

Case No A3/2014/3555

Neutral Citation Number: [2015] EWCA Civ 875
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
(MR JUSTICE NUGEE)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Tuesday, 30 June 2015

B E F O R E:

LORD JUSTICE KITCHIN

(1) JOHN CORBITT BARNESLEY
(2) GILLIAN ELIZABETH NOBLE
(3) LGL TRUSTEES LIMITED
(4) LGL NOMINEES LIMITED

Claimants/Appellants

-v-

PHILIP NOBLE

Defendant/Respondent

(Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Romie Tager QC (instructed by Addleshaw Goddard LLP) appeared on behalf of the
Claimants

The Defendants did not attend and were not represented

J U D G M E N T

1. LORD JUSTICE KITCHIN: This is an application by the claimants for permission to appeal against the judgment of Nugee J given on 31 July 2014 and his consequential order dismissing their claims in this action. Permission to appeal was refused on the papers by Lewison LJ on 31 December 2014. The claimants have requested that this decision be reconsidered at an oral hearing which has come on before me today. The claimants have been represented at this hearing by Mr Romie Tager QC, as they were before the judge.
2. The subject matter of the claim is complex, but in very broad terms arises out of the demerger of the Noble organisation ("Nobles") following the death of Mr Michael Noble in April 2006. The second claimant ("Gill") is Michael's widow. Michael and the defendant ("Philip") were brothers, and together built up Nobles into an extremely successful entertainments and restaurant group and, associated with it, a large property empire. Before Michael's death, Nobles was owned by Michael, Philip and a number of family settlements.
3. Following Michael's death, agreement was reached to divide these interests up in such a way that the property interests were acquired by what was referred to as "Gill's side" and the trading businesses were acquired by what was referred to as "Philip's side". On Philip's side, the main interest was held by Philip himself; on Gill's side, the main interest was held by the executors of Michael's estate who were the first claimant (Mr Barnsley), Gill and Philip. The trustees of the family settlements, which together held roughly one third of the interests of Nobles, were interested on both sides, and the third and fourth claimants were the trustees of the settlements on Gill's side.

4. The demerger was, as I have said, complex, and the parties fell out over a number of matters, including one which gave rise to these proceedings and which was referred to by the judge as the "VAT repayment issue". In outline, at the time of the demerger negotiations, some of the trading companies had potential claims for repayment of large sums of VAT and the discussions for the demerger therefore included the question of how these should be dealt with. In these proceedings, the claimants maintained that Philip was contractually bound to make a payment to Gill in respect of 25 per cent of any VAT repayments; that Philip made deliberate and deceitful misrepresentations in the course of negotiations as to the value of the repayments claimed; that Philip owed a duty of care in tort to the claimants to provide them with all information relevant to the valuation of various group companies, including the prospect of the VAT repayment contingency occurring and that he was in breach of that duty; that Philip acted in breach of trust in that he acted in breach of the self-dealing rule; and that Philip was also guilty of a breach of fiduciary duty which he owed to Mr Barnsley and Gill to disclose to them all relevant information concerning the VAT repayment contingency. The claimants only seek to pursue on appeal grounds of appeal relating to the allegations of breach of trust.

5. The claimants argued at trial that the demerger transaction, in which Philip played a role on both sides, represented a plain self-dealing situation, and the judge appears to have proceeded on that basis. However, Philip advanced a number of defences to the claim including first, that he was authorised to self-deal by an express provision in Michael's will (referred to as the transactions clause), and second, that his activities fell within another express provision of the will referred to as the exoneration clause.

6. The transactions clause permitted trustees and executors to self-deal in particular circumstances, namely if provisos (i) and (ii) or provisos (i) and (iii) to that clause were satisfied. The common requirement was proviso (i), which required the trustee or executor to act in good faith. The judge held that Philip only satisfied proviso (i), and accordingly he could not rely upon that particular clause. However, the judge held that Philip could rely upon the exoneration clause. The claimants recognise, and Mr Tager has accepted before me this morning, that the entirety of their proposed appeal depends upon obtaining permission to appeal against and succeeding in an appeal against this finding.

7. The critical part of the exoneration clause reads:

"In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust premises arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by him or by any other trustee hereof although the employment of such agent was not strictly necessary or expedient or by reason of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable."

8. The judge found that Philip acted in good faith within the meaning of this clause, and, as I have said, the transactions clause; that he did not act with any deliberate improper motive or conscious impropriety; that he was not guilty of wilful misconduct; and that he was not deliberately or consciously acting in a way that he knew to be wrong. In these circumstances, he was, so the judge held, entitled to the protection of the clause.

9. The claimants do not seek to challenge on appeal the findings that Philip did not act dishonestly or with improper motive or with deliberate or conscious impropriety; they do, however, challenge the judge's finding that Philip acted in good faith. They also contend that the judge wrongly interpreted the phrases "wilful and individual fraud or

wrongdoing" and "in the professed execution of the trust and powers hereof". As for the former, the judge held that the words "wilful and individual" govern both fraud and wrongdoing and importantly that "wilful wrongdoing" means "conscious and wilful misconduct", that is to say knowing and deliberate breach of duty or reckless indifference to the possibility of such breach. As for the latter, the judge considered that this simply confined the operation of the clause to acts of the executors carried out in their capacity as executors.

