

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT

No. 5325 of 2003

**[2003] EWHC 2863 (Ch)**

Royal Courts of Justice  
Monday, 3rd November 2003

Before:

SIR FRANCIS FERRIS

B E T W E E N :

(1) ARROW TRADING & INVESTMENTS Est. 1920 Petitioners  
(2) VELADAIL HOTELS LIMITED

- and -

(1) EDWARDIAN GROUP LIMITED & Ors. Respondents

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MR. D. LIGHTMAN (instructed by Messrs. Bird & Bird) appeared on behalf of the Petitioners.

MR. M. COLLINGS (instructed by Messrs. Howard Kennedy) appeared on behalf of the First Respondent.

THE 2nd - 11th RESPONDENTS were not present and were not represented.

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JUDGMENT

(As approved by the Judge)

1 SIR FRANCIS FERRIS:

2

3 1 The matter before me today is an application by the petitioners  
4 in a petition under s.459 of the Companies Act 1985 for an order  
5 restraining the company, whose affairs are the subject of the  
6 petition, from expending its money or other assets in the course  
7 of participation in the proceedings otherwise than for certain  
8 limited purposes.

9

10 2 The petition relates to a private company named Edwardian Group  
11 Limited. Although it is a private company it is an extremely large  
12 concern. The accounts for the year ended  
13 31st December 2002 show that during that year it had a turnover  
14 in excess of £70 million and produced an operating profit of in  
15 excess of £13 million and a net profit of some  
16 £4 million. In the preceding year its turnover was somewhat higher,  
17 but its profit was somewhat less. The company's capital is divided  
18 into two classes of shares, ordinary shares of 50 pence each and  
19 deferred shares of 50 pence each. There are something in excess  
20 of 9 million ordinary shares in issue and 1 million deferred shares.

21

22 3 The first petitioner, a company named Arrow Trading and Investments  
23 Est. 1920, holds 906,390 ordinary shares and 154,952 deferred  
24 shares. The second petitioner, Veladail Hotels Limited, holds  
25 57,940 ordinary shares and 57,940 deferred shares. In round terms,  
26 therefore, the petitioners hold about 10% of the ordinary shares  
27 of the company and between them they hold something in excess  
28 of 20% of the deferred shares. The remainder of the ordinary  
29 and deferred shares are held by the 2nd to 11th respondents, who  
30 are members of the Singh family or close associates of the Singh  
31 family, or in some cases, trustees for members of the Singh family  
32 or their close associates.

33

34 4 Prominent amongst the shareholders is the third respondent,  
35 Jasminder Singh. The leading light on the petitioners' side is  
36 Mr. Gulhati, who is the sole director of the second petitioner,  
37 and is a beneficiary under the discretionary trust on which the  
38 first petitioner holds its shares. Prior to July 2002 the directors  
39 of the company (who were quite numerous) included Mr. Gulhati,  
40 Mr. Jasminder Singh, some other members of the Singh family and  
41 two persons who are not shareholders; one of them, Mr. Morley and  
42 the other Mr. Hart. Mr. Morley became a director of the company  
43 in 1999 having previously held a position in HSBC. Mr. Hart became  
44 a director of the company in June 2001, having previously been  
45 a partner in the firm of Baker & McKenzie who acted as the solicitors  
46 for the company and/or for Mr. Jasminder Singh, and who act now  
47 in these proceedings for all the respondents other than the company  
48 itself, which is the first respondent.

49

50 5 I referred earlier to the prosperity of the company. There are  
51 indications in the evidence that it had a difficult period in,  
52 I think, the early 1990s, but for the most part in the succeeding  
53 period it appears to have experienced a high degree of prosperity.  
54 I indicated the level of turnover and profits for the years 2001  
55 and 2002. The company has, however, seldom paid any dividend.

1 It did so in 1988 and 1989 in connection with some capital  
2 re-arrangement and the dividend was, it seems, intended to enable  
3 the shareholders to acquire the shares of some outside parties.

