Neutral Citation Number: [2018] EWHC 2259 (Ch)

Case No: CR-2018-002932

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 27th July 2018

Before:

SARAH WORTHINGTON QC(Hon)
(sitting as a deputy High Court judge)

- -

Between:

ADETUTU O. ODUTOLA	**Respondent/ Petitioner**
- and –	
(1) JOANNA HART **(2) HAZEL TAYLOR** **(3) VICTORIA BALL** **(4) IAN SPENCER** **(5) CREMORNE MANSIONS RESIDENTS ASSOCIATION LIMITED**	**Applicants /Respondents**

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APPROVED JUDGMENT

THE PETITIONER appeared **In Person**
MR. JAMES SMITHDALE of **Quinn Emanuel and Sullivan LLP** for the **Applicants/ Respondents**

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MS. SARAH WORTHINGTON QC(Hon):

1. These proceedings concern an application to strike out a claim in unfair prejudice brought by one member of a residents' association against certain current and former directors of the association.

Background

2. The unfair prejudice petition (the Petition), dated 9th April 2018, is brought by the Petitioner pursuant to the Companies Act 2006 section 994. The Petitioner is a former Director and former Company Secretary of Cremorne Mansions Residents Association Ltd (the Company), the entity that manages Cremorne Mansions. She continues to be a shareholder in the Company by virtue of her ownership of a flat in the building. In these proceedings she appeared as a litigant in person.

3. The first three Respondents to the Petition are the current Directors of the Company. They own property in the building and thus are shareholders in the Company, along with other shareholders who are not party to this petition. The Fourth Respondent is a former Director and former shareholder of the Company, but has not owned property in the building since 2013.

4. The Respondents are the Applicants in these proceedings, although for ease of identification I shall refer to the parties simply as the Petitioner and the Respondents. By notice dated 23rd May 2018, the Respondents seek to have the unfair prejudice Petition struck out pursuant to CPR rule 3.4(2)(a) on grounds that the statement of case discloses no reasonable ground for bringing the claim, or pursuant to the court's inherent jurisdiction under CPR rule 3.4(5).

Alternatively, the Respondents seek summary judgment dismissing the claim pursuant to CPR Part 24 on the grounds that the petition has no real prospect of success.

5. The unfair prejudice petition runs to over 67 pages and contains a great deal of factual background as alleged by the Petitioner, concluding at paragraph [211] with twelve specific remedies sought by the Petitioner from the court, plus a general request that the court make such other orders as it thinks fit, and, finally, a request for an order for costs.

6. Evidence before the court in the form of witness statements and exhibits indicate that the Petitioner was removed as a Director and Company Secretary on 26th September 2017 pursuant to a resolution of the Company of that date. On that same date, the First, Second and Third Respondents were elected as new Directors. At least in part, the Petitioner is concerned to protect her rights and interests as a member of the Company in these changed circumstances.

Other Proceedings

7. By way of further background, between the filing of the unfair prejudice Petition and the filing of this current application, the Petitioner filed an application dated 12th June 2018 against the Fourth Respondent and a Mr. James Godwin (who is not a party to these proceedings) seeking an injunction against those two individuals under the Harassment Act 1997. This injunction application was dismissed by Morgan J on 22nd June 2018, with an order for the Petitioner to pay costs, and further certifying the application as being totally without merit.

8. During the course of this separate injunction application, the court noted that the Petitioner had also filed an application seeking a pre-trial witness summons under CPR 34.3(3) in the injunction proceedings. That summons application was dismissed by Carr J on 8th June 2018, and a request to renew or appeal the summons application was also rejected by the court.

The unfair prejudice Petition

9. Over the course of the Petitioner's 67-page Petition, a large number of detailed facts are raised. Not all of those can be repeated here. The most important in my view, and as the Petitioner identified and emphasised them in oral submissions, are the following:

   (i) The removal of the Petitioner as a director of the Company (along with an early attempt in July 2017 to remove her as a director on grounds of mental health issues), and her replacement with directors who might be incapable of acting in the best interests of the Company, or might fail to do so (e.g. see Petition para [29] re second Respondent), or who would be unwilling or incapable of making independent decisions in respect of the Company as and when the need arose (e.g. see Petition para [162] re third Respondent).

