Claim No: GLC 17510

Neutral Citation Number: [2010] EWHC 3850 (Ch)
IN THE HIGH COURTS OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 20th October 2010

BEFORE:

THE CHANCELLOR

Re: Dunstan's Publishing Ltd

Re: Companies Act 2006

BETWEEN:

CATHERINE JANE FAIRCLOUGH	Applicant
- and -	
DUNSTANS PUBLISHING LIMITED AND ANR	Respondents

Mr Daniel LIGHTMAN instructed by Bircham Dyson Bell LLP appeared on behalf of the Applicant
Mr Andrew GEORGE and Mr David Lowe instructed by S.J.Berwin appeared on behalf of the Respondents

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Approved Judgment

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THE CHANCELLOR:

1. This is a part 8 claim seeking an order under s.125(1) of the Companies Act 2006 for the rectification of the register of members of Dunstans Publishing Limited by substituting the name of Alistair Langford Townley (deceased) for that of the second respondent, Mr Peter Mason, as the holder of 750 ordinary shares of £1 each. The issue is whether for the purposes of s.125(1) of the Companies Act 2006 there was: any sufficient cause to omit the former or to enter the latter.

2. Mr Townley died on 30th October 2008 and probate in his last will, dated 29th November 1994, was granted to his long-standing partner, Catherine Jane Fairclough on 2nd April 2009. She is accordingly the applicant. Mr Townley carried on business as a publisher and publicist in the field of environmental issues, natural health and corporate social responsibility. In 1998 or 1999 Mr Mason, a journalist, accepted Mr Townley's offer to be a writer for and editor of a news sheet entitled "Ethical Performance." On 9th March 1999 Dunstans Publishing Limited, to which I shall refer as the Company, was incorporated to carry on Mr Townley's business with an authorised capital of one million shares of £1 each of which 1,000 were issued and are fully paid as to 750 to Mr Townley and 250 to Mr Mason.

3. Article 12 of the Articles of Association of the Company deals with the transfer of shares. I shall quote it in full in due course, but the following summary may help to explain the situation that has arisen. In the event of the death of a member the directors may within 12 months following his death request his personal representatives to serve a transfer notice. Such transfer notice must be given to the Company and state what such person considers to be a fair value of the shares. The Company is thereby constituted agent for the sale of those shares at that price or, at the option of either to buyer or seller, at fair value fixed by the auditors. Within 28 days after service of the transfer notice the Company is required to notify the transferor of the name of the member willing to buy the shares. Any difference as to the fair value is to be determined by the auditor on the application of either buyer or seller. If the personal representatives fail to serve a transfer notice within 14 days of being requested to do so they are then deemed to have served a transfer notice under paragraph (b) specifying the fair value of the shares to be the amount paid up on them.

4. As I have indicated, Mr Townley died on 30th October 2008 and probate was granted to Mrs Fairclough on 2nd April 2009. On 18th April 2009 Mr Mason, as the sole director of the Company, wrote to Mrs Fairclough seeking to exercise the rights of pre-emption conferred on him by Article 12(h), with which he enclosed a form of transfer notice under Article 12(b). On 30th April Mrs Fairclough sent to the Company the transfer notice in the form sent to her by Mr Mason specifying a price of £850,000, but headed "without prejudice." A covering letter on the same date stated:

> "I enclose herewith the Transfer Notice as set out in the Articles of Association.

> As I have said before, this notice is served entirely without prejudice to the fact that there is a concluded agreement between you and Alistair (that is to say Mr Townley), that upon the death of either you the shareholding each of you held would be transferred according to each of your wishes which had been expressed prior to Alistair's death and agreed upon.
>
> I intend to take all steps necessary to ensure that that agreement is upheld and the shares are transferred into my name as requested."

She then referred to certain passages appearing in the Company's website, which I do not need to read, and then continued:

> "I will be in touch again early next week once you are back from holiday to discuss the transfer of shares into my name in accordance with the agreement as noted."

That letter too is headed "without prejudice."