4 A similar exercise was carried out in 1998 and 1999 in each of  
5 which years there were also dividends paid. Otherwise, there have  
6 been no dividends.

7 6 The company has, however, paid very substantial remuneration to  
8 its directors. I have seen in the evidence figures for the  
9 remuneration of Mr. Jasinder Singh which show that in both 2001  
10 and 2002 his remuneration was in excess of £900,000 for each year  
11 and in some earlier years his remuneration comfortably topped  
12 £1,000,000 in the year. I think there is a good arguable case,  
13 as Mr. Lightman submitted on behalf of the petitioners, this is  
14 a company which has made distributions by way of remuneration  
15 rather than by way of dividends and that the actual figures for  
16 remuneration may be substantially in excess of what might be termed  
17 ordinary and reasonable remuneration for the services rendered,  
18 and contain a large element to reflect entitlement to shares.  
19

20 7 Mr. Gulhati was of course well aware of this conduct because he  
21 himself was a director of the company and indeed he freely admits  
22 that he himself received very substantial remuneration, although  
23 I do not think I have any figures as to the amount of such  
24 remuneration. In July 2002 the company, either by its directors  
25 or by recommendation of its directors endorsed in general meeting,  
26 substantially reduced Mr. Gulhati's remuneration and also, I  
27 think, the remuneration of one or more of the Singh directors.

28 In August 2002 Mr. Gulhati was removed from his directorship of  
29 the company and since then he has received no remuneration. The  
30 remuneration of

31 Mr. Jasinder Singh and of the other Singh directors has, it seems,  
32 continued at much the same high rate as previously.

33 It appears to me that the petition, which complains of unfairly  
34 prejudicial conduct, has at least an arguable prospect of success.

35 At all events no attempt to strike it out has been made on behalf  
36 of the respondents.  
37

38 8 The basis of the petition is that payment of remuneration at the  
39 high rates which have been applied if not always unfair became  
40 unfairly prejudicial to the two petitioner companies not later  
41 than the time when Mr. Gulhati was subjected first of all to a  
42 substantial reduction in remuneration and then removed altogether.  
43 For the purpose of this application I must assume that that  
44 represents a viable complaint, although of course on this  
45 application I say nothing about the substantive merits.  
46

47 9 The issue which is before me arises from the fact that the two  
48 non-shareholder directors, Mr. Hart and Mr. Morley, wish the  
49 company to take an active part in the petition at any rate for  
50 the purpose of justifying its remuneration policy. It seems that  
51 in recent years at least the remuneration of the directors has  
52 been based on a recommendation from a remuneration Committee  
53 consisting of, or at any rate including, Mr. Hart and Mr. Morley,  
54 although the actual decision as to remuneration has been taken  
55 by the Board and subsequently by the company in general meeting.

1           The decisions of the Board and of the company have, I am told,  
2           been majority decisions. Mr. Gulhati has opposed these resolutions  
3           while he was a director, and I infer that the petitioner companies  
4           have done so as well in their capacity as shareholders.  
5

6           10   The petitioners object to the company expending its funds on  
7           participation in the proceedings in the way envisaged by  
8           Mr. Hart and Mr. Morley. The company itself appears before me  
9           by solicitors who instruct Mr. Matthew Collings. It seems that  
10          the instructions originate from Mr. Hart and Mr. Morley. It is  
11          not clear what, if any, participation the other directors have  
12          had in causing the company to instruct solicitors and counsel in  
13          this way. I shall assume that the position is a regular one, but  
14          there may be questions to be asked in this connection.  
15

16          11   The general position about participation of a company in a petition  
17          under s.459 has been considered in a number of cases in the last  
18          15 years or so. Under the Rules the company has to be named as  
19          a respondent to the petition, but the usual course is that that  
20          company is an inactive party. In  
21          Re. Crossmore Electrical and Civil Engineering Ltd [1989] BCLC  
22          137. Mr. Justice Hoffman said, at p.138:

