Neutral Citation Number: [2020] EWHC 3176 (Ch)

Case No: CR-2018-005055

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTIES COURT OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
COMPANIES COURT

IN THE MATTER OF COMPOUND PHOTONICS GROUP LIMITED
AND IN THE MATTER OF COMPOUND PHOTONICS UK LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Monday, 16th November 2020

Before:

MR. JUSTICE ADAM JOHNSON

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Between:

(1) MARK FAULKNER
(2) JONATHAN SACHS
(3)-(70) THE MINORITIES
(as defined herein and as listed in Schedule 1) **Petitioners**

- and -

(1) VOLLIN HOLDINGS LIMITED
(2) MINDEN WORLDWIDE LIMITED
(3) COMPOUND PHOTONICS GROUP LIMITED
(4) COMPOUND PHOTONICS UK LIMITED
(5) ALDON INVESTMENTS LIMITED **Respondents**

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MR. ROBIN HOLLINGTON QC and **MR. ADRIAN PAY** (instructed by **Mischon de Reya LLP**) appeared on behalf of the **Petitioners.**
MR. ANDREAS GLEDHILL QC, MR. DONALD LILLY AND MR. TIMOTHY LAU (instructed by **Allen & Overy LLP**) appeared on behalf of the **Third, Second and Fifth Respondents.**
The Third and Fourth respondents did not appear and were not represented.

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Approved Judgment

Transcript of the Stenograph Notes by Marten Walsh Cherer Ltd.,
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MR. JUSTICE ADAM JOHNSON :

Introduction

1. The Petitioners by their Application Notice dated 3rd November 2020 seek summary determination of these proceedings against the First, Second and Fifth Respondents, referred to as the Active Respondents. To express it more fully, they seek an order that the Active Respondents purchase their shares in the Third Respondent at fair value, with directions to be given for determination of that value. Failing that, they seek fresh case management directions, in particular as to the form of the List of Issues and as to the scope of cross-examination.

2. The application has come on in somewhat unusual circumstances, in the sense that it has been heard during the course of opening submissions in the trial of the Petitioners' action. At the conclusion of opening statements on Friday 13th November 2020, I indicated that I was not minded to accede to the application for an immediate share purchase order, but would give my reasons orally on the next sitting day, Monday 16th November 2020. These are those reasons. I also gave certain directions as to the course of cross-examination which I will come back to.

Background

3. The Petitioners are minority shareholders in Compound Photonics Group Limited ("*CPGL*"). The First Petitioner, Mr. Faulkner, is the former Chairman of CPGL, and the Second Petitioner, Dr. Sachs, is the former Chief Executive Officer.

4. Although there is some dispute about its current activities, it is common ground that CPGL's business originally was in developing and marketing high resolution and high-performance display technology. The Active Respondents are investors and now majority shareholders in CPGL. The dispute between the parties results from events in 2016, which very broadly led to Dr. Sachs leaving the business in March 2016 and Mr. Faulkner leaving the business in October 2016.

5. Other complaints are made about the treatment of the minority shareholders in subsequent periods, including in particular as regards the sale of what the Petitioners see as a principal asset of the CPGL group, namely a fabrication facility known as Newton Aycliffe. The basic complaint is that this was sold at an undervalue in unusual circumstances, with no proper information being provided to the minority shareholders at the time.

6. Against this background, the Petitioners seek relief for unfair prejudice under sections 994-996 of the Companies Act 2006. Their core case, as they put it, rests on allegations of breach by the Active Respondents of what the Petitioners call the "*2013 Constitution*", i.e. a Shareholders' Agreement executed in 2013 and Articles of Association entered into at the same time. The 2013 Constitution, say the Petitioners, conceded extensive and unusually powerful provisions for the protection of the minority shareholders in CPGL, which included terms designed to entrench the positions of Mr. Faulkner and Dr. Sachs (see in particular the Shareholders' Agreement, clause 7), and moreover an express contractual duty of good faith between members (see clause 4.2).

