

ENGLAND AND WALES / JUDGMENT

Premier Motor Auctions Ltd, Re

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Neutral Citation Number: [2015] EWHC 3568 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION LEEDS DISTRICT REGISTRY IN THE MATTER OF PREMIER MOTOR AUCTIONS LEEDS LIMITED AND IN THE MATTER OF PREMIER MOTOR AUCTIONS LIMITED (both in liquidation)
Case No: 1074 of 2015 The Court House Oxford Row Leeds LS1 3BG Date: 11 December 2015
Before : His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

- ----- Application by : MARTIN JOHN ATKINS and FREDDY KHALASTCHI
(Joint Liquidators of the above Companies) Applicants
- -----
- ----- Simon Passfield (instructed by Temple Bright LLP) for the
Applicants Hearing date: 3 December 2015
- -----

Judgment

Judge Behrens : 1 Background On 22 December 2008 Premier Motor Auctions Limited (“PMA”) and Premier Motor Auctions Leeds Limited (“PMAL”) were placed into Administration. The Administrators were employees of or partners in PricewaterhouseCoopers LLP (“PWC”) On 18 June 2010 a compulsory winding up order was made against each company. With effect from 20 March 2014 the Applicants were appointed as the liquidators of each company. I shall refer to them as the Liquidators. On 25 July 2014 PMA and PMAL and two other parties issued proceedings (“the Proceedings”) against PWC, Lloyds Bank plc (“Lloyds”) and two other parties. On 17 June 2015 the claim form was amended so that the two additional Claimants and the two additional Defendants were removed. The relief claimed against PWC and Lloyds included claims for damages for fraudulent misrepresentation, conspiracy breach of duties of confidence and causing injury by unlawful means. A 54 page Particulars of Claim was served on 19 June 2015. It is not necessary to summarise the allegations. It is however to be noted that it is alleged that by reason of the conspiracies and other breaches by PWC and Lloyds PMA and PMAL have suffered loss by way of the destruction of their enterprise value. The losses estimated in paragraph 82 of the Particulars of Claim exceed £44 million. Both PWC and Lloyds filed detailed defences on 25 September 2015. Without going into details all of the allegations of breach of duty are denied. In paragraph 3 of its defence Lloyds asserts that the claim is without any proper foundation and entirely without merit. 2 This application The principal relief is for: On 25 November 2015 the Liquidators issued this application seeking 5 heads of relief. “if and insofar as rule 4.218 of the

rules is applicable, then pursuant to rule 4.218E(2)(a) the litigation expenses in [the Proceedings] are approved and authorised by the Court” The other heads of relief are ancillary to this. In summary the Liquidators seek orders that the matter be listed in such a way that it does not disclose the identity of the parties, that it be heard in private, that the application need not be served on Lloyds, that Lloyds should not be entitled to be heard on the application and that the order need not be served on Lloyds until after the final determination of the Proceedings. The application and the evidence in support have not been served and Lloyds accordingly took no part in the hearing. Finally the Liquidators seek an order that they be given 14 days notice of any application to inspect the Application or the evidence in support. 3 Evidence The application is supported by a witness statement from Mr Khalastchi. In paragraphs 1 to 6 he summarises the history of the insolvency, the administration and the appointment of the Liquidators. In paragraphs 7 to 9 he sets out the financial position of PMA and PMAL. Realisations totalling £9 million have been paid to the secured creditor – Lloyds. There is still between £4 million and £5 million owed to Lloyds. The only other asset in the liquidations will be any recovery made as a result of the Proceedings. In paragraphs 11 to 14 he gives a brief history of the Proceedings. In paragraph 15 he points out that on 11 November 1996 PMA and PMAL each created debentures giving Lloyds fixed and floating charges over the undertaking and all the assets of each company. Paragraphs 16 to 34 contain a summary of the relevant rules and comments on their applicability. I shall refer to them below. Paragraphs 35 to 39 deal with the funding of the Proceedings. In summary both solicitors and Counsel have entered into Conditional Fee Agreements (“CFA”). Mr Khalastchi has arranged ATE insurance which is anticipated to be sufficient to meet any adverse costs order. He has arranged third party funding for payment of non deferred ATE premiums, a portion of Counsel’s fees, expert witness fees and other disbursements. In paragraphs 41 to 47 he gives some details of the estimated costs of the proceedings. These are estimated to be approximately £3 million excluding any success fee, ATE insurance premium and VAT. In support of these figures he has exhibited a draft costs budget which is unsigned and which has not been disclosed to Lloyds. He points out that it is privileged. In paragraph 50 he gives his reasons why Lloyds should not be served or entitled to be heard on the hearing of the application: a. Information and documentation in the Application and witness statement is confidential and potentially privileged

