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IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
[2019] EWHC 1540 (Comm)

No. CR-2015-009042

Rolls Building  
Fetter Lane  
London, EC4A 1NL

Friday, 10 May 2019

Before:

MR JUSTICE FANOURT

B E T W E E N :

ESTERA TRUST (JERSEY) LTD. & Anor

Petitioner

- and -

SINGH & ORS

Respondents

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MR S. GEE QC and MR G. GOODFELLOW QC and MR A. BARDEN (instructed by Arnold & Porter Kaye Scholer LLP) appeared on behalf of the Petitioners.

MR D. LIGHTMAN QC (instructed by Orrick, Herrington & Sutcliffe LLP) appeared on behalf of the First Respondent.

MR F. CAMPBELL (instructed by Baker McKenzie) appeared on behalf of the Fourth Respondent.

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**J U D G M E N T**

MR JUSTICE FAN COURT:

- 1 On 5 July 2018 I gave judgment on, essentially, liability issues in this action at what was referred to as Trial 1 and on that date I made an order which included an order that, subject to one specific matter, the first and fourth respondents, that is Jasminder Singh and the Company, Edwardian Group Limited (“the Company”) on a joint and several basis should purchase the shares in the Company registered in the petitioners’ sole names at the price and in the manner to be determined at Trial 2. Then I set out the basis on which that determination should proceed.
- 2 I gave directions at the same time for the trial of the remaining issues. The second trial was concerned with property and share values leading to a determination of the price payable, interest and time that should be given to the Company to raise the money necessary to pay the price that I determined, it being recognised that Jasminder Singh alone was in no position to raise the full purchase price, though that, obviously, did not detract in principle from his liability under my order to the extent that the Company did not pay the price by the time that it was required to do so.
- 3 No issue was raised at the second trial about how the price payable might be affected by the incidence of taxation or how the sale should be structured in order to mitigate tax liability.
- 4 I handed down judgment on Trial 2 on 8 April this year. I held that £22.5 million should be paid within 28 days, that is to say by 6 May, and that the remainder of the price and interest should be paid within six months, so by 8 October of this year. By agreement all consequential matters were adjourned to be dealt with at a further hearing to be fixed with a 2-day estimate, that estimate reflecting the fact that costs issues were still outstanding relating to Trial 1.
- 5 The parties then sought to agree an order to be made to reflect the decision that I had reached on Trial 2 and the immediate obligations, including the obligation to make the first tranche payment within 28 days. Within a few days, the parties had exchanged drafts, the result of which was that I had to decide in principle only one question relating to whether or not the transferee of the shares should be “as jointly directed by the first and fourth respondents”. That was wording that was inserted by the respondents into a draft proffered by the petitioners. The words in the petitioners’ draft “the first and/or fourth respondents shall purchase” [specified numbers of shares]”, was not disputed as, indeed, it could not be disputed in principle in the light of my order at the end of Trial 1.
- 6 I was then asked by the petitioners shortly before the end of last term not to have the final order sealed for a short time to enable them to address and issue - I was not told what the issue was at that time. But in accordance with the request I decided to leave approval of the final order over until the start of this term, which started on 30 April, hoping, perhaps forlornly, that the parties might manage to resolve the outstanding question between themselves.
- 7 On 25 April, the Company’s solicitor notified the other parties that it hoped to be in a position to complete the purchase of all the shares, not just the first tranche but the whole of the shares to be purchased on 1 May. In fact, the proposal was that Jasminder Singh would buy Herinder Singh’s shares to a value of about £2.5 million and the Company would buy the rest.

