



Neutral Citation Number:

Case No: CR-2020-BHM-000447

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANIES AND INSOLVENCY LIST

Birmingham Civil and Family Justice Centre
33 Bull St, Birmingham B4 6DS

Date: 22nd November 2022

Before :

Mr Recorder Adrian Jack
(sitting as a High Court Judge)

IN THE MATTER OF INTERNATIONAL AUTOMOTIVE ENGINEERING
PROJECTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

(1) KEVIN GEOFFREY DODSON
(2) MURRY DODSON

Petitioners

and

(1) CHRISTOPHER RICHARD SHIELD
(2) CHARLES CATTANEO
(3) DAVID KEITH COTTERILL
(4) ALAN DAVID COTTERILL
(5) NEIL JOHN COLLINS
(6) NICHOLAS HARMAN COULBORN
(7) JOHN WILLIAM ROCK

(8) INTERNATIONAL AUTOMOTIVE ENGINEERING PROJECTS LIMITED
Respondents

Avtar Khangure QC (instructed by **Trowers & Hamlin LLP**) for the Petitioners
Max Mallin KC and **Stephen Reed** (instructed by **Shakespeare Martineau**) for the First
to Seventh Respondents
The Eighth Respondent did not appear and was not represented.

Judgment

Judgment date: 22 November 2022
Transcribed from 11:11:56 until 11:18:24
from 11:38:11 until 11:43:07
from 12:08:57 until 12:14:58
from 12:22:06 until 12:25:46
from 12:28:48 until 12:30:18

Reporting Restrictions Applied: No

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Mr Recorder Jack:

1. I am asked to consider an application to grant permission to appeal against the substantive judgment which I handed down earlier in the year. There are four grounds put forward for the appeal. It is right to say that each of the grounds alleges that I made errors in fact and/or in law and it then sets out what the defects in my judgment are. It is notorious that appeals against matters of fact are much more difficult to launch than appeals in relation to matters of law and the matters which Mr Mallin puts forward are almost entirely matters of fact.
2. It is right to say that of course Mr Mallin KC only has to persuade me that there are good arguable points which he can properly take on appeal. It is not necessary for him to go so far as to show that I am wrong, he just needs to show an arguable case.
3. So far as the first ground is concerned, this is an attack on my finding that there was a quasi-partnership and the way he puts that is that the shareholder agreement provided detailed obligations on the part of the shareholders as regards their duties to the company and to each other. He said, therefore, it was wrong for me to go outside that and find a quasi-partnership. All of the relations between the parties, he submitted, are governed by the contractual documents and therefore there was no ability to form a quasi-partnership.
4. I do not accept that is right as a matter of law. As he himself accepted, what constitutes a quasi-partnership is extremely fact sensitive. It does not seem to me the fact that there are detailed provisions means that a relationship between shareholders cannot be a quasi-partnership and in my judgment, this ground has no reasonable prospect of success.
5. The second ground relates to the diversion of the project but again, it seems to me that as he himself admitted, there is an overlap between this and the question of valuation in that if there was no prospect of the project being retained by the company, then that

potentially affects the valuation. That, of course, is subject to the fact that there are fiduciary duties owed by the directors of the company, which mean that there was an ongoing duty to account. These, though, it seems to me, are all matters which need to be looked at at the second round of the hearing dealing with valuation; it is not a matter which goes to the fact that diversion of the turnkey project was a matter which properly formed a ground of unfair prejudice on which the Petitioners can rely. So again, in those circumstances, it seems to me the second ground of appeal has no reasonable prospect of success.

6. I turn then to the third ground, which is breach of fiduciary duty by the diversion of the project to CGI. That again overlaps very substantially with ground 2 and suffers from the same problem, that this is effectively a matter for the valuation part of the case, not the question of underlying unfair prejudice so again, ground 3, in my judgment, has no reasonable prospect of success.
7. So far as ground 4 is concerned, here, Mr Mallin KC makes a number of points on the facts. It is quite right that one of the problems with determining what happened with the technical library was that all of the businessmen involved at the time, in particular BMW and Herr Stuckenberger and the others, do not seem to have taken any particular care to consider what the legal position as regards the ownership of documents and electronic software was. That made it more difficult to make findings of fact but the key factor, in my judgment, is that clearly, those involved with the company thought that there was a substantial value to the technical library which Mr Dodson had been able to acquire. This is shown by the reaction of the parties. Thus whatever the legal analysis of the ownership of the technical libraries might be, there is no doubt that the acquisition of the libraries was something which the parties at the time considered was a very important development in the advancement of the project.
8. In those circumstances, where one is looking at effectively complicated interacting matters of fact, again, an appeal has, in my judgment, no reasonable prospect of success. So, all four grounds, in my judgment, lack the necessary degree of prospect of success to allow permission to appeal to be granted.
9. There are no other substantial reasons to grant permission to appeal and in those circumstances, I refuse permission to appeal.

