

RE PEDERSEN (THAMESIDE) LTD
MEWSLADE HOLDINGS LTD v GOURGEY

BUSINESS AND PROPERTY COURTS (COMPANIES COURT)

HH Judge Pelling QC: 13 December 2017

[2017] EWHC 3406 (Ch); [2018] B.C.C. 58

H1 *Unfairly prejudicial conduct—Procedure—Points of claim—Striking out application—Petition against unfairly prejudicial conduct—Breach of duty alleged by director/shareholder—Deceased minority shareholder named as a respondent—No allegations made against deceased in prayer for petition or points of claim—Application to strike out deceased from prayer for petition and points of claim—Whether deceased’s name should be struck out—Companies Act 2006 s.994.*

H2 This was an application by the executrix of the estate of a deceased member of a company for an order striking out the references to the deceased contained in the prayer to a petition under s.994 of the Companies Act 2006 to which the deceased was a respondent and in the prayer to re-amended points of claim.

H3 The deceased held 5 per cent of the B shares in a company in which the A shares were owned equally by the petitioner company and an individual, “G”, who was the first respondent to the petition. In essence it was alleged that the company borrowed in excess of £4 million in order to obtain a commercial lease of, and develop, a hotel but that G caused a new company, “BHL”, to be set up to take over the project. G’s two sons held 95 per cent of the shares in BHL and the deceased the remaining 5 per cent. G was sole director of BHL but was replaced as director by his two sons. The petitioner company alleged that in breach of his duties as a director of the company, G (with the support of his son) in breach of his duties as a director of the company caused BHL to take over the project from the company. The petitioner brought a petition under s.994 of the Companies Act 2006 and in the points of claim made very serious allegations against G which if made out would plainly constitute unfairly prejudicial conduct by G. No such allegations were made by the petitioner against the deceased; the only allegation made in relation to him was that that he held 5 per cent of the shares in BHL. The executrix of the deceased’s estate applied for an order striking out the references to the deceased contained in the prayer to the petition to which the deceased was named as a respondent and in the prayer to re-amended points of claim.

H4 Held, granting the application:

H5 1. No allegations were made against the deceased to the effect that he was directly involved in the unfairly prejudicial conduct on which the petition relied: that was all exclusively attributed to G. There was no allegation either of the deceased having knowingly received or assisted G in relation to the alleged misconduct. The only place at which the deceased was mentioned in the points of claim was that he held 5 per cent of the shares in BHL. It was not alleged that the deceased was the recipient of the business opportunity belonging to the company that was allegedly transferred by G from the

company to BHL. It was not alleged that BHL distributed any income, much less income derived from or attributable to the company's business opportunity to any of BHL's shareholders and that the deceased profited in any way from what was alleged other than by virtue of being a shareholder in BHL. It was noteworthy that although it was alleged that G's sons owned 95 per cent of the issued share capital of BHL neither of them had been joined as a respondent to the proceedings.

H6 2. In those circumstances the petition as it stood did not contain any allegation against the deceased that he was either directly or indirectly involved in conducting the affairs of the company in an unfairly prejudicial manner or assisted G to do so. It was not alleged that the deceased knowingly received either directly or indirectly the or any part of the proceeds of such misconduct by G. It was noteworthy that there was no allegation of any sort of knowledge on the part of the deceased concerning G's misconduct, much less of him receiving the shares in BHL in order to compensate him for the loss of value of his shares in the company resulting from G's transfer of the company's business opportunity to BHL.

H7 3. It was plain and obvious that a trial judge would not grant the relief claimed against the deceased's estate on the basis of the allegations made. The sole relief claimed in the prayer to the petition and points of claim against the deceased was an order that jointly and severally with G he be ordered to buy all the petitioner's shares in the company at a price to be fixed by reference to various assumptions. If such relief were to be granted it would potentially expose the deceased's estate to purchasing the petitioner's entire shareholding at a price far in excess of what it was currently worth in circumstances where the petitioner held 45.7 per cent of the A shares in the company and the deceased held at his death only 5 per cent of the shares in BHL. It was difficult to see how the relief claimed could in those circumstances be regarded as even arguably proportionate given what was alleged against the deceased in the pleading as it stood. The petitioner chose to seek a remedy against the deceased which was manifestly excessive.

H8 4. The court should not refuse to make an order now because at a future hearing the judge could adjust the remedy sought against the deceased's estate so as to ensure that the its exposure would be more proportionate than would be the case if effect were given to the remedy pleaded by the petitioner. It was the duty of the petitioner to plead the remedy sought. If it was plain and obvious that the remedy sought would not be granted, then the petitioner was at obvious risk of having its claim struck out. The reference to the deceased in the prayer to the petition and the prayer to the points of claim should be struck out.

