Neutral Citation Number: [2021] EWHC 2504 (Ch)

Case No: CR-2019-005233

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

In the Matter of Motion Picture Capital Limited (Company No. 07676259)
And in the Matter of the Companies Act 2006

Date: 17 September 2021

Before :

Deputy ICC Judge Kyriakides

- -

Between :

Leon Alexander Clarance	**Petitioner**
- and -	
(1) Deepak Nayar	**Respondents**
(2) Reliance Big Entertainment (U.S.) Inc.	
(3) Motion Picture Capital Limited	

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The Petitioner in person
Oliver Phillips (instructed by **Vyman Solicitors Limited**) for the **First and Second Respondents**

Hearing date: 2 July 2021

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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.

Deputy ICC Judge Kyriakides:

1. This is the hearing of a preliminary issue ordered by ICC Judge Burton on 24 November 2020 at the first case management conference of a petition presented on 26 July 2019 ("**the Petition**") pursuant to section 994 of the Companies Act 2006 ("**CA**") by Leon Alexander Clarance ("**Mr Clarance**").

2. The preliminary issue ordered by the court is as follows:

> "*whether following the appropriation on 17 November 2020 by Motion Picture Capital Limited ("**the Company**") of the shares held by Mr Clarance in the share capital of the Company, Mr Clarance remains a shareholder of the Company and whether consequent thereon he remains entitled to pursue the Petition*".

Background

The Company

3. The Company was incorporated on 21 June 2011 as a private company limited by shares. At all material times, it has had an issued share capital of £102 divided into three classes of shares as follows: (i) 65 A shares of £1.00 each, all of which are held by Reliance Big Entertainment (U.S.) Inc., the Second Respondent ("**Reliance**"); (ii) 35 B shares of £1.00 each, 15 of which are held by Deepek Nayar, the First Respondent ("**Mr Nayar**") and 20 of which were, at least until 18 November 2020, held by Mr Clarance, but which are now held by Reliance and Mr Nayar as nominees for the Company ("**Shares**"); and (iii) 2 C shares of £1.00 each, which are held by Reliance. The relationship between the parties was governed by the Articles of Association of the Company ("**the Articles**") and a written shareholders' agreement dated 4 August 2011 made between Mr Clarance, Reliance, Mr Nayar and the Company ("**SHA**"). Mr Nayar and Reliance are together referred to in this judgment as the "**Respondent Shareholders**".

4. At all material times, the Company's principal business has been the provision of services for film and television series development and production. Its primary income is derived from production fees and royalty payments. Mr Clarance, who is a qualified chartered accountant, was the chief executive officer of the Company until April 2017, when his employment was terminated, and a director of the Company until May 2017, when he was removed from office. From May 2017 until September 2017 the sole director of the

Company was Mr Nayar. In September 2017 Shibasish Sarkar ("**Mr Sarkar**"), who is the nominee director of Reliance, was appointed as a director and from that point onwards the directors have been, and continue to be, Mr Nayar and Mr Sarkar.

The Petition

5. The Petition was commenced by way of a Part 7 Claim in the County Court of Bath in January 2019 with a petition accompanying it. Both documents named the Company as the sole Respondent. The proceedings were then transferred to this court with Mr Clarance serving the Petition in July 2019 and naming Mr Nayar, Reliance and the Company as respondents. ICC Judge Jones in his revised judgment dated 7 February 2020 decided to treat the Petition as the appropriate statement of case and thereby waived the earlier procedural defects.

6. The allegations of unfair prejudice in the Petition may be summarised as follows:

6.1. in breach of the SHA and Mr Nayar's duties as a director, the Respondent Shareholders, without any commercial justification, caused the Company's shareholding in its subsidiary, Georgeville Television LLC, which had secured an order from Netflix for ten episodes of a series called "Sense 8", to be transferred for a nil consideration to a company in the Reliance Group, and then for the income entitlement, which would have otherwise have gone to the Company, to be diverted from the Company and used to finance films produced by Mr Nayar's own companies;

6.2. in breach of the SHA and Mr Nayar's duties as a director, the Respondent Shareholders diverted business opportunities from the Company. By way of example:

6.2.1. in September 2016 Mr Nayar instructed Mr Clarance to withdraw the Company from its negotiations concerning the financing of the film "Windriver", only later to discover that the purpose was to allow Riverstone Pictures, a competitor company, which Mr Nayar had spent considerable time and resource developing, to secure the contract for itself and thereby to receive the benefits of financing what turned out to be a very successful film to the detriment of the Company;

6.2.2. after Mr Clarance had ceased to be a director of the Company, the Company was used to finance two films, "The Corrupted" and "Tell it to the Bees", but in such a way that all benefit deriving from the projects went to Riverstone Pictures;

