

Instant Access Properties Limited (in liquidation) v Bradley Rosser and Others [2018] EWHC 756 (Ch)

Published 29 May 2018

In a judgment handed down on 13 April 2018, Morgan J entirely dismissed a claim for £35m made against the former directors (and alleged shadow/de facto directors), and professional advisors of Instant Access Properties Limited (IAP).

IAP was a property club, active between 2003 and 2008. It sourced off plan properties overseas for purchase by its members. Developers who sold properties to members paid a commission to IAP, which it shared with two offshore companies (Darrencrest ("DC") and Leadenhall ("LH")). The same three individuals (Jim Moore, Brad Rosser and Alex Forth) held interests (via discretionary trusts and foundations) in IAP, DC and LH. Receiving commission offshore was tax advantageous for those individuals.

IAP's liquidators alleged that Rosser and Moore were shadow or de facto directors of IAP and with the de jure directors had breached their fiduciary duties to IAP by diverting commission income offshore to LH and DC. They also alleged that (1) the professional advisors were negligent and dishonestly assisted the directors' breaches; (2) there was a conspiracy to cause injury by unlawful means; and (3) that the arrangements amounted to fraudulent trading in breach of s.213 Insolvency Act 1986.

Breach of Duty?

On the facts, Morgan J found that Moore and Rosser were shadow directors for some parts of IAP's activities. He commented that there were very real difficulties in laying down a general principle as to the fiduciary duties owed by a shadow director. As to the specific allegations of fiduciary breach:

1. Causing IAP to enter into arrangements with LH and DC for no or no adequate consideration: On the evidence Morgan J rejected the argument that IAP gave away 50% of its commission to LH and DC for no, or no adequate consideration. The arrangements benefitted IAP. As such, neither the de jure directors, nor Rosser and Moore could be found in breach of fiduciary duty for their involvement in them;
2. Wrongly accepting benefits from a third party by reason of being directors of IAP. The relevant arrangements were for IAP's benefit, and were not entered into as a result of the Rosser and Moore's position within IAP. Accordingly, they were not liable to account for the benefits received;
3. Breaking the self-dealing rule [being involved in IAP entering into contracts with LH and DC (entities in which Rosser and Moore had an interest)]. On the facts, Rosser and Moore were not liable to account for the profits made by LH and DC: they had acted in good faith, and the de jure directors of IAP knew of their interests in LH and DC.

Ratification

It was argued that any breach of duty by Rosser and Moore had in any event been ratified. Whilst unnecessary to decide the point, Morgan J commented that the shareholders were given insufficient information to ratify the first alleged breach, but any breach of the self-dealing rule would have been ratified as sufficient disclosure was given.

Other Claims

The claims against the professional advisers also failed. It was no part of their duties to advise whether the arrangements between IAP, LH and DC were on commercial terms. Claims of dishonest assistance and conspiracy to injure by unlawful means were also rejected as the (shadow) directors did not commit the alleged fiduciary breaches. Morgan J specifically commented of the two individual professional defendants "*even if I had held that they had somehow or other assisted breaches of fiduciary duties, I would not have found them to have been dishonest.*" Finally, the fraudulent trading claim failed, the claims against the directors having been dismissed, and the allegation that attempts were made to conceal the LH/DC arrangements did not defraud any creditor or cause any loss.

Implications for Directors and their Insurers

The judgment makes clear that questions of (1) whether a person is a shadow director; (2) the extent and breach of any fiduciary duty owed as a shadow director; and (3) whether any breach has been ratified must be considered on the facts of

each individual case and the activities that the person undertakes. The extent of a shadow director's duties may change if the Secretary of State exercises the power to make regulations to define those duties, pursuant to s.89(2) Small Business, Enterprise and Employment Act 2015. Pending any such change in the law, careful analysis of the documentary evidence and

full factual matrix will often be crucial for anyone facing a claim that they were a shadow director and acted in breach of duty. Further, the extent to which an individual has been candid in disclosing the nature of conflicting commercial interests or arrangements which will benefit them could well be key to avoiding liability.

DAC Beachcroft LLP acted for two of the professional advisors, the Fourth and Fifth Defendants.

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