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NEUTRAL CITATION: [2019] EWHC 377 (Ch)

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS C  
AND WALES  
INSOLVENCY AND COMPANIES LIST (ChD)



No. CR-2016-007340

Royal Courts of Justice

Tuesday, 5 February 2019

Before:

HIS HONOUR JUDGE PAUL MATTHEWS  
(Sitting as a Judge of the High Court)

B E T W E E N :

(1) LUCY JANE MCCALLUM-TOPPIN  
(2) JULIE BRYAN

Petitioners

- and -

(1) ALISTAIR BRUCE MCCALLUM-TOPPIN  
(2) ALLAN ANDREW MCCALLUM-TOPPIN  
(3) BERTHA ANNE MCCALLUM-TOPPIN  
(4) AMT COFFEE LIMITED

Respondents

MR N. DOUGHERTY and MS C. STAYNINGS (instructed by BDB Pitmans LLP) appeared on behalf of the Claimants.

MR T. ELIAS (instructed by Forsters LLP) appeared on behalf of the First Respondent.

MR M. MORRISON (instructed by Blake Morgan LLP) appeared on behalf of the Second Respondent.

MR T. WALKER (instructed by Freeths) appeared on behalf of the Third Respondent.

THE FOURTH RESPONDENT was not present and was not represented.

**J U D G M E N T**  
**(As approved)**

HHJ PAUL MATTHEWS:

- 1 I handed down my decision in the form of a written judgment with reasons on 29 January 2016 (under neutral citation [2019] EWHC 46 (Ch)), after the trial of this petition under s.994 of the Companies Act 2006. I held that the petitioners had established conduct unfairly prejudicial to their interests under three main headings. Firstly, I held that excessive remuneration had been paid to the respondent directors; secondly, that they had not formed the view in good faith not to pay dividends after a certain time and, thirdly, that the first and second respondents had maintained loan accounts with the company which had deprived the company of working capital and caused damage to its interests in a number of ways.
  
- 2 Having done that, I held over to today the question of the relief to be granted as a result of the petition having succeeded. So today we are considering the question of what order should be made. In my written judgment, I had expressed the view that it should be an order that the first and second respondents should buy the shares of the petitioners.
  
- 3 One the questions which has arisen in that context is the question of determining the price for the petitioners' shares. In my written judgment, in a passage ending at para.216, I had held that it was not a case in which a minority discount should be applied to the petitioners' shares. The question which has arisen this morning in relation to the determination of the price for the petitioners' shares is what to do about the question of excessive remuneration paid to directors which I had found proved at the trial.

4 The problem, however, which acutely arose at the trial was that, for reasons given in my written judgment, I had ruled that the expert evidence adduced (separately) on behalf of the petitioners, the first respondent and the second respondent was all, for different reasons, inadmissible. Therefore I took no account of that expert evidence in relation to the question of excessive remuneration. The question of excessive remuneration had been put forward fairly and squarely in the pleadings and in the statements of case. Allegations were made that the remuneration paid to the directors was excessive by reference to various criteria. However, as I say, I excluded from consideration the expert evidence on excessive remuneration but, nevertheless, reached the conclusion that there had been excessive remuneration.

5 As I mentioned in argument this morning, I proceeded on the basis that I was not required at that stage necessarily to identify the *amount* of excessive remuneration or, if I was, then I could not, because I did not have the evidence. But what I was at least required to do, and could do, was to say whether, on any reasonable view, the remuneration paid actually was excessive. It is, as I said in argument, a little like counting up grains of corn and deciding whether or not what you have in front of you amounts to a heap or not. There comes a point when you add a grain of corn to a grain of corn and another grain of corn and at a certain point it becomes large enough to be called a heap and beyond a certain point it must be possible, without knowing exactly when that change happens, to say that what you have in front of you clearly is or clearly is not a heap of corn: see *eg Wood v Wood* [1947] P 103, 106. So, in this way, I had reached the conclusion that the directors' remuneration in certain years was clearly excessive and that the petitioners' case, therefore, in establishing conduct unfairly prejudicial to that extent was demonstrated. What, of course, I did not do was to establish the *quantum* of that excessive remuneration.

