TRANSCRIPT OF PROCEEDINGS

NCN: [2018] EWHC 4034 (Ch) Ref. BL-2018-000414

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (CHD)**

**BEFORE THE HONOURABLE MR JUSTICE BARLING**

**22 FEBRUARY 2018**

**NICOLA HORLICK**

**Applicant**

**- v -**

**MATTHEW PETER TAYLOR**

**First Respondent**

**ANDREW GREEN**

**Second Respondent**

**ELIZABETH ORBELL**

**Third Respondent**

**ROCKPOOL INVESTMENTS LLP**

**Fourth Respondent**

**MR M YOUNG (instructed in person by the Applicant) appeared on behalf of the Applicant**
**MR ROSEMAN (instructed by Fidelity Law Limited) appeared on behalf of the Respondents**

**JUDGMENT**
**(Approved)**

---

MR JUSTICE BARLING:

1. This is an application by Mrs Nicola Horlick for an injunction to restrain the respondents (who are also defendants to a claim which has now been issued) from holding a meeting of a company called Rockpool Investments LLP at 10am tomorrow morning. The application is supported by a number of other deponents who are in a similar position, in that they are members of the company. The hearing of the application has taken a large part of today. It has been heard in the interim applications list, in which a lot of other cases were also listed. Some of these have had to be moved out to accommodate the application; others are still waiting to come on.

2. The applicant is represented by Mr Martin Young of counsel and the respondents by Mr Roseman of counsel. The reason the matter has come on in such inappropriate circumstances is because last Friday - about a week ago – notice was given to the members of the LLP, including the applicant who was then on half-term holiday with her family, of the proposed meeting and of a number of resolutions. The main one was for a deed, which is the foundation document of the LLP, to be subject to certain amendments of which notice was given at the same time.

3. The deed in question is, as you would expect, a complex document, running to some 30 pages. The many proposed amendments are, to put it at its lowest, extremely significant. In order for the deed to be amended an 80 per cent majority by value of members present and voting is required.

4. One complicating factor is that the same documents giving notice of the meeting also gave members notice that there had been an increase in issued capital of about £900,000. The purpose of this was to take forward the policy of the managing committee, and in particular of the managing partner and first respondent, Mr Matthew Peter Taylor, to involve the

workforce in the profit share of the LLP. The issuance of further capital was carried out largely by means of loans granted by the respondents and others to the working members of the LLP to enable them to purchase shares in the LLP. No prior notice appears to have been given of the intention to issue this capital, the first formal notification of the implementation of that policy being the documents to which I have referred.

5. The effect of the additional issued capital is to dilute the interests of the existing membership, and it will be reflected in their voting rights. The voting members are known as Tier B, in that they have Tier B membership. To give an example, the effect on the applicant's Tier B holding, reflecting her voting rights, is reduced from 11.37 per cent to 2.68 per cent. Therefore, it represents a substantial reduction. Similarly, the value of her existing holding is some £8,660,000, and this is reduced notionally to some £2,041,000. A corresponding dilution in their holdings is reflected right across the board of Tier B membership by reason of the issuance of the new capital to staff.

6. This process, it is to be inferred and has not been disputed, must have taken place over a considerable period of time: for all these members of staff to arrange to take out interest-free loans in order to purchase shares in Tier B capital, could not have been achieved overnight. Yet, it is not in dispute that no notice of this process, formal or otherwise, has been given to the existing members, including the applicant, Mrs Horlick.

7. The proposed meeting, arranged on seven days' notice - the minimum period of notice required for any meeting of the LLP - will reflect this dilution in the Tier B voting capital. The new members benefiting from the additional issued capital would represent some 75 per cent of the total Tier B voting capital. Together with the apparent proponents of the proposed amendments (mainly the first three respondents, Mr Taylor, Mr Andrew Green and Miss Elizabeth Orbell), who represent some 8.5 per cent or thereabouts of the Tier B capital, the resolution would achieve the 80 per cent required to amend the deed of the LLP, if all the new members were to vote for it.

