Neutral Citation Number: [2021] EWHC 2685 (Ch)

Case No: CR-2021-001757

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

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 01/10/2021

Before :

THE HON. MR JUSTICE FANCOURT

- -

IN THE MATTER OF INTER GLOBAL SURGICAL LLP (No. OC371890)

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

(1) PAUL CHARLES FRANDSEN
(2) TARA FRANDSEN
(3) GGAPPT LIMITED (Company Number 07928952)

Applicants

(1) AARON CABARLE MULLIGAN
(2) ARCHMM LIMITED
(3) INTER GLOBAL SURGICAL LLP
(4) THE REGISTRAR OF COMPANIES

Respondents

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- -

James Mather and Max Marenbon (instructed by **Peters & Peters LLP**) for the **Applicants**
Andrew de Mestre QC (acting pro bono under the CLIPS scheme) for the **First and Second Respondents**

Hearing dates: 30 September, 1 October 2021

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Approved Judgment

MR JUSTICE FANCOURT :

1. GGAPPT Ltd ("the Company") has been struck off the Register of Companies for failure to file statutory returns and the first and second applicants (the Frandsens) apply urgently to this court, by claim form as yet unissued, to restore it to the Register pursuant to s.1029(1) Companies Act 2006. The Company is controlled and owned by the Frandsens. The relief sought is opposed by the first respondent, Mr Mullligan, who has nothing to do with the Company itself; and the Treasury Solicitor on behalf of the Registrar of Companies does not consent to an order for restoration being made.

2. By application notice dated 23 September 2021, all three applicants (the Frandsens and the Company) purport to apply for an interim injunction restraining the first and second respondents (Mr Mulligan and his company, ARCHMM Ltd), from interfering with or being concerned in the management of Inter Global Services LLP ("the LLP"), alternatively the appointment of a receiver and manager of the LLP.

3. The members of the LLP are the Company, as to 80% of the value of the LLP, and ARCHMM as to 20 % of the value of the Company. ARCHMM is controlled and owned by Mr Mulligan.

4. The dispute between the parties is about which of the members – the Company and ARCHMM - has the right to control the affairs of the LLP going forwards. While it remains struck off the Register, the Company cannot; and, as things stand, ARCHMM - in practice Mr Mulligan - has taken over control of the LLP. That has happened since the striking off and dissolution of the Company.

5. There are existing proceedings in the Queen's Bench Division of the High Court in which the LLP alleges that that Mr Mulligan has acted dishonestly and unlawfully in seeking to divert the business of the LLP to a limited company with a similar name that he owns, and other depredations are alleged. In these proceedings, Mr Mulligan makes serious allegations of dishonesty and unlawful conduct of the LLP's affairs against the Frandsens.

6. Mr Mulligan became aware that the Company was at risk of being struck off. He was aware of the implications of that for his control of the LLP and, on his own evidence, watched with interest and growing excitement to see if the Frandsens would deal with the outstanding filings in time. They did not. On 17 August 2021 the company was dissolved and stuck off – it appears that the applicants did not receive the warning notices from the Registrar of Companies. How that came about is a matter in dispute. The Frandsens consider that it is likely that Mr Mulligan diverted the warning letters from them; Mr Mulligan denies that.

7. At all events, Mr Mulligan knew immediately that the Company had been struck off and seized his opportunity. He has sought to take control of the LLP's affairs, including its IT, its business and its banking arrangements, and to exclude the Frandsens entirely. He (correctly) claims that, as things stand, ARCHMM is the only person that can be entitled to control the LLP, because the Company does not exist. That will of course change if and when the Company is restored to the Register.