6 The result is that today the petitioners say that there must be some mechanism put in place for the establishment of the amount of the excessive remuneration so that an effective remedy can be given to the petitioners in respect of that. I was referred to s.996 of the Companies Act 2006, subsection (1) of which says:

“If the court is satisfied that a petition under this Part is well-founded it may make such order as it thinks fit for giving relief in respect of the matters complained of.”

Then in subsection (2) various examples of orders which the court can make are given but, as it says, without prejudice to the generality of subsection 1. However, it is to be noted that the formulation of subsection (1) is that the court *may* make such order, not that it *must* do so.

7 So, the question is, can the court today order some kind of mechanism for establishing the excessive remuneration? What the petitioners have said is that one possibility would be for an expert determination to be made, and another would be for a kind of quantum trial, treating the first trial as a trial on liability only. It may be that a single joint expert could be instructed in order to give the relevant expert evidence of remuneration.

8 I was referred, in particular, to the decision of the Court of Appeal in *Re Tobian Properties Limited* [2013] 2 BCLC 567, where the Court of Appeal allowed an appeal from the judge, who had dismissed the petition under s.994. The position in that case was that the company was itself insolvent. Accordingly, as a result, the petitioner under the section was not concerned at that stage to seek to establish any *quantification* of excessive remuneration paid to a particular director, although it was the allegation of excessive remuneration that founded the petition for conduct unfairly prejudicial to his interests. The reason for this was that, unless it could be shown that enough would be recovered in the proceedings for the

company to pay its creditors, there would be no return to the shareholders and the petitioner would have no interest in proceeding further. So, in that case, what had happened was that there was a hearing essentially on liability only, with no attempt to have a hearing on quantum at the same time.

9 When the Court of Appeal reversed the judge on the question of whether there was conduct fairly unprejudicial, it had to decide what to do next. That court decided that it was right to order a quantum hearing. The the only judgment was given by Arden LJ, with whom Aikens LJ and Kitchin LJ agreed. In para.45 and following, Arden LJ said this:

“45. In this case, the judge was not engaged on the exercise of quantifying the value of Mr Maidment’s shares in *Tobian*, but of ascertaining whether there had been unfair prejudice. If *Tobian* had been solvent, the judge would not have had to quantify the amount of the excess remuneration. That quantification exercise would be done at the quantum hearing as a step in establishing the price payable under any buyout order.

46. Where, however, the company is insolvent, the court has to be flexible in its approach. This is because there is the complication that the petitioner may not be able to show that he obviously has some interest in the company meriting relief because his sole interest constitutes shares which at the moment of trial are valueless because no relief has yet been given in respect of the matters of which he complains. The court has to do what is necessary in that situation to achieve a just and fair result.

47. In this case, the right course in my judgment is for the judge to consider whether enough has been shown to justify a further hearing. Normally this will involve

showing a provisional case to an appropriate standard in the circumstances of the case. The appropriate standard will usually be a real prospect of success. The usual dividing line between the liability hearing and the quantum hearing is not set in stone.

48. In my judgment, there was a real prospect that the claim based on excessive remuneration could lead to the grant of relief even though Mr Maidment did not adduce expert evidence as to how Tobian's loss should be quantified at the liability trial. There were ample grounds on which the judge could reach the conclusion that Mr Attwood's remuneration was out of the norm for this particular company, and in that sense (if no other) that the remuneration was excessive. The judge did not need to make a finding at that stage as to the amount of remuneration that could properly have been paid. It was sufficient for him to conclude, as he would have been bound to do, that there was a real prospect that the claim for loss would exceed the amount of Tobian's deficiency as regards creditors.

49. In these circumstances, in my judgment, the judge could properly remit to the quantum hearing any issue from the liability trial that was more conveniently dealt with at the further hearing provided that it was not procedurally unfair to either party to do so. He would hear their submissions on this as we have done. In my judgment, in the circumstances of this case it was just and convenient to remit the issue of the quantification of the element of Mr Attwood's remuneration which was excessive to the quantum hearing even though it went to the issue of unfair prejudice which would normally be wholly dealt with at the liability trial. Dismissal of the petition deprived Mr Maidment of the opportunity of showing that the excess was sufficient to "plug the hole" resulting from Tobian's insolvency. It deprived him of access to justice in that respect. Mr Attwood is put to the cost of a further hearing

but he could have had no expectation that all the issues in the case would be dealt with at a single hearing: there had been no order to that effect. Newey J had made an interim order that share valuation evidence should be adduced at the quantum hearing but I give little weight to that as he was working on the basis of the usual dividing line between the liability hearing and the quantum hearing. Procedural fairness, therefore, supported remittal of the issue to a quantum hearing.”

