Neutral Citation Number: [2020] EWHC 1152 (Ch)

Case No: CR-2019-007011

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPANIES COURT (ChD)

IN THE MATTER OF PROFILE PARTNERS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

11 May 2020

Before Insolvency and Companies Court Judge Burton

Between:

Mr Michael Gott

Applicant/Petitioner

- and -

(1) Mr Rune Hauge
(2) Ms Lisa Davey
(3) PROFILE SPORT AND MEDIA LIMITED
(4) PROFILE HOLDINGS LIMITED
(5) PROFILE PARTNERS LIMITED
(a company incorporated in England and Wales)
(6) PROFILE PARTNERS LIMITED
(a company incorporated in Guernsey)
(7) PROFILE PARTNERS GMBH & CO. KG
(8) PROFILE PARTNERS VERWALTUNGSGESELLSCHAFT MBH
(9) GUERNSEY RESOURCES GROUP LIMITED

Respondents

- -

James Potts QC and Andrew Blake (instructed by **Kerman & Co**) for the **Petitioner**
Kuldip Singh QC (instructed by **Fieldfisher** for the **Respondents**

Hearing date: 13 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 11 May 2020

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. This is my judgment in relation to an application which came before me on 13 March 2020 in the Insolvency and Companies Court Urgent Applications' List.

2. The application arose in the context of a petition issued by Mr Gott against the Respondents under section 994 of the Companies Act 2006. The Petitioner sought an injunction to restrain:

   i) the First and Second Respondents from breaching undertakings set out in a letter dated 21 June 2019;

   ii) the Fifth to Eighth Respondents from incurring expenditure on legal or professional services for the purposes of the Petition, the Respondents' counterclaims and/or any other aspect of the dispute between the Petitioner and First to Fourth Respondents;

   iii) the First to Fourth Respondents from causing or permitting the Fifth to Eighth Respondents from taking the actions at (ii) above;

   iv) until final judgment in the claim, the Fifth to Eighth Respondents from paying invoices presented by the First Respondent; and

   v) until final judgment, prohibiting the First to Fourth Respondents from causing or permitting the Fifth to Eighth Respondents from taking actions described at (iv) above.

3. Paragraph 25.30 of the Chancery Guide provides that applications with a time estimate of more than two hours (including pre-reading time, judgment and consequentials) are generally not suitable for the ICC Interim Applications Court. The Petitioner provided a time estimate of up to two hours, including 45 minutes' pre-reading time, noting that if the Respondents were to file evidence in opposition, the time estimate might change. The Respondents' skeleton argument suggested one hour's pre-reading and one to one and half hours' hearing. The Interim List was full and I adjourned the hearing until 2pm in the afternoon.

4. The parties had sought to agree the terms of an interim order pending a full one-day hearing before a High Court Judge. However, the issues which I summarise below, remained in dispute. The time estimate proved woefully inadequate. Whilst I appreciate that the parties sought to restrict the volume of material for judicial pre-reading, the recommended list and bundle of core documents for the hearing did not include the Petition (which extends to 62 pages) nor the Defence and Counterclaim (102 pages). Nevertheless, key to the arguments raised during the hearing was the extent to which the Respondents' counterclaims merely repeated the First and Second Respondents' defence or were entirely independent claims by the Respondent companies against the Petitioner for which expenditure of company money was appropriate.

5. Towards the conclusion of the hearing which extended late into the afternoon, I realised that I would need time to reflect on the arguments with the benefit of all relevant documents before me. I took the unusual step of reserving judgment albeit

with a view to delivering an oral judgment during the course of the following week. As I was solidly listed the following week, that was always going to be challenging but it became even more difficult when the unique circumstances arising from the Covid-19 pandemic intervened in both my personal and professional life. The numerous emails which counsel have sent to me since then (my folder now contains 22) with further submissions, arguments and documentation, however well-intentioned, compounded matters. As the country entered lock-down I wrote to the parties urging them to seek to agree the final issues pending the return date. Some progress was made and I regret that I am only now handing down my judgment in relation to the outstanding issues. Against the backdrop of the unprecedented strain which the pandemic has put on the country's essential services and economy and with undertakings having been given to hold the ring in the meantime, it was right for the Court's resources to be reserved for dealing with the most urgent of applications.