- b. The bank cannot possibly express an impartial view and could use this as a self serving means of frustrating the Proceedings
- c. Due to the conditional nature of the costs and expenses incurred and the lack of sufficient other assets available, this issue only arises in circumstances where the Proceedings have been successful against Lloyds In paragraph 52 he submits that: Due to the confidential nature of disclosures made in this witness statement ... it would be inappropriate for the information contained in the witness statement to be in the public domain. 16 He accordingly asks for the application to be heard in private. He also asks (in paragraph 53) that any order made pursuant to this Application should not be served upon Lloyds until after the final determination of the Proceedings. 4 The Law In *Re Leyland DAF Ltd*, *Buchler v Talbot* [2004] UKHL 9; [2004] 2 A. C. 298; [2004] B. C. C. 214, the House of Lords held that a

liquidator was not entitled to claim his expenses in priority to the rights of the holder of a floating charge, and that it was immaterial whether or not the charge had crystallised before the commencement of the liquidation. This ruling overruled the decision in *Re Barleycorn Enterprises Ltd* [1970] Ch. 465, which had stood for many years. The effect of this decision was partially reversed by the provisions of s 176ZA of the Insolvency Act 1986 (which was inserted by s 1282 of the Companies Act 1986). The relevant parts of that section provide: 176ZA Payment of expenses of winding up (England and Wales) 176ZA(1) The expenses of winding up in England and Wales, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over any claims to property comprised in or subject to any floating charge created by the company and shall be paid out of any such property accordingly. 176ZA(2) In subsection (1)–

- (a) the reference to assets of the company available for payment of general creditors does not include any amount made available under section 176A(2)(a); (b) the reference to claims to property comprised in or subject to a floating charge is to the claims of–
- (i) the holders of debentures secured by, or holders of, the floating charge, and (ii) any preferential creditors entitled to be paid out of that property in priority to them. 176ZA(3) Provision may be made by rules restricting the application of subsection (1), in such circumstances as may be prescribed, to expenses authorised or approved–
- (a) by the holders of debentures secured by, or holders of, the floating charge and by any preferential creditors entitled to be paid in priority to them, or
- (b) by the court. 176ZA(4) References in this section to the expenses of the winding up are to all expenses properly incurred in the winding up, including the remuneration of the liquidator. Thus, whilst ss (1) reverses the decision of the House of Lords, that reversal may be modified or restricted in accordance with ss (3) and the rules made thereunder. The relevant rules are Rules 4.218A – E of the Insolvency Rules 1986. R 4218A(1) contains definitions of approval and authorisation, the creditor, legal proceedings and litigation expenses:
- (a) “approval” and “authorisation” respectively mean:
 - (i) where yet to be incurred, the approval, and (ii) where already incurred, the authorisation, of expenses specified in section 176ZA(3);
- (b) “the creditor” means—
 - (i) a preferential creditor of the company, or (ii) a holder of a debenture secured by, or a holder of, a floating charge created by the company;
- (c) “legal proceedings” means—

