Harlequin Chemicals Ltd et al v Werner Urban and Anthony Saville et al
Royal Court
18th March 2016

JUDGMENT 12/2016

Supplementary judgment on outstanding issue following written submissions on the validity of a claimed resolution of the Company to remove a director of the Company,

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

CIVIL ACTION NO. 1113

BETWEEN:

(1) HARLEQUIN CHEMICALS LIMITED
(2) PROTEC AUTO CARE LIMITED
(3) EASY CHOICE SEVENTEEN (PTY) LIMITED

Plaintiffs

-and-

(1) WERNER URBAN
(2) ANTHONY SAVILLE
(3)ADDITIVE DISTRIBUTORS LIMITED
(4)PROTEC INTERNATIONAL LIMITED Defendants

AND BETWEEN by way of counterclaim

(1) WERNER URBAN
(2) ANTHONY SAVILLE
(3)ADDITIVE DISTRIBUTORS LIMITED

Cross-Claimants

-and-

(1) HARLEQUIN CHEMICALS LIMITED
(2) PROTEC AUTO CARE LIMITED
(3) EASY CHOICE SEVENTEEN (PTY) LIMITED
(4)PROTEC INTERNATIONAL LIMITED

Cross-Defendants

AND

Counsel for the Plaintiffs/Cross Defendants : Advocate P. Stahelin
Counsel for the Defendants/Cross Claimants : Advocate T. W. McGuffin

CIVIL ACTION NO. 1114

BETWEEN:

(1) WERNER URBAN

(2) ANTHONY SAVILLE

(3) ADDITIVE DISTRIBUTORS LIMITED

Plaintiffs

-and-

(1) WILLIAM THOMAS STOUT

(2) WILLIAM FREDERICK STOUT

(3) EDWARD OVERBECK

(4) PROTEC INTERNATIONAL LIMITED

Defendants

Counsel for the Plaintiffs : Advocate T. W. McGuffin
Counsel for the Defendants : Advocate P. Stahelin

Supplementary Judgment handed down: 8th March 2016
Perfected: 18th March 2016

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Supplementary Judgment on outstanding issue following written submissions (Supplementary to judgment handed down on 11th November 2015

JUDGMENT

1. In my ex tempore judgment in these combined cases of 11th November 2015, I left over one issue to further submissions. This was the issue of the validity of a claimed resolution of the Company to remove Mr Stout Junior as a director of the Company, purportedly passed at an Extraordinary General Meeting of the Company held in London on 13th September 2006. The basic issue arising was whether such Meeting was, or should be taken to have been, quorate or inquorate.

2. I had held that the Meeting itself had been validly convened as a matter of procedure following its requisition by Mr Urban on 17th July 2006, there being no dispute as to this. However, the Meeting had proceeded on the basis that the (only) shareholders attending the Meeting had been Mr Urban and Mr Saville representing ADL, whereas at that time, ADL had not been recorded as a shareholder in the Company's Register of Members, owing to its shares having been unjustifiably "forfeited" (as to 160,000) as a result of a misconceived purported call on those shares in December 2000, and its remaining 5000 shares having been registered as transferred to Easy Choice in 2005, as a result of what I held to be a forged transfer purportedly made in 2002.

3. The Articles of the Company provide that at least two members of the Company, holding at least 5% of the Company's shares must be present at a General Meeting in order to constitute a quorum. Whilst Mr Urban's shareholding met the quantum requirement on its own, unless ADL could be regarded as a member of the Company at the time of the EGM that Meeting did not have the necessary quorum of two members present, but only one.

4. For Mr Urban and ADL/Mr Saville, Advocate McGuffin argues that in the light of the findings I made as to the conduct of Mr Stout Jnr I can, and should, simply disregard the actual state of the Company's share register, treating it as what it ought to have been. I would thus just treat ADL as if it has been on the register at the time, and declare the resolution to remove Mr Stout Jr. to have been valid accordingly.

