Neutral Citation Number: [2020] EWHC 3130 (Ch)

Case No: CR-2018-002335

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (CH D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 November 2020

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

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Between :

(1) ANTHONY KING
(2) JAMES PATRICK KING
(3) SUSAN MAY KING **Petitioners**

-- and –

(1) KINGS SOLUTIONS GROUP LIMITED
(2) PRIMEKINGS HOLDING LIMITED
(3) ROBIN FISHER
(4) BARRY STIEFEL
(5) GEOFFREY ZEIDLER
(6) KINGS SECURITY SYSTEMS LIMITED **Respondents**

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Ms Catherine Addy QC and **Mr Joseph Sullivan** (instructed by **Macfarlanes LLP**) for the **Respondents**
Mr Christopher Newman (instructed by **Claremont Litigation Limited**) for the **Petitioners**

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APPROVED JUDGMENT (COSTS)

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 am on 19 November 2020.

Tom Leech QC :

I. Introduction

1. On 29 October 2020 I gave judgment on an application to strike out parts of the Points of Claim served in an unfair prejudice petition under section 994 of the Companies Act 2006. I directed that I would deal with costs, permission to appeal and the form of order in writing. In this judgment I deal with those matters and in doing so I adopt the defined terms and abbreviations which I used in the substantive judgment: see [2020] EWHC 2861 (Ch).

2. On 6 November 2020 the parties exchanged written submissions and on 11 November 2020 they exchanged reply submissions. Both parties provided the Court with costs schedules and a form of order and the Applicants provided me with an updated form of order.

II. Costs

3. The application required the Court to decide whether the fourteen passages in the Points of Claim in the Appendix to the judgment should be struck out. The Applicants succeeded in relation to three passages (apart from certain extracts set out in bold) but failed in relation to the remaining eleven. In the light of this outcome, both the Applicants and the Petitioners submitted that they were the successful parties and that the Court should award them a proportion of their costs.

4. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party: see CPR Part 44.2(2)(a). However, in deciding what order to make, the Court will have regard to all the circumstances including (a) the conduct of the parties, (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful (c) any admissible offer to settle made by a party which is drawn to the Court's attention: see CPR Part 44.2(4).

5. Given the different arguments which were presented in relation to the passages which I struck out and the remaining passages, it is appropriate in my judgment

to approach the present case on the basis that there were two events: first, the application to strike out passages (1), (3) and (5) on the primary basis that the Petitioners failed to comply with CPR Part 38.7 and that they were an abuse of process; and, secondly, an application to strike out passages (2), (4) and (6) to (14) on the primary basis that the allegations did not involve conduct of the affairs of the Company.

Passages (1), (3) and (5)

6. It is also appropriate, in my judgment, to order the Petitioners to pay the costs of the application to strike out passages (1), (3) and (5). I held that they had failed to comply with CPR Part 38.7 and that it would be unjust and an abuse of process to permit these allegations to proceed against Mr Stiefel. No application was made by the Petitioners for the permission of the Court, whether prospectively or retrospectively, and it follows that there was no basis for them to advance these allegations. It is appropriate, therefore, to mark this conduct by ordering them to pay the costs of this part of the application.

Passages (2), (4) and (6) to (14)

7. The Petitioners were successful in opposing the application to strike out these passages in the Points of Claim. However, I decided no more than that they had pleaded a sufficient connection between the conduct which was the subject matter of the application and the conduct of the Company such that it was arguable that this conduct fell within section 994. It is possible that the Petitioners may prove these allegations at trial and that this conduct justifies relief under section 996 but it is also possible that they will fail either on the facts or the law (or both).

8. Although it might be appropriate in many cases to order the unsuccessful party to pay the costs of a strike out application, it seems to me that it would not be appropriate to do so in relation to these passages in the present case and that I should order costs in the Petition. I say this for two reasons: first, I do so because of the nature of the allegations which the Petitioners make against the Applicants. In paragraph 12 of his reply submissions Mr Newman described the

claim of which these allegations form a significant part in the following terms (original emphasis):

> "This is a very unusual case which would give any Court pause for thought, but that is because it is (thankfully) highly unusual for litigants and their legal team to embark on a vicious campaign aimed at 'weaponising' the civil justice system to destroy a man's life."

