Case No: BL-2022-001155

Neutral Citation Number: [2022] EWHC 3483 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 16 December 2022

Before: **Charles Morrison**
(sitting as a Deputy Judge of the High Court)

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Between:

FAILBETTER GAMES LIMITED

Claimant

- and -

MR ALEXIS KENNEDY

Defendant

- -
- -

Edward Crossley (instructed by **Wiggin LLP** Solicitors) for the **Claimant**
Caley Wright (instructed by **Patron Law** Solicitors) for the **Defendants**

Hearing date: 30 November 2022

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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 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30 am on 16 December 2022.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. This case concerns the Defendant, Mr Kennedy (**D**), and the company he founded in January 2010. In May of 2016, Mr Kennedy offered his resignation as CEO of the company; it is the company that is the Claimant (**C**) in these proceedings. C maintains that contemporaneous with D's resignation, D and C reached an oral agreement on terms that D would, inter alia, resign as director and CEO, sell 224 shares to the Company for £360,000 to be cancelled, and gift certain shares to his co-founder and to a number of employees (the **Share Agreement**).

2. D's case is that no agreement for the sale and gift of his shares was ever reached in May 2016; if it was, despite the Company paying over the sum of £360,000 to D, it was subject to contract and not binding. It is also accepted that on 30 May 2016, D signed a document the form of which being commonly known by transactional lawyers as a stock transfer form.

3. In due course C sought to regularise the position and complete a valid transfer of the shares pursuant to the Share Agreement. D declined to assist. D also sought to conduct himself as a continuing member of the company, going so far as to convene meetings and to seek to appoint himself as a director and change the Registered Office of C. This activity spawned an application by C to Mr Justice Leech, who on 7 September acceded to Cs request for injunctive relief to restrain the complained of behaviour of D, the essence of the order being that,

> "*The Defendant shall not exercise, or purport to exercise, any rights or purported rights as a member, director, officer, representative, employee or agent of the Claimant until final disposal of the Part 7 Claim or other further Order of the Court.*"

4. Pleadings have now closed in C's action, and also in the cross-claim issues by D. A window for trial has been intimated as March 2023. Against this backdrop, C comes to me to ask that three paragraphs of D's Defence be struck out. If the test for a strike out is not met, C invites me to grant summary judgment in respect of the same three limbs

of the Defence on the basis that D has no real prospect of successfully defending the claim on the basis of what is therein pleaded.

5. I heard the application on 30 November. C and D were represented by Mr Crossley and Mr Wright, respectively, both of counsel. As I mentioned at the conclusion of the hearing, I am indebted to them both for their clear and helpful skeleton arguments delivered to me in good time prior to the hearing.

The Applications

6. C invites the court to strike out paragraphs 26.2, 27 and 28 of the Defence pursuant to CPR r.3.4(2)(a), because it is said that they disclose no reasonable grounds for defending C's claim for specific performance of the Share Agreement.

7. In the alternative, C asks for summary judgment against D on paragraphs 26.2, 27 and 28 of the Defence, on the ground that D has no real prospect of successfully defending the claim for specific performance by what is pleaded in those paragraphs, and there is no other compelling reason why the issues raised by those paragraphs should be disposed of at trial.

The Pleading

8. The paragraphs at issue provide as follows:

> *"26. Further or alternatively, if (i) there was a concluded agreement between Mr Kennedy and the Company and (ii) Mr Kennedy is in reach of any such agreement, it is denied that the Company is entitled to specific performance of the same:*
>
> *...*
>
> *26.2 It would be unfair to Mr Kennedy to grant specific performance of the agreement. Any agreement on Mr Kennedy's part to sell his shares to the Company at an undervalue was motivated by the goodwill felt by Mr Kennedy towards the Company which he had founded and grown, and which had had sustained success thanks to the hard work of Mr Kennedy. In*

circumstances set out below at paragraph 27, that goodwill has substantially dissipated thanks to the actions of the Company."

