Neutral Citation Number: [2024] EWHC 2604 (Ch)

Case No: CR-2024-BRS-000090

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
COMPANIES AND INSOLVENCY LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15 October 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

JAMES ROBERT HERSOV	**Claimant**
- and -	
ENERGY RESEARCH LAB LTD	**Defendant**

- -
- -

James Wibberley (instructed by **Ashfords LLP**) for the **Claimant**
Dan McCourt Fritz KC (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing date: 10 October 2024

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This judgment was handed down remotely at 12 noon on 15 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. This is my judgment following a hearing on the return date of an interim injunction granted by HHJ Monty KC on 24 September 2024. In broad terms, that order restrained the defendant company from operating provisions in the articles of association under which it would act as the agent for the sale of the claimant's shares in the defendant to the other shareholders. The order was made on an application by notice dated the day before, 23 September 2024, and was supported by a witness statement also dated 23 September 2024 made by the claimant, together with one exhibit.

2. Strictly speaking, the application was made to the court on very short notice being given to the defendant, about 20 hours, and mostly out of business hours. However, because the notice given was so short, both the claimant and the judge treated the matter as though it were a without notice application. The original return date was one week later, but, by an order dated 30 September 2024, made by consent, the original order was varied so as to extend the injunction to a new return date, which, in the event, was 10 October 2024. Although the order of 24 September 2024 did not require the issue of substantive proceedings, in fact an unfair prejudice petition under section 994 of the Companies Act 2006 was presented by the claimant in relation to the affairs of the defendant on 27 September 2024.

3. By an application notice dated 27 September 2024, the claimant in substance seeks a continuation of the interim injunction until the disposal of the unfair prejudice petition. Strictly speaking, because the original injunction was granted only over until the return date, the continuation is in fact a fresh injunction. That continuation or fresh injunction is now opposed by a witness statement made by Mark Scully, the defendant's solicitor, dated 3 October 2024, together with one exhibit. That witness statement in particular opposes the continuation or renewal of the injunction on the basis that the duty to make full and frank disclosure (also known as the duty of fair presentation) inherent in a without notice application, was seriously breached. The claimant has responded to that evidence by way of a witness statement from his own solicitor, Andrew Perkins, dated 8 October 2024, also with one exhibit.

Background

4. The background facts, so far as necessary for the purposes of this judgment, are as follows. The claimant is a shareholder in the defendant, holding about 8% of the issued share capital. He was one of the defendant's founding shareholders. Although the company was incorporated in 2019, and the claimant worked for the company from the outset, his contract of employment as chief executive officer only began to run as from 1 September 2021, for three years, terminating on 31 August 2024 (unless terminated earlier). The contract gave no legal right to an automatic renewal. On 11 July 2024 the company notified the claimant that the contract would in fact not be renewed. The claimant challenged this decision in email correspondence in the following days. Eventually, on 22 July 2024 the claimant sent an email to all the employees of the defendant informing them of the nonrenewal of his contract, and saying that this was not in the best interests of the defendant company.

5. On 8 August 2020 for a meeting of the board of directors was held, at which the claimant was present and spoke. He once again raised the matter of the non-renewal of his contract. Another director, Justin Van Spall, proposed that the claimant be dismissed without notice, on the grounds of gross misconduct. All of the members of the board present, except the claimant, agreed. Later the same day a letter was sent on behalf of the company by Lee Harrison, another director and founding shareholder, terminating the claimant's employment without notice, and referring in particular to the email correspondence that followed the letter of 11 July 2024. The letter of 8 August 2024 referred in particular to clause 20.2 of the contract of employment and to article 37 of the defendant's articles of association.

6. Clause 18.1 of the contract of employment entitles the defendant to terminate the claimant's appointment without notice in certain circumstances, including "commit[ting] any act of gross misconduct". Clause 20.2(b)(i) then relevantly provides:

> "On termination of the Appointment without notice under clause 18.1, at the request of the Company … you hereby agree … that you shall be deemed to have irrevocably served … a transfer notice pursuant to article 37.1 of the Articles with respect to all shares held by you in the Company, in which the price per share specified therein shall be deemed to be the fair value as certified by the auditors of the Company for the time being in accordance with article 37.5 of the Articles … "