- (i) ... (ii) legal actions and proceedings, arbitration or any other dispute resolution procedures which a liquidator has power to bring or defend in the name of the company, and (iii) negotiations intended to lead or leading to a settlement or compromise of any action, proceeding or procedure to which subparagraphs (i) or (ii) relate;
- (d) “litigation expenses” means expenses of a liquidation which—
 - (i) are properly chargeable or incurred in the preparation or conduct of any legal proceedings, and (ii) as expenses in the liquidation, exceed, or in the opinion of the liquidator are likely to exceed (and only in so far as they exceed or are likely to exceed), in the aggregate £5000. Rule 4.218A(2) makes it clear that Litigation expenses shall not have the priority provided by section 176ZA over any claims to property comprised in or subject to a floating charge created by the company and shall not be paid out of any such property unless and until approved or authorised in accordance with rules 4.218B to 4.218E. It is not in dispute that Lloyds is a creditor within the meaning of r 4.218A(1)(b). Rule 4.218B(1) provides 24 Subject to Rules 4.218C to 4.218E, paragraphs (2) and (3) or (4) apply where, in the course of winding up a company, the liquidator—
 - (a) ascertains that property is comprised in or subject to a floating charge;
 - (b) has himself instituted or proposes to institute or continue legal proceedings or is in the process of defending or proposes to defend any legal proceeding brought or likely to be brought against the company; and
 - (c) prior to or at any stage in those proceedings, is of the opinion that—
 - (i) the assets of the company available for payment of general creditors are or will be insufficient to pay litigation expenses; and (ii) in order to pay litigation expenses he will have to have recourse to property comprised in or subject to a floating charge created by the company. In paragraph 26 and 27 of his witness statement Mr Khalastchi expresses the opinion that the Liquidators will have to have recourse to any recoveries made in the Proceedings in order to meet the litigation expenses. In paragraph 27 he makes the point that the Recoveries will be or will potentially amount to property comprised in or subject to the Debentures. Rules 4.218B(2) to 4.218D set out the primary method which the liquidator should adopt in a case where they have issued proceedings and have formed the view that he will have to have recourse to the recoveries in order to meet the litigation expenses. In summary:
 1. He must first identify the creditor or creditors with a claim to property subject to the floating charge [r 4.218B(2)]. In this case there is only one creditor - Lloyds.
 2. He must seek from that creditor approval or authorisation for such sum as he thinks fit [r 4.218B(3)]. There is provision for the liquidator to make further requests [r 4.218B(5)].

3. The request must contain the information specified in r 4.218C. The information includes a statement of the brief nature of the proceedings and the grounds upon which the liquidator relies. It also notifies the creditor of a 28 day time limit to reply and must specify the amount of litigation expenses for which approval is sought. There is provision which enables the creditor to seek reasonable further particulars of the information supplied. 4. It is to be noted that under r 4.218C(2) express provision is made in respect of information, the disclosure of which would be seriously prejudicial to the winding up of the Company: Where anything in paragraph (1) requires the inclusion of any information, the disclosure of which could be seriously prejudicial to the winding up of the company, the liquidator may–
- (a) exclude such information from any of the above, provided that it is accompanied by a statement to that effect; or
 - (b) include it on terms–
 - (i) that bind the creditor to keep the information confidential, and (ii) that include an undertaking on the part of the liquidator to apply to the court for an order that so much of the information as may be kept in the files of the court, not be open to public inspection.
5. Rule 4.218D deals with situations where the Liquidator fails to supply the specified information or where approval or authorisation is taken to have been granted. In this case the Liquidators have chosen not to adopt this primary method. They have not made a written request to Lloyds under r 4.218B. Instead they have adopted the procedure under r 4.218E which provides: 4.218E Litigation expenses and property subject to a floating charge—application to court by the liquidator 4.218E(1) In the circumstances specified below the court may, upon the application of the liquidator, approve or authorise such amount of litigation expenses as it thinks just. 4.218E(2) Save as provided by paragraph (3), application to the court by a liquidator for an order approving or authorising an amount for litigation expenses may only be made where–
- (a) the specified creditor (or, if more than one, any one of them) is or is intended to be a defendant in the legal proceedings in respect of which the litigation expenses have been or are to be incurred; or
 - (b) the specified creditor has been requested to approve or authorise the amount specified under Rule 4.218C(1)(c) and has, in any case–
 - (i) declined to approve or authorise, as the case may be, the specified amount; or (ii) has approved or authorised an amount which is less than the specified amount and which lesser amount the liquidator considers insufficient, or (iii) made such application for further particulars or other response to the liquidator's request as is, in the liquidator's opinion, unreasonable. 4.218E(3) Where the liquidator is of the view that circumstances are such that he requires urgent approval or authorisation of litigation expenses, he may apply to the court for approval or authorisation either–