6.2.3. the Company's opportunity to finance the music soundtrack for "The Corrupted", pursuant to a joint venture the Company had entered into with Cutting Edge Group, was diverted to Atlantic Screen Music Ltd, a company co-owned by Mr Nayar, and the Company cancelled its ventures with Cutting Edge Group and Hammer Films for no discernible reason other than the fact that Mr Clarance had initiated those ventures on behalf of the Company;

6.3. in breach of the SHA, in 2014 and 2015 Mr Nayar reduced the extent of Mr Clarance's day-to-day operational control of the Company, which led to a complete breakdown of the relationship between Mr Nayar and Mr Clarance;

6.4. in April 2017 and May 2017, in breach of the SHA, the Respondent Shareholders wrongfully excluded Mr Clarance from being, respectively, the CEO and a director of the Company;

6.5. the Respondent Shareholders significantly diluted the business of the Company by making the entirety of the Company's business development team redundant;

6.6. in breach of the SHA, the Respondent Shareholders have unreasonably refused to permit Mr Clarance to appoint his own nominee director to the board of directors;

6.7. in breach of the SHA, Mr Nayar and Reliance have refused to provide to Mr Clarance information which he is entitled to receive;

6.8. the Respondent Shareholders have used Company funds to pay their personal legal costs; and

6.9. finally, Mr Clarance seeks to draw adverse inferences from the incorporation of MPC Factoring Services Ltd and the refusal by the Respondent Shareholders to provide any information regarding its purpose.

7. Mr Clarance alleges that these acts have led to a breakdown of trust and confidence and to a substantial diminution in the value of his Shares. In his Petition, he claims that his Shares have a substantial value. In support of this, he relies upon the fact that during negotiations in 2016 for the purchase by him of the Respondent Shareholders' shares, the latter made a counter-offer, which valued the Company in a sum in excess of US$25 million, and, therefore, Mr Clarance's interest at about US$5 million.

8. On 7 November 2019 the Respondent Shareholders applied to strike out the Petition and/or for the court to grant reverse summary judgment on the grounds that the Petition disclosed no reasonable cause of action and/or was an abuse of process and/or because there was no real prospect of the Petition succeeding.

9. Save in one limited respect, the application was dismissed by ICC Judge Jones. In his judgment dated 7 February 2020 (*Clarance v Nayar* [2020] EWHC 143 (Ch), he stated at [64] as follows:

> "*(1) There is no doubt that the matters alleged in the Petition, the subject of a statement of truth, overall produce on their face an unfair prejudice claim with real prospects of success, if read on their own.*
>
> *(2) Success in full would mean that the shares registered in Mr Clarance's name will have to be purchased by the Applicants at a fair value without a minority discount. The valuation will add back the value of any compensation which ought to be credited as a result of the unfairly prejudicial conduct.*
>
> *(3) There is no professional valuation before me which values the shares accordingly. There is evidence of a valuation by the Applicants for the purpose of an offer of some US$25m in February 2016. There is also evidence of Mr Clarance's conclusions from that offer that his shares would be valued in excess of US$5m. The only professional valuation is of £100,000, but that does not add back loss of value. Indeed, there could be no professional valuation without adding back the findings of fact either having been agreed or determined by the court…"*

The circumstances leading to Mr Clarance giving a charge over his Shares in the Company

10. The Respondent Shareholders deny the allegations made by Mr Clarance in the Petition. Insofar as is relevant to this preliminary issue, they claim that Mr Clarance's dismissal as an employee and director of the Company is not unfairly prejudicial, but came about as a result of a discovery by them that he had transferred over US$2 million of investor funds to a bank account in the name of Cuckoo Lane LLP ("**Cuckoo Lane**"), a limited liability partnership of which Mr Clarance and his wife are the sole members. It is alleged by the Respondent Shareholders that Mr Clarance misappropriated those funds from the Company. The allegation is denied by Mr Clarance, who claims that the monies were transferred pursuant to rights he and/or Cuckoo Lane had pursuant to a contract with the Company. Where the truth lies in respect of this allegation is not an issue that I have to decide.

11. The dispute between the parties was settled by a settlement deed dated 30 August 2017 made between the Company, Cuckoo Lane and Mr Clarance ("**the Settlement Deed**"). It provided for the repayment by Cuckoo Lane of the sum of £2,450,612 in instalments commencing on 1 January 2018. The liabilities of Cuckoo Lane to the Company were guaranteed by Mr Clarance and various forms of security were given to the Company by both Cuckoo Lane and Mr Clarance. For the purposes of the preliminary issue, the only security that I need to consider is the Deed of Charge dated 30 August 2017 ("**the Charge**") pursuant to which Mr Clarance charged, inter alia, the Shares as security for Cuckoo Lane's and his liabilities under the Settlement Deed.

