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Appeal Ref: CH-2023-BHM-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CHANCERY APPEALS (ChD)
On appeal from the County Court at Birmingham
Order of His Honour Judge Williams dated 25 January 2023
Case No: CH-2022-BHM-000009

Date: 4th December 2023

Before :

MR JUSTICE RAJAH

- -

Between :

Davinder Bal

Appellant

- and -

Parveen Attri

Respondent

- -
- -

Davinder Bal appearing in person
Omar Ensaff for the Respondent

Hearing date: 21 November 2023

- -

Approved Judgment

Mr Justice Rajah:

Introduction

1. This is an appeal by the Claimant, Mr Davinder Bal ("**Mr Bal**") against the decision of HHJ Williams ("**the Judge**") after he had heard submissions on five preliminary issues at the start of a trial of a claim for breach of contract (liability only) and a counterclaim for harassment. The Judge determined the first preliminary issue against Mr Bal and dismissed his claim.

2. Zacaroli J granted Mr Bal permission to appeal limited to one issue –whether, upon the true construction of the option agreement, the failure to agree a new shareholder's agreement prior to the purported exercise of the option rendered the exercise of the option invalid.

The Facts

3. Mr Bal is a former solicitor who was the owner and director of a law firm, DBS Law Limited ("**DBS**") which was established in 1999. DBS was at one time said by Mr Bal to be generating a fee income of over £5 million a year but it got into financial difficulties and on 9 October 2018 it was placed in administration.

4. The Defendant Parveen Attri ("**Mrs Attri"**), an experienced solicitor, had been employed as head of the family law department of DBS from 26 March 2018.

5. On 21 June 2018 PKA Legal Limited ("**PKA**") was incorporated with Mrs Attri as the sole shareholder and director. PKA became an SRA recognised body on 24 September 2018.

6. On either the 14th or the 21st September 2018 Mr Bal and Mrs Attri entered into a share option agreement ("**the Option agreement**") which gave Mr Bal an option to acquire 80% of PKA for £1. I will return to the terms of the Option agreement later in this judgment.

7. On the 19th September 2018 the Solicitor's Disciplinary Tribunal ("**SDT**") concluded an investigation which had begun in 2016 and suspended Mr Bal from practice for a year and imposed conditions on his ability practice without the prior approval of the Solicitor's Regulatory Authority ("**SRA**") for a further three years.

8. On 10 October 2018, PKA purchased the business and assets of DBS for £120,000 by way of a pre-pack administration. Mr Bal made a loan of £55000 to PKA to help fund the purchase.

9. Relations between Mr Bal and Mrs Attri thereafter soured. Mrs Attri refused to sign and submit to the SRA a form FA2 for SRA approval of Mr Bal as a member of PKA on the basis that she was not willing to certify that he was a fit and proper person.

10. On 24 September 2020 Mr Bal purported to exercise the option by service of a written notice, knowing that without SRA approval, completion of the option risked placing him in breach of the conditions imposed on him by the SDT.

11. These proceedings were commenced in January 2021 by Part 8 Claim Form. At an aborted trial, they were directed in July 2021 to proceed as a Part 7 Claim. Mr Bal's Particulars of Claim sought specific performance of the option agreement including orders that Mrs Attri sign the form FA2 and send it to the SRA and that she complete the transfer of the 80% shareholding. In the alternative he claimed damages. Mrs Attri's Defence and Counterclaim denied any liability for refusing to sign the form FA 2 and also asserted that the option had not been validly exercised because clause 7.5 had not been complied with and was a condition to the exercise of the option. I set out the terms of clause 7.5 below.

12. On 31 August 2021 PKA entered administration.

13. The Part 7 proceedings came on for trial before the Judge on 11 January 2023. The parties agreed that the judge should deal with five issues of construction on submissions and without hearing oral evidence as the answers to one or more of those issues might determine the case without the need for further evidence. The first issue was whether, upon the true construction of the option agreement, the failure to agree a new shareholder's agreement prior to the purported exercise of the option, as envisaged by clause 7.5, rendered the exercise of the option invalid.

