IN THE HIGH COURT OF JUSTICE
KINGS'S BENCH DIVISION
PLANNING COURT

Claim No. CO/4860/2022

CHALLENGE PURSUANT TO SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

TAYTIME LIMITED

Claimant

- and –

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING, AND COMMUNITIES
(2) MAIDSTONE BOROUGH COUNCIL
(3) DAVID PADDEN

Defendants

CLAIMANT'S SUPPLEMENTAL NOTE ON PRIVATE LAW ISSUES

for hearing on 22 February 2024

I apologise to the Court for the subsequent and additional submission of this note. I was instructed at short notice to assist with the Claimant's skeleton argument in place of previous Chancery counsel and have now been instructed to appear at the full hearing.

Introduction

1. The purpose of this note is to supplement the submissions made at paragraphs [xx] of the Claimant's skeleton argument, largely by providing reference to relevant authority. It is not intended to replace or wholly repeat the points made and is provided to give notice of and assistance on some relevant principles.

A. Agency

Continuing Agency

2. MLL appointed Taytime as its agent for the purpose of pursuing the Appeal (C's skeleton paras 8, 26, 30, 74(2)) and Taytime agreed to act as MLL's agent for that purpose. That was an agency agreement, a contract. Whilst it is true that an agent's authority can be conferred without a contract, a contract is the usual position. Here, that was the position because the parties agreed to the agency and its purpose and there was consideration: MLL obtained the benefit of Taytime undertaking the time and effort to pursue MLL's appeal; and Taytime (as the landowner) obtained the opportunity to obtain financial benefits if the appeal was successful.

3. Parties are perfectly entitled to, and constantly do, appoint agents to manage litigation on their behalf. To take but a few examples: insurers delegate management of litigation to claims

management firms as their agents;[1] group action claimants usually vest authority to manage the litigation in a steering committee;[2] claims handling firms manage proceedings for multi-claimant actions (such as PPI claims)[3]; and solicitors have the implied authority to manage proceedings and take decision as they think appropriate, even where the client dies.[4]

4. The entry of MLL into liquidation did not impact that agency agreement or Taytime's position as an agent thereunder. Entry into liquidation does not affect contract[5] unless and until the liquidator exercises a power to disclaim or otherwise terminate them.[6] The liquidator has not done so here and so the agency agreement between Taytime and MLL, and the agency and authority thereunder, remain in force.

5. Accordingly, Taytime has at all times been MLL's agent for the purposes of managing the Appeal litigation. The liquidators did not need to appoint MLL, instead they would have needed to take positive actions to dismiss Taytime. They have not. Instead, they have confirmed, continued, and augmented that agency.

Liquidator's Powers to Appoint Agents of the Company

6. Upon their appointment, liquidators take the position and role of directors of the company.[7] Separately, Schedule 4 of the Insolvency Act sets out an extremely broad set of statutory powers available to the liquidator including the power "*to bring or defend any action or legal proceeding in the name of the company"* (para 4) and *"to do all acts…in the name and on behalf of the company"* (para 7) and concluding with the general power to "*do all such things as may be necessary for winding up the company's affairs and distributing its assets"* (para 13).

7. In relation to a company in liquidation, it is always essential to distinguish between actions the liquidators take *qua* agents (replacement directors) of the company and actions they take *qua* liquidators under the powers in the Insolvency legislation.[8]

8. Liquidators have the power to appoint agents to act as agents *of the company* (MLL) under their general power to act in the name of the company. This is a basic act of the company and is exercisable in precisely the same way as it would be by a director of the company, with due

[1] See for example: *Mulsanne Insurance Company Limited v Marshmallow Financial Services Limited* [2022] EWHC 276 (Ch) at para 41
[2] See for example: *Cavallari v Mercedes-Benz Group AG* [2023] EWHC 512 (KB)
[3] See for example: *CW&CG Claims Limited v Clarkewood Limited* [2022] EWHC 2959 at para 9
[4] *Donsland Ltd v Van Hoogstraten* [2002] EWCA Civ 253. On implied scopes of authority generally see *Bowstead and Reynolds on Agency* at 3-022 – 3-044.
[5] See *McPherson & Keay's Law of Company Liquidation* at 7-056. The statutory context
[6] See sections 178 and 233B of the Insolvency Act 1986 and rules 19.2 -19.3 of the Insolvency (England and Wales) Rules 2016 (along with the commentary in Sealy & Milman), which proceed on the basis that contract remain in force unless and until the liquidator can disclaim or otherwise terminate them.
[7] *McPherson* (*Ibid.)* para 9-003
[8] *Ibid.* para 9-002

regard to the paramountcy of the interests of the creditors (as would be the case for a director) and any other overriding duties on a liquidator (e.g. s.87 – not to trade the company unless for the purposes of benefitting the creditors).

9. That is distinct from the statutory power in para 11 of Schedule 4 for the liquidator to appoint an agent to act for them – i.e. as an agent of the *liquidator*. Whilst there may be essential functions of the liquidator's office (e.g. final determinations on proofs of debt) which may not be delegated, there is nothing to suggest that a liquidator – unlike any normal person or agent – cannot appoint an agent to manage litigation.