   (ii) An alleged "connection" between the Fourth Respondent and certain members of the Company, including the first three Respondents, and the secrecy and/or deceit associated with the denial of such a connection. The "connection" is allegedly through some financial means, the details of which are not specified, and which the Petitioner herself accepts is not

of itself illegal. However, the Petitioner alleges that because of this connection "the interests of these members are aligned with those of the Fourth Respondent and not with the interests of the Company as a whole, therefore unfairly prejudicial to the interests of the Company..." (see Petition, para [30]).

(iii) The alleged position of the Fourth Respondent as a shadow director of the Company, based, it seems, on his power over the three new directors, being the first three Respondents.

(iv) The failure of the new directors to circulate minutes of any meetings they or the Company may have held. This issue was pressed in oral submissions more than in the written Petition, and in argument it was suggested that this failure was a breach of the Petitioner's legitimate expectations that the affairs of the Company would be run in a transparent way; further, that this lack of transparency created a risk for members that the new directors may make decisions on behalf of the Company that could be detrimental to the Petitioner; and, finally, that this failure to provide minutes was part of a pattern of inappropriate conduct.

Somewhat inconsistently, or perhaps intended in the alternative, the Petitioner also pressed in argument her belief that these meetings had never taken place, and that the copies of signed and dated minutes provided to the court on the day of the hearing had simply been fabricated in the days before the hearing. This was despite the Petitioner's acknowledgement that the records at Companies House

showed a contemporaneous 2017 change in the board of directors, consistent with the minutes as provided to the court.

(v) Other consistent patterns of inappropriate activities, including the deceit associated with various alleged actual and attempted fraudulent building insurance claims by particular residents and ex-residents, as detailed in paragraphs [166]-[204] of the Petition. The Petitioner regards her endeavours to combat this behaviour as material in leading to her removal as Director and Secretary of the Company.

(vi) The alleged illegal activities of the Fourth Respondent in connection with two companies that the Petitioner suggests are involved in various unacceptable activities including fraudulent trading.

(vii) The alleged harassment of the Petitioner by the Fourth Respondent and a Mr. James Godwin (see the separate proceedings noted at para [7] above), including in that connection their illegal surveillance activities. In oral submissions, the Petitioner suggested that this surveillance amounted to electronic stalking. More generally, however, the Petitioner also alleged that the Fourth Respondent's ability to hack into electronic communications and conduct electronic surveillance was sufficient to suggest that other residents may be subject to blackmail, thus rendering it doubtful whether any assertions they might make could be believed. By way of example, the Petitioner suggested that any assertion that the meetings noted in sub-paragraph (iii) above had taken place could not be treated as credible.

(viii) Finally, there are alleged breaches of various terms of the leases under which the first three Respondents occupy their flats in the building, including incidents related to non-payment of service charges, poor cleaning or complete failure to clean, undue noise, visitors at unsociable hours, etc, as detailed at length in the unfair prejudice Petition.

10. Given that the Petition itself is 67 pages long, it is clear that a number of the specific allegations will be missing from this list, as will the detail of the allegations provided in the Petition. However, this list endeavours to capture those facts identified in oral argument by the Petitioner as most important to her case, and also to capture relatively comprehensively my view of the distinctive nature of the different categories of complaint advanced by the Petitioner.

The Law

11. The law is not in dispute. Both parties accept that the principles to be applied are clear and certain.

Strike Out – General Principles

12. The principles for ordering a strike out under CPR 3.4(2)(a) are not in dispute. CPR R 3.4(2)(a) provides: "The court may strike out a statement of case if it appears to the court – (a) that the statement of case discloses no reasonable grounds for bringing … the claim…".

