

JERSEY / JUDGMENT

Pender v GGH (Jersey) and Ors

[2020] JRC 109 (08 June 2020)

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judgment

the master:

Introduction

1. This judgment contains my decision in respect of the plaintiff's application for directions, in particular that the parties be required to provide discovery, and the second and third defendants' summons for a stay pending provision of a valuation of the first defendant.

Background

2. The general background to this dispute is set out in my previous judgment in this matter dated 26 th November 2019, reported at Pender v GHH (Jersey) Limited and Ors

[2019] JRC 228 . The main issue in that judgment was who should have been convened to the proceedings commenced by the plaintiff and, as a result of the action being discontinued against the fourth to eleventh defendants by agreement, what costs orders should follow.

3. The proceedings brought by the plaintiff are pursuant to Article 141 of the Companies (Jersey) Law 1991 . In his Order of Justice dated 13 th June, 2019, the plaintiff seeks a buy out of his interest in the First Defendant for a sum equal to their fair value. What is meant by fair value was the subject of argument before me and I set out later in this judgment the respective positions of the parties.

4. In paragraph 4 of my previous judgment, I summarised the issues between the parties in very broad terms as follows:- "In summary, the plaintiff complains about his dismissal as CEO, the dilution of his shareholdings, his removal as a director of the company and the confiscation of his ordinary shares due to the plaintiff being classified as a bad leaver."

5. In relation to the plaintiff's complaint of unfair prejudice, in the broadest of terms, the summary above still reflects the plaintiff's concerns. Later in this judgment, I refer to a detailed list of issues produced by the second and third defendants for this hearing and the plaintiff's comments on this list.

6. The hearing leading to my previous judgment took place on 13 th November, 2019. At the conclusion of this hearing, the parties were ordered to fix a further directions hearing which was initially listed for 24 th February, 2019.

7. When my previous judgment was

handed down on 26 th November, 2019, directions were given for the filing of pleadings leading to answers being filed on 10 th January, 2020, and a reply on the 31 st January, 2020. 8. Regrettably, for reasons beyond the parties' control, the hearing fixed for 24 th February, 2020, had to be adjourned and was re-fixed for 15 th April 2020. This date was further adjourned due to the impact of the coronavirus pandemic, with the result that the directions hearing only took place on 19 th May, 2020. This delay is regrettable but not the fault of the parties. 9. Prior to the hearing on 24th February 2020, the plaintiff had provided a summons for directions setting out what directions he was seeking. 10. On 8 th April, 2020, the second defendant issued a cross-summons seeking a stay. This application was supported by the affidavit of Mr Richard Garmon-Jones, Group Compliance and Legal Director of the second defendant, sworn on 4 th May 2020. 11. Paragraph 9 of Mr Garmon-Jones' affidavit states as follows:- "It is not at all clear from where the plaintiff has the impression that he stands to make anything like even a nominal financial pay-out from these proceedings. As matters currently stand, his ordinary shares, along with the ordinary shares of the other shareholders in the Company, including PSG, are worthless" 12. It is also appropriate to set out paragraphs 15 to 19 of the affidavit as follows: "15. Clause 11.2 of the Shareholders' Agreement requires that a firm of chartered accountants (not being the auditors of PSG), an investment bank or other independent person produce an annual valuation of PSG's entire business [RGJ/1 Tab 4].

16. Clause 11.2.1.2.1 - 11.2.1.2.7 of the Shareholders' Agreement sets out the principles upon which the valuation is conducted, defined as the Basic Valuation Method. The Basic Valuation Method is designed so that valuations across previous financial years are consistent and can be compared. The Basic Valuation Method has been the same since 2002.
17. This valuation process values PSG and its Group as at 31 December in the previous calendar year (i.e. at the end of PSG and the Group's financial year). The valuation is an aggregate of the separate valuations of PSG itself and all its subsidiaries (i.e. the rest of the Group), which includes the Company. These are derived from each company's annual report and financial statements for the financial year in question, which have been audited by the Group's auditors, BDO LLP, although it should be noted that BDO LLP uses a separate specialist audit team for the Company and PSG. The valuation methodology involves the valuers undertaking a detailed review with the directors of each of the subsidiaries comprised in the valuation, many of whom are part owners of the subsidiary company
18. The valuation methodology required by the Shareholders' Agreement involves the valuer producing a valuation report comprising the disaggregated valuations of the operating subsidiaries and businesses of PSG. The disaggregated valuations are aggregated to arrive at a valuation of PSG and its Group. If any company in PSG's Group has a negative value, such negative value will be taken into account in calculating the aggregated valuation for the entire Group, i.e. if any company is given a negative value, that negative value will be set-off against the positive values of other companies in the Group in determining the aggregate valuation of the Group. The aggregated valuation of PSG and its Group is then divided by the

