

Case No:

Neutral Citation Number: [2011] EWHC 3679 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 26 May 2011

BEFORE:

MR JUSTICE NORRIS

IN THE MATTER OF PROTEGE SERVICES LTD

BETWEEN:

ANDREW ROBINSON & ANR

Applicant/Claimant

- and -

ANDREAS CHARALAMBOUS & ORS

Respondent/Defendant

MR R DUDDRIDGE (instructed by Messrs Sherrards) appeared on behalf of the Claimant

MR A KHAN (instructed by DDO Solicitors) appeared on behalf of the Defendant

Approved Judgment

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE NORRIS: At the beginning of April 2011, a director and significant shareholder in Protégé Services Ltd, Mr Robinson, became aware that his co-directors and other significant shareholders were preparing to enter into direct personal employment or service contracts with Protégé's principal client, Accedian Networks. He became aware that, as part and parcel of the establishing of those new direct relationships, there was a proposal that Protégé should waive and release all sums of money due to it from its client, Accedian.
2. Whether this is, in truth, what happened and whether, in truth, it was intended that Accedian should be released from all of its obligations to Protégé remains yet to be proved at trial. There is at least a serious argument that that is what is going on. Further there is a serious argument that such conduct would constitute a breach of the personal obligations arising between shareholders in an apparent quasi-partnership company, and a serious argument that such conduct would amount to a breach of duty by a director, actionable by the company or by a minority shareholder through the mechanism of a petition under section 994.
3. Mr Justice Mann certainly took that view and, on a without notice application late on 1 April 2011, he granted Mr Robinson and another an injunction to restrain such conduct on the part of the other directors and shareholders in Protégé Services Ltd. His order restrained the respondents from attempting to give effect to any resolution purportedly removing Mr Robinson as a director of Protégé or from initiating dissolution proceedings in relation to Protégé. It restrained the respondents from seeking to take any action to terminate Protégé's agreement with Accedian or to waive or release any claims which Protégé may have. The return date for that injunction was 5 April 2011.
4. By agreement between the parties, that return date was adjourned to the first open date after 21 days. The point of that was two-fold. First, it was to see if the parties could reach terms and dispose of the matter. And, secondly, if not, to enable the respondents to file their evidence and set out their case in opposition to the injunction and in support of their freedom to remove Mr Robinson as a director, to terminate the Accedian contract or waive any pre-existing obligations of Accedian to Protégé and to enter into their direct personal relationships with Accedian.
5. The date of the adjourned hearing was fixed on 19 April 2011 and was immediately notified to the solicitors for the respondents. That is the return date before me today.
6. As matters have turned out, the respondents accept that Mr Justice Mann's injunction ought to continue until trial or further order in the meantime. But the hearing before me has continued because of the manner in which that agreement has been reached.
7. With a return date on 26 May 2011, and mindful of the obligations under the Chancery Guide as to the preparation of a bundle and the filing of a skeleton argument, the petitioners' solicitors on 17 May wrote to the respondents' solicitors, by hard copy and email, requesting to be informed by return what the respondents' position was in relation to the injunction application. They received no response by return or otherwise to that enquiry.
8. Accordingly, on 19 May 2011, by hard copy and by email, they wrote with a further enquiry. They asked the respondents to let them know by return what the respondents'

position was in relation to a draft consent order which was enclosed with the letter. The draft consent order provided that the injunction should remain in force until trial or further order and that the costs be reserved to the judge hearing the trial of the petition.

9. There was no prompt response to that enquiry and, accordingly, at 2.09pm on 20 May 2011 the petitioners' solicitors gave notice that they had formally instructed counsel in relation to the hearing and they enclosed a witness statement updating the court for the purposes of that hearing, the preparation for which, I am told, had commenced on 17 May 2011.

10. That does appear to have prompted a response for, at 2.31pm, there was sent a fax from the respondents' solicitors. That fax said:

“We have received instructions to apply to set aside the injunction. Therefore, the injunction should continue only until the hearing of our application.”

11. The author of the letter may or may not have seen a consent order, which had been sent half an hour earlier, but in any event the terms of the letter indicate a rejection of the proposal put on 19 May 2011. Accordingly preparations for the hearing on the petitioners' side continued.

12. On 23 May 2011 there was a change of position on the part of the respondents. 23 May 2011 was more than six weeks after the initial imposition of the injunction. It was more than 35 days after the fixing of the return date for the injunction and it was a matter of two days before the opening of the window for the hearing of the return date.

