Neutral Citation Number: [2022] EWHC 1110 (Ch)

Case No: CR-2022-BRS-000042

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 13 May 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

RUSHBROOKE UK LTD	**Applicant**
- and -	
4 DESIGNS CONCEPT LTD	**Respondent**

- -
- -

Charlie Newington-Bridges (instructed by **Neath Raisbeck Golding Law**) for the **Applicant**
John Churchill (instructed by **Temple Bright LLP**) for the **Respondent**

Hearing dates: 9 May 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.

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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Friday 13 May 2022.

HHJ Paul Matthews :

Introduction

1. On 9 May 2022 I heard an application for an injunction to restrain the presentation of a petition to wind up the applicant company, following the service upon the applicant of a statutory demand by the respondent. The application was issued on 20 April 2022 and was supported by no fewer than three witness statements from a director of and 50% shareholder in the applicant, Mark Steventon-Smith, dated 19 April 2022, 4 May 2022 and ninth of May 2022, respectively, and by a further witness statement from David McAndrew dated 6 May 2022. It was opposed by a witness statement dated 4 May 2022 from Andrew Cox, a director of the respondent company, and (rather unusually) two witness statements from the only other director of and 50% shareholder in the applicant company, Lee Bryan.

2. On 3 May 2022 I made an order giving directions for evidence and listing the application before me on 9 May 2022. On that day, after hearing argument from both sides on three preliminary issues, but before reaching argument on whether the criteria for an injunction were met, I announced my decision that the application would be struck out, on the basis that the director of the applicant who gave instructions to the solicitors to launch these proceedings had no authority on behalf of the company to do so. I said I would give my reasons in writing as soon as possible, and in the meantime the time for any appeal would be extended to 21 days after the handing-down of those reasons. This judgment contains the reasons for my decision.

3. The applicant company carries on business as an architectural consultancy but also carries out property development. As I have mentioned, Mr Steventon-Smith and Mr Bryan each own 50% of the shares, and each is one of the two directors. As will become apparent, they have fallen out, and a letter before claim was sent on 15 March 2022 by solicitors acting for Mr Steventon-Smith, Neath Raisbeck Golding Law ("NRG"), to solicitors acting for Mr Bryan, GA Solicitors. I will return later on to this letter. The respondent company carries on the business of architectural services, in particular urban design and residential services, in connection with the preparation of planning applications.

4. I bear in mind that, on this application, all the evidence was given in the form of witness statements, and there was no cross-examination sought or ordered. In *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, Rimer LJ (with whom Ward and Jacob LJJ agreed) said:

> "58. As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. Mr Ashworth

> referred us in support to *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others* [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in *Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree."

The creditor dispute

5. The sole director and shareholder of the respondent company, Andrew Cox, says in his witness statement that, since 2018, the respondent has invoiced the applicant in the sum of £152,920 for services supplied, and the respondent has paid £133,040 in respect of those services, leaving £19,880 outstanding. The outstanding invoices are exhibited to his witness statement and are dated between 1 October 2021 and 12 January 2022. Each invoice gives a brief description of the development and the services provided. They were sent by email to both Mr Bryan and to Mr Steventon-Smith on 13 January 2022. (There is also an earlier email from Mr Steventon-Smith to Mr Bryan, copied to Mr Cox, dated 23 December 2021 which says that he received "the attached invoices" from Mr Cox that morning, but it is not clear which invoices are being referred to.) Mr Cox sent a further email on 2 March 2022, again addressed to both Mr Steventon-Smith and Mr Bryan complaining of the lack of payment of these invoices.

6. Mr Cox also exhibits an exchange of emails both dated 18 October 2021. In the earlier email, addressed to Mr Steventon-Smith copied to Mr Bryan and Mr Steventon-Smith's wife. Mr Cox asks Mr Steventon-Smith about payment of outstanding invoices from 31 May 2021 onwards. The second email of 18 October 2021 is from Mr Bryan and sent both to Mr Cox and Mr Steventon-Smith, with a copy to Mr Steventon-Smith's wife. Mr Bryan in his email simply says "I approve these for payment".

7. Despite the emails of 13 January 2022 and 2 March 2022, the respondent did not receive any payment for the outstanding invoices, and decided to issue a statutory demand. Mr Cox contacted Mr Bryan before doing so. Mr Bryan apparently told him that from the information he had it was highly likely that the applicant was insolvent and that no creditors could be paid until a liquidator was appointed. The statutory demand was prepared, dated 30 March 2022 and was served on the applicant, by being sent to Mr Bryan, who received it on 5 April 2022. It appears that Mr Bryan then passed it to Mr Steventon Smith, who in turn passed it to NRG.

8. They wrote to the respondent by letter dated 12 April 2022, saying, not that they were instructed on behalf of the applicant, but that they were "instructed on behalf of Mark Steventon-Smith (our Client)" in relation to the statutory demand "served on Rushbrooke UK Limited (the Company)". This letter said that Mr Steventon-Smith had not been provided with any instructions from the company to carry out the work, or seen any evidence that the work invoiced for had been completed. It asked for copies of a large number of documents including copies of letters of instruction, notes

of meetings, complete and accurate timesheets, emails providing proof of completion of the work and any correspondence in relation to the work.

