Neutral Citation Number: [2025] EWHC 256 (Ch)

CH-2024-LDS-000002
Claim No: 8 of 2023

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LEEDS
APPEALS (ChD)

HER HONOUR JUDGE KELLY SITTING AS A JUDGE OF THE HIGH COURT
ON APPEAL FROM THE COUNTY COURT AT BARNSLEY

IN THE MATTER OF RACHAEL HUGILL, ROBIN HUGILL
AND R & R HUGILL (A PARTNERSHIP)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

AFP ASSETS LIMITED

Appellant

- and -

RACHAEL HUGILL, ROBIN HUGILL AND
R & R HUGILL (A PARTNERSHIP)

Respondents

Mr James Culverwell (instructed by **Howman Solicitors**) for the **Appellant**
Ms Chelsea Carter (instructed by **Excello Law**) for the **Respondents**

Hearing date: 9 January 2025
Date draft circulated to the Parties: 4 February 2025
Date handed down: 7 February 2025

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 7 February 2025.

Her Honour Judge Kelly sitting as a Judge of the High Court

1. This judgment follows the hearing of the appeal on 9 January 2025 against the decision of District Judge Watson dated 23 January 2024. The Respondents to this appeal had applied to set aside statutory demands pursuant to Rule 10.5(5)(b) of the Insolvency Rules 2016 ("IR 2016") on the grounds that the debt was genuinely disputed on substantial grounds. The District Judge set aside statutory demands which had been served by the Appellant on the Respondents in the sum of £213,787.40 ("the debt") on 10 May 2023. In addition, the judge ordered the Appellant to pay the Respondents' costs of the application.

2. I had the benefit of reading the skeleton argument and hearing oral submissions from Mr James Culverwell, counsel for the Appellant and from Ms Chelsea Carter, counsel for the Respondents. Ms Carter appeared for the Respondents before District Judge Watson. The Appellant was represented by other counsel.

Background

3. The dispute between the parties arose as a result of alleged breaches by the Respondents in respect of three agreements between the Appellant and R & R Hugill (a partnership), which agreements gave rise to joint and several liability between the partnership and its partners, Rachael and Robin Hugill, the other two Respondents.

4. The Appellant is a commercial finance company specialising in providing various financial facilities to the agricultural sector. The Respondents were in the business of cattle farming.

5. On 10 January 2020, the Respondents partnership and Appellant entered into a livestock facility agreement ("the LFA") pursuant to which the Appellant made a livestock credit facility available to the partnership. On 29 March 2022, the partnership and the Appellant entered into a finance lease whereby the Appellant leased certain assets to the partnership. In addition, on 10 May 2022, the partnership and the Appellant entered into a hire purchase agreement pursuant to which the Appellant hired out certain assets to the partnership.

6. The general terms and conditions of the LFA set out the various processes which governed the relationship between the parties. The LFA operated so that the Respondents could select a batch of livestock to purchase from Anglo Beef Processors UK ("ABP"). ABP would then contact the Appellant to confirm that the Appellant would fund the purchase of the selected cattle pursuant to the LFA. The Appellant would settle the purchase invoice and own the cattle while the Respondents reared the cattle until they were ready for sale and to be butchered.

7. Once cattle were ready to be sold, the Respondents would contact ABP who would agree a value for the cattle and pay the agreed figure to the Appellant. The Respondents would then be paid the difference between the sale proceeds and the balance owing to the Appellant under the LFA.

8. The agreement provided that upon an event of default, the Appellant would be entitled to demand that the Respondents immediately paid a termination sum to the Appellant as a debt.

9. On 21 March 2023, the Appellant gave the Respondents notice that they were in breach of the LFA and that events of default had occurred. The letter stated:

   "… Under the Clause 23.1(b) of the Agreement it was agreed that a breach of your obligations under any of the following (i) Clause 13, (ii) Clause 14, (iii) Clause 16 or (iv) Clause 18 would represent an event of default. Following the events and discussions during the last quarter of 2022 and the first quarter of this year we have concluded that you are in breach of both Clause 14 and Clause 18.

   Additionally, in failing to make payments on the scheduled repayments, you have committed a repudiatory breach of UFL 001814 and UHP001830, which is defined as an event of default under Clause 23.1(c) of the Agreement…

   … we hereby demand payment of the Termination Sum associated with the animals which have either died or been sold, which totals £159,131.13. We are prepared to give you until the 24 March 2023 to pay that sum. Failure to do so will result in the Agreement being terminated, the full Termination Sum of £368,605.17 being immediately payable, the livestock being collected and/or court action being taken to recover the balance of the amount demanded which has not been paid…"

10. On 30 March 2023, the Appellant served notice terminating the LFA, finance lease and hire purchase agreements. The letter stated:

"… We refer to our letter of 21 March 2023 which required action by 24 March 2023.

