APPEAL CASE REFERENCE: CH-2022-000121
Neutral Citation Number: [2023] EWHC 1286 (Ch)

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE ORDER OF DEPUTY MASTER MARSH
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)
Claim No. BL-2021-001842

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Monday, 3 April 2023

BEFORE:

MRS JUSTICE JOANNA SMITH

BETWEEN:

DR ROHIT KULKARNI

Appellant/Claimant

- and -

(1) GWENT HOLDINGS LIMITED
(2) ST JOSEPH'S INDEPENDENT HOSPITAL LIMITED

Respondents/Defendants

Dominic Chambers KC (instructed by DJM Solicitors) appeared on behalf of the Appellant/Claimant
Daniel Lightman KC and Thomas Braithwaite (instructed by Veale Wasbrough Vizards LLP) appeared on behalf of the Respondents/Defendants

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JUDGMENT
(Approved)

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MRS JUSTICE JOANNA SMITH:

1. This is the hearing of an application for permission to appeal rolled up with the substantive appeal. The appeal is against the order of Deputy Master Marsh dated 8 June 2022 whereby he dismissed the claimant's application for summary judgment. The Appellant's Notice invites the court to allow the appeal and to vary the order made by the Deputy Master so as to make a final declaration in the claimant's favour.

2. The background to the application is not contentious. The Deputy Master set it out in detail at paragraphs [3]-[42] of his detailed judgment, which I gratefully adopt. At the heart of this application is the true construction of clause 7.1(d) of a Shareholders' Agreement ("**the SHA**") dated 13 February 2020 made between the claimant and the defendants. The SHA concerns shares held, or to be held, by the claimant (a consultant orthopaedic surgeon) and the first defendant ("**Gwent**") in the second defendant ("**the Company**") which owns St Joseph's Hospital in Gwent. For present purposes I need record only that, as is set out in the Deputy Master's judgment, two breaches of the SHA are admitted by the defendants, and it accepted that they are repudiatory in nature.

3. In his judgment the Deputy Master dealt with a number of different issues in relation to the application for summary judgment which the claimant does not seek to pursue on appeal. In this context, it is fair to observe that the claimant has sought to pursue various arguments at various stages of these proceedings to date and that his arguments have developed and, to a certain extent, changed over time. Even today, new arguments were being made, and new authorities referred to, which were not raised or referred to before the Deputy Master. That is not an auspicious start to an argument premised on what the claimant now says is a short and obvious point of construction arising under clause 7.1(d) of the SHA.

4. Clause 7.1(d) is in the following terms:

> "7.1 A shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events … (d) the shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)."

5. As identified by the claimant in his skeleton argument for this hearing, the short point of construction is whether material (and repudiatory) breaches of the SHA (in the form of the admitted breaches), are breaches which are capable of remedy within the meaning of clause 7.1(d). The claimant submits that repudiatory breaches are, by their nature, incapable of remedy within the true meaning of that clause.

6. Although the grounds of appeal identifies five separate grounds, it is the claimant's case that these all stem from a single cohesive argument as to the true construction of clause 7.1(d) in its contractual context. Accordingly, and in common with the approach adopted by the parties at the hearing, I am not going to address each of the grounds in turn but will instead consider that single argument on its merits.

7. Before turning to the Deputy Master's judgment, I should also set out the provisions of clause 15 of the SHA, which is relevant to the argument that is advanced today by the claimant:

> "Termination
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> 15.1 Subject to clause 15.2, this agreement shall terminate:
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> (a) when a resolution is passed by the shareholders or creditors of the Company, or an order is made by the court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's shareholders, creditors or other contributors; or
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> (b) the appointment of a receiver, administrator or administrative receiver over the whole or any part of the assets of the Company or the making of any arrangement with the creditors of the Company of the affairs, business and property of the Company to be managed by a supervisor; or
>
> I when, as a result of transfers of Shares made in accordance with this agreement or the Articles, only one person remains as legal and beneficial holder of the Shares."