(proceedings continue)

10. I am asked to consider whether there should be a stay of the claim at first instance, pending the resolution of any appeal which may be brought by the Respondents. The historic approach of the Court has always been to take the view that matters at first instance should continue. That, though, is against a backdrop where the Court of Appeal were significantly overburdened by work and it took a very considerable time for appeals to get on in the Court of Appeal and for matters there finally to be disposed of.
11. We are now in the fortunate position that the Court of Appeal is able to put cases through much more speedily than has historically been the case. In particular, it looks as though if permission to appeal is granted, the final determination of the appeal, subject, of course, to any appeal to the Supreme Court, would be resolved within six months. That, in my judgment, is a material factor, which means that earlier decisions

which consider how the Court ought to exercise its discretion in relation to stays require revisiting.

12. Mr Khangure perfectly properly points out that this is now a comparatively stale matter where the events of which complaint is made all date back to the first half of the last decade, so that one is now dealing with matters which are over seven years old and are likely to be eight years old at least by the time one reaches a final trial. Against that, however, is the fact that there are effectively two limbs to the appeal which the Respondents have indicated they will wish to bring. The first is in relation to the question of diversion of the business opportunity and the second is in relation to the value of the technical libraries.
13. Now, it is right that there is almost certain to be a very substantial overlap between the value which is placed on the project and the value placed on the technical library and it may well be that the Petitioners will have to make an election as to how they wish the assessment of the compensation which they are claiming in relation to unfair prejudice should be determined. However, when one looks at the possible outcomes of the appeal, one outcome, obviously, is that permission to appeal is not granted or that any appeal is refused. The other possibility is that the appeal is allowed on all grounds. In that case, then there will not be any trial of valuation and in those circumstances, any work being done by the experts would be wasted.
14. There is, however, a third possibility, which is that the Court of Appeal allows the appeal in relation to one of the issues, namely divergence or the technical library. That potentially raises an issue as to how the experts should approach their valuation thereafter. In particular, if the experts proceed to a valuation report based on both the diversion of the project and on the use of the technical library, then that work may have to be redone if the Court of Appeal take the halfway house which I have outlined.
15. Given that one is looking at a delay of what appears to be a maximum of six months, in my judgment, weighing the factors together, it is appropriate to grant a stay of the proceedings pending the final outcome of the Court of Appeal.
16. I will hear the parties as to what other orders I ought to make. It seems to me that I ought to, at this stage, make orders in relation to how the expert evidence ought to proceed, whether there ought to be pleadings and the valuation date but I will hear counsel further on that. I have heard both Mr Mallin and Mr Khangure to an extent on questions of the approach to be taken but I have not heard them at all on the question of the valuation date.

(proceedings continue)

17. I will deal with the question of whether there ought to be detailed pleadings. Mr Mallin says that if one has a valuation date of 28th April 2015, it would be necessary for the Court to have a look at what subsequently occurred, although (as I pointed out in my substantive judgment at para [93]) it is quite unclear precisely what happened. At any rate, it looks as though the project was not a success and that the very large profits which had been expected from the turnkey project were not realised.
18. What Mr Mallin says is that that is relevant to the valuation if the valuation of 28th April 2015 is the appropriate date evaluation. I am afraid I am against him on that. It seems to me that the whole point of choosing a valuation date is that one chooses the

facts as at that date which produced the valuation figure for whatever it is which is being valued, so I gave the example of Hong Kong real estate, where at the time of the valuation date, the value of the real estate was 1.8 billion Hong Kong Dollars but by the time of the hearing before me was 1.5 billion Hong Kong Dollars. Obviously, if one takes the earlier valuation date, then one has to look at the 1.8 figure, one is not looking at the 1.5 figure.

19. It is the same in relation to a project such as this, where one has the sale and installation of lines in order to produce a turnkey engine manufacturing plant, one needs to look at what the value of the project was at 28th April 2015. What subsequently happens, whether the project was a success or whether it was a failure, is irrelevant to the valuation as at the valuation date.
20. In those circumstances, Mr Mallin's suggestion that there should be detailed pleadings of counterfactuals, in my judgment, falls away. That is not to say that the question of valuation as at 28th April 2015 — assuming that is the valuation date — will be straightforward. Quite the contrary. It is wrong simply to have a mechanical exercise such as that put forward by Mr Khangure in para 39 of his skeleton argument, where he says in paragraph B:

“The total contract price was £58,000,000, from which certain adjustments would have to be made and deducted. This is not an exhaustive list. (1) the cost of the lines, (2) lines 4 to 6, (3) any reasonable expenses, (4) the costs projected for carrying out the turnkey project”

Those are, of course, matters which a valuer will need to look at in order to produce what one might describe as an unadjusted figure, but it will be necessary either for the valuer or for the Court then to carry out a second stage of the analysis. This is because what is of importance is the various uncertainties which surround the project. In particular a project of this nature, involving the People's Republic of China, raises potential risks which are of a different nature to those which would be the case if, for example, the installation of the lines was taking place in the United Kingdom.