13. The change of position was in these terms:

“We agree to the terms of the consent order. Please provide us, by return, confirmation that this matter has been adjourned. Should we not hear from you in this regard we reserve our client's position in relation to costs and we will refer to this letter in court should we be required to do so.”

14. That last observation appears to acknowledge that the question as to costs is in some sense still open and not governed by the consent order which had been proposed. That would be consistent with the earlier rejection of the consent order terms. This letter effectively amounts to a fresh offer to compromise the application on the terms set out in the letter of 23 May 2011.

15. Although that letter says it was sent by fax, the petitioners' solicitors said in correspondence immediately that they had only received the letter on 24 May 2011 and the respondents cannot produce any fax transmission sheet.

16. On 24 May 2011 the petitioners' solicitors responded to the proposal that the costs should be reserved in the terms of their original draft consent order, which had been rejected, by saying that in consequence of the position adopted by the respondents they

had in fact incurred significant costs in preparation for the hearing, including the costs of the witness statement which had been served and the brief which had been delivered to counsel, and the preparatory work for the hearing such as updating the bundles and preparing schedules of costs. They said that their costs of so doing amounted to some £9,269 plus VAT. They asked that the respondents should pay those costs effectively as costs thrown away by preparation for a hearing which the respondents were now conceding was unnecessary.

17. The petitioners' solicitors sent a revised consent order containing that provision. This was rejected the same day by the respondents' solicitors. They said they had approved the terms of the original consent order. They pointed out that they had already alerted the petitioners' solicitors of their intention to rely on their own correspondence on the question of costs. They now asserted that they were going to apply to set aside the injunction and they said that the terms of the petitioners' solicitors' letter of 24 May 2011 were such that they would "seek costs against your firm personally". They returned a signed copy of the original consent order.
18. By a further letter of 25 May 2011 they indicated their view that the petitioners were unreasonably demanding costs when they had agreed to the continuation of the injunction, that such behaviour was unreasonable in all the circumstances and that, in view of that unreasonable attitude, they would be seeking a personal costs order against the petitioners' solicitors.
19. It is in that state that the matter comes before me. To his credit, Mr Khan, on behalf of the respondents, has not moved for any personal costs order to be made against the petitioners' solicitors. He was wise not to do so. He has instead made the submission that the proper course in the instant case is to reserve the costs to the trial judge in accordance with the petitioners' original, albeit rejected, proposal contained in their first draft consent order. He says, correctly, in my judgment, that at this stage the court cannot adjudicate upon the rights and wrongs of the dispute between the parties, and in the course of his submissions he drew attention to three points, which it is unnecessary for me to record, demonstrating that the merits might not all be one way.
20. The normal order when a court makes an injunction which turns on the balance of convenience and not on some underlying question on the merits is that the costs will either be made in the cause in some way or alternatively will be reserved to the trial judge. But there are exceptions to that approach. It is warranted to depart from that approach where the conduct of the interim hearing merits some other order. In my judgment, this is such a case.
21. The request of the petitioners' solicitors for a statement of the respondents' position in relation to the imminent hearing made on 17 May 2011 was, in my judgment, entirely appropriate. The response of the respondents' solicitors was, in my judgment, entirely inappropriate. To fail to respond, whether based on lack of instructions or some other reason, was clearly not the conduct of litigation in accordance with the overriding objective.
22. If the respondents were, indeed, more than six weeks after the original injunction had been granted and a month after the return date had been fixed, going to agree that the injunction should continue until trial they should have done so on 17 May 2011 or 18

May 2011. They would thereby have avoided the incurring of unnecessary costs in preparing for a hearing which could be avoided.

23. The prevarication and ultimate acknowledgement of the good sense of the petitioners' proposal needs to be reflected in some disciplinary costs order. I shall order that the respondents shall pay the costs of the petitioners thrown away by this hearing. I will summarily assess those costs. I have considered the schedule of costs and I am of the view that it should be reduced by the sum of £1,000 plus VAT. It seems to me that some of the costs shown as incurred on that schedule were not, in truth, thrown away.
24. Subject to that, I will make the order which it is now agreed should be made, namely that the injunction granted by Mr Justice Mann shall continue until trial or further order in the meanwhile, that subject to my costs order of today, the costs of the injunction application shall be reserved.