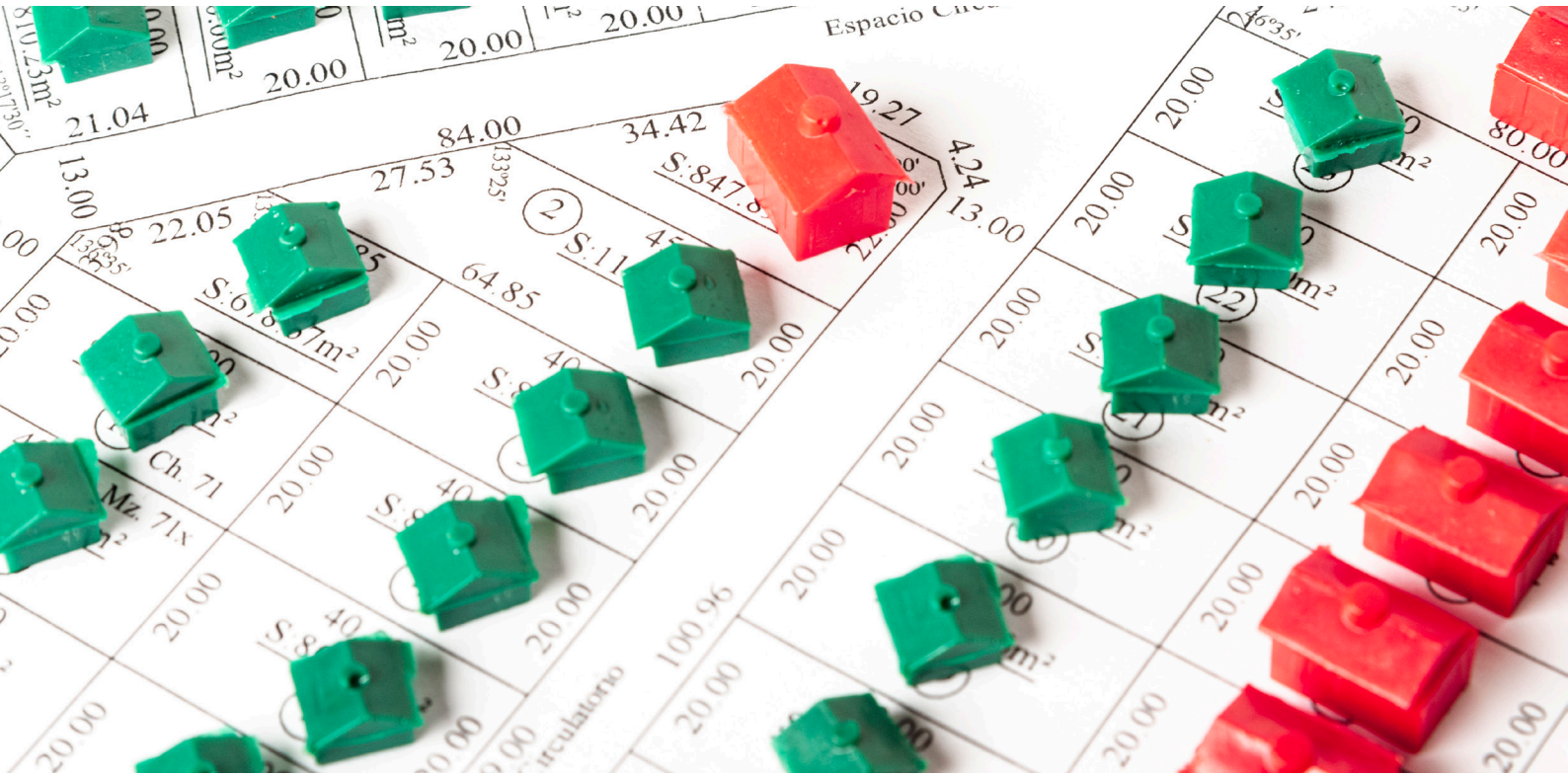

Care needed over procedures to resolve complex title disputes

A case involving land acquired by two directors later found to be in breach of their duties provides useful guidance for office-holders on procedure, says **Radford Goodman**

In the recent case of *Kendall v Ball [2024] EWHC 746*, the administrators of two companies – Sherwood Oak Holdings Ltd (Holdings) and its subsidiary, Sherwood Oak Homes Ltd (Homes) – sought a declaration that certain land was held on trust for the companies by its former directors.

The case provides a useful illustration of how proprietary remedies can be available in response to a breach of duty by a director even where the breach does not involve the misappropriation of pre-existing corporate assets. The judgment also includes observations by ICC Judge Greenwood as to the appropriate procedure to use when seeking to resolve a complex dispute concerning the beneficial ownership of property.

Background

Homes and Holdings were involved in the development of certain land that they owned. An additional piece of land providing access to the main site was to have been purchased by Holdings but, in the event, it was transferred to the directors personally. The purchase monies, however, came from an account in the name of Homes. Around five months later, Homes and Holdings were put into administration by one of their lenders.

The administrators applied to the court under the Insolvency Act 1986 (s234 and para 63 of schedule B1) on an expedited basis[1] for a declaration that the additional land was held by the directors on trust for Homes or Holdings and an order that the land be transferred accordingly.

