IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS

No. CH-2018-000244

Neutral Citation Number: [2019] EWHC 1125 (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 12 February 2019

Before:

MR JUSTICE FANCOURT

B E T W E E N :

TRACY DAVID STANDISH & ORS — Appellants

- and -

ROYAL BANK OF SCOTLAND & ORS — Respondents

MR D. READE QC and MR D. MCILROY (instructed by Lexlaw Solicitors and Advocates) appeared on behalf of the Appellants.

MR P. CASEY (instructed by Addleshaw Goddard LLP) appeared on behalf of the Respondents.

J U D G M E N T

MR JUSTICE FANCOURT:

1 This is a renewed application by the claimants in this action for permission to appeal against the decision of Chief Master Marsh made on 30 July 2018, in which he struck out the claimants' claim pursuant to part 3.4(2) of the Civil Procedure Rules. The master had before him not just an application to strike out issued by the defendants, but an application for permission to amend the particulars of claim. The master dealt with both applications in rolled-up fashion, that is to say he addressed the strike out application on the assumption that permission to amend would be given.

2 The claim brought by the claimants is for damages for the tort of conspiracy to injure by unlawful means arising from the activities of the first defendants', Global Restructuring Group. The unlawful means in question are alleged to be breaches of contract, breaches of an equitable duty and breaches of fiduciary duty, all being obligations alleged to be owed by the defendants or one of them to the company itself.

3 The amended particulars of claim plead that the defendants acted in breach of a contractual term of cooperation and good faith to be implied in what is called a customer agreement, that is to say an overarching contract between the bank and its customer, by exercising their powers arbitrarily and for ulterior motives and for their own gain. Secondly, in the same way, in breach of an equitable duty to act as a mortgagee in good faith and equitably towards the company. Thirdly, that the second defendant acted in breach of fiduciary duty by reason of the actions of a Mr Sondhi, alleged to be acting as a shadow director of the company. And in the light of all of those, that the defendants acted unlawfully by conspiring with a Mr Cooper to act in breach of those obligations and duties to harm the claimants as shareholders of the company by taking away their shareholdings as part of a restructuring exercise.

4 The Chief Master held that no contract that could be described as a customer agreement was sufficiently pleaded or identified and so any claim that terms were to be implied into it was bound to fail. Secondly, that the claim for breach of equitable duties as mortgagee was unarguable as a matter of law on the assumed facts. And, thirdly, that there was no arguable case that any actions of Mr Sondhi as shadow director caused any of the losses of which the claimants complain. Accordingly, he held that there were no arguably unlawful means that could support the pleaded conspiracy claim.

5 There is one ground of appeal advanced on behalf of the claimants, which is that the Chief Master erred in holding that the allegations in the particulars of claim as amended, that the defendants were liable for an unlawful means conspiracy, were bound to fail. Then there are five respects in which it is alleged that the Master fell into error. I will come to each of those in a moment.

6 The application for permission to appeal was considered on paper by Falk J on 29 November of last year and she gave a detailed and reasoned decision for refusing permission to appeal, explaining why each of the decisions made by the Chief Master was well-founded and why the claim, as pleaded, could not succeed.

7 Turning to the individual grounds for appeal, the first is that the Chief Master wrongly found that the claimants had no reasonable grounds for alleging that the defendants had acted in breach of a duty of good faith to be implied as a term of an overarching customer agreement between the parties. The appellants say that as a matter of law there can be and is generally

a contractual relationship between a bank and its client, separate from the terms of any specific loan agreements. That may well be so as a matter of generality, but what is that contractual agreement in this case? There are no details of when and how the alleged overarching contract came about, it being accepted that it must be an implied contract rather than an express contract, and there is no allegation of any particular terms of that overarching contract. A number of understandings said to be shared between the company and the bank are pleaded in para. 14, but it is clear that these are merely understandings and not alleged to be terms of the customer agreement. The appellants say that because they no longer have control of the company's papers as a result of the sale of the company, they cannot be specific about these matters. I find that very difficult to accept. The claimants are the previous directors and shareholders of the company who know when and how its banking arrangements with RBS or NatWest came about, what was discussed between the parties and what was done over the years, but nothing is pleaded about that, in breach of the requirements of CPR Practice Direction 16. There is no reference to any standard terms and conditions that may have been sent out by the bank from time to time, nor any indication whether those are accepted to be terms of the overarching contract.

8 The claimants' appeal and claim in this regard is based on the implication of terms into that implied contract. As the decision of the Supreme Court in *Marks & Spencer v BNP Paribas* makes clear, before one can imply terms into a contract it is necessary to understand and interpret what the express terms, if any, of the contract are. But here there are no express terms alleged. It is really only the implied term of good faith and fair dealing that is asserted. There is, it is alleged, an underlying banking relationship and was at the relevant time when the restructuring agreements were made and that, it is suggested, is sufficient as a basis in which to imply terms. It is said that there may be relevant documents in relation to that, which at this stage the appellants do not have. I am very sceptical about the likelihood of any such detailed contractual relationship being established in that way and I am not convinced that it is impossible for the appellants to plead their case at this stage. However, as a matter of law, if there is an underlying banking relationship, there may be something in the argument that various terms must be implied into such a contract, as a matter of law.

