

Neutral citation number: [2019] EWHC 3725 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Greater Manchester
M60 9DJ

BEFORE:

HIS HONOUR JUDGE DAVID HODGE QC
Sitting as a Judge of the High Court

IN THE MATTER OF MFW DEVELOPMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

MRS ANNE MARIE COYNE
(Suing on behalf of herself and all other shareholders in
MFW Developments Limited other than the First Defendant)

CLAIMANT

- and -

(1) MR MICHAEL FRANCIS WALSH
(2) MFW DEVELOPMENTS LIMITED
(3) MS NAOMI WETTON

DEFENDANTS

Legal Representation

Ms Lisa Linklater (instructed by Myerson Solicitors LLP) appeared on behalf of the Claimant

The First Defendant did not appear and was not represented

Mr Richard Chapman QC (instructed by rally Solicitors LLP) appeared on behalf of the Second Defendant

Mr Mark Hague (Solicitor of Farleys Solicitors LLP) appeared on behalf of the Proposed Third Defendant

Approved Judgment

Judgment date: 5 December 2019
Transcribed from 12:22:02 until 13:18:34

Reporting Restrictions Applied: No

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Judge David Hodge QC:

1. This is my extempore judgment in the matter of MFW Developments Limited. Claim number BL-2019-MAN-000055. This is the adjourned hearing of an application issued on 20 June 2019 by the sole Applicant, Mrs Anne Marie Coyne (suing on behalf of herself and the other shareholder in the company, apart from the First Defendant, Mr Michael Francis Walsh) to bring a derivative claim on behalf of the company, MFW Developments Limited, against Mr Walsh, as its sole director and 68% shareholder, for breach of his director's duties to the company.
2. The claim form itself was issued on the day prior to the application notice, 19 June 2019. The Claimant is represented by Ms Lisa Linklater (of counsel). The First Defendant, Mr Walsh, has not attended Court. The Second Defendant is the company itself, MFW Developments Limited, and it is represented by Mr Richard Chapman QC.
3. Mr Chapman is conscious that he is representing the company and not Mr Walsh, but his position is a somewhat difficult one because the company acts by Mr Walsh, who is the direct defendant to the proposed derivative claim. There is a proposed Third Defendant to that claim, Ms Naomi Wetton, who was the Company Secretary and also the personal partner of Mr Walsh, although relations between them have now irrevocably broken down. Indeed, subsequent to the issue of the present proceedings by Mrs Coyne, the company, at the direction of Mr Walsh, had issued its own claim against Ms Wetton seeking the recovery of sums of £133,191 and £53,630 under claim number BL-2019-MAN-000073. That claim was issued on 8 August 2019.
4. It is said that, in breach of her fiduciary duties to the company, Ms Wetton misappropriated those sums. In a witness statement from the solicitor acting for the Second Defendant, Mr Allan Kornbluth, dated 2 December 2019, at paragraph 6, it is acknowledged that the proposed derivative claim and the pending claim against Ms Wetton are closely linked.
5. According to paragraph 18 of the sixth witness statement of the Claimant's solicitor, Mr Adam Maher, dated 21 November 2019, it has been admitted by Ms Wetton, in her defence to the claim against her, that she received certain monies belonging to the company into her personal bank account, but she maintains that any administration by her of monies belonging to the company was carried out with the full knowledge of Mr Walsh, and at all times at his direction as the sole director of the company. In other words, Mr Walsh is advancing a claim on behalf of the company in those proceedings which Ms Wetton says is manifestly ill-founded because it was he who was responsible for her receiving the monies in question, and she had applied them in accordance with his directions. The respective positions of the company, acting by Mr Walsh, and of Ms Wetton in those proceedings is effectively what, in another jurisdiction, would be known as a cut-throat pair of positions.
6. There is now a considerable body of evidence before the Court. At a relatively early stage in the proceedings, on 24 July 2019, HHJ Stephen Davies, sitting as a judge of the High Court, ordered the joinder of the Second Defendant to the application for permission to continue with the derivative claim, and he gave directions as to

evidence. The matter came back before HHJ Davies on 14 August 2019, when Judge Davies made two orders. One adjourned the application for permission to bring the derivative claim, and directed the provision of further information and documents from the Defendants, and gave further procedural directions. And the other order granted proprietary injunctive relief preventing the use or disposal of the sale proceeds of a property said to belong to the company, 4 Holmefield, Sale other than in the ordinary course of the Second Defendant's business.

