



Neutral Citation No. [2020] EWHC 2445 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No: HQ16X4463

Royal Courts of Justice
Strand, London, WC2A 2LL

11 September 2020

Before:

HHJ KAREN WALDEN-SMITH
(Sitting as a Deputy High Court Judge)

Between:

WEE LEONG LUM

Claimant

- and -

BUN CHAN

Defendant

MARK STEPHENS (instructed by **LESTER DOMINIC**) for the **CLAIMANT**
JOHN CARL TOWNSEND (instructed by **LAWRENCE KURT**) for the **DEFENDANT** for
the hearing dates 29 and 30 June 2020
G PRICE ROWLANDS (instructed by **LAWRENCE KURT**) for the **DEFENDANT** for the
hearing dates 7, 8, 9 July

Hearing dates: 29 and 30 June 2020 and 7, 8 and 9 July 2020

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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HHJ WALDEN-SMITH:

1. This is the quantum determination arising consequent to the decision on liability in January 2020. Save for issues on costs and any other consequential determinations, this should be the final chapter in what has been somewhat tortuous litigation.
2. One recurring theme in this litigation has been the desire of the defendant to dispense with the services of counsel and to instruct new counsel immediately before a hearing so as not to give them sufficient opportunity to prepare with the thoroughness they would prefer. At the liability trial, counsel had been instructed a short time before the hearing and so I granted a short adjournment to allow her the opportunity to prepare her cross examination of the claimant more thoroughly. On this occasion, Mr Chan had counsel instructed for the hearing which was originally to take place remotely. Unfortunately, due to problems caused by the defendant's solicitor failing to ensure that the defendant had an interpreter instructed in the correct language and dialect, and then due to technical problems with the interpreter not being able to join effectively the remote hearing, the remote hearing had to be adjourned to allow a hybrid hearing to take place within the RCJ. In the week between the adjourned remote hearing and the hybrid hearing, the defendant again dispensed with his counsel and instructed new counsel. It is not clear why the defendant engages in this behaviour. Counsel instructed on this occasion is the fifth counsel the defendant has instructed. This behaviour has created difficulties for his counsel, who has done his very best in a short time to deal with the matters, for the claimant and the court.

The Background

3. In December 2014, the claimant Mr Wee Leong Lum entered into an agreement for the purpose of purchasing the trading stock and the equipment and other assets of the business known as Chan's Cookers Limited (known in this litigation as "OldCo") for a total consideration of £100,000 from the defendant. OldCo had been operating for many years in the business of supplying catering and kitchen equipment to the oriental food business. The claimant considered that it would be a profitable business for him to purchase and operate and, in order to undertake some form of due diligence, the claimant spent six months working in OldCo to learn the business and to gain an understanding of the value of the business.
4. The claimant decided that he would purchase the business and operate it under the name Chan's Cooker UK Ltd (known as "NewCo" for the purposes of this litigation).
5. The claimant had plans to work with someone in China who had invented a relatively cheap means of removing the grease and smell from Chinese kitchens and he had plans to grow the business on the back of potentially being the sole supplier of this new technology. The business of OldCo was to transfer to NewCo in January 2015 and the defendant was employed by the claimant as a manager for NewCo. The defendant had a duty of fidelity and was suspended by NewCo on 2 June 2016. NewCo did not develop as the claimant planned. Newco entered into liquidation in 2016. The claimant has taken an assignment from the liquidators of all causes of action that Newco had against the defendant for the purpose of bringing this litigation.
6. In essence, the claimant's case was that defendant worked against Newco. The claimant's case was that the defendant had diverted both payments and business

opportunities from NewCo in breach of his duties to NewCo. It is Mr Lum's case that Mr Chan did not stop operating his business for his own benefit and, at the same time, was interfering with how NewCo could operate effectively so that the business was eventually brought down. At that point, the defendant was able to revive Oldco and he started trading again under the trading name of Mr Chan's Cooker in the premises which had been the former premises of NewCo, and with equipment that he purchased from the liquidator of NewCo. This was subsequent to Mr Chan being suspended on 2 June 2016.

