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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

[2024] EWHC 945 (Ch)

No. CH-2023-000190

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 6 March 2024

Before:

MR JUSTICE MICHAEL GREEN

B E T W E E N :

SOPHIE REBECCA PERHAR — Claimant/ Appellant

- and -

(1) LOUISE FREESTONE
(2) PAUL MALLATRATT
(3) SYNERGY IN TRADE LIMITED — Defendants/ Respondents

THE CLAIMANT/APPELLANT appeared in Person.

MR J MORGAN KC (instructed by Howes Percival LLP) appeared on behalf of the Third Defendant/Respondent.

J U D G M E N T

MR JUSTICE MICHAEL GREEN:

1 This is the appeal of Mrs Sophie Perhar, who has represented herself in an exemplary and competent fashion, and she appeals from the order of Deputy ICC Judge Baister, ("the Judge"), made on 11 August 2023. The Judge is the former Chief Registrar or ICC Judge and has tremendous experience in this area. His decision in a reserved judgment concerned two preliminary issues in relation to the validity of the appointment of administrators over the appellant's company, The Sustainable Bathroom Company Limited, ("the company").

2 The first and second respondents are those administrators and they were appointed out of court by the third respondent, Synergy in Trade Limited ("Synergy"). The latter opposes the appeal and is represented by Mr James Morgan KC. The administrators adopt a neutral line, as would be expected, and their solicitors, Mills & Reeve LLP, sent a letter to the court saying that they would not be appearing on the appeal to save costs. They reserved their position in relation to any consequential matters, in particular costs, in relation to which they may wish to make submissions.

3 There are four grounds of appeal and, on 16 November 2023, Joanna Smith J gave permission to appeal on all four grounds, basing her decision largely on the factual findings that the Judge appeared to have made and his decision to imply a term into the debenture that is at the heart of this case. Recognising perhaps the problem with the findings of fact, Mr Morgan concentrated on the legal parts of the decision, namely the implication of the term and the validation of certain defects in the appointment process, and submitted that the appeal should be dismissed because the factual findings are really irrelevant and could not have affected the outcome.

4 Before dealing with the grounds of appeal, I should shortly explain the background, and I can take this from the opening paragraphs of the judgment. In paras.1 to 3, the Judge said as follows (and I quote):

> "1. The applicant, Sophie Perhar, incorporated The Sustainable Bathroom Company Ltd in January 2019. She is its sole shareholder, director and employee. It carried on business as a wholesaler of environmentally sustainable bathroom products developed by Mrs Perhar, initially a mosquito repellent called Mozzipatch and later an electric bamboo toothbrush. The Mozzipatch project was initially a success but ultimately came to grief as a result of the insolvency of the long established company entrusted with its distribution. By early 2022, the company had developed the toothbrush to the point of having in place a supply agreement with Aldi, the German supermarket chain.
>
> 2. Synergy in Trade Ltd is a provider of business finance. In March 2022, it agreed to provide the company with a line of credit on the terms (as varied) set out in a letter dated 11 April 2022 and accepted by the company on 12 April 2022. In essence, Synergy agreed to pay, or issue letters of credit on behalf of the company to, its suppliers for the cost of the goods in return for remuneration in the form of a share of profits, [that is] 70% in favour of the company, 30% in favour of Synergy. The facility was subject to a maximum aggregate principal of £350,000. The company agreed that a designated account would

be set up, details of which would be quoted on invoices to its customers (in effect Aldi at this stage). This was because Synergy was funding the supply of goods to the company from China and wanted to ensure that it received the income generated by the sale of those goods so that, in the words of Mr Slinger, a director of Synergy, the company could not use the receipts as its own general working capital.

3. The facility was supported by a debenture dated 10 March 2022. Mrs Perhar and her husband also gave personal guarantees."

5 The next paragraph of the judgment is important, as the Judge expressly recognised that the court is not in a position to resolve contested issues of fact. He said as follows:

"4. Agreeing the deal with Aldi and arranging the supply of goods from China was a laborious process, but business began in early 2023, and Aldi was invoiced. As a result of an error, the invoices did not contain full and accurate details of the designated account into which payments were to be made: they gave the wrong IBAN of the account. Instead of making payments into the designated account, in late February 2023, Aldi made payments to a Euro Revolut Business account held by the company which Mrs Perhar says had been set up in connection with establishing an EU branch in Ireland. As Mr Morgan KC says in para.13 of his skeleton argument, the court is not in a position to make findings as to the circumstances which led to this, but, for present purposes and on the basis that it appears to have been Synergy which set up the account, I will assume, but without making any finding, that Mrs Perhar is correct in blaming Synergy for what she describes as a 'critical mistake', although, as Mr Morgan says, the IBAN error does not explain how money that should have been received into the designated account found its way into the Revolut account."