The Option agreement

14. The Option agreement is a professionally drawn document prepared by Gateley PLC.

15. The parties to the agreement are Mr Bal as "the Buyer" and Mrs Attri as "the Seller". Paragraph 1 of the Option agreement contains a number of definitions and interpretation provisions. The most significant is the definition of "**Option**" as "*the option granted to the Buyer under clause 2.1*" and "**Option Shares**" as "*80% of the entire issued share capital of the Company*" (I adopt those definitions in this judgment).

16. Clause 2.1 provides:

> "*In consideration of the sum of £1.00 being paid by the Buyer to the Seller (receipt of which is acknowledged by the Seller, the Seller grants to the Buyer an option, exercisable by the Buyer under this clause 2, to acquire all (not only some) of the Option Shares from the Seller on the terms of this agreement*."

17. Clause 2.3 provides:

> "*The Buyer shall serve notice in writing on the Seller that the Option has been exercised and the Seller shall become bound to buy, and the Seller shall become bound to sell, all of the Option Shares*".

18. By clause 2.5 Mrs Attri was to keep any dividends or distributions payable on the Option Shares before the date of completion and Mr Bal was to have the dividends or distributions payable thereafter.

19. By clause 2.6 on signing the Option agreement Mrs. Attri was to deliver the original share certificate to Mr Bal. In addition she was to deliver signed but undated the documents necessary for completion (defined by clause 2.6 as "**the Documents**"). This was done.

20. By clause 3 the consideration payable on completion was £1.

21. By clause 4 completion was to take place at the registered office of PKA when Mr Bal would pay £1 to Mrs Attri, cancel the original share certificate (delivered to him on execution of the Option agreement) and date the Documents.

22. Clause 5 contained common warranties as to Mrs Attri's unencumbered title to the Option shares and her authority to deal with them.

23. Clause 6 contained a number of undertakings by Mrs Attri during the period from the date of the Option agreement to completion of the exercise of the Option. In summary:

    i) by clause 6.1 she undertook not to deal with the Option shares in any way during that period without Mr Bal's consent;

    ii) by clause 6.2 she undertook (in summary) to maintain the status quo in respect of the constitution, shareholding and business of PKA during that period; and

    iii) by clause 6.3 she agreed during that period to vote the Option Shares as directed by Mr Bal, or execute a proxy to enable him to attend and vote the Option Shares at any meeting or on any written resolution of PKA.

24. Clause 7 is headed "Further Assurance". Clause 7.1 requires the parties to do everything reasonably required to give effect to the Option agreement. Clause 7.2 to 7.4 contain provisions after completion for the Option shares while Mrs Attri remains registered holder of them to be held by Mrs Attri on trust for Mr Bal and for him to be appointed her attorney to deal with them.

25. Clause 7.5, which lies at the heart of this appeal, provides:

    "The Seller and the Buyer agree to enter into a shareholders agreement and new articles of association in relation to their shareholding in the Company prior to the date of the exercise of the Option and such shareholders agreement or articles will include a provision that any new issue of shares in the Company will be offered to all the shareholders on a pro rata basis so that the Buyer and the Seller has the opportunity to prevent a dilution of their shareholding on a new issue of shares in the Company."

26. Clauses 8 to 13 contained boiler plate clauses. Clause 11 contained a number of provisions as to the form of a notice under the agreement. It is not suggested that Mr Bal's notice did not comply with it. Clause 12.2 provided that this agreement and the documents entered under it was the entire agreement between the parties. Clause 12.6 provided:

    "If any part of this agreement is or becomes invalid, illegal or unenforceable it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant part shall be deemed deleted. Any modification to or deletion of a part of this agreement under this clause shall not affect the validity and enforceability of the rest of this agreement."