The Proceedings

7. The evidence from Mr Lum, in both this quantum hearing and at the liability hearing, has revealed that he has found this whole experience, both with purchasing the business and it failing and the subsequent litigation, extremely stressful.
8. Freezing injunctions were granted to the claimant on 12 January 2017 and 2 February 2017 and, after failing to reveal the existence of various bank accounts and withholding statements, the defendant was held to be in contempt by Sir David Eady by an order sealed on 24 March 2017. After a failure to comply with an unless order, judgment was entered against the defendant.
9. Mr Chan later succeeded in obtaining relief from sanction and for the judgment to be set aside. But after a three-day liability trial, judgment was entered against him and his counterclaim dismissed on 31 January 2020.
10. The defendant was held to be in breach of duty and liable for losses caused to NewCo for:
 - (i) Diverting payments due to NewCo to his own personal bank accounts and to the bank accounts of OldCo over which he had retained control; and
 - (ii) Diverting business opportunities that had come to his attention whilst serving NewCo as its manager.

Quantum

11. The claimant has set out three heads of loss:
 - (i) The loss in the value of NewCo;
 - (ii) Money that ought to have been paid to NewCo that he contends was diverted to the defendant;
 - (iii) Cash jobs which were diverted from NewCo to the defendant.
12. One of the major difficulties in assessing the appropriate level of damages is that there was no conventional due diligence exercise undertaken by Mr Lum prior to his purchase of the business. Mr Lum's understanding of the business and his own view as to its true value comes from having worked for Mr Chan in the business prior to its purchase. In addition, the court is faced with a lack of financial accounts for NewCo

and inaccurate financial accounts from OldCo, where the evidence suggests that the accounts only record approximately one-third of the true turnover.

13. The claimant relies upon his own impression of the volume of work that was being undertaken by OldCo to give a valuation of NewCo which was lost when it went into liquidation. That valuation, gained by impression, is not particularly helpful.
14. The greatest assistance to the court is the evidence of Waseem Yasin, a Fellow of the Institute of Chartered Accountants, who was jointly instructed by the claimant and the defendant subsequent to the liability findings.

Lost Value of NewCo

15. As Mr Yasin sets out in his report, he had difficulties in valuing NewCo. It has not been possible for him to evaluate the “but for” profits of the business based upon the previous trading results, identifying relevant adjustments, as a consequence of the lack of complete record. There are no financial accounts for NewCo, the financial accounts for OldCo were not accurate, and there is no reliable record of NewCo sales.
16. Mr Yasin values NewCo at £100,000 being the purchase price of NewCo paid between a willing buyer from a willing seller at arm’s length. The claimant contends that is not an appropriate way of valuing NewCo as there was no intention of the defendant to sell the business, but he always intended to keep hold of it; the actual turnover according to the claimant was in the region of £900,000 per annum and it had a profit margin of 60%. He contends that the lost value of NewCo should be not less than £200,000.
17. While the claimant relies upon *Brownings v Brachers* [2005] EWCA Civ 573 to support a contention that where a defendant has wrongfully deprived a party of something of value the court should be generous to the claimant in valuing that loss, that case does not allow the claimant to succeed where there is a lack of convincing evidence with respect to a particular matter. It does not reverse the burden of proof, and the burden of establishing any head of loss rests upon the claimant on the civil standard. What *Brownings v Brachers* is authority for is that the claimant is entitled to the benefit of any relevant doubt or a “fair wind” in establishing the value of what he has lost:

“In the well-known case of *Armory v Delamirie* (1722) 1 Stra 505... the Chief Justice directed the jury that unless the defendant produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

It has been recognised in subsequent authorities that in so directing the jury the Chief Justice was applying a general principle to the effect that, in a case where the defendant has wrongfully deprived the claimant of property of value (be it an item of physical property or a chose in action), the court will, save to the extent that it is persuaded otherwise by the

defendant, assess the value of the missing property on a basis which is generous to the claimant.

I respectfully agree that the principle in *Armory v Delamirie* is not directed at the legal burden of proof, rather it raises an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt. The practical effect of that is to give the claimant a fair wind in establishing the value of what he had lost.”