7. The Petitioners say that the basic terms of this bargain, which they characterise as giving rise to a contractual quasi-partnership, were repudiated by the Active Respondents by the means of their actions in 2016 and thereafter.

8. The Petitioners also rely on breaches of duty by the directors of CPGL nominated by the Active Respondents. They say that those directors, by reason of their relationships with the Active Respondents and those standing behind them, were inherently conflicted and consequently did not act in the interest of the shareholders as a whole or for proper purposes.

9. The Active Respondents, broadly, deny any breaches of the 2013 Constitution or of any directors' duties by the nominated directors. They say that the positions of Mr. Faulkner and Dr. Sachs were not entrenched, and that in any event there were sound commercial reasons for the departures of those two individuals in 2016, Dr. Sachs in point of fact having resigned. They also say that, on the evidence, the story of the sale of Newton Aycliffe is explicable on entirely rational commercial grounds, thus they say they acted at all times in good faith and there is no unfair prejudice entitling the Petitioners to seek relief.

10. The proceedings have been bifurcated. The present trial before me is concerned with the question whether an order for the purchase of the Petitioners' shares should be made at all. Issues of valuation have been carved out to a separate hearing.

11. I should mention costs. I do not have detailed information available but I am told that the Active Respondents' costs to date are in the region of £4 million ,and the costs of CPGL and its subsidiary, Compound Photonics UK Limited, are in the region of £1.4 million.

12. From a procedural point of view, the Petition proceedings have been very hard fought. One feature has been that until very recently the proceedings included a substantial Counterclaim by the Active Respondents against Dr. Sachs. This focused on allegations of mismanagement by Dr. Sachs, said to have caused losses to the Active Respondents as investors in CPGL. The losses were put in the region of US $50 million. This was obviously a very substantial sum for a private individual such as Dr. Sachs.

13. At the Pre-trial Review before me on 5th October 2020, the Counterclaim was still in play, although the Petitioners at that stage indicated that they were intending to apply for a summary determination of it at the start of trial. Things changed on 13th October, however, when the Active Respondents served a Notice of Discontinuance in respect of the Counterclaim. This was accompanied by a letter from their solicitors, Allen & Overy, explaining that although the Active Respondents maintained their position that Dr. Sachs was in breach of the 2013 Shareholders' Agreement, they had come to the conclusion that Dr. Sachs would be unable to satisfy any judgment against him. Therefore, they had taken the pragmatic decision not to pursue the Counterclaim.

The Petitioners' Application

14. The discontinuance of the Counterclaim is the catalyst for the Petitioners' Application. Broadly, the Petitioners make three points.

15. First, they say that the circumstances surrounding the Counterclaim and its discontinuance constitute an abuse of process. This is essentially because there was no proper motivation for bringing it. Instead, the motivation was an improper one, namely to intimidate Dr. Sachs. Thus, say the Petitioners, the Counterclaim was obviously a reaction to the Petition and had no independent validity. It was "*on its face utterly absurd*" and "*flawed as a matter of law*", and it was withdrawn only at the last minute when it became clear that its objective - that of intimidating of Dr. Sachs into abandoning the Petition – had failed. Moreover, say the Petitioners, the reason given by Allen & Overy for discontinuing the Counterclaim, namely that Dr. Sachs was not good for the money, cannot be the true reason because that was the position all along. Further, they say the Counterclaim fits into a wider pattern of intimidatory behaviour, which in the context of the proceedings has involved a strategy of seeking to expand the issues unnecessarily and drive up the costs. The Counterclaim has been an important part of this overall strategy since it has led to a distorted view being taken of the issues in the action, which is really, say the Petitioners, all about common themes of exclusion and mismanagement. Had there never been a Counterclaim, the proceedings could and would have been case managed in a very different way and the Active Respondents would never have been able to drive up costs to the present level.

