Court of Appeal considers receiver's duties and whether 2nd claim is abuse of process

Ahmad & Zanrose Developments v Bank of Scotland PLC, PriceWaterhouse Coopers PLC and GVA Grimley Limited – A3/2014/41996

Article by David Bowden

The Court of Appeal has heard submissions and reserved judgment in this appeal. HHJ Purle QC sitting as a Judge of the High Court, Chancery division dismissed the application of the Ahmad family and their Zanrose businesses against their bank and receivers this bank had appointed under the Law of Property Act 1925 on 28 November 2014. The Ahmads had claimed the LPA receivers were not validly appointed and that they had failed to sell the various charged properties for their proper value. The Ahmads claimed the bank had agreed at a May 2008 meeting not to appoint receivers and to give it further time to refinance and/or sell charged properties. The Ahmads also claimed that an insurance claim following a fire at the Zanrose warehouse had been compromised at a mediation for too low a sum, The judge below held that the claim as a whole was hopeless and struck out the claim. The Ahmads appealed this ruling.

Amir, Shabnum, Atif & Rozina Ahmad, Zanrose Developments Limited & Zanrose Textiles Limited v Bank of Scotland PLC, PriceWaterHouse Coopers PLC and GVA Grimley Limited
A3/2014/4199 13 and 14 June 2016
Court of Appeal, Civil Division (Lewison & Gloster LJJ)

What are the facts?
In August 2001 Birmingham Midshires Building Society ('BMS') lent £2.4million to Zanrose Textiles Ltd ('Zanrose') so it could buy a warehouse in Perivale. The directors of Zanrose are 2 brothers (Amir and Atif Ahmad) and their wives. The directors provided a guarantee limited to £1.25milion. Bank of Scotland PLC ('the bank') subsequently acquired BMS. Zanrose was a flooring business.

In May 2005 there was a major fire at the warehouse. It was badly damaged and the stock was destroyed. The fire put the Zanrose business under severe financial pressure. Zanrose made an insurance claim for fire damage and business interruption. The insurer (NIG) rejected the claims alleging there was misrepresentation, non-disclosure and/or fraud. Zanrose brought proceedings in the Commercial Court to recover its insurance losses. Stephen Hofmeyer QC advised that the insurance claim had 50% prospects of success. Following a mediation in May 2009 the insurance claim was settled by NIG paying £1.55million.

The Ahmads owned 5 town houses in Bollo Bridge Road, Acton which were let to tenants. Another business (Zanrose Developments Ltd) owned a residential development plot at Cleveland Road, Ealing. The Zanrose businesses had borrowed substantial sums from the bank. The bank held fixed charges over all the properties and a floating charge over the Zanrose businesses. There was a cross-guarantee between the two Zanrose companies.

The Ahmads had a meeting on 7 May 2008 with Messrs Stacey and Dobson of the bank and their accountant (Mr Singh). Mr Ahmad set out his proposals for refinancing. The bank said it had lost patience and intended to appoint receivers. Mr Stacey then rang Mr Ahmad in mid May 2008 giving him until the end of June 2008 to raise sufficient funds by re-financing and/or by selling the Bollo Bridge houses. This does not happen. In this article this is referred to as the 'May 2008 agreement'.

The charges gave the bank a right to appoint receivers in the event of default. By September 2008, the bank was owed £5.2million and it served formal demands on Zanrose and the Ahmads as guarantors. PriceWaterHouse Coopers PLC ('PWC') was initially appointed by the bank as receiver. Following the acquisition of the bank by Lloyds TSB, GVA Grimley Ltd ('Grimleys') became the bank's receiver instead in January 2009. The receivers valued the properties and sought to market them. Grimleys' valuations were confirmed by Edward Symmons.

The warehouse was sold for £1.051million, the Bollo Bridge Road houses for a total of £1.928million and the Cleveland Road site for £612k. After these recoveries, this left a debt due to the bank of £907,994.11. The bank issued a claim in the Leeds District Registry in April 2012 to recover its losses.

What happened when the case came before District Judge Jordan?
In May 2007 the Ahmads put in a defence and counterclaim alleging that both the warehouse and the Cleveland Road site had been sold at an undervalue and that the bank's actions had destroyed the value of the Zanrose businesses. On 4 September 2012 DJ Jordan granted summary judgement for the bank on the basis the defence had no real prospect of succeeding and he also struck out the counterclaim. Judgement was entered for the bank against the Ahmads for £917,583.33.

What is the connection in this case with Rodney Gardner of Miller Gardner, Solicitors?
The Ahmads then instructed Miller Gardner to act for them. Rodney Gardner made an application on the Ahmads' behalf to appeal and to adduce fresh evidence on the appeal. An elaborately pleaded draft defence and counterclaim was produced which made wide ranging allegations that the bank had been in breach of its fiduciary duties.