As the sum of £159,131.13 was not paid, agreement UFL001545 has been terminated due to your breaches of Clause 14 and Clause 18…"

11. On 22 May 2023, the Appellant served statutory demands on the Respondents. On 9 June 2023, the Respondents paid £127,500 to discharge the liabilities under the finance lease and hire purchase agreements. Thereafter, on 21 June 2023, the Respondents applied to set aside the statutory demands on the basis that the debt was genuinely disputed on substantial grounds.

12. The relevant clauses from the LFA are as follows:

(1) Clause 14 concerned the feeding and management of the livestock. It is not necessary to set out the full term in this judgment.
(2) Clause 18 concerned the sale of livestock and payment in respect of the sale of any livestock:
    a. 18.2 - you are only permitted to sell livestock within a relevant batch if the sale is an approved sale and the sale is in accordance with the requirements set out in the selling procedures and this clause 18.
    b. 18.8 - you must direct ABP pay the relevant batch balance (or, if the sale proceeds are less than the relevant batch balance, the whole of the sale proceeds) directly to our nominated bank account…
(3) Clause 23 concerned termination events:
    a. 23.1 - each of the following shall be an event of default and shall constitute a repudiatory breach of this livestock facility agreement. If for any reason:
        (a) you failed to pay on the due date therefor any amounts payable under this livestock facility agreement;
        (b) you commit any breach of your obligations under clauses 0, 0, 13, 14, 16 or 18;
        (c) you breach any other term of this livestock facility agreement or any other agreement you have with us and, if such breach is remediable, you fail to remedy it within seven (7) days of written notice requiring its remedy;
        (d) you attempt to sell, dispose… or otherwise deal with any of the livestock except in accordance with this livestock facility agreement;
        (o) any credit agreement or hire agreement you enter into with us or any other party becomes capable of being terminated other than by you under any contractual right under the said agreement;
(4) Clause 24 concerned termination remedies:
    a. 24.1 - if an event of default occurs, then without detracting from any rights we have to recover any outstanding debts or to seek remedies or damages against you:
        (a) we shall be entitled to accept your repudiation of this livestock facility agreement and terminate this livestock facility agreement

> by written notice to you (whereupon our consent to your possession of the livestock shall immediately cease) and…
> (ii) demands that you immediately pay to us, as a debt, a "termination sum" calculated as follows;
> a. the outstanding balance plus all of the sums due under this livestock facility agreement at the date of termination together with any interest payable…; Plus
> b. all of our costs and expenses, insuring, selling, storing, feeding and managing the livestock; plus
> c. an administration fee to compensate us for our other costs associated with early termination of £150 plus VAT;

13. I have had the benefit of reading the following witness statements:
    (1) Mr Robin Hugill, dated 20 June 2023 and 15 November 2023 for the Respondents;
    (2) Mr Duncan Cawston, dated 29 August 2023 and 3 January 2024 for the Appellant; and
    (3) Mr Philip Deans, dated 29 August 2023, for the Appellant.

14. I also read the various documents contained within the bundles to which I was taken during the course of the hearing and directed to in skeleton arguments.

15. In his first witness statement, Mr Hugill stated that the Respondents had paid off the debts in relation to the lease and hire purchase agreements and disputed the balance outstanding under the LFA on the basis that it was the subject of a genuine dispute. In his second witness statement in November 2023, it was asserted for the first time that there had not been an event of default entitling the Appellant to terminate the LFA. That argument was disputed by the Appellants.

16. In her brief judgment, District Judge Watson gave her reasons for setting aside the statutory demands. She was asked for clarification in respect of clause 18 of the LFA and her reasoning that there was an absence of evidence that the Respondents had complied with their requirements of that clause of the LFA. She gave a further short judgment.

