Neutral Citation Number: [2024] EWHC 2366 (Ch)

Case No: BR-2023-BHM-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANY AND INSOLVENCY LIST
IN THE MATTER OF XACT SKIPS LIMITED (COMPANY NO.10680673)
AND IN THE MATTER OF THE COMPANIES ACT 2006

Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham, B4 6DS

Wednesday, 10 July 2024

BEFORE:

HIS HONOUR JUDGE RICHARD WILLIAMS sitting as a High Court Judge

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BETWEEN:

MARK LEE HILLIARD

Petitioner

- and -

(1) CARL ANTHONY JORDAN
(2) XACT SKIPS LIMITED

Respondents

Adrian Davies (instructed by O'Donnell Solicitors) for the **Petitioner**
Rory Brown (instructed by Knox Insolvency Solicitors) for the **First Respondent**
The **Second Respondent** was not represented

Hearing dates: 25 – 27 June and 10 July 2024

JUDGMENT
(Approved Judgment)

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(Official Shorthand Writers to the Court)

HIS HONOUR JUDGE RICHARD WILLIAMS:

Introduction

1. This is my oral judgment following the trial of an unfair prejudice petition brought pursuant to section 994 of the Companies Act 2006.

2. The Petitioner is Mr Mark Hilliard ("***P***"), and the 1st Respondent is Mr Carl Jordan ("***R***").

3. It is agreed that there be an order that R purchase P's shares in Xact Skips Limited ("***the Company***") at an undiscounted value and reflecting the fact that the Company is a quasi-partnership. However, there is a dispute as to the date for valuing and thereby the value of the shareholding.

4. It is P's case that:

    a. R has conducted the Company's affairs in a manner that had been prejudicial and unfairly so to P's interests as a shareholder of the Company.

    b. In determining the date of the share valuation and in the context of fairness, the court ought to adopt the date when the unfair prejudice began.

    c. Therefore, the shares ought to be valued as at 23 March 2022 and adopting the jointly instructed expert's figure as at that date, but subject to adjustments seeking to put P back in the position that he would have been in, had the unfairly prejudicial conduct not occurred in the first place.

    d. Thereby producing a valuation of some £150,000 for P's shares.

5. It is R's case that:

    a. P has not been prejudiced let alone unfairly prejudiced by the way in which R has conducted the Company's affairs.

b. Indeed, P abandoned the Company following a petty argument with R's stepdaughter, and simply left R to run the Company alone.

c. It is only because of R's lone efforts that the Company is not in an insolvency process.

d. Therefore, fairness requires that the shares be valued as at the current date of the expert's report which produces a nil value.

6. The amount in dispute is some £150,000. R's costs budget was approved in the sum of some £100,000 and ignoring incurred costs. P failed to file a costs budget on time, and so is treated as having filed a budget comprising only the applicable court fee. P's application for relief from sanctions was dismissed, although, by order dated 4 December 2023, permission was granted to appeal that dismissal. Through no fault of the parties, that appeal has still not been heard. However, it appears likely that the parties have between them incurred costs wholly disproportionate to the amount now in dispute.

7. I have to say that this was a case crying out for early alternative dispute resolution. Whilst hindsight is a wonderful thing, it is perhaps unfortunate that the court did not mandate a Chancery Financial Dispute Resolution appointment at one of the four interim hearings that took place in the course of this litigation.

8. I raise that issue now because whatever my decision in the present case, there will remain to be resolved the issue over R's shares in the associated company. A round of further litigation would be financially ruinous, and I urge the parties to consider some form of alternative dispute resolution in an attempt to settle that outstanding matter before again resorting to the courts.

Background

9. By way of agreed or not seriously disputed background, P and R first met in around 2016 and thereafter became great friends, socialising and holidaying together with their

respective wives on a regular basis. It is a sad aspect of this case that they are no longer even on speaking terms.

10. R and his wife own Canalside Properties Limited ("***Canalside Properties***"), which in turn is the freehold owner of Canalside Yard, Napton, Southam ("***the Yard***").

11. The Yard was originally occupied in part by County Waste Limited ("***County Waste***"), and in part by Jordan Contracts (Midlands) Limited ("***Jordan Contracts***").