27. As set out above, Mr Kennedy left his role as CEO of the Company on good terms. Thereafter, Mr Kennedy set up a business known as Weather Factory, through which he continued his work writing and creating games. Thereafter, from around late 2017, the relationship between Mr Kennedy and the Company soured:

27.1. In December 2017, Mr Kennedy was approached for comment by the trade press on the Company having made a number of members of staff redundant, as set out at paragraph 26.1 above. Mr Kennedy stated that he was disappointed and thought the redundancies unnecessary. Mr Kennedy were contrary to assurances he had been given in May/June 2016. These comments were published and, it is to be inferred, caused the Company (or to the extent different its officers) to seek to damage Mr Kennedy's reputation;

27.2. The professional rivalry between the Company and Weather Factory grew, in particular when in 2019 Weather Factory was nominated for two BAFTA awards and won a number of Develop Star Awards. As to the latter, while the Company was nominated in four categories but failed to win any of them;

27.3. In 2019, an anonymous tweet included Mr Kennedy's name in a list of industry figures who mistreated women, and two individuals associated with the Company (one an employee and the other a contractor) made allegations that – in broad terms – Mr Kennedy had abused his position of authority while at the Company. Without contacting Mr Kennedy, the Company posted on social media that it believed and stood by the accusations against Mr Kennedy, leading to further baseless allegations against Mr Kennedy and substantial online abuse;

27.4. Mr Kennedy responded with a lengthy post on social media setting out his position on 16 September 2019. This had the effect of reducing the abuse received by Mr Kennedy online;

27.5. However on 13 September 2019, Mr Myers, a director of the Company, posted a blog entitled "About Alexis Kennedy". The blog-post was a personal attack on Mr Kennedy, drawing on information which can only have been obtained through the Company, albeit containing a number of baseless and inaccurate accusations and statements;

27.6. The Company accordingly propagated and encouraged an online hate campaign against Mr Kennedy, seemingly for reasons of personal or professional rivalry;

27.7. More recently, the Company has contained to encourage or facilitate online abuse of Mr Kennedy. To Mr Kennedy's knowledge:

27.7.1. On 15 October 2021, two of the Company's directors re-tweeted and endorsed a post containing baseless allegations of sexual harassment and grooming against Mr Kennedy; and

27.7.2. Also in or around October 2021, the Company allowed a discussion, hosted on one of its moderated online social spaces, identifying Mr Kennedy by name and speculating as to the extent to which the participants might be willing to defecate on Mr Kennedy's corpse. Complaints to the Company about this conduct went unanswered, and the posts remained available online for a period of weeks.

9. Paragraph 28 asserts that:

"*In the premises, the circumstances of any sale of shares by Mr Kennedy at an undervalue to the Company are entirely different from those that pertained as of the date of any agreement (which is in any event denied) in 2016. It would in the*

current circumstances be unfair to compel by way of an order for specific performance Mr Kennedy to sell his shares to the Company at an undervalue now."

The Law relating to the Applications

10. As to the application to strike-out the paragraphs of Defence, C relies on CPR r.3.4(a) and says that the averments *"disclose no reasonable grounds for bringing or defending the claim"*. Reliance is placed upon CPR PD3A, para.1.6, which states that a defence may fall within CPR r.3.4(2)(a) where the *"facts it sets out, while coherent, would not even if true amount in law to a defence to the claim".*

11. As matters transpired before me, there was no disagreement between the parties that the approach set out by Court of Appeal in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, [2004] All ER (D) 172, in terms that the court must be certain that the claim (or defence) is bound to fail, was the correct one. Quite properly it seems to me, Mr Crossley supplemented his elucidation of the relevant test by adding that if the court is concerned with a legal issue in a developing area of jurisprudence, the court may conclude that the issue is best determined against the facts found at a trial in order that it is decided against actual rather than hypothetical facts. In short, Mr Crossley invited me to proceed on the basis that paragraphs 26.2, 27 and 28 are true.

12. As I have already indicated, by way of a second bite at the cherry, in the alternative C asks for summary judgment pursuant to CPR r.24.2 on the basis that D has no real prospect of successfully defending the claim by what is set out in paragraphs 26.2, 27 and 28, and there is no other compelling reason why the issues raised by those paragraphs should be disposed of at a trial.

13. Again there was no disagreement before me as to the approach to the summary judgment application, my attention being invited to the well-known principles set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 229 (Ch).

14. Because C invites me to determine a question of law on the basis that the pleaded paragraphs subject to challenge are true, C argues that of the *Easyair* principles, perhaps the most relevant for me is the principle set out at para 15, (vii):

"It is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of…successfully defending the claim against him."

C's case

15. It is submitted that the court can at this juncture be certain that the facts pleaded at the impugned paragraphs could never amount to a basis for the court at trial declining to grant specific performance of the Share Agreement. The principal thrust of the case is that even if what is in the impugned paragraphs is all true, what it does not amount to is a defence in law. There are numerous grounds which, if established, will lead to a court declining to order specific performance. The grounds are well-known and well-defined, says Mr Crossley; however, the matters pleaded do not fall into any of them.

