IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2022] EWHC 2849 (Ch)

No. BL-2019-001698

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 14 October 2022

Before:

MR IAN KARET
(Sitting as a Deputy High Court Judge)

B E T W E E N :

(1) BOSTON TRUST COMPANY LIMITED
(2) BOSTON FIDUCIARY MANAGEMENT LTD — Claimants

- and -

(1) SZERELMEY LIMITED
(2) SZERELMEY (GB) LIMITED
(3) SZERELMEY RESTORATION LIMITED
(4) TELLISFORD LIMITED
(5) GORDON VERHOEF
(6) SZERELMEY (UK) LIMITED
(7) LONDON STONE LIMITED
(8) HERITAGE HOUSE (YORK) LIMITED
(9) TUSK HOLDINGS LIMITED
(10) HARE AND RANSOME JOINERY LTD — Defendants

J U D G M E N T

A P P E A R A N C E S

MR M. PARFITT (instructed by Osborne Clarke LLP) appeared on behalf of the Claimants.

MR D. LIGHTMAN KC (instructed by Brachers LLP) appeared on behalf of the First to Third Defendants.

THE FOURTH DEFENDANT did not attend and was not represented.

MR R. HOLLINGTON KC and MR A. PAY (instructed by Francis Wilks & Jones Solicitors) appeared on behalf of the Fifth, and Seventh to Tenth Defendants.

MR U. STAUNTON (instructed by Thomson Snell & Passmore LLP) appeared on behalf of the Sixth Defendant.

IAN KARET:

1 I have before me two applications in a derivative claim. The first is an application by the fifth, seventh, eighth, ninth, and tenth defendants (the "Application Defendants") to reconstitute the claim to bring in partnership claims made by one of the ultimate owners of the business (Mr Krause) against the other (Mr Verhoef). The second application is by the claimants to extend the costs indemnity to trial.

2 The trial is listed for ten days from 14 November 2022.

3 This dispute has been before the court on a number of occasions. Those include, in particular, two decisions discussed during this hearing. The first is the decision of Mr Stephen Houseman KC, sitting as a Deputy High Court Judge, in *Boston Trust Company Ltd v Szerelmey Ltd & Ors* [2020] EWHC 1136 (Ch). He gave permission to the claimants to continue the claim as a common law derivative claim. Mr Houseman's decision was appealed unsuccessfully to the Court of Appeal. The second is the decision of Mr Charles Morrison, sitting as a Deputy High Court Judge, in *Boston Trust Company Ltd & Anor (Trustees of Erutuf Trust) v Szerelmey Ltd & Ors* [2020] EWHC 3042 (Ch). He granted the claimants an indemnity from the first to third defendants (the "Operating Companies") for their costs of the action.

4 The Application Defendants' application refers to a claim issued in this court on 16 March 2022 with action number BL-2022-000463 (the "Partnership Claim"). It is made by Mr Krause against Mr Verhoef and his family trust. Time for service was extended, and it was served at the end of last week together with particulars of claim.

5 Before me, Mr Parfitt appeared for the claimants. Mr Hollington KC and Mr Pay appeared for the Application Defendants. Mr Lightman KC appeared for the Operating Companies. Mr Staunton for the sixth defendant.

Application to reconstitute

6 I shall deal first of the Application Defendants' application. It was issued on 22 September 2022 seeking an order that these proceedings be reconstituted as an application under s.994 Companies Act 2006 and that those proceedings be taken forward together with the Partnership Claim.

7 The result of a reconstitution would be that the trial in November 2022 would be vacated and a new trial be listed to address all the issues together. Mr Hollington suggested that the listing of the new trial could take place within a year. Mr Parfitt suggested that given the indications on the court website as to trial timetables, that would more likely to be two years away.

8 Mr Lightman submitted that it was not possible to reconstitute the application in the way set out in the application notice and that a new s.994 claim would need to be commenced. Mr Hollington indicated that this should not be an impediment to the application continuing, and that if I were to order the reconstitution sought then the parties would find a way through the formalities of the claim.

9 The relevant history of the dispute is set out in the judgment of Mr Houseman at paragraphs [8] - [10] and [12] - [16]:

"8. The present dispute concerns the Szerelmey group of companies which conducts a reputable stone restoration and repair business in the UK. The ultimate principal stakeholders in the Operating Companies are two individuals, Earl Krause and Mr Verhoef. Mr Verhoef took care of the Szerelmey business whilst Mr Krause took care of another jointly owned business in South Africa. All relevant corporate entities are incorporated in England and Wales.

9. Mr Krause and Mr Verhoef have been in business together for almost sixty years. They started their first business shortly after leaving school in 1960. When approaching retirement they sought to hand over to their respective offspring. It was that process of generational succession which, I am told, prompted the underlying dispute between them from around mid-late 2015 onwards. This proposed derivative action arises out of and forms part of that wider underlying dispute between principal stakeholders.

