

Neutral Citation Number: [2023] EWHC 704 (Ch)

Case No: CR-2022-0019052

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

**IN THE MATTER OF: DnaNudge Limited**

A N D

**IN THE MATTER OF: the Companies Act 2006**

Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Tuesday, 21 March 2023

Before:

HIS HONOUR JUDGE HODGE KC  
sitting as a Judge of the High Court

B E T W E E N :

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(1) VENTURA CAPITAL GP LIMITED  
(Acting for and on behalf of Ventura Capital LP Fund IV)

(2) VENTURA CAPITAL LIMITED

Claimants

– and –

DnaNUDGE LIMITED

Defendant

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**MR TIMOTHY COLLINGWOOD\_KC** (instructed by **Fladgate LLP**) appeared on behalf of the **Claimants**.

**MR ANDREW THORNTON KC** (instructed by **Dorsey & Whitney (Europe) LLP**) appeared on behalf of the **Defendant**.

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**J U D G M E N T   A P P R O V E D**

**JUDGE HODGE KC:**

- 1 This is my extemporary ruling on the issue of costs following the handing down of my written judgment on Wednesday, 8 March, following a hearing that occupied one-and-a-half days of court time in January. The substantive judgment bears the Neutral Citation Number [2023] EWHC 437 (Ch).
  
- 2 For the reasons set out in that judgment, I declared that a purported conversion of all of the issued Series A Preferred Shares in the defendant company into ordinary shares, on or about 7 June 2022, by way of a conversion notice signed by an investor majority, dated 26 May 2022, was invalid, void and of no effect.
  
- 3 In light of that declaration, I ordered that the defendant's register of members should be rectified by striking out each of the claimants and Sumitomo Mitsui Trust Bank ("SMTB") as the holders of Ordinary Shares and inserting the name of each of the claimants and SMTB as the holder of, respectively, 21,003 (in the case of the first claimant) and 3,023 (in the case of the second claimant) and 851 (in the case of SMTB) Series A Preferred Shares in the defendant company.
  
- 4 I further ordered that that rectification should take effect as from 7 June 2022 (or such earlier date as the defendant purported to enter the claimant and SMTB as the holder of Ordinary Shares instead of Series A Preferred Shares. By paragraph 5 of my order, I directed that there should be a further hearing on a date to be fixed to resolve all matters consequential upon the foregoing, including costs and any application for permission to appeal. This is that further consequential hearing.

5 Mr Timothy Collingwood KC again appears for the claimants and Mr Andrew Thornton KC again appears for the defendant. This hearing is proceeding remotely by the Teams video platform.

6 I have received oral submissions from both counsel as to the incidence of costs and this extemporary ruling is confined to the issue of costs in principle. Submissions on detailed quantification and assessment will follow.

7 For the defendant, Mr Thornton accepts that he lost on the issue of the true construction of the articles, but he submits that the claimant failed on its claim under s. 633 of the Companies Act 2006, which gave the claimants, in the circumstances of the present case, the right to apply to the court to have the variation of class rights attached to the Preferred Shares cancelled. Mr Thornton points out that the need for that application arose only in the hypothetical situation that Mr Thornton succeeded in establishing that there had been a variation or abrogation of class rights, as was his primary submission, but, contrary to his further primary submission, that article 10.1 yielded to article 9.2 (a), so that the share conversion had been effective notwithstanding the variation or abrogation of the special rights attached to the Preferred Shares. It would only have been in that hypothetical situation that s. 630 and s. 633 were engaged at all. In that event, it would be necessary for the claimants to show not only that they had suffered prejudice as a result of the variation, but also that such prejudice was unfair. I held that, had that scenario arisen, I would have found that the variation was not unfair and, therefore, the claim under s. 633 of the 2006 Act would have failed.

8 Thus, whilst it was strictly unnecessary for me to do so, and it did not affect the ultimate outcome of the claim, I expressed myself not satisfied that the claimants had made out their

alternative claim of unfair prejudice for the purposes of s. 633. However, for the reasons I gave in my written judgment relating to the true construction of the articles and the interrelationship between articles 9.2 (a) and 10.1, I granted the declaration that the conversion of the Preferred Shares into Ordinary Shares was invalid, void and of no effect.

9 Mr Thornton, as I say, accepts that, having lost on the issue of construction of the articles, the defendant should pay the claimants' costs of the claim. He does not seek an issues-based costs order. What he seeks is a disallowance of part of the costs incurred by the claimants in pursuing the claim, to reflect their failure on one aspect of the claim, namely that under s. 633. Mr Thornton invites the court to discount the costs by 50 per cent to reflect the claimants' failure on that aspect of the claim. He points out that the inclusion of a claim under s. 633 was significant in litigation terms because, under s. 633 (3) of the 2006 Act, if an application under s. 633 is made, the variation has no effect unless and until it is confirmed by the court. In other words, there is an automatic stay on the variation taking effect pending the final determination by the court of the s. 633 application. Mr Thornton points out that the claimants therefore effectively secured the benefit of interim injunctive relief without the corresponding detriment of having to give a cross-undertaking in damages.

10 Mr Thornton emphasized, when he came to reply, that the claimants had brought two quite discrete claims. They had succeeded on one and had failed on the other. The s. 633 claim had, in the event, proved entirely academic, and, indeed, was always going to be academic, because if the claimants were right on their primary case on the true construction of the articles, then it would never be necessary for the court to consider the claim under s. 633.

