Neutral Citation Number: [2014] EWHC 1142 (Ch)

Case No: 3680 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/04/2014

IN THE MATTER OF BEPPLER & JACOBSON LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

MR JUSTICE DAVID RICHARDS

- -

Between :

CALDERO TRADING LIMITED	**Petitioner**
- and -	
(1) BEPPLER & JACOBSON LIMITED	**Respondents**
(2) BEPPLER & JACOBSON MONTENEGRO D.O.O	
(3) LEIBSON CORPORATION	
(4) BELINDA CAPITAL LIMITED	
(5) IGOR LAZURENKO	
(6) MARCEL TELSER	
(7) LAWSON TRADING LIMITED	
(8) SERGEY SCHEKLANOV	

ROBIN HOLLINGTON QC and ADRIAN PAY (instructed by **Bryan Cave**) appeared on behalf of **the Petitioner**
OWAIN DRAPER (instructed by **Mishcon de Reya**) appeared on behalf of **the Third, Fourth, Fifth, Seventh and Eighth Respondents**
BEN GRIFFITHS (instructed by **Herbert Smith Freehills**) appeared on behalf of **the Provisional Liquidators of the First Respondent**

Hearing dates: 13 February 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE DAVID RICHARDS

Mr Justice David Richards :

1. The issue before the court is whether Igor Lazurenko and his company Leibson Corporation (Leibson) (the respondents) are liable to reimburse Caldero Trading Limited (Caldero) the sum of £87,501 paid by it in payment up of the shares in Beppler & Jacobson Limited (the company) held by it. The payment was made in August 2012 in response to a demand made by the provisional liquidators of the company.

2. The background to this matter is fully set out in the judgment which I handed down in July 2013: see [2013] EWHC 2191 (Ch).

3. In summary, the company was acquired as a shell company for use by Zoran Becirovic and Mr Lazurenko for their joint venture in acquiring and developing hotels in Montenegro. They agreed that Mr Lazurenko should provide or procure the provision of the finance necessary to carry out this venture and that Mr Becirovic should be in day to day charge of the business of the venture.

4. The shares in the company were initially divided between Mr Lazurenko and Mr Becirovic on an 80:20 basis, with 280,000 shares of £1 each being held by Leibson Corporation (Leibson), a company incorporated in the British Virgin Islands and ultimately owned by Mr Lazurenko. The balance of 70,000 shares were issued to Mr Becirovic. In October 2004 his shareholding was increased by the transfer from Leibson of shares representing 5% of the issued share capital plus one share. In April 2008 Mr Becirovic transferred the 87,501 shares registered in his name to Caldero, a company incorporated in Cyprus wholly owned by Mr Becirovic. In October 2010, Leibson transferred shares representing 5% of the issued capital of the company to Belinda Capital Limited (Belinda), a company incorporated in Nevis owned by Mr Lazurenko. The registered shareholdings have remained unaltered since then.

5. Mr Becirovic and Mr Lazurenko fell out and on 3 May 2012 Caldero presented a petition seeking relief under section 994 of the Companies Act 2006 or an order to wind up the company under section 123 of the Insolvency Act 1986 on the just and equitable ground. Caldero successfully applied for the appointment of provisional liquidators and directions were given for a speedy trial. In the period between May and late June 2012 statements of case were served and amended. The petition was set down for trial, to commence before Newey J on 13 July 2012.

6. The petition was settled on terms set out in an agreed order made by Newey J on 16 July 2012 (the Newey Order). The order recited that the court was satisfied that it was just and equitable to wind up the company and that its affairs had been conducted in a manner unfairly prejudicial to the interests of Caldero. The order provided for Leibson to purchase Caldero's shares at a price to be fixed by an expert as the fair value of the shares in accordance with the terms of schedule 1 to the order. The expert valuation required the prior determination of an issue whether the finance provided or procured by Mr Lazurenko had been provided by way of loan or capital (the Investment Issue). The order provided for the trial to be adjourned for the determination of the Investment Issue in accordance with directions set out in the order, which provided, amongst other things, that the trial would be limited to the determination of the Investment Issue and the carrying into effect of the purchase of Caldero's shares.