18. The starting point for the value of NewCo must be the purchase price of £100,000. The issue for this court is whether, in light of *Brownings v Brachers*, the court ought to increase that valuation to the one that Mr Lum says it ought to be given his own experience of the turnover of the business.
19. The contention that Mr Chan never intended to give up the business and always intended to operate in competition with NewCo does not, in my judgment, give any weight to the contention that he sold NewCo at an undervalue and that the loss in value of NewCo should be calculated on the basis of Mr Lum’s estimation of the turnover and profit margins. To do so would mean the court was going further than giving the claimant the benefit of the doubt. It would mean that the court had absolved the claimant of establishing the loss on the balance of probabilities and, as I have already set out, *Brownings v Brachers* does not reverse the burden of proof.
20. Given the way in which the defendant has behaved, both with respect to the operation of the business and through this litigation, I do not consider that Mr Chan would have undervalued the company. While it may always have been his intention to continue to operate in competition with NewCo, that was not (of course) something he was revealing to the claimant. In my judgment, Mr Chan would have wished to recover as much money as he possibly could from the sale of OldCo and hence the starting point must be, as Mr Yasin has provided, a value of £100,000.
21. However, subsequent to the report of Mr Yasin being provided, the evidence of Mr Chan at the quantum hearing has revealed that £100,000 was not in fact the total consideration for the business. His evidence was that he was to be paid £100 by Mr Lum for every cooker that was sold through NewCo. This point was raised in the liability trial, but its significance was not made apparent to Mr Yasin at the time he wrote his report. Mr Chan said that he was satisfied with the price for OldCo of £100,000 together with £100 per cooker sold, as that would provide him with an ongoing income which would assist him given his relatively modest salary for continuing to work for NewCo.
22. The difficulty for the claimant is that, while he may be entitled to a “fair wind” the court cannot increase the value of the company on the rather vague evidence provided by the claimant as to value. He says that his own view was that the business was carrying out vastly more work than the defendant now contends. That belief would not justify an increase in the value of the business beyond that which he paid for it, that is £100,000.
23. What changes that situation was the evidence of M Chan himself that he was to be paid £100 per cooker up to a potential sale of 1800 cookers. Mr Chan’s evidence was

both confused and confusing on this point and there was nothing set out in writing that the value of OldCo was not merely the £100,000 that was paid for it but that it should be increased in value as a consequence of this side agreement to pay a fee of £100 to Mr Chan for each cooker sold.

24. There was no evidence provided that the figure of 1800 was a realistic figure for the number of cookers that would be sold or how many £100s he had been paid during the time that NewCo was operating. Further, Mr Lum's evidence referred to the £100 per cooker being a supplement to the modest income that he was being paid for continuing as the manager of NewCo and if that were the case it was not part of an overall valuation of the business.
25. It is extremely difficult to give an accurate figure for the loss of the value of the business in all these circumstances. The base point must be the sale price of £100,000 but given Mr Lum the "fair wind" to which he entitled, and the evidence of Mr Chan which indicates that the £100 per cooker was both as part of the value of the business and partly his salary, I will provide for an uplift in the value of the business from the base line of £100,000 but only to £150,000 (which is the equivalent of payment for 500 cookers at £100 per cooker) given the lack of clarity in the evidence.
26. *Brownings v Brachers*, following *Armory v Delamarie*, provides a rebuttable presumption, it does not reverse the burden proof. Following the same reasoning as the expert has set out in his report, the lack of reliable financial information and the various unknowns in the amount of money and profits diverted from NewCo, means that the only reliable evidence with respect to the value of the business is the amount the claimant paid for it.
27. The increase in that valuation takes into account the claimant's own evidence acknowledging the agreement for additional payments but is limited to £150,000 as a consequence of the lack of clarity as to the purpose of the additional payments and that, in my judgment, it is unlikely that all the additional payments were referable to the value of the business.
28. Despite my findings at the liability trial, Mr Chan continued to argue at the quantum hearing that he is entitled to counterclaim for £30,000 as monies unpaid to him. That is not correct. The issue was dealt with in the liability trial and dismissed. It has no relevance to the current quantum decision.

Gross Profit

29. There is a dispute between the claimant and the defendant as to what the true profit margin for the business was. Mr Lum contends that it was as high as 60% of turnover, Mr Chan contends that it was limited to 40%.
30. In order to assist the court, the forensic accounting expert Mr Yasin summarised the accounts for the years ending 2014 and 2015 and concluded that the value of the sales less purchases and decreases in stocks, that is the gross profit, was 40% of the sales in 2014 and 44% of the smaller level of sales in 2015. As M Yasin points out that gross margin figure only reflects the direct material purchases of the business and does not take into account employees wages, travel expenditure, overheads such as heat and light, or administrative expenses such as insurance payments.

