Neutral Citation Number: [2021] EWHC 2089 (Ch)

Case No: BL-2020-000799

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2021

Before :

MR ASHLEY GREENBANK
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :

Gautam Radia	**Claimant**
- and -	
Darsan Jitendra Jhaveri	**Defendant**

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- -

James McWilliams, counsel (instructed by **Birketts LLP**) for the Claimant
The Defendant did not appear and was not represented

Hearing date: 22 June 2021

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This judgment was handed down by Mr Ashley Greenbank (sitting as a Deputy Judge of the High Court) remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 July 2021 at 10.30 am.

Mr Ashley Greenbank:

Introduction

1. This claim relates to the ownership of shares in a company, which is now known as Durham Cricket C.I.C. ("DCCIC"). DCCIC is a community interest company, which controls, manages and finances Durham County Cricket Club.

2. The shares to which this claim relates are designated as "founder shares". The founders shares have very restricted rights under the Articles of Association of DCCIC. They are worthless.

3. The relevant shares are registered in the name of the Claimant, Mr Gautam Radia or jointly in the name of Mr Radia and the name of his brother, Mr Hiren Radia. Mr Radia seeks a declaration to the effect that he holds those shares or any interest in those shares on trust for the Defendant, Mr Darsan Jitendra Jhaveri and/or a company which is owned and controlled by Mr Jhaveri and that he (Mr Radia) has no beneficial interest in them.

4. The court is therefore in the rather unusual position of being asked to make a declaration not to establish Mr Radia's ownership of the founder shares, but to establish that he does not own them. I have set out the reasons for this rather unusual request at [17] below.

5. Mr Jhaveri acknowledged service and filed a Defence to the claim. However, he has taken no further part in the proceedings. He was given notice of the hearing, but he did not attend and was not represented.

The hearing

6. The hearing before me was a trial of the claim in the absence of the Defendant, Mr Jhaveri. As Mr Jhaveri has been properly served, the court may proceed with the trail in his absence and give judgment or make an order against him (CPR 39.3).

7. The hearing took place as a remote video hearing. I was provided with a bundle of documents for the hearing. Those documents included two witness statements of Mr Radia. Mr Radia answered questions from the court on his witness statement.

The issues before the court

8. There are two issues before the court:

    i) first, whether the court has power to grant the declaration that Mr Radia has requested and, if so, whether it should exercise its discretion to grant a declaration in these circumstances;

ii) second, whether Mr Radia can establish that he has no beneficial interest in the relevant founder shares and so is entitled to the declaration that he seeks.

The availability of declaratory relief

9. Before I can move on to the second more substantive question, I must first answer the first of those questions.

Brief factual background

10. It will assist my explanation if I first set out some of the factual background to this claim, without at this stage addressing the substantive issues that arise in relation to the second question.

11. This case relates to holdings of shares in the company, which is now known as DCCIC. DCCIC was formerly known as Durham County Cricket Club Holdings Limited ("DCCCHL"). The company changed its name Durham Cricket Limited ("DCL") pursuant to a special resolution of the company dated 7 September 2016. The company changed its name again to its current name pursuant to a special resolution of the company dated 14 August 2017.

12. Prior to its change of name to DCL, the company had been in severe financial difficulties. As part of arrangements to refinance the company, and at the same time as the resolution changing its name to DCL, the company also passed special resolutions by virtue of which:

    i) the company adopted new Articles of Association which were consistent with the company becoming a community interest company; and

    ii) each ordinary share of £1 each in the capital of the company was converted into and redesignated as a founder share of £1 each.

13. Under the Articles of Association, founder shares carry no right to participate in the profits or assets of the company and no right to receive notice of, or attend, speak or vote at, a general meeting of the company or to vote on any written resolution of the company. Founder shares are not transferable except that, on the death of a holder of founder shares, the company has the right to purchase all the founder shares registered in the name of that shareholder for an aggregate price of one penny.

14. Mr Radia and Mr Jhaveri were registered holders of ordinary shares in DCCCHL immediately prior to the change of name of the company to DCL and the passing of the resolutions to which I refer at [11] and [12] above. As a result

of those resolutions, those shares were converted into founder shares in the company.

15. I have set out in the table below details of the current registered holdings of founder shares that are relevant in this case. These shareholdings are taken from the current register of members of DCCIC.

Registered holder(s)	**Number of founder shares**
Gautam Radia and Hiren Radia	50,000
Hiren Radia and Gautam Radia	50,000
Darsan Jhaveri	1,413,787
Gautam Radia	900,000

16. Mr Radia claims that the founder shares registered in his name as sole shareholder, namely the holding of 900,000 founder shares (the "DCCIC sole shares"), are held by him on bare trust for Mr Jhaveri and/or GBA Minmetals Trading Limited ("GBA"). GBA is a company incorporated in the British Virgin Islands, which, Mr Radia asserts, is owned and controlled by Mr Jhaveri. Mr Radia also claims that any interest in the founder shares registered in his name jointly with his brother, namely the two holdings of 50,000 founder shares (the "DCCIC joint shares"), is held by him and his brother on bare trust for Mr Jhaveri.

