



Neutral Citation Number: [2023] EWHC 2920 (Ch)

Case No: CR-2022-BRS-000101

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 20 November 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

IN THE MATTER OF **HLHP ORIENTAL FOOD LIMITED**
 HLHP BIRMINGHAM LIMITED
 HLHP BAYSWATER LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN :

1. MAGGIE OTTO	<u>Petitioners</u>
2. TAO XU	
3. IC UK HOLDINGS LIMITED	
JESSICA PUI MAN KWOK	
- and -	
1. INNER MONGOLIA HAPPY LAMB	<u>Respondents</u>
CATERING MANAGEMENT COMPANY	
LIMITED	
2. XIABING LIU	
3. ZANHAI ZHANG	
4. GANG ZHANG	
5. CHANGSONG WANG	
6. HLHP ORIENTAL FOOD LIMITED	
7. HLHP BIRMINGHAM LIMITED	
8. HLHP BAYSWATER LIMITED	

Charlie Newington-Bridges (instructed by **Shakespeare Martineau LLP**) for the **Petitioners**
Olivia Chaffin-Laird (instructed by **R & H Lawyers LLP**) for **Respondents 1-4 and 6-8**
The Fifth Respondent was not present or represented

Hearing dates: 15 November 2023

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 revised version as handed down may be treated as authentic.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 20 November 2023.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the costs issues arising out of an application by the petitioners by notice dated 18 October 2023 for an interim injunction. The injunction sought was to restrain the use of the funds of the sixth respondent, one of the three companies the subject of the petition, for the purposes of paying the legal expenses of the first five respondents. The substantive part of the application is no longer pursued by the petitioners, but they seek their costs of and occasioned by it. This is opposed by the respondents, who conversely seek their costs from the petitioners. This matter arises in the context of a petition under Part 30 of the Companies Act 2006 alleging conduct unfairly prejudicial to the petitioners as members of the companies concerned. That petition was presented on 21 September 2022, and a defence was filed on 2 November 2022. It is listed for trial over 10 days in March 2024.

The application for an interim injunction

Evidence in support

2. As I have said, the application was made on 18 October 2023, when it was supported by the fourth witness statement of Richard Gore, the petitioners' solicitor. His evidence included reference to a number of matters, which he said showed that the respondents' legal costs were being paid by the sixth respondent. He said this in particular (omitting reference to the exhibits):

“36. The evidence of the financial disclosure showed that the legal costs of the Respondents were being paid by the Sixth Respondent. I was very concerned that the Respondents were using company funds to pay their legal fees. This was a point the Respondents were warned about in a letter from Andrew Marsden, original counsel instructed in this matter, when he wrote to the Respondents' original solicitors Jackson Lyons on 24 May 2022. ...

37. Noting the significant amounts being paid out to the solicitors in the bank statements, I therefore contacted Ms Sissy He of R&H lawyers, who acts for the First to Fourth Respondents (she has acted for the Fifth Respondent as well, but does not do so anymore), and pointed out that the funds of the Companies could not be used for the purpose of advancing any shareholders' defence in proceedings under s994 of the Companies Act 2006.

38. In my letter dated 19 September 2023 to Sissy He of R&H lawyers, a copy of which is annexed hereto, I noted that the bank statements of the Sixth Respondent show a payment of £364,000 to R&H lawyers. Having reviewed the bank statements, I now note the sum is in fact £432,000. I note that a further c. £68,000 has been paid to Jackson Lyon Solicitors since last September. Jackson Lyon are the solicitors that previously acted for the First to Fifth Respondents. I attach to this witness statement those bank statements.

39. The response to my letter of 19 September 2023 written by Sissy He of R&H lawyers to me is mistakenly dated 10 April 2023. However, it was received after my letter of 19 September 2023, refers to correspondence I have sent in

September and so it can be reasonably assumed to have been written towards the end of September 2023. ...

40. Ms He on behalf of the Respondents confirmed that Companies' money was being used or expended in the defence put forward in these proceedings by the First to Fourth Respondents. Extraordinarily, she also seemed to suggest that there was no reason why the Companies' funds could not be used or expended on the Respondents' costs of the Litigation. It is stated in her letter that:

“the legal fees listed in the 1st paragraph were incurred by your clients, who caused financial prejudice and damages to the company's shareholders. Eventually these direct losses will be claimed back from your clients via various ways.”