So, from that, the Judge assumed that it was Synergy's own fault that the monies received by the company were paid into the wrong account.

6 Just to complete the factual background, upon which there is no dispute, as the Judge recorded at para.5 of his judgment, this led to a breakdown of the relationship between the company and Synergy, although the appellant maintains in her evidence that she had continued a productive relationship with Ms Cassandra McAlpine, who was Mr Slinger's partner at Synergy, and this included being supportive of the company and her until as late as Friday, 2 June 2023.

7 However, everything changed at 9am on Monday, 5 June 2023, when Synergy's solicitors, Howes Percival, sent a letter of demand to the company for payment of £376,291.30 by first class post and by email. The letter relied on a breach of clause 10.8 of the debenture and another provision in the facility letter requiring the monies to be paid into the designated account. The letter stated that, because of the failure to comply with the terms, the fixed charge was now enforceable if the outstanding sums were not paid forthwith.

8 Somewhat extraordinarily, at 11.56am that same day, less than three hours later, Synergy purported to appoint the administrators pursuant to para.14 of Schedule B1 of the Insolvency Act 1986. As the Judge said, Mrs Perhar almost immediately, through solicitors acting for her at the time, challenged the validity of the appointment on various grounds. The application was issued on 27 June 2023 seeking effectively a declaration that the appointment of administrators was a nullity and seeking damages.

9 On 10 July 2023, ICC Judge Greenwood allowed amendments to be made to the application notice. He directed that it be heard in the vacation and that there be two preliminary issues to be decided; (1) whether the floating charge under which the administrators were appointed was enforceable at the date of the appointment; and (2) whether the notice of appointment filed by Synergy was defective and incapable of cure.

10 It seems to me that the issues that arise on this appeal largely stem from the fact that those preliminary issues were directed to be tried on an expedited basis. As a result of the Judge's decision, the application will be going to a trial with witness evidence and cross-examination on the other issue that arose by the application, namely the improper motive on the part of Synergy and the claim for damages. That issue is listed for trial in November 2024, so the status of the administration will remain in abeyance until all issues are resolved. I assume it was thought that, if the applicant succeeded on the preliminary issue, there would be no need to have that trial. But the converse should perhaps have also been taken into account, namely what if she loses and appeals, as has happened here.

11 So the Judge was limited to deciding those two issues and he started by dealing with the enforceability issue. In short, he decided that, despite the admitted absence of any term in the debenture providing for the circumstances under which the floating charge element would become enforceable, and Mr Morgan has accepted, as he did below, that the documentation was defective in this respect, the Judge said nevertheless it was appropriate to imply into the debenture such a term that effectively incorporated the events of default in the facility letter.

12 That was quite a big decision and it is one of the grounds of appeal. Having implied that term into the debenture, the Judge went on to find that the company was in default in some way, including because it was in breach of trust, meaning that the floating charge had become enforceable. The Judge also rejected the appellant's evidence and arguments that any such breaches had been waived by Synergy. In relation to the more technical aspects as to whether there were defects in the appointment process, the Judge found that they were not fundamental, they had not caused prejudice and could be cured. Accordingly, the Judge found against the appellant on both aspects of the preliminary issue.

13 The four grounds of appeal are as follows:

(1) that the court made findings of fact akin to fraud and dishonesty without hearing evidence;
(2) that there was an erroneous interpretation of the contract in implying the terms on the grounds of business efficacy;
(3) that the Judge's findings on waiver or promissory estoppel were wrong; and,
(4) that there were wrong findings in relation to the process of appointing the administrators.

14 As I have said, Mr Morgan preferred to focus on ground 2 and the implication of the terms as to enforcement, and he submitted, effectively, that grounds 1 and 2 are irrelevant and it does not matter, therefore, that they involve factual findings made by the Judge. I disagree that they are irrelevant. Even if Mr Morgan is right on ground 2 and the term is to be implied into the debenture, it is still necessary to show that there were the events of default that might

entitle Synergy to enforce the floating charge, and a part of the Judge's reasoning was that there was such an event of default because the company was in breach of trust. Furthermore, the Judge found that the alleged breach was not waived. Those latter conclusions are based on an interpretation of the evidence that was made without cross-examination and where the Judge had actually said at the beginning of his judgment that he could not properly be making findings of contested fact.