12. County Waste was in the business of commercial waste disposal. Jordan Contracts is in the business of demolition, civil engineering and the crushing and recycling of aggregates. Jordan Contracts is R's own business, whilst County Waste was an unconnected business.

13. The rent review re-calculated County Waste's rent for the Yard for the period 1 November 2016 to 31 October 2017 at £95,000 per annum.

14. In 2017, County Waste went into administration, leaving that part of the Yard loaded with waste. The parties agreed that they would effectively take over the business of County Waste through the Company, which was incorporated for that purpose on 21 March 2017 with the parties being equal shareholders and co-directors of the Company.

15. There was no formal lease in the name of the Company, which paid £48,000 per annum for its occupation of the Yard. The parties contributed significant working capital towards clearing and improving the Yard with a large proportion of those works being carried out and invoiced by Jordan Contracts.

16. P owned the long leasehold of another yard at 11 Pentos Drive, Birmingham ("***the Birmingham Yard***"), which was sub-leased to Bell Skips Limited ("***Bell Skips***"). Bell Skips was in the same business as the Company, albeit covering a different geographical area.

17. The parties agreed to acquire Bell Skips together and became equal shareholders and co-directors of that company in 2018. Again, there was no formal sub-lease in the

name of Bell Skips, which paid £33,000 per annum for its occupation of the Birmingham Yard.

18. It was agreed that R would be based at the Yard and responsible for the day-to-day running of the Company, whilst P would be based at the Birmingham Yard and responsible for the day-to-day running of Bell Skips.

19. On 25 March 2021, an email was sent (in the name of R on behalf of Canalside Properties as the client) to solicitors requesting that they draft five-year leases in respect of the Yard for both the Company and Jordan Contracts with rents payable of £4,000 per month and £2,500 per months respectively.

20. On 7 October 2021, Funding Circle requested proof of ID for P in respect of a proposed loan to the Company. P duly supplied copies of his passport and council tax bill.

21. Later that month, the Company received a Funding Circle loan of £200,000.

22. Also, that month, P spoke on the telephone with Georgia, R's stepdaughter, who was working at the Company. They got into a disagreement and P felt that he had been disrespected. He called R later that evening and, in the course of the conversation, P referred to Georgia in very derogatory and offensive terms. The parties have not spoken since then.

23. On 28 March 2022, an email was sent in the name of R to the solicitors attaching documents signed by R as effectively landlord and tenant, which included the new lease and a rent deposit deed in respect of the Company's occupation of the Yard.

24. The new lease was for a term of five years at an annual rent of £120,000. The rent deposit deed provided for a deposit of £180,000 to be held in a separate, interest-bearing deposit account at a bank.

25. However, the new lease and rent deposit deed were only completed earlier this year because of delays on the part of the security department at Barclays Bank giving their consent as mortgagee. In the meantime, on 29 November 2021, Canalside Properties

signed receipt from the Company of the sum of £200,000 expressly as a bond to be held by Canalside Properties as per the terms of the new lease. The sum of £200,000 was funded by way of the Funding Circle loan. In addition, the increased rent of £10,000 per month was charged, albeit not paid, with effect from November 2021. The old rent continued to be paid.

26. On 6 December 2022, R resigned as a director of Bell Skips.

27. These proceedings were issued on 22 March 2023.

28. In preparation for this judgment, I have read and heard evidence from the parties and the single joint experts, Mr Banton, who valued the market rent and deposit, and Mr Horley, who valued the shares. I also read and heard submissions by counsel for both parties.

29. I am unable in the course of this judgment to refer to all of the evidence and argument relied upon by the parties, but I have taken it all into account in reaching my decision.

30. I found P and R to be honest witnesses, doing their best to assist the court. I was struck by how they both readily made concessions which did not support their respective cases.

31. As a result of the concessions made by P much of his case fell away. For example, in his written evidence, P claimed that when he asked Ann Wood, the Company's bookkeeper, to provide him with the Company's financial information and bank statements, she refused to do so without R's express authority. However, in his oral evidence, P confirmed that he was able to reinstate his access to the Company's bank account within the month of being logged out. In addition, thereafter Ann Wood had been authorised and had provided on more than one occasion the financial information requested by, or on behalf of , P.