The relevant provisions of the Settlement Deed and the Charge

12. The relevant provisions of the Deed of Settlement are as follows:

    12.1. Clauses 3.1 and 9.1, which provide for the payment by Cuckoo Lane of the sum of £2,450,612 on the dates and in the amounts specified and for Mr Clarance to guarantee Cuckoo Lane's obligations;

    12.2. Clause 5.1.3 which provides for Mr Clarance to charge the Shares;

    12.3. Clause 5.2.3, which provides for Mr Clarance at the same time as executing the Settlement Deed, to execute and deliver to the Company the Charge and to deposit

with the Company, or as the Company might direct, all certificates and other documents of title or evidence of ownership of the Shares;

12.4. Clauses 12.2 and 13.1, which provide that if Cuckoo Lane fails to pay any sum due under the Settlement Deed when due, the Company could declare that the entire unpaid amount becomes due and that, inter alia, the Charge is enforceable.

13. The relevant provisions of the Charge are as follows:

13.1. Clause 4, which creates the charge over the Shares as security for the liabilities of Cuckoo Lane or Mr Clarance to the Company;

13.2. Clause 6.1.2, which provides that upon the execution of the Charge, Mr Clarance would promptly deliver to the Company a duly executed share transfer for the Shares (with the date left blank) in form and terms satisfactory to the Company and would after the Charge had become enforceable and after a written request from the Company, execute such other documents and take such further action as the Company might require, to enable it or its nominee or any purchaser to be registered as the owner of or otherwise acquire legal title to, inter alia, the Shares. The Company was not permitted to date any transfer until it had become enforceable;

13.3. Clause 7.1, which provides that after an Event of Default as defined in the Settlement Agreement, the Secured Liabilities would immediately become payable on demand and, inter alia, the Charge would become immediately enforceable;

13.4. Clause 7.2, which provides that after the Charge has become enforceable, the Company could at its discretion enforce all or any part of it in any manner it deemed fit;

13.5. Clauses 7.3, 7.4 and 8 which set out the power for the Company to sell the Shares and seek to exclude liability of the Company as a mortgagee in possession;

13.6. Clause 7.8.1, which permits the Company to make good any default by Mr Clarance of any of his obligations under the Charge;

13.7. Clause 7.9, which provides that, in relation to any powers conferred by the Charge, the Company was under no duty to exercise them;

13.8. Clause 9.6, which provides that if the Shares are "financial collateral" and the Charge is a "security financial collateral arrangement", then the Company would have the right, while the Charge was enforceable, to appropriate all or any part of the Shares in or towards payment or discharge of the Secured Liabilities, with the parties agreeing that the value of the Shares so appropriated should be their market value determined by the Company by reference to a public index, independent valuation or by such other process as the Company may select;

13.9. Clause 11, which sets out the order of priority for the payments upon any sale of the Shares;

13.10. Clause 15.1, which provides that Mr Clarance by way of security, irrevocably appointed, inter alia, the Company, to be his attorney and in his name, on his behalf and as his act and deed, among other things:

13.10.1. to take any action which Mr Clarance was obliged to take under the Charge, but failed to do so;

13.10.2. following the Charge becoming enforceable, to execute and complete any documents or instruments which the Company might require for perfecting the title of the Company to the Shares or for vesting the same in the Company, its nominees or any purchaser;

13.11. Clause 20.1, which enables the Company to exercise its powers under the Deed in its absolute discretion without giving any reasons.

Events subsequent to the execution of the Settlement Agreement and the Charge

14. No payments were made by Cuckoo Lane or Mr Clarance under the Deed of Settlement, following which a notice of default was sent to Mr Clarance on 13 January 2018 requesting payment in full by no later than midday on 16 January 2018.

15. Following the failure to pay the Settlement Debt by 16 January 2018, proceedings were commenced by the Company against Cuckoo Lane and Mr Clarance and on 12 February 2018 an order was made by Mr Justice Teare entering judgment in default in favour of the Company for the sum of £2,132,674.20 plus costs summarily assessed at £20,617 ("**the**

Judgment Debt"). Charging orders were subsequently obtained and registered against four properties in which Mr Clarance has an interest.

16. Neither Mr Clarance nor Cuckoo Lane has to date paid any part of the Judgment Debt, although Mr Clarance states that the purpose of these proceedings, if successful, is to enable him to satisfy that debt in full from the sale of his Shares to Mr Nayar and/or Reliance and/or the Company.

