No 6387 of 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF F.W. MASON & SONS LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Neutral Citation Number: 2017 EWHC 1512 (Ch).

Before **Mr Justice Morgan**

BETWEEN:

(1) IAN RICHARDSON
(2) KEVIN JOHN HELLARD
(in their capacity as joint liquidators of
F.W. Mason & Sons Limited (in creditors' voluntary liquidation))

Applicants

- and –

(1) CHRISTOPHER MICHAEL WHITE
(2) ANDREW PHILIP WOOD

Respondents

IAN WILSON (Instructed by **Enyo Law LLP**) appeared on behalf of the Applicants

DOV OHRENSTEIN (Instructed directly by the First Respondent) appeared on behalf of the First Respondent

The Second Respondent was unrepresented

Wednesday, 21 June 2017

(2.38 pm)

Approved Decision

1. **MR JUSTICE MORGAN:** In this case, I have to consider case management directions in relation to an application issued by Mr Richardson and Mr Hellard against the respondents, Mr White and Mr Wood.

2. Mr Richardson and Mr Hellard are the joint liquidators of FW Mason & Sons Limited ("the company"), which is a company that was formerly in administration and is now in creditors' voluntary liquidation.

3. The respondents, Mr White and Mr Wood, were at one time the administrators of the company. Then they became the liquidators, and they were replaced as liquidators by Mr Richardson and Mr Hellard.

4. The application notice sets out the relief which is sought. Parts of the relief claimed are no longer pursued, so I will refer to those parts of the relief claimed which are pursued.

5. The first head of relief is a claim to a declaration that the respondents have misapplied or retained or become accountable for money or other property of the company and/or are guilty of misfeasance or breach of fiduciary or other duty in relation to the company under paragraph 75 of schedule B1 to the Insolvency Act 1986 and/or section 212 of the Insolvency Act 1986.

6. In addition to that declaration, the application notice seeks further or alternatively an order that the respondents account for and/or pay to the company all such sums as the court shall determine as compensation for the respondents' misfeasance and breaches of duty in charging remuneration to which the respondents were not

properly entitled, including compensation for all consequential losses and mitigation costs. There is also a claim for interest and for the costs of the application.

7. The application notice is supported by particulars of claim. It is not necessary to refer to very much in the particulars of claim, save that the basis of the claim, in relation to what is said to be overcharging by the respondents, is put in the alternative.

8. The first alternative is pleaded in paragraph 24 of the particulars of claim to the effect that the respondents deliberately and/or dishonestly charged and drew from the company's assets remuneration to which the respondents knew they were not properly entitled.

9. Paragraph 25 of the particulars of claim gives further detail as to that allegation. The alternative basis on which the claim is put in relation to what is called overcharging is in paragraph 27 of the particulars of claim, where it is alleged that the respondents, at least, acted negligently in breach of their common law duties to the company in drawing fees in excess of that which they ought to have known represented their proper entitlement.

10. The consequences of those matters are pleaded between paragraphs 28 and 31 of the particulars of claim. First, it is said that the respondents are liable to account for a number of matters. In paragraph 30, it is said that the respondents have caused the company to incur fees, costs and expenses, and those sums are claimed as damages or equitable compensation for loss. There is also a claim, in accordance with the application notice, for interest.

11. The respondents have served points of defence in which the claim against them is

denied and various matters are put forward to which I need not refer.

12. The matter has come before the court today for a determination of what is to happen as regards a possible trial of this application. The listing position is that the matter has been listed for trial in a trial window which I think may have begun on Monday of this week, but the expectations were that today would be a day for the trial judge, that is myself, to pre-read, with the trial starting tomorrow, with a trial estimate of 15 days.

13. However, the matter has been mentioned today in advance of the trial proceeding the way I have described because of recent developments in relation to the position of Mr White and Mr Wood. I emphasise that Mr White's position is not the same as Mr Wood's position. I will need to refer to them separately.

14. I will start with the position in relation to Mr White. Until recently, Mr White had the benefit of professional indemnity insurance and insurance covering the costs of his defence of this claim, and he had solicitors and counsel advising him in those respects. Recently, the insurers have disclaimed liability and have indicated that they will not pay for further representation for Mr White. Mr White's solicitors formerly on the record have come off the record. Mr White's counsel formerly retained has appeared today at this mention and, as I understand it, would still intend to appear on the first day of the trial, if there is to be a trial, but would not represent Mr White thereafter at any such trial.