The issues which remain in dispute

(A) Whether the Fifth to Eighth Respondents can use their own money to pay the legal costs which they incur in dealing with the Injunction Application.

6. It is a well-recognised principle of company law, and not in dispute, that a company's money should not be spent on disputes between the company's shareholders.

7. In seeking to persuade the court that the costs incurred or to be incurred by the Fifth to Eighth Respondents should be allowed, Mr Singh QC highlights that the court would usually make provision for a defendant to an application for a freezing injunction to meet its reasonable legal costs. Whilst not rehearsed during the hearing before me, he submits in his skeleton argument that case law surrounding Article 6 of the European Convention on Human Rights demonstrates that where a public authority, such as this Court, intends to take action which deprives a party of the ability to spend its own money as it pleases, it can only do so where the interference is permitted by law, reasonable, proportionate and necessary. He states that there is no suggestion that the Fifth to Eighth Respondents are seeking to meet the costs incurred by the First and Second Respondents in defending the s. 994 petition. They should, however, be allowed their own costs.

8. Both parties rely on the Court of Appeal's decision in *Jones v Jones* [2002] EWCA Civ 961. There, Edward Jones, a 50 per cent shareholder of a quasi-partnership company with his brother William complained against a resolution to exclude him from management of the company. The company commenced proceedings against Edward, alleging breach of duty. Three days later, Edward commenced proceedings under section 459 of the Companies Act 1985 and applied in the s.459 proceedings for an order prohibiting any payment by the company of costs incurred by not only the solicitors acting for his brother but also of costs incurred by separate lawyers acting for the company in the company's claim. He submitted that:

> "the [company's] allegations of misconduct will form an integral part of the defence to the petition brought by Edward and submits that the authorities show that it is an almost inflexible rule that the funds of the company should not be expended by the controlling shareholder in a dispute between the shareholders: see per Lindsay J in *Re Company No 001126 of 1992* [1993] BCC 325. Here the Chancery action is in essence part of the dispute between the shareholders. It

> would drive a coach and horses through the general rule if the controlling shareholder were able to procure the company to commence and fund a separate action against the excluded quasi-partner for the misconduct alleged against him. It cannot make any difference that William managed to commence the Chancery action four days before the section 459 proceedings were commenced."

9. Delivering the unanimous judgment of the Court of Appeal, Lady Justice Arden noted that the general principle that the company's money should not be expended on disputes between the shareholders:

> "clearly applies to participation by a company in section 459 proceedings brought by a member. However, there is no case where it has been applied in a duly authorised corporate action. As Mr Kosmin [counsel for the respondents] submitted, it is difficult to see how it can apply to such an action unless it is said that the action was brought under the authority of directors who were motivated not by the company's interests but by a desire to further the interests of shareholders. A corporate action could be brought which is in truth a shareholders' dispute, for example to set aside an irregular allotment of shares made by a previous board.
>
> … Circumstances of that kind may well, however, be very rare. In the present case Mr Hollington [counsel for the petitioner] has not, in my judgment, shown that the Chancery action is in substance part and parcel of the shareholders' dispute. There is almost total overlap in the factual material, but separate relief is claimed in favour of [the company] on the grounds of breach of duty to it. There is no suggestion that (but for the narrower submission) the action was one which could not be, or was not being, properly brought by [the company]. The fact that the same relief could have been claimed by [the Respondents] on a petition brought by them under section 459 does not mean that relief had to be sought in that way. The situation might have been very different if the Chancery action had clearly been brought in response to section 459 proceedings."