23  
24                    "It is a general principle of company law that the  
25                    company's money should not be expended on disputes between  
26                    the shareholders. See Pickering v. Stephenson (1872)  
27                    LR 14 Eq 322."  
28

29          In subsequent decisions the matter has been explored more fully,  
30          notably in a decision of Lindsay J. in Re: A company No.1126 of  
31          1992 [1994] 2 BCLC at p.146. After reviewing all the authorities,  
32          including the Pickering case, Lindsay J. said, at pp.155-156:

33  
34                    "Those, then, are the authorities to which I was referred.  
35                    As a body they suggest to me the following.  
36                    "Firstly that there may be cases (although it is unlikely  
37                    nowadays when wide objects clauses are the norm) where  
38                    a company's active participation in or payment of its own  
39                    costs in respect of active participation in a s.459  
40                    petition as to its own affairs is ultra vires in the strict  
41                    sense.  
42

43                    "Secondly, leaving aside that possible class, there is  
44                    no rule that necessarily and in all cases such active  
45                    participation and such expenditure is improper.  
46                    "Thirdly, that the test of whether such participation and  
47                    expenditure is proper is whether it is necessary or  
48                    expedient in the interests of the company as a whole (to  
49                    borrow from Harman J. in ex parte Johnson).  
50

51                    "Fourthly, that in considering that test the court's  
52                    starting point is a sort of rebuttable distaste for such  
53                    participation and expenditure, initial scepticism as to  
54                    its necessity or expediency. The chorus of disapproval  
55                    in the cases puts a heavy onus on a company which has

1 actively participated or has so incurred costs to satisfy  
2 the court with evidence of the necessity or expedience  
3 in the particular case. What will be necessary to  
4 discharge that onus will obviously vary greatly from case  
5 to case.  
6

7 "Fifthly, if a company seeks approval by the court of such  
8 participation or expenditure in advance then, in the  
9 absence of the most compelling circumstances proven by  
10 cogent evidence, such advance approval is very unlikely."  
11

12 12 The case before Lindsay J. was indeed a case where the company  
13 sought approval of expenditure in advance. As Mr. Collings points  
14 out the present is not such a case. Indeed it is the converse  
15 of such a case, for the petitioners seek to preclude the company  
16 from incurring such expenditure before the company has embarked  
17 upon it. It does not seem to me that the principle which is  
18 applicable should be different in the one type of case from the  
19 other, although no doubt in a case of the present kind there is  
20 an initial onus on the petitioners to show first that the company  
21 is indeed seeking to take part and, secondly, that the purposes  
22 for which or the manner in which the company wishes to take part  
23 are not of such an exceptional nature as to justify a departure  
24 from the general rule.  
25

26 13 In the present case there can be no doubt at all that the company  
27 does indeed intend to take part. It has made no bones about it  
28 and indeed it asked for directions from the registrar which would  
29 enable it to take part, although such directions were refused.  
30 The company has made no bones about its desire to take part and  
31 one can see from the witness statements of Mr. Hart and Mr. Morley  
32 what sort of participation is envisaged. It will suffice, I think,  
33 if I quote from paras.6 and 8 of Mr. Morley's witness statement,  
34 which Mr. Hart endorses. In para.6 Mr. Morley says:  
35

36 "6. I feel that the complaint which the Petitioners made  
37 about remuneration is very much directed to the Company.  
38 It is the Company, acting by its Remuneration Committee  
39 and its independent directors, which sets the level of  
40 remuneration and which pays the remuneration."  
41

42 I should interpose to say that by "independent directors"  
43 Mr. Morley means himself and Mr. Hart.  
44

45 "I fail to see why the Company should be unable to defend  
46 its position on remuneration and be unable to put forward  
47 and explain the position in the context of something as  
48 important as court proceedings, to which it is a party  
49 and which affects it greatly. It would be different if  
50 the Company was in effect a partnership where the parties  
51 had fallen out.

