

ENGLAND AND WALES / JUDGMENT

R v R & Ors

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Neutral Citation Number: [2013] EWHC 4244 (Fam) IN THE HIGH COURT OF JUSTICE FAMILY DIVISION Case No: FD 13 D 05341 Royal Courts of Justice Strand, London, WC2A 2LL Date: Friday, 15th November 2013 Before: THE PRESIDENT (SIR JAMES MUNBY)

Between: R Applicant

- and - R & OTHERS Respondents

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MR. BRENTON MOLYNEUX (instructed by Messrs. Keene Marsland & Co.) for the Applicant MS. JANE CAMPBELL (instructed by Messrs. Thomas Haywood) for the Respondents

Judgment

THE PRESIDENT: 1. I have been sitting today on the return date in relation to a freezing order made by Roderic Wood J on 1 November 2013.

2. There is a substantial measure of agreement between the parties, namely that, subject to certain significant adjustments, the freezing order should remain in place. Certain of those adjustments have been determined by me, will be given effect to in the order I make today and do not require elaboration or explanation in a judgment. Some of the proposed adjustments remain controversial and for reasons which the parties are well aware of (but which, again, need not be set out in a judgment today) cannot be resolved today and, if not resolved by agreement in the meantime – such agreement being, it seems to me, not beyond the bounds of possibility given the nature of the argument today and certain indications I have given – will be resolved at a hearing which I have fixed before me at two o'clock on Wednesday, 27 November 2013.

3. There is, however, one matter which I have resolved today and in relation to which it seems to me to be appropriate to give an albeit short judgment.
4. Paragraph 20 of the freezing order made by Roderic Wood J was in the form of an injunction restraining the husband from directly or indirectly engaging in any business that competes with a specified company (being the family company) or soliciting customers from, or attempting to sell, licence or provide the same or similar services to any customer or client of that company and so on and so forth. In other words, an injunction restraining the husband from acting in commercial competition with the company which has, for many years, been the mechanism through which the husband and the wife have carried on a successful business.
5. When I enquired of Mr. Molyneux, who appears for the wife, what the basis was upon which it was appropriate to grant such an injunction, an interesting legal argument ensued. The complaint is that the husband is, so it is said by the wife, deliberately – an allegation vigorously denied by the husband – competing in order to depreciate the value of one of the matrimonial assets, namely, the company. The husband denies that root and branch but it seems to me, for immediate purposes, I should proceed upon the basis that there is a sufficient factual foundation for the wife's concerns as to justify in principle the continuation of the injunction if, but only if, there is some appropriate legal basis for doing so. It will be appreciated from a comparison of the language of the order and the language of section 37(2) of the Matrimonial Causes Act 1973 that the injunction could only, with extreme difficulty, be brought within the language of that statutory provision. Indeed, my provisional view is that it simply cannot be brought within that provision. The focus of the argument has, accordingly, been not on section 37 of that Act but on section 37 of the Senior Courts Act 1981. 6.
7. The problem in the way of the wife is that there is, at least as at present, no contractual or other basis arising out of express agreement in relation to which it is said that there is some cause of action against the husband. Of course, as a matter of general principle, an injunction, if it is to be granted under section 37 of the 1981 Act (in contrast to section 37 of the 1973 Act) can only be granted in this Division if the circumstances are such as would, in principle, enable such an injunction to be granted in one of the other Divisions of the High Court; in other words, there has to be an appropriate cause of action in relation to which the injunctive relief is properly granted. 9.
8. Mr. Molyneux's ingenious and, in the event, successful riposte to that difficulty was to point to the husband's own evidence in which (albeit in a completely different context) the husband asserts and acknowledges that he has in recent months at least been what he calls a "shadow director" of the family company. That gave Mr. Molyneux the springboard for an argument based upon the very recent decision of Newey J in the Chancery Division in *Vivendi SA & Another v. Murray Richards & Another* [2013] EWHC 3006 (Ch). In that case (see paragraphs 133 onwards) Newey J conducted an interesting analysis of the duties of a shadow director. He traces the development since its initial recognition by Toulson J (as he

then was) in *Yukong Line Ltd. of Korea v. Rendsburg Investments Corp of Liberia* [1998] 2 BCLC 485 of the principle that a shadow director, as such, owes fiduciary duties. He traces the subsequent case law which shows that that is not a view which has been universally held by the various Judges of the Chancery Division in front of whom this issue has, from time to time, been ventilated. However, at the end of that — if I may say so — penetrating and convincing analysis, Newey J in paragraph 142 sets out his conclusion and the reasons for that conclusion, namely, "that shadow directors commonly owe fiduciary duties to at least some degree" to the company of which they are the shadow director. In paragraph 143 Newey J says this: "... I consider that a shadow director will normally owe the duty of good faith (or loyalty) ... when giving ... directions or instructions. A shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions."

10. I accept Newey J's conclusions and adopt as my own, without farther exposition, his reasons for arriving at those conclusions.
11. In these circumstances it seems to me that the position is straightforward. The husband is, on his own admission, a shadow director of what I have called the family company. As a shadow director of the family company he owes fiduciary duties, one of which is {as explained by Newey J in the passage I have just read) a duty to act in the interests of the company and not to act in his own separate interests.
12. That being so it is, on the face of it, a breach of his fiduciary duty for him to set up and operate a competing business, whether that business be in his own name or, as is suggested here, the name of some corporate entity through which he carries on his business. I make clear that the husband disputes that he is in fact carrying on such a business. He asserts that the business which the wife says is a competing business is not a fact a competing business given the (as he would have it) different natures of the businesses being carried on by the family company and the competing company. If that be so he has nothing to fear from the injunction because, as will be apparent from the language of the order, the order applies only to a business which 'competes' with the family company.
13. The position therefore seems to me to be very simple. The business, if any, which is carried on through the vehicle of this other corporate entity either does or does not compete with the family company. If it does not compete then there is nothing in the injunction which in any way fetters the operation of that company. If it does compete, then it is right that there should be an injunction because by operating a competing business he is, for the reasons I have given, in breach of his fiduciary duties.
14. Accordingly, for those reasons, it seems to me that paragraph 20 of the order which Roderic Wood J made was properly made and should remain in force.

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