5. On 21st May 2009 Mr Mason wrote two letters to Mrs Fairclough. The first is on the headed paper of the Company and reads as follows, insofar as relevant having referred to the provisions of Article 12(h) and the fact that in his earlier letter he had sent a form of transfer, he continued:

> "...the Company has not received a notice from you in compliance with the Articles. The Company has therefore offered all the Shares at £1 each to the single remaining member of the Company to buy."

6. In the second letter, not apparently written on the Company's headed paper, he wrote:

> "Dear Jane, Confirmation of purchase of shares in Dunstans Publishing Limited.
>
> I refer to you to the Company correspondence dated 18th April and 21st May 2009 dealing with the transfer of 750 ordinary shares held by Alistair Longford Townley, deceased ("the shares").
>
> The Company has offered the Shares to me at £1 each and I confirm that I am accepting this offer. I enclose a cheque for £750 payment in full settlement of the transaction and ask you to confirm receipt of this letter and enclosed payment."

Later, on 17th November Mr Mason sent an email to Mrs Fairclough headed "Re Dunstans" and it reads:

> "Dear Jane, whilst this is an open correspondence I should note that you declined to participate in the process of share transfer laid out in the Memorandum of Articles, and therefore the way of arriving at share value by asking the Company's auditors to provide it. The Company's process of the share transfer has concluded and all of the issued shares are properly registered in my name."

7. On the following day, 18th November Mrs Fairclough's solicitors wrote asking for Mr Townley's name to be restored on the Register. On 26th November and 4th December Mr Mason responded claiming that the registration in his name was complete and correct. On 10th February 2010 Mrs Fairclough's solicitors sent a letter before action, in response to which on 3rd March 2010 the Company refused to rectify the Register. In addition the letter indicated that an offer was made to treat Mrs Fairclough's transfer notice as valid provided that the parties agreed to proceed with the fair value process laid down in the Articles; by then the auditors had assessed it as £54,294. I should add that the auditor's valuation is undated and was based on the accounts of the Company to 30th April 2009.

8. The witness statement of Mrs Fairclough in support of this application was made on 18th March and the claim form was issued on 23rd March. It seeks the relief I have indicated. The response to this was a witness statement of Mr Mason. So far as relevant to the claim he denied the existence of any agreement such as Mrs Fairclough referred to in her letter of 30th April 2009. He maintained that the price proposed in the transfer notice was greatly in excess of a fair value for 750 shares of the Company and he pointed out that Mrs Fairclough's notice was headed "without prejudice". He contended that it was therefore invalid, because it was inconsistent with any desire to transfer the shares and was not unconditional.

9. On 28th May Mrs Fairclough made a witness statement in reply. So far as material to this claim she stated that in the summer of 2006 Mr Townley had informed her of an agreement with Mr Mason that on the death of either the shares were to go to Mrs Fairclough. She stated that such agreement had been acknowledged by Mr Mason on three separate occasions: at Mr Townley's funeral; on 17th December 2008 at a meeting with the Company accountant, Clive Relf and at a subsequent meeting on 12th March 2009, likewise a meeting with the accountant. She stated that a Mr Heron had offered in May 2009 to buy the shares for £500 each on the basis of which the estate of Mr Townley had been sworn to have a value of some £850,000. She added that, as Mr Mason had failed to take up the offer constituted by her transfer notice, any obligation on her part had ceased. Finally, Mr Mason made a second witness statement on 8th October 2010 and so far as material he denied that any such agreement had been reached as Mrs Fairclough had suggested. There has been no cross-examination of either person who made a witness statement.

10. I should now refer to the terms of Article 12 in full.
"12

> (A) No Share shall be transferred unless and until the rights of pre-emption hereinafter conferred shall have been exhausted.
>
> (B) The person proposing to transfer any Share (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice") to the Company that he desires to transfer the same, and such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the Share to any member

of the Company at the price so fixed or, at the option of either party, at the fair value to be fixed by the Auditor in accordance with Sub-Article (D) of this Article. The transfer notice may include two or more Shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the Directors.

(C) If the Company shall within the period of twenty-eight days after being served with the transfer notice find a Member willing to purchase the Share (hereinafter called "the purchaser") and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the fair value to transfer the Share to the purchaser, who shall be bound to complete the purchase within fourteen days from the service of the last-mentioned notice.

