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Case No: CR-2019-MAN-000391

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY & COMPANIES LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester, M60 9DJ

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Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between:

HOULDSWORTH VILLAGE MANAGEMENT COMPANY LIMITED

Claimant

- and –

KEITH BARTON

Defendant

- -

Miss Alice Richardson appeared on behalf of the Claimant
Mr Robert Sterling appeared on behalf of the Defendant

- -

APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE HODGE QC:

1. This is my extemporary judgment on the substantive hearing of a Part 8 claim issued on 14th May 2019 by Houldsworth Village Management Company Ltd again Mr Keith Barton under claim number CR2019-MAN-000391.

2. The claimant company is a lessee-owned management company which is responsible for the management functions at a residential apartment complex known as Victoria Mill and situated at Houldsworth Street, Reddish, Stockport. The defendant is the registered owner of the leasehold interest in that property known as apartment 93, Victoria Mill. That leasehold interest is registered at the Land Registry under title number MAN78902.

3. Victoria Mill contains 180 residential flats situated over four floors and let on long leases. Those occupational leases are tripartite agreements between the landlord, the individual occupational leaseholder and the claimant management company. That company provides the management functions for the benefit of the development and serves no other purpose save to provide those services. Those services are financed by service charges payable by the individual occupational leaseholders.

4. Under the terms of their respective occupational leases, each leaseholder is required to be a member of the claimant company. The defendant is a member by virtue of his ownership of the leasehold interest in apartment 93.

5. On or about 3rd May 2019, the defendant made a request in writing to inspect the current register of members in relation to the Claimant company. The request reads as follows:

> In accordance with Section 116 Companies Act 2006, I hereby request to inspect the register of members of Houldsworth Village Management Company Ltd. I hereby give you the following information: my name and address are Keith Barton, 39 Hazelwood, Wilmslow, SK9 2QA. The purpose for which the information is to be used: I wish to contact my fellow members with a view to seeking a general meeting of members and proposing resolutions to remove and replace the existing directors and the managing agent. The information will not be disclosed to any other person.

6. Pursuant to section 117 of the Companies Act 2006, the claimant was required either to comply with that request or to apply to the court within five working days. The claimant issued the present application to the court on 14th May in accordance with section 117, seeking a declaration from the court confirming that the defendant did not have a proper purpose for making the request for inspection of the register of members and that the request should therefore be refused. The defendant subsequently filed and served an acknowledgment of service along with witness evidence confirming his intention to contest the claim. The defendant maintains that he has a proper purpose for his request.

7. There has been one procedural case management order made by District Judge Richmond on 20th August 2019. That gave directions for further evidence. There was no provision for the attendance of any witness for cross-examination and this trial has therefore proceeded on the basis of written evidence.

8. The claimant is represented by Miss Alice Richardson (of counsel) and the defendant is represented by Mr Robert Sterling (also of counsel). Both

counsel have submitted detailed written skeleton arguments which I have had the opportunity of pre-reading. The evidence for the claimant comprises three witness statements (with their respective exhibits) of Mr Ian James MacDonald, a director of the claimant company. Those witness statements are dated 10th May, 14th June and 2nd September 2019. In addition, the claimant also relies on a witness statement of Mr Damiano Rea dated 14th June 2019. Mr Rea is a director of Heaton Property Block Management Ltd, which is the managing agent for Pandongate House in Newcastle-upon-Tyne. The relevance of that property is that it is also a residential property with a similar management company and structure to that of Victoria Mill.

9. In relation to the management company of that property, Mr Barton, the Defendant, had also made a similar section 116 request and that was the subject of an extemporary judgment delivered by His Honour Judge Kramer, sitting in the Business and Property Court in Newcastle-upon-Tyne on 25th January 2019. A transcript of that judgment has been placed before me and reliance upon it is placed by Miss Richardson for the claimant.