10. Mr Krause and Mr Verhoef and their respective family members enjoy (discretionary) beneficial interests in the relevant corporate entities through their own separate trust arrangements. It is for this reason that I describe them as (principal) stakeholders rather than shareholders. The primary holding concerns A shares with voting rights in Tellisford. The board of Tellisford comprises four directors with equal representation: Mr Krause and his son, Anton, on the one hand; Mr Verhoef and his wife, Celia, on the other hand.

...

12. Mr Verhoef and his family are beneficiaries under a New Zealand trust represented by VOC Trustee Limited ('VOC'). Through that trust arrangement and his ownership of an English company called Warthog Investments Limited ('WIL'), Mr Verhoef and his family effectively hold a majority of the voting rights in each of the Operating Companies. For convenience, I refer to this compendiously as the 'VOC/Verhoef' shareholding or stake.

13. The ultimate ownership proportion in respect of the Operating Companies is roughly 1:2 in favour of Mr Verhoef, namely: 33.33 per cent (Erutuf/Krause)/66.67 per cent (VOC/Verhoef) in respect of the First Defendant ('Szerelmey') and Second Defendant ('Szerelmey GB'); and 26.20 per cent (Erutuf/Krause)/58.22 per cent (VOC/Verhoef) in respect of the Third Defendant ('Szerelmey Restoration').

14. The differing proportions outlined above arise by virtue of a 21.41 per cent voting stake held by Mr David Maughan in an intermediate holding company, Tellisford UK Limited, which itself owns a 66.67 per cent indirect stake in Szerelmey Restoration. Mr Maughan also held or holds all ten of the non-voting B shares in Tellisford. Boston contend that he transferred five of those B shares to them. The relevant stock transfer form is dated 9 October 2019, a week or so after commencement of these proceedings. This alleged stake (albeit non-

voting) forms part of Boston's case as to sufficient interest to pursue these derivative claims, addressed below.

15. It is common ground that as between ultimate principal stakeholders, Mr Verhoef is the majority owner of the Operating Companies and has been at all material times. I refer to this ownership structure as the 'Tellisford Structure'. During the hearing, all parties referred to Mr Krause and Mr Verhoef as if they owned shares, by way of forensic shorthand. I forgave them as I hope they will forgive me for any linguistic shortcomings in this judgment.

16. It is also common ground that historically, by which I mean until the personal dispute emerged between Mr Krause and Mr Verhoef during 2015, the business paid out sums to each of the principals by way of profit share on a periodic basis. This may or may not have constituted or evidenced a legally binding contract between them in their personal capacity. It is suggested by the defendants that personal claims may exist between Mr Krause and Mr Verhoef as part of their contention that pursuit of this derivative action is inappropriate."

10 Mr Houseman addressed a number of further points that I should note here. At section C of the judgment, he considered the alleged wrongdoing under four heads. At [43], he noted:

> "There is no claim against any of the directors of the Operating Companies, save for Mr Verhoef. Boston have reserved their position. The logical premise of all four heads of claim is that the directors of the Operating Companies committed serious breaches of their fiduciary/statutory duties, primarily the duty to safeguard the interests of the relevant company, by sanctioning or permitting the Impugned Transactions."

(The Impugned Transactions are listed in the particulars of claim.)

11 There was some debate about the significance of an "adequate alternative remedy" as discussed in [154] - [155] of Mr Houseman's judgment. In [155], he said:

> "The suggested personal claim between Mr Krause and Mr Verhoef relating to unpaid profit-share would, at most, cover some (unspecified) part of the Management Fees Claim on the defendants' own case. The represented defendants - not just Mr Verhoef - were conspicuously careful not to concede the existence of a legally binding or enforceable agreement between principals. I do not regard the theoretical existence of this personal claim as an adequate alternative remedy in respect of the Alleged Wrongdoing."
>
> (The management fees claim is one of the four heads of wrongdoing alleged.)

12 The Application Defendants' argument is that the issue of the Partnership Claim in March 2022 constituted a material and significant change of circumstances such that it became clear that for the first time this was a quasi-partnership dispute. That was only drawn to the attention of the Application Defendants in May this year and the claim was only served this month. Mr Hollington said that the nature of the dispute was not clear in the application before Mr Houseman.

13 In the evidence before Mr Houseman, Mr Krause addressed the nature of his relationship with Mr Verhoef on at least two occasions.

14 Mr Krause's first affidavit was made for an *ex parte* application for a freezing injunction at the beginning of the proceedings. He raised there the nature of his relationship with Mr Verhoef in particular at paragraphs 56, 57, and 98. Mr Krause reserved his right to bring other claims against Mr Verhoef beyond this action.