- 8 There was then a letter written by the petitioners' solicitors to the Company's solicitors on 29 April, inviting the Company and Jasminder Singh to liaise with them with a view to arranging the purchase in a way that was said to be more beneficial to both parties, including a more favourable tax treatment for the petitioners. That letter attached a copy of a letter that was written to me by the petitioners' solicitors, explaining that the proposed purchase of Estera's shares by the Company was considered by the petitioners' legal team to be likely to give rise to a tax liability for the Herinder Trust of something in the region of £50 million, on the basis that the purchase of the Company's own shares would be treated as, in large part, an income distribution to Estera and not as giving rise to a capital gain. That matter had not been appreciated by Estera until relatively shortly before the letter.
- 9 The letter pointed out that a sale to any person other than the Company would not give rise to a tax liability on that basis. The letter said that I still had jurisdiction to deal with the matter, since the order had not yet been sealed, and it invited me to order that a final order be not drawn up and that there should be a further hearing to address that question. I saw that letter on the afternoon of 30 April and on 1 May I received a copy of a formal application that had been issued by the petitioners to the same effect as the 29 April letter.
- 10 In the first place, the petitioners wish to have further time before a final order is sealed in which to obtain and pursue detailed tax advice in the UK and in Jersey. They are represented by, among others, Mr Giles Goodfellow QC, who set out the substance of interim advice given by him in the form of a skeleton argument that was before me. The position is considered to be that the tax consequences of the order that the Company and Jasminder Singh seek might be mitigated in one of three different ways; either the purchase of Estera shares by someone other than the Company; alternatively, obtaining HMRC clearance on the availability of double taxation agreement relief, which is a process that is expected to take in the region of 30 days but has already been started/initiated by the petitioners, and, thirdly, transferring Estera shares in the Company to a Jersey Company owned by Estera which would then, itself, sell the shares to the Company and hold the proceeds of sale.
- 11 The petitioners say, amongst other things, that it is not right that the respondents should be able to decide between them who buys the shares and in what way the purchase is structured and that it is the petitioners who may decide those matters. The Company's position is that it is not interested in entering into potentially controversial tax avoidance measures at risk of damaging its standing with HMRC. It is unwilling to agree any variation of the order made in Trial 1 and it wishes immediately to complete the purchase of the shares, having obtained from its bankers and placed in its solicitor's client account the substantial funds needed for that purpose. It wishes to avoid embarrassment in its relationship with its bankers, having applied some pressure in order to persuade the bankers to lend the monies as a matter of some urgency. Interest is running on the whole of the outstanding purchase price at the rate of 4 per cent above Bank of England base rate. In fact, as it turned out, the Company says that it was ready to complete on 3 May and it says it should not be prejudiced by any delay.
- 12 Jasminder Singh's position is that the question of who should buy the shares was determined in Trial 1, against which there was no appeal, and that the petitioners are seeking impermissibly to reopen matters that have already been decided. They, like the Company, say it is a matter for the respondents to decide who buys the shares of Herinder Singh and Estera.
- 13 I address first the question of principle about the correct wording of the intended order and who should decide who buys the shares of Estera and Herinder Singh, subject to any order

the court may make. The Company and Jasminder Singh are jointly and severally liable to buy the shares. The order made against the Company was not simply a matter of convenience on the basis that it could fund the purchase. It was made because I held that the directors of the Company, acting as such, had conducted the Company's affairs in ways that were unfairly prejudicial to the petitioners as shareholders. Both the Company and Jasminder Singh were at fault and therefore it was right that both were ordered to buy the petitioners' shares. Apart from that matter of principle, it was recognised at the hand down of the first judgment that in practice it would have to be the Company that bought at least the substantial majority of the shares and for that reason it was an active participant in Trial 2.