7. As a result of Judge Davies's order, further documentation has been supplied by the Second Defendant Company, and that has led to proposed amended Particulars of Claim which set out the nature of the derivative claim sought to be brought on behalf of the company against Mr Walsh in rather more detail.
8. In addition, a derivative claim is now sought to be brought as part of that claim, against Ms Wetton. Ms Wetton is represented by Farleys Solicitors and their Mr Hague is present in Court on her behalf today. As between the Claimant and Ms Wetton, a Consent Order has been negotiated whereby Ms Wetton is to be joined as a Defendant to the proposed derivative claim. The derivative claim is to be consolidated with the existing claim by the company against Ms Wetton, and the latter proceedings are to be stayed, with Ms Wetton's costs incurred to date in respect of her defence to the related proceedings being subject to submissions, should permission to continue the derivative claim be granted, at the next costs and case management conference in the present proceedings. That has been agreed between the Claimant and Ms Wetton. The Defendants are of course not party to that agreement.
9. There is now, as I say, a considerable body of evidence before the Court. There is a first witness statement of the Claimant's solicitor, Mr Adam Maher, dated 16 May 2019 and a witness statement from Mrs Coyne of 13 June 2019. There is a fourth witness statement of Mr Maher dated 8 August 2019, and a witness statement from the First Defendant, Mr Michael Francis Walsh, of the same date. There is a sixth witness statement from Mr Maher dated 21 November 2019, and a witness statement from the Second Defendant's solicitor, Mr Allan Kornbluth, dated 2 December 2019.
10. In addition to the application notice issued on 20 June 2019, there is a further application by Mrs Coyne, apparently issued on either 20 or 21 November 2019, relating to the subject-matter of the proposed Consent Order, concerning the joinder of Ms Wetton and the stay of the existing proceedings against her.
11. I have heard submissions from Ms Linklater for Mrs Coyne, and from Mr Chapman QC for the Second Defendant. Both counsel had produced helpful written skeleton arguments which I had had the opportunity of pre-reading.
12. The procedural framework for the present application is to be found in Section 260 and following of the Companies Act 2006. The section governing the giving of permission to bring a derivative claim is Section 263 of the 2006 Act. Section 263(2) provides a mandatory bar on the grant of permission if the Court is satisfied of any of three matters there identified. None of those three matters are engaged in the present case.
13. Mr Chapman has expressly accepted that on the claim as now formulated, there is a prima facie case against Mr Walsh for misappropriation of company assets which

could, in principle, form the basis of a derivative claim. Section 263(3) sets out a number of matters to which the Court is required to have regard in considering whether to give permission to bring a derivative claim.

14. It is common ground that the matters identified in paragraphs (c), (d), and (e), have no relevance to the present application. I am therefore concerned solely with the matters identified in Section 263(3):

“(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with Section 172 (duty to promote the success of the company) would attach to continuing it”;

and:

“(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.”

15. Section 263(4) requires the Court::

“In considering whether to give permission . . . [to] have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.”

16. The company has three shareholders. Mrs Coyne as to 16%, Mr Walsh as to 68%, and their sister, Miss Julie Mee, as to the remaining 16%. The only evidence as to the views of Miss Mee is set out at paragraph 16 of Mr Walsh’s witness statement. There he says that Miss Mee has expressly disclaimed to him any part in these proceedings and has told him that she has no interest in this claim.
17. On inquiry of Ms Linklater, she told me on instructions, that Miss Mee was consulted at the start and had decided that she did not want to become actively involved in the claim. Ms Linklater referred to the costs that Mrs Coyne has incurred to date in bringing this matter forward, and the difficulty Mrs Coyne had experienced in obtaining a clear picture of what had been happening with regard to the company.
18. Ms Linklater pointed out that if permission were given to Mrs Coyne to bring the derivative action forward, that would avoid the need for any further action on Miss Mee’s part. Ms Linklater suggested that that would simplify the position. So, all the Court knows about Miss Mee is that she has sought to take no part in this litigation.
19. For the Second Defendant, Mr Chapman submits that permission to continue the derivative claim should be refused, particularly because the nature and context of the claim mean that an unfair prejudice position pursuant to Section 994 of the Companies Act 2006 would be a more appropriate form of relief.
20. In any event, he submits that permission to bring the derivative claim against Ms Wetton should be refused, as it is more appropriate for the company’s claim against

her to be pursued in the Wetton proceedings. There is said to be a costs and case management hearing scheduled in that litigation for February of next year.