52 It would have no separate position, but the Company has  
53 a separate position and is a substantial business of  
54 importance to many stakeholders besides its shareholders.  
55 Its continuity and stability is important to those

1 stakeholders. As a director of the Company I have an  
2 obligation to ensure that the Company's position is  
3 protected, and this will include dealing with unwarranted  
4 allegations about the actions it has taken."  
5

6 14 Then in para.8 he says,  
7

8 "Although the Company is a private company appropriate  
9 steps have been taken to improve corporate government.  
10 The Company has a position quite independent from its  
11 shareholders. The Company does not wish to take sides  
12 in the dispute which has arisen, and it would not be  
13 appropriate for it to do so. But it should be allowed to  
14 put forward its position, and explain (and defend) the  
15 actions which it has taken regarding remuneration, which  
16 is the principle issue in the proceedings."  
17

18 15 Then, although not in Mr. Morley witness statement, a suggestion  
19 is made that Mr. Morley and Mr. Hart may be able to promote some  
20 sort of mediation or compromise if the company is allowed to take  
21 part, whereas they would not be in such a position if the company  
22 was refused permission to take an active part.  
23

24 16 Although Mr. Morley, supported by Mr. Hart, is at pains to emphasize  
25 the independence of himself and Mr. Hart, and a desire of the  
26 company to put forward what he describes as a separate and  
27 independent position, it is quite clear that what Mr. Morley wants  
28 the company to do in putting forward that position is to defend  
29 its remuneration policy and thus in substance, if not intention,  
30 to support the position of the other respondents.  
31

32 17 The essential question in this case, as it seems to me, is whether  
33 it is right to say that the company has a separate and independent  
34 position on the issue of remuneration. No-one can deny of course  
35 that the company is a separate and distinct entity from its  
36 shareholders, but that is not, in my view, the same thing as saying  
37 that it has a separate and distinct position to present on an issue  
38 of the kind which this petition raises. The essence of the  
39 petitioners' claims is that the petitioners as shareholders have  
40 been unfairly treated as a result of the decisions of the majority.  
41 Those decisions are essentially the decisions of individuals,  
42 whether in their capacity as directors or as shareholders. They  
43 are embodied in resolutions and the like which are technically  
44 describable as "acts of the company", but the reality of the  
45 position is that what is complained of is treatment resulting from  
46 a decision or series of decisions made which have caused the company  
47 to endorse what is said to be the unfair remuneration policy.  
48

49 18 The particular aspect of the matter on which Mr. Hart and  
50 Mr. Morley seek to put their - or as they would put it the company's  
51 - position before the court is to explain the steps by which at  
52 any rate in recent years the company has arrived at the decisions  
53 which have been implemented as its remuneration policy. There  
54 can be no doubt that each of  
55 Mr. Hart and Mr. Morley has knowledge, by virtue of participation,

1 of facts and events which are of great materiality to the issues  
2 which the court will have to decide. They are undoubtedly relevant  
3 witnesses. What I am unable to understand is why the fact that  
4 Mr. Hart and Mr. Morley have this evidence and do not desire to  
5 align themselves with either of the warring parties means that  
6 the consequence is that the company has a separate and independent  
7 position. Mr. Hart and Mr. Morley can readily put their evidence  
8 before the court by being called by one or other of the parties.