9. Mr Cox responded by letter dated 18 April 2022, stating that the statutory demand been addressed to the company and not to Mr Steventon-Smith, and had been properly served. He pointed out that NRG said they were acting for Mr Steventon-Smith and not the company, and asked that they not write to him further until instructed by the company. Nevertheless, he stated that the work gave rise to the invoices had been "confirmed by the Company as having been properly performed". NRG replied by letter dated 19 April 2022 that they were instructed by Mr Steventon-Smith "in his capacity as director of" the company, and "he is within his rights as a director to provide any instructions he may wish in relation to the Company in order to protect its interests". On 20 April 2022, NRG issued the present application for an injunction to restrain the presentation of a winding up petition.

10. On 25 April 2022 Mr Bryan wrote to the respondent on the applicant's headed notepaper, referring to the letters from NRG dated 12, 14 and 19 April 2022. In his letter he stated that the statutory demand "was properly served on the Company on 5 April 2022. I acknowledged good service to you". He also commented on each of the invoices the subject of the statutory demand. On the same day Mr Cox wrote to NRG, stating that good service of the statutory demand had been confirmed by Mr Bryan in his letter of the same date, and this was attached. He also repeated his understanding that NRG did not act for the company, stating that Mr Bryan had confirmed that the company had not resolved to instruct NRG and that Mr Steventon-Smith had assured Mr Bryan during the last Board meeting that NRG did not act for the company.

11. In support of that last point, I was referred to a copy of the minutes of the directors' meeting of 4 February 2022, which was conducted on a virtual basis by video meeting. Item 3 of those minutes reads as follows:

> "Lee Bryan referred to Mark Steventon-Smith's email dated 03 February 2022 timed at 17:40 were Mark Steventon-Smith advised that NRG are not a contract partner of Rushbrooke. Lee Bryan requested written confirmation from NRG that it has no contractual relationship with the Company nor has it ever had a contractual relationship with the Company. Mark Steventon-Smith confirmed the statement to be correct and that NRG would provide written confirmation by close of play today."

12. After this application had been issued, Mr Bryan wrote to NRG by email on 5 May 2022. In that email, he said, amongst other things:

> "I understand that you purport to act for Rushbrooke UK Ltd in a matter before the High Court in Bristol with reference to CR-2022-BRS-000042.
>
> You are aware that I am a co-director of Rushbrooke UK Ltd and, in that capacity, I herewith disinstruct you to act any further in the above matter.
>
> You also purport to act for Mark Steventon-Smith and therefore cannot also act for the Company as plainly a potential conflict of interest arises. … I require you to abandon this application forthwith as it is an abuse of process … Please confirm, by return, that you will cease forthwith to act in this matter …

> In addition to the above, your firm is aware Rushbrooke UK Ltd is unable to pay its bills as they fall due and is therefore insolvent. You know this because invoices that you rendered to the Company were not paid by the Company (because it has inadequate funds) but by Mark Steventon-Smith personally … "

13. Mr Bryan's second witness statement, dated 6 May 2022 states as follows at paragraph 5:

> "I had no prior knowledge of this Application until after it was made. It has never been discussed with me by my co-director Mr Steventon-Smith nor did he discuss with me the instruction of [NRG] to make this Application or at all."

14. At paragraphs 22 and 23 of the same witness statement, he says this:

> "22. In my capacity as a director of Rushbrooke, I have dis-instructed NRG as I consider the Application that has been made to be an abuse of process and predicated on a false witness statement … For example, Mr Steventon-Smith says at paragraph 34 of his witness statement that the company is successful and solvent. It is neither.
>
> 23. Rushbrooke presently has cash at bank in the sum of £89,743.19 and overdue creditors amounting to at least £142,374.67 up to 28 February 2022. I therefore suspect that the true indebtedness of the company as of 30 April 2022 is circa £160,000 as fixed costs accrue with no means of discharging them. I am aware that the Company could raise invoices in the sum of c £36,000. The company is therefore, to the best of my knowledge, unarguably insolvent and becomes increasingly insolvent daily.
>
> 24. The Company is similarly not successful. Mr Steventon-Smith has attached to his witness statement the Company's accounts for the year ended 30 April 2020. However, he was supplied with draft accounts for the period ending 30 April 2021 which show that the Company lost £42,000. … "

15. In Mr Steventon-Smith's third witness statement, made on 9 May 2022 (the day of the hearing), he deals with the question of his authority to bring the application on behalf of the company. Amongst other things he says this:

> "6. Following the instigation of proceedings against Mr Bryan, Mr Bryan emailed the company's staff on 29th of November 2021 to advise that he was stepping back from Rushbrooke and that he would be limiting his role to that of Shareholder and Director …
>
> 7. Mr Bryan did not communicate this to me at any time which I believe to be odd and concerning. I was sent a copy of this email by staff members which is how I found out this information …
>
> 8. The staff were obviously concerned as Mr Bryan was the primary contact for all of Rushbrooke's clients, he delegated work streams, was responsible for invoicing work out, managing the staff and was point of contact for the vast majority of the clients of the Company.