8. The applicant argues (and it is right to say that the argument has evolved to some extent over the course of the last few days, and indeed in the course of today's hearing) that the increase in Tier B capital and consequent dilution is in breach of obligations under the LLP deed. The main provision relied upon in relation to virtually all the allegations is clause 16.1.2 which, in its present unamended form, states:

"So that each member shall at all times show the utmost good faith to the LLP and the other members in all transactions relating to the business and so to the LLP and give the LLP a true account of all type of dealings."

So, there is a very wide obligation of utmost good faith, not just to the LLP, but also towards other members. I note in passing that under the deed section 994 of the Companies Act 2006 has been excluded. Nevertheless, clause 16.1.2 exists.

9. One of the proposed amendments to be debated at the meeting tomorrow is an amendment to that provision which would remove the duty of utmost good faith as between members, and would reduce it (if indeed it is a reduction) to good faith. So, if the proposal is passed, then in the future the obligation will be owed only to the LLP, which, Mr Roseman submits, is more appropriate, being analogous to the position as between shareholders, rather than as between partners. Be that as it may, as things stand the obligation exists and is relied upon by the applicant.

10. The first point made is that there is a breach, or at any rate a serious issue to be tried as to a breach, of the duty of utmost good faith, by reason of the calling on the minimum 7 days' notice of a meeting of such significance. Not only are the proposed amendments to be debated by a voting community which includes the new members, but also the members will be debating amendments which are, it is fair to say, root and branch changes. Indeed, one need only look at the amount of red ink on the proposed amendments, to see just how fundamentally the deed would be amended.

11. In the course of argument before me, a number of aspects of the proposals have been examined. There is simply not time to go into them, save to say that they purport to alter the allocation of profits. On any view, there would be a change in the approach to the allocation of profits. Mr Roseman submits that they are beneficial to the Tier A membership, who do not have voting rights. However, other views have been expressed and are relied upon by the applicant. In any event, the initial point is that there are extremely significant changes throughout the document, and in view of the procedure adopted by the respondents there has been no opportunity for any of the members to consider them at all let alone in detail; the changes are, as it were, being steamrollered through without any consultation.

12. The question which arises on this aspect of the case, and which seems to me to be in many ways the crucial one, is whether in the circumstances there is a sufficiently strong case of a breach of the utmost good faith obligation. Relevant circumstances include: that the changes are of considerable significance for existing members and would alter the shape of

the company; that they may be proposed for the best of motives, arising from the need to provide greater participation on the part of the workforce - one of the rationales put forward by the governing committee in their explanatory documents; that they are also made in the light of a modification of the business model as a result of various regulatory changes that have taken place in the market for the kind of private equity work carried out by the LLP; that the voting community used to approve the amendments will include the new membership, created as a result of a dilution in the capital which was not notified to the existing membership.

13. Mr Roseman has argued with skill and force, first, that examples in the case law of the courts interfering with the holding of meetings by companies or similar entities are extremely rare. This is undoubtedly correct. He also argues, again correctly, that the respondents have complied with the strict contractual requirements for the time and method of giving notice of meetings of the company. He submits that, if the court were to interfere with this meeting and its timing, then it would create a precedent for any disgruntled member, where there is a proposal that he or she does not like, to suggest that insufficient time has been given, notwithstanding that the contractual time has been complied with, and to seek to delay and thereby to interfere with the proper administration of the business of the company.

14. He also submits that if the meeting is delayed, this would disincentivise all those of the workforce who might have participated in it, and that it would create doubt and uncertainty as to the future operations; this might well cause staff to leave and ultimately the business could be destroyed. Although there is some evidence to this effect from Mr Taylor, in my view the submission and evidence represent doom mongering on a very large scale. Although uncertainty, even for a short time, is always undesirable, no good reason has been identified why these very significant proposed amendments to the fundamental document of the LLP could not have been the subject of a longer notice; that would have enabled people to take stock of them.