31. Mr Lum's evidence is that the gross profit margin was in the region of 60%. He comes to that figure on the basis that his own experience, when he worked for OldCo for approximately 6 months prior to purchasing the business, assessing the value of the parts as against the price charged for any particular job and has provided examples of two jobs where he says that the gross profit is between 62.95% and 60.5%. He contends that the value of the sales was underestimated by Mr Chan so that if the true turnover was compared with the costs of sales and administrative expenses, the gross profit was 58.89% over the entire year.
32. It is obviously important not to base the gross profit figure on just one or two examples. However, the evidence before the court does support a finding that the gross level of sale was greater than that which is shown in the accounts. As I found at the liability trial, the turnover of approximately £300,000 per annum recorded only about a third of the true turnover and the evidence of Mr Chan himself given to the court supports a finding that the gross profit element of individual jobs was in the region of 55%. In all the circumstances, therefore, I move away from the finding of the expert that the gross profit element of the income was between 40% to 44% as that fails to take into account the true turnover and find that the gross profit was 55%.

Money Diverted from NewCo

33. The bank statements of the six accounts eventually disclosed by the defendant (which include three HSBC sterling accounts and a Barclays sterling account), showed that payments of £630,083.29 were received into his accounts during the period between January 2015 and January 2017. The details of the calculations of these sums are set out in the bundle of documents before the court and the figures were not denied by Mr Chan.
34. As against that figure the defendant put forward a number of explanations to the forensic accountant and the analysis by the expert shows that a number of those deposits were transfers between the defendant's accounts and therefore need to be excluded to avoid double counting; there was one re-presented deposit of an unpaid cheque in the sum of £3,240 which had already been included in an earlier deposit and so that is excluded; there were also a number of deposits, which the defendant said were rental income (although without supporting evidence to establish that was the case) which were not in fact received as they were not cleared; there was a further sum of £1,200 which represented a deposit on 8 December 2016 from the Mossman Family and which relates to a sales invoice of the same date and is said to be with respect to work that the defendant carried out after NewCo entered into liquidation – so far as that is concerned, the claimant's case is that is work that ought to have been NewCo's and therefore the fact that it was carried out by Mr Chan's Cooker, the defendant's new business which had risen up phoenix-like from the ashes of NewCo, does not mean that the defendant is entitled to retain those monies; finally, with respect to the HSBC Hong Kong account where the money is held in HK\$, those are monies which have been transferred from Mr Chan's HSBC sterling account and must not be counted again in order to avoid double counting.
35. Mr Chan thereafter put forward a number of explanations for the monies that had entered into his account and not been paid into NewCo's account. That includes OldCo debtors in the sum of £42,521.40 but the forensic account analysed that

assertion and found that the account given was not reliable and that there was a failure to provide evidence to support his assertion. Mr Chan says that £40,000 was received from his daughter as the proceeds of sale of a property, but failed to provide any evidence to support that contention. Mr Lum does accept that the payment of £40,000 was made and that sum should be set off against the monies owed to Mr Lum. £32,347.26 was, it is said by Mr Chan, from personal sources but again there was no evidence (either documentary or from witnesses) that such payments had been made. With respect to the contention that monies in the sum of £48,260 was paid into account for work carried out by Mr Chan in his new business, again the forensic account could find no evidence in support save for the one deposit of £1,200 referred to above. With respect to that payment, Mr Lum's case is that the work ought to have been carried out by NewCo and so Mr Chan has again diverted work and gained the gross profit for himself. The alleged property income of £95,108.86 did not withstand the scrutiny of the forensic account who could find no evidence to support property income being the source of the deposits. With respect to the monies held in Chinese Yuen, the defendant has given no explanation for the source of these monies. Finally, there was a deposit of £3,000 that Mr Chan contended was a transfer from another account and therefore should not be counted again as it would amount to double counter, but he was wrong about that and the deposit of £3,000 was not a transfer and remains unexplained. The defendant appears to accept that £49,114 of the monies deposited into his accounts related to NewCo monies, although the forensic accountant was unable to match everything.