15 I can be quite sure in my views on this appeal because I have come to the clear view that the judgment in relation to enforceability cannot stand and the issues related to that really need to be determined at the trial in November, so that the necessary facts can be found on the evidence and after cross-examination. I understand why the preliminary issues were ordered, but, as it has turned out, that issue as to enforceability, in particular, was not suitable for summary disposal and I will try and explain my reasons.

16 Ground 1 concerns the findings of fact made by the Judge principally that there was a breach of trust. Mrs Perhar suggests that these were effectively findings of fraud and/or dishonesty and, therefore, should not have been made at this sort of hearing where there was no opportunity for her to give evidence and to test the evidence with cross-examination. As she made clear in her oral submissions, these findings were most upsetting to her, being that they are in a public judgment and they could seriously, in themselves, affect her future livelihood. Effectively, she wants them removed from the record.

17 However, I accept Mr Morgan's submission that, to a lawyer, but perhaps not to a layperson, the findings of breach of trust do not necessarily import a finding of fraud or dishonesty and that was not what he submitted to the Judge and, even though the Judge does not make it clear in his judgment, it could not have been what the Judge was actually finding. Having said that, I rather doubt that it is simply a question of strict liability or a purely technical breach of trust, as Mr Morgan put it.

18 So what did the Judge actually find? He referred to the terms in the facility letter about the designated account, including the provision that stated that the company can resell or use goods subject to Synergy's retention of title claim, but that it was to hold the proceeds of sale "on trust for Synergy" until they are paid in full, and he also referred to clause 10.8.1 of the debenture that provided for payment into the designated account and "pending that payment, hold those proceeds on trust for [Synergy]." This actually implies that the money may not go into the designated account first, but that, in the meantime, those monies are held on trust.

19 These clauses led to the important para.17 of the judgment, which says as follows:

> "The second matter relied on as a triggering event does require some explanation. Whatever may be in dispute about how money that should have gone into the designated account ended up in the Revolut account, it is plain that it did, and Mrs Perhar does not contest that. It is also plain that, in breach of trust, she used funds which should have gone into the designated account, but were in any event held on trust for Synergy, to pay others, herself, Hopkins & Jones and Capability Holdings (pawnbrokers she had used) and Alison Jaques Ltd, a gallery run by a friend from whom she had borrowed and who was threatening to take legal action."

20 Mrs Perhar's evidence is that those payments out had to be made and that she was permitted to make those payments by Synergy in the form of Ms McAlpine. This is the waiver

argument dealt with under ground 3. As that argument was dismissed by the Judge, he held at para.20 of his judgment that he was satisfied that the company had breached the terms of its borrowing. Mr Morgan accepted that the company would not be in breach of trust if Synergy had so waived its contractual rights arising out of the payments that had been made ahead of repaying Synergy. It is, therefore, important, it seems to me, to consider grounds 1 and 3 together.

21 Mrs Perhar has adduced detailed evidence in relation to her discussions with Ms McAlpine in 2023 and indeed with Mr Slinger, but more particularly with Ms McAlpine after there was a major falling out with Mr Slinger, who, in rather graphic terms, Mrs Perhar has accused of inappropriate behaviour. I will not go into details and I understand that that is hotly contested by Mr Slinger.

22 The important point is that, according to Mrs Perhar, she then developed a much healthier relationship with Ms McAlpine that led to the position they were in by the beginning of June that Ms McAlpine had agreed on behalf of Synergy to a detailed written plan to move forward in which the facility for £350,000 would continue for its three year term and, given the contracts in the pipeline for the company, would see Synergy paid off and the company thriving. Mrs Perhar showed me some of the WhatsApps passing between her and Ms McAlpine, which all seemed positive, and there was indeed, as it seemed, a good working relationship between them as to the way forward. There could have been no inkling on the part of Mrs Perhar that the relationship was about to suddenly end.

23 Out of the blue and, particularly considering the discussions that had taken place shortly before with Ms McAlpine, as I have said, on 5 June 2023, Mr Slinger unilaterally decided to put the company into administration. Mrs Perhar says he decided to destroy it for improper motives.