8. At that time, there will be (and there is already, as between the Frandsens and Mr Mulligan) a serious dispute about whether, as majority owner and/or by reason of an oral agreement

allegedly made at the time that Mr Mulligan's 20% share was conferred on him, the Company has sole control of the LLP's affairs, subject to its duties to ARCHMM as an owner; or whether, by reason of the default position for members of a limited liability partnership under the Limited Liability Partnership Regulations 2001, control is shared between the members and so, in practice, the LLP is deadlocked. The only basis on which ARCHMM can have sole control of the LLP is while the Company remains struck off. Hence, I have no doubt, why Mr Mulligan seeks to oppose its restoration to the Register.

9. There are two questions for me to decide today.

10. First, whether at this stage I should order the restoration of the Company's name to the Register of Companies.

11. Second, in any event, whether I should grant the interim injunction that the applicants seek or appoint a receiver pending a full hearing of the application, which it is common ground will require a full day's hearing.

12. The materials that have been put before me include a lengthy skeleton argument on behalf of the applicants, lengthy evidence from Mr Frandsen and equally lengthy evidence from Mr Mulligan (which was served 2 days ago), and a skeleton argument from Mr Mulligan in person, which I adjourned the hearing in order to read. It is not possible for me, in the limited time that I had to hear the matter in the vacation applications list, to reach any clear conclusion on the detail of the factual dispute between the parties. Both sides have apparently cogent allegations against the other, which by delving into the underlying documents it may be possible to cut through, to some extent, in a longer hearing. I am satisfied that the applicants have an arguable case that the Company, when restored, is entitled to manage the LLP, but I am equally satisfied that Mr Mulligan has an arguable case that, in those circumstances, both members are entitled jointly to manage the LLP. That is an issue that can only be resolved at a trial because it involves evidence about what was said and agreed in 2015.

<u>Restoration</u>

13. On the first question, the position is that the Company was plainly active at the time when it was struck off. It was, at that time, the corporate vehicle through which the LLP's affairs were being managed by the Frandsens and it was pursuing remedies against Mr Mulligan in the Queen's Bench proceedings. The Crown has indicated by letter dated 31 August 2021 that it has no objection to restoration, as regards bona vacantia, and the applicants say that all necessary accounts and filings to bring the company's affairs up to date have been sent by post to the Treasury Solicitor and to the Registrar. No dispute was raised on behalf of Mr Mulligan as to any of these threshold requirements. Clearly, an undertaking could be given, if necessary, to file the outstanding documents within a short period after any order restoring the Company's name to the Register.

14. The Treasury Solicitor has not confirmed that the documents are satisfactory. It opposes the restoration on the basis that the Registrar of Companies has not been served with an issued claim form seeking restoration; the Treasury Solicitor contends that the applicants have chosen to apply to the court, under s.1029 of the Companies Act, rather than seek restoration administratively, under s.1024, as they might have done, and therefore they must abide by the rules of court for issue and service of proceedings and allow the Registrar a reasonable time to

consider her position and take advice. He contends that proper service and sufficient time have not yet happened.

15. The reason for the non-issue of the Part 8 claim is that the applicants tried but failed to issue the claim form in the Business and Property Courts in London. The office declined to accept the claim form, contending that it ought to be issued in the County Court at Central London. The applicants sent an unissued claim form to the Registrar and issued an application notice on 23 Sept, principally seeking injunctive relief or the appointment of a receiver but also stating:

> "A separate Part 8 Claim Form has been filed in respect of the Restoration Application, but the Court is invited to deal with both Applications at the same hearing."

16. Mr Mulligan's objection to an order restoring the Company's name is not solely on the basis of the procedural failure to issue and serve the Registrar. He submits, correctly, that as a matter of law a restoration, whether administrative or by court order, is deemed to have the effect that the company in question continued in existence as if it had not been dissolved or struck off. He submits, through Mr Andrew De Mestre of Counsel, who acted pro bono pursuant to the CLIPS scheme and to whom the Court is grateful for his time and help, that the dissolution of the Company was arguably a repudiatory breach of the oral management agreement on which the Frandsens rely, entitling ARCHMM to accept the repudiatory breach, which it did by conduct. He submitted that restoration of the Company's name would adversely affect its accrued rights and therefore should not be ordered.