13. Practice Direction 3A PD para 1.4 provides examples of where that might be held to be true, including in particular sub-paragraph (3), being "those

[particulars of claim] which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

14. In adopting this approach to the particulars of claim, I am mindful that the court should not grant a strike out unless the court is certain that the claim is bound to fail: see *Hughes v. Colin Richards & Co.* [2004] EWCA Civ 266. That is a significant hurdle.

15. On the other hand, with "a clear and obvious case" the aim of the jurisdiction is to achieve expedition and save expense: see Lord Woolf in *Kent v. Griffiths* [2001] QB 36.

16. Finally, the Respondents in the alternative seek summary judgment dismissing the claim pursuant to CPR Part 24 on the grounds that the petition has no real prospect of success.

Unfair Prejudice – General Principles

17. Similarly, the legal principles associated with an unfair prejudice petition are not in dispute. The Companies Act 2006 section 994 provides that (my emphasis added):

> "A member of a company may apply to the court by petition for an order under this Part on the ground –
>
> (a) that *the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members* generally or of some part of its members (including at least himself), or
>
> (b) that an *actual* or *proposed act* or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

18. First, these words make it clear that the Act only provides for remedies where the company's affairs have been, are being, or are proposed to be conducted in a way that is unfairly prejudicial to members. The reasons are self-evident: a court cannot order any sensible remedy where a petition simply asserts that particular directors or managers could well cause some sort of unspecified harm in the future. Properly elected directors are entitled to, and indeed obliged to, do their job. In advance of particular failures or threatened acts of harm, a court will not simply order directors to act within the law: in such a vague context it would add nothing. Nor will a court order fair and appropriate remedies in favour of shareholders before any specific harm is threatened or suffered: that is an impossible task. As *Palmer's Company Law* puts it, at paragraph 8.3803.2:

> "A mere fear about how the company's affairs may be conducted in the future does not fall within the unfair prejudice provisions of the Act. The petition in respect of them is premature."

This point is material to the facts in issue here.

19. Secondly, what is required of directors and managers in conducting the affairs of the company in a manner that is not unfairly prejudicial can be nuanced. In that regard, the leading authority is *O'Neill v. Phillips* [1999] 1 WLR 1092, especially pages 1098-1999, where the point is made that:

> "… a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But … There will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

The starting point, accordingly, is typically whether the conduct complained of is in breach of the Company's Articles of Association or the powers that the shareholders have entrusted to the board of directors, but claims can go further than that, although only where it would somehow be clearly unfair to allow parties to rely on their strict legal rights.

20. Thirdly, whatever the breadth suggested in the previous paragraph, an unfair prejudice petition can only be brought in relation to the conduct which constitutes "conduct of the affairs of the Company". It cannot be brought in relation to the individual actions of shareholders in the conduct of their own affairs, even where that conduct causes harm to the petitioner: see Harman J in *Re Unisoft Group Limited (No. 3)* [1994] 1 BCC 766, at page 777, distinguishing between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity; the first type of act will found unfair prejudice; the second will not. See too *Palmer's Company Law*, particularly at para 8.3803. This distinction is material on the facts here.

21. In the same vein, it is equally true that an unfair prejudice claim is not appropriate where another shareholder, even a majority shareholder, is conducting its own affairs (not the company's affairs) in a manner prejudicial to the interests of the company rather than the petitioner. The remedy is those circumstances, if there is one, is for the company to pursue its claims against the offending shareholder. This too is material on the facts here.

22. Finally, the reference in the Companies Act section 994 to the conduct of the affairs of the company does not require that those affairs be conducted by the

directors of the company; they may be conducted by members of the company or others proven to have such a role de facto (such as shadow directors).

Application of the law to the facts

23. *First*, an unfair prejudice claim cannot succeed unless it concerns the conduct by someone of the affairs of the Company. In my view that particular focus of the unfair prejudice provisions is a fatal flaw in the Petitioner's submissions. Moreover, the conduct of those affairs must be both prejudicial to the Petitioner and unfairly so. The Petitioner is clearly aggrieved, but in her Petition she does not identify with any particularity the exact nature of the prejudice and the unfairness she has suffered.