What grounds did the Ahmads advance for appealing DJ Jordan's ruling?
The grounds of appeal were that the bank should have given the Ahmads more time and/or a reasonable opportunity to sell all the properties and that the bank was in breach of the May 2008 agreement on this. It was maintained that all properties had been sold at an undervalue. The Ahmads alleged that they could have sold the Bollo Bridge houses for more and this would have allowed Zanrose to continue to trade. Finally the Ahmads alleged the NIG insurance claim was settled for an under-value.

What happened when the case came before Judge Kaye?
The matter came before HHJ Kaye QC in the High Court at Leeds on 10/11 April 2013. (Judge Kaye had ordered on 20 December 2012 that the permission to appeal application be 'rolled up' with the hearing of the appeal and the application to amend). By a written reserved judgment (unreported) dated 24 June 2013 the Ahmad's appeal was dismissed. Judge Kaye ruled that:

> '*I conclude therefore that no part of the proposed new pleading demonstrates any real prospects of success and I refuse permission to amend*.'

What grounds did the Ahmads advance for appealing Judge Kaye's ruling?
The Ahmads then sought permission for a 2nd appeal to the Court of Appeal. At that time, whilst the Ahmads advanced all 5 of these grounds of appeal, their main focus was on the last point. The grounds were:

- The Ahmads have substantial cross-claims against the bank which they should be able to set off against the bank's claim against them,
- The definition of 'surety' in the bank's documentation is not wide enough to cover a cross-guarantee,
- The Ahmads had insufficient advice before executing the various personal guarantees,
- The scale of the guarantors' liabilities was outside the purview of the guarantee, and
- The guarantee constituted financial accommodation to the guarantors, was within the ambit of the Consumer Credit Act 1974 ('CCA') and as it was not documented on a prescribed form was unenforceable.

What happened when this case came before the Court of Appeal the first time?
Miller Gardner then ceased to act for the Ahmads who instead were represented by Mr Michael Hartman of 1 Essex Court who was instructed under the Bar's direct access scheme. Lord Justice Floyd refused permission to appeal on the papers on 6 September 2013 noting that '*there was nothing to suggest the early appointment of receivers had resulted in the Bollo Bridge properties sale at an undervalue'*.

What ruling did Lady Justice Arden give?
At an oral hearing, Lady Justice Arden refused permission to appeal on all grounds on 4 December 2013. Her judgement is reported here: **[2013] EWCA Civ 1814**. She dismissed all the Ahmads' points about construction and purview of their guarantees. Arden LJ gave detailed analysis as to why a guarantee was not the provision of financial accommodation and hence was not CCA regulated. She endorses the view of Briggs J in *McGuinness v Norwich & Peterborough Building Society* **[2011] 1 WLR 613** on this.

Although not in her *ex tempore* judgment, in an exchange at the hearing with Mr Hartman, Arden LJ said that whilst a cross-claim could not be used as a set-off under the guarantees that would not of itself prevent the Ahmads issuing separate proceedings. As all appeal avenues were exhausted, on 13 December 2013 the bank served statutory demands on all guarantors making demand for payment of the judgment sum.

What was claimed in the second court claim?
In January 2014 the Ahmads issue their claim in the High Court against the bank and its LPA receivers. This claimed that the bank was in breach of the May 2008 agreement by appointing LPA

receivers too hastily and/or that this meeting produced a binding variation to the guarantees. It claimed all properties were sold at an undervalue. It alleged that both sets of LPA receivers were appointed in breach of the May 2008 agreement. As against PWC as LPA receiver it was alleged it acted negligently and in breach of its duty of care in failing to obtain the best price reasonably obtainable in settling the NIG insurance claim.

How did the Bank and the LPA receivers respond to this 2nd claim?
All defendants applied to strike out this 2nd claim and for summary judgment in the alternative.

What happened when the case came before Judge Purle QC?
The strike out applications were heard over 3 days between 25 and 27 November 2014. By a written judgement dated 28 November 2014 the defendants' applications were granted. The judgment is reported here: **[2014] EWHC 4611 (Ch).**

Judge Purle said the May 2008 meeting the Ahmads had with the bank and subsequent telephone conversations added nothing to the written agreement which was clear. The bank clearly had rights regarding the other charged assets. The bank by simply suspending its right to intervene until June 2008 did not prevent it from intervening in suitable circumstances afterwards. The absence of a term that a bank would hold back its hand after June 2008 (and of a reference to the other charged properties), would be expected to have provoked comment from the Ahmads if something else had in fact been agreed but it had not. It was not seriously arguable that the Ahmads had done anything other than enter the terms of a standard written agreement with the bank, or that this agreement extended to the other loans.