17. By order dated 19 August 2024, the Appellant was given permission to appeal in respect of grounds 1 to 4 inclusive. Those grounds were:

(1) The learned Judge fell into error by excluding from consideration the question of whether the 'Events of Default' set out in clauses 23.1(c) and (o) existed at termination, so as to provide the Appellant with a lawful basis for termination in addition to, or instead of, breach of clauses 14 and/or 18 of the Agreement. As a result the Judge erred and/or permitted a serious procedural irregularity which caused the decision to be unjust;

(2) The learned Judge fell into error by concluding the Demands should be set aside due to an "absence of evidence". That conclusion disclosed that she failed to apply the relevant legal test and burden…in determining the Application;

(3) The decision of the learned Judge that there was an 'absence of evidence' of whether or not the Respondents had breached clause 18 of the Agreement was in any event wrong bearing in mind the requirements of clause 18 and the evidence before her;

(4) The decision of the learned Judge that the Court needed to see evidence of compliance or non-compliance with "all the formalities" of clause 18 of the Agreement, and that in itself gave rise to a "genuine triable issue", was also wrong in law in that breach of any one constituent part of clause 18 was sufficient to amount to an 'event of default' entitling the Appellant to terminate on written notice as it did.

18. In his skeleton argument at paragraph 17, Mr Culverwell criticised the basis upon which the demands were set aside by the Judge as follows:

"As will be apparent from the transcript of judgment, the Judge:

a. Excluded from consideration the question of whether the 'Events of Default' set out in clauses 23.1(c) and (o) existed at termination so as to provide the Appellants with a lawful basis for termination in addition to, or instead of, breach of clauses 14 and/or 18 of the Agreement;

b. Found that she had an absence of contemporaneous documentation "from anyone" regarding the condition of the livestock purchased under the Agreement and as such there was a 'triable issue' in relation to the condition of the livestock and the reasons behind termination under clause 14;

c. After correctly identifying that the question in relation to breach of clause 18 was whether the "processes" in the Agreement (specifically those contained in clause 18) were followed for the sale of the livestock, found the "absence of evidence" left her "at a loss" and she was therefore of the view that whether there had been a breach of clause 18 was a "substantial matter in dispute" and thus there was a genuine triable issue in respect thereof.

d. Concluded there was an absence of evidence on which to base her decision;

e. After counsel for the Appellant sought clarification as to how the Respondents were said to have discharged their burden of demonstrating a genuine triable issue regarding breach of clause 18 of the Agreement in the absence of evidence they complied with the requirements thereof, and in particular the requirement to pay the sale proceeds (of the 52 cattle admittedly sold) to the Appellant, she clarified that there "was a consistent absence of information from both sides" and "gaps that need to be explored at a further trial";

f. Stated she expressed no view of the likely success or otherwise of the Respondents' case but "there [was] an absence of evidence in support": there was "nothing" from the Respondents on the point and there was limited evidence from the Appellant. The court needed to see evidence of "all the formalities" in clause 18. She appreciated the point that money wasn't paid but in her view clause 18, and compliance with it, needed to be looked at as a whole (i.e. not in constituent parts, as clarified in her reasons refusing permission to appeal)."

19. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the trial bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

The Law

20. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

21. CPR 52 deals with appeals. The appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. In addition, the appeal court may draw any inference of facts which it considers justified on the evidence.

22. On an application made pursuant to rule 10.4 IR 2016, the court may set aside a statutory demand where, pursuant to rule 10.5(5)(b) IR 2016, the outstanding sum of the debt is disputed on grounds which appear to the court to be substantial.

23. As to the principles for setting aside a statutory demand and in respect of the specific circumstances of this case, I was referred to the following cases:
    (1) *Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch);
    (2) *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643;
    (3) *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090;
    (4) *ICI Chemicals and Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725;
    (5) *Lombard North Central Plc v European Skyjets Ltd (In Liquidation)* [2020] EWHC 679 (QB);
    (6) *Nakanishi Marine Co Ltd v Gora Shipping Ltd, MFS Group SA, Attica Finance Inc* [2012] EWHC 3383 (Comm).

24. The principles from those cases are as follows:

(1) The burden is upon the applicant seeking to set aside the statutory demand to show that there is a genuine triable issue in respect of it. The test has been equated to the need to show a real prospect of success in order to succeed in a summary judgment application.

(2) In paragraph 21 of Collier, Arden LJ explained:

> "In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation... But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue."

(3) The court should not conduct a mini trial in considering whether to set aside a statutory demand.

(4) If a party refuses to perform a contract, giving wrong or inadequate reasons or no reasons at all, he may yet justify his refusal if there were at the time of termination facts in existence which would have provided a good reason. That principle is often used in relation to facts unknown to a party refusing to perform at the time of its refusal but it would also apply where the terminating party knew of the other good reason at the time of termination.

(5) However, that principle can be waived but only in cases of, in effect, estoppel.

(6) The principle may not apply to an express term of the contract if the court concludes, as a matter of interpretation of that clause, that a party is not entitled to rely on an event which is not set out in the termination notice itself.