Evidence in answer

3. I gave directions for service of the application on the respondents, and for their evidence to be filed and served by 27 October 2023, with the hearing of the application being listed for 2 November 2023. In fact, only the fifth respondent (who is a litigant in person) filed and served his evidence by 27 October 2023. The other respondents (represented by R & H Lawyers LLP) did not. The witness statement of the fifth respondent, in English translation (apparently using Chat GPT), included the following:

“18 Therefore, as the sole director of 6th-8th Respondents, after careful consideration, I decided to cover itself and other Respondents’ legal fee using the funding available in the Company’s account, and still leave more than enough funding in the Company’s account.

[...]

22 I also used the available funds in the Company account to pay for the legal fee to R&H Lawyers and Petitioners’ solicitor, Shakespeare Martineau as per the Board Meeting minutes dated May 2022.”

(The reference to a payment to Shakespeare Martineau is a reference to paying costs under an earlier court order in favour of the petitioners.)

4. On 31 October 2023, their solicitor sought an adjournment of the hearing fixed for 2 November 2023. For reasons given at the time, I refused that adjournment. Overnight on 1-2 November 2023, a witness statement from Steven Xin Li, the sole director of the sixth respondent, was sent by email to the petitioners’ solicitors. This witness statement contained for the first time a suggested justification for the payments being made by the sixth respondent. In part, it says the following (again omitting reference to the exhibits):

“7. I can confirm monies have been transferred from the Company to the aforementioned solicitors. The sums paid out however are not Company funds but rather, as clarified further below, represent repayment of loans made by the First, Second, Third, Fourth and Fifth Respondents to the Company. Rather than such

repayment having been made to the individuals to in turn pay them on to the solicitors the sums were paid directly to the firms of solicitors.

8. The Company has a registered share capital of £100,000.

9. In 2019, following suitable premises being identified, the shareholders each agreed to provide a loan to the Company. On 31 December 2021 the shareholders collectively invested in the Company the sum of £1,918,442. This is borne out by bank statements confirming the same ...

10. It was agreed in line with standard practice any excess funds would be recorded as Directors' loans. This is reflected in Company accounts ...

11. On 31 December 2021 the balance on the Director's loan account was as follows:

[There is then inserted a table headed "**Director's Loan balance on 31/12/2021**", followed by entries relating to different directors, including the petitioners.]

12. In January 2022, the financial health of the Company was good with the effect it was able to make repayments to shareholders.

13. The Company, in turn, on 29 January 2022 made part repayments to the Petitioners before, six months later, on 28 June 2022, making part repayments to the Respondents. This is borne out in the Company accounts, referred to as 'Directors Loan' summarised as follows:

[There is then inserted a table headed "**Details of repayment of Director's loan in 2022**", including entries relating to the first three petitioners.]

14. The balance on the Directors' Loan Account as at 31 October 2023 is as follows:

[There is then inserted a table, including entries relating to the petitioners.]

[...]

17. It follows the sums paid to solicitors, both Lyon and R&H Lawyers LLP do not belong to the Company. They are sums held for and on behalf of the Respondents for distribution as they decide, in line with the options set out at §15 above. It follows the legal fees are being paid by the First, Second, Third, Fourth and Fifth Respondents from the repayment of loans they had previously advanced to the Company."

The hearing on 2 November 2023

5. At the hearing on 2 November 2023, the petitioners said that they wished to proceed with the injunction application. However, given the new evidence, and also difficulties for the court in going behind witness evidence which had not been subject to cross-examination, they sought an order for the adjournment of the application and for the cross-examination of witnesses. I made that order, which also included a direction that Mr Li should provide a further witness statement by midday on 6

November 2023, and that the petitioners should provide witness evidence in response by 4 PM on Thursday, 9 November 2023. In the meantime, I was minded to grant an injunction against the respondents over until the hearing on 15 November 2023 in the terms of the application notice. The represented respondents accordingly gave an undertaking in those terms, with a cross undertaking in damages proffered by the petitioners. The fifth respondent was not present or represented, and so as against him I simply made an injunction in the same terms over to the same date.