The Judgment

27. I can now summarise the Judgment. After setting out the facts at [1] to [20], the judge set out at [21] the legal framework on contractual interpretation citing a series of well known cases of high authority summarised by Popplewell J in *Lukoil Asia Pacific PTE Limited v Ocean Tankers (PTE) Limited* [2018] EWHC 163 at paragraph [8]. In summary he directed himself to ascertain the intention of the parties, looking at the question objectively in the light of the factual background known to the parties.

28. At paragraphs 22 he set out parts of the Option agreement he considered most relevant and then he turned to the issue of whether or not the Appellant had validly exercised the option. He summarised the rival submissions of the parties at paragraph 24 and 25. In essence the Respondent contended that clause 7.5 was clear and as a matter of objective construction the option could not be validly exercised unless a shareholders' agreement was in place. The Appellant contended that clause 7.5 only made commercial sense if it was interpreted as requiring a shareholder's agreement on completion. He accepted the Respondent's argument for the following reasons:

"a. Firstly, the language used by the parties in the SO agreement is clear and unambiguous in that the parties were required to agree a shareholders' agreement prior to the exercise of the option;

b. Secondly, the SO agreement is a detailed and professionally drafted contract;

c. Thirdly, the parties to the SO agreement were commercially sophisticated and legally qualified;

d. Fourthly, in all those circumstances, significant weight must be attached to the language that the parties have chosen to express their agreement; and

e. Fifthly, I am not persuaded that there are any contra-indications arising from the wider context, which would justify departing from the textual analysis. In particular, there is absolutely no reason why any shareholders' agreement or resolution adopting new articles, could not have been expressed to take effect on and from completion, even if agreed in advance of the option being exercised. If the claimant was right as to his interpretation, then surely those requirements would have been better expressed under clause 4, which lists all those matters which must be done before completion takes place."

29. In paragraph 27 he summarised a further submission by the Appellant that when the option agreement was read as a whole, clause 7.5 was not intended to be enforceable, or it was an agreement to agree which was void and severable from the remaining part of the contract by clause 12.6.

30. He adopted the summary of the law by Chadwick LJ in *BJ Aviation Ltd v Pool Aviation Ltd* [2002] EWCA Civ 163 at [20] to [24] -at the heart of which is the principle that if the Court is satisfied that that the parties intend an enforceable bargain, and what needs to be agreed is capable of being determined by objective criteria of fairness or reasonableness, then the court will enforce the agreement and supply the mechanism for determining what needs to be determined. Applying that principle he rejected the Appellant's argument that clause 7.5 was unenforceable. Some of his reasons appear to cross the line into subjective rather than objective

intention but what seem to be the key reasons and which are relevant to this appeal were not:

> "iii. As submitted on behalf of the defendant, the importance of clause 7.5 is entirely understandable. If the claimant exercised the option and completed without any such protections in place, then that could mean that the defendant (now upon completion, a minority shareholder at 20%, with the claimant being the majority shareholder at 80%) would be entirely at the mercy of the claimant, notwithstanding the fact that it would have been the defendant, through her own endeavours, who had built up PKA prior to
> completion. Indeed, I note that there is no time limit by which the claimant
> was required to exercise the option; and
>
> d. Fourthly, the parties have not, in my view, left some essential matter to be agreed between them in the future. The wording of clause 7.5 is clear and unambiguous, in that the parties have agreed that following completion, the defendant will be protected against dilution and given the right to maintain her 20% ownership of PKA, in the event that new shares were issued. In my judgment, the shareholders' agreement and the new articles referred to in clause 7.5 relate to the subsidiary question of how the agreed contractual right to dilution protection is to be given effect to. They are merely agreed machinery to give effect to that primary contractual right. Indeed, the claimant said in his submissions, that the draft shareholders' agreement that he had send to the claimant was simply a standard form he had printed off the Internet.