17. Further, despite the obligation in clause 6.1.2 of the Charge, and despite requests made in letters dated 4 June 2018 and 6 March 2019, Mr Clarance failed to execute an undated transfer in favour of the Company, although Mr Clarance states that this did not originally happen, because he was not presented with any transfer to sign at the time he executed the Settlement Deed and the Charge. In the letter dated 6 March 2019 and a further letter dated 13 March 2019, Mr Clarance was warned by the Company's solicitors that failure to execute a transfer would lead to the Company exercising its Power of Attorney under clause 15.1 of the Charge to remedy the defect and transfer the Shares to itself.

18. At the time, however, no steps were taken by the Company to rely on its Power of Attorney and transfer the Shares to itself. In a witness statement of Alan Owens dated 7 November 2019 made in support of the Strike-Out Application, Mr Owens states that the reason for the Company's inaction at this time was because Mr Clarance had threatened to challenge any transfer executed by the Company as Attorney, which would then have given rise to satellite litigation in circumstances where the Company would have no realistic hope of recovering its costs from Mr Clarance.

19. On 1 October 2018 Mr Clarance commenced proceedings in the County Court in Yeovil for the Shares to be valued following the termination of his employment, which was a compulsory transfer event, both under the Articles of Association and the SHA. Mr Clarance states that he had sought to agree the value of his Shares with the Respondent Shareholders, but they had refused to engage in any way in any valuation process, contending that the value of the Shares was zero. Mr Clarance's proceedings were dismissed by consent on 20 November 2018 when the Company agreed to there being an independent valuation of the Shares pursuant to clause 15 of the SHA. The Shares were subsequently valued by Ms Kay Linnell in her report dated 29 March 2019 in the sum of

£100,000 as at 21 April 2017, the date of the compulsory transfer event ("**the Linnell Valuation**"). However, the Linnell Valuation was qualified in the following way:

"*I have not taken into account any alleged diversion of income or cancellation of projects, as alleged by Mr Clarance, made to the detriment of Motion Picture Capital Ltd shareholders which [has] been disregarded. My share determination of fair value does not include any positive value that may attach to a "chose in action" or any right to take legal claims for damages for these matters against any entity at undervalue that may or may not exist, nor the related potential legal costs, as this can only be a matter for the Courts*."

20. None of the Respondent Shareholders offered to purchase the Shares at a value of £100,000; the Respondent Shareholders continued to contend that the Shares had no value. Instead, the Company offered to credit the sum of £100,000 against the outstanding Judgment Debt provided that Mr Clarance executed a share transfer form. That offer was not accepted by Mr Clarance.

21. On 22 May 2020 the Company served a statutory demand on Mr Clarance seeking payment of the outstanding Judgment Debt. On 10 June 2020 Mr Clarance applied for the statutory demand to be set aside on the grounds that the statutory demand had failed to mention the Charge. Mr Clarance's application was granted by District Judge Parker on 17 August 2020, but the decision was subsequently set aside on appeal on 22 June 2021 and has now been remitted back to the County Court at Reading for a re-hearing.

22. On 17 November 2020, shortly before a case management conference in this Petition, which had been fixed for 24 November 2020, the Company held a board meeting for the purposes of considering and, if thought fit: (i) approving the deployment of the Power of Attorney contained in the Charge; (ii) if so approved, appointing a representative to execute the share transfer in respect of the Shares pursuant to the Power of Attorney; and (iii) approving the registration of the transfer of the Shares. The resolutions were duly passed and Mr Nayar was appointed to sign the share transfers. Share transfer forms were then executed transferring sixteen of the Shares to Reliance as nominee for the Company and four of the Shares to Mr Nayar also as nominee for the Company. On 18 November 2020 Mr Clarance was removed as the holder of the Shares in the register of members and

Mr Nayar and Reliance were entered as the holders of those Shares in the numbers set out above.

The Issues

23. The issues which arise for my consideration are as follows:

    23.1. whether Mr Clarance is still a member of the Company;

    23.2. if he is not a member of the Company, whether he is still entitled to continue with the Petition. This issue divides into two sub-issues, namely:

        23.2.1. whether the effect of removing Mr Clarance as a member of the Company is that Mr Clarance no longer has standing to pursue the Petition; and

        23.2.2. if the answer to the first question is that he continues to have standing, whether the effect of removing him as a member has deprived him of any interest in the outcome of the Petition.

Whether Mr Clarance is still a member of the Company

24. CA section 112 defines a member of a company as either a subscriber of a company's memorandum or every other person who agrees to become a member of a company, and whose name is entered in the register of members.

25. Mr Clarance is no longer on the register of members; his Shares are now registered in the names of the Respondent Shareholders. Accordingly, he is no longer a member of the Company.

Whether Mr Clarance is entitled to continue with the Petition

Standing

Arguments

26. Mr Phillips on behalf of the Respondents Shareholders submitted that the effect of Mr Clarance's name being removed from the register of members is that he thereupon ceased to have standing to continue with the Petition. He accepted that there was no authority on

this point, but referred me first to two authorities, which he argued supported his submission.