The Issues

25. The parties broadly agree on the issues to be determined. Had the District Judge:

(1) Wrongly excluded consideration of whether the 'Events of Default' set out in clauses 23.1(c) and (o) existed at termination;

(2) Failed to apply the relevant legal test and burden by concluding there was an "absence of evidence";
(3) Wrongly decided that there was an 'absence of evidence' as to whether or not the Respondents had breached clause 18 of the Agreement; and
(4) Decided that the Court needed to see evidence of compliance or non-compliance with "all the formalities" of clause 18 of the Agreement, and that that in itself gave rise to a "genuine triable issue".

Findings

(1) Wrongly excluded consideration of whether the 'events of default' set out in clauses 23.1(c) and (o) existed at termination.

26. The Appellant submitted that the District Judge was wrong, and/or permitted a serious procedural irregularity causing her decision to be unjust by excluding any consideration of whether events of default existed at termination pursuant to clauses 23.1(c) and (o). By clause 24.1 of the LFA, if an event of default occurred, the Appellant was entitled to accept the Respondents' repudiation by written notice which it did by the letter of 30 March 2023. Contractually, the Appellant was not required to specify the event of default which had occurred.

27. In response, the Respondents submitted that it was implicit within the clauses that the basis for termination must be identified and thus there was a need to identify the events of default relied upon. In the absence of such identification, any repudiation would not be clear and unequivocal. As the letter of 30 March 2023 specifically relied upon breaches of clauses 14 and 18 and did not refer to clause 23.1(c) and (o), the Appellant was not now permitted to rely upon any event of default pursuant to clause 23. The Judge's decision to exclude consideration of clause 23 was therefore correct.

28. The Appellant responded to this submission arguing that the wording of the contract was clear and no additional wording needed to be implied. In any event, whilst it was accepted that there was a requirement for a clear and unequivocal acceptance of repudiation, it was the act demonstrating that repudiation was accepted, here the

sending of the letter dated 30 March 2023, which had to be clear and unequivocal. The basis for terminating did not have to be clear and unequivocal.

29. However, even if the Respondents did need to be made aware of breaches pursuant to clause 23, they were made aware of those alleged breaches as being events of default in the letter dated 21 March 2023. That letter notified the Respondents of the alleged breaches and gave the Respondents an opportunity to remedy the breaches identified. In this case, the breaches were not remedied. No payments were made before the letter of 30 March 2023, nor before the issue of the statutory demands. The fact that the Appellant referred to clauses 14 and 18, but not to clause 23, did not disentitle the Appellant from relying on breaches of clause 23 to justify the termination.

30. In addition, the District Judge was not referred to the *Reinwood* case which makes it clear that the Appellant was entitled to rely upon events of default under clause 23.1 unless the Appellant's rights were specifically waived giving rise to an estoppel. No such waiver occurred and there was no evidence from the Respondents about relying upon the fact that events of default pursuant to clause 23 were not contained in the termination notice. In those circumstances, it would be unjust and unconscionable to refuse to allow the Appellant to rely on clause 23.

31. In my judgment, the Appellant is correct and I accept the arguments made by Mr Culverwell. It is unfortunate that the District Judge was not referred to the *Reinwood* case; had she been, she may not have accepted the Respondents' argument that as the Appellant had "pinned their colours to the mast", the Appellant could not now rely upon unchallenged breaches of clause 23.

32. I accept that there may be fact specific instances where a contract must be construed such that an event of default must be specified when notice of termination is given. However, I do not accept that this contract requires events of default to be specified. Had the Judge considered the unchallenged breaches of clause 23 in addition to clauses 14 and 18, she would have been driven to the conclusion that the Respondents were in default when the agreement was terminated by the Appellant by its letter dated 30 March 2023. This ground of appeal is therefore allowed.

(2) Failed to apply the relevant legal test and burden by concluding there was an "absence of evidence".

(3) Wrongly decided that there was an 'absence of evidence' as to whether or not the Respondents had breached clause 18 of the Agreement.

33. It is convenient to consider grounds of appeal 2 and 3 together. The Appellant submits that the District Judge did not apply the correct legal test or burden of proof when concluding that there was an absence of evidence dealing with clause 14 and clause 18. The District Judge was asked for clarification in respect of her reasons in respect of clause 18, as the Respondents' evidence did not assert that they paid the relevant batch balance to the Appellant. The District Judge stated that there was a "consistent absence of information and evidence from both sides, I am being consistent in my view that there are gaps within here that need to be explored at a further trial and therefore, whilst I make no view as to the success or otherwise of the Appellants case, nonetheless, there is an absence of support in relation to either view".

