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Case No: CR-2021-001640

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

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 16/02/2022

Before:

MRS JUSTICE FALK

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IN THE MATTER OF WATERSIDE NURSERY LIMITED
AND IN THE MATTER OF SCHEDULE 4 TO THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

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- -

Ben Shaw (instructed by **Burges Salmon LLP**) for the Company

Hearing date: 14 February 2022

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APPROVED JUDGMENT

I direct that 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 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2pm on Wednesday 16 February 2022.

Mrs Justice Falk

Mrs Justice Falk:

Introduction

1. This judgment concerns a short point of statutory construction, relating to a matter that would ordinarily be dealt with by an ICC judge but which has been referred to a High Court judge because of a conflict between earlier decisions.

2. The issue relates to statutory provisions introduced by the Small Business, Enterprise and Employment Act 2015 ("SBEEA 2015") that were intended to eliminate the use of bearer shares. In a nutshell, the question is whether the court continues to have jurisdiction to grant a suspended cancellation order under those provisions, despite the relevant time limit having expired.

3. I have reached the conclusion that the court does have jurisdiction.

4. It is convenient first to set out the relevant legal background and summarise the legislation, and then set out the salient facts before explaining my reasoning.

5. I am grateful for the written and oral submissions of Ben Shaw, who appeared for the applicant company, Waterside Nursery Limited (the "Company").

Legal background and Schedule 4 SBEEA 2015

6. Until the enactment of SBEEA 2015 companies were entitled to issue share warrants to bearer, commonly (although strictly not quite accurately) referred to as bearer shares. Section 779(1) Companies Act 2006 ("CA 2006") provided that a company limited by shares could, if authorised by its articles of association:

> "…issue with respect to any fully paid shares a warrant (a "share warrant") stating that the bearer of the warrant is entitled to the shares specified in it."

7. Where a company did this and the warrant was issued under its seal, title to the shares would transfer by delivery of the warrant (s 779(2)). The issuing company could also make provision for the payment of dividends, typically using coupons (s 779(3)), and for voting, usually by requiring the warrant to be deposited for the duration of the relevant meeting. Holders would typically be entitled to surrender their share warrants and become registered shareholders (s 780 CA 2006). But until that occurred the company was not permitted to enter anyone on its register of members as holder of the shares, and the register could only record details of the issue of the warrant and the number of shares included in it (s 122 CA 2006).

8. SBEEA 2015 introduced a wide range of measures. The provisions that this judgment is concerned with were part of a set of provisions contained in Part 7 of the Act that were intended to enhance corporate transparency. Other such provisions included the introduction of the requirement to maintain a register of people exercising significant control over a company (in Part 21A CA 2006), and provisions that generally require directors to be natural persons rather than bodies corporate.

9. The Explanatory Notes to SBEEA 2015 contain the following statement at paragraph 64:

> "At the G8 summit in Lough Erne in June 2013 the UK, alongside the rest of the G8, committed to a number of measures to enhance corporate transparency in order to tackle the misuse of companies. The Government published a discussion paper on these proposals in July 2013, and published the Government response to the views received on the discussion paper in April 2014. The measures included in Part 7 of the Act (linked to measures in Parts 8 and 9) are intended to deliver these commitments. These include the commitment to introduce a register of individuals who exercise significant control over a company; the removal and prohibition of the use of bearer shares; the prohibition of corporate directors, except in certain circumstances and measures to deter opaque arrangements involving directors and make individuals controlling directors more accountable."

10. Section 84(1) SBEEA 2015 amended s 779 CA 2006 by including a new subsection (4). That prohibited the issue of new share warrants on or after the date on which s 84 came into force, which was 26 May 2015. Section 84(3) introduced Schedule 4, which contains the provisions that deal with existing share warrants. The Explanatory Notes comment (at paragraph 571) that "the new section and Schedule will together effect a full abolition of bearer shares in UK companies".