15 In his first witness statement, made for the hearing before Mr Houseman, Mr Krause referred to the dispute over the right to the shares of Warthog Investment Limited. Warthog is part of the company structure which owns rights in the Operating Companies. If Mr Krause did own those shares, he would not be a minority shareholder but, for the purposes of this hearing, would be a 50/50 holder with Mr Verhoef.

16 A point was raised in argument before me that there is a possibility that the Partnership Claim might in fact lead to Mr Krause claiming to own more than 50 per cent. The parties accepted that I could proceed on the basis that this claim was only to be an equal shareholder with Mr Verhoef.

17 On 24 May 2022, Osborne Clarke, solicitors for the Claimants, wrote a pre-action letter to the Application Defendants noting that Partnership Claim had been issued but they were not serving it. Those defendants accept that the claim has now been served and that the particulars of claim, which were only made available in the last few days, reflect the Osborne Clarke letter.

18 Directions to in this action were made in September 2021. Disclosure was due to have taken place in spring this year but took longer than expected. That, in turn, pushed back witness statements, which were served in mid-July 2021. There was a mediation between the parties in August 2021. That was not successful.

19 Against that background, Mr Hollington advanced the following reasons why the application should succeed. The Partnership Claim only now shows that this is in truth a 50/50 claim or claim to equal ownership of the business rather than a minority claim as had been understood by Mr Houseman. The theoretical existence of personal claims by Mr Krause which had been raised before Mr Houseman has now crystallised. It is inevitable that Mr Krause will exit the business in some way. He has alleged wrongdoing by the defendants in the operation of the business and the suggestion that he would be prepared to sit by while those companies were continued to be managed by the same people was not credible. Finally, Mr Krause's witness statement for trial showed that, in practice, and although it was not so labelled, this was an application under s.994 of the Companies Act 2006 and it should be treated as such.

20 The Claimants respond as follows. First, that this is not a 50/50 claim. The Claimants are minority shareholders and this is a minority claim. The Application Defendants contest Mr Krause's claim of ownership of the business and until that claim is made good, the Claimants are in the minority. Second, the defendants have known all along about Mr Krause's assertions as to his ownership of the business, albeit not in the exact form of the Partnership Claim. Thirdly, it is not certain that Mr Krause will exit the business. Mr Krause has said that is not the case and that this is, in fact, not a s.994 application.

The law

21 Mr Houseman set out the relevant law at [61] - [93] of his judgment. The parties accepted that statement for the purposes of this application and I adopt it.

22 *Fraser & Ors v Oystertec PLC & Ors* [2004] EWHC 2225 (Ch), [29] is authority for the proposition that the court has jurisdiction to reconsider permission to continue if there is a material change of circumstances:

> "...What is contemplated is not a single authorisation of proceedings entitling the claimant indefinitely to pursue the original further claim without further authority, let alone pursue any further or other claim. Nor is it contemplated (save in the exceptional case when this might be appropriate) that the authority given when the action is begun is to continue without any review until trial. Continued supervision by the court is called for at successive stages in the action (e.g. after closure of pleadings and disclosure) and most particularly if there is a material change of circumstances."

Defendants' application - discussion

23 The Application Defendants' position that there has been a change of circumstances by the issue of the Partnership Claim and its recent service. I disagree. In my view, there has been no material change. The Application Defendants have known about Mr Krause's position from the outset of these proceedings and they have been able to take the point about this being a partnership dispute.

24 Mr Hollington said that the Claimants' claim was not put this way to Mr Houseman, not least in the Claimants' skeleton argument for the application before him.

25 There was a disagreement over the significance of the words "theoretical existence" in paragraph [155] of Mr Houseman's judgment set out above. Mr Parfitt said that those words referred to Mr Krause's potential claim for payments out of management fees that were equal to Mr Verhoef's payments. As neither of them was entitled to such payments, such a claim would have been impermissible and therefore not a claim that Mr Krause could make.

26 Mr Hollington said that the Claimants had advanced an argument that Mr Krause's ownership claim was only theoretical.

27 It is not possible for me to resolve this point on the materials available. I am satisfied that Mr Houseman had before him sufficient material to allow the Application Defendants to raise then the point now before me. There were a number of clear statements in Mr Krause's evidence about how he owned the business. On that basis, I do not believe that there has been a material change.

28 If I am wrong and there has been a material change then, in my view, the Application Defendants have raised it too close to the trial, now only a month away, to justify an adjournment.