7. Article 37 of the defendant's articles of association relevantly provides:

> "37.1. Any person (hereinafter called the 'Proposing Transferor') proposing to transfer any Shares to a third-party Buyer (the 'Buyer') shall give notice in writing (hereinafter called 'the transfer notice') to the Company specifying the price per Share which has been agreed to be paid by the Buyer. The transfer notice shall constitute the Company the agent of the Proposing Transferor for the sale of all (but not some of) the Shares comprised in the transfer notice to any Shareholder or Shareholders willing to purchase the same (hereinafter called 'the purchasing Shareholder') at the price specified therein. A transfer notice shall not be revocable except with the sanction of the Directors.
>
> 37.2. The Shares comprised in any transfer notice shall be offered to the Shareholders (other than the Proposing Transferor) as nearly as may be in proportion to the number of Shares held by them respectively. Such offer shall be made by notice in writing (hereinafter called 'the offer notice') within seven days after the receipt by the Company of the transfer notice. The offer notice shall state the price per Share specified in the transfer notice and shall limit the time in which the offer may be accepted, not being less than twenty-one days nor more than forty-two days after the date of the offer notice. For the purpose of this article an offer shall be deemed to be accepted on the day on which the acceptance is received by the Company …
>
> 37.3. If purchasing Shareholders shall be found for all the Shares comprised in the transfer notice within the appropriate period, the Company shall not later than seven days after the expiry of such appropriate period give notice in writing (hereinafter called the 'Sale Notice') to the Proposing Transferor specifying the

> purchasing Shareholders and the Proposing Transferor shall be bound upon payment of the price due in respect of all the Shares comprised in the transfer notice to transfer the Shares to the purchasing Shareholders.
>
> 37.4. If the Company shall not give a Sale Notice to the Proposing Transferor within the time specified in article 37.3 above, he shall, during the period of thirty days next following the expiry of the time so specified, be at liberty to transfer all or any of the Shares comprised in the transfer notice to any person or persons at the agreed price.
>
> 37.5. In the application of Articles 38 - 40:
>
> […]
>
> (c) where a transfer notice is given or deemed to be given under this article 37.1 and no price per Share is specified therein the transfer shall be deemed to specify the sum which shall, on the application of the Directors, be certified in writing by the auditors in accordance with article 38.3 of this article as the fair value thereof."

8. The defendant did make a request of the claimant in accordance with clause 20.2(b)(i) of the employment contract. Then on 15 August 2024 it gave notice to the other shareholders of what it said was the deemed transfer notice under article 37. The defendant gave them until 25 September 2024 to respond. The price for the shares was confirmed by the company's auditors under article 37.5(c) as £80 per share. On that basis the total value of the claimant's shares would be £160,000. The claimant's view is that the real value is between £700 and £1,000 per share, or between £1.4 million and £2 million in total. One of the shareholders, in fact holding just over 50% of the shares, Luglio Ltd (a Cypriot company owned by a Polish businessman), served a notice of acceptance on 24 September 2024. This was, of course, the same day as that on which HHJ Monty KC granted the interim injunction. In the usual way, a detailed note of the hearing and of the judge's judgment was taken. The order and supporting documents (including a copy of the note taken) were served on the defendant on the same day.

9. As I have said, on 27 September 2024 the claimant presented a petition alleging conduct by the other directors/shareholders which was unfairly prejudicial to him. The petition was drafted in summary form for speed, with the intention that fuller particulars would be given later. The two main allegations of unfairly prejudicial conduct in the petition were (i) the decision not to renew the claimant's contract of employment, and (ii) the decision to terminate his employment summarily. The prayer of that petition sought five things. First, it sought an order prohibiting the respondents (the other shareholders) from seeking compulsorily to purchase his shares "pending the final determination of these proceedings". Secondly, and "[f]urther or alternatively", it sought an conventional buy-out order, on the basis of a willing buyer and willing seller of the entire share capital of the defendant, without any discount for a minority holding and taking account of the unfairly prejudicial conduct alleged. Thirdly, it sought an order compensating the claimant for "his loss of employment, loss of office, and the loss of his role as CEO". Fourthly, it sought "such other relief and/or remedies" as the court might think fit. Lastly, it sought costs.

The law of interim injunctions

10. At the hearing, the law relating to the grant of interim injunctions was in effect common ground. CPR rule 25.3 relevantly provides:

> "(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.
>
> […]
>
> (3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given."

In connection with that rule, counsel for the claimant also referred me to Practice Direction 23A, paragraph 3.4, which in substance repeats rule 25.3(3):

> "3.4 Where an application is made without notice to the respondent, the evidence must also set out why notice was not given."