21. Finally, to the extent that permission to continue a derivative claim were given, no indemnity for costs should be granted.
22. There is a clear link between the issues in the proposed derivative claim and those in the pending claim against Ms Wetton. That is recognised by the Second Defendant's own solicitor. Essentially, in the derivative claim it will be said that Mr Walsh has been guilty of misappropriating company assets, both sale proceeds of properties and rental income. Mr Walsh, acting on behalf of the company, has asserted that some of the monies sought to be recovered from him had in fact been paid over to Ms Wetton without any proper authority on his part, and that she is liable to account for them. Ms Wetton, by contrast, says that although she received company monies, that was at the direction of Mr Walsh.
23. In my judgment, it is clearly appropriate that all of those issues should be resolved together, and at the same time, and by the same judge. That will be more efficient and cost-effective, and it will avoid any risk of inconsistent outcomes.
24. I had been concerned by the delay in the company's institution of proceedings against Ms Wetton between May 2018, when what Mr Walsh says is her misconduct first came to his attention, and the 8 August 2019, when the present proceedings against Ms Wetton were issued.
25. I am told that that delay is attributable to pre-action correspondence. I am really in no position to go into that, but it is clear that proceedings against Ms Wetton were only instituted after Mrs Coyne had brought the present proceedings against Mr Walsh and the company.
26. Clearly, in view of the pleaded issues in the existing litigation against Ms Wetton, and, in particular, her Defence that she was acting at the behest of Mr Walsh, there are clear conflicts between Mr Walsh's personal position and his position as a director of the company. It would be difficult for Mr Walsh to bring an impartial mind to bear in terms of any settlement proposals, for example. But, in any event, what passed between Mr Walsh and Ms Wetton is clearly relevant to the allegations in the proposed derivative claim, which Mr Chapman rightly accepts give rise to a prima facie case to answer of misconduct on the part of Mr Walsh as a company director.
27. The principal objection by Mr Chapman to the giving of leave for a derivative claim, is that it would be more appropriate for the issues between Mr Walsh and Mrs Coyne to be resolved in unfair prejudice proceedings under Section 994 of the Companies Act 2006. He says that it is really a matter for Mrs Coyne as to whether she seeks to join Ms Wetton in those proceedings.
28. Ms Wetton is not of course a shareholder in the company, although it is said by the company, acting through Mr Walsh, that she has acted as a shadow director, in particular, during a period when Mr Walsh was suffering from mental illness.
29. I have been taken to a number of authorities, both by Ms Linklater and by Mr Chapman. I have been taken to the decision of HHJ Keyser QC in the case of *Re*

Iuvus Ltd, Hughes v Weiss [2012] EWHC 2363 (Ch). I have been taken to paragraph 33, paragraph 55, and paragraph 66. I was also taken to paragraphs 74 to 75.

30. I have been taken to the decision of the Court of Appeal in *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70, and, in particular, to paragraph 75 of the leading judgment of Patten LJ.
31. I was taken to the decision of Mr Nicholas Strauss QC in *Phillips v Fryer* [2013] BCC 176.
32. Mr Chapman took me briefly to paragraph 57 of the decision of Briggs J in the case of *Universal Project Management Services Ltd v Fort Gilkicker Ltd & Ors* [2013] EWHC 348 (Ch), [2013] Ch 551.
33. I was taken to the well-known decision of Lewison J in the case of *Iesini & Ors v Westrip Holdings Ltd & Ors* [2009] EWHC 2526 (Ch), [2010] BCC 420, in particular to paragraphs 75 and 81 to 83.
34. Mr Chapman referred me to paragraph 80 of the decision of Newey J in the case of *Kleanthous v Paphitis & Ors* [2011] EWHC 2287 (Ch), [2012] BCC 676.
35. Finally, I was taken to the decision of HHJ Cooke in the case of *Hook v Sumner* [2015] EWHC 3820 (Ch), [2016] BCC 220, at paragraphs 139 through to 143 on the issue of indemnity as to costs.
36. Mr Chapman recognises that there is a clear conflict between the positions of the company and Mr Walsh. He recognises that there is no easy answer to this application because there are difficulties with all potential outcomes and a number of variables.
37. He submitted that the Court should consider whether the best approach would be a derivative claim or whether the existing Wetton claim should proceed first and whether there should be an unfair prejudice petition which could be combined with the Wetton claim. He submitted that it was a matter of identifying the best option. Mr Chapman submitted that that was not to give permission for a derivative claim. He submitted that there is no necessary binary choice between an unfair prejudice petition and a derivative claim. This case involves an area of overlap between the two of them, giving rise to a more nuanced position.
38. He submits that the appropriate course is an unfair prejudice petition; but even if the Court were to allow the derivative claim to proceed, Mr Chapman submits that it would be so close to an unfair prejudice petition that it should not warrant a costs indemnity from the company.
39. Standing back, he says that this is very much more a Section 994 petition than a derivative claim. He acknowledges that, on the present application, the crucial battleground is the availability of an alternative remedy, and whether this is really a Section 994 case.
40. He points to passages at paragraphs 19 and 20 of the witness statement of Mrs Coyne, echoed at paragraph 46 of the first witness statement of Mr Maher, in support

of his submission that this is clearly, from the Claimant's perspective, a case of mismanagement on the part of Mr Walsh, rather than misconduct towards the company.

