



Neutral Citation Number: [2024] EWCA Civ 1259

Case No: CA-2023-002147

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS IN MANCHESTER, BUSINESS LIST (ChD)
His Honour Judge Hodge KC sitting as a Judge of the High Court
[2023] EWHC 1452 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 October 2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWY
and
LORD JUSTICE ARNOLD

Between :

AYMES INTERNATIONAL LIMITED

**Claimant/
Appellant**

- and -

(1) NUTRITION4U BV
(2) NUTRIMEDICAL BV
(3) SANDER KETELAAR

**Defendants/
Respondents**

Andrew Latimer (instructed by **Hemingways Solicitors Ltd**) for the **Appellant**
The **Respondents** did not appear and were not represented

Hearing date : 8 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. The principal issue on this appeal concerns the interpretation of a call option agreement between the Claimant (“AIL”) and the First Defendant (“Nutrition4U”) dated 31 August 2016 (“the Agreement”). By the Agreement Nutrition4U granted AIL the option of purchasing the shares in the Second Defendant (“NutriMedical”), a wholly-owned subsidiary of Nutrition4U, in consideration of the payment by AIL of €537,500 (“the Option Consideration”). The Third Defendant Sander Ketelaar was the sole shareholder and director of Nutrition4U, and the Chief Executive Officer of NutriMedical. Mr Ketelaar was a party to the Agreement because it provided for him to continue to serve as NutriMedical’s CEO after the purchase of the shares.
2. AIL duly exercised the option. The issue is how much AIL must pay for the shares. AIL contends that it only need pay €1. The Defendants contended that AIL must pay the equivalent of €526,930. Who is right depends on whether or not the “Turnover” used to calculate the purchase consideration in accordance with the Agreement includes the Option Consideration. His Honour Judge Hodge KC sitting as a Judge of the High Court held for the reasons given in his judgment dated 19 June 2023 [2023] EWHC 1452 (Ch) that it does. AIL contends that it does not (ground 1). In addition, AIL challenges certain findings made by the judge concerning Roger Wertheim-Aymes (“Mr Aymes”), the sole shareholder and director of AIL (grounds 2 and 3). Newey LJ granted permission to appeal on all three grounds.
3. Nutrition4U entered into insolvency after the judge’s judgment, with the consequence that Mr Ketelaar ceased to be its director. None of the Defendants have played any part in the appeal.

Factual background

4. The judge set out the background to the dispute in detail in his judgment. For the purposes of the appeal this can be briefly summarised as follows. Mr Aymes was formerly employed by Nutricia International BV (“Nutricia”) as marketing director of its Complian division. AIL started trading in 2013. It supplies nutritional products in the UK and Ireland. NutriMedical is also a supplier of nutritional products. AIL soon entered into discussions with NutriMedical as both companies perceived there to be a synergy between their respective businesses. In particular, NutriMedical had a recipe for a liquid product manufactured by a company called Even Sante, whereas AIL’s range initially consisted of powder products. In 2014 AIL entered into an agreement with NutriMedical which appointed AIL as the exclusive distributor of certain NutriMedical products in the UK. The pricing was based on a fixed margin for NutriMedical’s products of 10%. Between 2015 and 2017 NutriMedical and AIL were involved in litigation with Nualtra Ltd (“Nualtra”) in the High Court of Ireland involving claims of trade mark infringement by NutriMedical and AIL against Nualtra, and a counterclaim for defamation and unlawful interference with business by Nualtra against AIL which was settled upon the payment of €101,000 by AIL to Nualtra. In 2016 AIL and Nutrition4U entered into the Agreement. Until 2019 AIL’s chairman was Patrick Eraut.