10. The Injunction Application in this matter seeks, *inter alia*, to restrain the Respondents from breaching the contractual agreement recorded in the Respondents' solicitors' letter of 21 June 2019 whereby the First and Second Respondents undertook that:

> "pending the resolution of the current dispute between the parties as set out in the letter before action:
>
> a) that they shall not use funds belonging to the PP Companies (as defined) or any of them to defend on their own behalves any petition presented and served on them in the same or substantially the same form … as that send in draft under cover of a letter dated 19 February 2019 from Mischon de Reya LLP"

11. The Fifth to Eighth Respondents were not parties to that agreement. Aside from the request which is common in petitions under section 994, for an Order that, in the alternative to the First to Fourth Respondents, the Company do purchase the Petitioner's shares, the prayer in the Petition seeks no relief against the Fifth to Eighth Respondents. They were nevertheless joined as respondents to the Injunction Application. Mr Singh submits that they should be entitled to spend their own money

protecting their interests in an application which the Petitioner chose to bring against them. The Court of Appeal in *Jones v Jones* recognised that if a company had a legitimate interest in bringing proceedings it should not be prevented from pursuing it. The Third to Ninth Respondents have their own claims against the Petitioner which are not part and parcel of the shareholders' dispute and which are set out in the counterclaim. He said that whilst the factual matrix overlaps with the background to the s.459 petition, the relief is claimed by the Respondent companies in their own right. For example, it is claimed that the Petitioner deliberately acted contrary to tax advice which resulted not only in damage to the First Respondent but also to the companies under the Petitioner's control as managing director.

12. Mr Potts QC, for the Petitioner, submits that any costs referable to the counterclaim are in fact costs of advancing the positions of the First to Fourth Respondents in the shareholders' disputes. Other than a claim regarding an alleged failure by the Petitioner to repay a loan to the First Respondent, the counterclaim entirely duplicates the defence. Its allegations date back to 2005 but no claim was intimated or brought against the Petitioner, other than in response to the Petition. Moreover, Mr Potts says, like the Defence, it is purportedly brought on behalf of all of the Respondents and fails to articulate which of the various Respondents pursue each of the causes of action. Permitting the Fifth to Eighth Respondents to spend company monies defending the Injunction Application would render the remaining undertakings – all intended to "hold the ring" - nugatory and give the First and Second Respondents an unfair advantage.

13. Mr Potts referred to the decision in *Pollard v Pollard & Ors* where His Honour Judge McCahill QC declined to restrain the company in that case from pursuing its Chancery claim against the petitioner but did restrain company funds from being used to fund it.

> " … There would be a grave injustice to [the petitioner] if the Company were to fund the action, because the Company would be funding a Chancery claim whose central plank is alleged breach of fiduciary duty, which is the very defence raised to the petition."

14. The learned judge also emphasised the importance, in the case before him, of the chronology. He was given no explanation why, if the Company was adamant that it wished bone fide to protect its position, it had not taken earlier action to pursue its claims against the petitioner.

15. Similarly, Mr Potts says that there is no reason for the costs of this Application to be carved out separately from the terms of the proposed order. The Respondents contractually agreed not to spend funds belonging to the Fifth to Eighth Respondents in these proceedings and this Application is brought in the same proceedings.

16. Mr Potts maintains that the use of company monies will be restrained as a misapplication of funds, without reference to the principles in *American Cyanamid* and that it can be seen from *Pollard v Pollard* that the same is true of counterclaims. However, if the Court were to apply *American Cyanamid*, the unfair advantage that would inure by permitting the Fifth to Eighth Respondents to use company monies to meet their costs of this Application could not adequately be remedied by damages. Where the adequacy of damages is in doubt, the court should assess the balance of

convenience and where other factors are evenly balanced, it should preserve the status quo. The status quo in this matter is that the First and Second Respondents should not be permitted to expend any of the Respondent companies' money on these proceedings. Unlike the Respondents in *Jones v Jones*, the Fifth to Eighth Respondents have not offered an undertaking to repay the sums expended by them in relation to the Injunction Application and the Petitioner has scant information regarding the extent of the Respondents' assets.

Decision in relation to the costs of the Injunction Application

17. Despite Mr Singh arguing forcefully for the Fifth to Eighth Respondents' right to spend their own money defending their own positions in the Injunction Applications, those positions, as currently formulated, are inextricably linked to and combined with the other Respondents. The Counterclaim repeats paragraphs 1-40 of the Defence and states:

> "By reason of the matters pleaded above, the Respondents and in particular [there is then a list of the First to Eighth Respondents] have suffered loss and damage".