- (a) without seeking approval or authorisation from the specified creditor; or
- (b) if sought, prior to the expiry of the specified time limit. 4.218E(4) The court may grant such application for approval or authorisation–
 - (a) provided that the liquidator satisfies it of the urgency of the case, and
 - (b) subject to such terms and conditions as it thinks just. 4.218E(5) The liquidator shall, at the same time as making any application to the court under this rule, send copies of it to the specified creditor or creditors, unless the court orders otherwise. 4.218E(6) The specified creditor (including any one or all of them where there are two or more such creditors) is entitled to be heard on any such application unless the court orders otherwise. 4.218E(7) The court may grant approval or authorisation subject to such terms and conditions as it may think just, including terms and conditions relating to the amount or nature of the litigation expenses and as to any obligation to make further applications to the court under this Rule. 4.218E(8) The costs of the liquidator's application under this Rule, including the costs of any specified creditor appearing or represented on it, shall be an expense of the liquidation unless the court orders otherwise. 5 Discussion In paragraph 33 of his witness statement Mr Khalastchi expresses the opinion that there must be some doubt as whether the rules cover this situation where all litigation expenses are incurred on a conditional basis and will only be paid in the event that the Proceedings are successful. This point is repeated in paragraph 21 of Mr Passfield's skeleton argument: ... the present application only becomes relevant if and to the extent that: (i) the Claim is successful, in that Lloyds and/or PWC are ordered to pay a sum of money to the Companies; (ii) Lloyds successfully establishes that those monies are caught by the Debentures; (iii) the litigation expenses exceed the sum paid to the Liquidators by Lloyds and/or PWC in respect of the Companies' costs; and (iv) the assets available for the general body of creditors (i.e. any sum recovered from Lloyds and/ or PWC in excess of the sum secured by the Debentures) are insufficient to meet any unpaid litigation expenses. I agree with this analysis. To my mind this gives rise to a question of construction as to whether the condition specified in rule 4.218B(1)(c) is satisfied. Can it be said that the Liquidators will have to have recourse to property comprised in or subject to Lloyds' floating charge in order to pay litigation expenses? If the answer to that question is no, the further question arises as to whether the court has any jurisdiction under r 4.218E(2) (a) at all. This is because the specified creditor is only identified under r 4.218B(2) after the date when the Liquidator forms the opinion in r 4.218B(1)(c). I am being asked to resolve these questions on a without notice basis without any assistance from the specified creditor – Lloyds. Lloyds, of course, have a serious financial interest in the outcome of this application. If the application is successful it will give priority to the Liquidators in respect of up to £3 million of legal expenses over Lloyds' rights under its floating charge. In those circumstances it is necessary to consider whether it is appropriate to deal with this application in their absence. Service on Lloyds 31 Although there is power under r 4.218E(5) and (6) to dispense with service on and the attendance of the specified creditor the default position is that the specified creditor should be served and entitled to be heard. It follows