The proceedings

5. AIL served a notice exercising the call option on 1 April 2020 specifying that completion of the share purchase was to take place on 29 May 2020. Completion did not take place on that date. On 8 April 2021 AIL commenced these proceedings seeking declaratory relief and a decree of specific performance. AIL joined NutriMedical and Mr Ketelaar as Defendants to ensure that they were bound by the judgment. The Defendants accepted that AIL had validly exercised the call option, but contended that the parties were no longer bound by the contract to purchase the shares on the basis that time was of the essence of that contract, which had lapsed, and in any event resisted specific performance. In the alternative, the Defendants raised the issue as to the consideration payable. There was also an issue between the parties as to the reasonableness of an employment contract offered by AIL to Mr Ketelaar to continue as NutriMedical's CEO after the acquisition.
6. The judge held that time was not of the essence of the contract to purchase the shares and that it was appropriate to order specific performance. Although the judge held that the employment contract offered by AIL to Mr Ketelaar was not entirely reasonable, he in effect gave guidance as to what would be reasonable. There is no challenge by either side to these aspects of his decision. AIL's position is that it still wishes to complete the purchase of the shares.

Relevant provisions of the Agreement

7. In the Agreement AIL is the "Buyer", Nutrition4U is the "Seller" and NutriMedical is the "Company". Recitals (C) and (D) state:
 - “(C) The Buyer wishes to have an exclusive right to exercise the Option, not exercisable before 1st April 2020, and in consideration of the Option agrees to pay the Company consideration of the equivalent of 150,000 Euros in GBP per annum in the 3 years and 7 months between 1st September 2016 and 31st March 2020 less the Company margin on any order placed by the Buyer before the date of this agreement but due to be delivered after the date of this agreement (the ‘**Option Consideration**’).
 - (D) The Buyer upon choosing to exercise the Option will issue shares in the Buyer to the Seller, such shares to have the [sic] similar rights to those held by the Buyer, based on the Company Value calculation and conditions set out in Schedule 1 at the time of the proposed transaction. If the Option is not exercised then there is no commitment to issue shares in the Buyer to the Seller.”
8. Clause 3.1 provides:

“Subject to the conditions in clause 2 and in consideration of the payment of the Option Consideration from 1st September 2016 of 150,000 Euros per annum by the Buyer to the Company payable in equal monthly instalments of 12,500

Euros until 31st March 2020, total €537,500, the Seller grants to the Buyer an Option to purchase all of the Option Shares on the terms set out in this agreement. The Company's margin on any order placed by the Buyer before 16 September 2016 but not received by that date is to be refunded and offset against the first payments."

9. Clauses 4.1, 4.2 and 5.1 provide that AIL can exercise the option by service of a notice in a window between 31 March 2020 and 1 July 2020.

10. Clause 6.1 provides:

"Subject to the completion of satisfactory due diligence including all financial due diligence in accordance with clauses 2.3, 2.4 and 2.5 above, the Consideration payable for the Option Shares shall be satisfied by:

- (a) the issue and allotment to the Seller of such number of shares in the Buyer as is determined pursuant to Schedule 1 (by way of fulfilment of the Proposed Transaction), or alternatively
- (b) the fee of 1 Euro if the Company Value as at the date of exercising the Option is 0 Euros or less. In such circumstances the parties agree that there shall be no UK Issue and therefore no obligation for the Buyer to issue shares in the Buyer to the Seller."

11. Clause 7.1 provides:

"Sales of products and services between the Buyer and the Seller are to be at cost with no additional margin applied by either party. There is no obligation on either party to provide the other with credit terms. Any Company margin paid on orders placed before 1st September 2016 for delivery after 1st September 2016 to be refunded."

12. Clause 21.1 provides that no term of the Agreement is enforceable by a third party. Clause 25.1 provides for the Agreement to be governed by and construed in accordance with the laws of England. Clause 25.2 provides for the courts of England to have exclusive jurisdiction over any dispute or claim.

