Richmondshire District Council v (1) Dealmaster Ltd (2) Penn **[2021] EWHC 2892 (Ch)**

Facts

The First Respondent ('R1') entered a company voluntary arrangement (CVA). The Second Respondent ('R2') was nominee and chairman of the qualifying decision procedure of creditors to approve the CVA. The Applicant ('A') applied under s 6 of the Insolvency Act 1986 and/or r 15.35 of the Insolvency (England and Wales) Rules 2016 to revoke or suspend approval of the CVA. R1's parent company ('Sterling') borrowed from a bank, which had cross-guarantees from R1 secured by charges. Sterling repaid the loan, then invoiced R1.

A alleged that:

- The CVA unfairly prejudiced it, or that there was material irregularity in its approval.
- R2 should not have admitted a significant creditor of R1 ('Hightide') to vote because its debt was not sufficiently proved.
- The CVA would not have been approved without the vote of that creditor, which was not a party to the application.
- The proposal wrongly stated the dividend in the CVA would be higher than in liquidation:
- R1's real property, which was excluded from the proposal, was undervalued in the proposal.
- R1's debt to Sterling was inflated and it was unfair for Sterling not to be bound by the CVA.

Held

Application dismissed.

'Unfair prejudice' concerns the effect of the CVA on relevant creditor(s); 'material irregularity' concerns the procedure for the CVA's approval.

The debt to Hightide (which ought to have been a party) was adequately evidenced. A's challenge was a 'fishing expedition'. Hightide being admitted to vote was not a material irregularity. Expert evidence valued the real property more highly. There was no unfair prejudice because valuations are inherently uncertain, the valuation in the proposal was genuine and not improper or negligent, the creditors were all treated as one class for this purpose, and a reasonable and honest person in A's position might have approved the CVA. There was therefore also no material irregularity.

R1's indebtedness to Sterling was adequately evidenced, and there was no material irregularity. Differential treatment of Sterling was justified in the circumstances, and there was no unfair prejudice.

Edwards v Tailby [2021] EWHC 2819 (Ch)

Facts

The Insolvency (England and Wales) Rules 2016 (IR 2016) draws a clear distinction between an office-holder's decision to admit a proof of debt for the purposes of dividend and one to admit the proof for voting purposes in a decision procedure: an appeal against the former must be brought pursuant to IR 2016, r 14.8 and/or r 14.11; an appeal against the latter can only be brought pursuant to IR 2016, r 15.35.

The time limit in r 15.35(4) (21 days from the decision date) was strict and any application retrospectively to extend it would be treated like an application for relief from sanctions under CPR 3.9 and Denton v TH White Ltd [2014] EWCA Civ 906 would apply. In May 2020 the administrators of a company sought a decision from its creditors and, for voting purposes, partially admitted the proof of debt of a creditor (O); in late July the directors became aware of the administrators' decision on O's proof and (within the 21 days of becoming aware) appealed the decision under rr 14.8 and 14.11; the administrators pointed out that the court had no jurisdiction to review their decision under those provisions and on 5 November 2020 the directors eventually applied to amend to include an appeal under r 15.35 in the alternative, seeking an extension of time under r 15.35(4). Deputy ICCJ Barnett dismissed both applications and the directors appealed.

Held

The initial application (under Part 14) was misconceived; even if it had sought the correct relief (under r 15.35) it would have been 75 days out of time; the application to amend was brought after considerable further delay (for which there was no adequate explanation) and time should not be extended (pursuant to CPR Part 3, as incorporated by IR 2016, r 12.1 and Sch 5, para 3) as the applicants could not satisfy the Denton test. Accordingly, although permission to appeal was granted (in relation to the Denton issues), the appeal was dismissed.

Serene Construction Ltd v Salata and Associates Ltd (formerly Salata & Co) [2021] EWHC 2433 (Ch)

Facts

This claim arose from the sale by receivers of residential development land. The Claimant acquired the land in 2006, and took out a mortgage with Barclays in 2007. The site had planning permission for 13 homes, granted in 2003. Following breaches of the loan covenants, in 2008 Barclays recalled the loan balance of £327,413. With no payment forthcoming, Barclays appointed receivers in 2011 (Salata).

Mr Sparrow of Connels advised the receivers on the land's sale. The site was marketed to 15 local developers with no guide price; three expressed interest and two made offers. Of these, one was conditional (and subsequently withdrawn); the receivers therefore accepted the remaining (unconditional) offer of £175,000.

The claimant alleged that the receivers had breached their duties by selling the property at an undervalue. The claimant alleged that the true value of the site was £575,000, and accordingly claimed damages from the receivers of £400,000 for the shortfall.