7. The Investment Issue came before me for trial over 13 days in March 2013. In my reserved judgment, I found that all finance had been provided by way of capital. On 24 January 2014, on a renewed oral application, the Court of Appeal (Gloster LJ) granted permission to appeal. The appeal has not yet been heard.

8. In my earlier judgment at [150]-[159] I referred to the issue now before me and set out some of the directly relevant facts. I observed at [152] that it seemed surprising, given that Mr Lazurenko had procured the provision of capital to the extent of, even on his own case, over €12 million that none of it had been applied in paying up the 350,000 issued shares of £1 each. However, neither Caldero nor the respondents contend that the shares had been paid up in this way. The shares held by Leibson and Belinda were paid up in cash in May 2010.

9. Caldero contends that the respondents are liable to reimburse it for the amount paid in paying up the shares registered in its name on one of the following grounds. Its primary case is that the respondents expressly agreed to do so under the original agreement for the financing of their joint venture and that the respondents have expressly acknowledged their obligation in this respect. As Caldero met the lawful demand made by the provisional liquidators for payment up of the shares, the respondents are contractually obliged to reimburse Caldero. Secondly and alternatively, Caldero submits that it was an implied term of the compromise agreement set out in the Newey Order that the respondents would be responsible for paying up the shares registered in the name of Caldero. Thirdly, and in the further alternative, Caldero has discharged a liability which was ultimately that of the respondents, for which they must reimburse Caldero under principles of unjust enrichment.

10. It will not be necessary to consider the third of these three grounds. A claim based on unjust enrichment would require that the respondents had a direct or indirect liability to pay up the shares. The only possible liability would be an express or implied contractual liability to Caldero. Accordingly, as I think Mr Hollington accepted in the course of his submissions, if Caldero failed on each of the first two grounds, it could not succeed on the basis of unjust enrichment.

11. The question of the payment up of the shares in the company was raised in the statements of case served in the petition. In paragraph 3 of the points of claim, Caldero pleaded the authorised and issued share capital of £350,000 divided into 350,000 ordinary shares of £1 each and stated "the amount of such capital paid up or credited as paid up is recorded as £262,499, although this may be in doubt." In paragraph 2 of its points of defence, Leibson pleaded as follows:

> "*Save that it appears that neither the petitioner ("P"), nor its predecessor in title, Mr Zoran Becirovic ("Mr Becirovic"), have ever paid up the shareholding of 87,501 shares in BJUK, and that BJUK's paid up capital is therefore £262,499, and save that P acquired its shareholding from Mr Becirovic pursuant to an agreement for value dated 1 April 2008, paragraphs 1 to 6 are admitted. It is averred that both [Leibson] and [Belinda] have paid up their shares.*"

12. Caldero responded to paragraph 2 of the points of defence in paragraph 7 of its points of reply. Paragraph 7.2 read:

> *"Mr Becirovic's and Caldero's shares were shown as being paid up in the filed accounts for BJUK for the years ending 30/11/08 (note 4), 30/11/07 (note 4), 30/11/06 (note 4), 30/11/05 (note 4), although Mr Becirovic had not paid any money, himself, in respect of his shares. At the meeting 16/11/10, Mr Lazurenko told Mr Becirovic that his shares in BJUK were not paid up. Mr Becirovic said that Mr Lazurenko should attend to this (on the basis that all the finance was to come from Mr Lazurenko)."*

13. The respondents served amended points of defence dated 25 June 2012, in which they accepted that Leibson as the majority shareholder should buy out Caldero's shareholding at a fair value with no discount for a minority shareholding. They stated that in the circumstances the majority of the allegations contained in the points of claim were irrelevant and that the real issue between the parties was the Investment Issue.

14. The respondents provided a substantial skeleton argument on 11 July 2012 in preparation for the trial due to commence before Newey J on 13 July 2012. In paragraph 30 of the skeleton the following was stated:

> "*(1) Caldero's shares have apparently not been paid up: see 7.2 of the original Points of Reply (1/6/2) responding to an allegation to that effect in the original Points of Defence served by Leibson.*
>
> *(2) However, the Respondents accept that (as stated in those Points of Reply) it was and remains their responsibility to ensure that Caldero's shares are fully paid up. The respondents are prepared to undertake to pay them up if the Court requires that as a condition of not making a winding up order.*"

