

ROYAL COURT
(Samedi Division)

166.

30th November, 1993

Before: P.R. Le Cras, Esq., Lieutenant Bailiff
and Jurats Vint and Rumfitt

Between: Albert Abela Holding Nederland BV Plaintiff

And: (1) Albert Abela Ameropa Associates Limited
(2) Ameropa Enterprises Limited
(3) Peter Saile
(4) Wolfgang Lipps
(5) Dr. Hans Joachim Lauck Defendants

And: Albert Abela Holdings Nederlands BV Plaintiff

And: (1) Albert Abela Ameropa Associates Limited
(2) Ameropa Enterprises Limited
(3) Peter Saile
(4) Wolfgang Lipps
(5) Dr. Hans Joachim Lauck
(6) Dr. Tony Weaver
(7) Hans Rehkopf
(8) Teppich Domane Harste GMBH and Co Defendants

Application by the Second Defendant for a declaration that the Royal Court does not have the power, under Article 143 of the Companies (Jersey) Law 1991 to appoint a person as an additional Director of the First Defendant.

Advocate A.R. Binnington for the Second Defendant
Advocate T.J. Le Cocq for the Plaintiff.

JUDGMENT

THE LIEUTENANT BAILIFF: As a preliminary point in this summons, which is brought by the Second Defendant, the Second Defendant claims that the injunction imposed when the Order of Justice was signed on 4th June, 1993, was wrongly imposed where it purports to make an order under Article 143(2) of the Companies (Jersey) Law, 1991, and this on the ground that the Court has no power in law to make such an order.

The summons seeks other relief but Counsel agreed that this should be taken as a preliminary point.

The point is a short one. It is not concerned with whether the Court has an inherent power to make an order to preserve assets *pendente lite*. It is whether the terms of the law permit the Court to make an order under this Article of the Companies' Law.

As the legislation is new, and as the point is an important one in the administration of Company Law, I propose to set out the arguments and finding at rather more length than might be usual in an interlocutory finding. Article 141(1) of the Companies (Jersey) Law, 1991, reads as follows:

"(1) A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or 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".

Article 143(1), and 143(2) (a), (b) and (c) read as follows:

"(1) If the court is satisfied that an application under Article 141 or 142 is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of paragraph (1), the court's order may -

- (a) regulate the conduct of the company's affairs in the future;
- (b) require the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do;

- (c) **authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct".**

Mr. Binnington's argument is very short. The Court, he submits, cannot be satisfied that an application is well founded until it has heard evidence and is satisfied with it. Until the Court is thus satisfied, the powers do not arise. A *prima facie* case is not enough. Thus here, until the case is heard out, the Court may not exercise these powers under the law.

The Jersey law is modelled on and follows word for word the wording of Articles 459 and 461 (as applicable) of the English Companies Act 1985.

These words were considered by Scott J (as he then was) in Re a Company (No. 004175 of 1986) (1987) BCLC 574. As this may not be readily available in the Island the Court proposes to cite the passages put to it by Mr. Binnington.

First, from the Headnote at p.574:

"The company was a quasi-partnership type of company in which the petitioner held 30% of the shares. The company never declared a dividend but from time to time the petitioner was paid director's remuneration. In October 1985 the two other members of the company who controlled the remainder of the shares informed the petitioner that his services were no longer required. He was paid some £18,000 by way of compensation for loss of office but rejected an offer for his shares as being too low. The petitioner commenced proceedings under s 459 of the Companies Act 1985 alleging that his exclusion from management constituted unfair prejudice. In the present proceedings the petitioner applied for an interim order for the payment to him of £40,000 representing some part of the value of his shares in the company.

Held - Before the court could make an order under s 461 of the 1985 Act it had to be satisfied that the affairs of the company had been conducted in a manner that was unfairly prejudicial to the interests of the petitioner as was required by s 459. Accordingly, the court had no jurisdiction to make an interim order for payment in anticipation of a court order that the respondents should purchase the shares of the petitioner because they had conducted the affairs of the company in a manner that was unfairly prejudicial to his interests. Therefore the application should be dismissed.

Then, at pp. 576 to 579:

The petitioner's case on the petition is that for the respondents, on the one hand, to exclude him from management, thereby depriving him of any benefit from his investment in the company, and, on the other hand, to offer him considerably less than a pro rata share of the company's worth, represents an unfair dealing with the affairs of the company.

He now applies for an interim order so that he may obtain before the hearing of the petition some sum representing some part at least of the value of his shares. Counsel for the petitioner (Mr. Walker) has stressed that pending the hearing of the petition the company, and thus the respondents, have the benefit of his investment in the company. Pending the hearing of the petition, the petitioner derives no benefit from that investment and it is only just, submitted counsel, that the court should make an order that will enable the petitioner to have the benefit, at least, of the sum that the respondents accept represents the value of the shares. £40,000, a sum somewhat less than the amount of the £45,000 offer, is sought.

I see the force of the case put forward by counsel on the petitioner's behalf. Before I can consider, however, whether it is a case that ought to incline me as a matter of discretion to make an order in the petitioner's favour, I must be satisfied that I have jurisdiction to make the order.