17. Although there is no point of substance in the procedural point taken by the Treasury Solicitor and embraced by Mr Mulligan, it seems to me that the Court cannot simply dispense with issue and service of a claim form on the Registrar of Companies and make a final order disposing of the proceedings before they are issued and served. Although, in some cases, the court grants interim relief on the basis of an undertaking to issue a claim immediately after the court order, in those circumstances the respondent is then served and the proceedings continue, with the respondent having a right to challenge the interim order and contest the proceedings at a trial. The position is different here, where an applicant seeks an order disposing finally of proceedings that have not been issued or served.

18. Although it appears, on the evidence before me, that the Registrar can have no proper objection to an order being made in due course, she is entitled to have the proceedings issued and served on her, before the proceedings are finally determined.

19. There is no reason why the Part 8 claim cannot be issued in the Business and Property Courts. The County Court at Central London does not have exclusive jurisdiction, even if a practice direction states that such claims should be issued there. I direct that this court should issue the claim without further delay, on payment of the appropriate fee. The applicants can then serve it on the Registrar and renew their application for restoration, on three clear days' notice. The matter is clearly urgent and should be brought back before the applications court, with appropriate evidence of service and of lodging the necessary documents, if that evidence is not already in place. In the circumstances, if the Registrar has any objection of substance, I expect that to be raised within the timescale indicated. Both the Registrar and the Treasury Solicitor

are already fully aware of the application and have the relevant documents, other than a formally issued claim form.

20. I am not wholly persuaded that there is anything in the point argued by Mr De Mestre as to why, in its discretion, the Court should not make an order restoring the Company's name. The applicants do not seek any direction under s.1032(3) of the Companies Act to give greater effect to the restoration than it will have under the Act as a matter of law. There may be an interesting questions in due course at trial as to whether, ignoring the restoration, the management agreement was terminated by action taken by Mr Mulligan; and whether, under the statute, the restoration undoes the termination of the agreement, if that is what happened. But the right to terminate accrued to Mr Mulligan solely as a result of the fact of dissolution of the Company, and was therefore adventitious as far as he was concerned. My provisional view, without hearing full argument, is that that is the kind of consequence that is intended to be avoided by the statutory deeming, and is different in type from something done after the dissolution for reasons unconnected with it: see the discussion in Bridgehouse (Bradford No.2) v BAe Systems plc [2019] EWHC 1768 (Comm) at [112] – [116].

21. In any event, if Mr Mulligan wishes to pursue his argument that prejudice to his rights justifies the refusal of an order, he is at liberty to intervene in the Part 8 claim and do so, but he will do so at risk as to costs if that is the only reason why a contested hearing of the Part 8 claim takes place. That is a matter for him.

22. For the reasons I have given, however, I will not make the order for restoration today and the applicants can pursue the Part 8 claim separately from the injunction application, once it is issued and served.

Interim Relief

23. On the interim relief application, the position is that each side claims control of the LLP or at least denies the other side's right to manage its affairs. It is common ground that the business of the LLP is being seriously prejudiced by the impasse. Mr Mulligan alleges in his evidence that the LLP is insolvent as a result of what the Frandsens have done during the last year of their management, up to the dissolution of the Company. Whether it is insolvent is disputed and unclear. It may well be that it is not insolvent; that it still has a viable business; and that the viability of a valuable business is being seriously threatened. The business is the supply of medical instruments to hospitals, on a "just in time" basis. Mr Frandsen's evidence was that it was turning over about £60,000 a month when he was managing it. If the LLP is unable to meet the urgent requirements of its customers, the business will be lost because they will lose confidence in it and go elsewhere, if they can.