11 Although, as Mr Collingwood submits, the claimants succeeded in obtaining the declaratory relief which it had always been seeking, it, in fact, obtained that relief on one of two discrete

causes of action; and on the second of those causes of action, that under s. 633, it had failed. In response to a suggestion by Mr Collingwood that the defendant could have applied to strike out that aspect of the claim, Mr Thornton invited the court to take the pragmatic view that, had it made such an application, it would have been met with the argument from the claimants that both aspects of the case should be allowed to proceed to trial, and that it would not be in accordance with the overriding objective of dealing with the case justly and at proportionate cost for the court, on a discrete, preliminary application, to seek to address one of the two heads of claim in isolation.

12 In response to a suggestion from the court that, even if it were to accede to Mr Thornton's invitation to discount part of the costs to be awarded against the defendant, a discount of as much as 50 per cent was excessive, and that it should perhaps be as little as 10 per cent, Mr Thornton submitted that a more appropriate discounted figure might be 20 per cent. Mr Thornton submitted that that would accord more closely with the court's assessment that of the total 143 paragraphs in the judgment roughly 23 (some 17 per cent) had been referable to the s. 633 application, at least on those parts of it on which Mr Thornton had succeeded. Mr Thornton recognises that he failed on one aspect of the s. 633 application, namely he had failed to persuade the court that s. 633 was not engaged at all in a case where a variation was made pursuant to a provision in the company's articles of association. Those, in summary, were Mr Thornton's submissions.

13 For the claimants, Mr Collingwood submitted that this was not an appropriate case for any issues-based costs order because the claimants had secured all the relief they had sought. They had also won on the potential application of s. 633 to a provision in a company's articles of association: see paragraph 116 of the judgment. It was only on the issue of unfair prejudice that the s. 633 application, had it been necessary to consider it, would have failed.

- 14 As for the protection of the s. 633 (3) restraint, Mr Collingwood submits that the claimants were fully entitled to it. Quite properly, the defendants should have been prevented from implementing the share conversion pending a final determination by the court because, in the event, the court has declared that conversion to have been invalid and of no effect.
- 15 Mr Collingwood submits that there should be no deduction at all; but if there were to be a deduction, it should be entirely *de minimis*. Although s. 633 had conferred interim protection on the claimants against the effects of the conversion, that had been entirely right and proper because the court had held the conversion to have been invalid. That, indeed, showed that there had been a legitimate purpose in bringing the application under s. 633 in the first place.
- 16 Mr Collingwood submitted that a 10 per cent discount should be the upper end of any discount. He invited the court, if it were not minded to treat any discount as negligible, to adopt a discount of 5 per cent, rather than 10 per cent, to reflect the limited time and litigation resources that had been devoted to the s. 633 issue.
- 17 I have borne all those submissions in mind. I can see that in some cases the court might wish to discourage apparently unmeritorious applications under s. 633 if the true object of them was to obtain an unwarranted stay under s. 633 (3). However, I accept that that is not this case. In the event, the claimants were fully entitled to protection from the interim implementation of a variation which the court has held to be invalid. The normal rule is that costs follow the event, as Mr Thornton recognises. The fact is that the claimants have succeeded in obtaining all the relief that they were seeking. In those circumstances, the court should only apply some discount to the costs to be awarded to the successful party if some issue of conduct has affected the way in which costs have fallen to be incurred.

18 In the present case, much of the evidential material would have needed to be covered even without any application under s. 633. Many of the submissions advanced at court would also have had to be made, irrespective of whether a claim under s. 633 had been included in the proceedings. I am satisfied that the s. 633 claim did add a little to the evidence and the submissions, but that little was relatively minor in terms both of evidential material, and in terms of legal submissions.

19 Doing the best I can, based upon the court's feel for the case, and in the exercise of the court's discretion as to costs, I consider that it is appropriate to make a very small discount to reflect the defendant's success, albeit not entire success, on the discrete s. 633 issues. In my judgment, the appropriate discount to apply is that of 10 per cent. I will, therefore, order that the claimants are to have 90 per cent of their costs of the proceedings.

### **L A T E R**

20 This is the final matter on which I need to rule at this hearing consequential upon the handing down of my substantive written judgment which bears the Neutral Citation No. [2023] EWHC 437 (Ch). For the unsuccessful defendant, Mr Thornton seeks permission to appeal my decision on the true construction of the articles of association and, in particular, the interrelationship between articles 9.2 (a) and 10.1.

21 I have set out my conclusions in my written judgment. After that written judgment was circulated in draft, I received further submissions, supported by three additional cases, from Mr Thornton; and I addressed those further submissions in the postscript to my judgment, before it was formally handed down on 8 March.

22 Mr Thornton has helpfully produced a three-page document setting out his proposed grounds of appeal; and he has, in the course of his oral submissions, drawn attention to additional matters in support of his application for permission to appeal.

23 I am satisfied, for the reasons that I gave in my written judgment, that there is no real prospect of Mr Thornton persuading the Court of Appeal to take a view different from me on the true construction and application of the articles in the present case. If there is no real prospect of an appeal succeeding - as I consider to be the case - there is no other reason, still less any compelling reason, why an appeal should be heard.

24 The court's reasons for its judgment are set down in writing. Mr Thornton has produced clear and concise grounds of appeal. If the appeal court considers that there is a real prospect of success, then the appeal court can give permission to appeal from my decision. But, for the reasons I have already given, I consider that there is no such real prospect of success; and I, therefore, refuse permission to appeal.

25 In accordance with the terms of my order of 8 March, the time for appealing runs from today and is 21 days. If Mr Thornton, for the defendant, wishes to pursue an application for permission, he can do so to the Court of Appeal within that 21-day period. That concludes this, I hope, final extemporary ruling.

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