> 9. As stated above at paragraph 7, Mr Bryan did not communicate to me that he was stepping back from his duties to the Company. He put no plan in place to hand over the outstanding workload, he did not inform clients of his intentions to step back from the Company he stopped invoicing client's for work undertaken - he abandoned all his responsibilities and he did not inform me of this. As a Director of the company I struggle to comprehend how Mr Bryan could think that these actions were in the best interests of the Company. I have had to attempt to pick up the pieces and the fallout resulting from Mr Bryan's actions.
>
> 10. Mr Bryan, by his own admission has effectively walked away from the Company. Whilst he asserted that he intended to carry on as a Director of the Company, his actions, I would argue, speak otherwise.
>
> […]
>
> 13. I have asked for updates but he has refused to engage with me. I have done my best to look into the current position but because I do not have access to Mr Bryan's files or computer systems, I am completely reliant on his cooperation, which he refuses to provide – this, to my understanding are not the actions of someone who states that they are still acting as a Director.
>
> 14. It is clear that Mr Bryan has completely abandoned the Company, not just as an employee, but as a Director, he has refused to assist in any meaningful way in relation to the issues facing the Company, he has ignored letters sent to his home address by HMRC, has refused to engage with the Company accountants, is assisting a company attempting to force the company into liquidation – these are not the actions of a person purporting to act as a Director of a company,
>
> 15. It is for this reason that I believe that I have the authority to be able to bring this application before the court, without having to have first sought Mr Bryan's prior agreement. I am attempting to protect the Company and serve its best interest. I consider that because I genuinely believe that Mr Bryan has completely abandoned the company and does not have its best interests at the forefront of his mind, that he is not been acting as director should."

16. I should record that I asked Mr Newington-Bridges, counsel instructed by NRG to present the application on behalf of the company, what proceedings were being referred to in the opening phrase of paragraph 6 of that witness statement, namely "Following the instigation of proceedings against Mr Bryan". Counsel confirmed that, so far as he was aware, there were no such proceedings instigated. He suggested that this referred simply to the breakdown of the relationship between the directors and the allegations that were being made by Mr Steventon-Smith against Mr Bryan.

The directors' dispute

17. The email from Mr Bryan to the company's staff dated 29 November 2021 gives those staff some details of the dispute between the two directors. It was a response to an email from the staff expressing concern about unpaid salaries and the future of the company. It says in part:

> "1. On 01 October, I met with Mark. He gave me a letter from a firm of solicitors that he claimed were acting for Rushbrooke. As I have not agreed to the appointment of legal representation for the Company, it is unclear to me how these solicitors are actually instructed. The letter contained a threat of legal proceedings against me for damages in excess of £7.0m. Aside from the absurdity of the claim, the Company could not afford to run such litigation and pursuit of it would cause the Company to become insolvent. Understandably, I therefore wanted to ensure that I had equal control over the Company's bank account (as a co-director I am entitled by law to such equal control).
>
> […]
>
> 2. I can imagine that [the company's bank] could be persuaded to release salary payments if the directors both agreed. However, until I understand the background to the threatened litigation and the appointment of solicitors purportedly by the Company and the costs which might have already been incurred, I will not know if the Company is in fact insolvent. I need full clarification of the Company's position to avoid any possible inadvertant preferential treatment of creditors.
>
> 3. In the prevailing circumstances, any director acting prudently would want full clarity of the company's That position before accepting the account should be un-frozen.
>
> […]
>
> As of 01 December 2021, I have decided to limit my role to just that of director and shareholder of the company."

18. As I have already said, it was only on 15 March 2022 that NRG sent a letter of claim to solicitors on behalf of Mr Bryan. I should refer to that letter in more detail. But it is first to be noted that, in this letter, NRG once more state that their client is Mr Steventon-Smith (who is referred to throughout as "the Claimant"), rather than the applicant company. It is right to say that there is a brief mention at the outset of an intended "derivative action", but this is not further elucidated, and I was not told that any application has been made for permission to bring or carry on a derivative claim on behalf of the company.

19. The letter sets out a series of allegations against Mr Bryan. From these, it appears that the dispute between Mr Steventon-Smith and Mr Bryan stems from a development opportunity offered to the company in 2018 to acquire land in north-east Bristol known as Waverley Cottage, Hambrook. It is said that the company sought information about the site and its potential, but, as this was not provided, the company did not further pursue the opportunity. On the other hand, it never made any formal decision to give it up. It is then alleged that Mr Bryan worked on the opportunity for his own benefit, and used the company's employees to assist him in this.

20. Further, in 2020 Mr Bryan was involved in incorporating a new property development company called Waverley Developments (South West) Ltd. He became one of the three directors and, according to Companies House filings, had a shareholding of between 25 and 50%. In 2021, again according to statutory filings, it appears that his

shareholding was transferred to a company called Bryan Group Limited, in which he and his wife each had a shareholding of between 25 and 50%, and of which they were both directors. An application for planning permission of the land concerned was submitted on behalf of Waverley Developments (South West) Ltd.

21. It is further alleged that in April 2021 Waverley Developments (South West) Ltd sought to sell the land with the benefit of outline planning permission, and that in May 2021 a conditional offer to purchase the land for £5.4 million was made by a property developer, Engie. Moreover, it is alleged that planning permission is expected to be given imminently.

22. It is then said that by reason of these alleged facts, in particular by taking the opportunity and realising it for the benefit of Waverley Developments (South West) Ltd, Mr Bryan was in breach of section 172 of the Companies Act 2006. In addition, by exploiting the opportunity for the benefit of Waverley Developments (South West) Ltd, Mr Bryan placed himself in a position of conflict of interest in breach of section 175 of the Companies Act 2006. Mr Bryan's failure to declare this conflict of interest or the interest in the exploitation of the opportunity by Waverley Developments (South West) Ltd, meant that he was in breach of section 177 of the Companies Act 2006. The exercise of his powers and conduct generally in relation to the opportunity was improper, and therefore in breach of section 171(2) of the Companies Act 2006.

23. I also record that the breakdown in relationship between the two directors, coupled with the company's financial difficulties, appears to have led to problems in paying staff salaries. In the bundle there are copies of documents relating to employment tribunal proceedings commenced by four members of staff. However, I am not concerned with those proceedings, and say nothing more about them.