The Deputy Master's Judgment

8. Although the point of construction that I have identified was raised before the Deputy Master, the bulk of the arguments in support of summary judgment were developed in

a rather different way before me, as I have indicated. The Deputy Master's reasons for dismissing the application were set out at paragraphs [81]-92] of his judgment, which were essentially concerned with whether the admitted repudiatory breaches of the SHA were remediable, having regard to the true interpretation of clause 7.1(d) in its particular contractual and factual context. Paragraphs [90]-[92] record his decision in this regard:

> "90. I accept as Mr Chambers submits that the notion of remediability must be construed in light of terms of the contract in question looked at in its relevant context. However it is clear from the authorities that the court must look to see whether the breach "can be put right for the future" or put another way, the mischief can be removed or whether there remains a stigma.
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> 91. Both Lord Wilson and Lord Toulson in Telechadder accepted the need for an inquiry to be made whether the mischief caused by the breach could be redressed. As a minimum it seems to me that the defendants have a real prospect of establishing at a trial that this is the right approach in this case. A full factual enquiry is needed at a trial. The claimant's evidence is nowhere near sufficient for the court to decide the point on a summary basis. Indeed there is a tension in the claimant's evidence between his decision to treat the SHA as continuing (after a lengthy gap between the events of 2020 and his response in 2021) and his evidence that the breaches led to an irretrievable breakdown in relations and a complete loss of faith in Gwent and David Lewis. Furthermore, his evidence about reaching that conclusion is based upon what he says was the effect of all four breaches and not severally in relation to the two breaches he relies upon now
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> 92. In my judgment, the issue of remediability is unlikely to be suitable for determination in most cases on a summary basis because, as in this case, the court does not have all the evidence it needs to make a determination about the proper construction of the contract and whether on the specific facts the breach was remediable."

9. It is common ground that the Deputy Master did not make any final finding as to the construction point that is now pursued on appeal. Instead, he determined that the issues of construction of the SHA and of the nature of the relevant breach were matters which must go to trial. I agree with Mr Lightman KC, for the defendants, that, amongst other things, this decision plainly reflected the fact that the Deputy Master considered there to be other issues relating to the construction of the SHA that were in dispute between the parties and needed to go to trial, including whether the relationship was a quasi-partnership and what effect that may have on the interpretation of the SHA.

10. From paragraph [93] of his judgment onwards, and although he recorded that it was not necessary to do so, the Deputy Master went on to consider various other propositions that had been advanced in support of the application, arriving at the conclusion which is now challenged at paragraph [98] that, properly construed, clause 7.1(d) does not mean that a repudiatory breach is never remediable. At [101] and [102], he set out various conclusions as follows:

> "101. Although it is convenient for the claimant to focus attention on his position, whether a particular breach is remediable involves the court construing the agreement in light of that breach and the overall position. Evidence about the effect of the breach on the innocent shareholder may be admissible. However, the court will determine whether the breach is remediable not just by considering a statement by the claimant about a loss of trust and confidence. The enquiry into whether the mischief caused by the breach has been remedied or whether, for example, there is a residual stigma involves much more than receiving self-serving evidence from the claimant.
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> Conclusion
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> 102. This claim should proceed to trial when all the issues of fact and law raised by the particulars of claim can be determined in light of findings of fact made by the trial judge. Neither of the issues placed before me are suitable for summary determination because the defendants have a real prospect of success…".

The Arguments on the Appeal

11. The claimant contends that the finding that repudiatory breaches are capable of remedy directly contradicts the old and well-established principle of the general law of contract that a repudiatory breach of contract is not capable of being remedied by the defaulting party so as to preclude the innocent party from accepting the defaulting party's repudiatory breach. This is a principle that the claimant derives from *Bournemouth University Higher Education Corporation v Buckland* [2011] QB 323 CA ("*Bournemouth*"), a case that was not cited to the Deputy Master but is now said by the claimant to "form an important part of the relevant factual matrix for the purposes of construing clause 7.1(d)".

12. Essentially, as I understand Mr Chambers KC's argument, on behalf of the claimant, as it was developed orally before me today, it is that clause 7.1(d) must be construed in the context of the whole SHA having regard, in particular, to three key factors:

a. First, the fact that the SHA is a multi-party agreement (a point that was raised before the Deputy Master, but is not mentioned in his judgment);

b. Second, the fact that the SHA has no fixed term and can only come to an end on the happening of an event identified in clause 15;

c. Third, the common law principle that I have just identified in *Bournemouth* that under the common law if a defaulting party commits a repudiatory breach, that breach cannot be cured so as to prevent the innocent party from accepting the breach.

13. By reference to these three factors Mr Chambers argues that clause 7.1(d) must be construed having regard to the fact that the SHA does not provide for a common law right of termination (both because of its multi-party nature and because of the terms of clause 15 which, it is said, exclude the common law right) and that accordingly clause 7.1(d) is to be seen effectively as a 'surrogate' for the common law right of termination. At the very least, he submits, it is to be construed in that context. Put another way, it is crucial to the claimant's construction argument that there is no common law right of termination, because the absence of such right supports the construction for which the claimant contends.