So, there, Arden LJ emphasises the particular circumstances of the case. I will come back to that.

10 Now, the first and second respondents, who are most affected by this, say first of all that para.214 to para.216 of my judgment are, in fact, conclusive of the question of the remedy which should be given to the petitioners in this case. In those paragraphs, which form the concluding paragraphs of a section beginning at 194 with the cross-heading “Basis of share purchase: discount or not?”, I was dealing with the question whether a minority holding discount should be applied in the valuation of the petitioners’ shares. As I say, the first and second respondents rely on my conclusion at para.214 to para.216 as saying that I there decided that the remedy which should be given for the conduct unfairly prejudicial which I have found to exist in my judgment should be simply the valuation of the shares of the petitioners on a 100 per cent basis and not with a minority holding discount applied. They refer in particular to the fact that in para.214 I say:

“In all the circumstances of this case, in my judgment, there are good reasons for saying that sale and purchase should be without any discount for minority.”

11 I go on, then, to refer to the decision in *Re McCarthy Surfacing Ltd* [2009] 1 BCLC 622 and say that I did not think that that was appropriate for this case. In para.216 I said:

“However, in the present case I consider that that is not enough. The conduct unfairly prejudicial in this case is not just a failure to consider whether to declare dividends, but also encompasses excessive directors’ remuneration and extensive use of directors’ loan accounts, amounting to a total exclusion of the estate (which did not have an independent director to represent it) from benefiting from its shareholding. A sale at a discounted value would present an undeserved windfall to the purchasing respondents. Now this Company, like all companies limited by shares, belonged to its shareholders. In these circumstances, I consider that nothing less than a sale and purchase of the shares at an undiscounted valuation will do justice, and amount to a ‘fair price’.”

12 I do not accept, however, that in these paragraphs, or in this part of my judgment, I was intending to state that the entire remedy that should be awarded was simply to remove the possibility of a discount for a minority shareholding. For one thing, in relation at least to the question of the impact of the directors’ loans, it was clear from the hearing before me, on Day 11 of this case, that I had in mind there would be a further hearing in order to deal with that aspect of the case and that, therefore, I could not in this part of my judgment have been meaning to shut out any question of valuation of the impact of the directors’ loan accounts. I find it difficult to project myself back in time so as to be able to say exactly what was going through my mind in writing these paragraphs, but I am sure that I did not intend to reach the conclusion that the only remedy that was to be given to the petitioners in respect of the impact of the excessive remuneration was to remove the question of minority holding discount. So, I reject the first submission made by the first and second respondents.

13 The second point is a separate one. It is that the petitioners put forward a case on the quantum of the excessive remuneration at the trial, supported what they hoped would be



appropriate expert evidence to demonstrate that. Unfortunately for them, I decided that all the expert evidence was inadmissible. The consequence was that, although I was in a position to say that there clearly was excessive remuneration in a number of years, I was not in a position to say exactly how much that excessive remuneration amounted to.

Accordingly, the petitioners have had an opportunity to make this case and they have not succeeded. So, say the respondents, they should not be allowed a second bite at the cherry. It is a case which moves into what we might call *Henderson v Henderson* territory, after the case of the same name: that is that it is an abuse of process to allow a party who has had an opportunity to put forward a case and lost to have another opportunity to put it forward again.