21. Now, whether the experts are the people who are going to be able to give a view on what adjustments ought to be made or whether the Court itself needs to consider the matter is a matter which I cannot determine today and it is premature to be doing that. The fact that there will need to be this secondary adjustment, however, in my judgment, is quite clear, and that in part answers the *cri de coeur* of Mr Mallin, who says the project was ultimately unsuccessful and therefore, it would be unfair to award any form of loss of profit based on a valuation date of 28th April 2015.
22. The uncertainties surrounding the contract are something which will be taken into account in this secondary adjustment of the valuation of the project and the technical libraries so, in my judgment, it is not necessary for there to be detailed pleadings of the sort urged by Mr Mallin KC.
23. However, it does seem to me that there needs to be a nailing of colours to mast by the Petitioners in that once the Court of Appeal has made its determination, then they should have four weeks in order to say what amounts they are claiming and that should be, in principle, a fairly short document which merely sets out the figures in broad terms and sets out any percentage deduction which is conceded in respect of the secondary adjustment.

(proceedings continue)

24. I am asked to consider what the appropriate valuation date in this matter is. The three competing dates are 28th April 2015, which was effectively when the situation crystallised with the technical library having been passed over from the company and the entering of the turnkey agreement with the Chinese purchasers. At that point, effectively the company's involvement had come to a complete end and matters had crystallised. The alternative is the date of presentation of the petition, which is 2nd September 2020, and the last possibility canvassed was today's date.
25. When considering valuation dates, the approach that I am going to take is this (using the summary of the law in *Ming Shu Hung, Ronald v J F Ming Inc* [2022] ECSCJ No 271 at para [66], following remittance of the case by the Privy Council [2021] UKPC 1, [2021] 1 BCLC 341). The choice of the date at which shares are to be valued for the purpose of a Purchase Order is a matter for the exercise of the discretion of the Court. The general rule is that an interest in a going concern ought to be valued at the date on which it sought to be purchased. That is a current valuation because the date of the Purchase Order will generally be the closest date to the date of the actual valuation, and that comes from Robert Walker LJ's judgment in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 WLR 1024 at paras [60] and [33] and from *Dinglas v Dinglas* [2018] EWHC 3327 (Ch) at para [55].
26. However, the rationale for this general rule is obvious, namely to ensure that the shares be valued at a date as close as possible to the actual sale so as to reflect the value of what the shareholder is selling. The general rule is no more than the starting point, the overriding requirement is that the date of valuation should be fair on the facts of the particular case. Accordingly, in the exercise of its discretion, the Court can select a different date to ensure that the valuation is fair to both parties and is proportionate to remedy the unfair prejudice suffered.
27. The choice of valuation date therefore calls for an evaluation of a number of factors, including the history of events in issue in the litigation. The courts have also repeatedly emphasised that there must be fairness to both parties, in particular a minority shareholder is not entitled to a one way bet, that is a minority shareholder whose shareholding has been subjected over time to fluctuations in value in the ordinary course of the company's business cannot pick and choose an exit date which is most advantageous to him.
28. There are many, perhaps hundreds, of cases where, in fairness to one side or the other, the court has departed from the general rule and applied a different date as the starting point. However, these are of limited assistance, each turning on its own facts and circumstances. Many cases have taken earlier dates than the date which is the *prima facie* date.
29. Here, in my judgment, the appropriate date is 28th April 2015. It is the date on which the unfair prejudice crystallised: nothing further needs to happen. There is no ongoing relationship between the parties beyond the fact that they are passive holders of shares in the company.
30. In those circumstances, in my judgment, this is a quintessential case where the unfair prejudice should be assessed at 28th April 2015.

(proceedings continue)

31. I am asked to consider whether there ought to be a discount in relation to the valuation, which is fixed on the shares of the Petitioners. Mr Mallin KC fairly accepts that in quasi-partnership cases, the starting point is that there should be no discount. But what he says is that here, it is not a question of the minority shareholders being forced out of the company. Instead the complaint is quite different, namely that the project has been diverted to another company and that that is the form of prejudice which has occurred.
32. I accept that, as a matter of the technical way in which matters have proceeded, it is not a question of the minority shareholder here being forced out of the company. They still have their shares. However, the reality of the matter is that the only business of the company was the prospect of entering the turnkey project and that once that project was diverted to a third party, that was, for all practical purposes, the same as having a minority shareholder excluded from the company.
33. In those circumstances, in my judgment, the usual rule that in quasi-partnership cases there should be no discount should also apply in this case.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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