11. In outline, the basic structure of Schedule 4 is to provide for a nine-month "surrender period" following the coming into force of s 84 (the "commencement date"), during which bearers of share warrants were entitled to surrender their warrants. No doubt as an incentive to do this, once the first seven months of the surrender period had expired the rights attached to the shares were suspended, and any transfer or agreement to transfer the share warrant was void. To the extent that share warrants had not been surrendered within the nine-month period, then the company was obliged to apply to the court within the following three months. The nature of the court's jurisdiction is described further below, but in summary if it was satisfied that the holder of the bearer shares had received the required notice, then not only the warrant but the shares themselves would be cancelled. If the court was not so satisfied then a two-month "grace period" was provided in which the bearer had a further right to surrender the warrant and avoid the shares being cancelled.

12. In more detail, paragraph 1 of Schedule 4 provided for a "right of surrender" within a "surrender period" of nine months starting on the commencement date (a period which would have which expired on 26 February 2016). The right of surrender entitled the bearer to surrender the warrant for cancellation and have their name entered as a member in the register of members.

13. Paragraph 2(1) contains provisions that required companies to give notice to bearers of the right of surrender and the consequences of not doing so, as soon as reasonably practicable and in any event before the expiry of one month after the commencement date. If it failed to do so then every officer committed an offence (paragraph 2(2)).

14. Paragraph 3 contains the provisions that suspended rights attached to the shares where warrants were not surrendered within seven months of the commencement date. It provides that any transfer or agreement to transfer the share warrant made after that time is void (paragraph 3(2)), and that all rights attached to the shares, including voting rights and any right to receive a dividend or other distribution, are suspended (paragraph 3(3)). Any distributions must be retained in a separate bank account. Under paragraph 3(6) the suspension would cease to have effect if the share warrant was subsequently surrendered "in accordance with this Schedule". At that point sums retained in the separate account would be paid out to the bearer with any interest.

15. Paragraph 4 obliged the company to give a further notice to bearers of outstanding share warrants before the end of the period of eight months beginning with the commencement date, and again provided that if there was a failure to comply with that requirement then every officer committed an offence.

16. Paragraph 5 and 6 deal with share warrants not surrendered before the end of the surrender period. They provide as follows:

> "*Expiry of right to surrender and applications for cancellation of outstanding share warrants*
>
> 5(1) This paragraph applies in relation to a company which has issued a share warrant which has not been surrendered for cancellation before the end of the surrender period.
>
> (2) The company must, as soon as reasonably practicable and in any event before the end of the period of 3 months beginning with the day after the end of the surrender period, apply to the court for an order (referred to in this Schedule as a "cancellation order") cancelling with effect from the date of the order—
>
> (a) the share warrant, and
>
> (b) the shares specified in it.
>
> (3) The company must give notice to the bearer of the share warrant of the fact that an application has been made under this paragraph before the end of the period of 14 days beginning with the day on which it is made; and the notice must include a copy of the application.
>
> (4) If a company fails to comply with sub-paragraph (2) or (3) an offence is committed by every officer of the company who is in default.
>
> (5) A company must, on making an application for a cancellation order, immediately give notice to the registrar.

(6) If a company fails to comply with sub-paragraph (5) an offence is committed by—

(a) the company, and

(b) every officer of the company who is in default.

Cancellation orders and suspended cancellation orders

6 (1) The court must make a cancellation order in respect of a share warrant if, on an application under paragraph 5, it is satisfied that—

(a) the company has given notice to the bearer of the share warrant as required by paragraphs 2 and 4, or

(b) the bearer had actual notice by other means of the matters mentioned in paragraph 2(1).

(2) If, on such an application, the court is not so satisfied, it must instead make a suspended cancellation order in respect of the share warrant.

(3) A "suspended cancellation order" is an order—

(a) requiring the company to give notice to the bearer of the share warrant containing the information set out in sub-paragraph (4) before the end of the period of 5 working days beginning with the day the order is made,

(b) providing that the bearer of the share warrant has a right of surrender during the period of 2 months beginning with the day the order is made (referred to in this Schedule as "the grace period"), and

(c) if the share warrant is not so surrendered, cancelling it and the shares specified in it with effect from the end of the grace period.

