Case No: CR-2016-002904

Neutral Citation Number: [2019] EWHC 738 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS

7 Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 14 February 2019

BEFORE:

MR DAVID HOLLAND QC (sitting as Deputy Judge of the Chancery Division)

BETWEEN:

PAUL ANDREW DINGLIS

Petitioner

- and -

(1) ANDREAS DINGLIS
(2) MASTER HOLDINGS GROUP LIMITED
(3) DINGLIS PROPERTIES LIMITED

Respondents

MR D PETERS (instructed by Ingram Winter Green LLP) appeared on behalf of the Petitioner
MR D LIGHTMAN QC & MR M HUBBARD (instructed by BDB Pitmans LLP) appeared on behalf of the Respondents

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JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. JUDGE HOLLAND: This is the PTR in an unfair prejudice petition. The background to it is rather neatly set out in the third witness statement of Ms Lester, who is the solicitor for the first and second respondents, and reads roughly as follows. The petitioner ("Paul") is a 12 per cent shareholder in the third respondent, Dinglis Properties Limited ("DPL"). The second respondent, Master Holdings Group Limited ("MHGL"), is a 76 per cent shareholder in DPL and is wholly controlled by the first respondent, who is Andrea Dinglis (Andreas), who is Paul's father.

2. Paul alleges that he was wrongfully excluded from the management of DPL on 25 June 2012 when he was removed as director. The respondents' case is that he had no equitable or other right to remain as a director of, or be involved in, the management of DPL and that in any case Paul's conduct before 25 June amply justified his removal and exclusion.

3. Paul in his petition asserts that he did not receive remuneration commensurate with the value of his services to what Paul characterises as a family business, which is the key allegation made by him in his petition. He says DPL was a family business and thus a quasi partnership. He presented his unfair prejudice petition in May 2016, 3 years and 11 months after his removal as a director, a delay upon which the respondents now seek to rely by way of re-amended pleading.

4. Paul seeks in his petition an order that Andreas and/or MHGL purchase his shares without a minority discount. In short, Paul says the affairs of DPL (which he alleges, as I have said, to be a quasi partnership) have been conducted in a way that is unfairly prejudicial to his interests as a shareholder. Alternatively, he seeks an order that DPL be wound up on a just and equitable basis under section 122 of the Insolvency Act 1986.

5. Originally, to continue by way of background, Paul's sister, Cheryl, the second respondent's daughter, was a second petitioner. On 21 December 2017, the petition so far as was pursued by her was dismissed by consent and a settlement agreement has been entered into between her and her father. In an amended petition, Paul made further allegations in relation to unfair prejudice which resulted from or were derived from activities carried out by Andreas in respect of DPL after Paul's sacking as director.

6. These proceedings have not been the only proceedings between the parties. In June 2015, DPL and Gatemark (a company with which Andreas is associated) issued a claim in the Chancery Division against Paul, Cheryl and other companies owned effectively by Paul and Cheryl. That resulted in an eight-day trial in March 2017 and a judgment in favour of Andreas and his companies. However, the appeal was allowed from that judgment by the Court of Appeal on 8 February of this year.

7. In addition, having been issued in May 2016, these proceedings did not progress until after the trial of the Chancery proceedings and it was not until 18 January 2018 that the first CMC was held. This resulted in an order from Registrar Barber of that date, which directed that certain specific issues known as "the first issues" were to be tried before the others. These are:

(1) whether Paul had been unfairly prejudiced in his capacity as a minority shareholder by the actions of either or both of Andreas and MHGL; and

(2) whether an order should be made requiring Andreas and/or MHGL to purchase Paul's shares and, if so, whether any such order should involve a discount for those shares representing a minority holding but not the extent of discount.

The trial of those first issues is listed for ten days plus a day's reading time in a window commencing on 25 March this year, thus it is just over a month away. This is the PTR which was directed to be heard pursuant to that order of Registrar Barber.

8. Various other matters occurred and an amended petition was filed on 19 January 2018. That raised new allegations and, following that, an amended points of defence was filed in February 2018 and an amended reply in March 2018. On 7 December 2018, Paul filed a re-amended petition which made further allegations. However, those re-amendments are not opposed by the respondents.

9. The context of the issues I have to decide is that, on 20 December 2018, the respondents served a re-amended defence which made substantial amendments. I will come to those in a moment. There was a specific disclosure application heard on 14 January 2019 by HH Judge Prentis, the outcome of which is not relevant to anything I have to decide today.