9 So far as ground two of the appeal is concerned, this is that the Chief Master failed to consider whether the claimants had any reasonable grounds for alleging breach of a duty of good faith to be implied as a term of the facility agreements made between the bank and the company. There seems to me to be a good reason why the master did not consider that. He was satisfied, and identifies at para. 41 of his judgment, that the claimants in the argument before him were not alleging that the terms were to be implied into the facility agreements. The reason for that is that para. 15 of the amended particulars of claim alleges no such thing. What it alleges is that there is a necessary implied term of the customer agreement – that is the overarching agreement – that each party would, in the performance of that agreement and/or any sub-agreements, cooperate with each other and act in good faith. There is no allegation as such that terms are to be implied to any facility agreements. Mr Reade QC, who appeared before me on the renewed application, drew attention to para. 45 of the amended particulars of claim in which there is an allegation that the bank acted in breach of the duty of good faith implied into the customer agreement and/or the sub-agreements entered into pursuant to that agreement. But that allegation of breach, pleaded in that very general way, cannot make up for the absence of any specific plea of a term to be implied into particular facility agreements. It is, of course, extremely difficult as a matter of law to imply such terms into express facility agreements. I am not persuaded, on the basis of the pleaded case, that there is any realistic possibility of the appeal succeeding on that ground.

10 Ground three is that the master wrongly found the claimants had no reasonable grounds for alleging that the defendants had acted in breach of equitable duties. The equitable duties of a mortgagee relate to the exercise of the mortgagee's rights, whether by selling the property, by taking possession or appointing a receiver. The equitable duties do not apply to a bank generally, merely because it holds a debenture or mortgage as security. There is a well-established distinction as a matter of equity between a mortgagee choosing whether to exercise remedies and actually exercising them. The mortgagee owes no fiduciary or other duty as to whether or not it exercises its remedies. That is entirely in the discretion of the chargee. But once the mortgagee exercises a power, whether it is a power of sale or a power to take possession or a power to appoint a receiver, then there is either a common law duty or an equitable duty, or both, to act with reasonable regard to the interests of the mortgagor. That, in my judgment, is clearly the distinction that is being drawn in the passage in *Medforth v Blake* that is referred to in support of the appellants' appeal. The suggestion is that the bank owed an equitable duty not to threaten to exercise its remedies unless it was justified and reasonable for it to do so. That is not, in my judgment, an incremental development of the law that can possibly be established, given the well-known distinction between the rights of the mortgagee to choose whether or not to exercise its remedies and the duties that it owes when it is exercising its remedies. In my judgment, ground three does not have a realistic prospect of success.

11 So far as ground four is concerned, the Chief Master accepted, for the purposes of the hearing before him, that Mr Sondhi or, alternatively, the second defendant, had acted as a shadow director. He rejected the claim on that basis because he held that there was no causative link between what Mr Sondhi had done as a shadow director and the loss that was caused to the claimants as a result of the second restructuring agreement, which had been entered into by the directors of the company. The sequence of relevant events which are pleaded in para. 30 of the amended particulars of claim is as follows. Mr Sondhi insisted on the appointment of a new turnaround consultant in December 2011. In around January 2012, Mr Sondhi insisted that the company appoint one of those possible consultants, Mr Cooper; he was then appointed as the chairman of the company. Following that, the second restructuring agreement was entered into in April 2012 and, following that, in May 2012, Mr Cooper was instructed to dismiss Mr Tracy Standish as managing director of the company. Looked at in that light, the allegation of breach of fiduciary duty in para. 51(3) of the amended particulars of claim may possibly be regarded on appeal as having some basis on which it could succeed. The allegation there is that, in breach of duties under the Companies Act applying to Mr Sondhi, he, on behalf of the second defendant or as agent of the first defendant, promoted the second restructuring and refused to agree to alternatives to the second restructuring. This is not adequately pleaded. There ought to be an explicit reference to Mr Sondhi's directions to Mr Cooper to the fact that Mr Cooper was acting in accordance with instructions received from Mr Sondhi. But, nevertheless, it seems to me to be arguable on appeal that there could be established a sufficient link between acting as *de facto* director and the second restructuring, which caused the substantial losses to the claimant shareholders. And, if that was a breach of a fiduciary duty, then it could arguably give rise to a claim for damages for conspiracy by unlawful means. There are, it appears to me, real difficulties in making that claim stand up as a matter of law, but I cannot say at this stage that an appeal is bound to fail on that ground.

12 The fifth ground on which an appeal is sought to be advanced is that the Chief Master failed to have sufficient regard to the prospects for developments in the law. He did allude to that. It is not, of itself, a freestanding ground of appeal in that if all the other grounds were to fail, the appeal could not succeed simply on the basis of the need to have regard to the likelihood of development of the law. So, I say nothing further about it at this stage.

13 It follows that I have reached a conclusion that two of the grounds of appeal are simply unarguable and permission for them should not be given. But there may be just enough in grounds one and four, which are labelled (a) and (d) in the document of the grounds of appeal, for an appeal to be heard. I also give some weight to the argument that, given the nature of the factual allegations in this case, which are very serious indeed, the claimants ought not to be bowled out from bringing their claim at this stage on the basis of legal impossibility without there being a full hearing of the merits of the appeal on those two grounds.

14 However, the prospects of a successful appeal are, in my judgment, nevertheless, quite sketchy and, in those circumstances, I consider it appropriate for the appellants to provide security for the respondents' costs of the appeal, or at least a reasonable sum towards the costs of the appeal, so that there is no prospect of the respondents being unfairly prejudiced in the event that the appeal does fail. It seems to me a reasonable sum, given the limited nature of the appeal that is going to be argued and therefore the relatively limited costs likely to be incurred, is the sum of £20,000. I will direct that security for that sum should be given by payment into the court within a period of 28 days from today. Subject to complying with that order, the appellants should have permission to appeal on grounds one and four, and I include ground five only because I do not want it to be argued at the appeal that, because I did not expressly give permission for it, that is not a relevant argument in relation to grounds one and four, although, as I have indicated, it is not really a freestanding ground of appeal.

15 Those are the reasons for the decision which I have reached and the limited permission to appeal that I have granted.

CERTIFICATE

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