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One Blackfriars Limited – the boomerang that didn't come back...

Introduction

In a further landmark decision on administrator's duties following *Davey v Money*[1], the High Court has dismissed the liquidators' claims of sale at undervalue and loss of opportunity for a funded rescue against the company's former administrators. The proceedings followed the sale of the site in 2011 by the BDO administrators to St George of the Berkeley Homes Group for £77 million, an amount defended as the market value by the former administrators on the basis of an open marketing and bidding process. The former administrators' conduct was vindicated with the court finding no breaches of duty thus ensuring all of the claims were comprehensively rejected. The case played out as a five week "*virtual trial*" with 13 expert witnesses last summer.

Background to the claim

The former developers were a joint venture between the Beetham Group (developer of towers in Liverpool and Manchester before the Global Financial Crisis) and Sergei Polonsky (a property developer of the Russian Mirax Group). Permission to construct a hotel and residential units had been obtained in 2009 with funding from a syndicate led by RBS. The Beetham Group fell into significant financial difficulty post the Global Financial Crisis. Appraisals of the site reported that the proposed hotel and large units were not financially viable but, with some reconfiguration, the site could be worth up to £50 million. Attempts to rescue the company failed and the BDO administrators were appointed in October 2010.

The former administrators (FAs) took advice on preserving and maximising value by implementing the existing planning consent and preparing a "*blue sky thinking*" vision of potential enhancements in conjunction with architects, planning and property advisers coordinated by CBRE. CBRE also led the sales and marketing campaign from early 2011, which culminated in a bidding process with the highest bidder emerging at £82.5m. This bidder suffered a funding failure with the FAs then falling back to the next highest bidder, St George, who completed the sale at £77.4m on an unconditional basis in October 2011. Throughout the sales and marketing process the FAs entertained rescue proposals by Mirax and various other potential funders were considered by the former directors – these all came to nothing.

On the eve of limitation expiring six years later, armed with litigation funding, at the behest of the former directors and following the restoration of the company, the liquidators (JLs) commenced proceedings against the FAs. The claim was initially pleaded as a simple sale at undervalue – the JLs alleged the site was worth around 115 million (i.e. a £37 million sale at undervalue).

The JLs then attempted to introduce a claim that the FAs had breached "Objective 1" in the Insolvency Act hierarchy of administration objectives by failing to rescue the company[2]. This was a new claim outside the limitation period and was thus not permitted by the court. However, the JLs persisted with a loss of chance claim based on the allegation that, had the administrators acted in accordance with their duties, they would have raised sufficient funding (estimated at trial to be in the region of £350-400 million) to have completed the development in the same manner as the post-sale development subsequently undertaken by Berkeley Homes. The loss claimed was some £250 million.

[1] Davey v Money [2018] EWHC 766 (Ch)

[2] Paragraph 3(1) Schedule B1 Insolvency Act 1986 contains a hierarchy of administration objectives known as objectives 1-3: (a) rescuing the company as a going concern (b) achieving a better result for the creditors as a whole (c) realising property in order to make a distribution to one or more secured or preferential creditors.

Both claims were predicated on the basis that the FAs had fallen short in their duties when assessing the site, marketing it and then selling it. The sale at undervalue allegation raised issues as to the FAs' duties, market value, planning potential and the sales/marketing and bidding process. The loss of chance case on causation would have raised issues as to the scope of an administrator's duty to pursue a speculative property development and the availability of finance (had the court considered there was some breach on the part of the FAs). Deputy High Court Judge John Kimbell QC rejected all of the allegations of breach of duty so no issues of causation arose.

