IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES SITTING AT BRISTOL

NEUTRAL CITATION No: [2019] EWHC 2896 (Ch)

Bristol Civil Justice Centre
2 Redcliff Street
Bristol

Date: 29 October 2019

Case No: 8BS0087C

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

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PROMONTORIA (OAK) LIMITED

Claimant/Respondent

-and-

(1) NICHOLAS MICHAEL EMANUEL
(2) NICOLA JANE EMANUEL

Defendants/Appellants

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Mr Hugh Sims, QC and Mr Oliver Mitchell (instructed by **Brains Solicitors**) for the **Appellants**
Mr Jamie Riley, QC and **Mr Ashley Cukier** (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing date: 29 October 2019

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Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

1. On 25 July 2019, I heard an application for permission to appeal a decision of Mr Recorder Willetts made on 16 July 2018. In the proceedings before Mr Recorder Willetts, the Claimant, Promontoria (Oak) Limited (**Promontoria Oak**), claimed as the assignee of Clydesdale Bank (the **Bank**) debts owed by the Defendants, Mr and Mrs Emanuel (the **Emanuels**). Promontoria Oak's claim succeeded before Mr Recorder Willetts, but on the basis of secondary evidence regarding the assignment between the Bank and Promontoria Oak. Essentially, a significantly redacted assignment (the **Redacted Assignment Deed**) was produced to the Court and it was on the basis of this – and some other evidence – that the Recorder concluded, in the face of opposition from the Emanuels, that Promontoria Oak's title to the debts had been established.

2. The grounds of appeal were six in number, the first three grounds being very closely related (**Grounds 1 to 3**). Grounds 1 to 3 concerned the extent to which the Recorder erred in failing to admit properly into evidence the complete Assignment Deed by way of which Promontoria Oak's rights against the Emanuels arose or, to put the same question another way, whether the Recorder was wrong in concluding (as he did) that Promontoria Oak could succeed in its case against the Emanuels without having the original of the Assignment Deed in evidence before the Recorder, in circumstances where the validity of that document was in issue and where the Emanuels were not accepting that the secondary evidence of the Assignment Deed disposed of their contentions in relation to it.

3. More specifically, Grounds 1 to 3 read as follows:

   (1) *Ground 1.* The Recorder was wrong to admit into evidence the Redacted Assignment Deed.

   (2) *Ground 2.* Alternatively, to Ground 1, the Recorder was wrong to conclude the Redacted Assignment Deed proved title.

   (3) *Ground 3.* Overall, the Recorder was wrong to conclude that Promontoria Oak had adduced sufficient evidence to prove chain of title.

4. I gave permission to appeal in relation to Grounds 1 to 3, permission having been refused on the papers by Zacaroli J. Like Zacaroli J, I declined to give permission to appeal in relation to the remaining grounds (**Grounds 4 to 6**) of appeal, and it is unnecessary for me to consider Grounds 4 to 6 any further in this Ruling.

5. At the hearing on 25 July 2019, there was a further application before me to admit new evidence in the appeal and – if that application were successful – to introduce a seventh ground of appeal – **Ground 7**. That application could not be heard on 25 July 2019, because Promontoria Oak required time to adduce evidence in response to that produced by the Emanuels.

6. Ground 7 provides as follows:

   "The judgment below was procured by reason of deliberate material non-disclosure/fraud and/or abuse of process and/or potential perjury, and accordingly the final order should be set aside and the claim dismissed; and/or (b) for the same reasons, the order as to costs in the Court below should in any event be set aside and/or varied."

7. In order to understand the nature of and basis for this application, it is necessary to set out some of the background facts:

(1) The Emanuels were customers of the Bank and – the details are irrelevant – borrowed money from the Bank for the purposes of their business, this borrowing being secured by a legal charge dated 2 October 2008 (the **Legal Charge**) over a property in Cornwall.

