by a first legal charge over Mr McGuinness' property at 17A Mayfield Road, Woodburn Green.

10. Following the facility letter, on 18 August 2021 Mr McGuinness entered into a personal guarantee in respect of the Company's liabilities, limited to £550,000, supported by a charge over his property at 17A Mayfield Road.

11. On 6 September 2021, the Company and GFS entered into a Debenture under which the Company granted GFS a fixed charge on all its freehold and leasehold property

and a floating charge on the remainder of its assets and undertaking. It specifically granted GFS a specific fixed charge on the Property.

12. Monies were duly advanced to the Company under the facility letter. The term of the loan was initially 12 months from the date of the first drawdown. It was extended by agreement so ultimately the amount advanced under the facility fell due for repayment on 27 January 2023. When this date passed, GFS issued a formal demand for payment. It did so on 23 February 2023.

13. The Company subsequently issued proceedings against GFS for a declaration that the floating charge was not enforceable. This was with a view, so it seems, to restraining GFS from appointing an administrator. These proceedings came before a judge of the Insolvency and Companies Court in London, Judge Prentis, on 20 April this year.

14. Before Judge Prentis, the Company appears to have argued that the whole advance was not immediately repayable and GFS' demand for repayment did not qualify as a formal demand under the parties' contractual arrangements. It can be seen from his judgment, at *[2023] EWHC 1727 (Ch),* that Judge Prentis rejected these arguments. He concluded that it was open to GFS to demand repayment and was satisfied it had successfully done so.

15. At [43] of his judgment, Judge Prentis concluded that the floating charge was enforceable that day, that is on 20 April. The following day, 21 April, GFS thus made the appointment now in issue or at least potentially in issue in these proceedings, that is the appointment, as administrators of the Company, of Mr Avery Gee and Mr Richardson.

16. Messrs Avery Gee and Richardson have also been appointed as receivers of Mr McGuinness' property at 17A Mayfield Road under the fixed charge securing his liabilities. This property is subject to possession proceedings in the County Court at High Wycombe.

17. The substantive claim in the present proceedings was issued as an Insolvency Act application on 25 September. In addition to the claim for injunctive relief, it encompasses claims for a declaration that the loan is unenforceable under the provisions of the *Financial Services and Markets Act 2000* and GFS' floating charge is not qualifying or enforceable.

18. There is no claim for a declaration that the appointment of administrators is void. Indeed, there was originally a claim for directions in relation to the conduct of the administration. However, the claim for injunctive relief obviously doesn't make sense if the administrators are in office. In any event, it is at least potentially implicit in the applicants' case that the appointment of administrators was void. This is an important aspect of the case to which I shall return later.

19. There are also claims for relief in relation to the charge of Mr McGuinness' property at Woodburn Green and a direction that the possession proceedings at High Wycombe be transferred to this court and heard within these proceedings. This aspect was initially difficult to reconcile with the rest of the claim. As part of the Insolvency Act claim it was obscure and didn't sit easily with the rest of the claim in relation to the administration of the Company. Mr Avery Gee and Mr Richardson brought the possession claim in their capacity as fixed charge receivers, not as administrators of the Company.

20. As I say, Judge Pearce's interim order was made the following day, that is on 26 September. In addition to his order for interim injunctive relief, Judge Pearce made a series of directions including a direction for the relief sought against GFS to be made within separate *Part 7* proceedings, supported by Particulars of Claim. He also directed that these proceedings were to be issued by 10 October. He granted the applicants permission to amend the current application.

21. Notwithstanding Judge Pearce's order, the Part 7 proceedings were not issued until yesterday. However, I can see there is a copy, on file, of the Part 7 Claim Form dated 10 October and Mr Passfield does not take a point about this.

22. At the beginning of the hearing, Mr Mayes drew my attention to the new Part 7 Claim, under Claim Form PT-2023-MAN-131, in which there are claims for declaratory relief and damages in relation to a loan, in 2019, from GFS to Mr McGuinness in connection with a project for the refurbishment and sale of17 Mayfield Road and the development of a new residential unit at what was to become known as 17A Mayfield Road. Mr Mayes invited me to entertain the application for interim relief today under both sets of proceedings. Again, no point is taken about this and I am content to proceed on this basis.

