Neutral Citation Number: [2024] EWHC 851 (Ch)

Case No: CR-2021-002450

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

CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 15 April 2024

Before:

Caroline Shea KC, sitting as a Deputy Judge of the Chancery Division

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Between:

MR JOHN SIMPSON

Petitioner

- and -

(1) MR MICHAEL AGAPIOS DIAMANDIS
(2) MS LORNA LEONARD
(3) MR ANDREW CHARLES WOOLLETT

~~**(4) MR ROBERT JOHN WHITLOCK**~~
~~**(5) MR LYNDON WHITLOCK**~~
(6) ARTEMAS JOSEPH HOLDINGS LIMITED ("AJHL")
(7) TILON CG LIMITED ("TCGL")
(8) TILON (HOLDINGS) LIMITED ("THL")

Mr Fraser Campbell (instructed Mishcon de Reya) for **the Petitioner**

Mr Loxton (directly instructed) **for the First and Second Respondents**

Mr Ben Channer (directly instructed) for the **Third Respondent**

Hearing date: 9 November 2023

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JUDGMENT

Caroline Shea KC:

1. This is my judgment on an application made pursuant to a notice dated 8 November 2023 ("the Application") for an adjournment of a trial listed for a 7 day hearing commencing 9 November 2023 (with one day's prior judicial reading). The Application is brought by the first, second and third respondents ("R1", "R2" and "R3" respectively, together "the Applicants") to a petition under section 994 of the Companies Act 2006 ("the Petition"). The Application is opposed by the Petitioner. The Applicants requested the Application be heard remotely the day before the trial was due to commence. I directed that it be heard at the outset of the trial on 9 November 2023, and that a skeleton argument be produced of no more than four pages addressing the legal principles relied upon in support of the Application. A skeleton argument was served on the afternoon of 8 November 2023 on behalf of the First and Second Respondents. Also served that afternoon was a skeleton argument on behalf of the Petitioner, opposing the Application.

2. I shall briefly set the scene in terms of the central dispute between the parties. It is the Petitioner's case that the Seventh Respondent ("TCGL") was sold at undervalue out of a holding company, the Sixth Respondent ("AJHL"), into a new holding company, the Eight Respondent ("THL"), in which the Petitioner had no shareholding, but in which R1 and R2 had in combination a majority shareholding. The sale was effected by R1 as sole director of TCGL, in the face of the Petitioner's objections. He claims this caused him to suffer unfair prejudice. R1 was a shareholder of AJHL, owning 47.5% of the shares, the same shareholding as that of the Petitioner. R2, the Company Secretary, owned a 5% shareholding in AJHL. R3 was an investor who was allocated a 15% share of THL upon the transfer to it of TCGL. The Fourth and Fifth Respondents were also investors in THL; the claim against them was settled last week by means of a Tomlin Order and they play no further part in these proceedings.

3. The Application is brought on three grounds: (1) the alleged financial deterioration of TCGL, the company at the centre of the dispute and in respect of the value of which the Petitioner and the Respondents have each adduced the evidence of an expert accountant. It was said that TCGL had been put into administration the week of the trial ("ground 1"); (2) the consequential need for further disclosure, witness statements and expert reports in order to do justice to the central issues in the case ("ground 2"); and (3) the fact that R1 and R2 are no longer legally represented at trial which creates an unfair inequality of arms ("ground 3").

4. The evidence in support of the Application is set out in section 10 of the Application Notice. The Application Notice was signed by a representative of Wordley Partnership, solicitors instructed by R1, R2, and R3, who checked the box indicating that the Applicants believe that the facts stated in section 10 are true. Notwithstanding that statement of truth, late yesterday afternoon, an email was sent informing me that

TCGL was not in fact in administration; rather a Notice of Intention to Appoint Administrators was filed by the directors of TCGL on 3 November 2023.

5. Although R1 and R2 are unrepresented for the purposes of the trial, they were represented on the Application by Mr Loxton of Counsel. Mr Loxton had been instructed to appear at the trial on a direct access basis, but had notified the court on 7 November 2023 that he had had to return his instructions the previous day. R3 was represented by Mr Channer of Counsel.

Ground (1) – TCGL financial problems

6. Under ground (1), it is said that TCGL has been struggling financially since May 2023, a position which worsened significantly in September 2023. This was said to have led to the administration of the company on 3 November 2023 (that evidence was later amended to say that a Notice of Intention to Appoint Administrators was filed on 3 November 2023). It is said that the experts, who exchanged expert reports at the beginning of June 2023 addressing the specific question of the value of TCGL, and who produced a joint statement dated 26 June 2023, have not had an opportunity to report or opine on the value of TCGL since these highly material matters arose. Neither prior to issuing the joint statement, nor until last week when documents were sent to the Respondents' expert, had either expert been supplied with any materials documenting the alleged decline, nor had they been otherwise alerted to the alleged change in financial outlook of TCGL.