Events after the hearing

6. Mr Li duly made a further witness statement on 6 November 2023, which was filed and served in accordance with my directions. This sought to correct an error in the earlier witness statement, but also gave further evidence in support of the explanation of the directors' loans to the sixth respondent, and their partial repayment. However, the petitioners did not serve any evidence in response, whether on 9 November 2023 or otherwise. Instead, on 9 November 2023, their solicitor sent a letter, timed at 12:03, to the represented respondents' solicitors. This letter referred to the evidence filed by Mr Li, saying that it was "inconsistent", and that it did not address certain matters. These included the absence of bank statements of the sixth respondent from September 2023, the general allegation made that the petitioners were aware of the existence of the directors' loans to the sixth respondent being used to pay their legal costs (which the petitioners denied), and the absence of specific instructions being given to the sixth respondent to pay the money direct to the lawyers.

7. Importantly, however, that letter went on to say:

"If your clients had produced Mr Li's evidence on time and in accordance with the court directions, and/or responded appropriately to our letter dated 19 September 2023, our clients would not have proceeded with their application.

Therefore, from a purely commercial perspective and with a view to avoiding the need to attend court next week and the costs involved with that, our clients will formally withdraw their application (and the interim order) on the basis that your clients pay their costs to date.

As to costs, our clients are prepared to accept a contribution of £13,500 to their costs as set out in the cost schedule sent to you ahead of the hearing next week."

8. The letter attached a draft letter to the court which it was said would be sent in the event that agreement was not reached between the parties as to costs. No such agreement was reached. Accordingly, the petitioners' solicitors wrote to the court on 10 November 2023, in the terms of the draft already supplied, informing the court that the petitioners had decided, "on purely commercial and practical terms, to withdraw their application for an injunction, subject to payment of their costs". On 13 November 2023, counsel on each side spoke on the telephone. The represented respondents asked for a copy of the letter to the court. This was supplied under cover of a letter sent later on the same day, which also reminded the respondent's solicitors that a draft of that letter had been sent to them the previous week.

The hearing on 15 November 2023

9. Accordingly, at the hearing on 15 November 2023, the petitioners did not pursue their application for an interim injunction. Instead, there was a preliminary point about the method by which the extant application was to be brought to an end, and a more significant argument about the costs consequences. I will deal with both of these in turn. I also released the represented respondents from their undertakings and discharged the injunction against the fifth respondent.

Discontinuance

10. As to the termination of the application, counsel for the represented respondents submitted that this amounted to a discontinuance falling within CPR Part 38. This meant that the costs consequences were those set out in rule 38.6, *ie* that, subject to any order of the court, the petitioners were liable for the costs of the respondents. (In fact, the rule says that the discontinuing party is liable for the costs of the other party up to the date *on which the notice of discontinuance was served* upon that other party. In the present case, no such notice of discontinuance has been served, because the petitioners take the view that this is not a discontinuance. I can leave that point on one side for the moment.)
11. For the sake of completeness, I should mention that rule 2(2) of the Companies (Unfair Prejudice Applications) Proceedings Rules 2009 provides that:

“Except so far as inconsistent with the Act and these Rules, the Civil Procedure Rules 1998 apply to proceedings under Part 30 of the Act with any necessary modifications.”

It was not suggested at the hearing that there was any relevant inconsistency preventing the CPR, and especially Part 38, from applying to this petition. Nor was it suggested that any modifications were necessary before it could do so. I therefore proceed on the basis that that Part applies to this petition without any modification.

12. Counsel for the petitioners submitted that this was not a discontinuance within Part 38. He referred to rule 38.1, which relevantly reads as follows:

“(1) The rules in this Part set out the procedure by which a claimant may discontinue all or part of a claim.

(2) A claimant who –

(a) claims more than one remedy; and

(b) subsequently abandons his claim to one or more of the remedies but continues with his claim for the other remedies,

is not to be treated as discontinuing all or part of a claim for the purposes of this Part.”

13. As Chief Master Marsh said in *Galazi v Christophorou* [2019] EWHC 670 (Ch),

“42. ... (2) A ‘claim’ for the purposes of this rule is not defined but it is clear that a claim is to be distinguished from a remedy. If the claimant abandons a remedy,

but continues the claim for other remedies, it is not treated as discontinuing all or part of the claim – rule 38.1(2).”