aggregate number of issued ordinary shares in PSG in order to arrive at a share price for PSG. As part of the process, it will, therefore, be possible to identify the valuation (whether positive or negative) attributed to the Company. The valuation of the Company will then have either a positive or negative impact in calculating the share price of PSG.

19. The valuation is undertaken by an independent third party valuer. The appointed valuers for 2019 are Nash & Co Capital Limited (formerly Nash Fitzwilliams Limited up until 27 October 2016) of 40 Craven Street, London WC2 4NG, who have carried out the annual valuation for the financial years ending 31 December 2015, 31 December 2016, 31 December 2017 and 31 December 2018 and are in the process of undertaking the valuation for the financial year ending 31 December 2019. Nash & Co Capital Limited has included the Company as part of its valuation of PSG and its Group for the financial years ending 31 December 2017 and 31 December 2018 and the Company forms part of the annual valuation currently being undertaken, which should be completed by 30 July 2020. Nash & Co Capital Limited's terms of reference for the valuation exercise for the year ended 31 December 2019 are at [RGJ/1 Tab 5]." 13. This valuation process was also explained as being important in paragraphs 22 and 23 of Mr Garmon-Jones' affidavit as follows:- "22. The annual valuation being carried out by Nash & Co Capital Limited is independent of this litigation. Its reliability as a barometer of the value of the PSG Group and its Group is beyond question and should be seen in context.
23. Having worked within PSG since 27 May 2002, I can say that the annual valuation is something of a sacred process within PSG and has always been so. PSG has never interfered with either the substance or the timetable of the process. We are very keen to ensure that it is, and is also seen to be, independent, not least because it is relied upon by a number of neutral third parties who have an interest in the valuation process remaining independent and reliable." 14. The argument that the first defendant was worthless had been foreshadowed in correspondence sent by Baker & Partners to Carey Olsen dated 18 th September, 2019, 19 th January, 2020, and 14 th February, 2020. 15. Shortly before the hearing, I asked Baker & Partners, as advocates for the second and third defendants, for copies of the valuations for 2017 and 2018 referred to in paragraph 19 of Mr Garmon-Jones' affidavit. I made this enquiry because I wanted to see what had been said in these valuations about the value of the first defendant. I considered I was entitled to request a copy because the valuations were documents referred to in an affidavit and therefore could be required to be produced, having regard to Rule 6/17(5) of the Royal Court Rules 2004, as amended. 16. What I was provided with were extracts of these valuations in respect of the first defendant. I was informed that these valuations reflected the second defendant's interest in the first defendant and were not therefore a valuation of the first defendant as a whole. However, it is common ground that the second defendant's interest is 74.99 % of the first defendant. The valuation of the second defendant's interest in the first defendant was said to be £17.9 million as at 31 st December 2017. As at 31 st December, 2018, the figure was £14.6 million. 17. In relation to the scope of discovery, Carey Olsen for the plaintiff wrote to Baker & Partners for the second and third defendants and Ogier for the first defendant on 7 th April,

2020. Paragraph 10 of the letter set out the scope of the discovery the plaintiff considered ought to be provided. The letter annexed a list of names also said to be relevant. 18. In relation to the first defendant, it, quite properly, has taken a neutral role and it has been agreed between the parties that the first defendant will provide its documents to the second defendant (in a manner not affecting their integrity) for the second defendant to provide discovery on behalf of all the defendants. This is to minimise costs. As Baker & Partners for the second defendant will supervise the provision of discovery, I did not consider that any additional input is required from Ogier on behalf of the first defendant. Accordingly, Advocate Evans was released from the hearing at the start of it. 19. In relation to the position of the second and third defendants, Baker & Partners replied to Carey Olsen by a letter dated 14th May, 2020. This letter set out the amount of material held by the second and third defendants and, subject to the issue of a stay for a valuation, otherwise confirmed that an e-discovery provider had been retained and that the second defendant intended to use a technology assisted review to ascertain what was relevant in order to provide discovery. Discussion and Decisions 20. In the second and third defendant's skeleton argument, the justification for seeking a stay was set out as follows:- "18. A stay until the end of July 2020 is appropriate given the circumstances of this case and would also be in accordance with the Court's duty to ensure cases are managed in accordance with the overriding objective.