5. Advocate Stahelin submits that I cannot just disregard the terms of the Guernsey Companies Law and the actual state of the Company's share register in this broad brush high level fashion. I agree with Advocate Stahelin. I am satisfied that I must approach this issue in a properly principled manner applying the actual state of the Company's Share Register unless there is a proper basis in law for deeming it actually to have been different.

6. This therefore leads to Advocate McGuffin's second argument.

7. This argument relates to the court's power to order the rectification of the Company's share register, and to do so retrospectively. If the court does this, then events or matters taking place subsequently to the date as and from which the court orders that such rectification shall be deemed to have been effective, will themselves take effect as if the Company' share register had been in its rectified form at the relevant date, rather than its actual form.

8. Both Advocates agree that the court has such a power. It arises, it is accepted, in the same way as it would be taken to apply in English law. This is because Guernsey company law principles are derived from and based on English company law: see Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd. 2009-10 GLR 38. I am satisfied that the suggested principles as to how the court's power to order rectification of a company's share register ought to be exercised in this context accord with the requirements set out by LB Southwell in that case at [91]. I note also that this accords with the approach taken in Jersey, in the case of In re the Representation of Thayer Group Ltd, [2006] JLR Note 24.

9. It follows that the power to order retrospective rectification of the register is discretionary, and not a power which the applicant can require to have invoked as of right. It also follows. that the power can be exercised upon terms. It further follows that, in accordance with English authority cited to me, the power will not be exercised so as to "work injustice" to any third party.

10. This is the clear basis of the decision in Re Sussex Brick Company Limited [1904] 1 Ch 598. Certain shareholders had not, by what was held to be an "accident", been registered as transferees of their shares before the passing of company resolutions for the reconstruction of the company, to which they wished to register objections. The Court of Appeal ordered rectification of the Company's share register backdated to a date which would enable them to exercise their rights of objection, whilst rejecting any argument that this could or should not be done because it would invalidate the notices convening the meeting at which the basic resolution was passed. The Court was satisfied that giving the disappointed shareholders status to have their objections taken into account, did not, and should not, require the further consequence that the previous meetings of the company be invalidated; the intended result did justice to the unfortunate shareholders without causing any true injustice to persons who had had no part in the mistake.

11. A more recent application of these principles in Smith v Charles Building Services Limited [2006] EWCA Civ 14 illustrates the limitations of the power to rectify, however. This case shows that (a) it can only be exercised to restore the share register in accordance with what it

should have been according to the facts found (which meant, in that case, restoration to the position under which there were two subscriber shareholders of the company on the register, regardless of further unresolved arguments as to whether the consequent equal ownership of the company was really in accordance with the parties' underlying intentions) and (b) it is to be emphasised that where the rights of innocent third parties may be affected, the court must take great care to ensure that any order for retrospective rectification is in suitable terms: see per Arden LJ at [22].

12. I take account of the principles apparent from the above authorities. In my judgment, therefore the proper general approach is that the court can order retrospective rectification of the Company's share register in order to do justice to the applicants, and will do so, if and insofar as it can be satisfied that the rights of any third parties will not thereby be unfairly prejudiced, or, put another way, that doing so will not work any real injustice to any such persons.

13. The practical issue behind Mr Saville/ADL's application to have the Register of Members rectified retrospectively is the fact that if I direct rectification from a date prior to the purported EGM of 13th September 2006, this will render that meeting quorate and thus validate the resolution which was purportedly passed, removing Mr Stout Jr as a director of the Company.

14. Advocate Stahelin submits that such an order ought not to be made, because of the effect that he says it would have on third parties. He points out that after the date of this purported, but at the time ineffective, resolution, the Company was put into administration in the UK, in 2007, the administrators relying on the request for administration made by Mr Stout Jr, as a director of the Company, and that subsequently its assets were disposed of to third parties, and in particular to a company owned and controlled by Mrs Stout Jr, who is not a party to the proceedings. There were also other creditors listed in the Reports made under the Administration, although the Company apparently had no assets after the above disposals. Therefore, he submits, it is apparent that third party rights have intervened prior to any order for rectification of the register, and this should therefore not be made retrospective.