15. The context in which that acknowledgement was made was a submission that Caldero could not show a sufficient interest as a contributory to entitle it to a winding up order on the just and equitable ground. The skeleton argument referred to and relied on the authorities which establish that a contributory petitioning for the winding up of a company must establish that there is likely to be a surplus available for distribution among the shareholders. In the absence of such surplus, a contributory cannot show a sufficient interest to justify the making of a winding up order. This principle does not, however, apply where the contributory holds shares which are not fully paid, because in such circumstances a contributory can show a sufficient interest in winding up the company. As it was the averment of the respondents that the shares held by Caldero were not fully paid, it followed that without more Caldero did have the necessary standing to seek a winding up order as a contributory. The acknowledgement was made and the undertaking offered in order to demonstrate that Caldero lacked the necessary interest.

16. The Newey Order did not contain any undertaking by the respondents to pay up the shares registered in the name of Caldero. As referred to above, it contained the order for Leibson to purchase from Caldero its shares on the terms set out in schedule 1 to the order and gave directions for the determination of the Investment Issue.

17. The pleaded case of Caldero was that Mr Lazurenko was obliged to procure the payment up of the shares registered in the name of Caldero, as part of the overall agreement between the parties that Mr Lazurenko would procure the provision of the finance required for the venture. That case was clearly spelt out in the points of reply served by Caldero and was not therefore the subject of a further statement of case by the respondents. Nonetheless, the skeleton argument provided by counsel for the respondents contained the acknowledgment that this was and remained their responsibility. Following provision of this skeleton argument, there was therefore no issue on this point as between Caldero and the respondents.

18. On the face of it, as it seems to me, Caldero is entitled to rely for reimbursement of the sum which it paid in payment up of the shares on the contractual obligation of the respondents, acknowledged by them in writing and without qualification.

19. It is submitted for the respondents that Caldero is not entitled to rely on this acknowledged contractual obligation.

20. The ground on which the respondents resist the order sought by Caldero is that the Newey Order, properly construed, involved a complete settlement of the petition, including all issues whether contested or admitted, save for the outstanding Investment Issue. It is therefore an abuse of process to seek reimbursement from the respondents of the amount of the payment made by Caldero in payment up of its shares. Accordingly, Mr Draper for the respondents submitted, the present application must be dismissed unless Caldero can establish an express or implied obligation in the compromise agreement on the part of the respondents to pay up the shares. Mr Draper correctly pointed out that Caldero does not argue that the compromise was a partial settlement, leaving certain issues such as the payment up of its shares for further determination. The only matter left for further determination was the Investment Issue. The issue of payment up having been raised in the statements of case and having been addressed in the respondents' skeleton, it is a matter which was "swallowed by the settlement".

21. Mr Draper relied on an express provision of the Newey Order to support his submission that any obligation to pay up the shares was dealt with as part of the settlement. Paragraph 1 of schedule 1 to the Newey Order defines "Shares" as "The Petitioner's 87,501 shares held in First Respondent *which shall be treated as paid up*" (emphasis added). This express provision, combined with the absence of any express obligation on the part of the respondents to pay up the shares, demonstrated that the dispute was compromised on terms which involved the imposition of no obligation on the respondents to pay up the shares.

22. Mr Draper submitted that this was further supported by the correspondence which had preceded the agreement of the terms of the Newey Order. In a letter dated 12 July 2012, Caldero's solicitors wrote to the respondents' solicitors as follows:

> *"We write further to the skeleton argument filed on behalf of your clients for the forthcoming hearing. This asserts, inter alia, that:*
>
> 1. *there is no good reason for the Company to be wound up given the existence of the so-called Leibson Offer; and*
>
> 2. *the Respondents will pay up the amount unpaid on Caldero's shares.*
>
> *As you know, we have consistently disputed the ability of Leibson to pay any sum of money on the basis that Leibson is a company of unknown financial standing….there is no reason to suppose that [the respondents] can be expected to pay the Petitioner the sums required to complete the Leibson Offer or to pay the amount unpaid on Caldero's shares.*
>
> …
>
> *Please accordingly confirm:*
>
> *1. That you clients have sufficient funds to satisfy the Leibson Offer, the amount unpaid on Caldero's shares and the sums payable in respect of costs, and*
>
> 2. *The source of those funds. "*

23. The respondents' solicitors replied on the same day, stating that the money required to pay the outstanding costs liability was in their client account and that the Leibson Offer went well beyond what Caldero was entitled to, in that it conceded that there should be a winding up if the purchase was not completed. It continued that the respondents' instructions were that they had the means to consummate the Leibson Offer and would not have to borrow in order to do so. No reference was made in the letter to the payment up of the shares.