(4) A notice required to be given by a suspended cancellation order must—

(a) inform the bearer of the share warrant of the fact that the bearer has a right of surrender during the grace period,

(b) inform the bearer of the consequences of not having exercised that right before the end of the period of 7 months beginning with the commencement date (see paragraph 3), and

> (c) explain that the share warrant will be cancelled with effect from the end of the grace period if it is not surrendered before then.
>
> …"

17. Paragraphs 7 to 12 deal with the reduction of capital resulting from any cancellation of shares under a cancellation order or suspended cancellation order made pursuant to paragraph 6, including provision for payment into court of the capital attached to the shares and any distributions which have been suspended. Bearers have three years from the date of cancellation in which to apply for these amounts to be paid to them, but the application may only be granted where there are "exceptional circumstances" justifying the failure to exercise the right of surrender (paragraph 10). The Explanatory Notes suggest that exceptional circumstances might include serious illness during the surrender period.

18. Paragraph 13 prohibits an application for voluntary striking off under s 1003 CA 2006 while any share warrant is outstanding.

19. Paragraph 14 explains how bearers of share warrants should be notified under Schedule 4, namely via the Gazette, by any means by which the company normally communicates with them, and by making the notice available on a prominent position on the company's website (if it has one).

The facts

20. The Company was incorporated on 20 January 2000 as a private company limited by shares, with a single subscriber share of £1 registered in the name of an incorporation agent. On the same date a further 999 £1 shares were issued to James Finlayson, who also took a transfer of the subscriber share. On the following day a share warrant to bearer was issued in respect of all 1000 shares, and Mr Finlayson hand delivered the share warrant to the trustee of a Guernsey trust, known as the Terrigal Trust. The share warrant has continued to be retained in Guernsey since that time by the trustee, which is currently SG Kleinwort Hambros Trust Company (C.I.) Limited (the "Trustee"). No further shares have been issued.

21. Mr Finlayson is the sole beneficiary of the Terrigal Trust and is also the sole director of the Company. The Company carries on a property business. As the name suggests, it owns the freehold of a plant nursery. Its profits are derived from rental income.

22. For reasons that are not entirely clear, notwithstanding the continued retention of the share warrant by the Trustee the Company's annual returns and confirmation statements filed at Companies House have since 2001 treated the Trustee as the registered holder of the shares. The Company has also managed its internal affairs on the same basis, providing notices of annual general meetings and paying dividends to the Trustee.

23. It follows from the way in which returns were filed that, as far as the Registrar of Companies was concerned, no share warrants existed. This no doubt accounts for the fact that the Company was not targeted by steps taken by Companies House

to pursue companies with outstanding share warrants following the enactment of SBEEA 2015. Further, neither the Trustee nor Mr Finlayson otherwise became aware that bearer shares should have been surrendered pursuant to that Act. The result was that none of the steps provided for in Schedule 4 were taken.

24. The matter only came to light in 2021 when Mr Finlayson sought advice in relation to a potential transfer of the shares. This led to the present application for a suspended cancellation order under paragraph 6(2), with a view to allowing the warrant to be surrendered within a two month grace period. The Registrar of Companies has been notified of the application.

25. The current position is that, as a result of the restrictions imposed by paragraph 3 of Schedule 4, the share warrant cannot be transferred and all rights to the shares are suspended, including the right to vote. Dividends should also have been paid into a separate account.

Discussion

26. The short point is whether the application before me is an application "under paragraph 5", as referred to in paragraph 6(1) of Schedule 4. If it is, then the court has jurisdiction. Further, Schedule 4 does not provide the court with any discretion. If it has jurisdiction the court must either make a cancellation order if it is satisfied that notice has been provided or the bearer has had actual notice as set out in paragraph 6(1), or it must make a suspended cancellation order. It is clear from the evidence in this case that no notice was provided and that the Trustee did not have notice by other means. It follows that if the court does have jurisdiction then it must make a suspended cancellation order.

27. Mr Shaw submitted that the application was an application under paragraph 5, albeit one that was made late. He submitted that this approach was consistent with Parliament's intention to abolish share warrants and ensure that all existing warrants were converted to registered shares. It also addressed the current difficulty that all rights attached to the shares, which represent the entire share capital of the Company, are suspended.