The reasons for Mr Radia's request for declaratory relief

17. As I have mentioned above, Mr Radia seeks a declaration that he does not have a beneficial interest in the DCCIC sole shares or the DCCIC joint shares. His reasons for doing so are as follows.

    i) Mr Radia is an Indian resident and national and, as a matter of Indian law, is prohibited by the Indian Foreign Exchange Management Act 1999 ("FEMA 1999") from borrowing funds from overseas entities to acquire shares in an overseas company without obtaining the prior approval of the Reserve Bank of India.

    ii) On 11 October 2018, Mr Radia was issued with a "show cause" notice by the Indian authorities pursuant to FEMA 1999. The notice asserted that:

a) on 15 September 2009, Mr Radia had borrowed £900,000 from Global Island Resources Ltd ("GIR"), a company incorporated in the British Virgin Islands, in order to make an investment in shares in DCCCHL;

b) also on 15 September 2009, Mr Radia jointly with his brother, Mr Hiren Radia, had borrowed £100,000 from GIR in order to make an investment in shares in DCCCHL

in each case without the prior approval of the Reserve Bank of India.

The notice required Mr Radia to prove that he had not acted in contravention of FEMA 1999 by doing so.

iii) Mr Radia says that the Indian authorities were prompted to issue the "show cause" notice by a letter sent to the Indian authorities on behalf of Mr Jhaveri, which, Mr Radia says, included a number of false statements concerning the acquisition and ownership of the DCCIC sole shares and the DCCIC joint shares.

The procedural background

18. Mr Radia commenced proceedings in the Courts of Singapore (the "Singapore Proceedings") claiming a declaration that the DCCIC sole shares and the DCCIC joint shares were held on trust for Mr Jhaveri and/or a Millers Capital Investments Pte. Ltd ("MCI"), a company incorporated in Singapore, which is owned and controlled by Mr Jhaveri. Mr Radia's Statement of Claim in the Singapore Proceedings is dated 8 March 2019. The Singapore Proceedings were stayed and set aside on the application of Mr Jhaveri on the grounds that the English courts were the most appropriate forum for the dispute.

19. Mr Radia commenced the current proceedings on 28 May 2020. In the Particulars of Claim, Mr Radia made the following assertions.

i) In relation to the DCCIC joint shares:

a) he and his brother, Mr Hiren Radia, sold the 100,000 DCCCHL ordinary shares which were subsequently converted into the DCCIC joint shares to Mr Jhaveri pursuant to two share purchase agreements dated 9 March 2012 for a total price of £100,000;

b) those shares were not registered in the name of Mr Jhaveri, following the payment of the purchase price and the execution of stock transfer forms,

c) accordingly, those shares were held by Mr Radia and his brother on bare trust for Mr Jhaveri and the DCCIC joint shares into which they were converted are held by Mr Radia and his brother on bare trust for Mr Jhaveri.

ii) In relation to the DCCIC sole shares:

a) the DCCIC sole shares are derived from two separate holdings of DCCCHL ordinary shares: the first being a holding of 500,000 DCCCHL ordinary shares, which were subscribed by GBA, but registered in the name of Mr Radia; the second being a holding of 400,000 DCCCHL ordinary shares, which were subscribed by GBA and intended to be registered in the name of MCI but were registered in the name of Mr Radia;

b) Mr Radia agreed with Mr Jhaveri in a telephone call in January 2013 to hold the shares on bare trust for GBA;

c) accordingly, those shares were held by Mr Radia on bare trust for GBA and the DCCIC sole shares into which they were converted are held by Mr Radia on bare trust for GBA.

20. Notice of these proceedings was served on Mr Jhaveri out of the jurisdiction pursuant to permission granted by the Order of Deputy Master Arkush dated 15 July 2020. Mr Jhaveri acknowledged service on 28 August 2020.

21. On 8 September 2020, Mr Jhaveri filed and served a Defence to these proceedings in which, amongst other things:

i) Mr Jhaveri accepted that he had purchased 100,000 DCCCHL ordinary shares from Mr Radia and his brother, but asserted that those shares were now represented by some of the DCCIC founder shares that are registered in his name;

ii) Mr Jhaveri denied that any trust had been created by agreement with Mr Radia and asserted that all of the shares subscribed by GBA were also now represented by some of the DCCIC founder shares that are registered in his name;

iii) Mr Jhaveri asserted that those DCCIC founder shares registered in Mr Radia's name (whether in his own name or jointly with Mr Hiren Radia) represented DCCCHL ordinary shares originally subscribed by GIR.