10. The evidence of the defendant comprises his two witness statements of 31st May and 12th August 2019.

11. There was no substantial dispute as to the applicable law. That was considered by the Court of Appeal in the case of *Re Burry and Knight Ltd v Knight* [2014] EWCA Civ 604, reported at [2014] 1 WLR 4046. That decision was subsequently followed in a later Court of Appeal case *Burberry Group plc v Fox-Davies* [2017] EWCA Civ 1129.

12. Mr Sterling has referred me to a useful summary of the applicable principles to be found in an unreported judgment, delivered on 28th November 2017, by Mr Terence Mowschenson QC, sitting as a Deputy Judge of the Chancery Division, in the case of *The Hut Group Ltd v Zedra Trust Company (Jersey) Ltd*.

13. The Deputy Judge said that the two Court of Appeal authorities to which I have referred provided guidance as to the manner in which the "proper purpose" test set out in sections 116 and 117 of the 2006 Act should be applied:

> (a) The criminal penalties imposed by section 118 of the Act emphasise the importance the legislature attached to the right of access to the share register.
>
> (b) The expression "proper purpose" in section 117 (3) ought to be given its ordinary and natural meaning.
>
> (c) The purpose should first be identified. That will normally be described in the request but the court is not restricted to the purpose in the request. The court will determine the purpose of the request on the balance of probabilities on the evidence before it.
>
> (d) After the purpose is established, the court will consider whether it is proper. The test whether a purpose is proper is an objective one made by the court on the basis of the evidence before it and will often depend on the precise facts and circumstances.

(e) The court may have regard to a guidance note issued by the Institute of Chartered Secretaries and Administrators which might provide useful guidance in a particular case.

(f) The test for whether a purpose is proper does not depend on whether it is in the interests of shareholders. The person (whether a shareholder or not) making the request may have his own interests in making the request.

(g) The onus is on the claimant company to satisfy the court on the balance of probabilities that the request is improper.

(h) If the court is in any doubt it should not make a no-access order.

(i) It is for the person making the request, rather than the court, to consider whether access will be of value to that person.

14. In that citation, I have omitted references to the supporting paragraphs of the Court of Appeal authorities.

15. In the light of the submissions, I should make it clear that I have had regard to the extensive citation presented to me from the judgment of Arden LJ in the *Burry & Knight* case. In particular, I have had regard to what is said at paragraphs 18 to 20 on the meaning of "proper purpose". At paragraph 20, Arden LJ said that she agreed with the view of the registrar in the lower court that where there are multiple purposes, some proper and some not, a proper purpose is not necessarily tainted by being coupled to an improper purpose. Arden LJ recognised that the court might, as the registrar had done, make an order on terms.

16. I have also had regard to paragraph 22, relating to the onus of proof. On a section 117 (3) application, the onus is on the claimant company to demonstrate to the court that it should be satisfied that the request is for an improper purpose, "satisfied" meaning being satisfied on a balance of probabilities. It is not enough that the purpose is capable of being, or may possibly be, an improper one if the court is not satisfied that it is, in fact, improper.

17. Like Mr Terence Mowschenson at paragraph 24 (c) of his judgment in the *The Hut Group* case, I take the view that the purpose of the request is to be determined on the balance of probabilities on the evidence before the court but that the burden of proof as to the purpose is on the company.

18. At paragraph 24, Arden LJ said that she agreed with the registrar that the way the statutory provisions were framed reflected a strong presumption in favour of shareholder democracy and a policy of upholding principles of corporate transparency and good corporate governance. She also agreed with the registrar that those factors point in favour of the court exercising its discretion "sparingly and with circumspection" where requests were made by shareholders to communicate with fellow shareholders. The reasons for that were said to be obvious: If a member could not communicate with fellow members, it put the board into a very strong position. The corporate governance of the company was accordingly weakened. The relationship between the board and the shareholders could not operate as it was intended to operate with the shareholders monitoring the activities of the directors. It would therefore require a "strong case" to prevent access for those reasons.