24 There are a lot of factual issues in there. The Judge could not possibly decide them and he did not try to. Instead, he dismissed the waiver argument in para.19 by reference to the terms of the debenture requiring any such waiver to be in writing and Mrs Perhar being allegedly unable to point to a clear statement that the alleged breaches of trust were being waived. He referred, as did Mr Morgan to me, to the *Closegate Hotel Development (Durham) Ltd v McClean* case [2013] EWHC 3237 (Ch), a decision of Mr Richard Snowden QC, as he then was. However, in that case, the Judge did say that, insofar as oral statements were relied upon as founding an estoppel, then, if they are undisputed, the court can decide that on a summary basis without hearing evidence, clearly leaving open the possibility that, if such oral statements were contested, it would not be suitable for disposal on a summary basis.

25 However, I have just referred to the written plan, and Mrs Perhar makes the point that Ms McAlpine has not responded to her fourth witness statement where she sets out her dealings with both Mr Slinger and Ms McAlpine. This witness statement was not before the Judge, but has been filed since and has not been responded to yet by Synergy or, in particular, Ms McAlpine.

26 Reference was also made to the case of *Re ARL 009 Ltd* [2020] EWHC 3125 (Ch) as to when a floating charge becomes enforceable. The Judge referred to this at para.24 of his judgment as follows:

> "[Mr Morgan KC] goes on to deal with matters of interpretation. He begins by citing Andrew Sutcliffe QC, sitting as a High Court Judge, in the *Re ARL 009 Ltd* case, accepting (at paragraph 50) that the

> question before him, whether the floating charge was enforceable within the meaning of paragraph 16, was 'to be assessed objectively and that such assessment involves consideration of all the circumstances including the terms of the debenture or other security document between the parties, any collateral contract or agreement, whether between the parties or between the floating chargeholder and a third party, any promissory estoppel, and any statutory provision.' In other words, a debenture is subject to the usual rules of construction when it comes to ascertaining its meaning and effect."

27 It seems to me that that really encapsulates my conclusion in relation to this appeal. All the issues – whether there was a breach of trust, whether the provision requiring monies to be held on trust was waived and indeed the meaning of the relevant contractual documents – has to be "assessed objectively and that such assessment involves consideration of all the circumstances".

28 In my view, the conclusions of breach of trust, which are, by the way, relied upon by Synergy for the trial issues coming up, including a suggestion that that amounts to a misappropriation, and the issues of waiver are heavily fact dependent and cannot just be found or dismissed by the Judge on this summary basis and by reference to a requirement in the debenture which, in other respects, was seriously defective, that any such waiver be in writing.

29 Mr Morgan took me through in some detail the communications between the parties in 2023 to show that, even on Mrs Perhar's evidence, there was no clear statement that Synergy was waiving its rights in respect of the payments out of its monies. However, I felt that this only confirmed to me that there are factual issues in relation to this issue which will necessarily have to take into account the nature of the relationship, the way they communicated with each other and what Mrs Perhar would have understood to have been the effect of those communications in the ongoing relationship and whether Synergy were still entitled to enforce its strict legal rights.

30 There is a further point to take into account, and that is that the whole relationship will be examined in detail at the trial on the improper motive question. It seems to me that there is some danger in coming to a factual conclusion now as to waiver when the trial judge may take a different view in the light of the evidence adduced at trial following cross-examination. For these reasons, I consider that the factual issues determined against the appellant were unsuitable for summary determination.

31 Mr Morgan submitted that these factual matters do not matter because the Judge found that Synergy could, in any event, rely on its general power to serve a demand and the company's failure to pay. The Judge dealt with this in paras.29 to 37 of his judgment where he went through the cases on prematurity and the notice provisions and, even though he seemed to accept that this was harsh on the company, he found that there was a valid demand served and that this could be relied on as a basis for the enforceability of the floating charge.

32 Mr Morgan rightly points out that the appellant does not appear to have appealed these findings and so those findings of the Judge must stand. However, I take into account the fact that the appellant is a litigant in person, albeit that her husband is a commercial barrister and has assisted her in the preparation for this case, but also that she is effectively appealing the Judge's decision on whether the floating charge was enforceable or not, which was the first issue that the Judge decided and is the subject matter of grounds one to three of the appeal. That is, in any event, dependent on the implied term that is the subject matter of ground 2 and,

as Mr Morgan said, not just whether such a term should be implied, but also the exact terms of it, namely the circumstances when it becomes enforceable.

33 So, turning to ground 2, the implication of a term as to when the floating charge is enforceable is critical for the purposes of para.16 of Schedule B1 of the Insolvency Act 1986, which states that administrators cannot be appointed under para.14 while the floating charge is "not enforceable". However, as is admitted, the debenture does not state when the charge is enforceable.