10. The claimants now accept that the words "wilful and individual" govern wrongdoing. But they say that the expression "wilful wrongdoing" includes wrongdoing which is the result of an intentional act and certainly such an intentional act which has not been carried out in good faith.
11. It seems to me that this contention faces formidable difficulties in that the finding of the judge may be said to accord with the decision of this court in Armitage v Nurse [1998] Ch 241 at [252], the decision of Evans-Lombe J in Bonham v Fishwick [2007] EWHC 1859 (Ch) at [23] and [28] and, most recently, the decision of Lewison J, as he then was, in Fattal v Walbrook Trustees (Jersey) Limited [2010] EWHC 2767 (Ch) at [72-82].
12. Nevertheless, Mr Tager has persuaded me, just, that the claimants' case is arguable and that they have a real prospect of success on appeal. The arguments which the claimants seek to develop include the following. First, there are, says Mr Tager, two possible interpretations of the exoneration clause: the interpretation contended for by Philip and accepted by the judge, or that contended for by the claimants, namely that a trustee or executor cannot claim the protection of the clause in circumstances where he has

committed fraud or wilful wrongdoing and where "wilful wrongdoing" simply means that the trustee or executor intended to do or omit to do a particular act which amounted to wrongdoing, whether or not he was conscious of that wrongdoing. In contrast to fraud, "wrongdoing" does not need any conscious intent to do wrong. Further, there are, continues Mr Tager, powerful policy considerations in favour of this interpretation, as reflected in the judgment of Sir Christopher Slade in Walker v Stones [2001] QB 902 at [941]. Indeed, continues Mr Tager, an exoneration clause in a will should be restrictively construed and anything which is not clearly within it should be treated as falling outside it. This, he submits is a proposition which is supported by the decision of this court in Bogg v Raper (1998/99) 1 ITELR 267 (The Times 22 April 1998).

13. Second, the transactions clause is an express provision which permits self-dealing but only in particular circumstances and where the trustee or executor has acted in good faith. Accordingly, continues Mr Tager, it cannot have been intended that self-dealing which falls outside the transactions clause because it was not carried out in good faith should nevertheless be exempted by the exoneration clause. Further, says Mr Tager, the judge ought to have found that Philip did not act in good faith, because he failed to give full and frank disclosure of the material facts that he knew about the VAT repayment contingency and he failed to protect or properly consider the interests of the beneficiaries of the will. In this connection, Mr Tager seeks to derive support from the observations of Bingham LJ, as he then was, in the Interfoto Picture Library case [1989] 1 QB 433, to the effect that good faith in making and carrying out contracts means more than that the parties should not deceive each other and involves, in essence, a principle of fair and open dealing. Mr Tager has accepted before me this morning that aspects of these submissions were not fully developed before the judge,

but he argues that they involve a point of construction, do not require further evidence and that he has at least an arguable case that he should be permitted to develop before the full court.

14. In addition to the foregoing, Mr Tager also highlights the slight difference in wording between the exoneration clause in the will and the similar clauses in Armitage v Nurse and Fattal v Walbrook Trustees. There is a potential distinction, says Mr Tager, between wilful dishonesty and wilful wrongdoing. Further, continues Mr Tager, when construing the exoneration clause in the context of the will as a whole, there is no need for the importation of any intent to do wrong in the context of the word "wrongdoing". Here, Philip did self-deal and was not acting in good faith, and there is no reason why he should be protected by the exoneration clause.
15. As I have indicated, I believe that the claimants will have an uphill task in persuading this court that the judge has fallen into error. Nevertheless, and not without some hesitation, I have come to the conclusion that these are arguments which the claimants should have the opportunity to develop before this court. I should note that in short written submissions filed on behalf of Philip on this application, it is contended that aspects of the submissions to which I have referred were not advanced by or on behalf of the claimants at the trial and are not open to the claimants in the light of their grounds of appeal. As I have said, Mr Tager accepts that to some extent he did not advance all of these arguments before the judge. Accordingly, in granting permission to appeal, I do not intend to preclude Philip from advancing the arguments set out in his written submissions at the full hearing.

16. The next main point which the claimants seek to develop on appeal is the meaning of the words "professed execution of the trusts and powers hereof." They seek to contend that the judge fell into error in accepting the submission advanced on behalf of Philip that the effect of these words was simply to confine the operation of the clause to acts of the executors carried out in their capacity as executors. Mr Tager submits that on the proper interpretation of the clause it is only when an executor is able to demonstrate that in the conscious exercise of his power as an executor he has acted in good faith and is not guilty of wilful wrongdoing that the protection can be invoked. It seems to me that this is a short point and, closely related as it is to the other points on a proper interpretation of this clause, I believe that the claimants ought to have the opportunity to develop their arguments before this court, albeit that it seems to me there are powerful reasons for considering that the interpretation arrived at by the judge was entirely correct.
17. The various other grounds of appeal raise relatively short matters which, as the claimants say, do not appear to have been addressed directly in the reasons for refusing permission to appeal in either the application before the judge or on the papers before Lewison LJ. They are, in brief: the duty to make disclosure of all relevant information; the correct approach to the assessment of equitable compensation of self-dealing; the claim for an account of profits; and the position of the third and fourth claimants in relation to these various equitable claims.
18. These are all relatively short matters, and in the light of the permission which I am minded to grant it seems to me that the claimants should have the opportunity to develop their submissions before this court, subject again to any argument that Philip

may seek to raise that these points are simply not open to the claimants in the light of the approach that they took at the trial.

19. I therefore grant the claimants permission to appeal on the basis I have summarised.