23. Pursuant to Judge Pearce's order, the applicants have also amended the substantive application to delete the claim for directions in the administration proceedings and modify the application for a declaration that the floating charge was not enforceable. The references to paragraphs 16 and 22 of Schedule B1 to the Insolvency Act 1986 have been deleted.

24. Following Judge Pearce's order, the administrators withdrew the property from auction. There is a suggestion, touched on a few moments ago, that they did not

promptly cease marketing the Property at the time. However, without wishing to pre-empt future applications, there is nothing on the evidence before me indicative of anything in the nature of a deliberate transgression of Judge Pearce's order. It should be noted, in passing, that the administrators have now tendered an apology to the court. This may ultimately be the end of the matter. Certainly Mr Mayes has not taken a point about this on behalf of the applicants.

25. The issue for me today is whether I should make an order continuing until trial or earlier order, the injunction initially granted by Judge Pearce to prohibit the marketing and sale of the Property.

26. In my judgment, the answer to this question is no.

27. Whilst the application is in the nature of an interim application, it is procedurally misconceived and the applicants have no realistic prospect of obtaining relief material to the interim application at trial. There is no serious question to be tried. However, on the hypothesis that this is incorrect, the balance of convenience unambiguously weighs in the respondents' favour.

28. Firstly, the Company can only have been joined successfully to the proceedings as an applicant if the appointment of administrators is void and, as sole director, Mr McGuinness has thus authorised his solicitors to act on their joint behalf. In his personal capacity, Mr McGuinness has no cause of action to warrant an injunction prohibiting the Company, its agents, or office holders from disposing of its own property. It is not suggested, for these purposes, that Mr McGuinness himself has a material interest in the Property, beneficial or otherwise, which he can assert independently from the Company.

29. In the substantive proceedings the applicants do not seek a declaration that the appointment of Messrs Avery Gee and Richardson, as administrators, was or is void. For this reason, I asked Mr Mayes to confirm, at the beginning of the hearing, whether it is the applicants' case that this is so. Mr Mayes initially stated that this forms no part of his case and suggested that the applicants do not seek to challenge the administrators' appointment. Later, however, he refined his submissions to leave the issue open on the basis that the issue of whether they had been validly appointed has not yet been determined. I shall thus deal with the case on the basis this question remains in issue since, if it is not an issue, the applicants can have no substantial case at all. It would mean that the Company has not been lawfully joined as an applicant. Since Mr McGuinness has no personal interest in the Property and can have no separate cause of action in his personal capacity, the application would fail at the outset.

30. Mr McGuinness now contends that one or more of the contractual agreements and instruments for the provision of security is a regulated mortgage agreement and thus unenforceable against the Company under *section 26* of the *Financial Services and Markets Act 2000* on the basis that they were in contravention of the general prohibition on regulated activity. However, the difficulty with this is that, by *section 22(1)* of the *2000 Act*, a "regulated activity" is defined so as to mean "an activity of a specified kind which is carried on by way of business" and, by virtue of *Article 61* of the *Financial Services and Markets Act 20*00 (*Regulated Activities*) *Order 2001*, it is provided that, whilst entering into a regulated mortgage contract is to be treated as a specified kind of activity, a "regulated mortgage contract" is limited to contracts under which the lender provides credit to an individual or trustee unlike the Company.

31. In the present case, the injunction is designed to restrain sale or disposal of the Property, not Mr McGuinness' personal property at Woodburn Green. The material contractual agreements and mortgage security in relation to the Property are the loan facility and the debenture, not the initial 2019 loan or mortgage. The agreements and mortgage security in relation to the Property itself did not involve the provision of credit to an individual or trustee. Under these agreements credit was provided to the Company, not Mr McGuinness. Mr McGuinness was not a party to the loan facility or the debenture and he was not personally advanced funds under them.