24. In their skeleton argument for trial, as quoted above, the respondents had offered an undertaking "to pay [the shares] up if the Court requires that as a condition of not making a winding up order." In context, I took that to mean an undertaking to the Court and Mr Draper did not disagree.

25. Against the background of the correspondence and the skeleton argument, Mr Draper submitted that the absence of any express obligation in the Newey Order on the respondents to pay up Caldero's shares is very telling. It indicates that all matters between Caldero and the respondents in relation to the company were resolved without the imposition of any such obligation on the respondents.

26. Mr Draper relied also on the discussion of abuse of process and of the principle in *Henderson v Henderson* (1843) 3 Hare 100 in the speeches of Lord Bingham of Cornhill and Lord Millett in *Johnson v Gore Wood & Co* [2002] 2 AC 1. At p.31, Lord Bingham said:

> *"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with*

> *them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."*

At p.32, Lord Bingham rejected the submission that the rule in *Henderson v Henderson* did not apply where the first action had culminated in a compromise and not a judgment. He observed:

> "*An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.*"

27. Mr Draper submitted that it was incumbent on Caldero to bring its claim for payment up of the shares in the petition that was before the court, or perhaps if the petition were not the right procedure for such a claim, in an action brought at the same time. Having settled the petition on the terms set out in the Newey Order, Caldero would not have been permitted subsequently to bring a claim for payment up of the shares. This serves to emphasise the totalility and finality of the compromise contained in the Newey Order.

28. If there had been a live issue between Caldero and the respondents as to the obligation on the respondents to pay up Caldero's shares, I would see great force in Mr Draper's submissions. However, there was no issue between them. As appears from the extracts from the statements of case and the respondents' skeleton quoted above, the

respondents accepted that a contractual obligation existed on them to pay up the shares. There was no need for Caldero to bring proceedings to establish or vindicate that right. That is the background against which the compromise contained in the Newey Order must be considered. In my view, the important considerations are as follows.

29. The purpose of the compromise agreement was to settle Caldero's claim that the respondents' conduct of the affairs of the company had been such as to entitle it either to an order for the purchase of its shares at fair value or to an order to wind up the company on the just and equitable ground. There was no requirement for the agreement to settle a matter which was not in dispute between the parties and which existed quite independently of the matters of which Caldero complained in its petition. Even if there had been complete harmony between Caldero and the respondents, the respondents were and would have remained under a contractual obligation to pay up Caldero's shares.

30. The respondents' argument therefore involves the proposition that the compromise set out in the Newey Order was intended by the parties to contain a waiver of Caldero's existing contractual right. It is clear that there is no express waiver, either specifically directed to the obligation to pay up the shares or expressed generally in language such as "full and final settlement of all claims or demands existing between the parties". All the submissions which Mr Draper skilfully deployed to resist Mr Hollington's alternative submission that an obligation to pay up the shares should be implied into the compromise, an implication which I would be inclined to reject, apply with equal force against any idea that the compromise implicitly waived Caldero's contractual right.

31. The reference in paragraph 1 of schedule 1 to the Newey Order to Caldero's shares being "treated as paid up" does not in my judgment operate as a waiver of the respondents' contractual obligation to pay up the shares. The reason for the definition of the Shares in those terms was to require the valuer to value the shares on the basis that they were fully paid. Without that assumption, the valuer would have to take account of the fact that Leibson as purchaser of the shares would be contingently liable to pay up the shares once they were registered in its name. This would presumably reduce their value by £87,501. There are only two rational bases on which Leibson as purchaser would agree to pay a price for the shares which was determined on an assumption that the shares were fully paid up, when in fact they were not. The first reason would be that they had agreed that Caldero was to bear the burden of paying up the shares. The respondents do not, however, contend that this was so, and there is nothing in the Newey Order or elsewhere to support such an obligation. The other explanation is that it remained the obligation of the respondents to pay up the shares. Far from supporting the position of the respondents, it appears to me that the reference to treating Caldero shares as fully paid supports Caldero's submission that the compromise was not intended to affect the existing obligation of the respondents in this respect.