that it is for the Liquidator to justify the court exercising its discretion under these sub rules. The principle that both sides are entitled to be heard is an important and fundamental principle of English law. It is in accordance with Article 6 ECHR which provides: "In the determination of his civil rights and obligation ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest The principle was expressed in this way in paragraph 13 of Lord Hoffmann's speech in *National Commercial Bank Jamaica v Olint* [2009] 1 WLR 1405: First, there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none. It seems to me that the Court should have these principles in mind when exercising its discretion under sub rules (5) and (6). I have summarised the whole of the evidence in this case and set out the 3 grounds upon which it is said that the discretion should be exercised in this case. In my view those grounds do not come within a measurable distance of justifying excluding Lloyds from participating in this application. It is by no means clear that any of the evidence is confidential or privileged. Plainly Lloyds will have full knowledge of the realisations from the administration and the allegations in the pleadings. The Liquidators are obliged to inform Lloyds of the existence of a conditional fee agreement. I accept that the draft costs schedule is at the moment privileged. I am told that the claim form in the Proceedings will be amended so that the value of the claim will be stated to exceed £10 million. This means that the requirement for the parties to file and exchange budgets before the first CMC does not apply (CPR 3.12(1)), although the court retains the discretion to order the parties to exchange and file costs budgets at a later date. However, it is by no means clear that this application should be based on a draft unsigned costs schedule. In any event there is no reason why confidential information should not be dealt with in a manner similar to that envisaged in r 4.218C(2). The fact that Lloyds may not be impartial is not a reason for exclusion from the hearing. Indeed it is a feature of almost all of the litigation that comes before the courts that the parties are not impartial. It is not made clear how Lloyds could use the application to frustrate the proceedings. The conditional nature of the costs and expenses incurred is relevant to the jurisdiction of the court to make an order under r 4.218E. It is not, in my view, relevant to the question of whether Lloyds are entitled to be heard. This is not a case

where Lloyds could take steps to defeat the purpose of the order. It is not made clear what steps Lloyds could or might take. For all these reasons I have come to the clear conclusion that the default position should apply and Lloyds should have been sent copies of the application and is entitled to be heard. I shall accordingly either dismiss the application or adjourn it to enable it and the evidence in support to be served on Lloyds. Publicity CPR 39 provides

- (1) The general rule is that a hearing is to be in public.
- (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
- (3) A hearing, or any part of it, may be in private if—
 - (a) ...;
 - (b) ...
 - (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
 - (d) ...
 - (e) ...
 - (f) ... or
 - (g) the court considers this to be necessary, in the interests of justice. The notes in the 2015 White Book contain guidance which includes: Hearings in private under r.39.2(3) are derogations from the principle of open justice and must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means. When such orders are made they must be limited in scope to what is required in the particular circumstances of the case (*G v Wikimedia Foundation Inc*

[2009] EWHC 3148 (QB), December 2, 2009, unrep. (Tugendhat J.).

[2012] 1 W. L. R. 1003

[2014] EWHC 3432 (Ch.) Morgan J, referring to Practice Guidance: Interim Non- In V v T (para. B13-001 below) noted that derogations from the Disclosure Orders fundamental principle of open justice can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice. The extent of any derogation should be no more than is strictly necessary to achieve the desired purpose. The Judge distilled the following general propositions from the authorities: (1) there are two dimensions to open justice. The first is that the public are entitled to attend court proceedings to see what is going on. The second dimension is the right of the media to report court proceedings to the public (2) the hearing of cases in open court deters

inappropriate behaviour by the court. It maintains public confidence in the administration of justice (3) court hearings taking place in public enable information to become available to the public in a democracy (4) the fact that a hearing in open court may be painful, humiliating and a deterrent either to a party or to a witness is not normally a proper basis for departing the open justice principle. The judge declined to hear an application for the variation of trusts concerning unborn and minor beneficiaries in private, being satisfied that their interests would be sufficiently protected by the imposition of reporting restrictions, anonymising the judgment and by making orders under CPR rr.5.4C and 5.4D ensuring that non parties would require permission to obtain certain court documents. I am not satisfied that there is any real confidentiality in relation to any of the material before the court with the possible exception of the draft costs schedule. I am certainly not satisfied that the circumstances of this case are sufficiently exceptional to justify derogation from the open justice principle. I accordingly reject the applications for privacy.

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Prepared on 24 October 2026 · Esheria