Preliminary points

24. As I said earlier, three preliminary points were taken at the outset of the hearing, before turning to consider the merits of the application. These were (1) the question of Mr Steventon-Smith's authority to litigate on behalf of the applicant company, (2) the admissibility of the further evidence that had been filed, beyond that provided for by my direction of 3 May 2022, and (3) the question whether the statutory demand had been properly served on the company. In fact, point (3) was not pursued, as the applicant accepted that there had been good service.

Admissibility of further evidence

25. In relation to point (2), my directions of 3 May 2022 had provided for the applicant to serve the application and supporting evidence on the respondent by 4 PM on that day, 3 May 2022, and the respondent to file and serve evidence in answer by 4 PM on 6 May 2022. I had not made any direction for evidence in reply. Despite that, and as I have already said, Mr Steventon-Smith made a second witness statement on 4 May 2022, as did his solicitor Mr McAndrew. Mr Steventon-Smith then made a third witness statement dated 9 May 2022. Mr Newington-Bridges submitted that no application for relief from sanctions was required, because no order of the court had been breached. However, if such an application were needed, he submitted that any breach was very minor, that it was explained by the fact that the evidence in answer was received very late in the day, and that whilst there was no real prejudice to the

respondent in admitting that evidence there would be real prejudice to the applicant in not admitting it.

26. Mr Churchill, on behalf of the respondents, cited to me my own decision in *Wolf Rock (Cornwall) Ltd v Langhelle* [2021] BCC 67. That was an appeal from a decision of the district judge refusing to permit reliance on witness statements served out of time, and not in accordance with an earlier order. I held that the district judge had been right in such a case to consider that the principles on which relief from sanctions was given were the right approach in deciding whether to admit the late evidence. Mr Newington-Bridges sought to distinguish that case, because whereas in that case there had been a direction that evidence was to be served by a certain time, and it was not, in the present case there was no direction at all for the evidence concerned. I have to say that I think that this is rather a distinction without a difference, but I do not need to decide the point. This is because I am satisfied that in all the circumstances, even if it was a case for relief from sanctions, I ought to grant that relief.

27. The problem really arose from the tight timetable which did not specifically provide for evidence in reply. In the circumstances it was only fair that the applicant should have the opportunity to deal with the evidence in reply which had been served on the business day before. If the timetable had been made more elongated there would have been an express provision for that evidence, and (if served in time) it would have been admitted. I could not see any prejudice to the respondent, though (if it was not admitted) there was the obvious possibility of prejudice to the applicant. I have therefore taken account of all of the evidence filed and served on this application.

Authority to litigate

28. I turn therefore to the first preliminary question, which is the most important. The (originating) application notice seeking an injunction to restrain presentation of a winding up petition based on the statutory demand in the sum of £19,800. Paragraph 2 of the notice states that "The applicant is RUSHBROOKE UK LIMITED …". At the end of the notice it is stated that "The address for service of the Applicant is NEATH RAISBECK GOLDING LAW …" Underneath that there is the signature of David McAndrew who is stated to be a "Partner", and is also stated to be "Solicitor for the Applicant".

29. The Solicitors Regulation Authority provides for two codes of conduct, one for solicitors and one for firms (July 2021 editions). They both contain an identical provision relating to obtaining and acting on instructions from the client or someone authorised by the client. In the code of conduct for solicitors it is paragraph 3.1, and in the code of conduct for firms it is paragraph 4.1. The text in each case is:

> "You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do. However, and in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client's best interests".

30. In the present case, the applicant is a limited company, which can act only by its officers and other organs in accordance with its constitution, comprised in the Memorandum and Articles of Association. As I understand the matter, this company was incorporated in April 2009, and has articles of association in the form of Table A under the Companies Act 1985 and the Companies (Table A to F) Regulations 1985, treated as prescribed under section 19(1) of the Companies Act 2006. I was not in fact taken to the articles during the hearing. But the important points are these. First, and subject to any directions given by special resolution of the company, the business of the company is to be managed by the directors, who may exercise all the powers of the company (paragraph 70). But the directors may appoint any person to be the agent of the company for stated purposes (paragraph 71), and may delegate any of their powers to any committee consisting of one or more directors or to the managing director or any director holding any other executive office (paragraph 72).

31. It is common ground between the parties in this case that there was no appointment by the directors of any person under paragraph 71, and no delegation of any of their powers under paragraph 72. It was also common ground that there was no special resolution of the company. That means that the only way in which the company could make a decision to instruct lawyers to commence proceedings would be by decision of the directors under paragraph 70. Yet, as I have set out earlier in this judgment, there is no evidence that the two directors ever decided to institute the present proceedings or to instruct solicitors to do so. Instead, it is clear on the material before me that Mr Steventon-Smith alone instructed NRG to issue the application for an injunction. Although in correspondence NRG has referred to Mr Steventon-Smith, rather than the company, as their client, the application notice itself is unequivocal: NRG by its partner Mr McAndrew states that the company is the applicant and that NRG is acting as its solicitor for this purpose.

Mitchell & Hobbs (UK) Ltd v Mill

32. In *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102, Anthony Machin QC, sitting as a deputy judge of the High Court, had to deal with a similar situation. The managing director of a company launched an action against the company secretary to recover a sum of money which the latter had withdrawn from the company's bank account, and obtained summary judgment. The company secretary appealed on the basis that the managing director had no authority to instruct solicitors to commence the proceedings. There was no evidence of a board meeting having been held to authorise the proceedings or any delegation to the managing director to do so. The managing director contended that any one director of a company could bring proceedings in the name of the company under paragraph 70 of Table A, or at least that a managing director could do so.