15. Faced with those circumstances, Mr White has indicated a readiness to compromise the claim against him. Indeed, matters have developed in this way. The applicants have provided a draft order to Mr White and Mr White has responded with a revision of that draft order which has been further revised in the course of oral

submissions today.

16. I will refer to the applicants' draft order and then refer to the differences which exist in the draft proffered by Mr White. I will refer only to parts which are material to the decision I have to make.

17. The applicants' draft order contains a declaration in these terms:

"The first respondent is guilty of misfeasance and breach of fiduciary duty in relation to the company on the basis pleaded in paragraphs 24 and 26 of the particulars of claim."

18. Paragraph 24 was the paragraph which alleged deliberate and dishonest taking of money from the company. Paragraph 26, which I did not refer to earlier, identified other respects in which there were breaches of fiduciary duty, but they included, if not comprised, an allegation of dishonesty.

19. So if that declaration were to be made, it would be a declaration that there was dishonesty on the part of Mr White.

20. The applicants' draft order continues, in relation to Mr White, by including an order that he pay a sum a little in excess of GBP1.2 million in relation to the remuneration charged to the company, and a further sum which is not specified in the draft order, relating to consequential losses. This is said to be without prejudice to claims which might be made against a surety under a certain insolvency bond.

21. The applicants' draft order continues with an order that Mr White pay interest in a specified sum, which is approximately GBP370,000, and finally the draft order includes an order for costs on the indemnity basis, to be the subject of a detailed assessment if not agreed.

22. Mr White's draft order also provides for a declaration in these terms:

"The respondents ..."

That's not only himself, but also Mr Wood:

"... are guilty of misfeasance or a breach of fiduciary duty or other duty in relation to the company."

23. Then, as regards other heads of relief, Mr White has asked for orders which treat the two respondents in the same way, but I understand from the way in which the case was presented that Mr White will submit to these orders against him, leaving the applicants to obtain whatever order is agreed with Mr Wood, the other respondent.

24. Proceeding on that basis, what Mr White is prepared to agree is an order that he pay to the company the sum slightly in excess of GBP1.2 million identified by the applicants and also interest in the sum of approximately GBP370,000, also identified by the applicants.

25. Mr White's draft order continues by including an order that he pay a further sum in relation to consequential losses to be assessed by the court, but in the course of oral submissions today, Mr White has indicated that he will pay the sum which is identified by the applicants and there need not be a further assessment.

26. In Mr White's draft order, he submitted to an order for costs, but it was suggested that the costs be on the standard basis. In the course of oral submissions today, Mr White has indicated that he will submit to an order that he pay costs on the indemnity basis.

27. It is perhaps not strictly necessary for me to consider why Mr White has made the proposal which he has made. One thing that Mr White obtains from a settlement in these terms, or an order in these terms, is that there is no specific finding of

dishonesty against him. That is a finding he is not prepared to submit to, and wishes to avoid. Apart from that, Mr White doesn't obtain anything. He is prepared to concede the figures and the basis for costs being the maximum extent of the claim put forward by the applicants.

28. The reality is that Mr White, or at any rate the reality as presented to me, is that he has no real assets. Any substantial judgment against him will result in his bankruptcy. There will be precious little for the trustee in bankruptcy to realise. Mr White does not see the point of contesting a 15-day trial where the outcome, whatever it is, will result in his bankruptcy in that way. He is, therefore, not really interested in whether the judgment is 1.2 million or a little less, whether the interest is the figure specified or a little less, he is not interested in the amount of the consequential losses, he is not interested in the basis for assessment of costs.

29. Turning then to the position as regards Mr Wood, his position is not entirely fixed and certain, but the applicants and Mr Wood have been in discussion, and there are certain matters which the applicants asked Mr Wood to provide, such as a supportive witness statement, as to which I don't know the full detail, but the direction of travel between the applicants and Mr Wood is that the intention is to have an order against Mr Wood which specifies a judgment figure against him. There will be no finding of dishonesty in relation to Mr Wood. Indeed, the assertion of dishonesty against Mr Wood will not be pursued.

30. What Mr Wood achieves by the proposed settlement is that the applicants will agree that they will not seek to enforce the orders they obtain against Mr Wood against his personal assets.

31. Just dealing with Mr Wood's position for a moment, this claim, insofar as the court

is concerned, is primarily, if not exclusively, a money claim. Although declaratory relief is sought, the declaration is essentially as to the basis of the claim which is put forward. It may not be necessary to have a declaration. In many circumstances, the parties and the court would have been content with an order which determined whether a money sum was payable and, if so, the amount of that money sum.