10. The issues that I have to decide are handily set out in the list of issues. They are as follows:

(1) The respondents' application for permission to re-amend their points of defence, which, apart from certain permitted or consented amendments, is opposed.

(2) The respondents' application for disclosure of the petitioner's bank statements; that is alive only as to costs.

(3) I must give consequential directions.

(4) There is the trial timetable.

This ruling deals with the first of those points: that is the application for permission to re-amend. As I said, the current pleadings are an amended petition dated 19 January 2018 (albeit that is now agreed to be superseded by the re-amended petition), an amended points of defence of 27 February 2018 and an amended reply.

11. The substance of the proposed amendments are set out again rather handily in paragraph 13 of the witness statement of Ms Lester. She describes them as follows:

> "About 11 pages of amendments which the petitioner has consented to, including a schedule (schedule 2); four pages of deletions; about two pages of a summary of the respondents' case, which is repeated in relation to relief; about six pages that are or are based on allegations of facts drawn from Companies House records and other similar sources in defence of Paul's quasi partnership claim; about 14 pages that are further particulars of allegations already contained in the Amended Defence in defence of Paul's quasi partnership claim, particularly as set out in paragraphs 8 to 31, and then to rely upon the same [and she lists the paragraphs]; about one page of formal objections to Paul's attempt to rely on unparticularised allegations of misconduct; about one and a half pages of developing the respondents' factual case in relation to the breakdown of relations between Paul and Andreas, largely by reference to factual material from the Chancery proceedings; about one page of corrections clarifying as to the existing statement of case or updates in respect of events since February 2018; about three pages of dealing with the relief sought in the Prayer to the Petition."

12. Mr Lightman, in submissions to me today on behalf of the first and second respondents, accepts that there has been an increase in length; it is not exactly double but he says there are 58 pages excluding deletions. Mr Lightman, in his skeleton argument drafted along with Mr Hubbard (who also appears today), accepts in paragraph 44 that these are substantial amendments. In his skeleton, at paragraph 7, Mr Peters on behalf of the petitioner asserts that great swathes of narrative text has been added at multiple points and almost every paragraph has been subject to at least some form of amendment. He points out that the length of the pleading has nearly doubled, although that is a rather false comparison. However, by any stretch of the imagination, the amendments sought are substantial.

13. The reasons put forward as to why these amendments took place are once again set out and summarised nicely by Ms Lester in her third witness statement. She says at paragraph 57:

> "The amendments have been made as a result of a recent further review of the parties' statements of case and the supporting documents, including those disclosed by Paul and the response in his pleadings carried out following the instruction of counsel instructed in the Chancery proceedings and newly instructed leading counsel."

She refers at paragraph 48 to the fact that they are lengthy and she says:

> "This is because the respondents have been conscious of the importance of late amendments being promptly particularised."

She says it is common ground and I note that she concludes in paragraph 61 by saying:

> "It would prejudice the Respondents if they were refused permission to amend as they would (in addition to being unable to rebut the ill-founded allegations sought to be made in the re-amended petition in respect of which Paul seeks either a share purchase order at a value which is indicated to be £3.25 million or the winding up of DPL on a just and equitable ground) be prevented from putting forward a full and accurate statement of case, a matter of particular importance in circumstances where the trial judge, in the exercise of statutory jurisdiction under sections 994 and 996 of the Companies Act, is required to consider all the circumstances of the case."

14. I have a discretion accorded to me by CPR rule 17.1 and 17.3 as to whether or not to allow these amendments to go forward. The leading case on so-called late amendments seems to me to be that of *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC), a decision of Coulson J (as he then was). He summarises the law and says at paragraph 15 as follows:

> "In my view, the traditional approach outlined by Peter Gibson LJ in *Cobbold v Greenwich LBC* to the effect that 'amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs' is no longer the right starting point."

He particularly refers at paragraph 16 to the Court of Appeal decision in *Swain-Mason and Others v Mills and Reeve LLP* [2011] EWCA Civ 14 and he describes it as follows:

> "... also stressed that, when dealing with very late amendments, the court should be less ready than in former times to grant a late application to amend. Moreover, Lloyd LJ said that, when considering the competing arguments of prejudice, the prejudice to the amending party in not being able to advance its amended case was a relevant factor, but was only one of the factors to be taken into account in reaching a conclusion. It was also stressed that a late amendment cannot be insufficient or deficient. And, at paragraph 72 of his judgment, Lloyd LJ said:
>
> '... a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases.'"