- 14 The order at Trial 1 having been made against the Company and Jasminder Singh jointly and severally, the position is that each is liable to buy the petitioners' shares and, each being liable to do so, each has the right to do so as against the petitioners. If one of those respondents were to buy all the shares before the time for doing so expired, that performance would exonerate the other respondent. Similarly, to the extent that something less than all the shares were bought, the other respondent would remain liable and entitled to purchase the remainder of the shares.
- 15 Accordingly, it before the time for purchase had expired, one of the respondents offered to complete the purchase, the petitioners could not properly refuse to do so. It is not for the petitioners to say how, as between the respondents, the rights to purchase are to be divided up. In principle, therefore, the amendment to the draft order proposed by the respondents was correct insofar as it implied that it was for the respondent to direct to whom, as between the two of them, the shares were to be transferred. The respondents did not have the right, without the petitioners' agreement or the court's approval, to have the shares transferred to someone else.
- 16 The position as a matter of law, in my judgment, would have been different in the event that both the respondents had defaulted on their obligations to buy by the specified dates. In those circumstances, the liability being joint and several, the petitioners would have been entitled to seek to enforce against either of the respondents or both of them as they saw fit. However, that position did not arise because an offer to complete the purchase of the shares, all the shares, was made well within the time specified in my judgment in Trial 2.
- 17 To the extent, therefore, that the petitioners argue that they are entitled to decide who buys the shares, I reject that argument. By agreement between them, the respondents are entitled to seek to complete the purchase in the proportions that they think appropriate. In any event, it is evident that Jasminder Singh is not himself in a position to pay the whole of the purchase price.
- 18 Apart from that issue of principle, whether, nevertheless, the court retains a residual discretion to direct that the Company effect the purchase or Eстера structure the sale in a particular way or perhaps that Jasminder Singh buys some of the Company's shares rather than Herinder Singh's shares is a question on which further argument may assist me, as is the question of whether and how any such discretion should be exercised.
- 19 In my judgment, there needs to be further argument in the light of the full picture so far as tax clearance or legitimate tax avoidance and structuring is concerned. In that regard, it does seem to me to be appropriate for the petitioners to be given further time to seek agreement with the Revenue, if that can be obtained, or to obtain such further advice or comfort that they can.

- 20 I make no decision today as to whether any variation of the mechanics of purchase would be appropriate, either with or without the agreement of the respondents. But it does seem to me that both of the respondents should be willing to engage constructively to see if some mutually agreeable solution can be found, given the history of these proceedings. As I mentioned to Mr Campbell in the course of argument, it would not be impressive if it later appears that the respondents have refused reasonably to engage with proposals that cannot prejudice them in order simply to cause prejudice to the petitioners in the shape of the incurring of a tax liability that could properly, and I emphasise “properly”, be avoided or mitigated.
- 21 The respondents, of course, must not be prejudiced by the delay that the petitioners seek. I must be satisfied that no delay (that cannot appropriately be compensated by an order I make) will eventuate, Mr Campbell referred to the relationship between the Company and its bank and the disadvantage of continuing uncertainty as to how, exactly, the petitioners’ shares will be purchased. I am not satisfied that either of those matters amounts to substantial prejudice. A further relatively short period of delay, with the judgment and order that I have made today being produced to the bank by way of explanation will not, in my judgment, give rise to any serious prejudice.
- 22 However, it is clearly important that the petitioners are not prejudiced in terms of their rights under the judgment in Trial 2 as a result of a delay which is brought about solely at the request of the petitioners. In those circumstances, it seems to me to be entirely appropriate to direct that, subject to any further order made at a later time, interest shall not continue to accrue on the purchase price for the shares after 3 May 2019.
- 23 The respondents’ rights, such as they are, subject to any discretion of the court, to perform in the way that they have decided is appropriate, should not be prejudiced by the lapse of time and the petitioners’ may therefore not rely later on the fact that payment of the first tranche was not, in fact, made by 6 May 2019, on any further delay in payment as a means of altering the legal position under the first two judgments. That is because the respondents were ready and willing to make payment on 3 May.
- 24 In those circumstances, I will adjourn this application to be heard at the same time as the other consequential matters. It seems to me that it is necessary to allow an extra half day for that purpose. I do not agree that the existing 2-day hearing estimate is excessive and can accommodate a further argument of the type that I have just identified. Two days plus a half day’s pre-reading is necessary in order to deal with the other issues. There will need to be another half a day in the time estimate to accommodate arguments about the machinery of completion. The hearing will therefore need to be two-and-a-half days in total and a day’s pre-reading for me.
- 25 What I will order, subject to any observations made by the parties, is that 14 days before the start of that hearing and, in any event, by 1 July 2019, if the hearing is further delayed than I hope it will be, the petitioners must set out clearly their position in terms of any structure that they propose and must file any evidence on which they rely. The respondents will then have seven days in which to put in any evidence in response.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge