



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

**[2020] CSIH 23
P1222/18**

Lord President
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Reclaiming Motion by

MCR Oil Tools LLC

Petitioner and Respondent

against

SPEX Offshore (UK) Ltd, SPEX Engineering (UK) Ltd, SPEX Corporate Holdings,
Ltd, SPEX Group Holdings Ltd, and SPEX Group US LLC

Respondents and Reclaimers

Petitioner and Respondent: Higgins QC, Ower; Ledingham Chalmers LLP

Respondents and Reclaimers: McBrearty QC; Pinsent Masons LLP

15 May 2020

Introduction

[1] MCR Oil Tools LLC ('MCR') is the plaintiff in legal proceedings in the federal court in Texas. The defendants are members of the SPEX group of companies, together with an individual director. MCR alleges that the defendants have sought to elide the terms of licence agreements that it made with SPEX Offshore Ltd and SPEX Services Ltd ('the licensees'). The case is due to go to trial before a jury in June 2021.

[2] MCR regards the licensees as the lynchpins of its case. Without them as defendants, it believes that its claims will either fail or be ineffectual. After the action commenced, MCR had a setback. It discovered that the licensees had been dissolved. Being “non-entities” they could not be parties to the action. MCR therefore brought this petition to restore them to the register of companies.

[3] SPEX opposes MCR’s application on the basis that it would serve no purpose, because (i) the licensees themselves have no assets and (ii) any attempt to fix liability on the other defendants is bound to fail.

[4] The commercial judge held that it was just to restore the licensees to the register. He held that the claim passed the threshold test of being more than “merely shadowy”. SPEX reclaims (appeals) his interlocutor of 29 January 2020.

[5] We shall now set out the background in more detail. For the sake of brevity we shall refer to both the reclaimers and the defendants in the Texan action as “SPEX”. In doing so, we recognise that there are slight differences between the composition of the two parties, but nothing turns on that.

Background

Parties

[6] MCR is a Texan corporation. It researches, designs and produces oilfield tools. Its portfolio of intellectual property includes patents, trade secrets, know-how and confidential information. The licensees were incorporated in Scotland.

Licence agreements

[7] MCR entered into contracts with the licensees as follows:

SPEX Services Ltd 29 June 2009 and 16 May 2011

SPEX Offshore Ltd 12 and 24 May 2104 (extended for a year by letter dated 1 June 2015)

[8] Under the licence agreements, MCR agreed to share its technology and intellectual property. In return, the licensees (a) acknowledged that MCR would own any improvements or modifications developed by them, (b) assigned, conveyed and sold any rights in any such improvements or modifications to MCR, and (c) undertook to co-operate in executing, or causing to have executed, any documents necessary to effect such a transfer. The licence agreements are governed by Texan law.

Patent applications

[9] From 2014 onwards, members of SPEX and their directors began filing patent applications relating to oilfield tools. MCR considered that they constituted improvements or modifications in terms of the licence agreements.

The licensees change name and dissolve

[10] In 2016 the licensees changed their names and entered into voluntary liquidation.

The chronology is as follows:

<i>SPEX Offshore Limited</i>	
<u>2012</u>	
11 September	incorporated
<u>2014</u>	
21 May	signed licence agreement with MCR
<u>2015</u>	
1 June	licence period extended

<u>2016</u>	
21 May	licence expired
19 August	changed name to General Services 1 Ltd ('GS1')
27 October	entered into liquidation
<u>2017</u>	
30 September	dissolved
<i>SPEX Services Limited</i>	
<u>2009</u>	
20 April	incorporated
29 June	signed licence agreement with MCR
<u>2016</u>	
16 May	licence expired
19 August	changed name to General Services 2 Ltd ('GS2')
30 November	entered into liquidation
<u>2018</u>	
5 January	dissolved

Texan Proceedings

The Defendants

[11] The defendants are:

SPEX Offshore (UK) Ltd,
 SPEX Engineering (UK) Ltd,
 SPEX Group US LLC,
 SPEX Group Holdings Ltd
 SPEX Corporate Holdings Ltd
 (GS1)

(GS2)

Jamie Oag

[12] It is worth making three points about the defendants. First, Mr Oag is or was a director of most of the SPEX companies. Secondly, SPEX Group Holdings Ltd is the ultimate owner of the group. Thirdly, SPEX Group US LLC is incorporated in Texas.

The claims

[13] MCR's written pleadings are now contained in the Third Amended Complaint ("TAC"). It is a lengthy and complex document. MCR advances multiple grounds of action, or "counts". They are: breach of contract, misappropriation of assets, unfair competition, fraud, interference with contract, denuding the corporation, and conspiracy. The overarching theme of MCR's case is that the defendants devised and implemented an elaborate scheme. It was designed to avoid the restrictive obligations in the licence agreements.

Remedies

[14] MCR seeks declaratory orders that it owns the disputed intellectual property. It also seeks orders for its return, injunction against its further use, damages, and expenses. Some of the claims are brought under common law, others under statute.

Defence

[15] The defendants reject all of MCR's assertions.

Motion to dismiss

[16] In 2018, SPEX filed a brief to dismiss the case against the licensees on the basis that they were no longer in legal existence. In consequence the claims for breach of contract and specific performance were not available. Further, there was no purpose in restoring the companies, because MCR would be unable to enforce any decree against the other defendants.

[17] MCR met that argument by informing the court that it had petitioned to restore the licensees to the register. It explained why it was anxious to retain them in the action and argued that it would be successful in any questions of piercing the veil and alter ego. The latter is a Texan doctrine involving the blurring of corporate identities.