Correct Approach to Interpretation

14. The general principles of interpretation are not controversial, and no time was devoted to them at the hearing. I was referred by Mr Chambers in his skeleton argument to *ABC Electrification Limited and Network Rail Infrastructure Limited* [2020] EWCA Civ 1645 CA at [18], in which Carr LJ summarised the key principles to be extracted from the trio of well-known Supreme Court authorities on contractual interpretation. I will not increase the length of this judgment by setting out her summary here.

15. Having regard to those principles and bearing in mind all of the submissions made to me by the parties, together with the authorities to which I was referred, I do not consider there to be a real prospect of success on this appeal, and I am going to refuse permission. In summary my reasons are as follows.

a. It is common ground that the multi-party nature of the SHA and, in particular, the operation of the common law principle of repudiation, raise a novel question of law in respect of which I am told there is no authority. As one of the critical planks of the claimant's case on the summary judgment appeal, I can see no real prospect of the court seizing the nettle and dealing with a novel point of construction which might have far reaching consequences and in respect of which there appears to be no precedent. That is particularly so where the factual matrix is already in dispute between the parties and where it is common ground that various matters relating to the factual matrix will need to be addressed at trial including the relationship between the parties.

b. Relatedly, during his submissions, Mr Chambers expressly asserted that because of the multi-party nature of the contract, the parties had agreed to modify the common law by the means of clause 7.1(d) and that they did that in order specifically to provide that, in the case of breach, the SHA would only end for the repudiating party but would continue for everyone else. This was reflected in his supplementary skeleton in which he submitted that clause 7.1(d) was designed by the parties to replicate, so far as possible, the common law regime of acceptance of a repudiation. However (aside from the fact that the reference to this being a multi-party agreement has only been added to the Particulars of Claim by amendment after the Deputy Master's judgment) this seems to me to raise factual matrix questions which the appeal court could not possibly address.

c. I note also Mr Lightman's submission, which Mr Chambers did not gainsay, that clause 7.1(d) is a common device used in many different types of contract. Whilst every clause must of course be construed in its own context, nonetheless Mr Lightman submits that in no earlier case has it ever been held or suggested that there is some fetter on the answer to the question whether a breach is capable of remedy based on whether the breach would be classified as repudiatory or not at common law. Again, in my judgment this represents a significant hurdle to the claimant in seeking permission to appeal from the Deputy Master's decision to refuse summary judgment.

d. On a textual analysis, the natural and ordinary meaning of the words of clause 7.1(d) cannot be in doubt. It is common ground that a material breach may be a repudiatory breach or something less serious. As Mr Lightman submits, the words "incapable of remedy" would seem, on any literal interpretation, to mean "if it can be put right for the future in a practical and non-technical sense" (see *Schuler v Wickman Machine Tool Sales Ltd* [1974] AC 235 per Lord Reid at page 249). The Deputy Master dealt with this in paragraphs [85]-[90] of his judgment. There can be little doubt that, viewed on their own, those words and their interpretation in the context of the facts of this case raise a factual question that would need to be dealt with at trial.

e. It is clear from the authorities cited by Mr Lightman that the courts have taken the view that there is no reason why a repudiatory breach may not be treated as capable of remedy for the purposes of a clause such as 7.1(d) (see *Force India v Etihad* [2010] EWCA Civ 1051 and *Crane v Wittenborg AS* (unreported) 21 December 1999, both Court of Appeal decisions). Accordingly, one starts from the premise that there is nothing wrong with the language used by the parties and that they intended it to mean what it says. Indeed, as I have said, I have not been shown any authority where the clear words were interpreted to mean something quite different so as to bring them into line with the common law principle of repudiation.

f. In the circumstances, I can see no reason or basis for the words "capable of remedy" to be subject to the gloss proposed by the claimant and I do not consider that such an argument has any real prospect of success for the purposes of an appeal against the refusal of summary judgment. The claimant's argument that the presence of clause 15 together with the nature of the cont'act distinguishes the SHA from agreements made in earlier cases is, as I have already made clear, an entirely novel argument.

g. During submissions, Mr Chambers indicated that the effect of the background context, including what he described as the factual matrix provided by *Bournemouth,* compels the court to interpret the words "if capable of remedy" as meaning the opposite when dealing with repudiatory breaches; i.e. that the

parties must have intended all repudiatory breaches to be treated as irremediable because at common law they cannot be cured so as to preclude acceptance. Aside from the fact that I do not consider that the *Bournemouth* factual matrix argument on which the claimant now seeks to rely has been properly pleaded, and while I make no final decision on the point, I consider that it would be very surprising indeed if this were the correct construction of this clause, given the clear words used by the parties.

