IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS

No. CH-2022-000195

[2023] EWHC 1521 (Ch)

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

Friday, 17 March 2023

Before:

MR JUSTICE ADAM JOHNSON

B E T W E E N :

METAL NRG PLC — Claimant

- and -

(1) BRITENERGY HOLDINGS LLP
(2) PIERPAOLO ROCCO
(3) BRITNRG LTD — Defendants

MR N DOUGHERTY (instructed by Orrick, Herrington & Sutcliffe (UK) LLP) appeared on behalf of the Claimant.

MR E LEVEY KC (instructed by Gunnercooke LLP) appeared on behalf of the First and Third Defendants.

J U D G M E N T

MR JUSTICE ADAM JOHNSON:

1 This is a renewed application for permission to appeal a decision of Deputy ICCJ Kyriakides dated 28 September 2022, Leech J having refused permission on the papers.

2 The Judge found in favour of the Claimant on its argument that five documents entered into in April 2021, referred to as the "*April Transactions Documents*", together constituted an "*arrangement*" within the meaning of that phrase in s.190 Companies Act 2006. The Judge granted the Claimant summary judgment and made a declaration and consequential orders accordingly.

3 The significance of the "*arrangement*" point is that by that stage of her analysis the Judge had already accepted that one of the five documents, referred to as the "*SPA*", *did* fall within s.190 and so should have been, but had not been, approved by a resolution of the members of the Claimant. The effect of the Judge finding that the other four agreements were part of the same "*arrangement*" was that they too were subject to the same requirement of shareholder approval and, such approval not having been sought or given, they too were ineffective.

4 There is no challenge against the Judge's finding in relation to the SPA, but the First and Third Defendants below (the intended Appellants in this Court) seek permission to appeal the finding on the "*arrangement*" issue.

5 The detailed background is not relevant. The basic point is that the Claimant and the First Defendant had previously entered into a Shareholders' Agreement under which, in return for the provision of capital and loan finance, they were each to acquire or to have an entitlement to acquire a 50% shareholding in the Third Defendant, a company which owned a promising investment in a natural resources business. The Claimant's entitlement to a 50% interest, however, was contingent on it making finance available within a prescribed timetable. In the event, it was not able to do so and so its entitlement to a 50% shareholding lapsed.

6 It was against that background that the parties entered into the April Transaction Documents. These included the SPA, under which, in short, the Claimant's entitlement to claim a 50% shareholding was resurrected. But four other documents were executed at the same time. These were the "*Company Option*", under which the Claimant was to pay the First Defendant the sum of £545,000 for the option to acquire 150 further shares in the Third Defendant at a price of £0.001 per share. There was also an option agreement the other way in favour of the First Defendant, referred to as the "*First Defendant Option*". There was a charge executed by the Claimant to secure the option price payable in respect of the Company Option, and there was a further agreement, varying the terms of the original Shareholders' Agreement.

7 It seems that the Claimant got cold feet about these arrangements. In any event, it was not happy with them and thus applied for a declaration that they were ineffective for failure to comply with s.190 Companies Act 2006, which requires shareholder approval for any substantial property transactions entered into by a company. In the event, and now critical to that analysis, as I have said, is whether the April Transaction Documents can properly be regarded together as constituting an "*arrangement*".

8 The Learned Judge concluded that they could. Her detailed reasons are at paragraph [71] of her Judgment. She relied on a number of factors. These included: (1) the background, meaning the Claimant's default under the terms of the original Shareholders' Agreement; (2) the fact that the April Transaction Documents were negotiated together to address the

problem that, in light of its default, the Claimant could no longer hope to acquire a 50% shareholding in the Third Defendant; (3) the fact that all the April Transaction Documents were submitted together for approval by the Claimant's Board of Directors; (4) the fact that the April Transaction Documents were all executed on the same day; (5) certain provisions of the SPA itself, in particular clause 9.1, which refers to the SPA and the other April Transaction Documents comprising the whole agreement between the parties, and also clause 5.4(b), which required the Claimant, on completion, to produce Board resolutions showing approval for all the April Transaction Documents; and finally, (6) the fact that the First Defendant Option could only be exercised if the Company Option was either terminated or cancelled.