16. It is tolerably clear from paragraphs 26 and 28, that what the pleading amounts to, *in toto*, is a plea that an order for specific performance would be unfair to D. It is submitted by C that any unfairness must be judged by reference to the behaviour of the claimant, and it must be something capable of being characterized as unfair that relates to the contract C wishes to enforce.

17. Although it was submitted that ordinarily the relevant unfairness will arise at or before the time of contracting, it was accepted that the principle is not straight-jacketed in that sense: it was possible to point to unfairness arising from post contractual behaviour (see *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187). In that case the relevant post-contract behaviour of the oil company in the way it dealt with its customer, persuaded the court that it would be unfair to hold the customer to its exclusive purchase obligation.

18. As to the case made by C, it was argued that the pleading in issue not only seeks to rely on facts and matter arising long after the Share Agreement was concluded in 2016, the particular unfairness alleged does not relate to the contract which is being enforced.

19. Submissions were also made to me by Mr Crossley going to the discrete ground of hardship, that is to say, hardship, being another recognised basis for the court arriving at the view that an order for specific performance should not lie. On the argument that I heard, it does not seem to me that anything turns on the distinction. As will be seen, D made his case on the basis of the unfairness which is clearly pleaded at paragraphs 26 and 28, buttressed by the matters going to unfairness set out in paragraph 27.

20. Whilst I would not want D to be fettered at trial by anything I might say here, C's approach to the law on unfairness was broadly speaking, accepted by D. The one issue that was taken, as will be seen later on in this judgment was in regard to the closed nature of the categories or circumstances that might justify a finding of unfairness. Placing reliance upon passages from *Chitty on Contracts* and also Spry's *Equitable Remedies*, it was asserted that a finding of unfairness justifying a refusal to order specific performance had to fall within the boundaries of the fixed principles the courts have determined as a basis for a refusal of an order: it could not be based upon some "vague notion of unfairness". In pointing to the badges of those fixed categories, Mr Crossley suggested that the behaviour of the Plaintiff must be the guide.

D's case

21. It is helpful before approaching the arguments advanced by D, to examine what it is that is asserted in the relevant pleading. Paragraph 26.2 in essence says that D agreed to transfer his shares at an undervalue on the basis of the goodwill he felt towards the company he had founded and grown. He no longer feels that goodwill, or to put it as D might, C is no longer entitled to that goodwill on account of its after the event behaviour, details of which are pleaded at paragraph 27. This, says Mr Wright, goes directly to the Share Agreement and its formation.

22. In paragraph 27, D sets out the behaviour of C that he appears to say was directly at odds with his understanding of how the parties would conduct themselves if he entered into the Share Agreement. Staff redundancies are cited; supposedly untrue and abusive defamatory statements are complained of. These issues all point, says D, to the unfairness that would characterise any order for specific performance. It would be unfair to hold him to an agreement under which he was to transfer his shares at a price otherwise

than their true value, where his motivation for do so was a belief in the future conduct of C, both towards him, and towards members of staff.

23. D responded to C's attempt to restrict the focus of any analysis of the right to prevent specific performance to a narrow set of defined principles by inviting my attention to *Halsbury's Laws, Vol 95,* at [**485**] where, under the heading *"*Unfairness or oppressiveness as a defence to specific performance", it is stated that:

> "*The court's discretion to grant specific performance is, it is said, not exercised if the contract is not 'equal and fair'. Even though no fraud, duress or undue influence such as to justify rescission is shown, the court may still not enforce the contract if it would not be consistent with equity and good conscience to do so.*"

24. To give weight to the submission that in any case the evidence to be led in this case fell squarely within the general principle, D sought to rely on the decision of HHJ Purle QC, in *Heath v Heath* [2009] EWHC 1908 (Ch), where at [**25**] the learned judge said,