19. Moreover, as set out in paragraph 25, it is in principle for shareholders to assess whether a communication is of value to them and what action they should take. Parliament could not, in Arden LJ's judgment, be taken to have intended the court to take a view about just how far the information which the member seeking access wished to give him was information of value. That would involve the court in making a commercial judgment as to the merits of the requesting member's view and would lead to satellite litigation which would delay a decision on access. In some cases it would be obvious that the information was of no value, as where it was already known to members or was simply nonsense. But if the court was in any doubt, it should not make a no-access order.

20. Later on, at paragraphs 81 through to 93, Arden LJ indicated that the court might make a no-access order on terms as to the use to be made of the information obtained from the share register. That was in fact what the registrar had done in that case; and his order was affirmed by the Court of Appeal. But (at paragraph 90) Arden LJ recognised that there would be other ways of achieving that end, such as by the court accepting an undertaking from the person making the request for access as to the purpose for which he would use the information obtained. Any such undertaking would be backed up by the criminal sanction on the misuse of that information in section 119.

21. Arden LJ referred to a submission that if the purpose of communication was proper, a proportionate and consistent way of dealing with the problem was that the company should make the share register available to the shareholder

on his undertaking not to use it for any purpose which was improper. In that case, counsel for the member had no objections to an undertaking.

22. At this point, I should say something about the decision of Judge Kramer in the earlier case of *Pandongate House Management Company Ltd v Barton*.

23. In that connection, Mr Sterling has referred me to the judgment of Clarke LJ in the case of *Rogers v Hoyle* [2014] EWCA Civ 257, reported at [2015] QB 265. At paragraphs 32 and following, Clarke LJ considered the effect of the rule in *Hollington v Hewthorn and Co Ltd* [1943] KB 587. At paragraph 39, Clarke LJ said that findings of fact made by another decision-maker were not to be admitted in a subsequent trial because the decision at that trial was to be made by the judge appointed to hear it and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, was to risk the decision being made, at least in part, on evidence other than that which the trial judge had heard, and in reliance on the opinion of someone who is neither the relevant decision-maker nor an expert in any relevant discipline, of which decision-making was not one. The opinion of someone who is not the trial judge was therefore, as a matter of law, irrelevant, and not one to which he ought to have regard.

24. Miss Richardson did not take issue with any of that. She did, however, point out that unless I was convinced that His Honour Judge Kramer was wrong, I should follow his decision on the applicable law. She also said that I was

entitled to look at his decision and to make such use of it as I might consider appropriate; whilst not bound by his findings of fact, I was entitled to look at his conclusions.

25. In my judgment, Judge Kramer's earlier decision is of little assistance to the court in the present case. There are a number of reasons for that. The first is that the evidence in that case was very different from that which is before the court in the instant case. Mr Sterling was at pains to emphasise that in that case Mr Barton will done himself no favours by falling into the trap of not responding to evidence that had been adduced against him as he should have done. Mr Sterling submitted that Mr Barton had not fallen into a similar trap in the present case because he had addressed the evidence adduced by the claimant in the present case at considerable length.

26. In the *Pandongate* case, the request for inspection of the register of members had merely given as its stated purpose Mr Barton's wish to contact his fellow members in order to seek their views on several matters relating to the company. At paragraph 13 of his relevant witness statement, Mr Barton had elaborated upon that. He had said that the purpose of his request was simply to update his current list of members "as I keep an up-to-date list to allow me to keep in touch with all my fellow leaseholders and seek their views on a number of matters regarding the management of Pandongate House as I have done since at least 2010". That is very different from Mr Barton's expressed purpose for seeking to inspect the register of members of the claimant company.