Ground (2) – further directions required

7. Under this ground it is said that directions are required for (1) a further disclosure bundle to be produced containing all documents relevant to the administration that post date the expert reports; (2) further witness statements from R1, R2 and R3 to provide evidence of fact as to reasons for the financial difficulties and the timing of the administration; (3) a witness statement from the administrator; and (4) supplemental reports from the experts, followed by a joint report on the value of TGCL over the period following the date of the joint report.

8. During oral submissions and in response to my questions, Mr Loxton suggested that there were some sixty-six relevant documents. These had in the last week been sent to his client's expert, Mr Isaacs, who was on holiday and who then intimated that he would not have time to produce anything more than a cursory supplemental report addressing the late disclosure prior to attending next week to give his evidence. Mr Loxton frankly accepted that his clients were in breach of the continuing duty to give disclosure in not having disclosed the documents to the Petitioner, and offered no reasons for the breach. He also offered no explanation as to why matters which have allegedly been unfolding since May 2023 were neither notified to the experts nor made the subject of supplementary witness evidence. He offered no explanation as to why the application to adjourn was brought merely one day before the hearing. Mr Channer adopted Mr Loxton's submissions and accepted that his client also was in breach of the duty to give disclosure.

Ground (3) – inequality of arms

9. It was stated in the Application Notice that due to financial difficulties R1 and R2 have been unable to retain counsel for the trial. An adjournment of the trial would allow funding to be obtained and counsel instructed, thus ensuring equality of arms and procedural fairness. It would not be in the interests of justice for R1 and R2 to represent themselves in a 7 day trial given the legal complexities of the case, the requirements of cross examination of lay witnesses and expert witnesses, the requirement to present legal arguments, and the potential value of the relief being sought against the Respondents (into millions of pounds).

Principles

10. The Application is made under CPR 3.1(2)(b) which provides the Court with the power to "adjourn or bring forward a hearing". The decision whether to order an adjournment must be made in the light of the overriding objective, which provides that the court must

> *deal with cases justly and at proportionate cost*', meaning, '*so far as practicable –*
>
> *(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;*
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> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate –*
>
> *(i) to the amount of money involved;*
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> *(ii) to the importance of the case;*
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> *(iii) to the complexity of the issues; and*
>
> *(iv) to the financial position of each party;*
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> *(d) ensuring that it is dealt with expeditiously and fairly;*
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> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and*
>
> *(f) enforcing compliance with rules, practice directions and orders.*

11. Counsel for the Petitioner drew my attention to the decision in Elliott Group Ltd v GECC UK (formerly GE Capital Corp) [2010] EWHC 409 (TCC), at [9]:

> "In essence, on an application of this sort, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes

ahead in circumstances where that party has not had proper or reasonable time to prepare its case".

Decision

12. Grounds (1) and (2) fall to be considered together, the need for further disclosure and evidence being consequences of what is said to be the deteriorating financial health of TCGL. My refusal of an adjournment on this ground is heavily influenced by the fact that the predicament in which the Applicants claim to find themselves lies fairly and squarely at their own door. It has been known since before the experts exchanged their reports that there were (as R1, R2 and R3 claim) concerns about the financial health of TGCL, the valuation of which lies at the heart of the remedy sought by the Petitioner, and as to which the experts were expressly instructed to opine. It is surprising, bordering on astonishing, that if there were concerns about the financial health of TGCL, Mr Isaacs was not told about it at the time when he was formulating his evidence on its value. Indeed the experts were expressly advised at the time of their joint statement (26 June 2023) that "it is currently forecast by the management of Tilon that there will be a significant improvement in financial performance in the year ended 30 April 2024 and beyond" (my emphasis) [para 3.4 of the Experts' Joint Statement]. The failure to mention the concerns, or disclose relevant documents, at that time, or any time since then, was an admitted breach of the disclosure obligation of all the Applicants. If disclosure had been made at the appropriate time, the experts could have been instructed and would have had time to supplement their reports, and the witnesses could have given relevant supplemental evidence.

13. Moreover the breach is baffling: no account has been given of why the management of TCGL failed to inform the Applicants' expert about its declining financial health, when its valuation is central to the relief sought by the Petitioner. Any need for an adjournment to allow time for further disclosure and evidence arises only because the Applicants arranged matters in that way (though whether with that objective in mind it is not possible to say).