H9 Cases referred to:

Fildes Brothers Ltd, Re [1970] 1 W.L.R. 592 (Ch)

Goodwill v British Pregnancy Advisory Service [1996] 1 W.L.R. 1397 (CA)

JE Cade & Son Ltd, Re [1991] B.C.C. 360 (Ch)

Legal Costs Negotiators Ltd, Re [1999] B.C.C. 547 (CA)

Lowe v Fahey [1996] B.C.C. 320 (Ch)

Saul D Harrison & Sons Plc, Re [1994] B.C.C. 475 (CA)

Supreme Travels Ltd v Little Olympian Each-Ways Ltd [1994] B.C.C. 947 (Ch)

Tecnion Investments Ltd, Re [1985] B.C.L.C. 434 (CA)

H10 *Christopher Parker QC* and *Oliver Phillips* (instructed by Blake Morgan LLP) for the petitioner/respondent.

Daniel Lightman QC (instructed by Elephant Solicitors) for the second respondent/applicant.

JUDGMENT**HH JUDGE PELLING QC:**

1. This is an application by the executrix of the estate of Mr Francois Nairac deceased (“the deceased”) for an order striking out the references to the deceased contained in the prayer to a [Companies Act 2006] s.994 petition (“the petition”) to which the deceased was a respondent and in the prayer to a re-amended combined points of claim in which are set out the allegations relied upon by the petitioner in the petition and related petitions (“the points of claim”). The deceased died on 19 April, 2016. His wife and executrix (“the applicant”) has been joined in his place as the second respondent to the petition.

2. The deceased held 5 per cent of the B class shares in Pedersen (Thameside) Ltd (“the company”). The A shares of the company were owned equally by the petitioner, a company ultimately controlled by Mr John Griffith, and Mr Maurice Gourgey (“Mr Gourgey”), the first respondent to the petition. Although there were various stages to the process, in essence it is alleged that the company borrowed in excess of £4 million in order to obtain a commercial lease of, and develop, a hotel in Brentford. I can then set out what is alleged to have happened by quoting from the points of claim starting at para.56:

“Subsequently, without the consent of Mr Griffith, Mr Gourgey caused a new company, BHL, to be set up to take over the project, of which his two sons hold 95 percent and Mr Nairac 5 per cent.

BHL was incorporated on 29 April 2010. From 2 June 2010 to 21 July 2011 the sole director of BHL was Mr Gourgey, on which date he resigned and was replaced by his two sons

...

In breach of his duties as a director of [the Company] ... Mr Gourgey (with the support of his son) in breach of his duties as a director (and following his resignation on 24 April 2012 acting as a shadow *de facto* director) of [the company] has caused BHL to take over the project from [the company]”

BHL, the full name of which is Brentford Hotels Ltd, is the fifth respondent to the petition. It is not in dispute that 5 per cent of the shares in BHL were allotted or transferred to the deceased.

3. Very serious allegations are made by the petitioner against Mr Gourgey in paras 59–61 of the points of claim which if made out would plainly constitute unfairly prejudicial conduct by Mr Gourgey. No such allegations are made by the petitioner against the deceased. The only allegation which is made in relation to the deceased is that made in para.56 of the points of claim, namely that he holds 5 per cent of the shares in BHL. In summarising the allegations made concerning the company the petitioner pleads at paras 86–87 of the points of claim as follows:

“The affairs of ... [the company] are being conducted by a man, Mr Gourgey, who is unfit to be a director thereof, as evidenced by his conduct of those companies ... Whilst unlawfully appropriating to himself or his companies the assets of ... [the company] ... Mr Gourgey is withholding any benefit from Mr Griffith and seeking repayment of such benefit as he has previously derived as a result of his shareholding.”

4. The relief sought by the petitioner against Mr Gourgey and the deceased’s estate is pleaded in para.7 of the prayer to the points of claim in these terms:

“That the First and/or Second Respondents to that Petition may be ordered to purchase [the petitioner’s] shares in PTL at a price to be determined by the Court in such manner as it thinks fit, and on the following bases:

- (a) The Court has determined the value of the corporate opportunity taken by BHL from PTL
- (b) On the basis of a sale between a willing vendor and a willing purchaser; acting at arm’s length; of the entire issued share capital of PTL.
- (c) Without any discount to reflect the fact that such a shareholding represents only a minority of the issued ordinary shares in PTL.
- (d) After taking account of and making due allowance for the unfairly prejudicial conduct of PTL’s affairs, namely the sum in (a) above.”