(2) The Legal Charge contained the usual statutory powers of sale and of appointing a receiver where a demand for the secured amounts – as defined in the Legal Charge – had gone unsatisfied. The Legal Charge contained an unfettered right in the Bank to assign its rights.

(3) In April 2012, the Bank wrote to the Emanuels giving notice that – in circumstances where loan repayments were not being made – it was making formal demand for repayment of the entire outstanding loan. That repayment was not made.

(4) On 24 June 2016, the Bank wrote to the Emanuels notifying them that – amongst other debts – their loan together with "all related rights and benefits, including, without limitation, guarantee and security" had been sold to Promontoria Holding 170 BV. This company – **Promontoria 170** – is, like Promontoria Oak, a company within the Cerberus group of companies. It is, however, to be differentiated from Promontoria Oak. Promontoria Oak and Promontoria 170 are different companies and distinct legal persons.

(5) The full details of the transfer of this loan, together with other loans, was not before Mr Recorder Willetts. As is apparent from Grounds 1 to 3, limited documentation evidencing the chain of title between the Bank and Promontoira Oak was before the Recorder at trial. I intend to say as little as possible on this point, for that would be to trespass on the appeal which is due to take place in December 2019. Based upon the material that is before me now, the following is the case:

(a) As is well known, an agreement to assign (whilst it may have some of the proprietary effects of an assignment) is to be differentiated from an assignment. In this case, there was an assignment, by way of the Assignment Deed, from the Bank to Promontoria Oak.

(b) The assignment effected pursuant to the Assignment Deed was notified to the Emanuels in a letter dated 16 September 2016. The first paragraph of this letter stated:

> "Further to our letter dated [24 June 2016: see paragraph 7(4) above] we are writing to confirm that [the Bank has] completed the sale of all amounts owing to another legal entity, namely [Promontoria Oak], an affiliate of Cerberus Global Investors (and successor in title to [Promontoria 170], the entity referred to in our letter dated [24 June 2016])…"

One can, therefore, infer that this was – or was intended to be – notice of an assignment under section 136 of the Law of Property Act 1925.

(c) The letter of 24 June 2016 (see paragraph 7(4) above) presaged an assignment not to Promontoria Oak but to Promontoria 170, whereas the

Assignment Deed was between the Bank and Promontoria Oak. At trial, and before me, the Emanuels sought to contend that:

(i) There were other transactions, involving Promontoria 170, that were not before Mr Recorder Willetts, nor before the Court now; which

(ii) Were potentially relevant to the resolution of the issues before Mr Recorder Willetts.

I have no difficulty in accepting the first of these two points: there is no doubt – and Promontoria Oak never sought to gainsay – that the Recorder saw an incomplete subset of the relevant transactional documents regarding the assignment.

It is the second of these two points – whether this additional material would have made a difference – in relation to which the Emanuels have real difficulty, and which I must consider further in this Ruling. To be clear, it was Promontoria Oak's contention that even if the Recorder had seen everything relating to the assignment, his conclusions would have been no different: all material facts were before the Recorder, and he reached the correct conclusion in relation to those facts.

8. I turn to the substance of the application before me. As I have noted (see paragraph 5 above), the application was first to adduce new evidence and secondly, on the back of that new evidence, to amend the grounds of appeal to introduce Ground 7. However, to be clear, it was contended by the Emanuels that the new evidence was also relevant to Grounds 1 to 3. In other words, even if Ground 7 were not introduced by amendment into the grounds of appeal, the Emanuels would still wish to rely on the new evidence in support of Grounds 1 to 3.

9. Ordinarily, I would in these circumstances consider the application to adduce new evidence first. In this case, however, I am satisfied that I should first consider whether Ground 7 should be introduced into this appeal at all. Promontoria Oak contended that Ground 7 was in substance a contention that the judgment of Mr Recorder Willetts had been obtained by fraud and that, where such an allegation was advanced, it should be advanced as a fresh action to set aside the original judgment. Whether a completely new claim is brought to set aside the judgment or whether the matter is "hived off" as a discrete question to be dealt with discretely but in the same proceedings matters not. The point is that an allegation that a judgment has been obtained by fraud can only appropriately be considered in what is in substance a fresh action, and not in an appeal from the judgment said to have been obtained by fraud.

10. The reason is obvious, and has been stated in (for instance) *Owens v. Noble,* [2010] EWCA Civ 224 at [27] and [29] and *Salekipour v. Parmar,* [2017] EWCA Civ 2141 at [69]*ff*. Whereas an appeal involves a challenge to the first instance judge's reasoning or fact finding or exercise of discretion, a contention that the underlying judgment was obtained by fraud involves no such challenge. Such a contention will, almost always, involve significant questions of fact (so as to render the appeal process unsuitable) and will give rise to questions which, *ex hypothesi*, were never before the first instance judge and never formed part of his or her judgment or reasoning.

11. I am satisfied that Ground 7 involves a contention that the judgment of Mr Recorder Willetts was obtained by fraud. It follows that this challenge to the judgment, if it is to be pursued, must be pursued by what would in substance be – leaving aside questions of form – a separate action.

12. For this reason, I do not permit the amendment to introduce Ground 7 into the appeal. In these circumstances, I should say little about the strength or otherwise of Ground 7 and nothing at all (at least in this context) about the new evidence that was adduced in support of Ground 7. The fact is that – if pursued – the pleading in relation to Ground 7 would have to be substantially expanded and particularised. The only point that I would note is that, as I understood it, Ground 7 was based upon two independent and self-standing propositions:

    (1) First, that the assignment from the Bank to Promontoria Oak had not properly been explained to the Judge.

    (2) Secondly, that the redactions that had been made to the Redacted Assignment Deed (and indeed the failure to disclose other relevant documents) on the ground of confidentiality were unjustifiable, even if the material withheld from the Recorder would not have made any difference to his substantive decision in relation to the question of Promontoria Oak's chain of title.

13. I turn to the application to adduce the new evidence in support of Grounds 1 to 3. The principles on which fresh evidence can be adduced on an appeal is clearly stated in *Civil Procedure 2019* in the commentary to CPR 52.21 (at §52.21.3); and in *Sharab v Al Saud*, [2009] EWCA Civ 353 at [52] and *Consolidated Developments Ltd v Cooper*, [2018] EWHC 1727 (Ch) at [33]. It is clear, in light of this authority, that the requirements laid down in *Ladd v Marshall*, [1954] 1 WLR 1489 for the adduction of new evidence on an appeal remain of great importance today.

14. I need articulate only the second requirement in *Ladd v Marshall*, which is that the new evidence would, if adduced at trial, have had an important influence on the result of the case, although it need not be decisive. I do not consider that the material that the Emanuels seek to adduce comes close to meeting this requirement:

    (1) The evidence that the Emanuels seek to adduce comprises *(i)* a deed of assignment from another (entirely different) transaction involving the Cerberus group of companies and *(ii)* Promontoria Oak's financial accounts for 2017.

    (2) Both documents are suggestive of the existence, in this case, of a sale and purchase agreement between the Bank and Promontoria 170, which was then novated and replaced with a fresh agreement between the Bank and Promontoria Oak. The Assignment Deed reflected the replacement agreement, and so comprised an assignment in which the Bank was the assignor and Promontoria Oak the assignee.

    (3) Interestingly, this was exactly what Promontoria Oak positively asserted was the case. Indeed, Promontoria Oak went so far as to say that evidence, permitting this conclusion, was in fact before the Recorder, and that he reached a conclusion consistent with it. Thus, Promontoria Oak contended that the evidence the Emanuels sought to adduce was not even <u>new</u>, and thus failed to meet the first requirement of *Ladd v. Marshall*.