32. It was Mr Draper's submission that the effect of the compromise contained in the Newey Order, reflecting the intentions of the parties, was that the loss occasioned by a call on the shares would as between them lie where it fell. If a call was made, as in fact it was, before the transfer of the shares to Leibson, Caldero would be liable to pay the call and thereby avoid a forfeiture of the shares. If, on the other hand, a call was

not made until after the transfer of the shares to Leibson, the liability would fall on Leibson. I am bound to say that this strikes me as a commercially improbable agreement. If parties are negotiating the sale of partly or nil paid shares, they would wish to decide who was to be responsible for paying up the shares, as it goes directly to the value of the shares.

33. The correspondence preceding the agreement of the Newey Order does not, in my judgment, support the respondents' position. The letter dated 12 July 2012 from Caldero's solicitors from which I have earlier quoted clearly separates the Leibson Offer from the respondents' obligation to pay up the shares and seeks assurance that the respondents will be able to pay the sums due in respect of each. Nothing in the reply from the respondents' solicitors, which does not in fact refer expressly to the obligation to pay up Caldero's shares, suggests that such obligation was to be wrapped up in the Leibson Offer and effectively waived.

34. Nor, in my judgment, does the offer of an undertaking to pay up the shares contained in the respondents' skeleton argument assist the respondents. The undertaking was not offered by way of contractual undertaking to Caldero. It was not needed, because Caldero already had the benefit of an acknowledged contractual obligation. The offer was of an undertaking *to the court* if "the C requires that as a condition of not making a winding up order." I have earlier explained the reason for that offer of an undertaking to the court, as confirmed by paragraphs 29 and 30 of the skeleton. This is not therefore a case in which there had been an offer by the respondents of a contractual undertaking, so making the absence of any contractual obligation in the compromise agreement a telling feature in its favour.

35. I do not consider that the respondents can obtain any support from the principles discussed in *Johnson v Gore Wood & Co*. Put shortly, the principle is that it may, depending entirely on the precise circumstances, be an abuse of process for a claim which could have been but was not brought in one set of proceedings to be brought in a subsequent set of proceedings. I do not see how this principle can apply where, as here, the matter in question is an admitted contractual obligation. Proceedings are brought in order to establish and enforce rights. Proceedings were not required in order to establish Caldero's contractual right against the respondents because it was acknowledged. Proceedings might have been necessary if the respondents, although having admitted the obligation, refused to perform it. But there was no suggestion by the respondents by the time of the Newey Order that they would not fulfil this obligation. Rather the reverse. Their skeleton argument dated only five days before the Newey Order and containing the offer of an undertaking to the court to perform the obligation confirmed not only the contractual obligation but the respondents' willingness to perform it. It would have been unnecessary and probably therefore improper for Caldero to bring a claim at that stage to establish or enforce its contractual right.

36. I would accept that where proceedings are settled on agreed terms of compromise, the court will approach issues of construction of the compromise agreement on the basis that the parties are likely to have sought to settle all matters in dispute between them. But, as I have explained, the matters in dispute between the parties in these proceedings were the alleged conduct by the respondents of the affairs of the company. There was no dispute about the separate matter of the obligation of the respondents to pay up the shares held by Caldero. In my judgment, Caldero's

contractual right in that respect was not waived or otherwise affected by the compromise agreement contained in the Newey Order. The respondents remained liable to pay up the shares if called upon to do so by Caldero while it remained the registered holder of the shares and therefore Caldero is entitled to be reimbursed by the respondents the sum of £87,501 which it paid in August 2012. I will accordingly order the respondents to pay that sum to Caldero.

37. There is a small procedural matter. There is no claim in the petition to recoup the sum of £87,501, but it was raised at the trial of the Investment Issue by Mr Hollington on behalf of Caldero and I gave directions in my order dated 31 July 2013 with a view to the resolution of that issue. There should, however, be an application before the court seeking that order and, as discussed with Mr Hollington in the course of the hearing, I will require Caldero to issue a pro forma application, if it has not already done so.