13. Schedule 1 provides, so far as material:

- "1. The Relevant Margin shall be a sum equal to the Turnover of the Company (excluding any sales to the Buyer) minus the direct cost of goods (excluding those goods sold to the buyer) and any logistics costs; sales and marketing costs (excluding those related to New Products) and €150,000 for CEO salary for the penultimate financial year preceding the exercise of the Option, namely Year 3. The Relevant Margin shall be based on

the figures in Year 3 which must be repeated or bettered in Year 4 by the same customers. If the Year 4 figure is lower for a customer then that figure will be used in determining the Relevant Margin. For the sake of completeness the NHS shall count as one customer for the purpose of this calculation. The equivalent calculation - mutatis mutandis - shall be used to determine the Relevant Margin of the Buyer. So:

Relevant Margin (RM) = Turnover in Year 3, repeated or bettered in Year 4

- Sales to AIL
- Cost of Goods excluding sales to AIL
- logistics cost excluding AIL sales
- Sales and Marketing Costs not relating to new products
- €150,000

2. The Relevant Margin x 6 plus (or minus if negative) Net Assets will be used to calculate the Company Value of the Buyer and Seller. So:

Company Value = RM x 6 + Net Assets”.

Ground 1: Interpretation of the Agreement

14. It can be seen from recital (C) and clause 3.1 that AIL agrees to pay the Option Consideration totalling €537,500 for the grant of the option and that this sum represents €150,000 per year for a period of 3 years and 7 months. It is common ground that it was duly paid.
15. If the option is exercised, then by virtue of clause 6.1 the consideration payable for the shares depends on the Company Value of NutriMedical at the date of the exercise of the option. If the Company Value is greater than zero, the consideration is not paid in cash, but by AIL issuing and allotting shares in itself to Nutrition4U. The number of shares to be issued is determined in accordance with provisions of Schedule 1 which I have not set out above. If the Company Value is zero or less, then AIL pays €1.
16. It can be seen from Schedule 1 paragraph 2 that the Company Value is Relevant Margin multiplied by 6 plus (or minus if negative) Net Assets. The Net Assets figure was agreed at trial as being €481,858. Schedule 1 paragraph 1 sets out how Relevant Margin is calculated. In essence, Relevant Margin is calculated as Turnover in the penultimate financial year before the exercise of the option minus specified deductions (subject to the Turnover being the same or better in the following year). Although Turnover looks as if it is a defined term, in fact it is not defined in the Agreement. Furthermore, the accountancy experts called by the parties agreed that whether the Option Consideration forms part of Turnover was a question of interpretation of the Agreement rather than of accountancy practice.

17. If the Option Consideration is included in Turnover, then Relevant Margin is positive and the Company Value is €526,930. If the Option Consideration is not included in Turnover, then Relevant Margin is negative and the Company Value is negative.
18. There was no dispute before the judge as to the applicable principles of contractual interpretation. These are well known and there is no need to rehearse them here.
19. AIL contends that Turnover does not include the Option Consideration. I agree with this. My reasons are as follows.
20. First, Option Consideration is a defined term in the Agreement. If the drafters had intended it to form part of the calculation of Relevant Margin, and hence Company Value, one would have expected them to have spelt that out in Schedule 1 paragraph 1. Instead, they made no reference to the Option Consideration in that calculation, but used an entirely different term, Turnover.
21. Secondly, the judge considered that the fact that Schedule 1 paragraph 1 does not specify that the Option Consideration should be deducted from Turnover supported the Defendants' interpretation of the Agreement. This reasoning assumes that Turnover would include the Option Consideration unless expressly excluded. In my view what is more pertinent is that Schedule 1 paragraph 1 does not specify that the Option Consideration should be included in Turnover.
22. Thirdly, given that Turnover is not defined in the Agreement, it should be given its ordinary meaning. The apposite definition in the *Oxford English Dictionary* (3rd ed) is definition III.10.a:

“The value of the goods and services that a company sells in a particular period of time; the amount of money received in sales in a given period.”

The Option Consideration is not the value of the goods or services that NutriMedical sold in a particular period of time or the amount of money NutriMedical received in sales in a given period. Indeed, it does not depend on NutriMedical making any sales at all. Rather, it is the value of the right granted by Nutrition4U to AIL to acquire the shares in NutriMedical.
23. Fourthly, but for clause 3.1, the Option Consideration would have been payable to Nutrition4U as the grantor of the option and the prospective vendor of the shares. Clause 3.1 required AIL to pay the Option Consideration to NutriMedical instead. NutriMedical is neither a party to the Agreement, nor able to enforce it by virtue of clause 21.1. Thus, in the hands of NutriMedical, the Option Consideration constituted a gift from Nutrition4U (parent) to NutriMedical (subsidiary). A gift from a parent to a subsidiary is not turnover of the subsidiary.
24. Fifthly, excluding the Option Consideration from Turnover makes good commercial sense. One would expect the purchase price of the shares to reflect the expected future earnings of NutriMedical based on its performance in the period prior to the exercise of the option. But the Option Consideration could not contribute to NutriMedical's expected future earnings. It was a one-off payment for a right granted by Nutrition4U.