I should refer to the relevant sections of the Companies Act 1985. Section 459(1) is in these terms:

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

Section 461(1) provides as follows:

'If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.'

Section 461(1) contains, therefore, a statutory criterion which must be satisfied before an order under a s 459 petition can be made. The court must be satisfied that the petition is well founded. The court cannot be satisfied that

the petition is well founded until it has been satisfied that -

'the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of some part of the members including at least himself ...'

(See s 459(1).)

Section 461(2) describes some of the orders that the court can make if the criterion in sub-s (1) has been satisfied. It provides:

'Without prejudice to the generality of subsection (1), the court's order may - (a) regulate the conduct of the company's affairs in the future, (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do, (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct, (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.'

In the present case, the petitioner is seeking under his s 459 petition an order under s 461(2)(d). He is asking the court by order to provide for the purchase of his shares by the other shareholders.

Under these statutory provisions the court has no jurisdiction to make an order on the petition until the statutory criterion set out in s 461(1) has been satisfied. That criterion will not be satisfied until the hearing of the petition.

Counsel for the petitioner argued, however, on four separate grounds that the court had power to make an interim order for the payment of a sum on account of the purchase price of shares.

First, he submitted, an interim order was justified under the power contained in s 520 of the 1985 Act. He deployed his argument by a somewhat circuitous route. He began by referring me to s 461(6) which provides that:

'Section 663 (winding-up rules) applies in relation to a petition under this Part as in relation to a winding-up petition.'

Section 663 confers on the Lord Chancellor power, with the concurrence of the Secretary of State, to make -

'general rules for carrying into effect the objects of this Act so far as relates to the winding-up of companies in England and Wales.'

So, s 461(6) confers that power on the Lord Chancellor, with the like concurrence, so far as relates to s 459 petitions as well as to winding-up petitions.

Then, having drawn attention to the manner in which the procedure relating to winding-up petitions and that relating to s 459 petitions can march side by side, counsel for the petitioner directed my attention to s 520 of the 1985 Act. Section 520(1) provides as follows:

'On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit ...'

Counsel for the petitioner submitted that this statutory provision formed the basis for the power of the court in winding-up petitions to make interim orders. He submitted that the context of s 461(6) and s 663, which allied winding-up petition procedure to s 459 petition procedure, justified giving to s 520(1) a broad, liberal construction so as to apply not only to winding-up petitions but also to s 459 petitions. I ought to read s 520(1), he submitted, as though it applied equally to s 459 petitions. Thus read, it would justify, he submitted, the making of interim orders or any other orders that the court thought fit.

I am unable to accept the submission of counsel for the petitioner. A power for the court to anticipate a purchase order made pursuant to s 461(2)(d) and, before the statutory criterion has been shown to be satisfied, to make an interim order for payment on account of the purchase price, would require in my judgment to be spelled out by clear words of statutory authority. There is none.

Analogous problems arose in two different areas of the law. *Re Heathstar Properties Ltd* [1966] 1 All ER 628, [1966] 1 WLR 993 concerned an application to register a charge out of time. The creditor, having made an application to have the time for registration extended under s 101 of the Companies Act 1948, made an interlocutory application for interim relief. Some form of interim registration was sought. Buckley J rejected that interim application. He held that the court had no jurisdiction to grant relief until it had been satisfied that the conditions for relief set out in s

101 existed. *Re Heathstar Properties Ltd* was cited and followed in the Court of Appeal in *Re W J King & Sons Ltd's Application* [1976] 1 All ER 770, [1976] 1 WLR 521. That case involved an application under the Mines (Working Facilities and Support) Acts 1966 and 1974. The application was for the grant of a compulsory licence over the respondents' quarry. The applicant made an interim application for the right to work the quarry pending the hearing of the full application. The Court of Appeal, reversing the judge at first instance, held that the court had no jurisdiction to anticipate rights that might or might not be granted in the future and that could not be granted until the specified statutory conditions had been satisfied. No interim order was possible.

Under s 459(1) and s 461(1) and (2), the court may have jurisdiction to order payment to be made by the respondents to the petitioner. But that jurisdiction will not, in my judgment arise until the specified statutory criterion has been satisfied. Until then the court does not, in my judgment, have jurisdiction to make any order for payment, whether interim or final. Section 520 provides no basis at all for an interim order for payment on account of the purchase price of the petitioner's shares. That ground fails.

Secondly, counsel for the petitioner (Mr. Walker) submitted that I ought to make the interim order on the footing that the statutory criterion has already been satisfied. I would have been willing to treat this hearing before me as the effective hearing on the question whether or not the company's affairs were being or had been conducted in a manner unfairly prejudicial to the interests of the petitioner if both counsel had consented to that course. Counsel for the petitioner, not surprisingly, was willing to consent; counsel for the respondents (Mr. Todd) equally not surprisingly, was not willing to consent. He wishes to cross-examine, and is entitled to cross-examine, the petitioner on various parts of his evidence. Whether on the hearing of the petition, the petitioner will succeed in showing that the interests of the company have been conducted in a manner unfairly prejudicial to him is a question to which I cannot, at this stage, give a final answer. The answer may depend on whether the offer of £45,000 was or was not a fair offer. The petitioner contends that it was a gross under-value. But if that offer was a fair one, and £45,000 does represent a fair valuation of his shares, then it does not seem to me obvious at all that the statutory criterion can be satisfied.