27. The first authority was *Jones v Sky Wheels Group Ltd* [2020] EWHC 1112, where one of the grounds on which an appeal court upheld the judgment of the lower court to set aside a statutory demand served on Mr Jones was because the decision to commence bankruptcy proceedings against Mr Jones had been driven by a desire to bankrupt him in order to forestall Mr Jones' threatened section 994 petition against his co-shareholder, Mr Schofield. The court held that it was unjust for Mr Jones to face the consequences of bankruptcy proceedings before his section 994 petition was heard, in circumstances where another court had held that it had a real prospect of success. In reaching its decision Snowden J stated at [98]:

"*Mr Harper QC submitted that even if (contrary to his earlier submissions) the Company had a collateral objective of seeking to bankrupt Mr Jones to frustrate his s 994 Petition, that would not prejudice Mr Jones' creditors so there would be no abuse of process. He argued that on bankruptcy, Mr Jones' shares in the Company would become the property of his trustee, who could decide objectively whether or not to pursue the Petition in the interests of creditors. This was the type of argument that found favour with the Privy Council in Ebbvale Ltd v Hosking [2013] UKPC 1, but I consider that the instant case is distinguishable from Ebbvale on the facts.*"

28. Mr Phillips submitted that this case showed that if a party ceased to own the property from which a cause of action arose, then he also lost the cause of action. Applied to the present case, this meant that when the Shares were transferred to the Respondent Shareholders and Mr Clarance was removed from the register of members, Mr Clarance ceased to have any standing to continue with his Petition.

29. The second authority that Mr Phillips referred me to was that of *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) and to the obiter dictum of Henderson J at [251] where he stated:

"*…….It remains to consider what, if anything, is left of his s 994 petition. The answer, in my judgment, is very little. Mr Flanagan remains a member of the LLP, so he has locus standi to present the petition, and he has not lost his standing subsequently…"*

30. He argued that this dictum supported his submission that standing could be lost after a section 994 petition had been presented.

31. I asked Mr Phillips whether the words "*apply to the court*" in section 994(1) were restricted to the commencement of proceedings by way of petition or whether they extended to the hearing of the Petition itself, so that standing could be lost in the interim. I gave him the opportunity to see if he could find any cases on this point over the luncheon adjournment. At the resumed hearing in the afternoon, Mr Phillips submitted that the latter interpretation was the correct one and submitted that the authorities of *Grace v Biagioli* [2006] 2 BCLC 70 and *In re GP Aviation Group International Ltd* [2014] 1 WLR 166 supported that construction.

32. In relation to the former case, I was referred to the following passage at [73], where in discussing the issue of the remedy in a section 994 petition and when it was appropriate for the court to assess the remedy, the Court of Appeal said:

"*Once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted. Although s 461(1) speaks in terms of relief being granted 'in respect of the matters complained of', the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order. In Re Bird Precision Bellows Ltd [1985] BCLC 493, [1986] Ch 658 Oliver LJ described the appropriate remedy as one which would 'put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company'. The prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past, present and future.*"

33. The point which Mr Phillips appears to have wanted to make in relying on the above case although it was not totally clear, was that if the remedy in a section 994 petition is not to be assessed until the final hearing, it must follow that "*apply*" in section 994(1) must also refer to, or at least, include that time.

34. Mr Phillips also referred me to the case of *In re GP Aviation Group International Ltd* [2014] 1 WLR 166 which was concerned with whether a liquidator of a company could assign a company's statutory right of appeal against assessments to tax. In deciding whether or not a right of appeal was property, which was capable of being assigned, the court looked at what the position was in bankruptcy. Mr Phillips submitted that paragraphs [14] to [31] showed that in bankruptcy a bankrupt lost his right of appeal, because although the right of appeal was not a chose in action and, therefore property, as the bankrupt had been divested of his property and also of his liabilities, he had no interest in the appeal itself. By analogy, argued Mr Phillips, in this case, as the Shares had been vested in someone other than the Petitioner, the statutory right to seek relief from the court also passed and Mr Clarance ceased to have any interest in the Petition and, therefore, any standing to pursue it

Discussion

35. CA section 994(1) provides:

> "*(1) A member of a company may apply to the court by petition for an order under this Part on the ground (a) that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself, or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial*."

36. Section 994(2) extends the definition of "member" as follows:

> "*The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as they apply to a member of the company.*"

37. It is clear that Mr Clarance was a member of the Company when the Petition was commenced, but, as found by me above, ceased to be a member when his name was removed from the register of members on 18 November 2020. Does this mean, however, that he has ceased to have standing to continue with the Petition? In my judgment, he has not.