9 The Defendants now seek permission to appeal. A number of individual Grounds are relied upon, which I will come on to, but I think it fair to say that they all drive at the same basic point. This is that the question whether the April Transaction Documents constituted an "*arrangement*" is really a factual question, which could not properly be tested on an application for summary judgment and needs to be tested at a trial.

10 One background point relied on is that the Learned Judge initially seems to have misunderstood the overall effect of the April Transaction Documents, because she assumed that, taken together, their effect was to restore parity between the parties, in terms of resurrecting the promise of each having a 50% shareholding in the Third Defendant. In fact, that was wrong. Parity in that sense would have been restored solely by the SPA. The two option agreements were not required to achieve that objective.

11 It is then said that once that error was identified, the Judge was nonetheless too quick to reach the conclusion that it did not matter and that her determination on the question of "*arrangement*" should stand.

12 It is also said that the issue of the proper characterisation of the April Transaction Documents, being a factual question, is reinforced by the Claimant's own approach, because the Claimant ran an argument that the individual agreements were dependent on one another, in the sense that, had one of the parties sought at the time to renege on one of them, the other party would have been entitled to "*cry foul*", on the basis that the deal was for them to be executed together. In her Judgment at paragraph [71.3], the Judge said she did not like this point because it was speculative, but ironically the Defendants/Appellants now say that it was just the right way of looking at things and gives rise to a factual question about what the parties thought or understood at the time, which should be tested at a trial.

13 I have decided that I am unpersuaded by the Defendants' arguments and will thus refuse permission to appeal. I see no real prospect of the Judge's basic finding being overturned on appeal and see no other compelling reason why an appeal should proceed.

14 At the heart of it is the question of what may constitute an "*arrangement*" for the purposes of s.190. The authorities emphasise that this is inherently flexible language wide enough to capture understandings which have no contractual effect (see *Murray v Leisureplay Plc* [2004] EWHC 1927 (QB) citing at [106] the earlier decision of the Court of Appeal in *In re Duckwari Plc* [1999] Ch 253).

15 That being so, I think the Judge was perfectly well entitled, on the basis of the materials available to her, to reach the conclusion that the April Transaction documents were an "*arrangement*" in the relevant sense. True it is that only the SPA was needed in order to

restore parity, in the sense of resurrecting the idea of each shareholder owning 50% of the Third Defendant, but it seems to me obvious that that was only part of the picture.

16 The logic of the Judge's position was that the April Transaction Documents, taken together, were intended to be an overall reset and revision of the parties' commercial relationship, in light of what had happened. Each of the five agreements dealt with a different aspect of that relationship. While it is true that not all of the obligations they imposed were stated to be interdependent in the technical sense, the agreements were plainly intended to be executed at the same time, and in fact were, and were plainly intended to operate together, regulating the parties' relationship as regards their interests in the Third Defendant into the future. That explains why the Claimant was required under the SPA to produce confirmation that its Board had approved all the April Transaction Documents. The overall package constituted the intended reset. As far as the Defendants were concerned, there was to be no "*pick and mix*" option for the Claimant.

17 That made sense, because taken together the agreements represented the same overall commercial deal. The point I think is clear from even a rudimentary analysis of the apparent commercial purpose. The SPA was intended to resurrect the Claimant's 50% shareholding. The Company Option gave it a right to boost that shareholding to an even larger percentage for a fixed pre-agreed price in the event that the Third Defendant was listed on the London Stock Exchange or on another similar exchange. The two agreements were obviously intended to operate together and, indeed, to my mind the Company Option only makes good commercial sense if combined with the SPA, because the whole point of it was to create an option for the Claimant to build on the 50% interest promised under the SPA.

