

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.

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