15. Having referred to a number of other cases, at paragraph 19, Coulson J summarises the principles as follows:

> "... the right approach to amendments is as follows:
>
> (a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made month months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay.
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focussed.
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial, and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.
>
> (f) [and this is the paragraph particularly relied upon by Mr Peters] Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."

16. Mr Lightman also drew my attention to the case of *Vilca & Ors v Xstrata Ltd & Anor* [2017] EWHC 2096 (QB), in which case, at paragraph 29, Stuart-Smith J emphasised that a lack of reasonable or proper explanation for any delay in seeking to amend pleadings was not a jurisdictional bar to obtaining an order getting permission to amend but was nevertheless a very important point.

17. Mr Lightman also drew my attention to the importance of having accurate, up-to-date and comprehensive pleadings, particularly in section 994 petitions. He referred me to *McPhilemy v Times Newspapers Ltd* and *Tchenguiz v Grant Thornton* but he drew my attention particularly to the principle which, in my judgment, is eloquently summarised by Malcolm Davis-White QC (as he then was) in the case of *Re: BC&G Care Homes* [2015] EWHC 1519 (Ch). In paragraphs 8 to 11 of that case, the learned judge said this:

> "8. The need for pleadings or statements of case to define the issues between the parties on a Petition under Part 30 of the Companies Act 2006 is well known. Referring to *Re Tecnion Investments Ltd* [1985] BCLC 434 at 441, David Richards J encapsulated the point as follows:
>
> 12. The importance of statements of case as the means by which the real issues in the case are defined is clear in all cases, but it is of particular importance in proceedings under s994 of the Companies Act 2006 where the jurisdiction is so widely expressed....."

18. That seems to be the principle. Whatever might have been said by Lord Woolf in the *McPhilemy v Times* case (which is, as Mr Lightman pointed out, a defamation case), it is clear that authorities such as *Re: BC&G Care Homes*, *Re: Coroin*, *Re: Peterson* and *Bankside* all emphasise the importance of accurate pleadings in section 994 cases and in particular that it is not good enough simply to say that any deficiency in pleadings can be made up by the witness statements.

19. The respondents accept that the amendments they seek to make are late amendments. Neither party, as Mr Lightman points out, asserts that the trial date would be lost if I allowed some or all of them. The respondents acknowledge that they shoulder the burden, perhaps a heavy burden, of showing that they should be permitted to make the late amendments. The respondents also accept (rightly, in my view) that responding to the amendments, if I allowed them in whole, would be a "burdensome additional task" involving substantial work. That is from Ms Lester's witness statement. That is also conceded by Mr Lightman in paragraphs 34 and 47(c) of his skeleton. It is said by Ms Lester that the preparation of the proposed amended document took 14 days (that is 10 working days) and I would not doubt that, if I allow the amendments in full, there would be considerable work and expense caused to the petitioner in responding to them, as indeed he ought to do so.

20. Mr Lightman points out particularly the authorities which say that delay is a relevant consideration in unfair prejudice petitions. He points to *Re: A Company (005134 of 1986)*, *Re: Estera Trust* and *Re: Woven Rugs*. He says that the issue of delay in this case (that is the delay between the petitioner being sacked as a director on the one hand and the issue of his petition alleging unfair prejudice on the other, a period of more than three years) goes to a number of issues; firstly, it goes to the petitioner's credibility. He asserts in his petition that this was a family company based on certain understandings but it is said that he did not raise this for over three years or for a substantial period of time and therefore this undermines the credibility of that assertion.

That, he says (and I agree), is a matter which is within the current pleadings and will be ventilated at trial.

21. However, the gist of certain of his amendments is to go on to say, as those cases make clear, that delay is also relevant on a number of other matters: it is relevant to whether the jurisdiction should be exercised at all; it is relevant to the date of valuation of any shares should there be an order for them to be bought out; and it is also relevant to whether or not any minority discount is accorded.