36. In addition to the evidence of the defendant's bank statements showing payments of £630,083.29 being received by him over a two year period, there is evidence of £314,127.52 being diverted from NewCo accounts into Mr Chan's accounts.
37. It is not appropriate to reduce this sum by the amount of monies that Mr Chan contends is rental monies for him. First, there is no evidence to support the contention that these were rental monies. Secondly, any property monies forms part of the large figure of £630,000 odd and is not to be counted against the monies diverted from the NewCo account. With respect to all the other explanations provided by Mr Chan, those explanations were not evidenced and for the reasons set out in paragraph 35 aforesaid, save for the payment of £40,000 that was made by Alice Chan to her father, there is a lack of convincing evidence that there was another source of the income other than NewCo.

Monies the claimant is entitled to recover

38. The sum of £49,114 from NewCo to Mr Chan's accounts is a sum that Mr Chan does not appear to challenge and should be returned in full to Mr Lum. The balance of the monies diverted from NewCo to Mr Chan's accounts totals £265,013.52 (being the total of diverted funds less the sum admitted by Mr Chan). Of that sum £202,474.66 were monies diverted from NewCo prior to Mr Chan's suspension as an employee of NewCo on 2 June 2016. Up until that time, Mr Chan was an employee of NewCo and anything that was contracted to be carried out NewCo was paid for by NewCo. In the circumstances, therefore, there should be no reduction as against those monies for the cost of carrying out the work.

39. The balance of the monies is £62,538. Of that sum £40,000 is accounted for as a payment to Mr Chan from his daughter. On the basis that the gross profit element of the £22,538 is 55%, Mr Lum is entitled to a further payment of £12,396.34.
40. In addition to the sums referred to above, the forensic account has calculated the amount of monies that appear to have been carried out and paid for (as recorded on the cash job sheets discovered by Mr Lum). That totals £192,010. There are further job sheets for work dated before the 2 June 2016 (being the date of Mr Chan's suspension) which the forensic accountant queried as they do not refer to work have been installed or delivered. I am satisfied that this is simply because Cantonese does not have a past tense, a point that was not demurred from by the defendant or his interpreter. Again, as these works were carried out prior to the suspension of Mr Chan, the total sum should be awarded to Mr Lum in the sum of £22,125.
41. The balance of the job sheets amounts to £124,024.93 and of this sum Mr Lum is only entitled to 55%, being the loss of profits, after 2 June 2016. That is a total sum of £68,213.20.
42. The cost of the liquidation of NewCo was £5,000. This figure has not been challenged and Mr Lum is entitled to that figure in addition to the loss of the value of NewCo which I have assessed to be £150,000.

Freezing Injunction

43. In my judgment there remains a very real risk that assets will be dissipated by Mr Chan. Indeed, that risk is increased now that judgment has been granted against him and a determination now made with respect to the quantum.
44. The freezing injunction granted on 2 February 2017, as varied by consent on 29 June 2020 to freeze assets to the value of £675,000, is to be extended until such time as the sums referred to above (together with interest thereon) have been paid.

Interest and costs

45. These two matters have been raised and dealt with in the written submissions on behalf of the claimant, Mr Lum. The defendants have failed to deal with the issue of interest and whether it ought to be awarded on a compound basis with respect to the monies taken from NewCo. The claimant has sought costs with respect to the wasted hearing on 29 and 30 June to be paid by the solicitors. In order to determine whether this is a case which is appropriate for a wasted costs order I would need a further hearing to be arranged in order for those solicitors to be represented before me.
46. Consequently, before I deal with these two outstanding matters I require the claimant's representatives to indicate whether they do in fact wish to proceed on the basis that they seek a wasted costs order against the defendant's solicitors and, if they confirm that to be the case, the defendant's solicitors are to set out the basis upon which they say that is not appropriate and I will arrange for there to be an in-person hearing at which time the defendant's solicitors can be represented.

47. I further require the claimant's representatives to set out in detail the basis upon which it is said that the court has, and should exercise, its discretion to award interest on a compound basis. The defendant must then respond to those submissions.
48. These further written submissions should be provided by the claimant within 7 days (17 September 2020) of the formal handing down of this judgment at 10am on 10 September 2020 by remote hearing with the defendant's written submissions within 7 days thereafter (24 September 2020). There will not be formal representations at that time unless the parties consider that it would be most cost effective for these remaining issues to be dealt with at that time. In those circumstances, the request for next Thursday's hearing to deal with further issues beyond the handing down of judgment, will need to be made through my clerk Victoria.rodwell@justice.gov.