31. After disposing of some late further submissions the Judge set out his conclusion:

> "Having concluded that the option was not validly exercised, then the claim must fail and it is neither necessary nor proportionate to determine the remaining issues"

Appeal

32. There is but one ground of appeal permitted by Zacoroli J. It is whether, upon the true construction of the option agreement, the failure to agree a new shareholder's agreement prior to the purported exercise of the option rendered the exercise of the option invalid. That encompasses the following parts of the Appellant's Grounds of Appeal which I summarise below:

    i) Ground 1 is that the judge was wrong to construe clause 7.5 as a condition precedent.

    ii) Ground 3 and 12(f) are that the judge was wrong to reject the argument that clause 7.5 was an unenforceable agreement to agree and severable from the rest of the option agreement because of clause 12.6.

Analysis

33. No criticism is made of the judge's summary of the relevant law. There is no exercise of discretion here by the trial judge. No evidence was heard and no findings of disputed fact were made. The preliminary issue was dealt with on submissions and documentary evidence and I have the same material before me as was before the

Judge. The question on this Appeal is whether on the true construction of the Option agreement, compliance with clause 7.5 is a pre-condition to the exercise of the Option. I have to decide whether the Judge got the answer to that question right or wrong.

34. The option is created by clause 2 of the Option Agreement. The option itself is very simple. By clause 2.3 the Option is exercised by Mr Bal serving notice in writing on Mrs Attri that the Option has been exercised. At that point Mrs Attri becomes bound to sell and Mr Bal becomes bound to buy the Option shares. The consideration payable on completion is stipulated to be £1 and clause 4 provides for completion. Leaving aside clause 7.5 there is no question of there being any pre-condition to the exercise of the Option other than the service of written notice.

35. I observe that the effect of clause 2 and clause 6 was that Mr Bal was conferred a considerable amount of power over the Option shares immediately upon execution of the Option agreement. Subject to the effect of clause 7.5, Mr Bal had an option exercisable at any time after the date of the Option agreement at his will, and he had the documents to complete the transfer of the Option shares to himself. In addition by clause 6 Mrs Attri had undertaken from the date of the Option agreement until completion of the exercise of the Option not to deal with the Option shares and to vote them at Mr Bal's direction.

36. The judge thought that the wording of clause 7.5 was "*clear and unambiguous*". By clause 7.5 the Parties "agree" to enter into a shareholders agreement and new articles of association prior to the date of exercise of the Option. That is correct, but it is also completely silent as to the consequences if they do not. There is no express pre condition that "unless" Clause 7.5 is complied with the Option shall not be exercisable or that it is exercisable "if" clause 7.5 is complied with. There are no express imperative words that these steps "must" or "shall" be taken prior to the Option exercise date.

37. The question is therefore whether it is necessary to give business efficacy to the Option agreement or so obvious that it goes without saying that clause 7.5 is a pre-condition to the exercise of the Option.

38. It is plainly not the latter. Clauses 2 to 4 appear to provide a complete code for the exercise and completion of the Option. Subject to the effect of clause 7.5, they are clearly intended to give Mr Bal the means to exercise and complete the Option at his will at any time and without further agreement from Mrs Attri. If Clause 7.5 is a pre-condition to the exercise of the Option, the Option could not be exercised until a shareholder's agreement or new articles of association had been agreed by Mrs Attri. This would run a coach and horses through the apparent intention of clauses 2 to 4.

39. I note also that Clause 7.5 appears under the heading "Further Assurances" amongst other clauses dealing with supplemental promises. As a matter of structure of a professionally drawn agreement, it is an inherently unlikely place to find a clause of fundamental importance as a pre-condition to the exercise of the Option. One would have expected such a clause to have been the first substantive clause prior to clause 2 or in clause 2 itself.

40. The Judge has not expressly addressed the question of why it is necessary to give business efficacy to the Option agreement to imply compliance of clause 7.5 as a pre-condition to the exercise of the Option. He was clearly struck by what he perceived to be the commercial importance to Mrs Attri of having a shareholder's agreement in place before completion of the Option as she would be a minority shareholder with a 20% share and "*entirely at the mercy of*" Mr. Bal. On this point I consider the judge was mistaken.