(D) In case any difference arises between the proposing transferor and the purchaser as to the fair value of a Share the Auditor shall, on the application of either party, certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the Auditor shall be considered to be acting as an expert and not as an arbitrator; and accordingly the Arbitration Act 1996 shall not apply.

[(E) – (G)]

(H) In the event of the death or bankruptcy of any Member or in the event of any member who is in the employment of the Company ceasing from any cause to be in such employment, the Directors may at any time within twelve calendar months thereafter request such Member or (in the event of his death or bankruptcy) his legal personal representative or trustee in bankruptcy to serve the Company with a transfer notice in respect of all their Shares registered in the name of such Member, and if default is made in complying with such request for a period of fourteen days the person in default shall at the expiration of the said period be deemed to have served the Company with a transfer notice in accordance with Sub-Article (B) hereof and to have specified therein the amount paid up on the Shares as the fair value.

[(I)]

11. I turn then to the submissions for the parties. For Mrs Fairclough, counsel submits that the transfer notice given by her on 30th April 2009 complied with Article 12 and was valid. Mr Mason could and should have referred the fair value to the auditors if he disagreed with her estimation and having failed to do so was now well out of time. Secondly, it was submitted that Article 12(b) does not require that the transferor should desire to transfer the shares to anyone in particular and that the heading "without prejudice" does not render the notice conditional or equivocal. In amplification of those submissions it is contended that all that the notice needed to do was to comply with the conditions laid down in Article 12(b), namely to be: (1) in writing; (2) to indicate the requisite desire

and; (3) to fix the price the giver of the notice considered to be a fair value. Counsel contended that the notice complied with each of those conditions and, absent the heading, the covering letter would be unquestionably valid. He submitted that the heading meant no more in its context than that Mrs Fairclough sought to preserve an alternative claim under the agreement she alleged so as to preclude any later argument that she had abandoned it by some form of election. Such concern did not make her notice either conditional or invalid.

12. The submissions of counsel for Mr Mason were to the opposite effect. He submitted that the transfer notice was conditional as it did not empower the Company to act freely as agent for the sale of Mr Townley's shares to another member; by contrast, the covering letter maintained that the shares should be transferred to Mrs Fairclough and not sold to anyone. He submitted that there was no such agreement as the covering letter claimed in any event.

13. These submissions were amplified in oral argument also. It was contended that the alleged agreement was one overriding Article 12 altogether on the principle Re Duomatic Limited and that a valid notice must constitute the Company as the agent for the sale of the shares on behalf of the giver of the notice and be irrevocable. Counsel contended that they did not satisfy any of those conditions, as the alleged agreement was inconsistent with any such authority or with the notice being irrevocable. He submitted that this was a case in which Mrs Fairclough was put to her election, but not having done so the notice was both equivocal and conditional. In that connection he referred me to the well-known passage in the speech of Lord Goff in Motor Oil (Hellas) (Corinth Refineries SA) v. Shipping Corporation India [1990] 1 Lloyds List Reports 3.1 at pages 397 and 398 and to its application of the principle there described by the Court of Appeal in a non-contractual setting in Union Music Limited and Arias Limited v. Russell John Watson and Blackknight Limited [2002] EWCA Civ 680. Finally, he contended that if all else failed I should withhold the relief sought by Mrs Fairclough in the exercise of the discretion conferred on me by s.125.

14. I will deal with these issues in turn. First it is necessary to point out that I am not concerned with whether the agreement which Mrs Fairclough seeks to rely upon exists and if so, whether it binds her and Mr Mason to anything. It may or may not. Nor am I concerned with whether Mrs Fairclough was bound to elect between her rights under Article 12 and those under the alleged agreement. It is sufficient that if she was bound to elect she did so and she elected for her rights under Article 12, so the question is what those rights were. To be valid the notice had to comply with any conditions imposed by the Article and the test formulated by Lord Steyn in Mannai Investment Company Limited v. Eagle Star [1997] AC 749.