24. Something is clearly needed to protect the business of the LLP until a full hearing of the application can take place. Its affairs will remain deadlocked, once the Company is restored, if I make no order, and in the meantime the Frandsens' interests are prejudiced. As things stand, the Company is not a member of the LLP because it remains dissolved, but there is a strong argument that it will be restored in due course. In those circumstances, the Frandsens are entitled to apply for interim relief to protect their claims pending restoration of the Company, though the Company itself cannot: see Yuzu Hair & Beauty Ltd v Selvathiraviam [2019] EWHC 772 (Ch).

25. There are only two sensible options, since Mr Mulligan has not applied for an order restraining the applicants from being involved in the LLP's affairs. One is to allow the applicants in the very short term to have control back, to the exclusion of ARCHMM and Mr Mulligan, with a view to having an urgent hearing of the application in the near future. The other is to appoint a receiver and manager of the LLP to secure its position, maintain its cash flow and business, and investigate its solvency. Once a receiver has taken over the LLP in that way, the application that the applicants would still wish to pursue becomes less urgent. The applicants may still seek an injunction excluding the respondents from any involvement in the LLP, so that – assuming that the LLP is solvent and viable - the receiver could be removed from office and hand over to the applicants, if an injunction is later granted. Alternatively, if the LLP is found to be insolvent, as Mr Mulligan alleges, the receivers, who are qualified insolvency practitioners, are ideally placed to do what is required in the interests of the creditors.

26. The disadvantage of the first option is that, if Mr Mulligan's allegations about the Frandsens are right, it may even in the very short term cause harm to the LLP's interests and prejudice ARCHMM; the potential advantage is that the ultimately successful party's money will not have to be spent on paying the receivers for their work.

27. The advantage of the second option is that independent and qualified managers will be able to protect the business of the LLP for the benefit of both parties, and further will be able to investigate the allegations of insolvency protect the interests of the LLP's creditors. The disadvantage is that it will cost money.

28. Mr de Mestre submitted that appointment of a receiver was a nuclear option, because it was expensive and, in practice, even if not in theory, would be a step that would not be undone, with the consequence that the receivers would remain in place until trial.

29. I do not accept that appointment of receivers is, in the circumstances of this case, a nuclear option. They are proposed to be appointed on the basis of relatively modest and partly capped fees for an initial period of work: £15,000 for week 1; £10,000 for week 2 and £5,000 per week thereafter, with an additional £15,000 on exit. If Mr Mulligan is proved right and the company is insolvent, they will put the company into administration or liquidation.

30. If on the other hand the business is solvent, they will be able to rescue and secure the business in the short term. The Frandsens still wish to have control themselves and not spend money on receivers, and on the return date of their application, if on the evidence as it then stands Mr Mulligan's case is significantly undermined, the court might well grant the injunction sought, on such terms as are appropriate to protect ARCHMM's legitimate financial interests as a member. There will be a significant cost in a receivership but I cannot see any sensible alternative, given what is common ground about the LLP's condition and the inevitable loss of its business if nothing is done. To grant the injunction without a fuller investigation of the apparent merits of each side's case on the return date would risk a significant injustice to the respondents and possibly serious harm to creditors. Even on the return date, I am not convinced that the merits of the claim will appear any more clearly.

31. I have no doubt that it is just and convenient to appoint receivers on an interim basis. Damages will clearly not be an adequate remedy for either party. By an appointment, both parties' legitimate interests will be protected. It will come at a cost, but in view of the unsavoury dispute between the parties that is inevitable. No sound objection was raised to the suitability of the proposed receivers as professional people to be appointed. The argument of Mr Mulligan

that, as insolvency practitioners, they would be ill-equipped to carry on a solvent business, lies rather ill in his mouth given the extensive allegations of financial imprudence and insolvency that he relies upon in his evidence. In any event, there was no substantial reason advanced why the proposed receivers would be unsuited to securing and maintaining the business of the LLP as a going concern in the short term.

32. I will hear the parties as to the terms of the receivership order.