32. Normally, an applicant or a claimant seeks a money sum because they want to have a judgment which they might be able to enforce. It is an odd thing to do for an applicant to seek a money sum in circumstances where it undertakes it will not enforce it against the personal assets of the relevant respondent or defendant.

33. Indeed, it is relatively clear in relation to Mr Wood that the applicants are not seeking an order from the court in the trial against him in order to get something of advantage against him. What is instead being done is to obtain an order against him by agreement which can be shown to third parties who might or might not be influenced in their conduct by what has been agreed by way of settlement. That is the position in relation to Mr Wood so far as the applicants are concerned.

34. I need to revert to the position of both Mr White and Mr Wood for this reason: they are sued as joint respondents, and if the matter were to go to trial and judgment, it is to be expected, in the ordinary way, that there would be contribution proceedings as between them. If Mr White were held liable, he might wish to claim a contribution from Mr Wood and vice versa.

35. So far as Mr Wood is concerned, if he has the agreement of the applicants that they will not enforce any monetary order against him, then Mr Wood has no reason to ask for a contribution because he will not have any liability to which a contribution

need be made.

36. So far as Mr White is concerned, there is no statement that there will be no enforcement against him, and so, in principle, he might have wished to claim a contribution from Mr Wood, but I am told today that Mr White is content, as part of the overall disposal of this matter, to have the court make no order in relation to his contribution claim, or even a form of order dismissing his contribution claim. So that will be the end of that.

37. Faced with that situation, I now need to consider the position of the three parties. What the applicants say is that the trial should continue, and I will in a moment refer to the reasons they put forward for that course. What Mr White says is that the trial should not continue. He has offered, he says, everything to which the applicants could be, at the highest, entitled at the end of a successful trial from the applicants' point of view, and the court's business is to make orders to give effect to the relief sought in proceedings. All of that has been achieved by the applicants by the offer he has made.

38. Mr White says, if the trial is to continue, he has found himself at short notice without legal representation, and any trial would have to be adjourned for a period, he says many months, in which he would be able to consider his position, seek to obtain pro bono representation, possibly challenge the insurers who have disclaimed liability, or, at the very least -- and this is the most probable outcome -- prepare to do what he could, however adequately or inadequately, to defend himself on a charge of dishonesty.

39. As to Mr Wood's position, at the beginning of this hearing today, Mr Wood indicated that, absent a settlement involving him, he would want the case to go

ahead, he would represent himself. He, too, is no longer legally represented, and he says that he wishes to set the record straight.

40. Of course, if the matter is settled so that a figure for his liability is agreed, coupled with the applicants' agreement not to enforce it against Mr Wood, I can't see any point in either the applicants or Mr Wood having a trial in relation to Mr Wood's liability.

41. So with that introduction, I go to the reasons why the applicants say the matter should proceed. I have the skeleton argument of Mr Wilson on their behalf, and he puts forward seven reasons for that course. I also have the skeleton argument of Mr Ohrenstein, who is acting effectively pro bono for Mr White, and he has given me the other side of the argument.

42. The matter has very fully been explored in the course of argument today, and I think it is sufficient if I indicate my conclusion on each of the seven reasons and give some brief reasons of my own.

43. The first two reasons, 7.1 and 7.2 of Mr Wilson's skeleton argument, relate to the declarations which have been the subject of the draft orders prepared by the applicants and by Mr White respectively. I think it is acknowledged that the court is reluctant to make declarations by consent, and indeed my view is that I would not be prepared, in this case, to make declarations by consent. I do not, myself, see a reason for making a declaration by consent.

44. It will suffice -- indeed, it may be more than sufficient, but it will certainly suffice -- if the order made, which is otherwise by consent, contains recitals in which Mr White admits that he is liable in negligence, and in that sense in breach of fiduciary duty in relation to the matters claimed. If the applicants wish to recite

in the order that, notwithstanding the entry into terms of settlement, the applicants reserve their right to establish that the claim was put, and can be put, on the basis of dishonesty, the order can so recite. But there is no necessity between these parties for there to be a declaration saying that there was dishonesty.

45. At any rate, there cannot be a declaration of dishonesty by consent, first, because the parties don't agree, and, secondly, I would not make the order by consent. It is not necessary to have a declaration of dishonesty for the purpose of disposing of the claim against Mr White. Indeed, the declaration of dishonesty is really sought for the purposes of collateral matters, as Mr Wilson fairly described it, and those are collateral matters to which I will return in dealing with the remaining reasons put forward.

46. The third reason put forward related to the quantum of consequential damages. Mr Wilson initially suggested that the quantification exercise could be influenced by a finding as to whether Mr White had been dishonest. That point has gone away because Mr White has agreed the applicants' figure for consequential losses.

47. The fourth matter related to contribution proceedings Mr White has issued. These contribution proceedings fall into two classes. The first class is the contribution claim against Mr Wood. In the course of today, that has gone away because Mr White is prepared essentially to withdraw that matter: either have no order in relation to it or indeed have the contribution claim dismissed.

48. There has been some discussion of what might happen if Mr White becomes bankrupt, as seems very likely, and his trustee in bankruptcy is concerned that Mr White has given up the contribution claim against Mr Wood. It has been pointed out that the principal creditor, the majority creditor, is likely to be the

applicants. I have been given some information -- I do not know that I can make findings -- about the total extent of Mr White's creditors, but the information suggests, at least, that there are not other major creditors compared with the claim of the applicants in this case.

49. If the applicants are content to say that their judgment against Mr Wood will not be enforced against him, then there would be a logic in them agreeing that they would not actively encourage the trustee in bankruptcy of Mr White to pursue a contribution claim against Mr Wood.

50. Although this is a loose end, which cannot be completely tied off, it is a loose end which has potential implications rather than certain implications. What would be certain would be if I were to say today that there will be a 15-day trial. That would be certain, a certain known consequence. I have to consider the pros and cons of imposing on the parties that certain known consequence as against the uncertain potential consequences contingent on a number of future matters.

51. As regards the second class of contribution claim against Mr Priestley and Mr Russell, who were also involved with the firm from which Mr White and Mr Wood came, Mr White's contribution claim was one which he wished to have heard together with this claim, but that was not permitted, partly because it would delay the trial of the applicants' claim against Mr White. It is not suggested that I do something which reunites the trial of the claim against Mr White and the trial of the contribution claim against Mr Priestley and Mr Russell.

52. So if I go ahead with the claim against Mr White, as the applicants say I should, I will potentially be making findings about Mr White and perhaps indirectly Mr Priestley and Mr Russell, which, if they were used against Mr Priestley and

Mr Russell, would be unfair to them.

53. Insofar as the applicants say that they would be the indirect beneficiaries of a contribution claim against Mr Priestley and Mr Russell, I think they accept that proceeding against Mr White at this trial, establishing that he was dishonest would actually reduce the benefit of the contribution claim against Mr Priestley and Mr Russell.

54. So treating that reason, the fourth reason, concerning contribution notices on its own, it doesn't seem to me that that is a good reason for having a trial which is not otherwise necessary.

55. The fifth reason put forward is, I surmise, what is really driving the applicants' desire to have a trial. There is a bond given by Royal Sun Alliance to the Insolvency Practitioners' Association of which Mr White and Mr Wood are or were members. What Mr Wilson says on behalf of the applicants is that there is reason to expect that the IPA will assign the bond to the liquidators, and the liquidators will then seek to recover under the bond. If the liquidators have established at this trial that Mr White was dishonest, that (he says) is going to be influential in persuading Royal Sun Alliance that Mr White was indeed dishonest, and that may encourage Royal Sun Alliance not to challenge a finding of dishonesty against Mr White, and that may then lead to the liquidators recovering under the bond.

56. My reaction to that is that there are a number of contingencies here to which I do not know the answer. The first is, will the IPA assign the bond to the liquidators? Mr Wilson presses me to form an optimistic view about that, but it is a prediction, not a certainty.

57. Then there is the question, if the bond is assigned to the liquidators, whether Royal

Sun Alliance will challenge the assertion of dishonesty against Mr White. They might not. It would seem to be an awful pity to spend 15 days determining dishonesty when the point might never be taken by Royal Sun Alliance.

58. I cannot judge the likelihood of Royal Sun Alliance taking the point. Certainly the applicants submit to me that the case of dishonesty is very strong and they also have a number of other cases, a large number of other cases, where they say there was systemic wrongdoing by the firm of accountants, all of which points can forcibly made to Royal Sun Alliance.

59. Even if there was a risk that Royal Sun Alliance would challenge dishonesty in this case, the problem is that the Royal Sun Alliance will not be bound by a decision that I make, having spent 15 days getting to the end of a trial, and then many days thereafter considering the right answer.

60. It does not seem to me to be well directed for the court to come to findings which do not bind Royal Sun Alliance rather than waiting to see if Royal Sun Alliance take the point and then having a trial where the result will bind Royal Sun Alliance.

61. So although, as I detect, that appears to be the major reason for the applicants wanting their trial, I am not persuaded it is a sufficient reason to have a trial in those circumstances.

62. The next matter relates to the assertion that the alleged overcharging of the company in this case was not an isolated matter but there was systemic dishonesty on the part of P&A which has affected a large number of other companies and in relation to P&A's appointment as insolvency practitioners in relation to those other companies there will be further claims on the Royal Sun Alliance bond.

63. I have referred to that matter in passing already. No doubt the facts of the cases will differ. It may be -- I do not know, I haven't decided -- that there was a system here and there will therefore be an overlap in the facts between the various cases. I do not, myself, see that as a sufficient reason for trying out in detail the facts of this particular case. Again, it may never be necessary to have a trial of the facts of any case.

64. If the target is to persuade Royal Sun Alliance that there was dishonesty, it remains to be seen whether Royal Sun Alliance will make a fight of that issue.

65. I have been exercised by the gravity of the allegations in this case and by the reflection that, if the allegations are true, then an officer of the court, Mr White, has been guilty of very serious dishonesty. I have considered the possibility that the court should take upon itself the task of enquiring into the facts to expose wrongdoing and, if it were to find wrongdoing -- a matter on which I have no views -- then it would expose the wrongdoing and would send a very clear signal to insolvency practitioners generally as to the very serious consequences for anyone who behaves in the way alleged to have happened in this case.

66. However, I am persuaded that that would be wrong in principle for the court. The court's task is not to conduct public inquiries. The court's task is to determine claims by one litigant against another.

67. If a litigant, the applicants in this case, obtains from the court the order which it seeks in the claim, then it would certainly normally not be right for the court to direct an inquiry of the underlying matters so that it could go into them, make findings, give a judgment and allow publicity to be given to that judgment.

68. So although, if I were to try the case, and if I were to find wrongdoing as alleged,

I expect I would be very firm in my criticisms of the wrongdoer, I do not regard it as an appropriate use of the court's time to embark on that inquiry in case that were to be the result.

69. The last matter concerns the likely -- certainly the possible -- bankruptcy of Mr White. It is pointed out that, whereas normally a bankrupt is discharged from bankruptcy debts after 12 months, the bankrupt is not discharged from debts which have come about by reason of the bankrupt's fraud. The applicants would say that that applies here, and so, after a bankruptcy and after 12 months and after a discharge from bankruptcy debts, the applicants might arrive at a situation where they would wish to say that the discharge is not effective and would wish to take action against Mr White in relation to future earnings and future assets.

70. Again, we are in the territory of future possibilities as to which there is no certainty, whereas a 15-day trial starting soon, or even starting later, is a certainty which will happen which will involve cost and time and effort.

71. Before coming to a final view as to what should happen, I need to refer to the position of Mr White again. He is unrepresented. I am far from convinced that he will be able to get representation at this trial, whether I adjourn it or not. There are obvious difficulties for him in defending himself. He will not be a skilled cross-examiner of the many witnesses who will be called against him. Unfortunately, at the present time, the court is often asked to try cases where there is inequality of arms. It is not a happy situation for the parties or indeed for the court or for the system of justice, but it is unavoidable in those cases.

72. The trial which I am asked to conduct in this case would probably be such a trial. There is a risk of unfairness. I am sure that any judge, including myself, would

strain very hard to minimise or eliminate that risk, but the risk would exist, and the appearance of unfairness may not be entirely capable of being dispelled.

73. It seems to me that the applicants want to have a trial not to obtain findings which will bind Mr White to them, but which they will be able to deploy to advance arguments against third parties who were not represented at the trial, did not take any part in the trial, and who, as a matter of law, will not be bound by the results of the trial.

74. I do not see that that is something that I should support.

75. Accordingly, the conclusion I reach is that, as regards Mr White, the matter will be dealt with by the court making an order, the drafting of which can follow, which reflects the offers he has made which give to the applicants everything they claim in these proceedings, to which they say they are genuinely and properly entitled. As regards Mr Wood, if the matter is settled with him in the way that appears to be a real possibility, then there will not be a trial in relation to Mr Wood either, but orders will be made to give effect to the offers Mr Wood has made and the terms agreed with Mr Wood.

76. If contrary to, I think, everyone's expectation the matter cannot be agreed with Mr Wood, there will have to be a trial in relation to the claim against Mr Wood.

77. We are now in the middle of Wednesday afternoon. I cannot say immediately that the case is over, although it looks like it is rapidly moving to that point. I will indicate that the case will be heard starting on Friday of this week at 10.30 am unless I am given a message in the course of today or tomorrow which means the trial need not proceed.

(3.21 pm)

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