27. At paragraph 33 of his judgment, Judge Kramer had observed that Mr Barton had produced a witness statement in which he did not deal with the claims of the claimant in any detail. The criticism levelled at his evidence by the claimant was that whilst Mr Barton had asserted that the claimant's evidence had not demonstrated that he was a vexatious litigator, bent on further needless litigation, he had not condescended to any detail. At paragraph 34, Judge Kramer's conclusion was that in the absence of anything but a bare denial of the allegations, and their relevance, or any justification put forward for any of Mr Barton's behaviour, there was such a weight of evidence from both of the claimant's witnesses' evidence (and their exhibits) that the judge was driven to accept, on balance, that Mr Barton had brought the claims of which the claimant's witnesses spoke; that they had been entirely, or almost entirely, baseless; that he had failed to pay service charges on properties he had owned for years on end; that he had sought to campaign amongst leaseholders to show disaffection as to the management of the properties in which he had an interest; that his behaviour had been disruptive; and that it had caused leaseholder management companies to incur unnecessary expense and administrative effort which was largely to the prejudice of other leaseholders who were paying their service charges.

28. The evidence before the court in the present case is very different because there are explanations from Mr Barton for his conduct.

29. At paragraph 43, Judge Kramer concluded, on the evidence, and on the balance of probabilities, that the purpose of the request had been to contact other leaseholders in order to invite their support to challenge the service

charge, and to remove the existing company as managing agents, and, ultimately, to support Mr Barton when the case next came before a tribunal, either on his application or as a result of the reference to the first-tier tribunal of the claimant's civil claim against Mr Barton to recover outstanding service charges. Judge Kramer set out his reasons for that conclusion at paragraphs 44 and 45.

30. Judge Kramer then went on to consider whether contacting the leaseholders to seek to support challenges to the service charge and the retention of the managing agents was a proper purpose. At paragraphs 46 to 48 he concluded that it was not. Relying upon observations in the case of *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371, reported at [2009] HLR 33, at paragraphs 30 to 32, Judge Kramer said that it was trite law that the capacities of member and leaseholder were separate. A person who is both had different rights in each capacity and those derived from different contracts. Rights of the members arose under the articles of association. As members, they could take part in the running of the company to the extent that they could pass resolutions, request meetings of the company, and appoint a board to manage it. They had rights of recourse under the Companies Act if they felt their rights had been infringed. However, the day-to-day management of the company was in the board and not the shareholders. The leaseholders' rights arose under the lease, and they had certain protections which, so far as were relevant in the case before him, related to the reasonableness of service charges and the proper management of the property.

31. At paragraph 47, Judge Kramer said that, in the present context, matters relating to the company must mean the running of the company and not the business undertaken by it. That conclusion was said to strike a proper balance between the conflicting considerations of shareholder democracy and the public interest in knowing the identity of the owners of a company and protecting personal information. If was said not to be a proper use of the company's register to use it for ulterior purposes.

32. At paragraphs 49 to 51, Judge Kramer provided an alternative basis for his decision. That was that Mr Barton wished to obtain the information in order to be able to act in a way that had the effect of harassing the company or harming its members. Judge Kramer recognised that it was difficult to make a decision as to motivation where there had been no cross-examination. However, he found that he was faced with a case where there was detailed evidence put in by the Claimant as to Mr Barton's behaviour, both in relation to Pandongate House and other properties, which the Judge had accepted as factually accurate in the absence of any real attempt to counter what had been said, other than in the most general terms. Given that history, there was said to be a very high likelihood that Mr Barton would be using any list of members he had to contact leaseholders to continue his campaign, and that was likely not only to harass the officers of the company and hamper the efficient running of it, both in terms of cost and effort, and that that in itself was contrary to the interests of other members.

33. Accordingly, the Judge found that not only was the purpose not a proper one, but that there was a further purpose behind Mr Barton's request, which was to

better carry on his campaign against the property managers and the service charge and, in doing so, that he was likely to damage the interests of both the company and its members. The Judge's decision in those circumstances was that he should grant the directions sought and direct that the company was not to comply with the request made under section 116.