9 Having regard to the apparent tenor of their evidence that party  
10 is likely to be the respondents, but there is no reason why the  
11 petitioners should not call them if they think fit.  
12

13 19 For Mr. Hart and Mr. Morley to give evidence will not, as it seems  
14 to me, of itself align them with the case of the party who calls  
15 them. Moreover I see nothing of any great force in Mr. Hart's  
16 and Mr. Morley's suggestion that they do not wish any proof of  
17 evidence to be taken by the solicitors for either of the warring  
18 parties. I can understand their reluctance to have a proof or  
19 a witness statement taken in that way, but that does not, in my  
20 view, lead to the consequence that the company has a separate and  
21 independent position which it must be allowed to put forward at  
22 its own expense in order to salve the consciences of these two  
23 individuals. There are other ways, as it seems to me, in which  
24 the problem could be cured.  
25

26 20 In the course of argument the possibility has been canvassed that  
27 what should be done is for Mr. Hart and Mr. Morley to produce proofs  
28 of evidence prepared with the assistance of their own solicitors  
29 which would be made available to both of the parties. If the company  
30 is involved this would be, in my view, for no good reason and it  
31 would probably result in the company incurring great expense.  
32

33 21 Mr. Collings has said that the company does not intend to take  
34 any great part in the proceedings and the expense would be  
35 minimised. I am afraid that is the sort of suggestion which is  
36 only too commonly advanced at the early stages of litigation. At  
37 the later stages one finds that the participation has been  
38 significant and the costs have been enormous. I think there is  
39 a grave risk that the same would be the case here.  
40

41 22 It does not seem to me, therefore, that the company has a separate  
42 and independent position and it certainly does not seem to me  
43 expedient that the company should be allowed to take an active  
44 part in the proceedings simply for the purpose of putting before  
45 the court the evidence of Mr. Hart and  
46 Mr. Morley in the manner which they personally prefer.  
47

48 23 The other main respect in which it is said that the company needs  
49 to participate is that Mr. Hart and Mr. Morley may be in a position  
50 to promote some form of mediation or compromise which would be  
51 greatly to the advantage of the company. I can well see that it  
52 would be to the benefit of the company and indeed to the benefit  
53 of all the parties if a compromise could be arrived at. It may  
54 be that Mr. Hart and Mr. Morley are the appropriate instruments  
55 of promoting such mediation or compromise, although the omens are

1 not altogether auspicious in view of what is said on behalf of  
2 Mr. Gulhati about the claimed independence of Mr. Hart and Mr.  
3 Morley. Even assuming that Mr. Hart and Mr. Morley are in a position  
4 to promote some form of agreed solution, essentially they would  
5 be doing so as individuals, not as directors of the company. As  
6 individuals they may have valuable services to render in this  
7 respect, but that cannot, in my view, be a reason for allowing  
8 the company to participate actively in the proceedings contrary  
9 to the general rule.

10  
11 24 Mr. Collings complained bitterly that this was a case in which  
12 once and for all relief was being sought restraining the company  
13 from taking any part in the proceedings, except for certain  
14 specified purposes. That is not strictly correct because the  
15 proposed order contains a number of exceptions. For example it  
16 is envisaged that the company may properly participate at the stage  
17 of judgment on the petition when it may have an interest in arguing  
18 on the form of order. It is also proposed that the company should  
19 be at liberty to take any steps which the petitioners and the other  
20 respondents agree upon. Finally it is implicit in the order, though  
21 I think not explicit, that the company will have power to make  
22 an application for permission to incur costs in order to undertake  
23 a participation in respects not so far thought of.

24  
25 25 The reason why the relief sought today appears to have a once and  
26 for all character in certain respects is that it is squarely directed  
27 to the particular steps which Mr. Hart and Mr. Morley have indicated  
28 that they wish the company to undertake. I have examined those  
29 steps and for the reasons which I have stated it does not seem to  
30 me that the company ought to be allowed to spend funds on  
31 participating in the litigation for those purposes. I have not  
32 gone wider because it has not been suggested to me what other specific  
33 positive steps the company could or would wish to take. If and  
34 when such steps are contemplated then it may be possible to obtain  
35 authority for the company to take part, either by agreement between  
36 the parties or by coming back to the court. If the company has  
37 to come back to court after one or other of the parties has refused  
38 consent, that may have costs consequences.

39  
40 26 At the moment it seems to me that there can be no objection to  
41 the form of order sought. I shall therefore grant the order which  
42 is asked for in the notice of application.  
43