11. The test for granting an interim injunction is well-known as that laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In essence there are three questions. First, is there a serious question to be tried? Second, would damages be an adequate remedy for a party injured by the court's grant of, or failure to grant, the injunction? Third, if not, where does the balance of convenience lie?

12. As I have said, strictly speaking, this is an application for a new injunction by the claimant, as the old one runs out on the return date. In the present case, the defendant accepts that, on the evidence put forward by the claimant, there is a serious issue to be tried. There are arguments over the second and third questions, but also there are the complaints about material nondisclosure raised by the defendant's evidence, and also a point arising under rule 25.3, in relation to the original order.

13. Counsel were agreed that, in relation to material nondisclosure, I could take the law from the judgment of Carr J (as she then was) in *Tugushev v Orlov* [2019] EWHC 2031 (Comm), where the judge said:

> "7. The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
>
> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to

evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without

> renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
>
> xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
>
> xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

The complaints of material non-disclosure

14. The defendant's complaints about material nondisclosure are summarised in the witness statement of Mark Scully as follows:

> "51. In summary, I would suggest that Mr Hersov and those representing him breached the duty of fair presentation in the following respects:
>
> (1) Misleading the Court as to the adequacy of damages for Mr Hersov if the injunction sought were not granted.
>
> (2) Failing to draw the Court's attention to the non-monetary claims that would be available to Mr Hersov if the injunction sought were not granted.
>
> (3) Failing to identify any of the arguments that ERL might have made as to the adequacy of damages for Mr Hersov and the non-monetary claims available to him had Mr Hersov made his application on an inter partes basis and on notice in accordance with the CPR.
>
> (4) Falsely asserting that the injunction sought would not prejudice ERL or any of its other shareholders.
>
> (5) Failing to identify any of the arguments that ERL might have made as to (i) the prejudice that the injunction sought would cause it and its shareholders, and

(ii) the inadequacy of damages under the cross-undertaking as a remedy for loss that the injunction risked causing it.

(6) Failing to draw the Court's attention to the fact that the cross-undertaking offered by Mr Hersov would not give any protection to ERL's shareholders unless and until Mr Hersov gave them notice of the Ex Parte Order.

(7) Incorrectly representing that Mr Hersov's shares in the ERL adequately substantiated the cross-undertaking.

(8) Failing to identify any of the arguments that ERL might have made as to the need for Mr Hersov to (i) provide a cross-undertaking that protected its shareholders unconditionally, and (ii) fortify his cross-undertaking (alternatively provide proper evidence of his financial position).

(9) Entirely failing to explain Mr Hersov's extraordinary delay in making the Application. In circumstances where ERL made its position in relation to Mr Hersov's shares clear as long ago as 8 August 2024 [JRH1/153-158], I find this failure startling. Mr Hersov was the architect of the Application's urgency: by delaying for as long he did he manufactured a situation in which he could make the Application ex parte and without notice. The fair presentation of the Application demanded nothing less than a full and frank explanation for the reasons for Mr Hersov's delay and the timing of the Application. No explanation was given.

(10) Failing to canvass the possibility of Mr Hersov undertaking not to reappoint himself as a director or to appoint any other person as a director. An undertaking to that effect would have reflected the status quo (at least as regards the composition of ERL's board), since as at the date of the Ex Parte hearing Mr Hersov had no representative on the board. He has not sought to appoint a director since the Ex Parte Order was made."

15. At the hearing before me, counsel for the defendant did not deal with all of these points, but concentrated on delay (no 9), the prejudice to the defendant and its other shareholders (nos 4 and 5), and the adequacy of damages/financial relief for any loss that the claimant might have suffered (nos 1-3).

Other points

16. But, in addition to these points, counsel for the defendant argued the following further points:

(1) The majority shareholders should have been joined, but had not been.

(2) The renewed application was pointless and unnecessary: the claimant had standing by now, and would not lose it, there were other remedies available, and any concerns about property rights should be dealt with as against Luglio Ltd.

(3) Damages on the cross undertaking given by the claimant would be inadequate for the defendant.

(4) The balance of convenience favoured refusing the new injunction.