34. There was an application for permission to appeal Judge Kramer's decision. That application apparently came before Rose LJ on 7th June 2019. She refused permission to appeal. Her reasons were as follows:

> The Appellant raises four grounds of appeal. The first three challenge the basis of Judge Kramer's decision to grant the Respondent company an order under Section 117 directing that it need not comply with his request to inspect the company's register of members. That basis was his conclusion that the purpose for which Mr Barton was seeking the list was to further his interests as a leaseholder in the block of flats of which the Respondent is the management company and had nothing to do with his interests as a member of that company. If that had been the sole basis for the Judge's decision, I might have considered that the challenge had a real prospect of success. However, he also decided the application on a second basis; that Mr Barton's wish to obtain the information was in order to harass the company or harm its members. That conclusion was based on his findings arising from detailed evidence put in by the Respondent as to Mr Barton's previous behaviour, both in relation to the block of flats at Pandongate House and other properties. I consider that ground 4 of the Appellant's grounds of appeal against that decision has no prospect of success and, therefore, the appeal as a whole, even if Mr Barton were to succeed on his first three grounds, would not result in a different order.

35. As I have said, the evidence in the present case is very different on the issue raised by ground four of the appellant's grounds of appeal. Rose LJ might have been prepared to give permission to appeal on the earlier bases for Judge Kramer's decision. In those circumstances, I cannot attach particular weight to Judge Kramer's views on whether the purpose of Mr Barton's request in that

case was to further his interests as a leaseholder in the flats, and therefore had nothing to do with his interests as a member of the company. The purpose for Mr Barton's request in the *Pandongate* case is very different from the reasons he has given for his request in the present case, as is apparent from my recital of his stated purpose in support of each of two requests.

36. In her skeleton argument, Miss Richardson submits that whilst seeking to remove persons as directors of the company may be a proper purpose, replacing the managing agents is not. I reject that submission. I prefer the alternative arguments of Mr Sterling, as set out in his written skeleton.

37. Mr Sterling, in his oral submissions, contended that Miss Richardson was seeking to develop, and elevate, the principle in the *Morshead Mansions* case into one disqualifying members of a property management company, who were also leaseholders of property, from exercising rights under section 116. The *Morshead* case was not in any way concerned with a request under section 116 or an application to the court under section 117 of the 2006 Act. The *Morshead Mansions* case was concerned with provisions in the company's articles of association which were held to preclude a member of the company, who was also a leaseholder, from exercising the statutory rights of a leaseholder to challenge service charges. Here, Mr Sterling says, the position is the other way around. Here a member of a management company was seeking to exercise his rights as a shareholder to inspect the register of members; he is entitled to do so so long as his purpose is proper.

38. On the face of the request, it is an entirely proper purpose to seek a general meeting of members and, in aid of that, to contact fellow shareholders with

a view to proposing resolutions to remove and replace the existing directors and the managing agent.

39. As I have said, Miss Richardson accepts that the removal of directors is a proper purpose. Her objection is to the stated purpose of seeking to remove the managing agents. It is, however, important to bear in mind the objects of the claimant company. The first of those stated objects in the memorandum of association (at clause 3.1.1) is to acquire, hold, manage and administer the freehold or leasehold of three apartment buildings including, without limitation, common areas, roads, access ways, footpaths, parking areas, drains, sewers, lighting, security and associated facilities, either on its own account or as trustee, nominee or agent of any company or person; in short, it is acquire, hold **and manage** the property.

40. Mr Sterling points out that the directors have chosen to delegate their management functions to appointed managing agents. The evidence of Mr MacDonald emphasis, at paragraph 21 of his first witness statement and paragraph 54 of his second witness statement, that the appointment of managing agents is not a decision for the members of the claimant company generally but rather a decision for the board of directors.

41. In my judgment, given the objects of the claimant company, it is a perfectly proper purpose for the defendant to seek to contact shareholders in the company with a view to seeking a general meeting of members and proposing resolutions to remove and replace the existing directors and the managing agent. In my judgment, on the face of the request, that is a proper purpose; but, in any event, as Mr Sterling points out, the burden is on the claimant to

establish that the purpose is an improper one; and, in my judgment, that burden has not been discharged.