33. The deputy judge rejected the submission. He said (at page 108a-b):

> "I do not read reg 70 as empowering a single director, where there is a board of directors, to institute proceedings without reference to his co-directors. I believe that reg 70, in its proper intent, means that the power to manage the company (and in this respect the business of the company (to use the wording of reg 70) must include the institution of proceedings in its name) is a power to be exercised by the board of directors. I do not believe that such business, and in particular the

> institution of such proceedings, can be carried on by a single director acting, as it were, as the board of directors."

34. The deputy judge then went on to consider the position of a managing director, and said this (at page 108d-e):

> "[Counsel] submitted to me that a managing director, *ex virtute officii*, had the power to institute proceedings. I do not find that in any way a matter which the articles in Table A provide for. The managing director of a company is not under the articles given any powers over and above other directors in relation to the business of the company. As I say and as reg 72 makes clear, in a particular case the managing director may have powers over and above those enjoyed by his co-directors because they may have delegated those powers to him and, if they have done, so be it. There being in the present case no such delegation, in my view, reg 72 does not assist the plaintiff company."

35. The deputy judge therefore reached the following conclusion (at page 108f):

> "It is for these reasons that I hold, on what I call this 'preliminary issue', that these proceedings were instituted without authority. In those circumstances, there not being in this case in contemplation any board meeting … which might ratify *ab initio* what had been done, I take the view that this action has to be struck out and not merely stayed, and that is the order which I make."

Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd

36. That decision was discussed in the later case of *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd* [2005] EWHC 736 (Ch). In that case the defendant (who was described throughout not by its proper name, but by the name "Pertemps") had 45% of the shares of the claimant, which were "A" shares, and was thereby entitled to appoint two directors to the board. The other 55% of the shares, which were "B" shares, was held between three individuals, who between them were also entitled to appoint two directors. There was a shareholders' agreement dated 15 January 2003 and a loan agreement also dated January 2003 by which the defendant advanced monies to the claimant. On 5 September 2003 claimant company entered into a debenture deed with the defendant, I assume by way of security to the defendant for the claimant's obligations towards it. The relationship between the A shareholders and the B shareholders broke down, and indeed in November and December 2004 two petitions were presented by the defendant for the winding up of the claimant. Also in November 2004, the claimant by solicitors issued a claim against the defendant, seeking an injunction restraining the defendant from appointing receivers in respect of the 2003 debenture. These were the proceedings in which the present application was made.

37. In December 2004 the defendant's solicitors issued an application to strike out the claim, on the basis that the proceedings were not authorised by the claimant's board, but had been commenced by Messrs Seear and Hopkins, the two B directors (one of whom, Mr Seear, was the managing director of the claimant), who had instructed solicitors without the consent of the board. After an earlier hearing before Rimer J, this issue, and two others, were dealt with by Peter Smith J. The judge said it was clear that the claimant's board did not expressly authorise the commencement of these

proceedings. He referred to the decision in *Mitchell & Hobbs (UK) Ltd v Mill*, which he cited for the propositions that, in the absence of any delegation of authority, only the board might resolve to commence proceedings, and the managing director had no authority to do so on his own. The judge pointed out that there had been no board resolution and that "self-evidently" the two A directors appointed by the defendant, Messrs Bacon and Watts, would not agree to commence any action against the defendant.

38. The judge commented on this situation as follows:

> "[48] This is of course bizarre. If Pertemps have behaved wrongly their appointed directors prevent Fusion from rectifying the wrong it will suffer caused by two of its own directors. There are of course ways to circumvent this. First the other shareholders and directors Messrs Seear, Hopkins and Butcher could present a s 459 petition and seek relief to protect Fusion's position in that petition. It could have been done by counter-application in existing petitions. Second they could have brought a Foss v Harbottle application and sought appropriately a Wallersteiner v Moir order to protect the costs. I adverted to this in the two previous hearings and suggested this was a matter of resolving the authority issue. No such applications have been made and Mr Collings boldly in his final submissions before me on 19 April 2005 said 'Fusion stands on its position on authority' (albeit reserving the right if the draft judgment was against him to try and cure the position afterwards).
>
> [49] It must be borne in mind, in my view, that blocking of a legitimate cause of action Fusion might bring by Messrs Bacon and Watts given their conflict would in my view be a breach of the fiduciary duty of directors that they owe to Fusion. It cannot be right that they take advantage of their own breach of duty in blocking a legitimate challenge against a company in which they are also interested. The Courts will not allow such a position to happen.
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> [50] It seems to me plain that Pertemps acknowledged there would be people who would represent Fusion defensively in the proceedings that it brought. That was despite there being no Board resolution.
>
> [51] For the present proceedings equally it seems to me clear that it was contemplated that somebody would represent Fusion to fight the issues. …
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> […]
>
> [54] Nevertheless in addition to the letter of 31 December 2004 there are significant matters in the correspondence which show that it was plainly contemplated that Maxwell Batley should be allowed to receive instructions to raise a point on behalf of Fusion. As Rimer J observed it cannot be right to allow Pertemps to blow hot and cold on the issue. Having considered that Maxwell Batley were Fusion's solicitors for the purpose of the letter of 31 December 2004 and that letter itself having contemplated an injunctive application to prevent it being implemented, it can only have been on the basis that they well know that Fusion would continue to instruct Maxwell Batley, through the instructions of Messrs Seear and Hopkins, to ensure Fusion was given a fair opportunity to challenge Pertemps' actions.