15. I will consider the conditions required by Article 12 first. I accept that the Article required a valid notice to be written, as it was, and to state, as it did, that the giver "desires to transfer" the shares. It is suggested that such statement was untrue in that she wished to transfer the shares to herself and not to a purchaser. But the nature of the desire must be considered in the context of Article 12(h). Mrs Fairclough did desire to transfer the shares for what, in her notice, she stated to be the fair value in preference to having to sell them under Article 12(h) by default at

their par value. Nor does the Article require any particular transferee to be identified. The third condition is that the notice must specify the sum the giver of the notice fixes as the fair value. That was complied with and in her second witness statement Mrs Fairclough explained how that figure was arrived at.

16. The additional conditions for which counsel for Mr Mason contends, namely that the notice should constitute the Company as agent for the sale of the shares and be irrevocable, are not, in my view, conditions to be satisfied by the notice, but are the consequences imposed by the Article in the event of a notice otherwise complying with the Article being given. Accordingly, I conclude that the notice complied with the conditions specified by Article 12(b).

17. In Mannai Investment Company Limited v. Eagle Star the House of Lords considered the test to be applied when considering the interpretation and validity of unilateral notices. The test they recognised was "How a reasonable recipient would have understood it." That depends on the circumstances surrounding the parties when it was given. The test is objective, but the reaction of the recipient may be considered, even though it plays no part in the test to be applied - see Lancecrest Limited v. Asiwaju [2005] 1 Estate Gazette Law Reports page 40. I was also referred to a number of cases in which in one form of notice or another, the phrase "without prejudice" has been used. They are Norwich Union Life Insurance Limited v. Sketchley [1986] 2 Estate Gazette Law Reports 126; British Rail Pension Trustee v. Cardshops Limited [1987] 1 Estate Gazette Law Reports 127 and; Royal Life Insurance v. Phillips [1990] 61 Planning and Compensation Reports 182. I do not find it necessary to refer to the details of any of them. They predate the decision of the House of Lords in the Mannai case and accordingly they can be no more than exemplifications of the principle in Mannai in the particular circumstances of those cases.

18. In the context of this case it is clear that the notice was given without prejudice in the sense that the giver sought to preserve her alternative claim and preclude any suggestion that she had elected against it. Whether or not she was successful is not necessary to determine, but there can be no doubt that she intended her notice to be a notice under Article 12. It was given in response to a request served on 18th April in substantially the form of the draft sent with that request and under cover of a letter which stated in terms: "I enclose herewith the transfer notice as set out in the Articles of Association." I do not accept the submission that the notice given by Mrs Fairclough was either equivocal or conditional. The fact that in his response dated 21st May Mr Mason described both the letter and notice as as merely "a without prejudice communication" is insufficient to rob the notice as explained in the letter of either its meaning or legal effect. For all these reasons I conclude that the name of Mr Townley has been omitted from and the name of Mr Mason included in the register of members, in each case, without sufficient cause.

19. Accordingly, the only remaining question is whether in the exercise of my discretion I should refuse to make the order Mrs Fairclough seeks. The facts relied on are simply stated. As I have indicated Mr Townley died on 30th October 2008, Mrs Fairclough's notice was issued on 30th April 2009, the 12 months permitted by Article 12(h) expired on 30th October 2009 and the application before me was not issued until 23rd March 2010. In those circumstances the time

for serving another request under Article 12(h) or for referring the fair value to the auditors had expired long before this claim was issued. It is suggested that if the application had been issued when the point arose in May 2009 Mr Mason might have issued a fresh request and/or replied to the auditors to fix a fair value. In those circumstances it is submitted that it would be inequitable to grant the relief sought by Mrs Fairclough.

20. I am quite unable to see why any of those facts would make the grant of the relief sought by Mrs Fairclough in any way inequitable. The notice and the letter were clear on their faces. There is no question of Mr Mason being misled by the form of notice that governed that or their substance. Mr Mason took his stand on his view as to their legal effect. I can see no reason why he should be given any second chance or somehow protected from the consequences of his own action. In all these circumstances I will grant the relief sought by the Part 8 claim.