h. The claimant says that clause 7.1(d) should be interpreted (given, in particular the provisions of clause 15) as a clause that was intended by the parties to operate as an entirely independent and discrete regime, effectively to replicate the common law doctrine of repudiation and thereby to address the situation of shareholders who acted in breach of the SHA. In other words it ought to be construed as being intended to provide a substitute for the common law entitlement to termination for breach. However even this substitute is accepted by Mr Chambers as making a change to the common law in the sense that it would only bring the SHA to an end for the defaulting party and, only then, if the shareholders were prepared to purchase the shares. In any event, I agree with Mr Lightman that there is no obvious reason why clause 7.1(d) should be regarded as a surrogate for common law termination as opposed to a clause standing in its own right, with its own remedies for breach.

i. The Deputy Master carried out a contextual analysis dealing with the effect of clause 15, at paragraph [95] and onwards of his judgment and I agree with his reasoning.

j. It is a central feature of the claimant's case that, pursuant to the SHA, the parties gave up their common law right to terminate for repudiatory breach. However, I agree with the Deputy Master that there is nothing express in the SHA that lends support to that proposition and the ordinary assumption is that an express power to terminate does not preclude termination at common law.

k. True it is that clause 15 provides for three circumstances in which the contract "shall" terminate, but it nowhere provides that the parties have given up their

common law rights and, if their common law rights continue, then there appears to be no basis for the construction of 7.1(d) for which the claimant now contends. Furthermore, as the Deputy Master says at paragraph [97] of his judgment, clause 15 is not a clause which provides for a right to terminate. It does not purport to be an exclusive termination clause and I agree with him that, on the face of things, there is no reason to take a narrow reading of the SHA – particularly where other issues as to its construction will inevitably need to be dealt with at trial.

16. The claimant raised an argument based on election in his skeleton argument for this hearing for the first time. However, in circumstances where Mr Chambers very fairly conceded that this argument is not a standalone point and does not provide an answer on the application, I do not consider it takes matters any further and there is no need for me to address it further.

Conclusion

17. In conclusion, in my judgment, for the reasons I have given, the true interpretation of clause 7.1(d) needs to be considered at trial when a full understanding of the factual matrix and context in which the SHA was entered into can be obtained. I cannot see that there is any real prospect of the appeal court overturning the Deputy Master's decision to refuse summary judgment and granting the final declaration sought. Accordingly, permission to appeal is refused.

Judgment on costs

18. I must now determine the costs following the hearing of the rolled up appeal in this matter. The defendants seek a figure of £87,984.69 to be summarily assessed. Mr Chambers, on behalf of the claimant, has raised two points in relation to that figure. The first relates to the guideline hourly rates for the defendant's solicitors and the second concerns the proposed Respondent's Notice.

19. Dealing with the first of those points, Mr Chambers points out that the guideline hourly rates for Grades A, C and D identified in the statement of costs are all well above the

standard guideline hourly rates and he reminds me that the Court of Appeal has relatively recently indicated that where that is so, there must be an explanation as to why it is so. Mr Lightman quite rightly accepts that no explanation has been advanced in this case and accordingly I am going to reduce the solicitors' hourly rates by approximately £9,000 to reflect the fact that they are therefore too high.

20. Turning then to the second point, Mr Chambers says that there should be no order as to costs in respect of the Respondent's Notice, albeit that some costs are included in the statement of costs that has been put forward by the defendant. Essentially he says that there should be no order as to costs in circumstances where the Respondent's Notice has not been contested and where he says that the response to that Respondent's Notice on the claimant's side has not been abusive (as is suggested by the defendants) and that it was entirely appropriate for the claimant to run the arguments that he was seeking to run in response to the Respondent's Notice.

21. I am bound to say that (although I have not heard full argument on the point) I am not convinced that it would have been appropriate on this appeal to run arguments which appear to me to seek to go behind the decision of Master Brightwell in relation to the question of relief from forfeiture. However, in circumstances where the costs included in the statement of costs in relation to this issue appear to be relatively minor, I consider that I can do justice pursuant to the overriding objective by ordering that the claimant should pay costs summarily assessed in the sum of £72,000 to the defendant. This reduced figure is designed to take account of the reduction in guideline hourly rates to which I have referred and also to reflect a small reduction in respect of the costs of the Respondent's Notice.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge