IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMPANIES COURT (ChD)
[2021] EWHC 2463 (Ch)

No. CR-2021-000750

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 22 July 2021

Before:

MR EASON RAJAH QC

(Sitting as a Judge of the High Court)

B E T W E E N :

(1) MAURICE ELLIOT SHERLING
(2) GRAHAM CHARLES HUDSON — Applicants

- and -

COMPETITION AND MARKETS AUTHORITY — Respondent

MR C. BUCKLEY (instructed by Hogan Lovells International LLP) appeared on behalf of the Applicants.

MS C. ADDY QC and MS N. JHITTAY (instructed by Competition and Markets Authority) appeared on behalf of the Respondent.

J U D G M E N T
(Via Microsoft TEAMs)

EASON RAJAH QC:

1 This is an expedited hearing of an application by Maurice Elliot Sherling ("Mr Sherling") and Graham Charles Hudson ("Mr Hudson") for permission, pursuant to section 17 of the Company Directors Disqualification Act 1986 ("CDDA"), to act as director of certain companies notwithstanding competition disqualification undertakings given by each of them pursuant to section 9B of the CDDA. The Competition and Markets Authority ("the CMA") has been joined as defendant to this application because under section 17(7) of the CDDA, it must appear on the hearing of the application and draw to the attention of the court any matters which appear to it to be relevant, and at such a hearing, it may call witnesses and give evidence.

2 The CMA has raised various concerns and factual queries with which it says the claimants have engaged constructively. The position now is that provided the claimants limit their application to the particular company as identified in the draft form of order which I have been provided by the CMA, and provided the substantive conditions identified in the draft form of order are imposed, then the CMA says it has no further matters which it considers it should draw to the court's attention.

3 Both the claimants and the CMA expressly recognise that it is for the court to determine whether the claimants should be granted any leave and, if so, on what terms. However, they both say that the CMA, in pursuance of its statutory role, has given careful consideration to the claim and, accordingly, I am invited to place reliance upon the CMA's position. I have been provided with detailed written submissions by both parties which have been of very great assistance to me.

4 Let me start by setting out the competition disqualification regime and the CDUs which have been given by the claimants. The CMA is the UK's primary competition and consumer law body. It is an independent, non-ministerial government department and its function is to act so as to ensure that markets are competitive and that consumers are protected. For that purpose, it has powers of investigation and sanction under the Competition Act 1998, the essential purpose of which is to protect and promote competition by prohibiting certain types of conduct which would otherwise reduce or restrict competition between businesses.

5 Following a formal investigation which it opened in July 2017 under section 25 of the Competition Act 1998, the CMA concluded on 4 November 2020 that Associated Lead Mills Limited, Royston Sheet Lead Limited, and their parent company International Metal Industries Limited, all of which form part of the IMI Group which I am concerned with, and H.J. Enthoven Limited trading as BLM British Lead ("BLM"), and its parent Eco-Bat Technologies Limited, entered into four agreements and/or concerted practices each of which had as its object the prevention, restriction, or distortion of competition in relation to the supply of rolled lead within the UK and/or within the internal market. The four agreements and/or concerted practices are respectively defining in the decision as the October 2015 infringement, the July 2016 infringement, the August 2016 infringement, and the April 2017 infringement. As set out in the decision, the CMA found that the July 2016 infringement may have affected trade within the UK in breach of the chapter 1 prohibition and the other three infringements may have affected trade within the UK and between member states in breach of the chapter 1 prohibition and Article 101(1) of the Treaty on the Functioning of the European Union.

6 More specifically, those infringements consisted of the following. Firstly, in October 2015, an agreement and/or concerted practice with H.J. Enthoven Limited, trading as BLM British

Lead, not to supply Contractor Buying Group Limited by withdrawing or otherwise refusing to supply, underpinned by an exchange of commercially sensitive information regarding their strategies towards Contractor Buying Group Limited. Secondly, in July 2016, an agreement and/or concerted practice with BLM to share the market through the allocation of a particular customer by way of a non-aggression pact and/or to fix prices in relation to that customer, including an exchange of commercially sensitive pricing information. Thirdly, in August 2016, an agreement and/or concerted practice with BLM to share the market by way of a non-aggression pact and/or to fix prices, including an exchange of information regarding a competitively sensitive market and pricing strategy. Finally, in April 2017, a concerted practice with BLM to fix prices through the alignment of prices in respect of certifying group customers effected by unilateral disclosure of commercially sensitive pricing information from BLM to ALM.

7 Sections 9A to 9E of the CDDA contain a regime for disqualification orders in respect of infringements of competition law. In particular, the court must make a disqualification order of no more than fifteen years against a person if it is satisfied in respect of the two conditions stated at section 9A(2) and (3). First, that an undertaking which is a company of which that person was a director has committed a breach of competition law within the meaning of section 9A(4) of the CDDA, and, secondly, that his conduct as a director makes him unfit to be concerned in the management of a company.

8 As the law stands, in accordance with the authorities concerning section 6 of the CDDA, an order must be made under section 9A of the CDDA if the director's conduct:

> "...viewed cumulatively and taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."
>
> (*Re Grayan Building Services Ltd* [1995] Ch 241 and see also *Competition and Markets Authority v Martin* [2020] EWHC 1751 (Ch)).

9 Accordingly, in or around April 2019 and after issuing its Statement of Objections, the CMA opened an investigation under the CDDA into whether to apply for a competition disqualification order against each of the claimants in light of their responsibility for the infringing conduct of IMI identified in the decision. Each of them subsequently admitted that their conduct as a director of ALM was such as to make them unfit to be concerned in the management of a company and offered a competition disqualification undertaking pursuant to section 9B of the CDDA 1986 which the CMA accepted. In particular, Mr Hudson offered a CDU for a period of four years and Mr Sherling offered a CDU for a period of three years. Both periods of disqualification commenced on 30 May 2021. However, as noted above and by an order dated 13 May 2021, the claimants were each granted interim leave to continue to act as directors of the companies in the IMI Group pending this expedited hearing and subject to certain specified conditions.

10 By the terms of the schedules to the CDU given by each claimant, firstly, the second claimant Mr Hudson admitted that he was a *de facto* director of ALM after the date of his formal resignation in October 2014 and through the period of the infringements, and that the infringements occurred under his direction. Secondly, Mr Sherling admitted that he was a *de jure* director of ALM since 1 March 2016 and then as regards the July 2016 infringement and the August 2016 infringement, by virtue of text messages which were sent to him by Mr Hudson, he had reasonable grounds to suspect ALM's conduct constituted a breach of competition law but took no steps to prevent it or to report it to the authorities.

11 I turn now to applications for leave to act. Notwithstanding the giving of a CDU, under section 9B(4) and section 17(3A) of the CDDA, a person may apply to the court for leave to act as a director and otherwise be concerned in the management of a company. It is well established that, when granted, any such leave ought only to be by reference to identified companies rather than by way of blanket permission.

12 The court's approach to applications for permission pursuant to section 17 of the CDDA was summarised by Miles J in *Rwamba v Secretary of State for Business, Energy, and Industrial Strategy* [2021] BCC 184 at [34]. Firstly, taking the numbered subparagraphs:

> "i) The court has a discretion under section 17 to allow a person who has been disqualified to be a director of a company or be concerned or take part in the promotion, formation, or management of a company.
>
> ii) The onus is on an applicant under the section to persuade the court to grant permission. The starting point when approaching the jurisdiction is that the applicant has been held unfit to be a director for the period of the order (or has accepted the equivalent when giving an undertaking). Nonetheless leave may be given in a proper case.
>
> iii) It is for the court (and not for the Secretary of State) to be satisfied that it is appropriate to give leave for the applicant to be a director etc.
>
> iv) The discretion under section 17 to give leave is unfettered. It is wrong to seek to add glosses or preconditions. The question for the court is whether in all the circumstances it is appropriate to give leave; and in approaching this question the court balances all the relevant factors.
>
> v) Though it is usual to establish that the Company has a 'need' for the applicant to be a director or involved in the management, this is not a precondition. For instance, the appointment may be made to allow the director to obtain a tax advantage.
>
> vi) The court should, among other things, have regard to the nature and seriousness of the conduct that led to the disqualification order or undertaking and the length of the disqualification. Where that conduct was dishonest a court may be reluctant to give leave.
>
> vii) The court should, when deciding whether to give leave for a director to act as a director have regard to the purposes of a disqualification order. These include (i) protecting the public directly by prohibiting the disqualified person from acting and (ii) deterring both the particular director and others from the kind of conduct that has led to the order.
>
> viii) Leave should not be too freely given as this would tend to undermine the protective and deterrent purposes of a disqualification order. The court would not wish anyone dealing with a director to be misled as to the gravity of a disqualification order.
>
> ix) On the other hand, the power of the court to grant leave under section 17 is inherent in the disqualification regime and in an appropriate case

it may serve the public interest to allow a disqualified person to be a director of a specific company.

x) Moreover, the fact that the applicant for leave has agreed to the imposition of conditions designed to ensure high standards of corporate conduct may itself be seen as promoting the policy of deterring misconduct."

13 Those principles, which were helpfully summarised by Miles J are the principles which I intend to apply in this case.

14 The powers to impose disqualification orders exist because of the importance of competition law for the day-to-day business activities of all markets within the UK jurisdiction. Breaches of competition law are serious and the importance of the requirement of fair competition is not to be understated. In this regard, in *Stamatis & Anor v The Competition and Markets Authority* [2019] EWHC 3318, Deputy Insolvency and Companies Court Judge Baister observed that there is a difference between leave in this context and leave more generally, and as much as in any competition disqualification based on cover bidding or the like, it necessarily involves deception. It involves dishonest behaviour that is almost certain to result in real financial damage to others. That applies whatever the disqualification period may be.

15 The CMA has been anxious to impress on the court that it regards CDO regime as serving a valuable purpose in bringing home to individuals the need for competition law compliance. The CMA says the court should avoid granting leave too readily as to do so would undermine the purposes for which the person was disqualified in the first place and could detract seriously from the deterrent effect of the CDO regime. Accordingly, the CMA says, it is concerned to see that leave is granted only in exceptional cases.

16 Moreover, the CMA says it is concerned that if any such leave is granted, it is limited to the extent necessary and is visibly subject to appropriate substantive conditions. In particular, the CMA's position is that it would not suffice for the court to be satisfied that appropriate and sufficient measures had been implemented and thus grant leave to an applicant without also making it an express condition of such leave that such measures must continue.

17 Against that background as to the CMA's views of the importance of the CD regime and its views that leave to act as a director, notwithstanding disqualification, should very much be the exception rather than the norm, it is significant that after careful consideration of this application, including interactive dialogue on the terms on which leave might be granted, the CMA effectively does not oppose the application and invites the court to place reliance on its views.

18 I turn now to the present claim. The claim originally concerned a total of thirteen companies within the IMI Group but it is no longer pursued in respect of four of them. The nine relevant companies for which leave is now sought are: (a) International Metal Industries Limited (IMI); (b) L&P Trading Limited; (c) Envirowales Limited; (d) Associated Lead Mills Limited; (e) Jamestown Industries Limited; (f) Royston Sheet Lead Limited; (g) Royston Lead Limited; (h) Met-Seam Limited; and (i) Jamestown Metal Resources Limited (JMR) which is a company registered in the Republic of Ireland.

19 Each of the above other companies, apart from JMR, is registered in England and Wales. By the claim, the claimants essentially aver, and the CMA agrees, that the court has jurisdiction to consider the claimants' application for leave to act in relation to JMR and that

the CDUs would otherwise affect each of the claimant's ability to act as a director of JMR. "Company" is defined in section 22(2) of the CDDA and it includes a company that may be wound up under Part V of the Insolvency Act 1986 (unregistered companies) section 22(2)(b). In *Re Westminster Property Management Ltd (No. 2), Official Receiver v Stern* [2001] BCC 305, Lloyd J applied the *Latreefers* test of the three core requirements which must be satisfied for asserting jurisdiction to wind up such a company. Firstly, there must be a sufficient connection to the jurisdiction which may but does not necessarily have to include assets within the jurisdiction. Secondly, there must be a reasonable possibility of benefit to someone applying for a winding up order, and, thirdly, one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise a jurisdiction.

20 There has been a debate between the court and counsel over how easy it is to apply all three requirements of that test, which is designed to be applied in the context of a winding up petition to wind up an unregistered company, to a situation such as the present where it is simply intended to found a jurisdiction to grant leave for a director to act notwithstanding qualification. The difficulty is that there is not a winding up petition, there is not someone applying for a winding up order, there will be no distribution of assets, and it therefore raises a difficult hypothetical question to answer whether the second and third requirements, in particular, are satisfied and I gather that there is some debate amongst academics such as Walters and Davies White QC as to whether that is the correct test to apply.

21 It is, in the end, not a question which I need to decide in this case. It seems to me that, in essence, the court is being asked to see whether there is some legitimate purpose to be achieved by the court if it were to assert its jurisdiction over a foreign company and if there is, then it has sufficient jurisdiction for the purposes of section 22(2) of the CDDA. However, as I say, it does not arise in this case because I am satisfied that all three of the requirements of the *Latreefers* test are, in this case, made out.

22 Firstly, it is submitted by the claimants that JMR has a sufficient connection with the jurisdiction such that JMR would be covered by the undertakings given by the applicants if permission is required. This is because, the claimants say, JMR buys and sells within the jurisdiction, including purchasing almost all of its raw lead from Envirowales, which is based in Wales. In 2020, JMR made (a) sales to group companies in England and Wales totalling £2,269,000, including sales to ALM of £2,253,000, and (b) purchases from group companies in England and Wales totalling £8,257,000, including purchases from Envirowales of £7,515,000. Further, it has substantial creditors and debtors within the jurisdiction. As at 28 February 2021, JMR was owed £8,208,000 by group companies in England and Wales, and the majority of which (some £8,002,000) was due from Envirowales and it owed £471,000 to group companies in England and Wales.

23 Further, it has an invoice financing and stock facility with HSBC Bank plc in the jurisdiction and it is a wholly-owned subsidiary of Envirolead Distribution, a company registered in the jurisdiction. In these circumstances, it seems to me that JMR has a substantial connection with the jurisdiction through its trading relationship and lending relationship with persons in the jurisdiction. It had assets in the jurisdiction to be administered in the event of a winding up for the benefit of anyone who was interested in such a winding up and it is a wholly-owned subsidiary of a company within the jurisdiction who would be interested in any distribution of JMR's assets. In these circumstances, I accept that I have jurisdiction to grant leave as sought by the claimants in respect of JMR.

24 I am told that there is a parallel application for leave in the High Court in Northern Ireland in respect of JMR, ALM, and Met-Seam and that there is a dispute between the claimants and the CMA as to whether such High Court has relevant jurisdiction. However, I am also told that that matter need not concern me as the claimants and the CMA are agreed that leave is required from this court in any event.

25 Is there a need for the claimants to be directors of these companies or involved in their management? IMI is said to be a non-trading holding company whereas the remaining eight companies are trading companies. Both Mr Sherling and Mr Hudson seek leave to act as directors in relation to seven of the companies. Only Mr Sherling seeks leave in respect of IMI and L&P Trading. Mr Hudson was only formally appointed as a director in respect of the companies which he seeks leave on 8 April 2021 but he admits to having previously been acting as a *de facto* director as stated in his CDU. Whilst the leave application notably features an unusually large number of companies, the position as explained in the evidence filed by and on behalf of the claimants is that whilst there are a number of corporate entities within the trading group, the reality is that they represent, to use the claimants' words, a single "end to end business" such that in respect of the seven trading companies for which both claimants seek leave, it would be extremely difficult to seek to compartmentalise their business activities in a way in which a *de jure* director of only one or some of them would not also be inadvertently acting as a *de facto* director of another.

26 Accordingly, it is to be emphasised that whilst the application does concern an unusually large volume of companies, that is only and exceptionally because they form an integral part of essentially one commercial enterprise and it should not be seen as any indication that the court will readily grant leave to disqualified directors. Indeed, it is notable that in response to the CMA's concerns raised in correspondence, leave is no longer sought by the first claimant in relation to four other companies within the IMI Group.

27 The evidence of the claimants, which after a dialogue of queries and explanation between the claimants and the CMA is accepted by CMA, is that there is a need for both the claimants to be involved in the management of these companies and therefore, because of the difficulties of compartmentalisation referred to above, that means that they should be directors of these companies. If they are not permitted to be directors, then it is very likely that the companies will fail. I am satisfied that this is correct. The main points that weigh with me are that:

(a) Both the claimants are and have been intimately involved with all operational aspects of the business and their continued involvement is key to the companies' continued operation. Only they have the necessary knowledge and experience in what appears to be a shallow leadership team. I mean that in terms of depth rather than in terms of the quality of the leadership team, obviously. They and only they have the confidence of their lenders and creditors and the necessary relationship with key customers and suppliers for continued successful trading;

(b) There are no suitable persons who can take on their role; and

(c) Significant further cash needs to be injected into the business. Mr Sherling has agreed to commit £3.8 million in addition to £2 million invested in April last year into the business. He is not willing to inject that cash unless he and Mr Hudson are directors for fear that the business would fail and the funds would be lost.