Attempted adjournment

The trial had been scheduled to commence in June 2020 when the pandemic struck. The liquidators attempted to adjourn the trial, which was resisted by the FAs on the basis that technology was available for a remote hearing and that it was not in the interests of justice to have a prolonged and lengthy delay. In what is now a lead authority on adjournment during the pandemic, the court ruled in favour of a remote trial[3] which unfolded over five weeks between June and July of 2020. Both the adjournment application and the main judgment provide useful guidance on the utility of virtual trial technology. The judge was clearly impressed, commenting that the technology worked well, that he did not feel disadvantaged in his ability to assess reliability and credibility of witnesses and that there may be an overall advantage to this form of trial:

> *"…my overall assessment is that not only were those challenges overcome by appropriate and mutually agreed adjustments on the part of counsel, the parties and court but that the trial was conducted more efficiently and far more conveniently as a fully remote trial. It was also more accessible to the public than it would have been had it taken place in a traditional court room in the Rolls Building*."[4]

I understand that the trial was the longest to be conducted virtually (5 weeks) and, given its success, we can expect to see more fully remote or hybrid trials in the future.

The judgment

In his careful 130 page judgment, the judge comprehensively rejected the allegations of breach of duty and found that the FAs fully complied with their statutory and other duties throughout the course of the administration.

Duty

The judge first confirmed a number of principles, including those from other cases in the area and Snowden J's judgment in *Davey v Money* (another administration where a sale at undervalue allegation was also comprehensively rejected):

- The duty to obtain the best price is not an absolute one – but one to take reasonable care to obtain the best price "*that circumstances as he reasonably perceives them to be permit*".
- Contrary to the JLs' submission, this duty upon sale was not "*non-delegable*" or one of strict liability, but rather one where the administrators could reasonably rely on apparently competent property advice (the judge referred to CBRE being the company's agents so, if they were so obviously incompetent, the JLs could have sued them – but they did not).
- There is a modified fiduciary duty of loyalty when following Objective 3, which allows unsecured creditors' interests to be subordinated to the secured creditors provided "*unnecessary harm*" is avoided.
- The standard of review means the administrators' decision concerning which objective to pursue is only open to challenge "*if made in bad faith or was clearly perverse*".
- There is no duty to consult with shareholders/directors as that would "*cut across and interfere with the legislative framework of duties*".[5]

The alleged breaches

Having framed the duties, the judge turned to the JLs' allegations concerning the appointment of CBRE and the FA's strategy to maximise the realisable value upon sale[6]. These were all rejected with the judge finding:

- "*The FAs had due regard to the interests of all the creditors and the company, in the light of (a) the circumstances as they reasonably perceived them*

[3] [2020] EWHC 845 (Ch)
[4] Para 25
[5] Paras 200-258
[6] Paras 259-464

to be and (b) the advice which they received…" [from their property and planning advisers].

- There was no conflict of interest which prevented the FAs from appointing CBRE to advise them (the JLs had alleged a conflict arising from CBRE's prior advice to the banks) and the FAs had no reason to doubt the competence of CBRE or their planning advisers at any stage.

The judge also rejected the allegations around the FAs' choice of objectives and the alleged surrender of their discretion to the banks where he found:

- *"The FAs gave proper and genuine consideration to the statutory objectives of the administration and gathered sufficient information to determine which statutory objective to pursue"*.
- Whilst there was an agreement at the outset that the administration could be considered "*light touch*", that did not involve the FAs surrendering any power or discretion to conduct the administration in accordance with their duties. Nor did they at any stage disregard or fail to give adequate weight to the interests of the other creditors.

On whether to pursue an attempted rescue (Objective 1) or a sale to realise value for the secured creditors (Objective 3), the judge considered the overall circumstances faced by the FAs, including the multiple attempts by the directors to obtain funding to either avoid, or take the company out of, administration and concluded:

- "*The Statutory Proposals accurately identified Objective 3 as the objective the FAs were pursuing. This reflected an agreement reached by the FAs following a discussion between them as to where the value of the Site was likely to break*".
- "*The FAs reasonably concluded that Objective 1 was unlikely to be achievable but did not close their minds to the possibility that an investor might be found to refinance the project*".
- "*The FAs reasonably left it to the former developers to seek out potential investors (which they did albeit unsuccessfully)*".