42. I have already indicated that the present case is distinguishable from the *Pandongate* case on its own facts. I would accept that it may be appropriate, in certain contexts, to distinguish between the running of the company and the operation of the business undertaken by the company. In the present case, however, where the business of the company is the management of a block of flats, and the appointment of the managing agents is vested in the board of directors, in my judgment it is an entirely proper and legitimate purpose for a member to seek to inspect the register of members with a view to seeking, through the general meeting, to effect a change in the constitution of the company's board of directors with a view to the reconstituted board of directors then being in a position to review the propriety of the appointment, and terms of appointment, of the existing managing agents. In my judgment, that is an entirely proper purpose.

43. In the light of the constitutional arrangements applicable in the present case to the claimant company, it seems to me that it cannot be said that seeking to change the board with a view to seeking a change in the identity or terms of appointment of the managing agents is nothing to do with Mr Barton's interests as a member of the company. The distinction drawn in an entirely different context between Mr Barton's rights as leaseholder and his rights as a member of the company, established by the *Morshead Mansions* case, has, in my judgment, no relevant application in the present circumstances and case.

44. So far as the wider basis of attack upon the purpose of the request is concerned, I am not satisfied that the claimant has discharged the burden of establishing that Mr Barton has any purpose other than that which he has stated in his request for seeking inspection of the register. Certain aspects of Mr Barton's conduct, both in relation to Victoria Mill and other residential properties, may have been regrettable, but that is certainly not unqualifiedly the case. He has had some successes; but in the absence of cross-examination, and in the light of the evidence and explanations as to his conduct provided by Mr Barton in his evidence in the instant case, I am not satisfied that the claimant has discharged the burden of showing that the true purpose of Mr Barton's request has been to seek to harass the directors or managing agents, or to cause disruption to them, or to other leaseholders, in the management of Victoria Mill.

45. Mr Barton may have been decisively rejected by the members of the company as a continuing director of the company after he served for a term of a little over a year between 12th May 2014 and 29th May 2015, although I take Mr Sterling's point that the size of the vote against Mr Barton was, in large part, due to proxy votes, and one does not know the extent to which those proxies had conferred a discretion on the chairman of the relevant general meeting. However, Mr Barton has put forward a stated purpose for his request which is very different from that which he had put forward in the *Pandongate* case; and I am not satisfied that there is any valid reason for rejecting that stated purpose as genuine, particularly in the absence of cross-examination. The quality of the evidence which led Judge Kramer to the view that Mr Barton, in the case before him, was seeking to inspect the list simply to

continue a campaign of harassment, and to hamper the efficient running of the company, and to support his own private litigation, does not lead the court to similar conclusions in the present case.

46. In any event, at the end of Mr Sterling's oral submissions I inquired whether the court could refuse the non-access application on terms whereby the court's order made it clear that Mr Barton was to use the list of members solely for the purpose set out in his request of 3rd May 2019. Miss Richardson rightly directed me to what was said by Arden LJ at paragraphs 90 to 93 of the *Burry & Knight* case. As a result of that, at the invitation of the court, and on instructions, Mr Sterling offered an undertaking by Mr Barton, if the non-access request were refused, that he would use the register only for the purpose of contacting his fellow members with a view to seeking a general meeting of members and proposing the resolutions to remove and replace the existing directors and the managing agent. I accept that undertaking. That fortifies my conclusion that Mr Barton is genuine as to his stated purpose for seeking to inspect the register of members. That reinforces my view that the claimant's challenge to Mr Barton's stated purpose has not been established.

47. For those reasons, therefore, I will dismiss the claimant's application. In doing so, I make it clear that I accept the genuineness of the concerns entertained by the company as to Mr Barton's motives for making the request; but, for the reasons I have indicated, in my judgment, those concerns have not been sufficiently established by the claimant. It follows from my dismissal of the claim that pursuant to Section 117 (5) of the 2006 Act, the claimant must comply with Mr Barton's request immediately.

48. Those are my reasons and that concludes this extemporary judgment.