> […]
>
> [56] I therefore accept Mr Collings' submission that proceedings were properly authorised as against Pertemps to challenge to the letter of 31 December 2004."

39. Were it not for a further case, to which I will turn in a moment, I would have considered that Peter Smith J, having accepted the general principle expressed in *Mitchell & Hobbs (UK) Ltd v Mill*, had reached his decision, that proceedings were properly authorised as against the defendant, based on two separate points. The first is represented by the statement in paragraph 49 that "It cannot be right that they [the A directors] take advantage of their own breach of duty in blocking a legitimate challenge against a company in which they are also interested." The second is represented by the references in paragraphs 50, 51 and 54 to the communication by the defendant to the claimant of an understanding, or at any rate of a contemplation, that the claimant would be represented by solicitors in the litigation between the parties. Although the word 'estoppel' is not mentioned anywhere, what it seems to me was actuating the learned judge was at least an estoppel-like principle. This is that, having by its own actions encouraged the claimant to understand that it could instruct solicitors despite the absence of a board resolution, so that the claimant in effect relied on that encouragement in doing so, the defendant could not now rely on the absence of a board resolution to justify striking out the claim.

Smith v Butler

40. But, as I said above, there is another case to consider. This is the decision of the Court of Appeal in *Smith v Butler* [2012] EWCA Civ 314. This case concerned the affairs of the company, Contact Holdings Ltd. This was in substance a dispute between the two shareholders, Mr Smith, with 68.8% of the shares, and Mr Butler, with 31.2% of the shares. They were both directors, along with a third person, Mr Harris, the finance director. In addition, Mr Smith was the chairman of the board, and Mr Butler was the managing director of the company. Mr Butler was concerned about allegations that Mr Smith had utilised his company credit card for the payment of personal expenses amounting to £78,000.

41. Having consulted Mr Harris, who agreed with him, Mr Butler took it upon himself on 1 July 2011, without the benefit of a resolution of the Board of Directors, to suspend Mr Smith from office and to exclude him from the company's premises. Mr Smith served on the company requisition for the convening and holding of an extraordinary general meeting to consider resolutions for the removal of Mr Butler and Mr Harris as directors. But Mr Butler made clear that he would not attend such a meeting, so that the meeting would then be inquorate, and ineffective. Subsequently Mr Smith applied to the court for a declaration as against both Mr Butler and the company that Mr Butler's actions were outside his powers, and for an order convening a general meeting with a quorum of one. At first instance Mr Smith succeeded, and Mr Butler appealed.

42. In the Court of Appeal, Arden LJ gave the leading judgment. She decided that the judge had been right to conclude that Mr Butler had no authority is managing director to suspend Mr Smith from his role as chairman or to procure the company to defend his proceedings, and would dismiss the appeal. Rimer LJ agreed with her on these points, and would also dismiss the appeal. But he added that he preferred not to

express any general view as to a managing director's implied authority to commence or defend legal proceedings on behalf of the company. The third member of the court, Ryder J, also agreed with Arden LJ's reasons and conclusions and would likewise dismiss the appeal. Unlike Rimer LJ, however, he did not express any reservation in relation to implied authority to commence or defend legal proceedings.

43. The primary issue before the Court of Appeal related to the powers of the managing director. In discussing this issue Arden LJ referred to both *Mitchell & Hobbs (UK) Ltd v Mill* and *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd*. She said this:

> "23. Mr Dougherty [for the appellant] distinguishes the decision of Mr Andrew Machin QC, sitting as a deputy judge of the High Court of Justice, Chancery Division, in *Mitchell & Hobbs* at 108. In that case, the essential conclusion of the judge was that, in the absence of any evidence about the delegation of powers, neither the managing director nor any single director could authorise the commencement of proceedings without a board resolution.
>
> 24. Both parties rely on the decision of Peter Smith J in *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd (No 2*) [2005] 2 BCLC 571 at [44] to [58]. In that case, Peter Smith J applied the essential conclusion in *Mitchell & Hobbs*. Mr Dougherty submits that Peter Smith J also upheld a further principle, namely that directors acting in breach of duty could not claim that other directors lacked authority to commence proceedings to remedy the breach without the approval of a board resolution. Mr Berragan submits that those observations were obiter and that the ratio of this case was merely that on appropriate facts individual directors acting without the authority of a board can have implied authority to commence proceedings.
>
> […]
>
> 34. The decision in *Mitchell & Hobbs* has to be seen in the context of its particular facts. The company was a small private company with two directors and three shareholders (the directors and the company secretary). The company secretary withdrew a small sum from the company's bank account and put it in a safe place in order to prevent one of the directors from dissipating it. That director then caused the company to sue the secretary. The result in the case is, therefore, hardly surprising.
>
> 35. Part of the judge's reasoning in *Mitchell & Hobbs*, however, was that since there was no express delegation of powers to the managing director he had no greater powers than any single director. He held:
>
> > '[Counsel submitted that] Mr Radford's capacity as managing director imbued him with powers over and above those enjoyed by a non-managing director, notwithstanding that there was no evidence that any powers had been delegated to Mr Radford as managing director. He submitted to me that a managing director, *ex virtute officii*, had the power to institute proceedings. I do not find that in any way a matter which the articles in Table A provide for. The managing director of a company is not under the articles given any powers over and above other directors in relation to the