- 14 *Tobian* was submitted to me by the respondents to be the case of an insolvent company, where there was no point in having expert evidence on the quantum of any excessive remuneration until it was clear that the petition was well-founded and that there was at least a reasonable prospect of a recovery which would put the company back in the black and give some form of return to the members. As I have said, Arden LJ emphasises at a number of points in her judgment the particular facts of that case and the need to ensure that it would be procedurally fair to have the quantum hearing on a second opportunity after the trial of the petition on liability has been concluded.
- 15 In my judgment, this case is not *Tobian*. The company, for one thing, is not insolvent. But, more importantly, the petitioners did seek to prove not only the fact, but also the quantum of the excessive remuneration at trial. In this they were unsuccessful. In my judgment, it would be procedurally unfair to allow a second attempt at this stage. The petitioners have had the full opportunity to, and did, put forward the evidence which they wished to rely on. Unfortunately for them, it failed because of the legal consequences of inadmissibility.

16 So, in my judgment, it is not going to be possible, in the present case, to hold a quantum hearing in relation to the excessive remuneration issue. I make clear that this does not affect the question of the impact of the loan accounts, in relation to which, as I have said earlier, I was taken to passages in the transcript of the hearing on Day 11 which showed that I envisaged at that stage that there would probably have to be a second hearing in order to deal with that question.

### LATER

17 I have to decide the question of the valuation date for the purposes of the exercise that will have to be carried out in order for the value to be fixed for the purchase of the petitioners' shares. On behalf of the petitioners, Mr Dougherty accepts that *prima facie* the shares should be valued at a date as close as possible to the actual sale so as to reflect the value that is being sold. He refers me to *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031. But he argues that, nevertheless, in the present case, there were considerations that suggested that it would be fairer to select an earlier date. In his submission that was the end of the period for which the last audited accounts are available. This is the end of December 2017, accounts for which were produced after the trial had concluded. These are audited accounts. They therefore amount to accounts on which some reliance can be placed. It gives everyone, not just the valuer but all the parties, certainty at a lower cost if the valuation is produced as at a date for which there exist audited accounts.

18 The first and second respondents (the third respondent not being concerned with this), say that there is nothing special about this company or, indeed, this case, and that the starting point is that you value the company as at the date of judgment for the reason given in the *Profinance Trust* case. There is no good reason, therefore, in the present case for picking any different date. I infer from the preference expressed by the respondents for the judgment date or a date very close to it, rather than a date at the end of 2017, that the value

of the company is likely to have declined in the interval. Otherwise, it would not make sense for the respondents to argue for a later date. Of course, the respondents are in control of the company so they would be aware in general terms of the fortunes of the company, even though the accounts are not yet prepared, so there is a practical reason why it matters what the valuation date is in this case.

- 19 I note that, in the skeleton argument presented for the petitioners, Mr Dougherty and Ms Staynings have put forward three main considerations to demonstrate that the end of 2017 should be the valuation date. They refer to the relatively settled position in the 2017 accounts, supported by the auditing to which I have already referred. They refer to the complexities of the exercise in trying to identify appropriate levels of gross remuneration and the position over time in relation to loan accounts for 2018 - it may be necessary to make further findings - and, thirdly, I think less importantly, they refer to cost saving reasons that would favour picking the company's accounting date rather than simply selecting a date which would go a few weeks into the next accounting year.
- 20 However, as it seems to me, the starting point is that you value the shares as at the date of the judgment because it is closest to the date on which the sale will actually take place and you have to value it before the sale takes place because, otherwise, you do not know how much money you are going to be putting forward on that date so any change to that, moving it backwards in time to a period which is not the closest date possible to the actual sale, risks producing a value which is unreal. The practical consequence of that can be illustrated by an example given by Mr Elias during the argument. This is the example of a third-party buyer who comes out of the woodwork at the eleventh hour and offers to buy the company. That buyer, of course, will offer to buy it at a value as at today and not at a value as at December 2017, in which case there is a mismatch between what the order produces as a

value and what the market produces and that seems to me to be an oddity which ought to be avoided if possible.

21 The question is, is it sufficient to justify moving the valuation date back that it will be or it may be easier and less expensive to pick a date at the end of a period covered by audited accounts, than to go into an exercise that will produce a more up-to-date figure, particularly where, as I infer, there has been some change to the value of the company in the meantime? Not without some reluctance, I reach the conclusion that there is no sufficiently good reason for departing from the general rule that it should be at the date of judgment in order to be as close as possible to the actual sale. I do not consider that the matters urged on me by Mr Dougherty are sufficient on the facts of this case to justify departing from that general principle. It seems to me that if I were to be prepared to depart in this case, it would be a departure that should be followed in many other cases too, to the extent that, as I think Nourse J said in *Re London School of Electronics Ltd* [1986] Ch 211, there would be so many exceptions that you would end up with no rule at all. For those reasons, I will order that the valuation date be the date of judgment.