16. Second, the Petitioners say that the abandonment of the Counterclaim has a more pointed effect. The submission made is that only the Counterclaim, and not the Defence to the Petition, ever made allegations of breach of duty by Dr. Sachs. Such allegations of breach of duty having now been abandoned, the Defence (say the Petitioners) is laid bare. That is to say, no properly arguable defence is advanced to the unfair prejudice alleged in what is called the forced resignation of Dr. Sachs. The factual assertions in the Defence, say the Petitioners, are put forward as no more than background, and nothing is said which would justify Dr. Sachs' removal in the manner in which it in fact occurred. The same logic, it is argued, applies to Mr. Faulkner's position, although he was never the subject of the Counterclaim.

17. Third, the Petitioners say that in any event, it would be an abuse to allow the Active Respondents to rely in their Defence on effectively the same allegations previously relied on in support of the Counterclaim, because that would permit them to pursue under a different guise allegations which have rightly been abandoned. That would amount to a *Henderson v Henderson* type of abuse, akin to allowing issues which have already been resolved to be re-litigated.

18. Underlying all of these points as a more general theme is the submission that the Petitioners are mystified as to why the Active Respondents are refusing to buy their shares. They say that a share purchase order is a financially neutral remedy, that it is obvious the Active Respondents have the financial means to fund a purchase of the minority shares, and that there can be no good reason for them failing to do so. Hence, their continued refusal is explicable only on the basis of a more sinister motive, namely that the Active Respondents are seeking to exercise some perverse form of punishment over Mr. Faulkner and Dr. Sachs.

Discussion

19. I approach the matter as follows.

20. To begin with, in my judgment the Active Respondents have an arguable defence to the case based on the alleged exclusion of Dr. Sachs, notwithstanding the abandonment of the Counterclaim.

21. The Petitioners' argument is essentially that Dr. Sachs had an entrenched right to remain as a director of CPGL, and although his exclusion might have been justified if it could be shown that he had acted in breach of duty (see cases such as *Re Sprintroom Ltd* [2019] EWCA Civ. 932, [2019] BCC 1031), no case based on breach of duty is now made out and so his exclusion was necessarily unfair.

22. The difficulty is that the question whether Dr. Sachs had an entrenched right to remain as a director is, itself, the subject of intense dispute.

23. The Active Respondents say he had no such right. They say that as shareholders they had a statutory right under Companies Act Section 168(1) to remove Dr. Sachs, which was untrammelled by any equitable or other constraints.

24. This central question, whether Dr. Sachs had an entrenched right or a qualified one, is tied up with the background to the investments made by the Active Respondents and the nature of the business they were investing in. As to the background to the investments, there is a factual dispute relating to representations said to have been made to Dr. Sachs at the time of Vollin's original investment in 2010. As to the nature of the business, this is part of the factual matrix which may assist the Court in interpreting the parties' contractual intentions. The point is that this was a business which involved taking something of a commercial gamble, i.e. that the technology which Dr. Sachs was developing would be advanced to the point where it became marketable, and then in fact marketed in a manner which provided returns to the investors. The question which arises is what the parties intentions were if, as the Active Respondents maintain, a position was reached where large sums had been invested but they were losing faith in Dr. Sachs' ability to deliver on his personal vision.

25. Such matters are in turn related to the issue of whether the Active Respondents breached their contractual duty of good faith, since the content of that duty, if it is in play, will be influenced by the nature of the commercial bargain it was designed to protect. That then feeds into the overall assessment of whether Dr. Sachs' departure was in fact unfairly prejudicial or not.

26. Dr. Sachs in fact resigned from CPGL and executed a settlement agreement recording his decision to do so, albeit that that reserved any rights he might have as a shareholder. His case is that he was left with no option but to resign in light of the actions of the Active Respondents. That is said to be because they threatened to withdraw funding from CPGL unless he stepped down. Dr. Sachs says that in fact that threat was itself misleading, because in reality the Active Respondents had no intention of withdrawing funding.

