# Lexis®Nexis Case Summaries

## Galer v Mond (administrator of SFPL Ltd) and another

[2021] EWHC 1952 (Ch), [2021] All ER (D) 110 (Jan)

Company – Administrator. The applicant, the company's sole director and sole shareholder, failed in his application for an order declaring invalid the appointment of an administrator of that company. The Administrative Court held, among other things, that on the evidence, any allegation that the administrator's appointment would not be in accordance with the statutory purposes of administration, or that there would be any risk of a lack of independence, ought to be and was rejected out of hand.

**Catchwords**

*Company – Administrator – Validity of appointment*

**Background**

SFPL Ltd (the company) was incorporated in August of 2016 as a vehicle for the acquisition and development of a property in London (the property). The applicant was the company's sole director and sole shareholder. The plan was that the applicant would be the active participant, but that there would be a group of individuals, resident in Israel, who would invest into the venture. By January 2017, the investors were in place, and it had been agreed that an Israeli lawyer (O) should act as their representative in their dealings in relation to the project.

In March, a number of relevant agreements were entered into. First, a facility agreement, under which O had agreed to loan the company the total sum of £1.2m, divided as to a specified part, £890,000 for the purchase price of the property and the remainder, £310,000, to cover its development costs, with a provision for payment of interest at 20% which was, undoubtedly, high and which was said, by the applicant, to be explained as being really a disguised profit. On the same day, a debenture was entered into whereby a fixed and also a floating charge was given by the company to secure the liabilities under the facility agreement. The property was purchased two days later, and the development proceeded.

Although the loan relating to the purchase price was provided the remainder relating to the development costs were not fully provided, despite requests by him. Accordingly, he approached a bridging loan company (Tempus) which agreed to advance monies to the company to complete the building works on the basis that it would obtain a first charge over the property, which had to be agreed to and was. However, the property still was not completed because of a number of problems. Eventually, Tempus was not prepared to advance further monies to enable the works to be completed. It was at that time, in February 2020, that the second respondent, Brighter Enterprises Ltd (BEL) was incorporated, with F, as its sole director, and his wife as its sole shareholder. It was also around that time that Tempus appointed a receiver under its security, and in April 2020, it completed a sale of the property to BEL for £1.2m.

On sale, Tempus was paid out the amount apparently due to it, with the balance of some £403,000 of the net proceeds being paid to O. On 7 April 2020, a deed of assignment took place, and involved an assignment under cl 2 of all of the assignor's rights, title, interest and benefits in and to the debt, and the facility agreement, and the security. It was intended to operate as an absolute legal assignment. Notice of that assignment was duly given on 16 April to the applicant.

On 25 September, a Part 8 claim form was issued by solicitors acting on behalf of O, seeking the transfer of the shareholding from the applicant to O on the basis of the terms of the facility agreement, without making any reference to the relevance or the impact of the assignment of the facility agreement. The applicant put in evidence in response, making the point that if the notice of assignment was right, and by that time he had not seen the deed of assignment itself, O would appear to have had no right to make that claim.

No further steps had been taken in relation to that litigation but, on 15 December, a letter of demand was written to the company by solicitors instructed by BEL, and on 17 December, a notice of appointment, appointing M as administrator of the company was produced and filed. It was in the prescribed form, and contained a statutory declaration, signed by G. He recorded that he was resident in Israel and that the declaration had been made before R, a solicitor in Manchester who had also been in Israel at that time, who was a solicitor with the same firm who had acted for O in the Pt 8 litigation.

The applicant applied for an order declaring invalid M's appointment as administrator of the company.

**Issues and decisions**

(1) Whether the notice of appointment was invalid because the declaration purported to have been witnessed by R.

The applicant argued that it was not open to an English qualified solicitor to witness the declaration, there being no evidence that R had any qualification in Israel as a lawyer, to witness an oath in Israel. The argument in that respect focussed on the impact of the Commissioners For Oaths Act of 1889 (CFOA 1889). The applicant submitted that by CFOA 1889 s 3(1), any statutory declaration could be taken or made in any place out of England only before any person having authority to administer an oath in that place. He submitted that that meant that in the present case, where that had happened in Israel, it could only be done before someone who had authority in Israel to administer an oath.

BEL contended that the applicant's argument was wrong, because of the provisions of CFOA 1889 s 1(2), which provided that a commissioner for oaths could, in England or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England. His submission was that that section expressly permitted to happen that which had happened in the present case, namely, that R, as an English qualified solicitor, had been perfectly entitled to administer an oath in Israel because that had been permitted by s 1(2)(see [17] of the judgment).