25. Sixthly, by contrast, including the Option Consideration in Turnover makes no commercial sense at all. The result would be to treat the sum paid by AIL for the grant of the option as inflating the price payable by AIL for the purchase of the shares. This is particularly so given the multiplier of 6 in the calculation of Company Value.
26. Seventhly, the calculation of Relevant Margin in Schedule 1 paragraph 1 supports this interpretation. The first three deductions exclude sales by NutriMedical to AIL and associated costs from the calculation. Thus AIL was not paying for the value of its own trade with NutriMedical. It would be inconsistent with this for AIL to pay for the value of AIL's payment of the Option Consideration to NutriMedical.
27. Eighthly, it can be seen from the Agreement that clause 7.1 provides for sales of products and services between AIL and NutriMedical to be at cost. Furthermore, the last sentence of clause 3.1 and the last sentence of clause 7.1 require NutriMedical's margin on orders placed before 1 September 2016 for delivery after that date to be refunded. The Defendants relied before the judge on the undisputed fact that the reason why the parties agreed that the Option Consideration should be paid to NutriMedical rather than Nutrition4U was to compensate NutriMedical for its loss of margin from selling to AIL, which was in exchange for NutriMedical's cooperation in supplying a recipe to enable AIL to develop an alternative product with a supplier other than Even Sante. The judge considered that this supported the Defendants' interpretation of the Agreement. I disagree. At most, it shows that AIL was prepared, as part of the overall commercial deal, to agree to the sum it paid for the grant of the option being used to prop up NutriMedical's profits during the period covered by the option rather than NutriMedical continuing to earn margin on sales to AIL. It does not alter the fact that there is nothing in the Agreement to show that the Option Consideration should be included in the calculation of Turnover.
28. Ninthly, the Defendants also argued before the judge that deduction of the Option Consideration of €150,000 per annum would amount to "double counting" because the calculation of Relevant Margin in Schedule 1 paragraph 1 requires the deduction of €150,000 "for CEO salary". The judge accepted this argument, but again I disagree. The coincidence in the figures is just that. The sums in question are expressly for different things. There is no double counting. I would add that this argument is inconsistent with the Defendants' argument based on clause 7.1.

Grounds 2 and 3: Findings about Mr Aymes

29. The three principal factual witnesses who gave evidence before the judge were Mr Aymes, Mr Eraut and Mr Ketelaar. Mr Eraut had been approached by both sides to give evidence, and his witness statement consisted of answers provided by him to a jointly prepared list of questions. He was called to give oral evidence by AIL and cross-examined by counsel for the Defendants. In his judgment the judge set out his assessment of each of the witnesses. His assessment of Mr Aymes was that he was "an unsatisfactory, and an unreliable, witness". By contrast, the judge found Messrs Eraut and Ketelaar to be reliable witnesses. Accordingly, the judge preferred the evidence of Messrs Eraut and Ketelaar to that of Mr Aymes where they were in conflict.
30. The judge recorded that Mr Aymes had given evidence for approximately four hours. He gave five reasons for his assessment of Mr Aymes as a witness. First, he found