Delay

17. I deal first with delay, and the failure to explain it, as this was at the forefront of the defendant's submissions. Although the defendant had informed the claimant on 11 July 2024 that his contract would not be renewed after 31 August 2024, he did not present his petition alleging unfairly prejudicial conduct until 27 September. In the meantime, on 8 August 2024, the board had voted to dismiss him summarily for gross misconduct. In the dismissal letter, the claimant was warned of the effect of clause 20.2 of his contract and article 37 of the company's articles of association. A week later, on 15 August, the defendant notified shareholders of the deemed transfer notice in relation to the claimant's shares. It set 25 September as the deadline for responses. The claimant therefore had time to draft and present a petition for unfairly prejudicial conduct, or to make an on-notice application for an interim injunction to restrain the defendant from operating the deemed transfer notice provisions of the articles, before 25 September. Instead, however, the claimant waited until 23 September before issuing an application for an interim injunction, by which time an on notice application was only possible with the court's permission for short notice (which was not sought). And he waited until 27 September before presenting a petition, which itself expressly stated that it was in summary form only and further particulars would be provided in due course.

18. At the hearing before HHJ Monty KC, the judge was aware of the chronology, and that there had been a delay of more than two months since the grounds for the petition arose, and more than five weeks since the grounds for the interim injunction arose. He was also taken to the relevant provisions in the employment contract and in the articles. What he was not given was any explanation for the delay. According to the claimant's solicitors' note, his counsel told the judge:

> "I have explanation for that delay. I accept that is not in witness evidence so I am hesitant about seeking to give evidence from the bar about why it was not immediately followed up. I can confidently say that we are where we are because we have a firm deadline of 25 September. Even if started rolling sooner, we would have needed to do something from 25 sept."

19. In the note of his judgment the judge is recorded to have said:

> "I should also mention a point raised by CC [Clifford Chance, the defendant's solicitors] that there has been significant delay between events in early to mi-August and the application being made. I haven't been given the explanation as to why there was this delay, there is no evidence before me as to why the delay occurs. Whilst it was open for Mr Wibberley to say something, he took the following course: he says we are where we are, as of tomorrow the notice period runs out. It is now that the application needs to be considered and I accept that. I am satisfied that the court should do so."

20. In the claimant's evidence in reply to that from the defendant (after the interim injunction had been granted), the claimant's solicitor Mr Perkins for the first time gave a partial explanation for the delay. His firm, Ashfords LLP, was in fact the second firm to be appointed by the claimant. The claimant wished to benefit from a legal expenses insurance policy which he held, but the first firm instructed was not "panel approved". No further details have been provided as to when cover was first

sought, how long the discussions lasted and what happened. It is not at all clear why even this process should have taken so many weeks to deal with what was supposed to be an urgent need for an interim injunction. Nor is it clear that there were no other causes of the delay either. What *is* clear is that, although in his own original witness statement the claimant said "I can confirm that I hold sufficient wealth [t]o be able to satisfy such an order [for a cross-undertaking in damages to 'any sum which the Court requires me to pay']… ", and so was not constrained to wait for insurers, he preferred to pursue the option of using the insurance for an urgent matter instead of spending his own money.

21. The defendant submitted that the claimant was in breach of CPR rule 25.3(3), by not giving reasons for the need for a without notice application. It further submitted that the claimant had not explained to the judge the delay since mid-August in making *any* application, with or without notice. The explanation subsequently given, if given at the time, would have aggravated rather than mitigated the situation, and would have had a material bearing on the judge's decision. The non-disclosure justified discharge and non-renewal of the original order, as deterrence is an important part of the rigorous approach to be taken to without notice applications: *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm), [82]; *Tugushev v Orlov* [2019] EWHC 2031 (Comm), [7](ix)-(xi).

22. The claimant accepted that he could have made the application sooner than 23 September. But the effective "bookend" (as the claimant called it) for the application was the end of the offer period, on 25 September, and so, given that the application was made only on 23 September, it had to be a without notice application. The judge was taken through the correspondence, and knew that delay was in issue. The claimant did not suggest there was a good reason, and did not assert that it was not the claimant's fault. The claimant submitted that the judge understood that the failure to explain the delay was a point *against* the defendant, because there was no good reason for it. Thus the case was as high against the claimant as it could be.