32. As a condition of the arrangements, the Company was required to obtain a guarantee from Mr McGuinness supported by a Fixed Charge over his property at Woodburn Green. However, this does not involve the provision of credit to Mr McGuinness personally and, on the hypothesis it somehow could have done, this would not have rendered void the Company's debenture. The administrators were appointed under the debenture or floating charge. They were not appointed as administrators under the fixed charge of Mr McGuinness' property at Woodburn Green nor were they appointed under the guarantee. Their title as administrators is derived from the debenture.

33. In any event, when the matter came before him, Judge Prentis adjudged that the debenture was enforceable immediately prior to the appointment of administrators. He did so at the hearing of an application to which Mr McGuinness, the Company, and GFS, were all parties. It is true that, at this stage, no point was taken about the operation of the *Financial Services and Markets Act 2000* but, if the issues Judge Prentis determined were narrower than the issues now being advanced, it is an abuse of process for Mr McGuinness or the Company to litigate the new issues now by

deploying arguments based on the *2000 Act*. To do so is to offend the principle in *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313 since the new issues ought to have been raised before Judge Prentis, see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17]). Mr Mayes accepted that the point could have been raised before. He submitted that it did not follow that it should have been raised earlier but provided no convincing explanation for the omission. In my judgment, it was incumbent on his client to raise before Judge Prentis the entire basis for challenge of the security under which the applicants were to be appointed. He is now precluded from raising issues which he omitted to raise when open to him to do so.

34. Mr Passfield raised an additional point. Relying on the judgment of Brightman J in *Re Bailey, Hay & Co. Ltd* [1971] 1 WLR 1357, he submitted that the applicants were now barred from equitable relief by laches. This was on the basis that some five months had been allowed to elapse before Mr McGuinness raised the present challenge during which he was actively negotiating with the administrators to purchase the Property. In my judgment, there is force in this submission. However, to successfully defend the application it is not essential for the respondents to rely on this aspect of their case as a free standing argument. The application fails at the first hurdle since the Company has not been lawfully joined as applicant and Mr McGuinness does not have standing to make the application alone.

35. On the hypothesis that, contrary to the way in which I see things there is a serious question to be tried, the balance of convenience does not weigh in the applicants' favour. As Mr Passfield observed, the administrators are under a duty to obtain a proper price when realising the Property and could reasonably be expected to act

consistently with their duties or perceived duties as office holders unless and until it is determined that their appointment is void. Conversely, if they are prohibited from doing so, this is likely to be the substantial disadvantage of the Company's creditors. Assessing the relevant loss on this basis would by no means be straightforward, but if it were possible to carry out such an assessment, Mr McGuinness has not filed evidence to demonstrate that he can satisfactorily meet such losses.

36. During the course of the hearing Mr Mayes took instructions from Mr McGuinness about his financial position. He was advised that Mr McGuinness has assets amounting to £400,000 and these could be deployed in support of his cross-undertaking. Whilst unsupported by written evidence, I would have been minded to explore this further and invite Mr McGuinness to file additional evidence had the case turned on this particular aspect. However, in my judgment it does not do so. For this reason, I have not asked Mr Mayes to develop further his evidence on the point.

37. The application for injunctive relief is dismissed with costs, such costs to be assessed on the indemnity basis.

38. Following dismissal of the application, the respondents are plainly the successful parties and there can be no good reason for me to make a different order.

39. Moreover, the applicants' conduct and overall circumstances take this case out of the norm. Firstly, the application has failed at the first hurdle on the basis that there was no serious question to be tried. The Company was not lawfully joined as applicant and Mr McGuinness was not entitled to make the application in his personal capacity. The application has been used as a vehicle to re-litigate issues that have already been determined or ought already to have been fully determined by the courts. Secondly, as Mr Passfield submits, the application was only issued on the eve of the auction

following serious delay. It was heard on the day of the auction itself. No proper explanation for this has been given. When the application was initially placed before him, there was thus insufficient time for Judge Pearce to deal with it. He granted the applicants interim relief shortly before the auction so as to hold the ring and avoid pre-empting the parties' rights. However, in the light of the evidence subsequently filed, there was no good reason for him to have been placed in such a position.

40. The respondents' costs must thus be assessed on the indemnity basis.