Neutral Citation Number: [2020] EWHC 1047 (Ch)

Case No: CR-2020-001487

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
7 Fetter Lane
London EC4A 1NL

Date: 01/05/2020

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

(1) MR CLIFFORD BRYAN EVANS	**Claimant**
- and -	
(1) EUROKEY PROPERTIES LIMITED	**Defendants**
(2) MR MARTYN REDMAN	

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- -

Mr Clifford Evans acting in person
Stuart White (instructed by **Acumen Business Law**) for the **Second Defendant**
Hearing dates: 27 April 2020

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Approved Judgment

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

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 11.30 a.m. on 1 May 2020

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

The background

1. Eurocash Group Plc (the "Company") was incorporated on 21 June 2004, changed its name to Eurokeys Properties Limited in 2007, and ceased trading in late 2008 or early 2009. The claimant petitioned to wind up the Company on a judgment debt (I shall turn to the debt below) and a compulsory winding up order was made on 25 May 2011. The Company was dissolved in March 2013. The Company, in which the second defendant was a director and shareholder, provided VAT advice as a service to business customers.

2. The claimant held shares in a connected company and, as the claimant explains in his unsigned witness statement, "through various transaction those shares [were] exchanged for shares in [the Company]". A company known as Viatrade Limited subsequently purchased its entire shareholding (the "Connected Sale").

3. The claimant complains about the Connected Sale. He argues that the transaction rendered his shareholding in the Company valueless but benefited the second defendant.

4. On 11 May 2010 judgment was entered in default against the Company and in favour of the claimant and his nephew in the Southampton County Court.

5. As can be seen from the (incomplete) chronology provided to the court, the Company had ceased trading by the time judgment in default had been entered. During the course of the hearing the claimant was unable to provide the court with a copy of the claim form upon which gave rise to the judgment, but a letter written by Blake Lapthorn instructed by the claimants in 2013 explained that the claim was for

"misrepresentation by Redman and Judgment obtained on 11 May 2010...on the basis of 13.77% of the approved sale price of £600,000". The letter was addressed to the Insolvency Service, the solicitors acknowledged that no claims had been made by the liquidators against the directors of the Company (there being a lack of funds) but asked that the Official Receiver consider disqualification proceedings. I have not been told if the judgment debt was proved for in the liquidation. Regardless of whether it was proved for, the debt would not have survived the winding up of the Company.

The unfair prejudice petition

6. On 1 March 2020 the claimant issued a Part 8 claim form seeking relief: "Following a successful Unfair Prejudice petition and subsequent CCJ l, Clifford Bryan Evans wish the court to administer the prescribed legal court remedy see S996 of the Companies Act 2006 - Powers of the court. Part (e) provides for the purchase of my shares, in this case by Martyn Keith Redman at a "fair value". This "fair value" is to be determined by the court and based on performance should not be less than £4.85 per share. Please be advised my daughter, Miss Julie Evans, has filed this claim on my behalf." The claim form is supported by the witness statement mentioned above which fails to carry a statement of truth. On 9 April 2020 Acumen Business Law wrote to Mr Evans "we note you make reference to a "successful" unfair prejudice petition, but no such order is enclosed, only a judgment which does not name our client as defendant. The date of the alleged petition is not even provided, only a draft petition with no evidence that said petition was ever issued." The letter pointed out that there had been no letter before action and warned that an adjournment would have to be applied for at Mr Evans' expense due to the failures outlined. The letter drew a response from Mr

Evans on 16 April 2020. He explained that he did not intend to say, "following a successful" unfair prejudice petition, but that unfair prejudice had been "established".

Legal requirements

7. The Companies (Unfair Prejudice Applications) Proceedings Rules 2009 (the "Rules") came into force on 1 October 2009 and make provision for the form of proceeding, procedure for presentation, and service and return of a petition to be used in connection with an application to court under section 994 or 995 of the Companies Act 2006. Section 996 of the Companies Act 2006 provides that if "the court is satisfied that a petition under the Part is well founded, it may make such order as it thinks fit for giving relief of the matters complained of".

8. The procedure is important. In re Osea Road Camp Sites Ltd [2005] 1 WLR 760 Pumfrey J held that there was no power to dispense with the requirement to comply with the Rules. The matter related to the predecessor of section 994 of the Companies Act 2006, namely section 459 of the Companies Act 1985, but nothing turns on that. He noted the arguments [12]:

"Section 459(1) of the 1985 Act grants a power to a member of a company to apply to the court by petition for a specified relief. Mr Bamber's proceedings were not a petition. They were proceedings by claim form accompanied by particulars of claim, and so it is said these proceedings are a nullity. Secondly, it is said that there is no power to amend the proceedings as they are now constituted …as a section 459 petition. Thirdly, it is said that furthermore, Mr Bamber no longer is a member of the company and, accordingly, cannot start fresh proceedings by way of presentation of a

petition under section 459 of the 1985 Act. In that event, the defendants contend that, on these purely procedural grounds, this action should be brought to a halt now."