38. As a matter of construction, it seems to me that section 994(1) is directed to the commencement of proceedings for unfair prejudice and to those parties who have standing to bring them. It provides that the proceedings must be started by petition and only those who are members or to whom shares have been transferred or transmitted have locus to apply. The provisions of section 994(2) support such a construction in that the pre-requisite to a person who is not a member having standing to bring a petition is that shares must have been transferred or transmitted to him, that is, by the time the petition is presented. There is no requirement, however, that the shares must continue to be held by him up until the hearing of the petition.

39. None of the cases cited to me by Mr Phillips was concerned with the construction of section 994(1). Nor was I referred to any other case where the court had construed the words "apply", in another context, although the extent to which any such case might have been useful would, of course, have depended upon the wording of the relevant provision and its context.

40. I also do not consider that the cases produced by Mr Phillips assist me in deciding how section 994(1) should be construed. In particular:

    40.1. *Jones v Sky Wheels Group Ltd* was concerned with what effect a bankruptcy would have had on a section 994 petition. As a matter of bankruptcy law, the effect of bankruptcy is to vest all property of the bankrupt, including all choses in action, in his trustee. As a result of these bankruptcy provisions, a bankrupt would cease to have standing to pursue a section 994 petition. The case, therefore, does not decide that a petitioner who is not made bankrupt loses standing to pursue a petition if he or she ceases to be a member of a company.

    40.2. the dictum in *Flanagan v Liontrust Investment Partners LLP* is merely obiter and seemingly made in passing. The court was not asked to consider the issue of standing and whether it could be lost and, if so how;

    40.3. the cases relied upon by Mr Phillips on what "*apply to the court*" means in section 994(1) do not deal with this point. The dictum in *Grace v Biagioli* referred to in paragraph 32 above is concerned with when the issue of the remedy under CA section 994 should be dealt with and how it should be approached; it does not seek to

construe CA section 994(1) or to deal in any way with a petitioner's standing at the time of trial. Likewise, I do not think that *In re GP Aviation Group International Ltd* assists for the same reasons given in relation to *Jones v Sky Wheels Group.*

41. In conclusion, in my judgment, Mr Clarance has not lost his standing to pursue the Petition.

Whether Mr Clarance continues to have an interest in pursuing the Petition

Arguments

42. Mr Phillips submitted that, even if Mr Clarance continues to have standing, he no longer has any interest in pursuing the Petition, because it is plain and obvious that he would not be granted the relief sought. In support of his submission, Mr Phillips referred me to the cases of *Re Pedersen (Thameside) Ltd* [2018] B.C.C. 58 at [12], *Re J E Cade & Son Ltd* [1992] BCLC at 223c-d, *Re Antigen Laboratories Ltd* [1951] 1 All ER 110 and *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 432f-i, which establish the following propositions:

    42.1. the scope of the remedies that a court can provide under CA section 996 is very wide as shown by the wording of section 996(1), which provides that if the court is satisfied that a petition is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of;

    42.2. a petitioner must specify in his petition the relief that he seeks, though it is proper for a petition to add, as envisaged by the form set out in the schedule to the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 SI 1986/2000, a prayer "that such other order may be made as the court thinks fit";

    42.3. if it is plain and obvious that the relief, which a petitioner claims against a respondent, would never be granted, then the petition may be struck out as an abuse of process.

43. In the Petition, Mr Clarance seeks an order that the Company and/or Reliance and/or Mr Nayar purchase his "*shareholding in the Company at a price to be determined by the Court, and all necessary directions including as regards the date of any valuation and adjustments to the said price to reflect the fact that Reliance and Messrs Nayar and*

Sarkar have acted in breaches of their statutory fiduciary duties to the Company and in any event in a manner that is unfairly prejudicial to Mr Clarance". The prayer also seeks "*such other orders, accounts and directions…as the Court thinks fit"* and "*further or other relief*".

44. Mr Phillips's argument was a simple one. He submitted that where the only relief claimed was the purchase of the Shares, in circumstances where Mr Clarance no longer owned those Shares, it was plain and obvious that the relief sought would never be granted and, therefore, that the Petition should not be allowed to continue.