In my view, it is not possible for me at this stage to deal with the application on the footing that the statutory criterion has been satisfied. The second ground on which

counsel for the petitioner makes his application therefore fails".

Counsel also referred the Court to Re W.J. King & Sons (1976) 1 All ER 770 C.A., mentioned in the above passage.

Counsel also made the point (See Hughes -v- Clewley (12th May, 1993) Jersey Unreported) that as the wording of the local law followed Scott J's decision, this must have been the intention of the legislature when they used the words "is satisfied" rather than employ words which indicate the specific power to make an interim order.

Furthermore, he submitted that both Hughes -v- Clewley and the Representation of TSB Bank (Channel Islands) Ltd (6th July, 1992) have, in the words of the latter case, very strong persuasive effect, the legislation being in precisely the same terms as that in England.

In answer, after giving his views on the precise construction, Mr. Le Cocq submitted that the Court should not fetter itself. Every interlocutory application, he suggested, which is granted is well founded within the parameters applicable to such interlocutory proceedings. In his view Article 143(c) clearly envisaged interlocutory proceedings.

As to In Re a Company (No. 004175 of 1986), this concerned an application for an interim order to pay, and its scope should not be widened. On reading the judgment as a whole it is clear that a certain type of order is being sought and the Judge is not saying that the Judgment is of general application. In effect he is saying that I must have a discretion given by law to make an order for an interim money order, and no more, for everyone can see and knows, on reading the Judgment as a whole, that that is what it is.

Apart therefore from an interim money payment, the Court should read the Article as it is clearly intended it should be read. The Judgment is not one of general application. He submitted (See passages at 578 h and 579 d) that the Court's concern was limited to the type of order sought.

In the interests of justice the Court should, he submitted, give the widest application to the law.

Finally he referred the Court to Jaber & Ors. -v- Science & Information Technology Ltd & Ors. (1992) BCLC 84, where Ferrer J at p.784 had granted injunctive relief under s 459 of the English Law. He had to concede however that it would seem that relief was not sought under Article 461.

In reply, Mr. Binnington referred to in Re a Company (No. 004502 of 1988) ex parte Johnson (1992) BCLC 701;

The Headnote:

"(2) The petitioner had no standing to seek an order that the respondents recoup the company for moneys which had been improperly expended in connection with the s 459 proceedings. Until there was a finding of unfair prejudice under s 459 the court had no power to make an order under s 461. Also, as the petitioner was bringing the action in his capacity as a shareholder he had no standing to seek redress on behalf of the company.

And at p.707:

It seems to me that the decision of Scott J in *Re a company (No. 004175 of 1986) [1987] BCLC 574* is exactly applicable. The order there sought was of course a very different order, as Mr. Walford submitted to me, from the order here sought. None the less, in my judgment, the principle upon which Scott J decided that matter (with which I agree but which I would follow in any event unless I was convinced it was wrong) was that unless and until the statutory criteria set out in ss 459(1) and 461(1) of the 1985 Act are satisfied there is no power to make orders on the petition. Until the statutory requirements are satisfied, in my view, no order for payment can be made. It is an ancillary order which would be within s 461 when the primary grounds are satisfied but that jurisdiction does not arise until the s 461 grounds are satisfied".

He repeated his submission that under Article 143, the Court's powers do not arise until the statutory grounds are satisfied. If an injunction is to be imposed, it should be imposed by the Court in the exercise of its ordinary powers.

The Court finds in favour of Mr. Binnington's submissions. In our view the Article must be construed in the way in which Scott J construed it; it preceded the legislation here, and the Court finds that in the instant circumstances the Court had no power to make an order under s 143(2) as sought by the Plaintiff.

Authorities

Re a Company (No. 004502 of 1988) *ex parte* Johnson
(1992) BCLC 701.

Jaber & Ors. -v- Science & Information Technology Ltd & Ors.
(1992) BCLC 84.

Companies (Jersey) Law, 1991: Articles 141-143.

Companies Act 1985: ss. 459-461.

Shorter Oxford English Dictionary (3rd Ed'n): Vol. 2: "Satisfy".

Re. a Company (No. 004175 of 1986) (1987) BCLC 574.

Re. a Company (1986) 2 All ER 253.

Re. W.J. King & Sons (1976) 1 All ER 770 C.A.

Greenhalgh -v- Arderne Cinemas (1946) 1 All ER 512 C.A.

Hughes -v- Clewley (12th May, 1993) Jersey Unreported.

Re. a Company (No. 002612 of 1984) (1984) BCLC 99, 262.

Representation of TSB Bank (Channel Islands) Ltd (6th July, 1992)
Jersey Unreported.