15. He also points out that Messrs Urban and Saville seem to have become aware of the Administration in 2008, and took no steps to challenge it. I do not, however, find that a particularly compelling matter in the context of this application, having regard to the history of the proceedings and the facts which I have found.

16. Advocate McGuffin argues that these are no grounds for not ordering retrospective rectification of the Company's share register, because no actual prejudice to any independent third party has been identified by Advocate Stahelin, and the third parties involved are all either associates of or connected with Mr Stout Jr. Whilst the administrators may have been theoretically independent, they can be regarded as involved with Mr Stout Jr because they took their instructions from him. Advocate McGuffin submits that the order should be made entirely retrospective, to make the share register correspond to what it ought to have been, because any failure to do this would, in effect, be to allow Mr Stout Jr to profit from his own wrong-doing, either directly or through his associates.

17. I observe at this point that these arguments appear to me now to be starting to rely on evidence or assertion which is outside the scope of the evidence which has been properly before me under the terms of the trial of these matters. I also find that they are coming close to asking the court to resolve disputes which are not before the court, and which cannot be properly resolved on the actual state of the evidence, (cf Smith v Charles Building Services Ltd, above) first because of its potential inadequacy and second because it may well involve persons who are neither parties to these proceedings, nor privy to the interests of parties to the proceedings in the sense that their interests clearly stand or fall with the rights of actual parties.

18. I am sympathetic to the argument that Mr Stout should not be able to achieve by the back door a result which is contrary to the just interests of Mr Saville/ADL as found in these

proceedings, and thereby gain advantage from wrongdoing. In principle, Mr Saville/ADL is entitled to have the Company's share register rectified to record the situation as it always properly should have appeared, namely by restoring the name of ADL to the register (a) in respect of the 160,000 shares as if it had never been removed and (b) in respect of the 5,000 shares by expunging the name of Easy Choice and restoring the name of ADL as the owner of those shares as if the change had never taken place. I will therefore make such an order, but subject to the following qualification which, in my judgment, is required as a matter of proper principle:

19. Provided that this rectification of the share register of the Company shall operate as between the several parties to these proceedings, but shall not, without further action or order of the Court, be taken to affect adversely the rights of any person who is not a party to these proceedings. Liberty to apply (or to intervene) to any party or person if so advised.

20. I also propose to declare, following on from the above, that the EGM of the Company of 13th September 2006 in London was, in consequence, quorate and effective to transact the business of the Meeting recorded as being transacted.

21. I think it appropriate to make this further declaration on the state of the evidence before me. I am aware that this meeting was attended only by Mr Urban and Mr Saville, albeit it was validly convened. It is of course the position that other shareholders who were properly entitled to attend such a meeting did not do so. This may be because they took the view that they could safely ignore the notice to attend the Meeting as it could never be quorate in any event, given the apparent state of the Company's Register of Members and the allegiances of those named in it. However, any such persons involved were all parties to these proceedings or, at any rate, sufficiently clearly in the camp of Mr Stout Jr that I cannot see that there is any unfair prejudice to any innocent party in holding such shareholders to be subject to the actual effects of the resolution which the Urban/Saville parties sought to pass by proper means, in accordance with what was really the true and just position as regards the Company's share register.

22. I should, though, comment further about the limitations of the effect of the above orders, as I see them. Whilst the retrospective rectification of the share register may, and I am satisfied should, have the effect of validating the 13th September 2006 Meeting and resolution as between the parties to this litigation, it goes no further than this. It does not, without more, affect any other matter. Therefore, any act of Mr Stout Jr purportedly on behalf of the Company as a director of it after 13th September 2006 becomes simply the act of a person who had no legal authority to act as a director of the Company at the relevant time. The position of any third party dealing with him/the Company in good faith in this situation might well, therefore, depend on the general principles of company law which apply to third parties in such circumstances (as to which I have not heard argument) and would not necessarily lead to the invalidation or total ineffectiveness of any such matters.

23. This, however, is potentially a matter either parallel to, or forming one aspect of, the effect of the protective proviso to my order which I set out, and therefore, if dispute arises, it is a matter for another day.

Her Honour Hazel Marshall QC, Lieutenant Bailiff 8th
March 2016.