There was no answer to BEL's submission. It was a clear provision which had clear effect, and s 3, upon which the applicant relied, could only properly be construed as being subject to that provision. That was fortified by subsection 2 of s 3 which provided that, in the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice should be taken of his seal or signature, affixed, impressed or subscribed to or on any such oath or affidavit, so that in the present case it could be seen that R had witnessed the declaration in his capacity as an English qualified solicitor. Accordingly, that objection had no merit (see [18] of the judgment).

The application would fail (see [41] of the judgment).

(2) The proper construction of the facilities agreement.

The applicant argued that, although it did not say so expressly, the facility agreement, on its proper construction, required the full amount of the £1.2m to be advanced to the company as a precondition for O, as the lender, to have the right to exercise any security provided by the facility agreement and the security documents referred to in it. On that basis, because the £1.2m had not been fully provided, it was said that there had been no right to exercise the right to make demand and to appoint an administrator.

On any proper approach to the contractual principles of construction, it could not realistically or credibly be argued that there was some implied condition precedent, such as was alleged by the applicant. Instead, the obvious position was that if there had been a breach in a failure to provide the balance, then that would have entitled the applicant, had he regarded it as sufficiently serious, to treat the agreement as at an end. He would have been entitled to withdraw from the agreement, but a consequence of that, of course, would have been that he would have had to repay what the company owed. He might have been able to set off any claims for loss against that amount, but what he would not have been entitled to do was simply to say that O was in breach, the applicant did not have to repay anything, and O could not enforce any security. That argument was simply not realistically open to the applicant (see [23] of the judgment).

(3) Whether the deed of assignment: (i) was an effective, absolute assignment; and (ii) was prohibited by one of the particular terms of the facility agreement.

With regard to the first point, so far as its effectiveness was concerned, the position was that, any steps taken by O to seek to rely upon the facility agreement by bringing the Part 8 claims were of no relevance to the question of construction of the deed of assignment, namely, whether it extended to assigning the debts due under the facility agreement, and the rights under the facility agreement, and the security documents, as it had specifically said. Anything said or done by O after that date, such as the Part 8 proceedings, could have no legal relevance to the question of the proper meaning and construction of the deed. The applicant had rightly accepted that point when it had been put to him. The provisions in relation to deferred consideration and the provisions in relation to long stop date had no relevance to that particular point. The deed of assignment did, as one would expect, constitute an immediately effective assignment. It followed that the first point had no merit (see [25], [27] of the judgment).

The second point related to a restriction on assignment contained in the short form facility agreement at cl 14. The applicant submitted that that meant that there could be no assignment and no novation, save to a bank, financial institution, or independent lender. BEL submitted that that restriction only applied to a transfer of all of the rights and obligations by novation, and did not apply to an assignment. BEL was clearly right in that submission for two reasons. First, because there was a clear separation of assignment and novation, which meant that the final words: 'Another bank, financial institution, or independent lender' as a matter of syntax, only applied to novation. Second, because that construction made obvious commercial common sense, it was obvious that the borrower would not want to have the whole contract novated to another entity who was not a substantial entity and who might not be independent (see [29] of the judgment).

(4) Whether M was unable to act with complete independence as an administrator, given the circumstances of his instructions.

The applicant made it very clear that he made no allegation of any impropriety against M at all personally. What he did seek to submit was that the interrelationship between the individuals and the companies, and, to some extent at least, the solicitors involved, suggested a connection and that that connection had fed into the circumstances in which M had been put forward as nominator. He further submitted more widely that that meant that the statement by M that the statutory purposes of the administration could be met should be treated with some circumspection, not just in relation to the sale at an undervalue claim but also in relation to the insurance claim.

It was not acceptable for someone who did not like the fact that an administrator had been appointed to seek to persuade the court to declare his appointment invalid by raising a smokescreen of general allegations when there was simply no hard evidence at all to suggest that the administrator would do anything other than act as any administrator would, namely with independence and integrity. On the evidence, any allegation that the appointment of the administrator would not be in accordance with the statutory purposes of administration, or that there would be any risk of a lack of independence, ought to be and was rejected out of hand (see [39] of the judgment).

The application would fail (see [41] of the judgment).

**Judgment date**

15 January 2021

**Judge**

Judge Stephen Davies

**Representation**

Steven McGarry for the applicant.
Duncan Hedar for SFPL Ltd.
John Waiting for BEL.