14. In argument, I suggested the example of a claim in trespass to land, where the claimant in the claim form sought both a permanent injunction and damages. If subsequently the claimant abandoned the claim to an injunction, that was giving up a remedy (injunction) and not the claim (trespass to land). I then wondered whether the case would not be *a fortiori* if, after having issued the claim, the claimant sought an interim injunction, but then abandoned it before the application was heard. Although counsel for the represented respondents accepted the trespass analogy in relation to the permanent injunction, she submitted that the application for an interim application did not form any part of the claim in the claim form, but was an entirely separate and stand-alone “claim” (as she put it, in the widest sense of the word). Accordingly, the decision to withdraw the application for an interim injunction amounted to a discontinuance within rule 38.1.
15. I reject this submission. I accept, of course, that an application for an interim remedy is not part of the final relief sought in the prayer of the claim. But it does not follow that that application represents a separate “claim” within the meaning of rule 38.1, and thus attracts the rules about discontinuance. In my judgment, the claim for the purposes of Part 38 is whatever is the subject of the claim form or other originating process, here a petition under the Companies Act 2006. That complains of conduct unfairly prejudicial to the petitioners, and seeks relief from that conduct, *inter alia* in the form of an order requiring some or all of the first five respondents to acquire their shareholdings in the sixth to eight respondents at their fair values, and also damages. It is a claim created by statute. The application in that claim for an interim injunction is not itself part of that claim. As it happens, and unlike the trespass example, there is no claim to a permanent injunction either. It is simply part of the procedures available to preserve the position until the trial of the petition and the possible grant of a permanent remedy.
16. In my judgment, where an application for an interim remedy in an existing claim or other originating process is deliberately not pursued, that does not amount to a discontinuance of a claim or a part of a claim within Part 38 of the CPR. Accordingly, it is not necessary to serve notice of discontinuance, and the costs consequences set out in rule 38.6 do not apply. Instead the applicable rules must be found elsewhere.

Withdrawal

17. The question therefore arises as to the appropriate mechanism, if any, by which an interlocutory application not proceeded with may be formally brought to an end, if the answer is not discontinuance. Sometimes an application not proceeded with is simply dismissed, as where the applicant does not attend court, and the respondent applies for dismissal. Here, however, the applicants seek to *withdraw* their application. Both counsel agreed that (if discontinuance did not apply) no rule provided expressly for this case. They also said they had not found any relevant caselaw. I referred to CPR rule 3.1(2)(m). This provides as follows:

"Except where these Rules provide otherwise, the court may –

[...]

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective..."

18. In the recent case of *Parrot Pay Ltd v Goddington Pierce Ltd* [2023] EWHC 2774 (Ch), where the same question of power to terminate an application arose, I said this:

"9. ... CPR rule 3.1(2)(m) does allow the court to take any step or make any order for the purpose of managing the case and furthering the overriding objective. I have on at least one previous occasion (*Agents Mutual v Moginnie James Ltd* [2016] EWHC 3384 (Ch)) held that this power extends to permitting amendments to be made to applications once issued. I can see no reason why the width of those words would not extend to permitting an application to be withdrawn, instead of simply amended. So, I hold that that is possible. Of course, any permission given by the court to withdraw an application would be on such terms as the court might consider appropriate, including costs or other consequential matters."

I adhere to that view. In my judgment, the court has power to permit the withdrawal of an interim application under rule 3.1(2)(m), and on such terms as it may think fit. The applicants seek to withdraw the application, and the respondents do not object. I will therefore permit that withdrawal.

Costs

The general rule and the exception

19. However, no particular costs consequences are prescribed for such a withdrawal. *Prima facie*, therefore, the ordinary rules apply. These rules are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).
20. If the general rule applies, it requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". In the present case, I am dealing only with a single stand-alone application. Rix LJ's reference to "the litigation" therefore has to be read as a reference to this application. The successful parties on the application are the respondents. The application has been withdrawn, and the respondents have been successful in their resistance to it. In my judgment it is appropriate here to make an order about costs. Under the general rule, the applicants should pay the respondents' costs. But the court has the power to make a different order. Is there a sufficient reason to do so?

Applicants' submissions

21. The applicants say that there is. They say it was reasonable for them on the material that they had to ask the respondents in September 2023 to confirm that the sixth respondent's funds were not being used to pay the other respondents' legal costs. No such confirmation was forthcoming. Indeed, Ms He's letter in reply in late September suggested that such funds were being so used. It was therefore reasonable for them on 18 October to issue their application. The evidence of the fifth respondent, dated 25 October, in answer to the application, appeared to confirm what the applicants suspected. The first statement of any justification for such payment came only on 2 November. That was the day of the first hearing of the application, when a further witness statement by the respondents was ordered, as was cross-examination of relevant witnesses. However, once the further witness statement, giving more details of the justification, was received (on 6 November) and considered by the petitioners, they decided not to pursue their application further. They told the respondents so, by letter of 9 November, with the letter to the court being sent on 10 November. They say that, if the respondents had explained the position earlier, when asked, the application would not have been issued. The respondents should therefore pay the applicant's costs.