Held

The court referred to Cuckmere Brick Co v Mutual Finance [1971] 2 All ER 633, highlighting that mortgagees (and receivers) owe a duty when exercising a power of sale to take reasonable steps to obtain 'the true market value' or 'a proper price.' The enquiry focusses on the precautions taken to obtain that value - mere sales below the price assessed by a valuer are insufficient to create liability. Applying those principles, the court dismissed the claim, as no breach of duty by the receivers had been established. Specifically, the court rejected allegations that:

- The Defendants should have engaged an independent expert valuer. There was no basis to suggest that the assistance and expertise of Mr Sparrow and Connells was insufficient.
- The Defendants should have marketed the property to a wider pool of buyers, with a suggested guide price. In light of the difficult market conditions, and the possibility of deterring potential buyers with a public listing, the steps taken to market the property were appropriate.
- The Defendants had failed to draw attention to the 2003 permission. There was doubt over whether the 2003 permission had lapsed (the Local Authority asserted it had); the available evidence suggested buyers had been told in any event; and given that planning permission information is readily available online it could not be assumed that a failure to mention permission would mean prospective buyers were unaware of it.

Re CGL Realisations Ltd [2021] EWHC 2395 (Ch)

Facts

The Liquidator of CGL Realisation Ltd ('the Company') brought a preference claim against the respondent creditor in respect of a £112m payment made by the company to the Respondent in connection with the sale of a group of companies. The Respondent was a connected party and the payment made at the relevant time so that desire to prefer was presumed. The parties completed a joint disclosure review document. Subsequently the Liquidator applied for Model E disclosure in respect of the desire to prefer issue and sought information in respect of potentially deleted documents. The Respondent applied for Model C disclosure in respect of the Liquidator's conclusions and concerns arising from his initial investigation.

Held

Both applications were dismissed. George Bompas QC (sitting as a deputy High Court Judge) held:

1. Liquidator's Application: Model E disclosure was inappropriate on the issue of desire to prefer given (a) the time for disclosure was less than month away; (b) the Liquidator was

seeking to rerun the first stage review of documents; and (c) it was disproportionate where the burden was on the Respondent to displace the presumption. As regards the lost documents, the Respondent's solicitors had given a witness statement in relation to the matter but, in any event, given the presumed desire to prefer, it was the Respondent who was more likely to be disadvantaged by the loss of the documents.

2. Respondent's Application: The Liquidator's concerns and findings arising from his investigation were not a matter in issue in the disclosure review document. While the court may be interested at trial to hear about the Liquidator's initial concerns, they did not go to whether the factual foundation of the preference claim was made out. Disclosure was only required in respect of documents relevant to the factual ingredients of the preference claim.

Mitchell v Al Jaber [2021] EWCA Civ 1190

Reversing the High Court, the Court of Appeal held that examinees' statements made pursuant to s 236 of the Insolvency Act 1986 (the 'Act') are immune from suit.

Facts

BVI joint liquidators applied to amend their re-amended points of claim at trial, after it became clear the Sheikh's s 236 examination contained untruths. The High Court permitted the reamendments. It rejected the Sheikh's submission that, as a participant in litigation, he was immune from suit and that the re-amendments correspondingly had no prospect of success.

Held

Immunity from suit requires a context-specific approach. The High Court's view - that s 236 examinations were investigative and not judicial in their nature - was wrong. Its application of the Trapp v Mackie criteria to reach that conclusion had been too narrow.

The broader judicial context of s 236 was critical: such examinations 'are commenced by an order of the Court and which [they are] intended to facilitate' [81]. Given that liquidators, the Official Receiver and the court benefitted from immunity in such proceedings, it would be odd if the examinee alone was left exposed to subsequent litigation [101]. It followed that s 236 formed part of a wider concept of ' judicial proceedings' and statements made by examinees therein attracted immunity from suit.

That conclusion was supported by public policy. An examinee's immunity encouraged free and frank disclosure, thereby assisting the liquidator to obtain information with which to conduct the winding up. Moreover, the immunity does not protect examinees from direct actions based on non-disclosure in breach of the usual duties to provide information (such as those at ss 235, 237(1) and 433 of the Act). It therefore did not materially damage the principle that wrongs should be remediable. That the liquidators were officers of the BVI courts made no difference to the court's analysis [112]. The Sheikh's appeal was therefore allowed and his s 236 statements were granted immunity. However, since the Liquidators could rely on the other above provisions, not all of the proposed re-amendments were immediately struck out .