The JLs had also criticised the strategy of seeking to encourage potential bidders with planning potential in the existing consent and architectural design (i.e. the Blue Sky thinking), alleging that the FAs should have taken on the risk (despite an absence of funding) of applying for a revised consent. These allegations were also rejected:

- The FAs gave proper consideration to the advice they received on planning, marketing and sales.
- It was reasonable for the FAs to decide not to pursue an amended planning permission themselves, but instead to leave it to interested purchasers to decide what extra value might be generated from an amendment and what the chances were.
- Having consulted their property advisers, the FAs decided that the appropriate strategy to pursue was to implement the Permitted Scheme (albeit with modified conditions), explore with expert architectural assistance potential reconfigurations for the Site, obtain some reassurance from the Council in the form of comfort letters and to use the letters and configuration ideas to assist with the marketing of the Site.

The judge found no fault with this strategy:

- "*The agreed strategy was not akin to, nor did it in effect amount to, a plan to sell the Site as quickly as possible for cash – the implementation process and the application to amend conditions would mean the Site could not be marketed and sold until early 2011, which could have enabled other stakeholders to pursue alternative options to potentially take the Company out of Administration*".
- The strategy adopted by the FAs was discussed openly with the former developers in October and November 2010. It was not opposed by them or any of the other stakeholders.

The JLs had alleged the FAs were in breach by not commissioning their own valuation when faced with divergent views on value by CBRE and valuers engaged by the former developers. On this the judge found:

- "*The FAs were open about the fact that the information on value they had been given by CBRE did not accord with the value the directors*

of the Company believed the Site had in light of valuations held by them".

- "*It was reasonable in all the circumstances for the FAs to decide not to obtain an independent valuation of the Site but instead to allow a properly conducted marketing and bidding process to determine the Site's value*".

Finally, the JL's allegations that the marketing/ bidding process and the decision to prefer an unconditional sale was flawed was also rejected:

- "*The Site was appropriately marketed. Neither the FAs nor CBRE educated the market down as had been alleged. The FAs reasonably decided to give preference to an unconditional sale of the Site without overage provisions but the FAs did not preclude bidders from making conditional offers*".
- "*The bidding process was appropriately conducted. There was no reason for the FAs to abandon it at any stage*".

Conclusion

On this basis the court concluded that the FAs "*… fully complied with their strategy and other duties throughout the course of the administration*". They… "*took reasonable steps to obtain the best reasonably obtainable price for the Site. The price obtained for the Site was its then market price*". This had been the position of the FAs throughout the administration, when the allegations were first made upon restoration of the company and during the pre-action correspondence; namely that the best evidence of true market value is the price achieved after a properly conducted marketing and bidding process. The judge agreed:

> *"…there is no better evidence of its market value on the day of sale than the price that was achieved following what I have found to be a properly conducted free and open marketing and sale process*."[7]

The absence of any breach on the part of the FAs closed the door on any need to entertain the loss of opportunity claim. The judge considered that the absence of both funding and appetite to pursue such a development was clear from the former developers' multiple attempts to secure a funded rescue to no avail. He commented that only a highly successful developer with substantial capital such as St George of the Berkeley Homes Group could have taken on such a venture, ruling that the former directors and their advisers:

> *"…could not find an investor who was willing to step in and either outbid St. George or take the Company out of administration, notwithstanding their real-time knowledge of the level of incoming bids and all of their efforts, suggests that if St. George did get a bargain that was because they could see something which no-one else with the resources necessary to develop the Site could."*

Claims against IPs following the demise of businesses post the Global Financial Crisis have been common and another wave of such claims by former owners following the pandemic is predicted. With the advent of litigation funding and, despite the heightened cost risk to funders post the removal of the "Arkin Cap" in the *Davey v Money* proceedings[8], claims such as these may well persist. The OBF judgment follows *Davey v Money* in confirming important limitations in the scope of administrators' duties and will provide valuable assistance in the future when assessing the conduct of insolvency practitioners.

The completed building now stands near Blackfriars bridge on the Southbank and given its unique shape is colloquially known as the Vase or the Boomerang. Despite the former developers' best endeavours, both during the administration and in their subsequent litigation - this boomerang is seemingly not coming back…

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Adam Culy is a partner in Stephenson Harwood's commercial litigation team but was BDO's head of practice protection in the lead-up to the trial and continued as a consultant to BDO throughout the trial.

[7] Para 264

[8] [2019] EWHC 997 (Ch), Chapelgate v Money [2020] EWCA Civ 246

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