## **LATER**

22 Mr Dougherty wishes the order to contain provision for the ascertainment of the remuneration drawn by the first two respondents in the period 2017 to the date of judgment and then for there to be a procedure to determine whether any of that remuneration was excessive and, if so, by how much. This is separate from the issue which I have already decided relating to the expert evidence that was adduced for the period up to 2016 in the trial. That is because it would not have been possible for the petitioners to adduce any expert evidence in relation to 2017 to 2019, as the information available at the time would not permit it. However, this is a further point which would otherwise have to be determined and

the question is whether, as the respondents say, it would be time consuming and so expensive proportionate to the value of it that it should not be entertained at all or whether, as Mr Dougherty says, the petitioners are entitled to it and, in the usual way, if it turns out to be a disproportionately expensive exercise, the parties can protect themselves.

23 In my judgment, Mr Dougherty is right. This is a point which has not been decided. It was not part of the argument that we heard earlier and I think that the petitioners are entitled, if they wish, to have this point determined and the question therefore is: how should it be determined? It seems to me that there must be some way of certifying the remuneration and pension contributions from the beginning of 2017 through to the date of judgment so that there is no need to adduce formal evidence of it. Whether this is the company's auditors or some other officers of the company who do this or who make a witness statement, at the moment I am not particularly fussed about. I cannot see it being a big issue.

24 The more difficult question is how is the process to go forward once that information is obtained. The two main candidates are that the court makes the determination on the basis of some evidence being put forward by the parties, preferably by a single joint expert, or that the expert makes a determination of this issue which would be a rather quicker and hopefully less expensive exercise. Given that the values involved seem to be quite modest compared to the values that might otherwise be involved, I will direct that the appropriate way forward is for this to be the subject of an expert determination rather than a court process. I do not shrink from making the decision myself, but it seems to me that the needs of the litigation are for a much more modest process than would otherwise have been the case.

**LATER**

- 25 The question now for the court is whether, when the expert acts as an expert and not as an arbitrator so that his decision is binding, save in the event of fraud, bias or manifest and material error (which is what I understand the current law to be), nevertheless, he ought to give reasons for his decision and, indeed, in the way it is drafted here adequate reasons but leave it as reasons for the moment. Mr Dougherty says that this is a bad idea because it will lengthen the process and it will create the risk of uncertainty if he gives more information on the basis of which one party or another decides to attempt to challenge the decision.
- 26 I am sorry to say that, having seen the way in which the parties to this litigation have carried on their relations together (I mean the lay clients, not the lawyers), I think it is very likely that whichever party is dissatisfied would seek to challenge the decision one way or another. I am loth to put any kind of weapon into the hands of a party that does not need to be there, and I am fortified in seeing that Lord Hoffmann, evidently, was of the same view in *O'Neill v Phillips* [1999] 1 WLR 1092, HL. Notwithstanding the obvious attractions of providing information to enable the exceptions to the binding nature of the determination to be vindicated which Mr Morrison has urged on me, I think the better course is not to require reasons to be given.

### **LATER**

- 27 Mr Dougherty does not invite me to adjudicate on the application which previously he intended to make for a revision of his costs budget, but he asks whether I would in some way make a reference to certain factual matters which he says may assist the costs judge on a detailed assessment. I assume that he is thinking of the jurisdiction of the court under CPR rule 3.15(4), which says that, whether or not the court makes a costs management order, it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment

proceedings. This is so that ,even though the court is not actually pronouncing on the budget, it is nevertheless saying things that it thinks may be helpful to the court which assesses the costs.