The same relief is claimed in the prayer to the petition. No relief has been claimed against BHL, even though it is a respondent to the petition and is alleged to have received the corporate opportunity allegedly diverted to it from the company, and Mr Gourgey’s sons have not been joined, even though it is pleaded that they own 95 percent of BHL’s issued share capital.

5. Mr Lightman QC appearing on behalf of the applicant submits that the reference to the second respondent in the prayer to the points of claim and a similar provision within the petition should be struck out on the basis that no allegations of unfairly prejudicial misconduct are made against the deceased in either the petition or the points of claim and that in consequence there is no prospect of the petitioner succeeding in obtaining the relief claimed as against the deceased’s estate. Further or alternatively, Mr Lightman submits that the relief sought is so manifestly excessive in all the circumstances, being those which are pleaded, that no court would grant what has been sought.

6. The petitioner opposes the application on the grounds that:

- (a) it is not in dispute that the deceased benefited from the improper diversion of a valuable corporate opportunity belonging to the company;
- (b) the application is a collateral attack on an order made by Simon J, as he then was, dated 1 May 2015 by which he directed that all questions of what further steps were necessary to dispose of the petitions, including the petition, were to be considered at a hearing which has now been listed to take place in April 2018; and
- (c) the application is brought on the same basis as a 2013 application to strike out the parts of the petition which, in the end, was withdrawn.

7. At the hearing before me this last point was not relied upon by Mr Parker QC on behalf of the petitioner. He was right not to rely upon it. The earlier application was an attempt to strike out allegations of a collateral nature made against Mr Gourgey. It was not concerned at all with the points now made on behalf of the deceased’s estate. I therefore reject as unsustainable any attempt by the petitioner to rely upon that point.

8. Before turning to the points of substance that arise, I should record that the respondents’ defence to the petitions, including the petition, was struck out pursuant to an order made by Rose J on 4 April, 2014 by which she directed that unless the respondents served their response to a request for further information by 4.00 pm on 22 April 2014 the points of defence of the respondents were to be struck out. Two applications for relief from sanctions followed, the first of which resulted in an order which was not in the event complied with and the second of which was dismissed. I should also record that during the time when these events occurred the deceased was represented by the same solicitors as

Mr Gourgey and no attempt was made at that stage to treat his interests as separate from those of Mr Gourgey.

9. Against that background I turn to the applicable principles. It is common ground that for the purpose of this application all the factual allegations made in the petition must be presumed to be made out and proceed on that basis. This is all the more the case where, as here, the respondents' defence has been struck out. The core principle on which Mr Lightman relies is that stated by Peter Gibson LJ in *Re Legal Costs Negotiators Ltd* [1999] B.C.C. 547 at 551 where he said this:

“The court on an application to strike out a s.459 petition can look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless (see *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] BCC 947 at pp. 955 and 957 per Lindsay J and *Re Oriental Gas Co Ltd* [1999] BCC 237 at p. 245H where Ferris J adopted what Lindsay J said, describing the test as being whether it is plain and obvious that the relief claimed would never be granted).”

10. In advancing an unfair prejudice claim and in considering applications of the sort I am now considering it is necessary to remember that the jurisdiction under s.994 and the relief that may be granted under s.996 if a claim is successful is a wide one. There is no qualification on the classes of person against whom a claim under s.994 can be brought or against whom an order under s.996 can be made. Thus in *Lowe v Fahey* [1996] B.C.C. 320 it was held that where the unfairly prejudicial conduct alleged involved the diversion of company funds a petitioner was entitled as a matter of jurisdiction to seek an order for payment to the company not only against members, former members or directors allegedly involved but also against third parties who had knowingly received or improperly assisted in the wrongful diversion. Thus in this case a claim could have, but has not, been made against BHL, the recipient of the commercial opportunity lost to the company.

11. However, where a claim under s.994 is brought it is necessary for the petitioner both to plead and prove that the respondent was concerned either directly or indirectly in conducting the affairs of the company in an unfairly prejudicial manner. In considering a strike-out application, as when trying a s.994 petition, it is necessary to focus on the allegations that have been pleaded—see *Re Fildes Brothers Ltd* [1970] 1 W.L.R. 592 per Megarry J at 597G–598C where he said:

“... the petitioner is confined to the heads of complaint set forth in his petition. His evidence may no doubt amplify and explain these complaints, but I do not think that he can rely upon any new head not fairly covered by his petition ... In *Re Lundie Brothers Ltd* [1965] 1 W.L.R. 1051, 1058, Plowman J. said:

‘It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter. I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity.’