29 Mr Hollington accepted that the Application Defendants were slow to spot the significance of the pre-action letter sent in May 2022. By way of explanation, he noted that the Application Defendants had been busy first on disclosure then on witness statements and then involved in the mediation. I understand that those activities will have taken time, but their delay in applying is significant. Given the weight the Application Defendants now attach to the Partnership Claim, they should have acted sooner. It would, for example, have

been open to them to seek service of the Partnership Claim, and that would have crystallised the position months before the trial was due. I also note on the matter of timing the advanced ages of the two protagonists. If there is to be a trial which they will attend, it is better that it be sooner rather than later.

30 The application to reconstitute thus fails.

Costs Indemnity

31 I now move to the claimants' application to continue the costs indemnity. The claimants seek an order to continue to trial the costs indemnity for the derivative claim granted by Mr Charles Morrison by order of 9 December 2020.

32 Mr Morrison's judgment sets out the applicable law at [23] - [35] and I adopt that. The legal principles he discussed cover, in particular, the decision in *Wallersteiner v Moir (No. 2)* [1975] QB 373.

33 The Application Defendants say that following the issue and service of the Partnership Claim, I should approach the question of the indemnity as if this were a 50/50 owned business as Mr Krause contends, or as if this were a partnership or quasi-partnership where a dispute had arisen between the principals. The significance of this approach is that in such cases the court may refuse to order an indemnity because a claimant in that position will gain an unfair benefit from the indemnity.

34 Mr Hollington said that cost the costs indemnity was in fact his principal point and that this was where the Application Defendants placed most weight. The arguments made above were all relevant here. Those were the nature of the relationship between the parties; the inevitability of an exit by Mr Krause should he succeed in his claim; and the unlikelihood that Mr Krause would accept that the Operating Companies should continue to be run by those who had done so to date if they were found to have committed the wrongs alleged.

35 Mr Lightman noted that it was within my power to grant an indemnity or to refuse one, or to grant one that would not include any adverse costs. He also suggested that I might consider capping the costs. On the cap point, no party indicated they were interested in that.

36 Mr Parfitt pointed out that the usual rule following *Wallersteiner v Moir* is that once a derivative action is allowed to proceed, the indemnity would usually follow, and he relied in particular on the statement of Lord Reed in *Wishart* at [71] as set out at [31] of Mr Morrison's judgment.

Indemnity – the law

37 I was taken to on a number of cases including *Barrett v Duckett* [1995] 1 BCLC 243, CA; *Halle v Trax BW Ltd* [2000] BCC 1020; *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65, *per* Lord Reed; *Mumbray v Lapper* [2005] BCC 990; *Bhullar v Bhullar* [2016] BCC 134; the Scottish case of *CJC Media (Scotland) Limited v Gary Clark and CJC Media (UK) Limited* [2020] SAC (Civ) 11; *Re Nexbell Limited* [2021] EWHC 1258 (Ch); and *Qayoumi v Oakhouse Property Management Ltd* [2003] 1 BCLC 352.

38 Mr Lightman told me that he was not aware of any case where the parties were disputing a claim to equal entitlement to the shares of the company in dispute rather than there being equal holdings at the time the indemnity was sought. He suggested that the cases and *Mumbray* in particular indicated that the most important factor was the nature of the

relationship between the parties rather than the exact percentages of their shareholdings. I accept that.

Indemnity - discussion

39 Mr Lightman raised the point that indemnified costs should not be used to assist in the preparation of the Partnership Claim. He referred to an exchange in October 2022 between the solicitors for the Operating Companies and the solicitors for the Claimants about the concern of the Operating Companies about the use of disclosure in this action in the Partnership Claim. The Operating Companies' solicitors raised this in a letter that also addressed CPR 31.22. That covers the potential misuse of documents disclosed in litigation. The Claimants' solicitors had in reply concentrated on CPR 31.22, and they did not fully address the point about the use of the claimants' own documents in the preparation of the Partnership Claim. Mr Lightman indicated that should the indemnity continue, the court should provide protection against the use of indemnified costs for anything other than the derivative claim.

40 I will continue the indemnity through to trial. The nature of the relationship between the parties is, as I have said, one that has always been apparent should the Application Defendants have wished to take the point.

41 Mr Morrison granted a full indemnity and on that basis, and it appears reasonable and proportionate to continue it in the same form until trial, subject to Mr Lightman's point about the correct use of indemnified costs.

42 It would have been possible from the outset to describe this case as a "partnership bust-up" – see *Mumbray* at [25]. Notwithstanding that, Mr Morrison thought it appropriate to grant the order and it has been in place for a considerable time. That time is also a factor which I take into account in ordering that the indemnity should continue. There has been no significant change in circumstances as to the ownership of shares in the operating company or in the positions adopted by the parties as to their relationships with one another.

43 I accept Mr Lightman's suggestion that there be appropriately worded protection against the use of the indemnity to fund the Partnership Claim and counsel should seek to agree an order in those terms.

44 I am grateful to counsel for their clear and helpful arguments.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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