(4) I have some sympathy with this contention, but I decide this application on the basis of the second requirement in *Ladd v. Marshall*, namely that the evidence the Emanuels seek to adduce could have had no effect on the dispute that was determined by the Recorder. Counsel for the Emanuels, Mr Sims, QC, quite properly accepted that he could not – on the basis of the material before the Recorder plus the new evidence – contend that the Recorder was wrong or even arguably wrong in his conclusion that Promontoria Oak had proper title to recover the Emanuals' debts.

(5) The most that could be said was that the failure on the part of Promontoria Oak to disclose all details of the transfer of the debts from the Bank to it, including as to the involvement of Promontoria 170, was that it deprived the Emanuels and the Recorder of the opportunity to look "under the bonnet" of the transaction, so as to be able to check for themselves that a proper chain of title existed between the Bank and Promontoria Oak and to identify any deficiency that Promontoria Oak itself might have failed to spot. In short, Mr Sims, QC contended that the Emanuels were entitled to see this material, and if (without good reason) it was not produced, then Promontoria Oak could not succeed in its claim.

(6) It is not for me, today, to give any view as to the merits of this point. It is sufficient to say that the point can be made without reference to the new evidence the Emanuels seek to adduce. Not only that, but it seems to me that the point in Grounds 1 to 3 is not even strengthened by the introduction of this evidence. As I see it, the "new" evidence – assuming it to be new – is irrelevant to Grounds 1 to 3.

(7) It is appropriate that I state exactly what I understand Grounds 1 to 3 to contend for. It seems to me that Grounds 1, 2 and 3, properly understood, operate at three tiers:

(a) On the first tier, documents relating to "chain of title" are, on the face of it, relevant documents where chain of title is in issue, and they must be produced where they exist. (It is unnecessary to go into the case of where such documents once existed but have been lost: that is not this case.) Where such documents did exist before the Court, and were not produced for examination by the party challenging title, then the Recorder erred in proceeding to judgment in favour of Promontoria. He should either have found for the Emanuels, without more, or adjourned to enable the material to be produced.

(b) On the second tier, assuming the first point (at paragraph 14(7)(a)) were to fail, the Recorder erred in permitting the redactions to be made to the Assignment Deed. In the case of this argument, the question of "chain of title" is a matter to be proved by the party asserting title; and that party is entitled to prove its title in whatever way it sees fit. Depending on how that party seeks to prove its title will define what documents are, and what documents are not, relevant. In this case, the contention would be that the Recorder applied the wrong test in permitting the Assignment Deed to be redacted in the way it was on the basis that the redacted paragraphs were irrelevant and confidential.

Both of these points, as it seems to me, are open to the Emanuels when they come to press Grounds 1 to 3 before this Court. Neither point requires in any way the introduction of the new evidence. I stress that in formulating these points, I am merely illustrating the types of argument that could be made in order to determine the question of admissibility. I have no doubt that when this appeal comes to be heard, the Emanuels will have their own formulations, and they have every right to frame their arguments as they wish.

However, it is necessary to be clear that there is a third tier of argument, that might be read into Grounds 1 to 3, which is not open to the Emanuels.

(c) On the third tier, the contention would be that both the Emanuels and the Court were "mislead" into proceeding on the basis that the redactions to the Assignment Deed were proper. In other words, whatever the test for redaction might be, it was not followed by Promontoria Oak and not followed in a way that can now be said to be culpable.

It is necessary that I state clearly – and, to the extent necessary, explicitly rule – that this contention is not open to the Emanuels on their appeal. That is because it involves the contention that Promontoria Oak, in culpably withholding this material, obtained a judgment in its favour that it had no right to. In effect, this contention involves re-introducing the substance of Ground 7 – or at least that part articulated in paragraph 12(2) above – by the back door. For the reasons I have given, such a point, if it is to be made, must be made by way of a separate action.

(8) Given this articulation of the points in issue on the appeal, it is clear that the new evidence can make no difference, and for that reason alone, should not be admitted on the appeal.

15. For these reasons, the application to admit new evidence and the application to introduce Ground 7 both fail.