28. I have concluded that the better interpretation of Schedule 4 is that the application is an application under paragraph 5, such that the court does have jurisdiction. My reasons are as follows.

29. The clear aim of s 84 and Schedule 4 SBEEA 2015, both of which are headed "Abolition of share warrants to bearer", was to abolish share warrants to bearer, as part of legislative changes designed to ensure greater transparency of company ownership and control. As discussed further below, an interpretation which confines the court's jurisdiction to applications made within the three month time limit is more likely to frustrate than to achieve that objective.

30. Companies that had issued share warrants were required to take action within a relatively short period to ensure that abolition occurred. If the relevant action was not taken then every officer committed an offence. Holders of share warrants were also strongly incentivised to surrender their warrants by the prospect of their

share rights first being suspended under paragraph 3, and then potentially lost altogether by a cancellation order.

31. It is however important to note the emphasis put by Schedule 4 on the roles of the issuing company and (through the related offences) its officers. The onus was on the company to provide notice under paragraph 2 and again under paragraph 4. The onus was also on the company to apply to the court under paragraph 5, and notify the bearer again under paragraph 5(3).

32. The fact that the onus was on the company is supported by the structure of paragraph 6. If bearers had been notified in accordance with paragraphs 2 and 4, then the court was required to make a cancellation order, the effect of which was to cancel not only the share warrant but the shares themselves. Although the nominal value and any premium paid, plus any dividends held in suspension, would be paid into court, those amounts could only be recovered by the holder in exceptional circumstances. Any additional value would in any event be lost.

33. In sharp contrast, if notice had not in fact been provided as required by paragraphs 2 and 4, and the bearer did not otherwise have actual notice, a suspended cancellation order had to be made, providing for a grace period within which surrender could be effected and full rights restored. In other words, the bearer was not to be penalised by the loss of the shares for the company's failure to give notice under paragraph 2 or paragraph 4. In my view it would be inconsistent with this if the holder were placed in a worse position by the company's failure not only to comply with paragraphs 2 and 4, but to comply with paragraph 5 on a timely basis.

34. Whilst it is correct that there is nothing that expressly permits an application to be made outside the prescribed time limit, it is equally the case that neither paragraph 5 nor paragraph 6 provide in terms that no application may be made after the time provided. Instead, paragraph 5(4) provides that failure to apply to the court and give notice under paragraphs 5(2) and (3) amounts to an offence by every officer in default. In my view that is the sanction that Parliament provided for failure to comply with paragraph 5 on a timely basis. As already indicated, the provision of a grace period to holders of bearer shares who had not been notified under paragraphs 2 and 4 and did not have actual notice by other means is consistent with this. The aim of the legislation was to abolish bearer shares and provide what Parliament determined were the necessary incentives to do so. The provision of a grace period shows that the intention was not to deprive bearers of their rights if they had not been appropriately warned.

35. Mr Shaw referred me to a passage in *Bennion, Bailey and Norbury on Statutory Interpretation (8th ed.)* at section 26.4, which discusses what is sometimes described as a "presumption against doubtful penalisation", namely a principle that a person should not be penalised except under clear law. As that passage describes, the principle can apply to civil detriments as well as criminal liability (*ESS Production Ltd (in administration) v Sully* [2005] EWCA Civ 554; [2005] 2 BCLC 547 at [78], per Arden LJ). The rationale is that the legislature is presumed to intend that a person on whom hardship is inflicted should be given a fair warning of the risks (*Bogdanic v Secretary of State for the Home Department*

[2014] EWHC 2872 (QB) at [47] per Sales J). That principle is relevant here, and should be taken into account in interpreting the legislation.

36. It is also important to consider what the position would be if the court did not have jurisdiction. The shares are not currently transferable and all rights attaching to them are suspended. Under paragraph 3(6) the suspension only ceases to have effect if the share warrant is "subsequently surrendered in accordance with this Schedule". Section 780 CA 2006, which contained provision for surrenders of share warrants, was repealed by SBEEA 2015, reinforcing the point that Schedule 4 is intended to provide the sole surrender mechanism. Whilst a surrender might still be made under the Company's articles of association, that would not have the effect of removing the suspension of rights because it would not be effected "in accordance with" Schedule 4.