27. These matters again are disputed on the evidence. In short, the Active Respondents say that they were genuinely concerned about the consequences of Dr. Sachs remaining at CPGL, because they had been disappointed by the fact that marketable products were still not available by March 2016, and there were limits to their willingness to continue to make funding available. Thus, they say, they acted in good faith and for perfectly understandable commercial reasons.

28. Pausing there, it seems to be clear that the picture which emerges is not one which allows for summary determination. The analysis involves some degree of nuance. Certainly, it seems to me, it will have to involve an assessment of the evidence overall and the making of findings of fact following cross-examination of the witnesses.

29. I make three additional observations before moving on to the topic of abuse of process.

30. First, in expressing the views above I have borne in mind that the exclusion of Dr. Sachs is not the only ground of unfair prejudice relied on, and that others are in play as well, which Mr. Hollington has sought to characterise as more straightforward. These also, however, involve disputed factual issues, such as the real reasons for Mr. Faulkner's departure from the business and whether Newton Aycliffe was in fact sold at an undervalue. On these topics and indeed others the parties have served detailed evidence, including expert valuation evidence on the Newton Aycliffe sale. The short point is that at this stage, and given the way the case has developed, it is difficult to separate out discrete issues from the overall picture, and to say that they unquestionably and without further investigation justify a share purchase order.

31. Second, I should say I am not persuaded by the Petitioner's argument based on the *Henderson v Henderson* and *Johnson v Gore Wood* line of authorities. It is one thing to preclude a party from litigating or re-litigating matters which could and should have been dealt with in earlier proceedings. That reflects the important policy of encouraging finality in litigation. It is quite another, as here, where overlapping facts are relied on, both as a defence and as the basis of a counterclaim, to say that the party who abandons his counterclaim should not be able to advance a defence. It seems to me, and I will come back to this point, that that is quite a different situation requiring something rather extreme to justify shutting the door on the defendant completely.

32. Third, and finally on this topic, I should emphasise that in making the observations I have made about the parties' respective cases, I do not at all intend at this stage to express a view one way or another about where the overall merits lie. In fact, my position is entirely the opposite. On the basis of my understanding at the moment, I think it would be quite unfair to express any definitive view. That is why I say the matter is not capable of summary determination at this stage.

33. I must next deal with the case based on abuse of process. I think I can deal with that more briefly. I am quite prepared to accept that the Counterclaim, containing as it did the headline figure of $50 million, must have appeared intimidatory to Dr. Sachs. It would to any private individual. I am also prepared to accept the existence of the Counterclaim has had a somewhat distorting effect on the shape of the proceedings so far. That is because it has promoted a particular focus on the individual actions of Dr. Sachs over a long time-period, not by way of background to the critical events of March 2016, but instead as the foundation for the case of breach of duty by him. I can see that that emphasis is likely to have led to increased disclosure on topics which, as matters have turned out, may only be of limited or peripheral relevance to the enquiry the Court has to conduct.

34. I feel unable, however, to conclude that the Counterclaim and the steps taken in relation to it can properly be characterised as an abuse of process, or -perhaps more

significantly - to conclude that even if they were, the correct and appropriate response at this stage would be to debar the Active Respondents from defending the Petition.

35. As to the question of abuse, the particular form of abuse here is said to spring from the Active Respondents' motivation: it is said their motivation was not to vindicate a legal right, but instead to intimidate Dr. Sachs.

36. Such cases present a difficulty. After all, one can have mixed motives for pursuing legal action, but a viable claim pursued even in order to be vindictive is not obviously an abuse. The answer the Courts have given is that where proceedings are pursued for mixed motives, one proper and one perhaps improper, there is no abuse because it is not for the Court to embark on the difficult exercise of establishing which of two relevant purposes was the predominant one: see *JSC BTA Bank v Ablyazov No. 6* [2011] EWHC 1136 (Comm), [2011] WLR, 2996, at [22]. To put it another way, there is no abuse if one of the purposes is legitimate.