45. In response, Mr Clarance argued that it would not be just for the court to dismiss the Petition. He said that the only parties that would benefit from the dismissal of the Petition were the Respondent Shareholders in circumstances where the court had already found that there was a real prospect of his Petition succeeding. The Company, he argued, had a fiduciary duty to optimise the value of his Shares. However, the Respondent Shareholders, having exhausted all other avenues to defeat the Petition, had resorted to exercising their powers improperly by causing the Company to use its Power of Attorney in the Charge to transfer the Shares to themselves as nominees for the Company in the belief that this would deprive Mr Clarance of standing in this Petition and, therefore, finally dispose of it. Mr Clarance submitted that, in so doing, the Respondent Shareholders:

    45.1. had deprived him of realising the true value for his Shares, which would take into account the value which they are alleged to have wrongfully removed from the Company. In this respect, Mr Clarance referred to the Linnell Valuation of £100,000 relied on by the Respondent Shareholders, which had made it clear that it did not take into account any sums that might be notionally added back into the Company in the event that Mr Clarance established his allegations in the Petition. Mr Clarance also referred to the valuation of the Company in the sum of US$25 million, which had formed the basis of the Respondent Shareholders' offer for Mr Clarance to purchase their shares and said that this was evidence that his Shares had a value of at least US$ 5 million;

    45.2. had acted contrary to the interests of the Company, because by transferring the Shares to the Company and crediting those Shares with a value of only £100,000

against the Judgment Debt, they had deprived the Company of the opportunity of recovering the full amount of the Judgment Debt;

45.3. had acted in a way that sought to advance their own interests to the detriment of the Company;

45.4. had acted in a way which was intended to avoid their being held accountable for their wrongful acts as set out in the Petition; and

45.5. had acted, therefore, in a way which was unfairly prejudicial to Mr Clarance's interests as a shareholder.

46. Mr Clarance also made the following further points:

46.1. the decision to exercise the Power of Attorney had been made by only two directors, when the Articles of Association provided for a minimum of three directors to be appointed, albeit that a quorum of two was sufficient for the purposes of making a decision. Further, the two directors failed to disclose their interest in the decision by not disclosing that it would, in their view, result in the Petition being dismissed against them;

46.2. the Power of Attorney was exercised nearly two years after the Charge had become enforceable and that he had continued with the Petition for that period in the belief that it would not be exercised;

46.3. the Power of Attorney was exercised only shortly prior to the case management conference on 24 November 2020 and only after all other avenues had been exhausted with a view to having the Petition struck out or dismissed or the standing of Mr Clarance removed from him.

Discussion

47. As shown by the passage in *Grace v Biagioli* in paragraph 32 above, the issue of what remedy should be granted if a petitioner is successful on liability is ultimately for the trial judge. The trial judge has a wide discretion under CA section 996 regarding the remedy, but must fashion it according to the unfair prejudice found. He or she may also take into account, if relevant, conduct that has taken place after the date of presentation of the

petition as well as conduct occurring prior to that date. Further, a judge at trial is not restricted to granting the remedy claimed by a petitioner, if he or she considers that that remedy is not appropriate to the findings of unfair prejudice made.

48. Therefore, it is not for this court to determine what remedy should, or is likely to, be ordered if Mr Clarance is successful on liability. The only issue that this court must decide is whether, taking into account the matters set out in *Grace v Biagioli*, including the conduct of the Respondents since the presentation of the Petition, it is plain and obvious that the remedy which Mr Clarance seeks will not be granted at trial. If it is plain and obvious that that relief will not be granted, then the Petition should be dismissed.

49. If a petitioner voluntarily transfers his shares prior to the trial of his section 994 petition, it is difficult to see how he will continue to have any interest in the remedy claimed by him in the petition and why his petition should, therefore, be allowed to continue. Where, however, there is an involuntary transfer of shares after the presentation of a section 994 petition, as in this case, the position may be different, but not necessarily so. Each case will depend upon its own facts and circumstances.

50. Turning to the facts of the present case, the issue that I have to consider is whether, in procuring the transfer of the Shares to nominees of the Company, there was a proper exercise of power by the directors and the Company. If the conduct of the directors and the Company was clearly proper, then the Petition should be dismissed as Mr Clarance would have ceased to have any interest in the remedy sought by him. On the other hand, if Mr Clarance has a real prospect of establishing that the directors of the Company and/or the Company as mortgagee have not acted properly, then, for the reasons stated below, in my judgment it is not plain and obvious that the remedy sought by Mr Clarance will not be granted at trial if he succeeds on liability.

51. Directors of a company must: (i) exercise their powers for the purposes for which they are conferred (CA s. 171(b)); (ii) act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole (CA s. 172(1)); and (iii) avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. Further, a mortgagee has a duty to act in good faith.

52. During the course of the hearing I pressed Mr Phillips to pinpoint the basis on which the Company is said to have executed the transfer of the Shares in favour of its nominees. Mr Phillips said that it had not exercised any rights under clause 9.6, which, assuming that it could be shown that the Charge was a collateral security arrangement, permitted the Company to appropriate the Shares towards payment of the Secured Liabilities at a value to be determined in accordance with that clause. Instead, he said that the Company had exercised its rights as attorney under clause 15 of the Charge, by correcting Mr Clarance's failure to execute an undated transfer and then proceeding to vest the Shares in the names of its nominees. Mr Phillips added that in order to be fair to Mr Clarance, and although not relying on clause 9.6, the Company had given credit against the Judgment Debt in the sum of £100,000, representing the value of the Shares as determined by the Linnell Valuation.