> **If title is in dispute, the usual [and] appropriate course would be to commence proceedings in the name of the company itself**

Procedural issues

Part of the directors' case was that the administrators could not properly use s234 or para 63 to determine an ownership dispute and, secondly, that the constructive trust case had not been "fairly stated and particularised" so as to enable the directors to understand and answer it.

First, s234(2) provides that: "Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder."[2]

The judge followed the Court of Appeal's decision in *Ezair v Conn [2020] BCC 865*[3], in

which it was held that the purpose of s234 is to provide a summary remedy to enable office-holders to carry out their functions: it is not designed to be used as a means to determine complex title disputes. An applicant under s234 only needs to show apparent entitlement to the property.

The judge observed that: "If title is in dispute, the usual [and] appropriate course would be to commence proceedings in the name of the company itself."[4] However, the court is "…not precluded from finally resolving issues raised in respect of title…" and will do so in certain cases,[5] for example, where the dispute involves a pure point of law. He concluded that: "Ultimately, the decision whether or not to determine the issue is likely to depend on whether or not a summary process, without statements of case, disclosure and witness statements, is fair."

Secondly, para 63 of schedule B1 provides that the administrator of a company may apply to the court for directions in connection with his functions. The judge accepted that para 63 is broad enough to allow the court to determine disputes[6] but, as with s234, he said that whether or not it should be used for that purpose in any given case "will depend, certainly in part, on whether or not it is fair to use a summary process, without statements of case, disclosure and witness statements" and he considered that "…in many such cases, the usual and appropriate course would be to commence proceedings in the name of the company itself."

> **The administrators would have to accept, however, that their claims would be "subject to the constraints inherent in the process which they have chosen – including that there was no cross-examination and no disclosure"**

On the particular facts of this case, the directors' procedural objections failed. The administrators' case was found to have been clear in substance both in pre-action correspondence and in the witness statements filed in support of the application. Formal pleadings were not, therefore, necessary and, in any event, the respondents had not raised any procedural objections until just before the final hearing.

> **It was alleged by the administrators that by having the additional land transferred to themselves, the directors acted in breach of their duties to promote the success of the companies and avoid conflicts of interest**

In these circumstances, the judge held that it was appropriate for the court to determine the substantive issue as to title. The administrators would have to accept, however, that their claims would be "subject to the constraints inherent in the process which they have chosen – including that there was no cross-examination and no disclosure". Thus, written evidence filed by the directors could not be tested and was more likely to be accepted on its face.

The trust arguments

The first submission made by the administrators was that the additional property was held by the directors on a resulting trust because Homes had provided the purchase monies. A resulting trust arises when property is purchased by party A but the purchase monies were provided by party B and party B was acting in the character of a purchaser (that is, the party was not lending the money or giving party A a gift). The court held that, on the evidence before it, Homes had not acted "in the character of a purchaser". In particular, the parties had intended that the additional land would be acquired beneficially by the directors, rather than the companies, and there was an intention that, by some means, the company accounts would be adjusted to reflect the directors' (mistaken) understanding that it was their money, and not Homes' money, that was being used to fund the acquisition. The resulting trust claim therefore failed.

Secondly, the administrators submitted that by having the additional land transferred to themselves, the directors acted in breach of their duties to promote the success of the companies[7] and avoid conflicts of interest[8] and that, therefore, the additional land was held by the directors on a constructive trust for the companies.

The court found that the directors were in breach of both duties. In particular, the court noted that the additional land was a "valuable, integral part of the development project, required by the companies and intended to be used by them to construct the presently (and long) contemplated means of access to the site" and that its acquisition by the directors in their own names placed them in a position of 'sharp conflict'. The court held that the directors "…exploited and diverted to themselves an opportunity to acquire property which the companies themselves needed" and "failed positively to advance any good reason for having acquired the [additional land] themselves, consistent with the best interests of the companies."

In such circumstances, the court held that the directors were to be treated as having acquired the additional land on behalf of the companies and it was therefore appropriate to declare that the additional land was held on constructive trust, notwithstanding that this case did not involve the misappropriation of pre-existing corporate property.[9]

In view of the judge's comments as to the scope of s234 and para 63, office-holders and their legal advisers will need to give careful thought to the appropriate procedure to use in the particular circumstances of each case when seeking the determination of a title dispute. An application for directions will often be appropriate, even in complex cases, because of its inherent flexibility: the case may proceed on a summary basis (as here), provided it is fair to do so, or the court may, if necessary, direct the parties to deliver formal statements of case, provide disclosure, and/or produce their witnesses for cross-examination[10] as in full, adversarial litigation.

1 To enable the administrators to take advantage of a commercial sale opportunity
2 An application under s234 of the Insolvency Act 1986 is made in the name of the office-holder, not the company
3 See also *Re Cosslett (Contractors) Ltd [2001] UKHL 58*
4 An action in the name of the company would be commenced under the ordinary Civil Procedure Rules rather than by way of an application under the Insolvency (England and Wales) Rules 2016.
5 See for example, *Re London Iron & Steel Co Ltd [1990] BCC 159*
6 *Re Rodus Developments Ltd (in administration) [2022] EWHC 3232* was cited as an example.
7 s172 of the Companies Act 2006
8 s175 of the Companies Act 2006
9 Applying *Davies v Ford [2020] EWHC 686 and Re Bhullar Bros. [2003] EWCA Civ. 424*
10 See in particular rules 12.11 and 12.27 of the Insolvency (England and Wales) Rules 2016

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