[18] The Court stayed the Texan action in relation to the licensees until these petition proceedings have concluded. It also ruled that Scots law is the applicable law in respect of questions of piercing the veil and alter ego. The Texan Court directed that the case against the other defendants should continue.

The test

[19] The question in each case is whether it is “just” to restore a company to the register: The Companies Act 2006 s 1031(1)(c). A line of authority provides guidance on the correct approach: *Stanhope Pension Trust Ltd v Registrar of Companies* [1994] BCC 84, [1994] 1 BCLC 628 ; *Re Oakleague Ltd* [1995] BCC 921, [1995] 2 BCL; *City of Westminster Assurance Co v Registrar of Companies* [1997] BCC 960; *Re Blenheim Leisure (Restaurants) Ltd (No 2)* [2000] BCC 821; *Whitbread Hotels Ltd, Petitioners* 2002 SLT 178; and *Advocate General for Scotland, Petitioner* [2010] CSOH 117.

[20] Neuberger J (as he then was) summarised matters in *Re Blenheim*. Each case turns on its own circumstances. Regard should be had to the nature of the application to remove its name from the register, the reasons for the application to restore, the events since dissolution, and whether restoration would do any good. He added these observations:

- a) the process is purely administrative and is intended to be comparatively quick
- b) absent special circumstances, restoration should follow – exercising the discretion against restoration should be the exception not the rule
- c) a claim which is highly speculative but not fanciful will pass the test
- d) even if the prospects of the claim are dubious or slender (but more than shadowy), the court should restore the company and let any other arguments be dealt with by another court

[21] Lord Hoffmann gave currency to the phrase “merely shadowy” in the context of applications to restore. He stated that the court need not express a concluded view on whether a proposed claim is likely to succeed. It is sufficient if the applicant’s interest in having the company restored is more than “merely shadowy”: *Stanhope* at 90A-B. The third and fourth observations made by Neuberger J show that, while there are fine distinctions to be made, the test is a low one.

Matters not in dispute

[22] Mr McBrearty accepted that various matters are not in dispute. MCR is entitled to bring these restoration proceedings, by reason of it being either a potential creditor, or a person with a potential legal claim against the licensees. It therefore passes through one of the statutory “gateways”: Companies Act 2006 s 1029(2). Further (i) the court has a wide

discretion, (ii) it should deal with matters simply, (iii) if it finds the application to be more than “merely shadowy”, it is likely to grant restoration, (iv) MCR should not be required to establish its claim twice, and (v) there is no allegation of fraud or dishonesty on the part of MCR in bringing this petition: *Witherdale v Registrar of Companies* [2008] 1 BCLC 174; *Grupo Mexico* [2018] Bus LR 1863.

Submissions

SPEX

[23] Mr McBrearty contends that the “merely shadowy” test covers the law as well as the facts. It is self-evident that any attempt to pierce the veil would be bound to fail, having regard to *Prest v Petrodel Resources Ltd & Others* [2013] 2 AC 415; *Persad v Singh* [2017] BCC 779, *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337, and *Rosendale Borough Council v Hurstwood Properties Ltd* [2019] 1 WLR 4567. He also maintained that the TAC lacked coherence and invited us to prefer the affidavit evidence of the Hon. Elton Joe Kendall to that lodged on behalf of MCR.

MCR

[24] Miss Higgins submits that MCR will succeed in piercing the veil. Accordingly restoration does have a purpose. She contends, however, that any detailed legal analysis of the issue is premature. She says that the court should rely on the affidavits provided by its former and current attorneys, Mr Portela and Ms Smithee.

[25] Mr Portela explains that MCR wishes to restore the licensees for two main reasons.

- (a) *declaratory orders* If the Texan court grants orders against the licensees that the patents filed by SPEX constitute “improvements or modifications”,

then MCR can trace its rights through the licensees to whichever companies now purport to hold them.

(b) *breach of contract* These claims will be “easier to achieve” against the contractual signatories. Without the licensees, there is a “further layer of difficulty” to establish liability against the other defendants.

[26] Most importantly, Mr Portela adds:

“that all the claims we have advanced on behalf of MCR set out in the US Proceedings ... have legal merit and an adequate legal and evidentiary basis”.

Is the claim “merely shadowy”?

[27] We decline Mr McBrearty’s invitation to examine the law, the Texan pleadings and the affidavits for the following reasons.

[28] As to the law, it would require a level of analysis which is inappropriate to these proceedings. It is precisely the type of exercise that the authorities warn against.

[29] As to the pleadings, the TAC discloses a complex interplay between the counts and the remedies. We do not have confidence that, not being schooled in Texan jurisprudence, we could properly evaluate the written pleadings.

[30] As to the affidavits, we see no reason to go behind those lodged by MCR. There was no suggestion that they had not been advanced responsibly: *Whitbread Hotels Ltd*.

[31] More generally, we see nothing in the circumstances to warrant this case being placed into the exceptional category. We are therefore satisfied that the test is met. MCR’s claims are more than merely shadowy.

[32] In this opinion we have tried to avoid trespassing beyond our jurisdiction. For the reasons given, we express no view on the issues which will be determined by the Texan court.

Conclusion

[33] We conclude that it is just to restore the licensees to the register of companies. We therefore agree that the commercial judge correctly exercised his discretion, refuse the reclaiming motion and adhere to his interlocutor of 29 January 2020.