18 A similar point may be made as regards the First Defendant Option, which was designed to allow the First Defendant to boost its shareholding, but only if the Company Option was not exercised. To put it simply, the agreements operate coherently together, as an overall package. Similar observations may equally well be made as regards the other two agreements making up the overall suite.

19 In all the circumstances, it seems to me entirely fair to regard them as constituting the same overall "*arrangement*" and to say, as the Judge effectively did, that if one of them falls then all of them do. The point is sharply illustrated by considering the effect, in this case, of the Defendants' appeal being upheld. The effect would be to hold the Claimant to the Company Option, designed to enable it to boost a 50% shareholding in the Third Defendant, but in circumstances where the SPA has been swept aside and so there is and never will be any such 50% shareholding. Such an outcome makes no sense at all and, to my mind, illustrates clearly why the April Transaction Documents are correctly to be viewed as one "*arrangement*". It seems quite illogical to separate them.

20 In short, I think the Judge was right to take the same view. Granted, she emphasised the factual background, including the fact that the April Transaction Documents were negotiated together in order to address the problems caused by the Claimant's earlier default, but overall it seems to me plain that what she meant was that the parties had used the occasion of the default to modify and to reset their overall commercial deal in a number of respects, all of them connected and forming one coherent whole.

21 Having made those general points, I can deal briefly with the Appellants' specific grounds.

22 Ground 1: This is the argument that the Learned Judge reversed the burden of proof in saying at paragraph [71] of her Judgment that the Defendants had not shown any real prospect of establishing that the April Transaction Documents were not one composite arrangement.

23 On this, I agree that, taken literally, the language used by the Judge suggests that she was thinking that the burden was on the Defendants to prove a negative. I do not, though, think that is actually how the Judge approached her analysis. A better reading of paragraph [71], taken as a whole, is that the Judge had identified from the available evidence a large number of points, all pointing in the direction of the Claimant's position that the April Transaction documents were to be looked at together as a new overall "*arrangement*" in the form of a reset and, on the other hand, the Defendants had thrown nothing of any weight into the mix which pointed in the opposite direction.

24 I see no problem with that approach, which seems to me an entirely conventional one on a summary judgment application. If an applicant for summary judgment shows strong grounds why no trial is needed, the respondent will need to put forward evidence showing the contrary. Here, the Defendants have no evidence and were not able to counter what the Judge thought was the obvious conclusion to draw from the evidence which was available. That does not involve reversing the burden of proof, only being realistic about the evidence which is actually before the Court.

25 Ground 2: This relies on the submission that the Judge was wrong to rely on the fact that the SPA and the Company Option had a close factual connection. The point made is that, although the concept of an "*arrangement*" is a flexible one, it does not follow that, just because contracts are negotiated and agreed at the same time, they constitute an "*arrangement*".

26 The flaw here, as I see it, is that the Judge did not rely solely on the fact that the agreements were negotiated and agreed at the same time. She relied also on the background and the commercial context. All available factors, including the timing of execution of the relevant agreements, indicated that, together, they were intended to constitute a reset of the relationship between the Claimant and the First Defendant in their capacity as shareholders in the Third Defendant. That is what supported the conclusion that, together, the agreements were one single "*arrangement*". I think the Judge was correct to reach that view and see no real prospect of it being overturned.

27 Ground 3: This concerns the "*cry foul*" argument. The Defendants/Appellants say the Judge should have had regard to it, not least because it was the Claimant's own pleaded case. I think, however, that the Defendants read too much into this point. The Judge declined to rely on it, because she thought it speculative. By that, I think she meant it was sufficient and, in the circumstances, more helpful to look at what had actually happened, rather than at what might have happened on alternative facts if history had turned out differently.