9. Section 459(1) of the 1985 Act provides: "A member of a company may apply to the court by petition for an order under this Part..." Section 994(1) of the Companies Act 2006 uses the same formulation: "A member of a company may apply to the court by petition for an order under this Part…". Mr Justice Pumfrey held [13] "If there is a power to dispense with the requirement of the statute that these proceedings be by way of a petition, then it seems to me that the dispensation must be by means of a provision which has statutory force." He found that the requirement to use a petition was mandatory and that it was the only "gateway through which a member of a company who alleges unfair prejudice may pass". He further found that CPR 3.10 could not assist if the wrong procedure had been adopted because [15] "It seems to me to be a failure to use the mechanism provided for the purpose". Accordingly, if the mechanism provided for the purpose is not used the [22] proceedings [are] fatally procedurally flawed".

10. In Re Grandactual Ltd; Hough and others v Hardcastle and others [2005] EWHC 1415 Mr Justice Rattee was asked to strike out an unfair prejudice petition. Four heads of conduct, including "unfair dilution of class C shares in the company" constituted the "matters complained of". The petition was presented in July 2004 but the "matters complained of" extended back to the period 1995-1997. The court found [20] "Petitions under s459 are always a very burdensome form of litigation. I understand that s459 is not subject to any period of limitation, but relief under s461 is always within the discretion of the court. I do not consider that the court should

countenance such proceedings in the circumstances that I have described nearly ten years after the event."

The evidence

11. Mr Evans has not answered in written evidence or during oral submissions whether the draft petition (which appears to have been drafted sometime in 2008) was in fact ever presented or issued in the Chancery Division. The following indicate that the petition was never presented and a judgment never obtained (i) the petition provided to the court by Mr Evans is marked "draft"; (ii) it was drafted over 10 years ago; (iii) it has not been endorsed with a date, time and place for the return date; (iv) there is no evidence of a return date; (v) there is no evidence that a court provided directions for points of claim or defence or the manner in which evidence was to be adduced in accordance with rule 5 of the Rules; (vi) no judgment has been provided establishing the assertion that unfair prejudice proceedings had been before the court or that unfair prejudice had been "established"; (vii) there is no order following any such judgment that provides for liability or a remedy; (viii) the second Defendant is entirely unaware of any such proceedings, judgment or order and (ix) no court file has been provided. The petition appears to have been drafted by Blake Lapthorn solicitors, but they have provided no evidence to support Mr Evans' claim. On the other hand it is accepted that a default judgment was obtained in 2010 against the Company.

12. In short there is no evidence that a petition was ever before the court or that "the court [was] satisfied that [the] petition …[was] well founded" and as a consequence it has no discretion to "make such order as it thinks fit for giving relief of the matters complained of".

Conclusions

13. In my judgment, allotting the appropriate time to this matter, and dealing with it justly and proportionately, the claim form dated 1 March 2020 must be struck out. First the claim form seeks relief in respect of the draft petition where there is no evidence that the draft petition was before the court or that "the court [was] satisfied that [the] petition …[was] well founded". If a petition is not well founded then the relief sought in the claim form cannot be given as there will be no discretion to "make such order as it thinks fit for giving relief of the matters complained of". It is more likely than not that Mr Evans obtained the judgment in default he has provided to the court and mistook it for the draft petition. The default judgment is against the Company. After the Company entered insolvent liquidation, he obtained a right to prove in the liquidation. The judgment debt does not survive liquidation and in any event the Company no longer exists owing to its dissolution.

14. Secondly, in so far as the claim form seeks a remedy pursuant to section 996 of the Companies Act 1996 the "proceedings [are] fatally procedurally flawed". They are not brought by a petition as required by statute.

15. Thirdly, even if I am wrong about the first and second reasons I would follow the decision of Mr Justice Rattee in Re Grandactual Ltd and not countenance such proceedings in the circumstances that I have described nearly ten years after the event.

16. As this case was heard in a short time period during a hearing conducted by Skype for Business, I mention a few last matters. First due to the submissions there was no time in the court schedule to give a judgment. This is the reason for a written judgment.

Secondly, I wish to pay tribute to Mr Evans for his conduct during the hearing. He was courteous, and well prepared. I permitted him to read a pre-prepared script.

17. Lastly, I have been asked to take account of the overriding objective to save expense by indicating what order should be made in respect of costs. I stress that I have not heard argument on costs and the indication I give is only an indication. I shall also provide reasons in the hope that it will reduce the time required for a costs argument, in the event that a hearing is required for that purpose.

18. CPR 44.2 governs costs and the general rule is that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party". The court may depart from the general rule but should first identify the successful party. The identification of the successful party is a matter for the exercise of common-sense looking at the matter realistically and in a commercially sensible way. Mr Evans chose to issue the claim form perhaps not realising or understanding the detail of the law. He made a series of errors and as a result the claim has been struck out. The successful party is the Second Defendant who has put an end to the claim. I have been given no reason to depart from the general rule. In the absence of any such reason, I indicate that Mr Evans as claimant, shall pay the costs of the Second Defendant to be assessed if not agreed.

19. I invite the parties to agree an order.