> "*I do however consider that both parties were, on the evidence I have heard, acting under a serious misapprehension as at 8th August 1997. The 1st Defendant was clearly motivated by her belief that Martin was the beneficiary of the deceased's estate. She had that belief because that is what the deceased told her and caused to be put into the agreement. In entering into the relatively informal agreement she reached, she took comfort from the fact that her children would benefit, the expectation being that Martin would receive everything, and act fairly towards his brother and sister. The deceased must have shared this belief at the time, as he prepared the draft so describing Martin, which was typed up by Martin's wife. I also accept the 1st Defendant's evidence to the effect that the deceased told her that their children would eventually benefit on his death. If he did not also believe at the time that Martin was the beneficiary of his estate, he was being disingenuous by putting forward an agreement so describing him. Some corroboration for the fact that he did harbour this belief came from Martin's evidence. He said that his father told him that he was leaving it to his (Martin's) discretion how to divide the estate.*

*[**26**]. Considerations of this kind may justify the court in refusing the remedy of specific performance. Mistake as a vitiating element has been eliminated as a separate equitable doctrine by Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679. Nevertheless, specific performance is a discretionary remedy and mistake may in my judgment still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case, of which I consider the present to be one, the mistake may also amount to, or be practically indistinguishable from, a misrepresentation. Here, the statement of the deceased that Martin was the beneficiary of his estate may well have accorded with what the deceased thought to be true, but it was wrong. That statement was a significant inducement in persuading the 1st Defendant to make the agreement of 8th August 1997. It would not be right or fair, in those circumstances, for the agreement now to be specifically enforced.*"

25. Whilst the case before me is not made in mistake, what is argued is that D entered into the agreement on a certain understanding as to how the company would subsequently behave and how the staff would be treated. That understanding now being shown, or as it is intended it will be demonstrated at trial, to be mistaken because of the after event conduct of C, it is submitted that it would be unfair to hold D to his bargain by way of a discretionary remedy. Reliance is placed on the reasoning of HHJ Purle QC in *Heath*, to the extent that the belief of a party at the time of contracting can be a factor leading to a finding of unfairness, if that belief can be shown by subsequent events to have been unfounded, in particular, by reason of conduct of the party seeking to enforce the bargain, that is inconsistent with that known belief on the part of the other.

Discussion

26. As might have been expected, Mr Wright for D sought to persuade me that I must approach any decision to strike out a pleading or grant summary judgment upon it, with the utmost caution. Yes, in an appropriate case I must not shy away from "grasping the nettle" but I must allow a party to be heard at trial where there is in prospect evidence to be led that could realistically have a real bearing on the issues. I agree with him. I also accept the proposition advanced by Mr Crossley, founded as it is on authority, that the

evidence cannot be of the "something might turn up" character. I must be able to see, now, that there is good reason to believe, or at any rate a realistic prospect, that evidence will be led at trial that could have a bearing on the controversy.

27. But even if that evidence is all accepted by the court, what if it could not in law, swing the scales in favour of D? That in essence is C's case; the evidence that would be led if the impugned paragraphs are allowed to stand would be irrelevant to the tests that must be satisfied as a matter of law if an order for specific performance is not to lie.

28. I have to say that I am not persuaded that it would be right to shut out D from leading the evidence he seeks to adduce in regard to the impugned paragraphs. In my judgment the trial judge should have the benefit of hearing the relevant evidence and hearing fully developed submissions on the question of fairness against that backdrop. At all events I am not prepared to say at this juncture that the facts and matters pleaded could not influence a finding of unfairness such as will persuade the court to decline an order of specific performance.

29. Although it is at the front of my mind, my decision is not borne merely out of a sense of caution. In my judgment it is very well capable of argument that given the nature of D's relationship with C, as its founder and original CEO, and in light of the circumstances surrounding the entering into of the Share Agreement, that evidence of his state of mind and understanding could be relevant to a submission based upon the subsequent conduct of C. I am not prepared to hold that such a case could not make out a submission of unfairness that would justify a refusal of specific performance. I am also not persuaded that the perimeter of the relief is as hard and fast as the C has sought to argue; if I am wrong and it is, then I do not see that the case made by D cannot be brought within that perimeter when the evidence, as a whole, has been led at trial. It goes to the circumstances surrounding the making of the alleged agreement; it touches upon the subsequent conduct of C. I do not see that it is that far away from the principles urged upon me by Mr Crossley especially if regard is had to the reasoning in *Shell UK Ltd,* nor would it seem an obvious departure from the approach taken by HHJ Purle QC in arriving at his decision in *Heath*.

30. Thus whether I decide this application on the basis appropriate for a strike-out application or whether I approach it applying the summary judgment test asking myself the question has D any real prospect of successfully defending the claim on the basis of the matters appearing in the impugned paragraphs, in either instance I come to the view that the application must fail and it will be dismissed.