It was inherently implausible that a bank would agree to forfeit the ability to appoint a receiver on demand, especially where the charged assets were incapable of discharging the full debt. By the relevant time, everyone had known that the Ahmads and the Zanrose companies were in trouble and that the funding arrangement had come to an end. The bank had been pressing for the sale of properties and repayment of the guarantee liabilities. Due to non-payment, the bank had been entitled to intervene sooner rather than later. HHJ Purle QC concluded:

> '*The claims against both sets of Receivers, in all their forms must fail. It follows from these observations that the claim as a whole is hopeless. The claim will therefore be struck out and the action dismissed against all the defendants.*'

What grounds did the Ahmads advance for appealing Judge Purle's ruling?
In a lengthy skeleton argument of 34 pages, these 6 grounds of appeal were advanced:

- The May 2008 agreement varied the terms granting the bank's power to appoint receivers.
- There is *res judicata* or cause of action estoppel. HHJ Kaye QC merely gave an interlocutory ruling and there has been no determination on the evidence.
- The LPA receivers sold the Bollo Bridge houses for values less than the Ahmads could have achieved.
- The NIG insurance claim was settled for too little.
- The LPA receivers were not validly appointed and, if so, their actions amounted to trespass.
- There was interference with contractual relations and/or the tort of causing injury by unlawful means.

On what basis did Lord Justice Briggs grant permission for a '2nd time around' appeal?
Surprisingly Lord Justice Briggs granted permission to appeal on all grounds on the papers on 19 May 2015. Although HHJ Kaye's judgment was in his bundle for permission to appeal it is not clear what other papers relating to the bank's action and whether the rulings and judgments made by DJ Jordan, Floyd LJ and Arden LJ were there. Briggs LJ granted permission stating:

- The difference in view between HHJ Kay QC and HHJ Purle QC about whether the May 2008 agreement included a right to defer appointing receivers beyond 2008 means the Ahmads have '*more than a fanciful prospect of success',*
- There is a real prospect of challenging Judge Purle's conclusion that the settlement of the NIG claim was a '*good deal*', and
- Real prospect of success that the decision of Judge Kaye did not create an issue estoppel as to whether the sale of the Bollo Bridge Road houses were at an undervalue.

What were the issues the Court of Appeal was asked to address?
Briggs LJ rather oddly concluded that '*no useful purpose would be achieved by refusing permission on specific grounds'*. As open ended permission was granted and the issues were not delineated in any way, this has meant the appeal has taken up more judicial time than it deserved. The Court of Appeal has had to consider argument from all parties on all 6 of the Ahmads' grounds of appeal.

What does the respondent bank say?
It had prepared and served a skeleton argument. It was represented at the appeal hearing by the junior counsel, Mr James Barker, who appeared below before Judge Purle. No respondent to this appeal sought to cross appeal or put in respondent's notice. The bank submits:

- The Ahmads' draft amended Particulars of Claim do not disclose reasonable grounds for bringing any claim against the bank,
- The personal claims of the Ahmads are the subject of a cause of action estoppel and constitute an abuse of process in this 2nd action, and
- Judge Purle was correct to conclude that none of the claims made against the bank stood any real prospect of succeeding at trial and it was therefore appropriate to grant summary judgment.

What do the LPA receivers say?
PriceWaterHouse Coopers PLC and GVA Grimleys were separately represented. In addition to the corporate LPA receivers, 2 individuals within each firm were parties to the action. Both LPA receivers had prepared and served a skeleton argument. They were represented at the appeal hearing by the junior counsel, Mr Fionn Pilbrow and Mr Simon Wilton respectively, who appeared below before Judge Purle.

PWC says the Ahmads' case against it boils down to these points:

- The appointment of LPA receivers by the bank was invalid,
- Even if valid, appointing LPA receivers represented a breach of the May 2008 agreement (at which PWC was not present) and PWC had knowledge of this wrongfulness which amounted to a breach of its equitable duty of good faith, and
- PWC breached its equitable duty to obtain the best price reasonably obtainable at the time of sale.

PWC submits that failure by the Ahmads to establish these 3 points means that their claims against it are hopeless. Grimleys make many of the same points but as they were not appointed until January 2009 deny any responsibility for anything that happened prior to this.