28 These matters, subject to one point about an assumption in the second of the five matters and subject to a question as to how substantial “substantial” really is in (4), are all purely factual matters. So far as I can see, they are accurate as far as they go, but I am not persuaded it would be right for me to use the pulpit of the bench in order to inform the costs judge of them, because it might give the appearance of seeking to influence the costs judge in deciding whether or not it was justified to assess costs for the petitioners (if that be the case) which exceeded their costs budget. That is a matter which the costs judge will have to deal with at the time and, in circumstances when, as far I can see, all of these matters may well be urged in favour of so allowing. So I will not say anything further in relation to this point.

### **LATER**

29 Mr Dougherty applies for the petitioners’ costs against all three respondents jointly and severally. The general rule is that costs are in the discretion of the court but that if the court decides in its discretion to make a costs order, then the general rule is that costs will follow the event. That is to say that the costs of the successful party will be paid by the unsuccessful party. In a case with more than two parties, that becomes a bit more complicated, so the first point that I have to consider is who is or who are the successful party or parties.

30 I think there is no question but that the petitioners have been successful in their petition. It does not mean they succeeded on every point, but they substantively succeeded and,

therefore, they count as the successful party. In principle, therefore, if the court decides to make an order, the general rule should be that their costs should be paid. But there is also a question about the third respondent, Anna, if I may so term her without disrespect, who claims also to be the successful party, in that, in the result, no relief has been ordered against her. That is quite true. It is very tempting, therefore, to see Anna as a successful party in that respect. She is not quite as successful as all that because, of course, she has defended the claim on the basis that allegations of breach of duty and so on were denied, yet I have found in some respects that there were such breaches of duty, that wrongs were done. It is simply that, as a matter of deciding what is the best relief to grant, I have not ordered it as against her, in part because, as Mr Dougherty said, she has indicated her intention of wishing to transfer her share and of wishing to exit the company as soon as she can.

31 The question, however, remains: is she to be treated as a successful or an unsuccessful party? It seems to me that, on the whole, she is an unsuccessful party. But, even if she is a successful party, then I think there are good reasons within the meaning of the costs rules for making a different order than awarding her her costs. I was taken in relation to her to certain correspondence which showed that, not long after her solicitors had been instructed they wrote, if I may say so, a very sensible letter for the time in which proposals were put forward which, if they had been taken forward by the other respondents, might have actually produced a settlement of the whole matter. That did not happen. However, that letter was put forward by the solicitors for the third respondent in October 2016, shortly before the petition was presented, and I think that I should give some credit for that approach being taken and, indeed, reflect also the fact that, even if it were at a late stage, the third respondent, Anna, has sought to exit the company and, as found by me in my judgment, has not borne the same degree of responsibility as the first and second respondents for what has happened. It seems to me that I should give credit to this extent at least, that so far as Anna is concerned, it does not seem right that she should be jointly and severally responsible to



the petitioners. I will therefore order her to pay costs only insofar as they were incurred by the petitioners as against her.

32 In relation to the first respondent, Alistair, Mr Elias properly accepted that, in principle, as far as his client was concerned, he was unsuccessful. But he said that there were letters, communications, which showed that the court should make a different order from the general order. The problem with the letters to which he took me was that at no point was there any binding commitment to acquire the estate's shares, whereas the order which the petitioners have obtained is one that they will have their shares bought. Accordingly, Alistair's position is not strong enough in my judgment to justify a different order from the norm and, therefore, as far as Alistair is concerned, I will order him to pay the petitioners' costs.

33 Turning then to the second respondent, Allan, his position is slightly stronger. But the main letter on which reliance is placed, that is the letter at p.115 of bundle E1, does not propose an unconditional purchase of the shares. Instead it requires further agreement to be reached on a deferred payment plan. The position now is that the petitioners have obtained an order that will require the first two respondents to purchase their shares. There is no conditionality in it at all. If through impecuniosity or for any other reason the money is not available, that is a different matter, but that is not what was being offered by the second defendant at that time.

34 In my judgment, there is no justification for the court in relation to the first and second respondents taking other than the ordinary course of ordering the unsuccessful parties to pay the costs of the successful. That is the petitioners. As between themselves, the First and Second Respondents will be jointly and severally responsible for all the costs of the

proceedings and, as I have already said, Anna will be singly responsible, not jointly and severally, in relation to the costs that were incurred in proceedings as against her.

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