- a. The Plaintiffs' position is that there is no alternative but for resources to be expended on discovery immediately in accordance with the RCR and PD. That is not the case. The rules are the servant and not the master of the court. J v K

[2016] JRC 110 at para 10.

- b. The court is empowered by RCR 1/6 to tailor its directions to suit the particular circumstances of the litigation.
- c. The PD on discovery and electronic discovery do not account for a situation, which is the case here, where the ultimate value of what is at stake in the litigation is completely unknown to either the Plaintiff or the court.
- d. All the indications are that D1 (and by extension the Plaintiff's shares) has no value. The independent expert third party valuations of D1 from 2017 and 2018 showed D1 was heavily indebted and made no profit. [Tab 8]
- f. Even if the Plaintiff were to win at trial and the court order a share purchase order or compensation for their fair or market value, the Plaintiff's victory would be entirely pyrrhic as D1 has no value at present, and indeed never had any value.
- g. As matters currently stand, the Plaintiff is proposing that the Court make an order that D2/ D3 undertake a very extensive and expensive discovery exercise without the Plaintiff or the court having any appreciation for what is ultimately at stake in this litigation.

- h. Given the breadth of the discovery that the Plaintiff seeks, there will inevitably be arguments as to its scope upon which the Court will have to adjudicate. The Court cannot properly discharge its duty under RCR 1/6 to manage cases in a proportionate manner (including the timing and ambit of discovery) unless it is properly informed." 21. In advance of the hearing, in accordance with Practice Direction RC 20/04, I expressed reservations whether a stay was appropriate as no strike out application was being brought on the basis that the first defendant had no value and therefore the plaintiff would recover nothing even if all his allegations of unfair prejudice were established. Based on the pleadings and material supplied, in the absence of such an application, I could not see the benefit of a stay. It is well-known that the hurdle for a strike out application to succeed on the basis that a claim is an abuse of process or vexatious is a high one. I took this into account in expressing my concerns whether a stay was appropriate, absent such an application. The absence of such an application indicated that only a trial could resolve issues of quantum. 22. I was not persuaded during the course of argument that I should reach a different conclusion on the question of a stay for the following reasons. 23. The starting point for my decision is *Profinance Trust SA v Gladstone*

[2001] EWCA Civ 1031, where the English Court of Appeal at paragraph 61 summarised the overall approach to be taken in relation to what date was set for the purposes of valuing shares for a buy-out, assuming unfair prejudice was established. Paragraph 61 states as follows:- "61. The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:

- i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant (*Meyer*). ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (*OC Transport*, and to a lesser degree *London School of Electronics*). But an improper alteration in the issued share capital unaccompanied by any change in the business, will not necessarily have that outcome (*DR Chemicals*). iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct (*Cumana*). iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out (*Elgindata*).
- v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings (*O'Neill v Phillips*)."
24. I also regard paragraph 32 of the same judgment as helpful. The context of this

paragraph is whether a court ordering a buy-out can award interest. However, the observations are also relevant to a party seeking a buy-out making its case clear. Paragraph 32 with my underlining added states:- "32. It is however a power which should be exercised with great caution. Miss Newman has rightly drawn attention to the need for lawyers to be able to advise their clients as to the likely range of outcomes of s.459 proceedings, in order to encourage compromise in an area in which litigation can be crippling expensive. If a petitioner seeking an order for the purchase of his shares contends (either as his only claim or in the alternative) that they should be valued at a relatively early date but then augmented by the equivalent of interest, he must put forward that claim clearly and persuade the court by evidence that it is the only way, or the best way, to a fair result . It should not be a last-minute afterthought (as it may have been, to some extent, in *Re Bird Precision Bellows and Elliott v Planet Organic*). Unless a petitioner is asking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow. The exercise which the deputy judge undertook, as described in the last paragraph of his judgment, does not appear to have had a solid evidential basis."