41. He accepts that reading the amended Particulars of Claim without regard to their background context, the case may seem like a standard breach of fiduciary duty claim; but he submits that when one scratches below the surface, rather more becomes apparent. He submits that the relief sought by the amended Particulars of Claim does not really strike at the heart of the dispute between the parties.
42. The reality is, that whatever the outcome of the proposed derivative claim, there will be a dispute over the division of funds between the three shareholders. He points out that there is no ongoing trading relationship that Mrs Coyne wishes to be a part of. As a trading entity, the company's life is at an end. There will have to be a distribution of the company's assets at some point, and the relief that is really called for should be directed to the basis for that distribution.
43. Mr Chapman emphasises that at the heart of this case is the fact that the company has liquidated all of its property assets and is no longer trading. That situation is said to be far more appropriate to the grant of relief by way of a Section 994 petition.
44. Mr Chapman also points to the fact that, as 68% shareholder of the company, Mr Walsh stands to receive back 68% of any recovery by way of derivative claim. As a result, it is appropriate to approach the matter from the viewpoint of a Section 994 petition rather than as a derivative claim.
45. On the issue of good faith, Mr Chapman submits that if the purpose of pursuing a derivative claim is really to obtain the benefit of a costs indemnity, then that is indicative of a lack of good faith.
46. So far as the existing Wetton claim is concerned, Mr Chapman submits that it is only superficially attractive to have them heard together. In proceedings brought by Mrs Coyne on behalf of the company, both Mr Walsh and Ms Wetton will be Defendants. If the existing claim against Ms Wetton continues, then the company, acting through Mr Walsh, will be pursuing Ms Wetton alone.
47. Mr Chapman points to the absence of any allegation of a lack of vigour on the part of Mr Walsh and the company in pursuing Ms Wetton. Mr Chapman accepts that there will inevitably be some form of proceedings against Mr Walsh, and that will lead to the need for discussions. Those proceedings will need to be case managed in conjunction with the existing Wetton claim; but he submits that a derivative claim would be even less appropriate as a vehicle for taking the matter forward.
48. So far as the continuation of the existing proprietary injunctions is concerned, since they exist for the benefit of the company, Mr Chapman accepted that it would be appropriate for them to remain in place. He suggested that an appropriate vehicle for that would be an undertaking from Mrs Coyne to present an unfair prejudice petition. In the meantime, those injunctions could continue on a pre-action basis.
49. He acknowledged that, from the perspective of the company, the proprietary injunctions needed to remain in place; but he submitted that there was a pragmatic way of keeping them alive.

50. In her brief reply, Ms Linklater emphasised that, in his oral submissions, there had been a remarkable lack of focus by Mr Chapman on Section 263(3)(b) of the 2006 Act, and the importance that a person acting in accordance with the duty to promote the success of the company would attach to pursuing a derivative claim.
51. Ms Linklater pointed out that rather than adopting a position of neutrality, the company had taken an adverse position with regard to the need to pursue a claim to recover assets which Mr Chapman accepted arguably had been misappropriated.
52. So far as the references to non-payment of dividends and exclusion from participation in the management of the company were concerned, Ms Linklater pointed out that at the time the witness statements had been prepared in support of the original application, very little had been known about what Mr Walsh had been doing. Despite exhaustive requests for information it was only as a result of the further information and documents directed to be produced by Judge Davies that gaps had been filled.
53. On the issue of good faith, Ms Linklater emphasised that Mrs Coyne is a retired midwife. She has had to expend considerable sums to date due to Mr Walsh's failures to engage in providing details about the company and its affairs and dealings.
54. She points out that, so far, the Second Defendant has been defending the application with the use of the company's assets. It has also been funding the litigation against Ms Wetton.
55. I accept Mr Chapman's submission that the crucial battleground on the present application is whether an unfair prejudice petition is a more appropriate way forward. In my judgment it is not, despite the references in the early witness statements to non-payment of dividends and other matters of mismanagement of the company. I am satisfied that what Mrs Coyne is really seeking are financial remedies on behalf of the company for alleged misfeasance on the part of its sole director, Mr Walsh.
56. She is seeking a remedy for misconduct rather than, as Mr Chapman suggests, relief from mismanagement of the company's affairs. I am satisfied that the proper way of achieving this is by a derivative claim, and not a Section 994 petition.
57. The proposed derivative claim, and the claim against Ms Wetton, are inextricably linked. It is impossible to separate the factual bases for both claims. They should be litigated together. I am satisfied that the most appropriate means of achieving this is by a derivative claim, directed both to Mr Walsh and Ms Wetton, so that the differences between their respective cases can be adjudicated upon.
58. I am also satisfied that it is more appropriate for litigation against Ms Wetton to be conducted by Mrs Coyne, with her impartial stance, than by Mr Walsh, who clearly has a conflict of interest. I am satisfied that the most pragmatic and efficient and cost-effective way forward is for the existing Wetton proceedings to be stayed - something Ms Wetton does not object to - and for Mrs Coyne to be given permission to pursue a claim against both Mr Walsh and Ms Wetton by way of derivative claim on behalf of the company.