32. As a consequence of P's concessions made during his oral evidence that effectively left to be determined the allegation of unfair prejudice arising from the Company entering into the new lease, the rent deposit deed and the Funding Circle loan.

P's knowledge of the property transactions

33. It was P's evidence that until the commencement of these proceedings, he knew nothing about the new lease and the rent deposit deed. Whilst he had been aware of the Funding Circle loan, he had been led to believe that the loan was to be used to fund the acquisition of new machinery.

34. It was R's evidence that P was fully consulted about and was agreeable to the property transactions, including the Funding Circle loan and its purpose to pay the rent deposit.

35. Whilst I found the parties to be honest witnesses, the extent to which they departed from their written evidence in their oral evidence, meant that I did not find them to be reliable witnesses. They were seeking to recall conversations that took place several years ago, which necessarily gives rise to particular problems. Apart from the fact that quite understandably, it is often difficult for witnesses to remember accurately what was said so long ago, witnesses can easily persuade themselves that the accounts they now give are the correct ones.

36. In such circumstances, usually the best approach for a judge to adopt in the trial of commercial cases is to base factual findings on inferences drawn from the contemporary documents. The problem with that approach in this case is that there are very few contemporary documents available for two reasons:

    a. Firstly, having regard to their informal nature, most of the party's business dealings with each other were conducted by speaking over the phone.

    b. Secondly, the case management order dated 28 November 2023 provided for limited Model B disclosure, effectively confined to reliance and known adverse documents.

37. However, on reflection and for the following reasons, I do not consider that it is necessary to resolve this particular factual dispute over the property transactions:

    a. Even if P was kept in the dark about those transactions, I do not consider that it is properly arguable that the property transactions were unfairly prejudicial

if made on market terms, since the Company gained the benefit of security of tenure in circumstances where it has had none before and despite having expended significant sums in improving the site.

b. In his oral evidence, P suggested that it would have been no problem re-locating to another suitable site, but I disagree. In his written evidence, Mr Banton stated as follows:

> "[14.1] The waste market in the UK remains complex and heavily regulated…..
>
> …….
>
> [14.4] So, waste management properties such as the subject property are by their nature specialist industrial properties…..
>
> [14.5] ….obtaining planning permission for waste management uses can be difficult, costly and time consuming to obtain. It may take many years for permission to be granted, and it could require several sequential planning applications, each seeking better and improved conditions than the then existing permission, for a valuable permission to be obtained.
>
> [14.6] In view of these timescales and difficulties, the grant of planning permission can often justify an enhanced rental value above that of industrial land used for, say, open storage. Planning permission runs with the land so the benefit of a planning permission can be reflected in the rent demanded by a landlord……
>
> [14.7] As a result, a rent premium above that of a typical rent for industrial land is sometimes paid. This is particularly likely on the grant of a new lease (rather than as a rent review) when there may be competing prospective tenants……"

c. In his written evidence, R stated as follows:

> "[60] I think that from at least March 2021 Mark knew from discussions with me that Xact would have a formal lease with Canalside as this was when solicitors were first engaged by me to arrange this…….. I remember explaining to Mark that banks like this formality and that having a lease in place was good for Xact as Xact wouldn't be worth anything without a lease and I think this was why Mark agreed to this. The rent deposit deed discussions with Mark took place at some point around or soon after the lease instructions were given by my but I can't remember a precise date.
>
> …….
>
> [63] In relation to the lease terms, I confirm that Mark was not involved in direct discussions with the Solicitor drafting the lease."

d. Therefore, even if P was consulted upon and was agreeable in principle to the property transactions, he was not consulted upon and so was not agreeable to the specific terms agreed by R. Indeed, I remind myself that when R initially gave instructions to the solicitors, it was on the basis that the rent payable under the new lease would be £4,000 per month, consistent with the amount that the Company had been paying for many years.

38. In conclusion, whether or not P knew of and authorised the property transactions in principle, the central issue to be determined in this case is whether the actual terms ultimately agreed unilaterally by R on behalf of the Company were market terms.

Market terms

39. In his written evidence, Mr Banton stated that due to the capital costs of physical on-site works, as well as the planning and EA licence costs, a waste management tenant

will typically seek to agree a longer-term lease than many industrial users. A 25-year term can be typical. He therefore concluded that a normal lease for the Yard would be a term of 15 years. The term under the new lease is five years.