22. My starting point is the *Galliford Try* case. I accept that neither party is saying that there will have to be an adjournment of the trial date, and that is an important factor. Mr Peters on behalf of the petitioner directs my attention to paragraph 19(f) and his point is that, if there is no good ground for delay in making an application to amend, then effectively the prejudice that his client might suffer has only to be minimal in order for me to refuse the application to amend. He says there is no adequate explanation for this delay and he says the prejudice will be that he will have to at the very least plead to any amendments. Indeed, in relation to the specific amendment to do with delay, his client may well have to file a witness statement, he says, the length of which he cannot now tell. He may have to cause there to be investigation into relevant documents in respect of which there has not yet been investigation, the time and expense of which investigation he cannot now tell.

23. My starting point is that I will not allow any amendment which is not necessary in the sense that the respondent will be shut out from arguing a particular point if I do not allow the amendment. Looking at the document, my view is that most of these amendments are not necessary in that sense. I asked Mr Lightman when he addressed me whether there was a point which was introduced which he would be shut out from arguing if I did not agree to the amendment. The only one he identified was the point on delay.

24. I do not accept that the respondents have put forward any valid reason for the late amendments. What appears to have happened is that, following the re-amended petition, the respondents and their legal advisors and Mr Lightman (who has been recently instructed) reviewed the pleadings and decided that they wanted to retune them or reset them and indeed specifically to plead the delay point. None of these points, or very few of them, are said to result from new material or new allegations.

25. I also am of the view that Mr Lightman's point about the importance of pleadings in section 994 cases can be turned against him because, if it is, as he says and as I accept, important to plead properly, adequately and fully all the allegations and a response to them, it might well be asked why on earth these amendments, none of which result from late disclosure or anything like that, are being made at such a late stage. In particular, the delay point seems to me to be one that was obvious right from the start and yet it is only one month or just over month before trial that they attempt to be made.

26. I do not accept that the respondents can properly pray in aid any "inappropriately lax" pleading by the petitioner and nor do I accept that the fact that the petitioner has had

the draft re-amended particulars since late December of last year is of any relevance. I agree with the point made by Ms Joanna Smith (sitting as a deputy judge in the TCC) in the case of *ADVA v Optron* [2018] EWHC 852 to the effect that there is no need or no obligation on the petitioner to do anything in relation to the draft amended pleadings unless and until permission has been allowed for the amendment to be made. I agree that, in the words of Coulson J citing the *Swain* case, if I allow any of these amendments, the petitioner will be mucked about and it will disrupt to a greater or lesser extent the trial preparation. I do not accept that what Mr Peters describes as the "meandering evidential narrative" in the proposed amendments will assist at trial.

27. However, that being said, it does seem to me that there is one point where I am prepared to allow the re-amendment, and that is the delay point. It seems to me that that is necessary in the sense that, as Mr Lightman conceded and Mr Peters accepted, if I refuse to allow that amendment, it will prevent the respondents from relying on certain legal points. I accept Mr Lightman's point that, if I allow that in, it will not result in a great delay or expansion of evidence at trial in the sense that I accept his point that the petitioner will be cross-examined about the delay in any event as a matter of credibility and therefore, so far as credibility and as far as that is concerned, it will not result in a great extension of the cross-examination in this case.

28. I entirely accept Mr Peters's point that this will cause his client some prejudice in that he will no doubt find it necessary to file a further witness statement and to respond to the points by way of pleading. It may be unfair to describe Mr Peters as studiously avoiding having taken instructions on the basis that he could tell me that he was not aware of how long this new statement might be, and I accept that of course. He is not aware how much extra effort it will be. But, although it will cause some prejudice, on the facts of this case, it is outweighed by the prejudice which will be caused, albeit of their own making, to the respondents if I do not allow the amendment on the delay point.

29. Mr Lightman has in his skeleton set out the paragraphs which he says refer to delay: 3(e), 3(g), 80(a), 87(a), 93, 94.4, 131, 134 and 1.2.3. Therefore, in the exercise of my discretion and for the reasons why I have outlined, I am prepared to allow the amendments:

    (a) which have been consented to; and

    (b) which deal with the delay point as set out.

I am not prepared to allow any of the other amendments. So far as those that are merely updating agreed facts, I do not see that it is necessary formally to plead those. As Mr Lightman eventually suggested, he can prepare a schedule of such points by way of either a separate schedule or in his opening statement and Mr Peters can either accept (which I have no doubt he will) or deny for a particular reason those points. I do not think it is necessary formally to plead and it will cause unnecessary delay and expense to do so. That is the order I propose to make on the application.