> business of the company. As I say and as reg 72 makes clear, in a particular case the managing director may have powers over and above those enjoyed by his co-directors because they may have delegated those powers to him and, if they have done, so be it. There being in the present case no such delegation, in my view, reg 72 does not assist the plaintiff company.'
>
> 36. In my judgment, the last sentence that I have quoted goes too far. The managing director has certain powers by implication from his office. Even in a small company those powers will often include power to commence proceedings unless the board has expressly or by implication decided that such proceedings should not be taken or would be likely not to ratify the commencement of proceedings. In *Mitchell & Hobbs*, there were two directors who had fallen out with each other. As in this case one of the directors had sufficient shares to bring about the removal of the other. The warring directors would probably not agree that the board should ratify the commencement of the proceedings. The actual decision in the case was, therefore, correct. Moreover, it is important to note that the application in *Mitchell & Hobbs* was for summary judgment, and so no witnesses were heard. The judge could not, therefore, take the more obvious course of inquiring whether the director who had authorised the commencement of proceedings had acted in the best interests of the company as opposed to his own personal interest.
>
> 37. *Fusion Interactive Communication Solutions Ltd* again turns on its particular facts. The facts were such that the judge could draw an inference that two of the company's directors (one of whom was the managing director) had power to commence proceedings on behalf of the company. The judge's holding that a managing director had no implied power to commence proceedings was, therefore, not essential to his conclusion. This case does not, therefore, establish the wider principle for which Mr Dougherty contends (see paragraph 24, above)."

For the purposes of the present case, it is not necessary that I cite any more of this decision.

Discussion

44. It is clear from their judgments in *Smith v Butler* that the majority of the court (Arden LJ and Ryder J) qualified the decision in *Mitchell & Hobbs (UK) Ltd v Mill*, so that, in some cases at least, paragraph 72 of Table A may confer authority on a managing director to commence or defend proceedings on behalf of the company. However, in a case like *Mitchell & Hobbs*, where there were only two directors, who had fallen out, and therefore would not agree to all ratify the commencement of proceedings, the court considered that the decision in that case, that there was no authority to commence the proceedings, was correct. That is also in substance the position in the present case, where the only two directors have fallen out, and therefore there would be no agreement on a board resolution in relation to commencing or defending litigation.

45. Moreover, in this case there is no managing director, and so it is not necessary to consider whether such a director would have greater powers. I will only observe in passing that, with great respect, I do not find it easy to understand the statement of Arden LJ in paragraph 36 of her judgment that

> "In my judgment, the last sentence that I have quoted goes too far. The managing director has certain powers by implication from his office."

The sentence in the judgment of Peter Smith J referred to said:

> "There being in the present case no such delegation, in my view, reg 72 does not assist the plaintiff company".

Reg 72 of Table A is entirely about *delegation* of powers, and not the *implication* of them merely from the office of managing director itself. So, when Peter Smith J says that, because there was no question of delegation in that case, there was no assistance from reg 72, it seems an obvious point to make. Perhaps Arden LJ was referring to a delegation of powers *by implication*. Or perhaps she meant that there could be implied powers attaching to the office of managing director without reference to reg 72. However, in that case Peter Smith J would not have gone too far. He would instead have failed to mention another possibility. It is regrettably unclear, at least to me. But I need not discuss this aspect further.

46. It is also clear from the judgements of the Court of Appeal that the decision in *Fusion* was one which turned on its particular facts. Arden LJ says that the facts were such "that the judge could draw an inference that two of the company's directors (one of whom was the managing director) had power to commence proceedings on behalf of the company." It is not clear whether this statement involves approval of either or both of the two points that I have drawn from Peter Smith J's judgment. As to the former, I can see that it might be said that a principle that directors cannot take advantage of their own breach of duty to block proceedings against them for that breach of duty could amount to an exception to the general rule, amounting to the conferring of a power or authority to bring proceedings, in perhaps the same way as a derivative claim is an exception to the general principle (the so-called rule in *Foss v Harbottle*) that only the company can sue for wrongs suffered by it. On the other hand, I am doubtful that it can be intended to cover the operation of the estoppel-like principle, because that would not operate to confer any implied power upon one director, but rather prevent the other party from taking the point that there was no board resolution or other authority.

47. Mr Newington-Bridges submitted that there was a real risk that Mr Bryan was trying to thwart the potential claim against himself by supporting the claim of a third party against the company which might result in the winding up of the company. As in *Fusion*, it would be unfair for him to do this, and therefore the other director, Mr Steventon-Smith, should be allowed to appoint solicitors to resist the statutory demand and seek an injunction to restrain the presentation of a winding up petition. He said that, even if it would be possible for the liquidator in winding up to pursue any claim that the company had against Mr Bryan, there was still a practical advantage for Mr Bryan in having the company put into liquidation, because that made it less likely that any proceedings would ever be brought.

48. Secondly, Mr Newington-Bridges submitted that the email dated 5 May 2022 from Mr Bryan to NRG, purporting to "disinstruct" that firm, clearly implied that it *had* been instructed in the past. So NRG had had authority to act for the company. In addition, Mr Bryan had abandoned his role in the company and left Mr Steventon-Smith to assume responsibility for the whole business. This must include authority to

commence proceedings to defend the company from third party claims and vindicate claims that could be brought by the company.