40. In his written evidence, Mr Banton stated that a normal lease for the Yard would provide a commencement rent of £95,000 per annum, with a rent review every five years. The new lease provides for rent of £120,000, which by my calculation is a mark-up of 26 per cent. In his oral evidence, Mr Banton accepted that the figure of £120,000 was materially high.

41. So far as the rent deposit, Mr Banton was of the opinion that a sum of £180,000 was high, but not inappropriate. However, whilst that was the sum stated in the rent deposit deed, the actual sum paid over was £200,000.

42. Finally, it was a remarkable admission by R in his oral evidence that, although the rent deposit was paid over, it was not protected as provided for in the rent deposit deed in a separate interest-bearing bank account. Instead, R used the money to discharge the mortgage on his mother's home, which he is due to inherit. He further explained that he would decide in due course what rate of interest was to be applied.

43. As per Arden LJ ***In re Tobian Properties Ltd*** [2012] EWCA Civ 998, the concept of fairness in this corporate context is flexible and open textured where shareholders can show wrongdoing that prejudices their interests. However, it is not unbounded. One of the most important matters to which the court will have regard is the terms on which the parties agreed to do business together.

44. The parties here agreed that P would be primarily responsible for the day-to-day running of Bell Skips, and R would be primarily responsible for the day-to-day running of the Company. The terms on which the parties agreed to do business together included the articles of association of the Company, which at Article 14 included provisions to avoid conflict of interests. It was accepted on behalf of R that, where the same person is both the landlord and the tenant, there is the potential for conflict of interests to arise, but there was no actual prejudice to the Company since the terms agreed by R on behalf of the Company were market terms.

45. As already explained, whether or not the P authorised R to enter into the property transactions, it could not possibly have been a blanket authority to do so on any terms, even if contrary to the interests of the Company. In his written evidence, R stated that he thought the arrangements to be commercial but fair.

46. I disagree. I consider that R fixed the terms of the new lease and paid over/used the rent deposit by reference to his own interests, rather than those of the Company:

    a. It was argued that the new lease benefited the Company by providing it with security of tenure, but the five-year term was materially shorter than the market term assessed by the single joint expert in circumstances where the Company had expended significant sums in improving the site and would struggle to relocate to another suitable site if evicted from the Yard.

    b. In addition, the rent under the new lease was materially more than the market rent assessed by the single joint expert.

    c. Finally, the rent deposit deed provided for the sum of £180,000, which sum was considered by the single joint expert to be on the high side. Nevertheless, R caused the Company to pay the even higher sum of £200,000. When that higher sum was paid, and contrary to the expressed terms of the rent deposit deed, it was not properly secured, and with no interest accruing upon it, despite the fact that the rent deposit is recorded on the balance sheet as a significant asset of the Company. In my view, R has simply used that money as if his own, for his own personal benefit.

47. Therefore, I find that R's conduct of the Company's affairs has been unfairly prejudicial to the interests of P as a member of the Company, such that P's shareholding should fairly be valued as at 23 March 2022 being the date of P's letter of claim, and perhaps not by coincidence, also being five days before R signed the new lease and the rent deposit deed on behalf of both the landlord and the tenant.

Adjustments

48. The expert's valuation of the Company as at 23 March 2022 is £206,000. P argues that I ought to adjust that figure by adding back the arrangement fee of £10,000 and interest of £65,557 paid on the Funding Circle loan. However, I do not consider such adjustments would be fair or consistent when having regard to the fact that the expert's valuation is on a net asset basis, which assets include the amount of that loan.

49. However, I do consider it fair to adjust the valuation by adding back the amount of the increased rent charged for the four-month period prior to the new lease being signed and being a total add back of £24,000. Whilst it is recorded in the expert's report that the increased level of rent was charged but not paid, the expert has recorded Canalside Properties as a creditor of the Company for the amount of unpaid rent. That adjustment therefore leaves a figure of £115,000 for the purchase of P's shareholding.

Overall conclusion

50. I direct that R purchase the fifty ordinary shares of £1 in the capital of the Company presently registered in the name of P at a price of £115,000.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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