37. The result of the court not having jurisdiction to entertain a late application under Schedule 4 would be that the shares would remain "in limbo". This is unsatisfactory and seems unlikely to be what Parliament could have intended. Not only would it prevent bearers of share warrants who had not been appropriately notified from recovering their share rights via the grace period mechanism, but it would also preclude the court from granting a cancellation order where notice had been given. Suppose, for example, that notice had been given under paragraphs 2 and 4, but for some reason the application to court was made more than three months after the end of the surrender period. If a late application was not an application "under paragraph 5" then the court would not have jurisdiction to make a cancellation order, however short the delay and whatever reason there might be for it. In practice the share warrants would simply remain outstanding, rather than being surrendered or the shares cancelled as Parliament intended.

38. To an extent, this point also works the other way. The lack of any discretion means that, if it had jurisdiction, the court would be obliged to act under paragraph 6 however late the application and whether or not there was any good reason for the delay or other circumstances that merited excusing it. However, the answer to this lies in the sanctions provided for. If notice had been received the shares must be cancelled. If not, the bearer is only given a short grace period of two months, following which the shares are cancelled. Further, offences are prescribed for failures to comply with paragraph 5. The court's role remains an important one, but it is to decide whether the conditions have been met to grant a cancellation order, with the effective expropriation that that involves, or instead to grant a suspended cancellation order which allows the holder a grace period.

39. In *Re Charles Stanley Group plc* [2021] EWHC 359 (Ch), in the context of a proposed scheme of arrangement, Chief ICC Judge Briggs dismissed an application for a suspended cancellation order in respect of share warrants representing 0.16% of Charles Stanley's share capital. He disagreed with an unreported decision of Registrar Derrett in *Re Five Arrows Ltd* on 8 August 2016, where a cancellation order was made on an application issued in June 2016, after the latest date permitted by paragraph 5 of Schedule 4. The reason given by the Chief ICC Judge was that the procedure imposed by the legislation required compliance with the time limits (paragraph [23]). He also pointed out at [24] that the company was not without remedy because it could seek to cancel the shares through a conventional court approved reduction of capital under s 641 and ss

645-649 CA 2006. (In fact this is what Charles Stanley did: see the decision of Marcus Smith J sanctioning the scheme on 19 January 2022, reported at [2022] EWHC 103 (Ch), at [13]-[17].)

40. I accord significant respect to the view of the Chief ICC Judge. However, having considered the matter in some detail I am unable to agree with his conclusion for the reasons already given. I would further observe that, whilst the remedy of a conventional reduction of capital may well have been available to Charles Stanley, it would not be available in every case and is not a panacea. In this case the share warrants represent all of the Company's issued share capital. Since voting rights are suspended it would be impossible for the Company to pass the special resolution that would required for a reduction of capital pursuant to s 641 CA 2006, whether with court approval or using the mechanism under which private companies may reduce capital without court approval on production of a solvency statement. Further, a reduction of capital cannot be undertaken under s 641 if it would result in no shares being left in issue (see s 641(2)).

41. Both of these problems might be addressed if the Company first issued some new shares. However, there is no assurance that that could be achieved. Since voting rights are suspended it would depend on the happenstance of the director or directors already having the authority to issue new shares[1], and being able to do so without regard to any rights of pre-emption (which, like other share rights, would appear to be suspended by virtue of paragraph 3 of Schedule 4).

42. Further, if shares were in fact issued to third parties in those circumstances and the shares represented by the share warrants were then cancelled under the reduction of capital procedure, the overall effect would be to deprive the bearer of their interest in the company without having any chance to intervene, including in circumstances where the company was in default because it had failed to provide the requisite notices. In my view that would be inconsistent with the onus placed on the company to notify bearers of warrants and the grace period contemplated by the legislation if notice has not been provided.