No evidence was before me of the separate interests which the Fifth to Eighth Respondents sought to protect in the Injunction Application nor of how their costs of the Injunction Application would be separately identified from those of the First to Fourth Respondents and nor further still of any damage that would be caused to them until the hearing which could not be financially compensated by the Petitioner.

18. Whilst the Fifth to Eighth Respondents were not parties in their own right to the June Contract, it was entered into for the purpose of protecting and preserving the assets of the Fifth Respondent pending the outcome of the s. 994 proceedings and to ensure that the First and Second Respondents did not obtain an unfair advantage in the litigation via recourse to company funds. For the purposes of section 994, the "affairs of the company" should be widely construed.

19. The fact that the counterclaims were not brought until many years after the alleged causes of action arose and only in response to the petition, fortify my view that they are part and parcel of the dispute between the shareholders of the Fifth Respondent. I cannot conclude, on the pleadings as drafted, that costs referable to the counterclaim would not amount to costs incurred in advancing the positions of the First to Fourth Respondents. In my judgment, as currently pleaded, the interests of the Fifth to Eighth Respondents are not sufficiently distinct to justify an exceptional departure from the general rule that the company's money (here the money also of the Sixth to Eighth Respondents) should not be spent on disputes between shareholders.

(B) Directions and expedition

20. Since the pandemic necessitated the Court's resources being committed to the most urgent of applications, the parties have also sent numerous emails to me regarding the directions which they wish me to make for the return date.

21. At the hearing on 13 March 2020 Mr Singh informed me that if I were prepared to expedite the matter, the Chancery Listings clerk had indicated that the Injunction Application could be listed before a High Court Judge on 24 April 2020.

22. However, during the hearing on 13 March 2020 and in his skeleton, Mr Potts heralded the Petitioner's intention to apply for summary judgment. He said that without expedition, and in the ordinary course, the Injunction Application could be listed for the week commencing 4 May 2020 where two days would be available.

23. There was no application before me for expedition. In light of the Petitioner's proposed, pending application, I said that it appeared to me to represent a better use of the Court's resources, for the two days identified in May to be reserved so that the Petitioner's application could be issued, evidence served in time and both matters heard by the same High Court Judge. My note book records "Early May dates". I anticipated at the time, being able to restore the adjourned hearing a couple of days later to deliver my oral judgment and make whatever directions were then appropriate for the matter to be listed before a High Court Judge.

24. Clearly and most unfortunately, that has not proved possible. By email, Mr Singh urged me to decline to deal with the listing of the Petitioner's new application and said that I should not seek to pre-empt the decision of the High Court Judge who will be dealing with them.

25. One of the reasons behind my decision to decline to permit the Fifth to Eighth Respondents from spending their own money in relation to the Injunction Application is the vague and unparticularised manner in which the claims of each Respondent have been combined in the Points of Defence and Counterclaim. I am conscious, however, that if, on the return date, the High Court Judge concludes that the Fifth to Eighth Respondents should be able to spend their money on advice including their defence to the Petitioner's proposed application to strike out and/or for summary judgment, then by listing the matters for hearing at the same time, I will have deprived them of the ability to utilise company funds properly to prepare that defence. This seems to me to be a point of fundamental importance which overrides my initial inclination to list both applications to be heard together.

26. The issues in dispute in the Injunction Application are well-known to both parties and can be aired before the court at the return date still reserved for the week commencing 4 May 2020. At the conclusion of that hearing, which I anticipate will be conducted remotely, the Judge should have ample time to make directions for the future conduct of the proceedings and also to deal with the costs of the hearing before me.

27. I invite counsel to provide a revised draft order, reflecting this Judgment, including a provision for costs to be reserved to the Effective Hearing. The draft order should include the caveat in the third recital which Mr Singh insists is of importance to the Respondents and remove references to the Respondents as "nominal", simply referring to them instead by number.

ICC Judge Burton

11 May 2020