24. Two particular claims in the Petition are clearly concerned with the conduct of the affairs of the Company: the dismissal of the Petitioner as Director and Secretary, and the failure to circulate minutes. The dismissal of the Petitioner as a director under the Companies Act 2006 section 168 is no doubt prejudicial to the Petitioner, but given the mandatory statutory power of the shareholders in general meeting to take such action, it can hardly be described as "unfairly so", and no evidence was advanced by the Petitioner to suggest otherwise. Thus even if all the facts alleged by the Petitioner are assumed to be true, they do not suggest any unfair prejudice in this context. Indeed, the Petitioner seems more focused on the harm her replacements might cause in the future.

25. Equally, and as fully aired in oral argument, the failure to circulate minutes may have been an inconvenience to the Petitioner, but there is no legal obligation to circulate such minutes, only to make them available on request. As a long-

standing director of the Company, the Petitioner would have been aware of this. The Petitioner confirmed that she had received advance notice of the relevant dismissal meeting and, it seems, certain other meetings. She had declined to attend the dismissal meeting, despite her statutory right to be heard. As a director of the Company until dismissed, it would seem incumbent upon her to make her own enquiries as to her continuing role and status. Instead, her complaint is that she was unfairly prejudiced by the failure to circulate minutes with the result that she did not know that she had been dismissed as a director until months after the event. In this context, even if the alleged fact that she did not discover her status for some months is true, it cannot credibly be argued that it was the fact that the affairs of the Company had been conducted in an unfairly prejudicial manner that caused this harm or prejudice to the Petitioner; the delay in the Petitioner discovering her managerial status would seem to lie at her own feet.

26. Next, but still focusing on the conduct of the Company' affairs, the Petitioner alleges that the Company's affairs may be conducted in an adverse manner at some time in the future now that she has been replaced by three new directors. As indicated earlier, however, a mere fear about the future does not fall within the unfair prejudice provisions of the Act. A petition in respect of these matters is premature, and must await that eventuality before any claim can be brought, whether by a member as here, or by the Company itself against its directors. Claims based on these matters are bound to fail.

27. Finally, still focusing on the conduct of the Company' affairs, the allegation that the Fourth Respondent is a shadow director of the Company appears

unsustainable, but is in any event irrelevant to a claim in unfair prejudice on the facts alleged. No particular detail was given in support of the allegation. No "conduct" constituting unfair prejudice was identified beyond the general matters already considered and dismissed. Thus even if the Fourth Respondent were a shadow director, it would not affect the outcome of this unfair prejudice claim for reasons already given. But no evidence was presented to show that the board of directors of the Company was accustomed to acting at the direction of the Fourth Respondent. Indeed, the new directors do not seem to have conducted any particular Company business warranting criticism in the Petition, either on their own or at the direction of anyone else. There is only the alleged risk of failures in the future.

28. Whether the Fourth Respondent had control over the residents generally, or a majority of them, and thus could direct the conduct of the affairs of the Company in that way, was not a point taken specifically by the Petitioner, but it may perhaps be inferred. However, this assertion too would seem equally unsustainable. The Petitioner presented no hard evidence of the fact of control by the Fourth Respondent over other residents. She merely speculated that there must be a financial relationship of some unspecified sort that put the Fourth Respondent in a position of dominance. This is too vague to assist the Petitioner. Even if the court is prepared to assume that alleged facts are true in determining a strike out, the court will not assume the very thing that needs to be shown to advance the claim. By contrast, the residents presented signed statements to the court to the contrary, denying any such financial relationship. Further, the Petitioner has not pointed to any particular harm or prejudice that has been suffered as a result of the conduct of the affairs of the Company in a

manner influenced by this alleged control. Accordingly, here too the Petitioner cannot succeed in her claim to have suffered unfair prejudice in the conduct of the affairs of the company as a result of some sort of control by or a "connection" with the Fourth Respondent.