that Mr Aymes had “deliberately overstated both his role within his former group employer, Nutricia ..., and also the extent of the claimant’s market share within the UK ...”. Secondly, “at times” the judge found Mr Aymes’ evidence “difficult to follow”. Thirdly, Mr Aymes “displayed both a reluctance to answer direct questions when they were put to him, and a tendency to deflect awkward questions to Mr Eraut and Mr Kirby [an employee of AIL who also gave evidence]”. Fourthly, Mr Aymes “had a tendency to supplement the evidence in his witness statement”. Fifthly, the judge rejected Mr Aymes’ evidence that he was not aware at the time that an employee of AIL had disseminated the untrue statements concerning Nualtra which formed the basis for the latter’s counterclaim in the Irish proceedings. The judge accepted Mr Eraut’s evidence that Mr Aymes had been aware of this, which the judge considered “accords with the inherent probabilities: it is most unlikely that anyone within [AIL] would have taken it upon themselves to libel Nualtra without the prior knowledge and approval of Mr Aymes, who was the owner and directing mind of [AIL]”.

31. AIL challenges these findings on two grounds. Ground 2 is that the judge was wrong (i) to permit cross-examination of Mr Aymes about Nualtra since that was a collateral matter which was irrelevant to the issues before the court and (ii) not to accept Mr Aymes’ answers to questions that went purely to credit as final and to accept Mr Eraut’s contrary evidence. Ground 3 is that the judge’s findings that Mr Aymes had deliberately overstated his role within Nutricia and AIL’s market share in the UK were not open to him on the evidence.
32. So far as ground 2(i) is concerned, counsel for AIL complained that the Defendants had not pleaded anything in their Defence about Nualtra, there had no disclosure of documents relating to Nualtra and the topic was not mentioned in Mr Ketelaar’s witness statement for trial. The first that AIL knew about the Defendants’ intention to ask Mr Aymes about this episode was when the Defendants served a bundle of documents (particularly judgments in the Irish proceedings) as cross-examination material shortly before trial. Counsel for AIL objected to this line of questioning of Mr Aymes, but the judge overruled the objection. Counsel for AIL submitted that the judge was wrong to do so since the Nualtra episode was irrelevant to any issue before the court. In my view this is a *non sequitur*. The fact that the episode was irrelevant to any pleaded issue, which explains why it was not pleaded and so on, did not prevent counsel for the Defendants cross-examining Mr Aymes about it as a matter going to his credibility. Although Mr Aymes’ evidence was irrelevant to the interpretation of the Agreement, there were certain factual issues between the parties at trial (in particular, as to who had been responsible for the delay in completing the share purchase) to which it was relevant.
33. Ground 2(ii) is a more substantial objection. The traditional rule is that a witness’ answers on a matter relevant solely to credibility cannot be impeached by the evidence of another witness: see e.g. *Hobbs v C.T. Tinling & Co Ltd* [1929] 2 KB 1 at 18-19 (Scrutton LJ), 39 (Greer LJ) and 50 (Sankey LJ). Counsel for AIL objected to counsel for the Defendants asking Mr Eraut about the Nualtra episode on this basis, but again the judge overruled the objection even though the judge had said, when permitting the cross-examination of Mr Aymes on this topic, that the Defendants would be bound by the answers they got from Mr Aymes. In his judgment the judge accepted the suggestion of the editors of *Phillips on Evidence* (20th ed) at 12-14 that

the rule “may be applied flexibly under the CPR”, and considered that it was appropriate to depart from it given that Mr Eraut had been called by AIL.