28 If the companies fail, quite apart from the loss to its shareholders, there will be a loss of 247 jobs, including 142 in an economically deprived area of South Wales, as well as the reduction of competition in a market which only currently has three significant players. I am satisfied, therefore, that the companies need the claimants as directors for their survival and there is a public interest to be served in their survival.

29 I turn, therefore, to look at whether the public can be adequately protected if an order giving leave to act is made in light of the risk of a repetition of the anti-competitive conduct by the claimants which led to the infringement in the first place. The overarching point to make is that I am satisfied from the evidence which has been filed that genuine attempts have been and are being made to ensure future compliance with competition law. A compliance programme has been designed with the assistance of Lesley Ainsworth, a competition specialist with over 30 years' experience of competition law, a former partner at Hogan Lovells, a former panel member of the CMA, and a current member of the Competition Decisions Committee of the FCA and the Payment Systems Regulator. I therefore expect that programme to be a robust one, not one which simply pays lip service to the principles of competition law.

30 Mr Smith has been appointed a competition compliance officer for the group for the next five years and, for this purpose, has been made a director of all the companies for which permission is sought. Significantly, David Rintoul, a partner with the firm Hill Dickinson has been appointed as a non-executive director in relation to the companies as of 8 April 2021. He has been given specific responsibility for overseeing competition law compliance supervising the claimants' compliance, carrying out regular searches and spot checks of email, text, and phone call records, and he has undertaken to report to the CMA any relevant concerns. This independent non-executive director, who is a solicitor with relevant business experience and with specific responsibility for supervision and checks which has been tailored to the needs of this specific case, is, in my view, an important safeguard.

31 The IMI Group will have in place by 26 July 2021, today being 22 July 2021, a formal written whistleblowing policy which identifies the formal reporting lines of all staff to Mr Smith and Mr Rintoul. Going forwards, there will now be three further directors in addition to the claimants, or the first claimant, on the board of every relevant company. Each of those directors has filed evidence confirming that they understand their duties as directors and each has had training in competition law. There will be minuted board minutes of the relevant companies which will now take place monthly. Further, Mr Glynn Thomas, who is an independent consultant to the IMI Group, having been appointed at the behest of the Group's funders HSBC, will continue in his monitoring and advisory role providing a further and important check on the companies' activities and compliance. HSBC have made clear that if he is uncomfortable with compliance and resigns, HSBC will withdraw its facilities. This is a further powerful incentive for the claimants and the companies to ensure compliance.

32 I am satisfied that with these extensive and continuing requirements, the risk to the public of misconduct is minimised and high standards of corporate governance are promoted. I have taken into account the seriousness of the original offence. It is a serious matter to have committed offences which make one unfit to be a director of a company and it is a serious matter to be disqualified from doing so. There is, nevertheless, a scale of seriousness of the offences for such disqualifications which was recognised in *Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 and this offence falls within the minimum bracket of two to five years where though disqualification is mandatory, the case is, in the scale of seriousness of the offences, relatively not very serious.

33 So far as deterrence is concerned, I am satisfied that a fair-minded observer would not regard the granting of leave in this case as undermining the disqualification regime or the seriousness of the disqualification undertakings which the claimants have given. There are good reasons, for the companies and the communities in which they operate, to allow the claimants to be directors of these companies representing, as they do, one commercial enterprise. The extensive conditions required by the proposed order take into account any concerns which the CMA have had and mean that the public is well protected from future misconduct.

34 Finally, the conditions proposed ultimately by the CMA are rightly onerous. No one can sensibly think that these claimants have got this order easily. The deterrent objective of the regime is not, in my judgment, undermined by the proposed order.

35 In the circumstances, I will grant leave on the terms which are set out in the draft form of order which accompany the defendant's skeleton argument, which includes provision for the defendant's costs to be paid by the claimants.

CERTIFICATE

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