... In cases in which there are no normal pleadings, it seems to me important that those who oppose a winding up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack let him first amend his petition.”

This statement of principle was approved by the Court of Appeal in *Re Tecnion Investments Ltd* [1985] B.C.L.C. 434 per Dillon LJ at 441.

12. As I have said, the scope of the remedies that a court can provide under s.996 is very wide as the express terms of the section make clear. However, the relief sought must be proportionate to the unfairly prejudicial conduct of which the petitioner complains—see by way of example *Re JE Cade & Son Ltd* [1991] B.C.C. 360 per Warner J at 368F. It is for the petitioner to specify the relief that he, she or it seeks and in my judgment in an appropriate case a respondent is entitled to seek to strike out the relief claimed as being excessive, providing that the respondent can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed is so remote that the case can be described as perfectly hopeless.

13. Against that background, I now turn to the facts of this case. As I have said already, no allegations are made against the deceased to the effect that he was directly involved in the unfairly prejudicial conduct on which the petition relies. That is all exclusively attributed to Mr Gourgey—see paras 59–61 of the points of claim. In para.87 of the points of claim it is alleged that Mr Gourgey has unlawfully appropriated the assets of the company, “... to himself or his companies ...” There is no allegation either of the deceased having knowingly received or assisted Mr Gourgey in relation to the alleged misconduct. The only place at which the deceased is mentioned is para.56 of the points of claim which I have quoted in its entirety earlier in this judgment. It is not alleged that the deceased was the recipient of the business opportunity belonging to the company. That was allegedly transferred by Mr Gourgey from the company to BHL. It is not alleged that BHL has distributed any income, much less income derived from or attributable to the company’s business opportunity to any of BHL’s shareholders and that the deceased profited in any way from what is alleged other than by virtue of being a shareholder in BHL. It is noteworthy that although it is alleged that Mr Gourgey’s sons own 95 percent of the issued share capital of BHL neither have been joined as a respondent to the proceedings.

14. In those circumstances I do not accept that the petition as it stands contains any allegation against the deceased that he was either directly or indirectly involved in conducting the affairs of the company in an unfairly prejudicial manner or assisted Mr Gourgey so do so. I not accept that it is alleged that deceased knowingly received either directly or indirectly the or any part of the proceeds of such misconduct by Mr Gourgey. It is noteworthy that there is no allegation of any sort of knowledge on the part of the deceased concerning Mr Gourgey’s misconduct, much less of him receiving the shares in BHL in order to compensate him for the loss of value of his shares in the company resulting from Mr Gourgey’s transfer of the company’s business opportunity to BHL. In this regard the case is reminiscent of *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] B.C.C. 947 where Lindsey J said at 956F to 957A:

“It is in this context that Mr Potts says that the petitioner’s complaint is (and I use his words) that there is here a ‘con’ and that OAG is ‘in it up to its neck’. However, I think I need to be a little more analytical than that. Mr Potts’ strong language is surely that of, at worst, conspiracy or, at least, of OAG having knowledge—actual, imputed or constructive knowledge—that its activities or omissions were or might represent unfair prejudice to the petitioner or that OAG committed some other material wrongs. But no such allegation is anywhere to be found in the petition. Such wrongs, if there were any, under s. 151 are not said to be wrongs by OAG. It is nowhere said that what OAG acquired what was received for less than full market consideration, and the matters pleaded suggest, if anything, that it has paid or will pay a little over the odds for what it received. Mr Potts gave me a list of the paragraphs in the amended petition said to show

OAG's involvement in the matters complained of, and para. 107 of the amended petition gives a similar but not identical list. I hope I have not overlooked anything material in the 94 pages of the body of the petition but I have not found any reference to anything done or omitted by OAG being alleged to have been wrongful or unlawful or in breach of some duty or obligation upon OAG. Whilst it is undoubtedly the case that OAG was in a sense, concerned in transactions of which complaint is made, I cannot in the circumstances alleged in the amended petition see that concern as amounting to anything material."

15. In my judgment it is plain and obvious that a trial judge will not grant the relief claimed against the deceased's estate on the basis of the allegations made. The sole relief claimed in the prayer to the petition and points of claim against the deceased and now his estate is an order that jointly and severally with Mr Gourgey he may be ordered to buy all the petitioner's shares in the company at a price to be fixed by reference to the various assumptions there set out and quoted earlier in this judgment. Mr Lightman submitted and I did not understand Mr Parker QC to dispute that if such relief were to be granted it would potentially expose the deceased's estate to purchasing the petitioner's entire shareholding at a price far in excess of what they are currently worth in circumstances where the petitioner holds 45.7 per cent of the A shares in the company and the deceased held at his death only 5 per cent of the shares in BHL. It is difficult to see how the relief claimed could in those circumstances be regarded as even arguably proportionate given what is alleged against the deceased in the pleading as it currently stands.