Respondents' submissions

22. The respondents oppose that. They say that the evidence showed that the first and third petitioners knew about the directors' loans to the sixth respondent from the beginning, since they were directors of the company until January 2020 and February 2021 respectively. They were informed of the decision to begin to repay the loans in 2022, and each of them was partially repaid. All the documents exhibited by Mr Li were disclosed at an earlier stage in the proceedings, and the petitioners could have looked at them. There was therefore no need to issue the application. Instead there should have been further discussion between the parties. The respondents accept that they did not explain the position when asked in September, in the way that they did in the evidence of Mr Li in November. But they said that they were right all along, and that the petitioners had the means of knowing this.

Assessment

23. I accept that the petitioners must have known of the directors' loans to the sixth respondent. I also accept that they must have known that some of those loans had been repaid. But there is nothing to show that these were at the forefront of their minds in September 2023. It is then a significant further step to say that, when the payments from the sixth respondent's account to the lawyers were discovered in the bank statements, the petitioners should have inferred that this was a further partial repayment of such loans. The payments were made to the lawyers, and not to the directors themselves. No instruction to the sixth respondent to repay loans was found in the disclosure given. The petitioners asked for an explanation and justification of the payments, but received instead (in the letter from Ms He) an implied acceptance that the payments of costs had indeed been made from the funds of the sixth respondent. In my judgment it was perfectly reasonable for them to issue the application.
24. When, in response to the application, they received the evidence of the fifth respondent, they must have been strengthened in their belief, because he too accepted that such payments had been made from the funds of the sixth respondent. The

represented respondents however did not file their evidence in accordance with my directions. They served the first witness statement of Mr Li on this subject only on the day of the hearing itself. Unsurprisingly, the matter was adjourned to enable further evidence to be filed, and cross-examination was ordered for the adjourned hearing. However, once the petitioners had seen the further evidence from Mr Li, they promptly and sensibly decided that it was unlikely that they would obtain the interim injunction that they sought. They informed the respondents that they intended to withdraw their application, but would seek their costs. In my judgment, the petitioners behaved and responded reasonably throughout.

25. On the other hand, I am afraid that the represented respondents did not. The suspicions of the petitioners were reasonably aroused by the discovery of payments from the sixth respondent to the lawyers (notwithstanding the warning letters sent to their then solicitors in 2022). They therefore wrote in September 2023 asking for an explanation and confirmation that the sixth respondent's funds would not be used to pay the respondents' legal costs. The represented respondents had the perfect opportunity to explain the position, in exactly the same way that Mr Li did in his evidence subsequently. Had they taken that opportunity, the application would not have been issued, and the costs not incurred. But they did not.
26. Then, when the petitioners reasonably issued the application itself, the represented respondents did not serve their evidence in accordance with my directions, although the fifth respondent did, thereby incidentally confirming the petitioners' suspicions. Just two days before the hearing, the represented respondents asked, without any substantive explanation, and without offering any undertakings, for the hearing on 2 November to be adjourned. Finally, put under pressure as they were, they produced the first of the two witness statements of Mr Li on the morning of the hearing. This for the first time provided an explanation for the payments made by the sixth defendant. It was then corrected and amplified by the further witness statement of Mr Li four days later. I see no good reason (and none was suggested) why the substance of the evidence of Mr Li could not have been put in a letter and sent to the petitioners in answer to their letter of enquiry in September.

Conclusion

27. In my judgment, the conduct of the represented respondents in relation to this application amply justifies the court making a different order as to costs than that proposed by the general rule. The costs of and occasioned by this application were caused entirely by the represented respondents, and accordingly they must pay the petitioners' costs. It is appropriate that these costs be summarily assessed, to avoid further waste of costs. In the first instance I will deal with assessment of the costs on the papers. The represented respondents must file and serve written submissions on the petitioners' costs schedule or schedules by 4 pm on Monday 20 November 2023, and the petitioners may if so advised file and serve submissions in reply by 4 pm on Tuesday 21 November 2023. I will then deal with the assessment as soon as possible thereafter. I am grateful to counsel and solicitors on both sides for their assistance.