34. It was argued that by using those words, the Judge was not finding that there was an arguable dispute. Had she applied the legal test properly, she could not have found that there was an arguable dispute in respect of clause 18 in circumstances where it was accepted by the Respondents that they had sold 52 cattle in late 2022.

35. In response, the Respondents submit that the Appellant appears to be conflating the reasons given in the District Judge's decision in respect of clause 14 with the decision in respect of clause 18. Further, the Respondents submit that reading the judgment as a whole, it cannot be said that the only conclusion the Judge made was that there was an absence of evidence and therefore she set aside the demands. It was argued that the Respondents had given evidence that the Appellant was informed of the sale and approved it which means that the Judge was entitled to conclude that there was a triable issue which needed to be resolved at trial.

36. In respect of clause 14 of the LFA, I accept that the Judge was correct in her conclusion that there was a triable issue. There was conflicting evidence about the state of the animals.

37. However, in respect of clause 18, in my judgment, the Judge was wrong in concluding that there was a triable issue. Firstly, I do not accept the submission of Ms Carter that the Respondents had provided evidence that the Appellant was informed of the sale and approved it. This was not the evidence of Mr Hugill. All he said was that 52 cattle were sold in December 2022 and that he "understood this was done with the approval" of the Appellant. He went on to say that the sale was agreed by ABP as there were slightly too many cattle on the farm and so they were sold as a matter of good farming practice. Mr Hugill stated that he had little contact with the Appellant and he "understood that ABP had informed [the Appellant] of the sale and Duncan Cawston in particular was aware and approved this sale". Mr Hugill did not set out why he had come to the understanding he had nor as to how he asserted that Duncan Cawston had approved the sale.

38. When specifically asked to clarify her reasoning in respect of clause 18, the District Judge said that she was not making any finding one way or another as to the prospects of success of the Respondents in respect of clause 18. I accept the argument of the Appellant that even taking her reasoning in the round across the two judgments, this statement by the Judge demonstrates that she misapplied the burden of proof in respect of this point. The District Judge should only have found a triable issue if plausible evidence was given by the Respondents. Mr Cawston specifically stated that he did not approve the sale and further, that no monies in respect of the sale of the 52 cattle had been paid to the Appellant.

39. I further reject the arguments raised on behalf of the Respondents that if the sale of the 52 cattle took place on an agreed basis outside the terms of the LFA, the Respondents cannot be in breach of clause 18. Nor do I accept the argument that it must be taken that the Appellant must have approved the sale (or that there was a triable issue in respect of that) because the size of the herd was not questioned when the livestock were collected. The LFA specifically required all sales to be pursuant to

that agreement. The mere fact that the size of herd was not questioned when it was collected does not suffice in my judgment to raise an arguable dispute on the evidence.

40. The Respondents knew under the agreement that ABP was not the Appellant's agent and was not authorised to make statements or representations for the Appellant. Further, the selling procedure required the Respondents to send the Appellant notification of sale of the livestock. There was no evidence that that had been done. In addition, no evidence was given by the Respondents that they had directed ABP to pay to the Appellant as was required by clause 18.8. In those circumstances, I accept that as the burden of proof is on the Respondents to show a triable issue, it was not possible on the evidence to conclude that the Respondents had a real prospect of demonstrating compliance with those requirements. In my judgment, the Respondents had not provided sufficient evidence of compliance with the requirements of clause 18. For those reasons, grounds 2 and 3 of the appeal are also allowed.

(4) Decided that the Court needed to see evidence of compliance or non-compliance with "all the formalities" of clause 18 of the Agreement, and that that in itself gave rise to a "genuine triable issue".

41. In respect of ground 4, the Appellant asserted that the District Judge was wrong in finding that she needed to see evidence of compliance or non-compliance with "all the formalities" in respect of clause 18 and the sale of the 52 cattle. It was submitted that as it is drafted, a breach of any part of clause 18 would amount to an event of default.

42. In response, the Respondents submitted that on a reading of the judgments as a whole, the District Judge was correct in deciding that the court would need to see evidence about how the sale of the livestock took place and all the details surrounding the sale when deciding the issue of compliance with clause 18 at trial.

43. In my judgment, the contract cannot reasonably be read as requiring compliance with all the subparagraphs of clause 18 before there can be an event of default. Further, for the reasons given in respect of grounds 2 and 3, the evidence presented by the

Respondents was not such as to establish that there was not a breach of clause 18 in any event.

Conclusion

44. For all the reasons given, the appeal is successful in respect of all four grounds of appeal.