34 Of course, I accept that the only point of having such a debenture is to be able to enforce it when the time comes, but, if it fails to spell out under what circumstances it is enforceable, that is quite a serious defect. There are terms that recognise that Synergy can take certain steps, including the appointment of administrators, but it does not state when they can be appointed. Mr Morgan says, however, that it is so obvious that there must be an implied term as to enforcement.

35 The Judge went through the authorities on the implication of terms and the correction of mistakes, and he decided this matter on the basis of business efficacy and/or obviousness. It is not entirely clear to me exactly what the Judge was deciding should be implied into the debenture because he concludes this section of his judgment at para.27 by saying "It is appropriate to imply an enforceability term so as to give the debenture the required business efficacy." He had previously referred to the events of default in the facility letter, and I assume that, because they were meant to be construed as a coherent whole, those events of default should be transported into the debenture. Mr Morgan confirmed this, but it should perhaps have been expressly set out in the judgment. Mr Morgan said that it is only really the first of the facility letter events of default, namely a breach of the obligations in the facility letter or debenture, that needs to be implied for Synergy to get home on this issue.

36 The implication of terms and the correction of mistakes in drafting is heavily dependent on context and the factual matrix. Mr Morgan said, however, that he did not know what further evidence would help on this point. I mentioned a couple of points during argument, namely that the debenture was actually entered into a month before the facility letter, so it may be asked whether the terms of the latter should be imported into the former. Mr Morgan responded by saying that there was a previous draft of the facility letter around at the time that the debenture was entered into.

37 The second point that I raised was that it may be material to take into account when the floating charge would crystallise under the terms of the debenture, and that is provided for in clause 4. Mr Morgan said that this was by the by and not relevant, but it does seem to me that the precise terms to be implied into the debenture is critical to whether there has been an event of default meaning that the floating charge is enforceable.

38 There has been some confusion as to which default is actually being relied upon or was relied upon by Synergy at the time that it appointed the administrators. The letter of demand only referred to the designated account, but the Judge assumed, as he said at the beginning of his judgment, that this default was not the fault of the company. Was it the failure to meet the demand served earlier that day? If so, is that within the precise term to be implied into the debenture? Mr Morgan said that the amount due was payable on demand, as was made clear by the terms of the debenture. That may be so, but does that necessarily constitute an event of default within the term to be implied into the debenture as to enforceability or would there be implied, for instance, a requirement that reasonable notice be given to the debtor before enforcement can take place?

39 In short, it seems to me that this issue is also, to a certain extent, fact dependent and, given that I am going to give leave for the relevant facts as to breach and waiver to be determined at a trial, I think it is also appropriate to leave this issue to be decided at trial. It is all part of the enforceability of the floating charge and that is all dependent on there having been an event of default that has been implied into the debenture.

40 I am, therefore, going to allow the appeal on grounds 1 to 3. I do not decide them in favour of the appellant, but instead leave them to be determined at the trial in November.

41 Ground 4 is concerned with the second issue before the Judge, namely the allegedly defective appointment of the administrators. The Judge decided that any defects could be cured and did not affect the validity of the appointments. He relied on r.12.64 of the Insolvency (England and Wales) Rules 2016, which provide for insolvency proceedings not being invalidated by formal defects or irregularities unless "substantial injustice has been caused by the defect or irregularity."

42 Mrs Perhar particularly relied on that and the findings of the Judge at para.44 that there was no evidence of prejudice to the company. He also made similar findings at paras.50 and 51. On this aspect, I am against Mrs Perhar. I think she is conflating the substantial prejudice she claims to have suffered from the wrongful appointment of the administrators, something which she is able to argue at the trial when issues of enforceability and improper motive will be live, with the somewhat trivial defects in the documentation. True it is that this was sloppily done, but the Judge went through each of the three mistakes identified and explained why they could not, whether individually or cumulatively, amount to such a fundamental defect so as to affect the validity of the appointment.

43 The defects themselves did not cause the company substantial injustice. It is whether Synergy was entitled to appoint administrators in the circumstances existing on 5 June 2023 that may well have caused substantial injustice to the company and Mrs Perhar. That, she is still able to argue for, but she cannot argue in relation to the technical defects in respect of which the Judge's judgment will stand.

44 I hope that is clear enough. I am going to allow the appeal on grounds 1 to 3, which will leave issue 1 that was before the Judge to the trial judge, but I dismiss the appeal on ground 4.

CERTIFICATE

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This transcript has been approved by the Judge.