53. I also asked Mr Phillips whether the Company intended to sell the Shares. His response was that there was no market for the Shares. This is probably right as the only potential purchasers would be Reliance and Mr Nayar and both of these parties have already refused to purchase the Shares at the Linnell Valuation of £100,000.

54. In light of the above, it would appear that the Company has not exercised any right under the Charge to appropriate the Shares in part payment of the Judgment Debt, the only such right being that contained in clause 9.6 of the Charge, which the Company has not sought to implement. What it has done is to take possession of the Shares with no intention of selling them due to the lack of an available market (including the Respondent Shareholders) and has sought to credit what it contends is the value of the Shares against the Judgment Debt, although there is nothing in the Charge itself which gives it this power. In this respect, I note that the transfer documents do not record the consideration for the Shares as being nil; the consideration stated is in the sums of £80,000 and £20,000, respectively. Although it was not either parties' case, this does raise a concern as to whether this was in reality a purported sale of the Shares by the Company to itself, which might offend against the capital maintenance rules as well as offending against the principle that a mortgagee cannot sell mortgaged property to itself.

55. There is no obvious purpose or benefit to the Company having possession of the Shares through its nominees. The only obvious benefit on the face of things as they currently stand is to the Respondent Shareholders, who, in view of the preliminary issue sought,

clearly believed that their actions would give them a good chance of having the Petition dismissed on the grounds of standing and thereby avoid having the court determine the allegations of wrongdoing against them. In this respect, it is also relevant that the step of transferring the Shares was taken nearly two years after the default complained of, shortly before a case management conference in this Petition and then only after the Respondent Shareholders had exhausted all other avenues which might either have got rid of the Petition at an early stage or, at the very least, have deprived Mr Clarance of standing to pursue it.

56. Apart from contending that the transfer of the Shares was made pursuant to the rights of the Company under the Charge and that the Charge was a security which was given voluntarily by Mr Clarance, the Respondents Shareholders have not sought to explain on what basis the transfer of the Shares to nominees of the Company was considered to be in the interests of the Company. As matters currently stand, there must be a real prospect of establishing that such action was, in fact, contrary to the Company's interests. ICC Judge Jones found that there was a real prospect of the Petition succeeding. He also held at [64(8)] of his judgment that Mr Clarance's valuation of his Shares at US$5 million could not be rejected for the purposes of the summary judgment/strike-out application. His findings were, therefore, that Mr Clarance had a real prospect of obtaining an order from the court that his Shares should be purchased for at least US$5 million. This would mean that, if Mr Clarance succeeded at trial, the Judgment Debt and any additional interest owed to the Company would be completely discharged and he would receive a substantial surplus. Despite these findings, no consideration appears to have been given by the Respondent Shareholders to the loss that the Company itself might suffer as a result of Mr Clarance ceasing to be a member of the Company and ceasing to have the right, as they believed would be the case, to pursue the Petition.

57. Taking into account the above matters, in my judgment, Mr Clarance has a real prospect of establishing at trial that:

    57.1. Mr Nayar and Mr Sarkar: (i) exercised their powers as directors for an improper purpose; and (ii) did not act in good faith and in the interests of the Company;

    57.2. the Company, as mortgagee, did not act in good faith;

57.3. the subsequent acts complained of amount to further unfairly prejudicial conduct against Mr. Clarance.

58. In light of the above and the wide discretion that the court has under CA section 996 when deciding the issue of remedy, including its ability to take into account matters which post-date the presentation of the Petition, I do not think that it is plain and obvious that a court would refuse to make an order for the purchase of the Shares at trial. In my judgment, if the above matters are established, there is a real prospect that the court, in the exercise of its discretion under section 996 and in order to enable a purchase order to be made, would make such other orders as might be necessary to restore the position to what it was prior to the Shares being transferred.

Conclusion

59. My findings on the preliminary issue are, therefore, as follows:

59.1. Mr Clarance ceased to be a member of the Company on 18 November 2020;

59.2. despite having ceased to be a member, Mr Clarance continues to have standing to pursue the Petition;

59.3. it is not plain and obvious that Mr Clarance would not be granted the relief he seeks in the Petition. He, therefore, continues to have an interest in pursuing it.

60. Finally, I note that this preliminary issue was ordered just after the relevant transfers of the Shares had happened. The issues regarding whether those transfers were proper were argued before me as part of the preliminary issue and evidence was adduced from both parties. In light of my findings, Mr Clarance may now wish to consider whether to amend his Petition, and to seek appropriate legal advice.

61. I would take this opportunity to thank both Mr Phillips and Mr Clarance for their helpful submissions.