34. As for ground 3, the judge’s findings can only be overturned if they were rationally unsupportable. Counsel for AIL submitted that they were rationally unsupportable because, on a proper analysis of the evidence, the worst that Mr Aymes could be accused of was some looseness in the drafting of the relevant paragraphs of his witness statement which he had readily clarified in cross-examination.
35. It is not appropriate to say any more about the merits of grounds 2 and 3, because in my judgment it is very doubtful that this Court has jurisdiction to entertain an appeal by AIL on these grounds, and even if it does have jurisdiction it should not exercise it. Section 16(1) of the Senior Courts Act 1981 provides that the Court of Appeal “shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court”. The leading authority on the interpretation of this provision is *Cie Noga d’Importation et d’Exportation SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142, [2003] 1 WLR 307, where this Court held that a decision of the High Court on a preliminary issue was a judgment or order within the meaning of section 16(1) even if the decision was limited to a finding of fact. As Waller LJ (with whom Tuckey and Hale LJ agreed as to the law) explained, however:
- “27. ... if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is ... one he or she does not like.
28. ... If however ... the court had gone on to make a decision in relation to the legal consequences which one party would not seek to challenge, in my view that party would not be entitled simply to appeal the findings because it did not like the reasons for the decision in his or her favour.”
36. In the present case AIL has appealed against paragraph 4 and the first sentence of paragraph 6 of the judge’s order dated 16 October 2023, but otherwise has not challenged any of the substantive parts of the order. Those parts of the order give effect to the judge’s interpretation of Turnover in the Agreement. AIL’s appeal against those parts of the order is based on ground 1, and I have held that it should succeed. AIL does not rely upon grounds 2 and 3 in support of its challenge to those parts of the order. Indeed, as I have explained, on AIL’s own case Mr Aymes’ evidence is irrelevant to the interpretation of the Agreement.
37. Instead, grounds 2 and 3 challenge the judge’s findings in his judgment concerning Mr Aymes. When asked what relief AIL sought from this Court on the basis of grounds 2 and 3, counsel for AIL said that AIL would be content with a judgment of this Court reversing those findings. Such a judgment would have no legal consequences, however. As counsel for AIL candidly accepted, AIL’s only purpose in seeking such a judgment is to attempt to salvage Mr Aymes’ reputation, which is important not only to Mr Aymes personally, but also to AIL. That is not a sufficient basis for this Court to entertain the appeal, particularly when it is borne in mind that, even if this Court were to hold that the judge’s first and fifth reasons for assessing Mr

Aymes to be an unsatisfactory and unreliable witness were unsustainable, that would still leave the other three reasons.

38. Counsel for AIL relied upon *In Re W (A Child)* [2016] EWCA Civ 2415, [2017] 1 WLR 2415 as establishing that this Court has jurisdiction to entertain an appeal on grounds 2 and 3. That case concerned a fact-finding judgment in relation to allegations of sexual abuse by a number of family members made by C, an older sibling of children who were the subject of care proceedings. The judge found that none of C's allegations were proved. In addition, the judge criticised the local authority and the professionals involved, particularly a social worker SW and a police officer PO. These criticisms had not been raised by any party to the proceedings, still less put to SW or PO in cross-examination. They came "out of the blue" when the judge delivered an oral "bullet point" judgment in private at the conclusion of the hearing. The judge subsequently produced a detailed written judgment, but this had not been handed down in public. This Court allowed an appeal by the local authority, SW and PO, and ordered that the judge's findings against them be set aside and excised from the judgment before it was handed down in public.
39. *Re W* is distinguishable from the present case for four reasons. First, the appellants were the persons who had been criticised by the judge, even though SW and PO had not originally been parties to the care proceedings. In the present case there is no appeal by Mr Aymes. Secondly, the criticisms had not been put to the appellants in evidence, and so they had had no chance to answer them before the judge reached his conclusions. In the present case the allegations in question were put to Mr Aymes in cross-examination. Thirdly, the judge's judgment had not been handed down in public, and so the Court was in a position to take remedial action. In the present case, the judge's judgment has been a matter of public record for a year, and would remain a matter of public record even if this Court were to disagree. Fourthly, the appeal was allowed on the basis that there had been an infringement of the appellants' rights under Articles 6 (in the case of the local authority) and 8 (in the case of SW and PO) of the European Convention on Human Rights. That is not how grounds 2 and 3 are framed. Nor can I see any tenable way of recasting them on such a basis.
40. Even if the Court has jurisdiction in the absence of the features of *Re W* discussed in the preceding paragraph to entertain an appeal against factual findings by a judge which have no legal consequences for the parties, it must be an exceptional jurisdiction which should only be exercised for compelling reasons. In my view there are no compelling reasons to exercise the jurisdiction, if it exists, in this case.

Conclusion

41. For the reasons given above, I would allow AIL's appeal on ground 1, but hold that this Court should not entertain grounds 2 and 3 even if it has jurisdiction to do so.

Lord Justice Newey:

42. I agree.

Lord Justice Lewison:

43. I also agree.