23. In my judgment there was no substantive breach of CPR rule 25.3. The explanation for making a without notice application was that the application was being made right at the end of the offer period. Making an application on notice risked the operation of the compulsory purchase provisions in article 37. The judge in his judgment understood and accepted that. However, that does not touch the larger question of the explanation for leaving matters so late that it had to be a without notice application. Even now, the evidence is not a complete explanation. As Mr Perkins says, the need to report to insurers and the transfer from one solicitors' firm to another, were "*a* cause" of the delay, not "*the* cause". But if the claimant is, as he says, a wealthy man, I think it was incumbent upon him to explain to the court how it came to be that he took so long (i) after 11 July to prepare and present an unfair prejudice petition (which might have obviated the need for the interim injunction), and (ii) after 15 August to make an application for the interim inunction itself. I am bound to say, for myself, that the claimant's desire to make use of his insurance policy does not explain why it took as long as it did, but, even if it did, it would be an inadequate reason. And then to delay so long that it could not be an application on notice, but had to be a without notice application, without explaining why this state of affairs had been allowed to arise, strikes me as a clear and serious breach of the duty to present a without notice application fairly. It was a deliberate choice by the claimant not to give

the explanation to the judge. I understand counsel's desire not to give evidence from the bar, but there were other alternatives.

24. It is impossible to know what HHJ Monty KC would have made of the application if he had been given a full explanation of the reasons for the delay. Perhaps he would still have made the order. I am not sure that I would have done so. But that does not matter. As Carr J said in *Tugushev*, [7](xi),

> "The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing."

25. Here I do not think I can allow the original order to stand. The breach is simply too serious. On the other hand, it does not automatically follow that discharging the original order means that no new order should be granted. For one thing, the evidence is now different, and an at least partial explanation has been given. But the court should not allow the claimant to benefit from the injunction which it obtained in breach of the duty of full and frank disclosure. To continue the injunction would do just that. If the injunction had not been granted by HHJ Monty KC, no doubt the transfer provisions would have been operated, and there would have been no point in applying thereafter *against the defendant*, for its part (as the claimant's agent) in the procedure would be over. Any subsequent application would have had to be *against the purchaser*, probably Luglio Ltd. But the present application is not against Luglio Ltd, or indeed any of the other shareholders. For these reasons I will dismiss this application for a renewed injunction over until trial of the petition.

Prejudice to the defendant and other shareholders

26. Strictly, that means that I need not consider the other matters that were debated before me. But, as I observed at the hearing, this matter may well go further, and I should therefore briefly indicate my views on those other matters. Accordingly, I deal next with the question of prejudice to the defendant and its other shareholders. It is clear that, before HHJ Monty KC, the claimant submitted that there would be no prejudice to the defendant or the other shareholders in granting the injunction sought, at least over to the return day. In the note of his judgment, the judge is first recorded as saying:

> "I can see no downside to the company being prevented from taking further steps in relation to shares."

Then, almost immediately, he added

> "I accept that there is no financial risk to company or shareholders".

27. Before me, the defendant submitted that there was plainly the risk of immediate irremediable harm, in that the purchase provisions of article 37 could not be operated, and rights might be permanently lost. This was put on the basis that would-be purchasers (under article 37.2) had to put in their replies to the deemed transfer notice by 25 September 2024, and then the defendant company (under article 37.3) had seven days to give notice in writing to the claimant obliging him to transfer his shares to the purchasers. If the defendant did not give the notice under article 37.3 within the

seven days, the claimant would be free (under article 37.4) to sell his shares to anyone. So injuncting the defendant to prevent the service of a notice under article 37.3 within the requisite seven days would cause the would-be purchasers to lose the chance to acquire the shares, and render the defendant liable to claims from the would-be purchasers.

28. First I deal with the position of the defendant itself. In my judgment the defendant cannot be exposed to claims by others for failing to do something which a court of competent jurisdiction has by injunction restrained it from doing. So, the defendant would suffer no prejudice, and there could be no *material* non-disclosure as to that. The position of the would-be purchasers is however different. Their potential loss is the loss of the right to acquire the claimant's shares against his will, at a price (assessed pursuant to the articles) which the claimant himself asserts to be only a fraction of what he says is their true worth. On that basis, the would-be purchasers would lose something of considerable value. At the original hearing HHJ Monty KC was taken to article 37, and indeed went through it in detail in his judgment. He, as an experienced judge, cannot have failed to see that, if the article 37.3 notice was not served within seven days, the claimant would be free to sell his shares elsewhere, and the other shareholders would on the face of it lose their (valuable) opportunity. In such circumstances, it was not necessary to spell out the potential harm to them. It was obvious. So, in my judgment there was no material non-disclosure as to that.