49. However, I do not think that the decision in *Fusion* assists the claimant in this case. In relation to the principle that directors cannot take advantage of their own breach of duty to block proceedings against them for that breach of duty, the short answer here is that Mr Bryan is not the object of these proceedings, and so he is not taking advantage of his own breach of duty to block any proceedings against him. Unlike *Fusion*, which was a dispute between the shareholders and directors of the company, these proceedings involve a dispute between the company and a third party about unpaid invoices. So far as the operation of the estoppel-like principle is concerned, there is no suggestion here that the respondent ever made any representations to the company or gave the company to understand that the absence of proper authority to bring proceedings would not be taken as a point against it. And on the material before me I am not satisfied that Mr Bryan made any material representations which might found an estoppel as between the two directors.

50. Nor, standing back and looking at it more generally, as Arden LJ did in *Smith v Butler*, is there any basis upon which I can infer the conferring of an implied power on Mr Steventon-Smith to commence proceedings on behalf of the company against a defendant who claims to be a creditor and has served a statutory demand. The email from Mr Bryan, purporting to disinstruct NRG, does not, properly construed, imply that Mr Bryan ever agreed to that firm's been instructed. On the contrary, it makes it clear that he did not agree to it, and, so far as NRG *has* in a practical sense been instructed, he wishes to reverse the position. If the decision by Mr Steventon-Smith alone to instruct NRG were capable of ratification by the agreement of Mr Bryan, that ratification would not be achieved by this email.

51. Finally, although Mr Bryan clearly stepped back from his hands-on role in the company last November, that related to his employment in its business, and not to his office of director or his position as shareholder. As he said at the end of his email of 29 November 2021,

> "As of 01 December 2021, I have decided to limit my role to just that of director and shareholder of the company."

Even if he *could* be said to have abandoned his employment, and even if this amounted to a breach of contract (as to which I have not been addressed and make no decision), that would not affect his legal position as either director or shareholder. He continued to be a member of the board of directors, and therefore Mr Steventon-Smith did not thereby become the sole member of the board, able to exercise all the powers of the directors by himself.

52. Mr Newington-Bridges criticised Mr Bryan's actions in supporting the respondent as a breach of his duty to the company under section 172 of the Companies Act 2006 to act in its best interests. Mr Churchill pointed to subsection (3) of that section, which provides:

> "The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

53. Mr Churchill submitted that, given that Mr Bryan had given evidence in his witness statement that he believed the company to be insolvent, he had a duty to consider the interests of the creditors ahead of those of the company. He referred to the decision of the Court of Appeal in *BTI 2014 LLC v Sequana SA* [2019] Bus LR 2178, where the court considered what was the trigger for the directors' duty to consider the interests of the creditors ahead of those of the company. David Richards LJ (with whom Longmore and Henderson LJJ agreed, said:

> "220. Judicial statements should never be treated and construed as if they were statutes but, in my judgment, the formulation used by Sir Andrew Morritt C and Patten LJ in *Bilta v Nazir*, and by judges in other cases, that the duty arises when the directors know or should know that the company is or is likely to become insolvent accurately encapsulates the trigger. In this context, 'likely' means probable, not some lower test such as that adopted by Hoffmann J in construing the statutory test for the making of an administration order: see *Re Harris Simons Construction Ltd* [1989] 1 WLR 368."

54. Mr Newington-Bridges replied to that by saying that, as Mr Bryan had abandoned the company, so he could not properly know its position and what its creditor position was. I do not think that this follows. What Mr Bryan said in his witness statement was plainly based on information which he had and on his past experience. I note that, although Mr Steventon-Smith made a third witness statement on 9 May 2022 to respond to evidence given by Mr Bryan in his second witness statement of 6 May 2022, he did not challenge what Mr Bryan had said in paragraph 23 about the company's financial position. On the material before me, I consider that the trigger actually had occurred in this case. It was therefore Mr Bryan's duty to put the interests of the creditors ahead of those of the company, and that explained why he was supporting the creditor rather than the company.

55. I should also mention that I was referred by Mr Churchill to the decision of Snowden J in *Re Maud* [2016] Bus LR 1243, in which the judge discussed the decision of the Privy Council in *Ebbvale Ltd v Hosking* [2013] 2 BCLC 204. In that case the trustee in bankruptcy of a person believed to own property in England brought proceedings there for a declaration that the property was owned by the bankrupt, and joined Ebbvale, a Bahamian company, which appeared also to be claiming the same property. Before the claim was heard, the trustee acquired a claim against Ebbvale from a third party and presented a winding up petition against it in the Bahamas. The Bahamian court made a winding up order and the company appealed to the Privy Council.

56. The Privy Council decided that, even if the trustee thought it might be helpful to his English case if a liquidator replaced the directors of the company, he also had a legitimate interest as a creditor of the company in having a professional decision taken as to whether the company should spend money in defending the English proceedings. On this basis the petition to wind up was not an abuse of process and the appeal was dismissed. Mr Churchill relied on this as a basis for submitting that it was not an abuse of process for Mr Bryan in the present case to support the respondent creditor as against the company of which he was a director.

57. In my judgment, this case does not assist me. Mr Bryan is not trying to wind up the company, and there are no proceedings being brought by him which can be said to

amount to an abuse of process. To the extent that Mr Bryan might be considered to be in breach of his duty to put the interests of the company first, I have dealt with that in discussing section 172(3) of the 2006 Act and the *Sequana* case. In the circumstances, the decision in *Ebbvale* does not take the matter further.

Conclusion

58. It was for all these reasons that I announced at the hearing on 9 May 2022 that I would strike out the application on the basis that Mr Steventon-Smith had no authority to make or give instructions to make the application on behalf of the company.