43. This last point of course applies equally to cases where not all of the existing shares are represented by share warrants, and where shareholders would be affected unequally by a capital reduction designed to cancel the shares held in bearer form. So the point is not limited to cases where all the shares are represented by share warrants.

44. I also note that limited alternative options appear to be available for a solvent company. A members' voluntary winding up would also require a resolution in general meeting. In theory, winding up could be ordered by the court on the grounds that it was just and equitable to wind the company up (under s 122(1)(g)

[1] I note that s 550 CA 2006 allows directors to exercise powers to allot shares but (a) this only applies to private companies with a single class of share, and only to the extent not prohibited by the company's articles; and (b) only if members have first resolved that the directors should have the powers conferred by that section: paragraph 43 of Schedule 2 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008. Issuing shares without compliance with the applicable restrictions could itself involve commission of an offence, under s 549(4) CA 2006.

Insolvency Act 2006). But, quite apart from the fact that the bearer of the share warrants would not be able to receive any distributions of surplus assets, winding up rather misses the point. The evident aim of the legislation is to kill off bearer shares, not the companies that issued them. As Mr Shaw pointed out, a winding up would not only affect the company and its shareholders, but would also potentially affect third parties, including creditors.

45. Paragraph 13 of Schedule 4 prevents any application for voluntary striking off under s 1003 CA 2006 at a time when there is a share warrant outstanding. That not only underlines the point in the previous paragraph, but in my view illustrates that Parliament must have intended that a mechanism would continue to be available for share warrants to be cancelled.

46. I also note that where a company has otherwise been struck off or has been dissolved at a time when it had share warrants in issue, then by virtue of ss 1028A and 1032A CA 2006, which were inserted by Schedule 4 SBEEA 2015, the relevant shares are automatically cancelled in the event of restoration to the register. But somehow procuring striking off by the Registrar of Companies, for example by failing to file accounts, is not a practical alternative either. As well as obviously having a material impact on the company, it would only compound existing compliance failures. It is not likely that Parliament intended that any such action would be required.

47. Mr Shaw submitted that, to the extent that Schedule 4 was ambiguous, resort could be had to Ministerial statements under the principle in *Pepper v Hart* [1993] AC 593. I should clarify that I do not consider the legislation to be ambiguous, or any of the statements to which Mr Shaw drew my attention to be sufficiently clear and specific to assist.

48. I should mention two other points. First, I am conscious that as sole director and as beneficiary of the Terrigal Trust, Mr Finlayson both bears responsibility for the failure to comply with Schedule 4 on a timely basis, and effectively benefits from my decision. However, I do not consider that this feature of the facts of this case should affect my decision on a point of statutory construction. Secondly, I am conscious that the legislation omits to provide a mechanism to address a case where a cancellation order takes effect in circumstances that result in all the company's issued shares being cancelled (as would be the case here if the share warrant was not surrendered during the grace period). In contrast, provision is made to cover that eventuality under ss 1028A and 1032A CA 2006 where a company is restored to the register. Again, however, I do not consider that that omission, which would also have existed if an application under paragraph 5 had been made on a timely basis, should affect my conclusion as to the correct construction of the provisions.

49. I should emphasise that my decision is limited to a conclusion that the court has jurisdiction, and (given that the requisite notices were not provided and the Trustee did not otherwise have notice) that the appropriate order is a suspended cancellation order. I make no finding in relation to the offences provided for by Schedule 4, which – except insofar as their existence is relevant to the correct construction of the statutory provisions – are not a matter for me. I note that the Registrar of Companies has already been notified pursuant to paragraph 5(5) and

that any cancellation of the shares pursuant to the order would also need to be registered under paragraph 7.

50. I also make no finding in respect of dividends paid or voting rights that may have been exercised during the period when the rights attached to the shares were suspended. That is a matter to be resolved, if required, between Company and the Trustee, together with any relevant third party.

Conclusion

51. In conclusion, the court does have jurisdiction to entertain an application made after the time limit prescribed in paragraph 5 of Schedule 4, and the appropriate order in this case is a suspended cancellation order.