15. The nature of the evolving case, as outlined through the medium of the witness statement of Mrs Horlick, shows that there has been some difficulty in attempting to understand precisely what these changes mean. At first, Mrs Horlick suspected that the dilution suffered by the respondents themselves, and in particular the first respondent, was so substantial, and the reduction in overall per capita interest in the company so substantial, that there must have been some clause in the loan agreements with the new members that would

have enabled the position to be ameliorated by a right of pre-emption or something of that sort. However, Mr Taylor has made plain, and the applicant through counsel has accepted, that there is no such clause, and therefore that aspect of the case fell away at an earlier stage in the argument today.

16. Therefore, as I have said, the question comes down to whether there is a sufficiently strong case that clause 16.1.2 has been breached, to get the applicant over the initial threshold for an injunction to be granted. A higher standard than the *American Cyanamid* "seriously arguable case" would be appropriate here, because if the court were to grant a form of order which causes the meeting to be postponed, then in effect final relief will have been granted on this aspect of the litigation. See, for example, the recent Hong Kong decision, *China Investment Fund Limited v Guang Sheng Investment Development Group Limited* [2016] (unreported), where Mrs Justice Lam referred to the authority of *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 in stating that where an interlocutory injunction is likely to be dispositive of a particular aspect of the litigation, then a higher standard of prospect of success would apply than would be the case under *American Cyanamid* principles.

17. As it stands, the underlying claim seeks an injunction in respect of this meeting and the proposed amendments. It also seeks damages for the dilution based on, amongst other provisions, clause 16.1.2 of the deed. In her witness statement number 2, and by counsel, the applicant has confirmed that the underlying claim will seek to unravel the dilution that has taken place, as well as, or as an alternative to, seeking damages. On whether the dilution itself is unlawful and a breach of the current deed, I express no view at this stage. Equally, the unravelling of the dilution is not currently part of the claim, so I leave that aspect out of account too. Nor do I express any view on the argument that the profit sharing structure, as proposed to be amended, would represent a further breach of clause 16.1.2 by the first respondent and possibly by the second and third respondents. That argument, which concerns a new proposed clause 13, is complex and not suitable for determination even on a provisional basis today. The same applies to a contention that the proposed amendment to the right of inspection of the books of account would be in breach of clause 16.1.2. Those appear to be difficult arguments, and in considering whether an injunction is appropriate, I leave them out of account.

18. I propose to decide the matter on the basis of alleged breach of the utmost good faith obligation having regard to the way in which these matters have been dealt with as a matter

of the timing and period of notice. It is a token of the problem that we are debating such matters in this unsatisfactory way. We are only doing so because what are on any view very significant changes to the LLP's fundamental deed have been bounced on the members with the absolute minimum notice. Such a course was almost certainly going to lead to precisely this situation. In my view, there is a very good prospect of establishing a breach of the duty of utmost good faith by proceeding in this way, and certainly a sufficiently high prospect to enable the claim to surmount the initial merits threshold, even allowing for a higher standard than "a seriously arguable case".

19. In relation to the adequacy of a remedy in damages and the balance of convenience, I cannot be satisfied that any damages awarded to the applicant would be an adequate remedy for the adverse change in her situation as a result of what is proposed if the proposals were to go through. Such damages might well also present considerable problems of causation and/or quantification. Conversely, I consider that the possible risks postulated by the Respondents in regard to a postponement of the meeting are very much exaggerated. There was no pressing need at all for it to be held at such short notice, and there is little if any downside in a short delay. Furthermore, whereas some of the amendments may be perfectly innocuous, they are being put forward as a package. There has been no suggestion by the respondents that they would be willing to take anything controversial out of account for tomorrow's meeting.

21. In these circumstances, it is just and convenient to grant an injunction. I am not going to grant it until trial or further order, as that would be pointless. I am simply going to make an order that the meeting should not take place tomorrow, and should not be arranged to take place earlier than 28 days from today.

22. I ask counsel to draw and agree the terms of the order, but I make it with immediate effect.

---

*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*