41. I agree with the judge's analysis in paragraph 29(d) that clause 7.5 itself conferred the primary contractual protection to Mrs Attri against the dilution of her interest. The Judge seems to have assumed that further mechanics were necessary to give that protection teeth and make it effective but I do not think that is right. Any shareholder's agreement agreed pursuant to clause 7.5 simply needed to reiterate that primary contractual obligation to comply with clause 7.5, it would have been duplicative and would have added nothing to the primary contractual obligation the judge correctly found to exist in clause 7.5. Mrs Attri would have been in the same position in the event of a dilution of her interest whether it was contrary to a new shareholder's agreement or clause 7.5. She would have had to seek to protect her rights by recourse to the courts, probably by unfair prejudice proceedings under section 994 Companies Act 2006.

42. Clause 7.5 does not require the primary protection to appear in the Articles of Association, but even if it did it would not change the analysis. Firstly, subject to the Articles of Association saying otherwise (and they were not before the court), it is a principle of modern company law derived from statute that where there is only one class of shares, an issue of shares is to be offered pro rata to the other shareholders. So express provision in new Articles of Association will not have added anything to Mrs. Attri's protection. As an 80% shareholder Mr Bal could change new Articles of Association (even if they included the primary protection) and Mrs Attri would again have had to seek to protect her rights by unfair prejudice proceedings.

43. Further the significance of the undertakings given by Mrs Attri to vote the Option shares at Mr Bal's direction from the date of the Option agreement meant there was no significant change in his voting power on completion of the Option.

44. In summary, Mrs Attri's protection came from the inclusion of clause 7.5 and not from any machinery which it might have envisaged. Further, completion of the Option did not signal a momentous shift in voting power to Mr Bal – he already had it. There was no commercial imperative such that the court should infer that the parties must have intended clause 7.5 to impose a pre-condition to the exercise of the Option.

45. Mr Ensaff submitted that commercial parties presented with clause 7.5 would not know that the further mechanism it envisaged was not legally necessary for the protection of Mrs Attri's position and would want it anyway even if it were by way of false reassurance. This is not a legitimate basis to infer a term into a contract – it is not necessary to imply a term to give business efficacy to the contract if all it does is provide false reassurance to the parties. Further, this is a professionally drafted document by a draughtsman who it must be assumed knew the law, and as the judge observed the parties are commercially sophisticated and legally qualified.

46. Mr Ensaff also submitted that clause 7.5 was a pre-condition to the exercise of the Option but a condition precedent to the Option agreement. In other words the Option agreement had no effect until clause 7.5 had been complied with. That is plainly wrong. The Option agreement is an unconditional deed and its delivery (and thus the date it takes legal effect) is expressly the date of the agreement. It has many provisions which are expressed to take effect from the date of the agreement – such as the undertakings given by Ms Attri in clause 6, and the provision by her of the Documents and the share certificate. It is clear that the Option agreement was intended to take effect when it was signed and not on the happening of some further event.

Conclusion

47. For these reasons I conclude that on the true construction of the Option agreement, compliance with clause 7.5 is not a pre-condition to the exercise of the Option. I therefore allow the appeal.

48. As the Judge dealt with just one of six issues and heard no evidence I will remit the case for trial on the remaining issues in the case. The Judge's order dismissed Mrs Attri's counterclaim for harassment. Mr Ensaff has confirmed that she does not wish it to be reinstated.

49. I heard some submissions on costs at the hearing, but the parties did not have the benefit of knowing my decision. I received short written submissions on costs from both parties after the circulation of this judgment in draft. The costs order I make will reflect Mr Bal's success on this appeal, but also reflect the fact that this is not the conclusion of the proceedings and it is not clear who will be ultimately successful in the proceedings. I will order the costs of the Appeal to be the Appellant's costs in the case below. So Mr Bal will be entitled to his costs of this appeal if he is successful in the proceedings below.