14. I also bear in mind that at the PTR an earlier application to adjourn the trial made no reference to the need for further time for disclosure and further evidence. The purpose of a PTR is for parties to indicate the extent to which they are ready for trial, and to highlight and address any difficulties or additional requirements they may have between the PTR and the trial. No mention was made at that PTR of the alleged problems facing TCGL, nor of the fact that those problems might affect the experts' conclusions on value. A party cannot be allowed to derail a trial because of difficulties caused by its own defaults; the more so when no reasons are given. Nor has any explanation been given as to why the Application is made so late in the day.

15. I bear in mind that the court must balance the prejudice to the Petitioner if the adjournment is granted against the prejudice to the Applicants if it is not. I have concluded that the Applicants will not suffer prejudice in view of the fact that the new disclosure and supplemental evidence of fact and expert opinion may prove not to be relevant. Firstly, if the Petitioner loses on the question of liability, the question of

value will be redundant. I appreciate that there has been no order for a split trial, and the central question of valuation is to be heard together with the issue of liability. But it is relevant that if the issue of liability is decided against the Petitioner then no further evidence would be required. Second, it may be determined that the correct valuation date for the assessment of the losses suffered by the Petitioner predates the recent changes in the financial health of TCGL. If that is the case, no further directions will be necessary, since the evidence of later value will be irrelevant. Further I accept the submission of Mr Campbell that the court should or at least can decide the valuation date prior to hearing the valuation evidence: see the decision of Proudman J. in re Phoenix Contracts (Leicester) Ltd [2010] EWHC 2375 (Ch) at [150]. If either of these outcomes were to transpire, the adjournment will have been for no purpose (on these first two grounds).

16. If it were to transpire that subsequent valuation evidence is relevant, then it could be dealt with by listing a further hearing, of one or two days, which could be listed well before the first dates upon which an 8 day trial could be relisted, which I am told is in Spring 2025. So even if further evidence proves to be required, the parties will be better served, and the overriding principle better observed, by proceeding with this hearing as listed, and hiving off the additional valuation evidence to a later hearing. This is a far preferable outcome to an adjournment of the entire trial now, with a new listing some 18 months hence. That would be severely prejudicial to the Petitioner, and indeed to the Court and to its other users.

Ground (3)

17. This ground applies only to R1 and R2. The Applicants have all instructed Wordley solicitors, which firm I am told is acting on a purely formal basis. The arrangement is unconventional; it runs to settling, and signing, the Application Notices, but not apparently to providing any substantive legal advice.

18. A previous application to adjourn the trial, which was due to be heard at the PTR, was withdrawn, I am told, by R3 (the only party attending, but representing himself and R1 and R2 at that time) at the PTR. R3 told the Court that funding for the trial on the part of R1 and R2 had been secured. It is now claimed that that is no longer the case. R1 and R2, it is said in section 10 of the Application Notice, are in financial difficulties. They “have been unable to retain counsel for the trial”. An adjournment “would allow funding to be obtained and counsel instructed”. This assertion, made on instructions, is unsupported by any evidence. No further details are given as to the current means of R1 and R2, or why they have been unable to retain counsel for trial, or whether and if so why it is only now that this has become apparent. No details are given of how it has come about that Mr Loxton, instructed some three weeks ago, presumably with R1 and R2 then able to afford his services, had to return the brief three days ago. I have no evidence against which to test the assertion that R1 and R2 have no means, and no evidence to assess the extent to which they are innocent or implicated in relation to their change in financial circumstances (if change there has been – again, I have not been told).

19. Further, R3 is represented. Whilst the issues facing R1 and R2 on the one hand, and R3 on the other, are not wholly co-extensive, there is a considerable degree of overlap, and Mr Channer on behalf of R3 is able to address me on the applicable law. R1 and R2 had legal representation until three days or so before the trial. It can be assumed that they will have received legal advice during that time. Again, they have failed to address that question. It is wrong in principle for parties seeking relief to be able to gain relief as a result of as a result of the Court's inability to test their claims because of their own failure to adduce evidence to support their application. Even a fully evidenced application to adjourn would face an uphill struggle to succeed so close to the date listed for hearing. This Application, supported by virtually no relevant evidence, cannot do better because of the wholesale default of the Applicants to provide relevant evidence. Whilst it may be the case that prejudice will be caused to the First and Second Respondents by reason of not being represented at trial, I have no evidence as to how, nor when, that position is anticipated to change. So there is no way I can understand or assess to what extent if any, or when, the prejudice will be obviated by the adjournment sought.

20. For these reasons I refused the Application when it was made, indicating that written reasons would be produced subsequently. I will in any event make an order that the Applicant gives specific disclosure of all documents relevant to the issue of the financial health of TCGL. The question of the costs of the Application, if not agreed, will be reserved to the consequentials hearing following the handing down of judgment in the main trial.