28 In my opinion, that approach cannot be faulted as a matter of principle. If, on the known facts, a set of contracts can properly be characterised as an "*arrangement*", then so be it. That was plainly the Judge's view. She did not think it useful, still less essential as a matter of law, to carry out a thought experiment in order to assess how the parties might have reacted on alternative facts. I do not think her approach on this point is open to question.

29 Ground 4: This is the general submission that the question of "*arrangement*" was a factual matter which required resolution at a trial. I agree it is in part a factual matter, as well as a matter of legal characterisation, but, even so, that does not in all cases require a trial. The question on an application for summary judgment is whether there is a triable issue. The Judge thought not, because the facts and the resultant legal characterisation were sufficiently clear. Notably, as Leech J pointed out in refusing permission to appeal on the papers, the Defendants had served no evidence from Mr Rocco, the Second Defendant. That being so, in my view, the Judge was perfectly well entitled to come to the view she did on the uncontested evidence she had available. She was presented with nothing to make her think that anything might, in due course, arise at trial or before that would have a material impact on her view.

30 Ground 5: This relies on the proposition that the Judge was wrong to proceed on the basis that, having regard to their immediate background, the purpose of the April Transaction Documents was to enable the Claimant to "*rectify its default*", a phrase used at paragraphs [10] and [71.3] of the Judgment. I have dealt with this point already I think. It relies on too narrow a reading of the Judge's reasoning. Looking at the Judgment in the round, it seems to me that the Judge regarded the April Transaction Documents as an "*arrangement*" because, together, they constituted a reset of the parties' relationship as shareholders. That reset came about because of the Claimant's default, in the sense that the default caused the parties to look again at their relationship and to reconfigure it in a number of ways going beyond a mere restatement of the original position. Even so, a reset was still one exercise designed to regulate different aspects of the parties' relationship into the future and so I think it fair to characterise it as a single "*arrangement*", even though the different aspects were set out in different agreements. That is the view the Judge reached and I think she was correct to do so.

31 Finally, I shall deal with one further point which emerged in argument. Mr Levey KC pointed to the fact that there are ongoing proceedings against the Second Defendant, Mr Rocco. He said that if those proceedings continue, they will necessarily have to traverse much of the same ground relating to the background to the April Transaction Documents, which would be relevant to a trial of the s.190 issue. He said, in effect, that one therefore might as well leave the s.190 question as a live issue so it can be tried together with the claim against Mr Rocco. The option price paid under the Company Option has been paid into Court and could simply stay there, pending a trial of the actions taken together.

32 To put it another way, Mr Levey said that the facts there was to be a trial anyway, and that the relevant funds would be preserved in the meantime, together gave rise to a compelling reason why there should be a trial of the s.190 issue and that, in turn, was a compelling reason why permission to appeal should be granted and indeed the appeal allowed.

33 I reject that point also. For one thing, it was made only during the course of the hearing and it was not prefigured in any of the Grounds of appeal. Mr Dougherty therefore only had limited ability to respond to it.

34 More substantively, it seems to me quite unconvincing, when properly examined. For all the reasons already given, my opinion is that the s.190 point has been properly resolved and finally determined. That was quite properly done in the sense that the Court felt it was in a position to deal with the issue and duly did so. I see nothing at all wrong with that. It quite frequently happens that, where appropriate, certain issues or aspects of a case are resolved before others. That is no more than good case management. Where a Court has properly reached a decision in such circumstances, I do not see it provides a good reason for

impeaching that decision to say there are related proceedings which overlap in terms of their subject matter. If they do, so be it. The Court, when it deals with the related proceedings, will need to determine precisely what effect the prior findings have. In theory, they should have the effect of limiting the issues in play in the later action, but, whether they do or not, the mere fact that there is an overlap does not, in my judgment, provide a reason for interfering with the prior decision.

35 To summarise and repeat, for all the reasons I have given, I see no real prospect of the Appellants succeeding on their proposed appeal. Neither do I see any other compelling reason why there should be an appeal. Therefore, as Leech J did before me, I refuse permission to appeal.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.