Renewed application pointless and unnecessary

29. The next point I think I should deal with was that the renewed application was pointless and unnecessary, because (i) the claimant by now had standing to present his petition and indeed had presented it, and would not lose it if his shares were compulsorily acquired. Moreover, (ii) there were other remedies available to the claimant, and any proprietary concerns should be dealt with directly as against Luglio Ltd. As to the first point, the defendant relied on the decisions of Deputy ICC Judge Kyriakides in *Re Motion Picture Capital Ltd* [2021] EWHC 2504 (Ch), and of ICC Judge Greenwood in *Re Contingent and Future Technologies Ltd* [2024] BCC 223. In each of these two cases it was held that a petitioner does not, or at any rate not automatically, lose standing to present an unfair prejudice petition if, *after* having presented such a petition, that petitioner ceases to be a shareholder in the company. The reasoning is not identical in the two cases, and the latter decision does not refer to the former, but I am not concerned with that now.

30. This is because I heard no arguments about the correctness of these decisions, and therefore nothing I say is intended either to approve or disapprove of either of them. I merely observe that, in the event that the same point arises before another ICC judge or any judge sitting as a High Court judge, those decisions would not stand in the way of a different decision being reached. I am told that they have been referred to in textbooks with apparent approval, but I cannot yet say that they are fixtures in the legal firmament. Accordingly, I do not feel able to rely on them as sufficiently justifying the rather cut and dried conclusion proffered to me by the defendant, and I do not consider that the claimant is to be criticised for being cautious in the circumstances.

31. As for the other remedies said to be available to the claimant, the defendant submitted that the claimant could have made a claim against the ultimate purchaser of his shares,

injuncting dealings with them pending the trial of the question whether he had been properly dismissed without notice, and seeking rectification of the share register if the share transfer had been registered. No doubt he could, but, in the circumstances of this case, where he alleged that the compulsory purchase procedure for his shares was never engaged, he was entitled (at his own risk) to proceed against his compulsory "agent" to seek to prevent the process followed by such agent from completing. It is not for the defendant to tell the claimant that some other interim remedy would have suited his purpose just as well.

Adequacy of damages for the claimant

32. The next point is the question of the adequacy of damages or financial relief for any loss that the claimant might have suffered. Here the defendant relied on statements in two decisions of the Court of Appeal, in *Pringle v Callard* [2007] EWCA Civ 1075 and *Loveridge v Loveridge (No.1)* [2020] EWCA Civ 1104 respectively. Both were cases about unfair prejudice petitions, where the petitioner claimed a "buy-out" order in conventional terms. In each case the petitioner sought an interim injunction designed to allow him a measure of participation in the business of the company pending determination of the petition.

33. In *Pringle*, Arden LJ (with whom Thomas LJ agreed) referred to the decision of Harman J in *Re a Company* [1985] BCLC 80, 82-83, and said:

> "24. In that case there was a risk of irreversible damage if an interim remedy was not granted. That is because the respondents to the unfair prejudice petition in that case proposed to make a rights issue and [Harman J] held that there was an arguable issue as to unfair prejudice where the object of the issue, and its effect, might be to deplete the resources of the petitioner to such an extent that he could no longer properly prosecute the petition and where he could not take up his proportionate entitlement under the rights issue."

34. Arden LJ then went on to say:

> "26. It is a very different matter where the remedy sought at the end of the day is a buyout and where the matters complained of on an interim basis can be taken into account in the process of the valuation of the shares for the buyout. This is made clear by Hoffmann J in *Re Posgate and Denby (Agencies) Ltd* [1987] BCLC 8."

35. In *Loveridge*, Floyd LJ (with whom Lewison and Asplin LJJ agreed) said:

> "71. So far as the damages calculation is concerned, there is no doubt that it will be possible to estimate the value of the companies now. If there is a sale of the companies to a third party at a lower figure, that will provide a measure of the damage, if any, caused by the interim administration of the majority. A similar calculation applies if the ultimate outcome is a buyout by the majority, a possibility that I cannot reject as readily as the judge did."

The court refused to grant an interim injunction in favour of the petitioner, on the basis (*inter alia*) that damages/financial compensation would be adequate.