16. Mr Parker submitted that if the application was to succeed it would at least potentially leave the estate with the benefit of Mr Gourgey's misconduct. In my judgment this is an exaggerated complaint because the real beneficiary is BHL and 95 per cent of the shareholding in that company is owned by Mr Gourgey's sons, neither of whom have been joined as respondents to these proceedings. Further and more pertinently, any loss that has been suffered as a result of the conduct complained about can be recovered in its entirety from the sole wrongdoer identified in the petition, namely Mr Gourgey, and/or from the true recipient of the commercial opportunity, namely BHL against whom no relief has been sought even though it has been joined as a respondent to the proceedings. The real point however is that the petitioner chose to seek a remedy against the deceased which was manifestly excessive.

17. The only point that remains is Mr Parker's submission that I should make no order on this application and leave it to the judge hearing the April 2018 hearing to decide what if anything the estate should pay since that is what Simon J ordered. As to this point I do not accept that the present application is a collateral attack on Simon J's order not least because the issue I am now considering was not one that he had been invited to consider. I fully accept that the application before me could have been made earlier but that does not justify leaving it to be dealt with next year and thereby exposing the parties to further cost and inconvenience which can be avoided. As Mr Lightman submitted by reference to Peter Gibson LJ's judgment in *Goodwill v British Pregnancy Advisory Service* [1996] 1 W.L.R. 1397 at 1402, it defies common sense to refuse to allow the saving of time and cost simply to punish a party for failing to apply earlier than in fact it has for relief it is otherwise plainly entitled to.

18. Mr Parker submitted that I should leave the issue over until the April hearing because it would then be possible for the judge to view matters in the round, draw inferences based on the fact that the application was not made earlier and on the content of the defence as struck out in the circumstances identified earlier in this judgment and to draw inferences as to the true involvement of the Deceased. In my judgment this approach is mistaken. Aside from the fact that it comes close to adopting the

course Hoffmann LJ, as he then was, held in *Re Saul D Harrison & Sons Plc* [1994] B.C.C. 475 at 492 should not be adopted—that is allowing a petition to proceed simply in the hope that something will turn up—Mr Parker’s suggested approach is mistaken because of the way in which the claim is currently pleaded. Had it been alleged, for example, that it was to be inferred that the deceased received the shares in BHL as compensation for the loss of value in his shares in the company knowing or believing that Mr Gourgey was acting in a manner that was unfairly prejudicial to the interests of the company’s members by transferring the company’s commercial opportunity to BHL, it is possible that Mr Parker’s approach could be justified. However, there is no such allegation (or any other material allegation) pleaded and thus on the principles set out above it would not be open to the judge to reach such a conclusion.

19. Likewise, I do not accept the submission that I should not make any order now because at the hearing in April the judge could adjust the mechanics of the remedy sought against the deceased’s estate so as to ensure that the estate’s exposure would be more proportionate than would be the case if effect were given to the remedy pleaded by the petitioner. Whilst I accept that a judge would have jurisdiction to make such an order at the trial of the petition (assuming that the judge was satisfied that the petitioner was entitled to succeed against the deceased’s estate) it remains the case that it is the duty of the petitioner to plead the remedy sought. If it is plain and obvious that the remedy sought will not be granted, then the petitioner is at obvious risk of having its claim struck out.

20. In summary, therefore, I am not satisfied that any relevant allegation has been pleaded against the deceased. The only allegation pleaded is that he was allotted or had transferred to him shares in BHL. It is not alleged that the deceased had control of either the company or BHL. It is not alleged that the shares in BHL were transferred to him to compensate him for loss in value of his B class shares in the company. It is not alleged that he was involved either directly or indirectly in the transfer of the Brentford Hotel opportunity from the company to BHL or in assisting in such a transfer. There is no evidence, nor could there be, that the value of the deceased’s shareholding in BHL would come close to equating to the value of the petitioner’s 45.7 per cent interest in the company valued on the basis claimed by the petitioner. In all the circumstances, it is plain and obvious that the relief claimed against the deceased’s estate will never be granted. That being so, I consider that the reference to the second respondent in para. 1 of the prayer to the petition and para. 7 of the prayer to the points of claim should be struck out.

(Order accordingly)