37. On the present facts I do not feel able to conclude that the Active Respondents' only purpose was an improper one. Looked at from their point of view, they invested very substantial sums in CPGL but with limited or no returns. One way of characterising their actions is to say that they wished to take steps to try and recoup some part of their losses. True it is that they did so only in response to the Petition, but it is also true, on the other side of the equation, that although the Counterclaim was a feature of these proceedings from the time of the original Defence, no application was made to strike it out until it was eventually discontinued shortly before the present trial. That suggests that it was thought to have at least some independent validity even if, as Mr. Hollington has pointed out, there were arguments in favour of it being legally misconceived.

38. Further and in any event, it would be an extreme step at this stage for the remedy for any abuse to be an ordering debarring the Active Respondents from defending the Petition.

39. Questions of proportionality and fairness arise. The Counterclaim having been discontinued, the Petitioners will be entitled to their costs of dealing with it. Granted, not all the inconvenience caused by having to deal with it is addressed by means of an order for costs, but that is nonetheless an important matter for me to bear in mind making an overall assessment of what is now the appropriate step to take.

40. Looking then from the point of view of the Active Respondents, the effect of a debarring order made at this stage would be to shut them out for advancing what in my view is at least an arguable defence: see above. That is a step I should take only as a last resort to reflect truly exceptional circumstances, because if a less drastic and more proportionate response is available it would be an unfairness to the Active Respondents to debar them from advancing their case at all: see, for example, *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004.

41. In *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ. 685, [2015] 1 WLR 4534, Vos LJ emphasised the importance of fairness, and in particular the significance of the question whether there could still be a fair trial between the parties: see paragraph [22]. Bearing in mind the points made already in this Judgment, it seems to me that this is a case in which there *can* still be a fair trial between the parties, and indeed is a

case in which fairness dictates there should be a trial, subject to appropriate limitations on the scope of cross-examination.

42. It seems to me I should also bear in mind the practical realities. Making a buyout order now without a trial would not only be an extreme step, but as Mr. Hollington has very fairly and properly accepted, an almost unprecedented one. If there were to be an appeal and were the order reversed, parties would then be faced with the prospect of having to assemble again for trial at some future point. That is obviously a highly unappealing prospect, and in my judgment not a risk worth taking at this late stage in the circumstances of this case.

Conclusion

43. In summary, I am not persuaded I should accede to the Petitioners' application and make any immediate order for sale, whether on the basis that the Active Respondents are debarred from defending the Petition or otherwise.

44. That said, I think that both the parties and the Court now need to manage the case in a manner which reflects the changed circumstances which have emerged. As to that, and to repeat for the purposes of this Judgment the points made at the close of opening submissions, it is difficult for me to be entirely prescriptive, but I think it comes down to this.

45. The main focus now, so far as concerns Dr. Sachs' departure from the business, should be on the events running up to March 2016, surrounding his decision to resign. Of course, those events will need to be contextualised. They cannot be looked at in isolation. Background facts will be relevant for that purpose, in order to understand clearly what point had been arrived at by March 2016 and why. But in terms of emphasis and focus, the emphasis should now, in light of the discontinuance of the Counterclaim, be on what happened in March 2016 and the reasons for it, with a view to assessing whether the actions of the Active Respondents *at that point* were unfairly prejudicial or not.

46. That, as it seems to me, is different to a case which has as a point of focus alleged acts of mismanagement by Dr. Sachs going back over time, which in one way or another are said to amount to breaches of duty by him.

47. My overall view, therefore, is that the trial should proceed, but should be managed with a view to the resolution of the issues as they now stand. That will involve the Court monitoring the progress of cross-examination, to seek to ensure it is kept within appropriate bounds. It must also involve the parties making some efforts themselves to manage the available time in a proportionate manner. I do not propose to modify the existing split in terms of cross-examination time, but I will ask Mr. Gledhill to bear very much in mind the points I have made. I will say that the Court will be astute to ensure that the cross-examination is proportionate and directed to the issues as they now stand. I also express the hope, as far as Mr. Gledhill is concerned, that he will be able to finish his cross-examination of Dr Sachs comfortably within the timescale allotted to him.

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