36. In my judgment, there is a difference between an unfair prejudice petition where the petitioner seeks to be bought out by other shareholders (and therefore wants money rather than shares) and one where the petitioner seeks to hold the existing shares but seeks some other remedy, such as avoiding dilution or loss of management power. In the former case, the buy-out price (sought by the petitioner) can be calculated taking into account the unfairly prejudicial conduct. In the latter, the petitioner wishes to remain a shareholder, unaffected by the conduct complained of, and the value of the shares will not be calculated as for a buy-out. In such a case, the general rule applies that unique property is usually preserved *in specie* rather than valued in damages.

37. However, in the present case, that distinction does not matter. This is because the primary remedy sought by the petition in the present case *is* a buy-out order, and there is no prayer for the shares to be retained in specie. It is true that the petition contains a "sweep-up" provision, asking for "such other relief and/or remedies" as the court might think fit. But a provision of this kind, whilst no doubt preserving the power of *the court* to fashion other remedies which it considers more suitable than those expressly sought, cannot be interpreted as a specific prayer *by the petitioner* for anything under the sun.

38. So, the difficulty for the claimant is that the relief that he seeks in his petition is to *sell* his shares, and not to *retain* them. In oral argument, the claimant sought to say that he really wanted to retain his shares, but in my judgment I must deal with the matter as presented to me and to the defendant on the documents. There was no indication at any time of any draft amendment to the petition, or even a letter or email to the defendant saying that it was intended to amend the petition (which, given that the petition has not yet been served, would not require permission from the court). Even at the hearing, the claimant did not say "I have changed my mind, I now wish to claim different relief". The furthest he went was to say that he wanted to preserve the *possibility* of asking for this in the future.

39. In my judgment, that is not good enough. In that context, and taking into account the statements in *Pringle* and *Loveridge*, it is impossible to see why, as long as he has standing to present his petition, the claimant should not be left to his money remedy on a buy-out. If he succeeds in his petition, he will be entitled to the enhanced value that he claims the shares have, rather than the lower value that he claims the articles would foist upon him. In my judgment, a money buy-out order would provide a just response to his complaint (if made good). That is an entirely separate reason for dismissing this application. However, as I say, all this is subject to the question of standing to present a petition at all. Since there is here a doubt about that standing in case the claimant's shares are compulsorily acquired, I would not have refused an interim injunction on this ground.

Non-joinder of the majority shareholders

40. The defendant's next point was to complain of the claimant's non-joinder of the majority shareholders. Here the defendant said that the other shareholders – or at least Luglio Ltd as majority shareholder – should have been joined to the injunction application. I do not agree. What the claimant was concerned about was the defendant acting as his agent under article 37 of the company's articles, dealing with his shares on his behalf. He wished to argue that the defendant had no right to do so as it was not lawful in the circumstances for the company to dismiss him without notice. The

claimant was entitled to decide whom he wished to seek to injunct: *cf Dollfuss Mieg v Bank of England* [1951] Ch 33, 38. He was entitled to take the view that it was more sensible to go after his "agent" than after someone who might or might not turn out to be his "purchaser", but who might have nothing more to do, having previously put the defendant in funds (although I emphasise that there was no evidence of this before me). In my judgment there was nothing in this point.

Damages inadequate for defendant and other shareholders

41. The next point was that damages on the cross-undertaking given by the claimant would be inadequate for the defendant and the other shareholders. I did not understand the defendant's concern to stem from the claimant's impecuniosity, for the defendant alleged none. On the contrary, it relied for other reasons on his own evidence that he was wealthy. In any event, so far as concerns the defendant, I have already held that there was no prejudice to the defendant, so there would be no damages. As for the other shareholders, their potential loss is not to be able to buy the claimant's shares against his will at a price which he at least considers to be an undervalue. The valuation of such a loss is problematic in ordinary situations. These are unquoted shares without a liquid market. But since this is a petition alleging unfairly prejudicial conduct, in which the petitioner seeks a buy-out order, I do not see why, if the petition fails, the court cannot order a valuation for the purposes of showing what the other shareholders would have lost by not being able to acquire the claimant's share at the value placed on them by the article 37 procedure. What is sauce for the goose is sauce for the gander.

Balance of convenience

42. Lastly, there was the question of the balance of convenience. On the conclusions that I have already arrived at this does not arise.

Conclusion

43. For the reasons given above, I discharge the order of HHJ Monty KC, and dismiss the claimant's application for a renewed interim injunction. I should be grateful to receive a draft minute of order for consideration.