B. <u>Assignment</u>

10. The starting point is that a party is able to assign almost any valuable rights it has.[9] This is usually approached through the concept of property but English private law takes an extremely broad (and broadening) view of what constitutes property. Traditionally it includes *things in possession* and *things in action* (chose in action), that will, for example, include contractual rights and rights of action. However, it has recently been clarified that even that broad approach is inaccurate, as the Courts have recognised unusual rights (such as cryptoassets and NFTs) as property. See generally: *AA v Persons Unknown* [2020] 4 W.L.R. 35.

11. In the context of insolvency, the ability to assign is even broader. First, the relevant definition of "property" under s. 436 of the Insolvency Act 1986[10] (which defines what liquidators are empowered to assign under the power of sale in Schedule 4 to the 1986 Act) is the broadest definition of that concept in private law. Second, as explained below, liquidators have long been specifically empowered to assign rights of action in which the assignee has no interest (a historic general restriction on assignment under the concepts of *champerty* and *maintenance*).

12. Common law causes of action are choses in action and assignable. Statutory causes and rights of action are generally assignable, though the matter may involve interpretation of the particular right:

    12.1. Claims for breach of statutory duty are assignable (in line with the assignability of common law causes of action) and other rights of action under statute have also been found to be assignable: *Dawson v Great Northern and City Railway Company* [1905] 1 KB 260 (statutory right to apply for compensation arising from land …).

[9] *Guest on the Law of Assignment* (4th Ed.) at para 1-01

[10] "*…money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property"*

12.2. Causes of action arising under the Companies Act 2006 and the Insolvency Act 1986 are generally assignable.[11] That includes the liquidator's rights to bring actions to clawback funds from directors or to seek declarations from the Court as to fraudulent or wrong trading by directors (ss. 213-214).[12]

12.3. The closest case to the current statutory right of action is *Muorah v Secretary of State* [2023] EWHC 285 (Admin), cited at paragraph 52 of the Claimant's skeleton argument, where the Court proceeded on the basis that the similar statutory right under was assignable.

12.4. In various scenarios where assignment is not desired, Parliament has specifically excluded it: for example in relation to social security.[13]

13. There is relatively little case law on the assignment of statutory rights of action. Historically, an important reason for this was the general aversion of the law to the assignment of a "bare right to litigate" – as opposed to (e.g.) rights ancillary to proprietary rights or the benefits of a contract – this was on the basis that it was considered champertous or the offence of maintenance for a right of action to be assigned to one with no interest in it.[14] The law has moved on and a right to litigate is assignable to a party which has a genuine commercial interest[15] or some other legitimate interest in pursuing the action.[16] In addition, the doctrines have been specifically excluded in the context of a liquidator's power to assign, for the purpose of giving liquidators increased scope to obtain value from creditors by assigning rights of action.

14. Any potential assignment here would be by a liquidator under its expanded power to assign to a assignee (Taytime) with a genuine commercial interest in the prosecution of the Appeal.

The approach Liquidators should take to continuing proceedings

15. As noted in the Claimant's skeleton argument at paragraph 87(3), litigation or the assignment of claims is a key way for liquidators to seek to obtain additional value for the creditors. Indeed, it is their duty to consider such actions and their potential to add value to the estate.

[11] See for example: *Manolete Partners Plc v Smith* [2020] EWHC 364 (Ch) paras 1-2
[12] This is now pursuant to s. 246ZD of the Insolvency Act 1986. However, that statutory intervention was because liquidators' powers to assign which are restricted to assignment of *the company's* property and these are actions vested in the liquidator. The case law proceeded on the basis that these were assignable rights just not of the company, so this statutory amendment was required to resolve that specific issue. See: *Re Oasis Merchandising Services Ltd* [1998] Ch 170 and *Re Totalbrand Ltd; Cage Consultants v Iqbal [2020] EWHC 2917 (Ch)*
[13] *Guest on the Law of Assignment* (4th Ed.) at para 4-27
[14] *The Law of Personal Property* (3rd Ed,) at para 24-002 – 24-004
[15] *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 at 703.
[16] *Guest* at para 4-41

16. At paragraph 98 of the Claimant's skeleton argument, reference was made to the potential benefits for creditors in pursuing this Appeal. In relation to that, the Court may be assisted by the following principles:

    16.1. Where a party receives, and freely accepts, value from another party's efforts without providing consideration in return, it will be liable to provide restitution in the sum of that value.[17]

    16.2. When calculating the Company's liability to a given creditor, a liquidator will assess the net position, setting off sums owed to the Company against debts proved by the creditor.[18]

    16.3. Under the *pari passu* principle, the assets of a company are divided proportionally between the creditors according to their proved debts. Naturally, every pound deducted from the Claimant's claim against the Company will increase the proportion of the Company's assets which is available to the other creditors.

17. A liquidator failing to take advantage of an opportunity to pursue proceedings with costs covered could be at risk of a claim from creditors.

18. In any case, it is notable that the Court of Appeal has specifically criticised attempts by strangers to an arrangement made by the liquidators to impugn the same where they had no interest in the arrangement but sought to achieve a collateral benefit: *Lock v Stanley* [2022] EWCA Civ 626; [2022] BCC 940. In that case, the party was a creditor of the company and applied under the proper procedure under s.168 of the Insolvency Act 1986. The reasoning applies *a fortiori* here to a purely technical try-on by a pure stranger to the liquidation.

BEN WAISTELL

XXIV Old Buildings

15th February 2024

[17] *Chitty* at 33-024-33-025; 33-078
[18] See *McPherson* at 12-035