29. Equally, I find the Petitioner's suggestion that the Fourth Respondent has control because of his ability to blackmail others to be a suggestion completely lacking in credibility, and one that should not have been made without some serious evidence in support. No evidence was offered beyond mere assertion, so there are no alleged facts which, even if true, would indicate blackmail.

30. *Secondly*, it is necessary to turn from considering conduct of the affairs of the company to considering the other conduct complained of in the Petition. That conduct falls into the category of conduct by individuals of their private, personal or individual affairs, and simply cannot be material to an unfair prejudice petition. It is immaterial that this conduct is engaged in by the very same individuals who are also entitled in other contexts to conduct the affairs of the company. If the Petitioner's legal rights are infringed by these different sorts of private activities, then she may indeed have a claim by way of a different cause of action, but it is not a claim under the unfair prejudice provisions of the Companies Act 2006 section 994. Equally, if the Company's rights are infringed by such private activities, then the Company may have a claim. This is not controversial.

31. All the conduct identified in paragraph 9, sub-paragraphs (v)-(viii), falls into this second category, and so is immaterial in advancing a petition in unfair prejudice. If these allegations were all provable, then some of them may have

given rise to claims by the Petitioner against the individuals concerned (e.g. para 9(vii), but see para 7 above), or claims by the Company against the individuals concerned (e.g. para 9(viii) and perhaps (v) if the Company was harmed), or claims by parties not before this court against the individuals concerned (e.g. para 9(v) and (vi)), but none of that is a matter for this court in these unfair prejudice proceedings.

32. *Thirdly*, and simply by way of completeness, I could not find, and the Petitioner did not point me to, any additional forms of conduct identified in the Petition and not captured in the broad classes of conduct identified in paragraph 9 above, that might credibly be classified as constituting conduct of the affairs of the company in a manner that is unfairly prejudicial to the Petitioner.

33. *Finally*, my conclusions in these proceedings follow as a matter of course given the applicable law. For the purposes of determining the strike out claim, I am prepared to assume that the facts alleged by the Petitioner are true. Were it material, I would not have been prepared to go so far as to assume that bald assertions of control by the Fourth Respondent by financial means or by blackmail were true in the complete absence of any alleged facts in support. However, claims of unfair prejudice on those grounds fail in any event since no actual prejudice, unfair or otherwise, is alleged, although there is concern for the future.

34. This approach means that the court can largely ignore the nature of the evidence presented in support of the Petition, but I note in this regard that certain important aspects of the alleged conduct are not supported by any evidence, and some of allegations are, in my view, inherently implausible.

Conclusion

35. Given the law on unfair prejudice petitions, much of what was presented by the Petitioner in her Petition was not, and could not be, relevant to the claim in issue, since it did not concern the conduct of the affairs of the Company at all, or else merely expressed fear about how those affairs might be conducted in the future by the new directors. All those grounds of complaint, even if they could all be proved exactly as asserted, must inevitably fail in a claim brought under the Companies Act 2006 section 994.

36. In the two instances where the alleged conduct did concern the conduct of the affairs of the Company – i.e. the dismissal of the Petitioner as Director and Secretary, and the failure to circulate minutes – even if the facts are exactly as asserted, neither form of conduct could, in the circumstances alleged, be found to have unfairly prejudiced the Petitioner.

37. It follows that, for the reasons set out above, I find in favour of the Respondents and hold that the unfair prejudice Petition should be struck out on the ground that this is a clear case where the claim is bound to fail even if the facts as alleged are all assumed to be true.

38. This makes it unnecessary to consider whether the court might alternatively have dismissed the claim pursuant to CPR Part 24 on the grounds that the Petition has no real prospect of success, but it is perhaps implicit that that test, too, would have been met on the facts before the court.

39. In ordering the strike out, I also hold that the Petition should be certified as being totally without merit, in the sense that it is bound to fail, for the reasons already indicated earlier.

(Permission to appeal refused.)