59. I am satisfied that a person acting in accordance with a duty to promote the company's success would attach considerable weight to pursuing a claim against Mr Walsh in conjunction with the existing claim against Ms Wetton.
60. I am entirely satisfied that Mrs Coyne is acting in good faith in seeking to continue this claim. She may be hoping to do so with the benefit of an indemnity from the company's assets; but, in my judgment, that is entirely proper in circumstances where she is seeking to promote the best interests of the company of which she is a 16% shareholder.
61. I am satisfied that this is an appropriate case for the grant of an indemnity as to costs at least, as Ms Linklater suggests, up to the first costs and case management hearing, by which time the nature of Mr Walsh's defence to the derivative claim will be known.
62. In *Iesini & Ors v Westrip Holdings Ltd & Ors*, Lewison J expressed the view that:
- “If the court finds that a claim is being properly pursued for the benefit of the company, it should ordinarily order that the company should pay the costs of doing so.”**
63. Subsequent authorities make it clear that a more nuanced approach is called for. As Judge Cooke recognised at paragraph 139 of *Hook v Sumner*:
- “It is a matter of discretion for the court to be exercised in the light of all the circumstances of the case and not a universal rule that an indemnity as to costs should be provided.”**
64. Like Morgan J in the case of *Bhullar v Bhullar* [2015] EWHC 1943 (Ch), reported at [2016] BCC 134:
- “A court can be properly concerned that in a dispute between shareholders, an indemnity given by the company to one side or the other may give an unfair advantage to that side.”**
65. That was recognised by Judge Cooke at paragraph 139 of his judgment in *Hook v Sumner*. However, this is not a case where granting an indemnity would in any way prevent or delay the distribution of company assets to its shareholders. There is no suggestion by Mr Walsh that any such distribution is to be made.
66. The company is already funding the litigation against Ms Wetton; and it seems to me that it is merely a continuation of that state of affairs for the company to fund the proposed derivative claim against Mr Walsh, as well as Ms Wetton, which, in my judgment, is clearly necessary to sort out the true position between the competing parties.
67. Unlike Judge Cooke in *Hook v Sumner*, I do not consider that this is a relatively close decision as to whether a derivative claim or a shareholders' petition is the better course of pursuing matters. I do not consider that the grant of an indemnity as to costs from the company would be to confer on Mrs Coyne an unmeritorious advantage which she would not receive if she were to proceed by way of unfair prejudice petition.

68. I acknowledge that if there were a shareholders dispute litigated in that way, then both sides would be required to pay their own costs of that dispute. But Mrs Coyne is not pursuing such a dispute; she is seeking to recover monies on behalf of the company as to which there is a prima facie case of misappropriation.
69. I am not satisfied that an unfair prejudice petition will necessarily follow the outcome of the derivative claim. It seems to me far more likely that if the parties cannot come to terms, and cannot agree to proceed by way of a members voluntary liquidation, then the appropriate course, given that the company is no longer trading, would be the presentation of a contributory's petition to wind up the company on the basis that its substratum has ceased to exist, and it is therefore just and equitable for the company to be wound up, and for its assets, which are no longer being used in the way of its business, to be distributed between the shareholders.
70. So, for all of those reasons, I will give permission for the derivative claim to continue, and for there to be an indemnity as to costs up to the stage of the first costs and case management hearing. There is a draft order in the bundle. I will hear submissions as to the extent to which it is appropriate to make an order in those terms. In my version I think it is at divider 18. So that concludes this extemporary judgment.

This Transcript has been approved by the Judge.

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