(After further submissions)

30. This is the second contentious matter for my determination in this PTR. It is to do with costs of a specific disclosure application. In the order of 18 January 2018, Registrar Barber made the following orders:

> "12. Disclosure in the Chancery action shall stand as disclosure in these proceedings.
>
> 13. By 30 April 2018, each party may send the other a request for disclosure in respect of documents or categories of documents considered relevant to those issues which were not disclosed in the Chancery action.
>
> 14. If any party objects to such a request for disclosure, they will inform the other in writing by 21 May 2018 and provide reasons.
>
> 15. The parties will exchange a list of documents."

So, there was express provision for an application for specific disclosure.

31. I take the story up relying on the recitation of facts in the first and second respondents' skeleton argument. On 30 April, the respondents requested disclosure of complete bank statements for the period 2002 to 2012 for all bank accounts held by Paul in the period, including any joint accounts of which he was a signatory. The petitioner's solicitors responded on 21 May stating that Paul did not object to disclosing bank statements.

32. On 11 July 2018, Paul singed an N265 disclosure statement. The search for documents was limited to those set out in the "claimant's" request for disclosure served on 30 April 2018 ("claimant" being an obvious error). He said he had in his possession bank statements going back to 2004 and these will be produced with any relevant items redacted or excluded.

33. 17 August 2018, there was an express request by the respondents' solicitors for an inspection of those documents referred to in the respondents' statement, including bank statements. A copy of the bank statements in respect of five bank accounts were provided on 24 August 2018. Those statements were heavily redacted. On 18 September 2018, the respondents' solicitors wrote to the petitioner's solicitors and requested that the issue of what appeared to be inconsistent or incorrect approach to redacted documents be dealt with. There was a response on 3 October 2018, which stated that Paul's policy in respect of the redactions was to include only certain items. From that, it became clear that the redaction process, if one read between the lines, had been conducted by the petitioner personally and not by his solicitor.

34. There was then a delay of some months, about which Mr Peters complains, whereupon the application was made dated 20 December, which application was supported by evidence. In the application, the respondents sought specific disclosure pursuant to CPR 31.12, of copies of bank statements showing all personal and inter-company transfers. On 4 February, in response to that, the petitioner's solicitors filed evidence which included further entries from the banks statements. It was thus clear that, having

properly applied the process, there were certain of the original redactions which ought not to have been made. The relevant entries are not that many but they are not so minimal as to be insignificant.

35. Following receipt of those new documents, the respondents have effectively accepted that the application does not need to proceed to decision but they seek their costs of having to make the application. Mr Hubbard says two things. First of all, he says that there has been a significant failure by the petitioner's solicitors properly to supervise the redaction. He points me to the case of *CMCS Common Market Commercial Services AVV v Taylor* [2011] EWHC 324 (Ch), which is a decision by Briggs J in the Chancery Division in which Briggs J makes it clear that it is the duty of the solicitor supervising disclosure to also supervise any redactions.

36. It is clear (and it is not disputed) that the actual redactions were not so supervised and, once the application was made, the solicitor then looked at the redactions and realised that there were redactions which should not have been made. That was remedied. So, Mr Hubbard says, an application has been made and was successful and, as a result, the respondent should have the costs of the application.

37. Essentially, in response, Mr Peters makes two points. First of all, he says that the application actually made was too wide in scope, and there is some force in that. Secondly, and more importantly, he says that, following the letter of 30 October, there was a significant delay of a couple of months, following which the application was issued. What the respondents' solicitors should have done, he says, is immediately engage; when it became clear from the letter sent by his solicitors that the redaction process had not been supervised by the solicitor, further correspondence should have ensued and then the matter would have been remedied without the need for a further formal application.

38. I can see force in all of those points made by both parties. There was, Mr Hubbard says, a serious breach in the failure to supervise. I am not sure that is right but there was a failure and, as a result of the application being made, further entries have been disclosed. On the other hand, it seems to me that Mr Peters is right to say that, had correspondence ensued, the application would not have been necessary and thus the application was effectively premature, late (if that can be the case) and unnecessary. I do see some force in those points but it seems to me that Mr Hubbard is right to say that there was an issue of failure to supervise. Doing the best I can in the exercise of my discretion on costs, I am going to order that the petitioner pay half the respondents' costs of the application for the specific disclosure.

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This transcript has been approved by the Judge