Are there any prior authorities of any relevance?
Not surprisingly considering the way the case has been handled by the Ahmads and their advisers below, a bloated authorities bundle was produced for the hearing. Although (unless advocates certify otherwise) the Court of Appeal expects no more than 10 authorities this bundle contained 28 cases, 1 Australian one and extracts from 3 textbooks (including Lewison LJ's own on the interpretation of contracts). These authorities are however highly relevant:

> *Arnold v National Westminster Bank* **[1991] 2 AC 93**
> Although issue estoppel constituted a complete bar to re-litigation between the same parties of a decided point, its operation could be prevented in special circumstances. Where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not by reasonable diligence have been brought forward in those proceedings, it gave rise to an exception to issue estoppel (whether or not that point had been specifically raised and decided). Such further material was not confined to matters of fact. Justice required that the party who suffered from the mistake should not be prevented from reopening that issue when it arose in later proceedings.
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> *Laing v Taylor Walton* **[2008] PNLR 11**
> It would bring the administration of justice into disrepute if a claimant were to be permitted in 2nd proceedings to advance exactly the same case as was tried and rejected by a trial judge in a 1st set. In order to succeed in a new claim, a claimant had to demonstrate not only that the judge's decision was wrong but that it was wrong because it wrongly assessed the very matters that were relied upon in support of the new claim.

Ludsin Overseas Ltd v Maggs **[2014] EWHC 3566 (Ch)**
The best indication of the value of an asset at any particular time was what someone would pay for it after reasonable attempts had been made to sell it. Evidence to the effect that nobody had been prepared to offer even £2 million for a property after 6 months' marketing by a reputable agent was more persuasive than expert evidence (obtained before marketing had begun) which then valued the property at £3.35 million.

Selven Properties v Royal Bank of Scotland **[2003] EWCA Civ 1409, [2004] 1 WLR 997, [2004] 4 All ER 484**
A receiver owed an equitable duty to the mortgagee and to all other parties interested in the equity of redemption. Neither a mortgagee nor a receiver was required to incur expense in the improvement of security in order to sell it at a higher price and there was a freedom to investigate how such potential could be realised without any corresponding obligation to pursue those enquiries. A receiver carried wider management duties than a mortgagee and had no right to remain passive if such conduct would be damaging to either the mortgagee or the mortgagor. A receiver was under no liability to a mortgagor other than to take reasonable steps to obtain a proper price for the property at the relevant time and not to act in bad faith. The fact that the receivers were agents of the mortgagor did not affect their fiduciary duty to other parties.

OBG v Allan **[2008] 1 AC 1**
Receivers were appointed under a floating charge which was later admitted to have been an invalid appointment. Acting in good faith, the receivers took control of the company's assets. There were claims for trespass to its land, conversion of its chattels and the tort of unlawful interference with its contractual relations. The tort protects from interference legal interests beyond the merely contractual but it requires both unlawful means and an intention to cause loss.

What interventions did the judges make? What points seem to be troubling them?
Gloster LJ was irritated by addition of the unlawful interference with land claim. She questioned why the Ahmads needed it when the LPA receivers' transactions could simply be adopted. Gloster LJ interrupted the Ahmads' counsel on a number of occasions to remind him that the Court of Appeal was only interested in points of principle. Lewison LJ queried from the outset how the Ahmads could get round the issue estoppel point noting that Judge Purle had regard to what happened before Judge Kaye. There were some probing interventions on the scope of receiver's duties.

Rather surprisingly during his reply counsel for the Ahmads conceded that the meaning of the May 2008 agreement was suitable for determination by the court on this appeal even though Lewison LJ probed to check to ensure that was what he wanted to do.

What will happen next?
However complex the Ahmads' counsel tried to make it, at the hearing the essential argument was that the Ahmads had been denied a trial on the merits and had not been able to test the evidence by cross-examining the witnesses for the bank and the LPA receivers. This was a hollow argument because if that is what the Ahmads wanted to do, they should have presented their defence and counterclaim properly originally and sought to resist the summary judgment application before DJ Jordan on proper grounds.

As it is, the actions of the Ahmads have sought to increase their liability for costs (including not only their own but those of the bank and the 2 LPA receivers) substantially. As statutory demands have previously been served by the bank on the Ahmads as guarantors, no doubt bankruptcy petitions will follow after the appeal judgment is handed down. Whether the Ahmads seek to try and re-run all these points again for a 3rd time in insolvency proceedings remains to be seen.

When will a written judgement appear?
It was surprising that the court did not announce the appeal would be dismissed at the end of the hearing and disappointing that it allowed the case to drift into a second day. Judgement will now be handed down at 10.30am on Friday 24 June 2016. In view of the short period that has elapsed from the hearing and that no magic bullets were fired at the hearing, the only result can surely be that the appeal is dismissed.

21st June 2016