9. If I order costs in the Petition and the Petitioners establish the allegations in passages (2), (4) and (6) to (14) at trial, then they will recover their costs of opposing the application to strike them out. However, if they fail, then the Court is likely to find that the Petitioners should never have made such allegations in the first place and that the Applicants should never have been put to the cost of defending them (including the cost of the present application). The fact that the Court was unable to strike them out should not provide a justification for making allegations of this nature and the Applicants should be entitled to their costs of the application unless they acted unreasonably.

10. Secondly, I am satisfied that it was reasonable for the Applicants to pursue the application even though they lost on these paragraphs. Ms Addy and Mr Sullivan submitted (and I accept) that the Petitioners had an ample opportunity to withdraw passages (1), (3) and (5) of the Points of Claim but chose not do so. Indeed, they argued before me that the application was "totally without merit". Although Mr Newman submitted that the Applicants should have made a request for further information, he did not suggest that the Petitioners would have agreed to withdraw these allegations and they made no offer to do so. In my judgment, therefore, a hearing was inevitable and it was reasonable for the Applicants to pursue the application.

Apportionment

11. Neither party submitted that I should make an issues based costs order under CPR Part 44.2(6)(f). Ms Addy and Mr Sullivan submitted that the Petitioners should be ordered to pay 50% of the Applicants' costs by weighing up "the significantly greater proportion of the preparation, evidence and hearing time"

devoted to passages (1), (3) and (5). In his reply submissions, Mr Newman reminded me that the Applicants divided up the allegations in the Application Notice into four categories A to D and that the Petitioners were successful on three out of four.

12. I accept that submission. Although the Applicants sought to strike out all three categories on the basis, broadly speaking, that they were not concerned with the affairs of the Company, they also advanced a number of other grounds. In my judgment, their own division of the application into four categories is a fair reflection of both the time spent on those issues and their importance. I will order, therefore, that the Petitioners should pay 25% of the Applicants' costs of the application and that 75% of the parties' costs of the application should be costs in the petition.

Payment on Account

13. I accept the Applicants' submission that there is no good reason not to order a payment on account of costs. 25% of the amount claimed by the Applicants in respect of the application is £97,083.40. Given the split costs order which I have made and the total amount claimed by the Applicants in respect of the application, this is a case for a conservative approach. I will order the Petitioners to make a payment on account of £40,000 within 28 days.

14. Mr Newman also drew my attention to the uncertainty about Primekings' VAT position and I accept his submission that the Applicants have had sufficient time to establish the position. In those circumstances, I will not order the Petitioners to pay any VAT on the payment on account (whether or not it is recoverable). If the Applicants are entitled to recover VAT from the Petitioners, this issue will have to be raised and dealt with on the detailed assessment.

III. Permission to Appeal

Prospect of Success

15. Ms Addy and Mr Sullivan submitted that the Applicants have a real prospect of success on an appeal. They argued that there was no pleaded basis for finding the necessary causal connection between the private actions of the Primekings Parties and conduct of the affairs of the Company. They also argued that the Court erred as a matter of law and fact in treating the Campaign as a single or composite "piece of conduct". I do not accept that submission for the following reasons:

    i) Ms Addy and Mr Sullivan accepted the Court's analysis of *Graham v Every* [2015] 1 BCLC 41. They do not suggest, therefore, that there are grounds to appeal on the law.

    ii) On a detailed analysis of the Points of Claim I was satisfied that there was an adequately pleaded basis for finding the necessary causal connection and I rejected the points which they now make in support of the application for permission to appeal.

    iii) The Applicants did not apply to strike out the "Campaign" allegation and accepted, therefore, that some of the conduct upon which the Petitioners relied was capable of justifying relief under section 996. In substance, they failed to persuade me that I should strike out some of the particulars of that allegation (which must go to trial in any event).

Compelling Reason

16. Ms Addy and Mr Sullivan also submitted that the Judgment gave rise to an "undesirable charter" for petitioners and that consideration and clarification was required by the Court of Appeal. I reject that submission. Ms Addy emphasised throughout the application that I was conducting a case management exercise and the decision involved a direct application of *Graham v Every*. Although I expressed concern about permitting certain allegations to go forward, that concern was directed at the sweeping nature of those allegations and not the application of *Graham v Every*. The Applicants will have to persuade the Court of Appeal that this is an appropriate case in which the law requires further clarification.

III. The Order

17. I approve the order in the form which I am handing down with this judgment. I have considered Mr Newman's submissions and I accept his submission about the second recital relating to KSSL but reject his submission in relation to the operative parts. It is clear from Ms Addy's and Mr Sullivan's draft that the application was only partially successful and if there is any further debate the judgment is, of course, available.