22. On 16 October 2020, Mr Jhaveri sent an email to the court, in which he stated that he had "nothing further to add", and that he would not engage further with these proceedings. On the same day, Mr Jhaveri also sent an email to Mr Radia

stating that he had decided not to instruct English lawyers so as not to incur further costs and that his "participation in the matter is limited to filing the [Defence]". Mr Jhaveri has taken no further part in these proceedings.

23. DCCIC was given notice of these proceedings by a Notice of Claim dated 5 February 2021. DCCIC confirmed that it did not wish to participate in the proceedings in an email to Mr Radia's solicitors dated 15 February 2021.

The court's power to grant declaratory relief

24. The court's jurisdiction to grant declaratory relief derives from s19 of the Senior Courts Act 1981 ("SCA").

25. The court may make binding declarations whether or not any other relief is claimed (CPR 40.20). It is a matter for the court's discretion whether to grant a declaration in the circumstances of any particular case.

26. I was referred by Mr McWilliams to various authorities which set out the principles which are to be applied by the courts when exercising that discretion. Those authorities included *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 378 ("*Rolls-Royce*"), *Elinoil Hellenic Petroleum Co. SA v Biotechnika SRO* [2020] EWHC 3592 (Comm) ("*Elinoil*") and *Financial Services Authority v Rourke* [2002] C.P. Rep 14. I have also considered the judgment of Marcus Smith J in *The Bank of New York Mellon, London branch v Essar Steel India Limited* [2018] EWHC 3177 (Ch) ("*Bank of New York*") to which HHJ Pelling QC refers in his judgment in the *Elinoil* case.

27. Some of those cases begin by considering certain preliminary issues; namely, whether the claimant has standing to bring the claim, and whether the defendant is properly before the court. Those points are not in issue in this case: Mr Radia, as the registered holder of the founder shares, has standing to bring the claim and the Defendant, Mr Jhaveri, has acknowledged service and has filed a Defence and so is clearly before the court.

28. As regards the principles that are to be applied in exercising the court's discretion, Aikens LJ summarized those principles in his judgment in the *Rolls-Royce* case (at [118]-[120]) in the following terms:

> 118. The court's present jurisdiction to grant a declaration is derived from statute, originally the Court of Chancery Act 1850, then section 50 of the Chancery Procedure Act 1852. The present statutory foundation is section 19 of the Supreme Court Act 1981, and also CPR Pt 40.20. It is well-established that a claimant does not need to have a subsisting cause of action against a defendant before the court will grant a claimant a declaration: see *Guaranty Trust Co of New York v Hannay*.

> 119. The grant of a declaration is discretionary. The law has developed since the statement of principle by Lord Diplock in the leading case of *Gouriet v Union of Post Office Workers*. I have looked again at *Gouriet's* case, the decisions of this court in *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Pld and the International Commercial Bank Plc, In Re S, Feetum v Levy*, and most recently, *The Office of Fair Trading v Foxtons Ltd*, as well as the decisions referred to in Wall LJ's judgment. There is no doubt that the circumstances in which the court will be prepared to grant declaratory relief are now considerably wider than they were thought to be after *Gouriet's* case and the Meadows case. In the words of Jonathan Parker LJ in *Feetum v Levy*, "…things have indeed moved on since the *Meadows* case was decided; and the courts should not nowadays apply such a restrictive meaning to the passage in Lord Diplock's speech in *Gouriet's* case ".
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> 120. For the purposes of the present case, I think that the principles in the cases can be summarised as follows: (1) the power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, it must consider the other options of resolving this issue.

29. These principles are reiterated in the other cases to which I was referred. The other points of principle that I noted from those cases were as follows.

    i) the court must approach the question of whether all sides of the argument will be fully and properly put (*Rolls-Royce* [120(6)]) with "great care and with something of a conservative mindset against the granting of a

declaration" in circumstances where a defendant is not engaging with the proceedings (*Bank of New York* [22(1)]).

ii) As a general rule, the courts should be reluctant to grant declarations which are sought for the purpose of being placed before courts of other sovereign jurisdictions as "advisory rulings" on issues before those courts "unless there are special reasons for doing so" (*Elinoil* [15]). This consideration is in reality part of the determination of whether this hearing is the most effective way of resolving the issues raised (*Rolls-Royce* [120(7)]).

The application of those principles in this case

30. For the purposes of the present case, of the principles summarized by Aikens LJ in the *Rolls-Royce* case (at [120]), the main points at issue are:

i) whether there is a real and present dispute between the parties before the court;

ii) whether the court is satisfied that all sides of the argument will be fully and properly put; and

iii) whether the present proceedings are the most effective way of resolving the issues raised.

Is there a real dispute between the parties?

31. As the pleadings in this case demonstrate, there is a dispute between the parties in this case as to the ownership of the DCCIC joint shares and the DCCIC sole shares. However, I have to take into account that those shares are worthless. I can understand Mr Jhaveri's unwillingness to become embroiled in expensive litigation over the ownership of shares that have little if any economic value. As I have described, Mr Radia's real purpose in bringing these proceedings is to obtain a declaration for use in his response to the investigation which is being undertaken by the Indian authorities in relation to possible breaches of FEMA 1999.

Will all sides of the argument be fully and properly put?

32. One of the principles espoused by Aikens LJ in the *Rolls-Royce* case is that, before granting declaratory relief, the court must be satisfied that all sides of the argument will be "fully and properly put" and for this purpose it must ensure that "all those affected are either before it or will have their arguments put before the court" (*Rolls-Royce* [120(6)]).

33. In the present case, the Defendant, Mr Jhaveri, is before the court. He has acknowledged service and has filed a Defence. The Defence shows that there are material questions of fact at issue between the parties.

34. Mr Jhaveri has not, however, produced any evidence in support of the matters raised in his Defence and he was not present at or represented at the hearing. The effect is that, although Mr Jhaveri has had the opportunity to present his case, he has not availed himself of that opportunity and the court is left in a position of having to determine whether or not to grant the declaration that Mr Radia has requested in the absence of Mr Jhaveri's evidence, which may be of material importance in relation to the disputed questions of fact – in particular, for example, in relation to the disputed oral agreement between Mr Radia and Mr Jhaveri in January 2013 regarding the creation of a bare trust over the DCCCHL ordinary shares which, Mr Radia says, were subsequently converted into the DCCIC sole shares.

35. This is, of course, not Mr Radia's fault and I accept that it would be wrong for Mr Jhaveri's non-participation, of itself, to prevent the grant of a declaration in an appropriate case. However, I am mindful of the guidance of Marcus Smith J in the *Bank of New York* case (at [22(1)]) to the effect that the court should approach the grant of a declaration with "great care" and "a conservative mindset against the granting of a declaration", in cases where the defendant is not engaging with the proceedings.

36. In this case, there are other parties who would be affected by the declaration that Mr Radia requests and who are not before the court. These include Mr Radia's brother, Mr Hiren Radia, and DCCIC itself. Mr Hiren Radia is not a party to these proceedings and has not provided any evidence. A notice of claim was served on DCCIC on 5 February 2021 pursuant to which DCCIC had an opportunity to become a party to these proceedings. I am informed that DCCIC confirmed to Mr Radia's solicitors on 15 February 2021 that it did not wish to participate in the proceedings.

37. Without getting into the detail of the evidence which has been presented to me on the second question, from the documentary evidence before the court and the witness evidence of Mr Radia, it is clear to me that the court would benefit from the evidence of DCCIC (or personnel who were involved with the company at the time at which it was known as DCCCHL) in considering the matters to which Mr Radia's claim gives rise. This relates particularly to evidence of the detail of the payments that were made to the company to subscribe for shares and the entries that were made on the register of members in respect of each transaction. Once again, I accept that DCCIC's unwillingness to participate in the proceedings may not be Mr Radia's fault, but without that evidence it is difficult to be satisfied that the case of all those who are potentially affected will be fully and properly put.

Are the present proceedings the most effective way of resolving the issues raised?

38. Mr McWilliams says that this court is the appropriate forum in which to resolve the issues which are the subject matter of this claim. The claim relates to the ownership of shares in a company incorporated in England and Wales. The Singapore courts have refused to make declarations requested by Mr Radia at least in part because, in their view, the English courts are the appropriate forum for this dispute.

39. The fact remains, however, that two of the potential parties to these proceedings have refused to engage in them or to engage in them fully. There are good reasons for their taking that view: the subject matter of the claim – the DCCIC founder shares – are worthless and there is no real utility in these proceedings for them. Mr Radia's real dispute is with the Indian authorities. Although, as I understand it, there are no proceedings at this point in time before an Indian court in relation to matters in respect of the enquiries brought by the Indian authorities, the main purpose of Mr Radia's claim is to obtain a declaration from this court in the context of the investigation and in any possible future proceedings. In my view, the Indian authorities should be allowed to proceed with their investigations without the fetter of a declaration from this court (if it were given) based on proceedings such as these in which relevant participants are not fully engaged.

Disposition

40. For these reasons, in my view, it would not be appropriate for the court to grant declaratory relief in this case and I decline to do so.

41. I should make it clear that my decision is not a decision on the substance of the matters in respect of which Mr Radia has brought his claim. I make no decision on those matters.

42. In the circumstances, I make no order as to costs.