25. In the present case, the second and third defendants quite rightly stated that they wanted to know the case they had to meet in terms of the date the plaintiff contended was the correct valuation date. The second and third defendants therefore submitted that it was only once the plaintiff had pleaded its case setting out the valuation date contended for that appropriate discovery could occur. The stay was relevant to the plaintiff being able to make his case clear, as he would then know the true value of the first defendant based on the valuation for 2019 that was going to be produced. 26. The problem with this approach is that in unfair prejudice cases a plaintiff is complaining about his shareholding being diluted and/or exclusion from a company. Such a plaintiff does not therefore know until discovery what has happened since exclusion and what might be the true value of a company from which such a plaintiff has been excluded. In other words, until a plaintiff has access to information showing the financial position of the company which is the subject of allegations of unfair prejudice and what steps or what has occurred since such an exclusion, such a plaintiff cannot determine what is the fair date for value. 27. To be fair to Advocate Thomas during the course of argument, he accepted in principle the logic of the above analysis. His complaint was however, in the present case that the amount of evidence required by the plaintiff on discovery was disproportionate. The plaintiff was therefore trying to put the second and third defendants to significant cost with no parameters. This was why he contended the plaintiff should make his case clear on valuation in his pleading. 28. In relation to this argument, I firstly observe that this is a different approach from why a stay was required. The basis of the application for a stay was that a valuation for 2019 would show that the first defendant was worthless and would allow the court to then make a proportionate discovery order. By the time of the hearing Advocate Thomas was arguing for the approach summarised at paragraph 25 above albeit maintaining that the first defendant was worthless. He contended that this change of approach was because the second and third defendants had reflected on my observations prior to the hearing. While I am not able to determine ultimately why a change of position occurred because any discussions leading to

the submissions made are privileged, I am troubled by the approach of the second and third defendants in seeking a stay on the basis of an updated valuation to those obtained in 2017 and 2018. I accept that different conclusions might be drawn about the value of the first defendant and the plaintiff's interest in it. However, arriving at those conclusions was always going to be a matter of expert evidence and required discovery of relevant financial records before any expert opinion could be given, based on those valuations. This position should have been self-evident based on a reading of the 2017 and 2018 valuations themselves. No court was ever going to be persuaded without a trial that the first defendant had no value in light of the valuations obtained by the second defendant of its interest in the first defendant in 2017 and 2018. 29. In light of this criticism, Advocate Thomas asked and was permitted to make supplemental submissions on this issue prior to the final judgment being handed down, which I have considered carefully. I record that Baker & Partners did not see these valuations until I asked for them and so were not aware of them when they sent the correspondence I have referred to above. I also wish to make it clear my criticism does not mean that the second and third defendants' arguments about value may not prevail at trial. That is for another day after discovery and expert evidence as I address below. However, the valuations were always going to be the subject of argument and so using them as a basis to seek a stay was never going to succeed. The second defendant is clearly a sophisticated business and its directing minds must have appreciated the contentious nature of its application and the likely challenge to any valuations relied upon. 30. The answer in my judgment to the concerns of the second and third defendants about the costs of discovery is that because the plaintiff has established an arguable case of unfair prejudice which requires a trial, principle requires discovery of what has happened since the plaintiff's exclusion in order for the plaintiff to make his case clear in terms of value. The second and third defendants' approach is inviting the plaintiff to limit his case in respect of matters where he may not have the requisite knowledge and to accept valuations where he has had no input. It should be remembered that the purpose of the unfair prejudice legislation is to protect minority shareholders against actions of the majority that affect the value of their shareholding. It is a necessary corollary of this remedy that a company facing allegations of unfairly prejudicial conduct has to provide discovery of its financial position during and subsequent to the periods of time relevant to alleged unfairly prejudicial conduct having occurred. At this stage in this case the plaintiff has in terms of liability set out his case and that he wishes his interest in the first defendant to be acquired for fair value. 31. The existence of an arguable claim in unfair prejudice also means that the stay sought must fail absent a strike out application or other application that a trial is not required because the valuations produced themselves show an arguable case as to value. The plaintiff is therefore entitled to see what the first defendant's financial position is through the discovery process before having to make his case clear as to value. 32. The plaintiff is also not obliged to accept the valuation process produced by the second defendant for its own interest. That would drive a coach and horses through the protection afforded by Article 141 and its English equivalent. 33. The plaintiff is on notice of the second and third defendants' position and if he fails in his case on value may be at risk as to costs. The second and third defendants are

also able to protect their position on costs through without prejudice save as to costs offers if they so wish. The second and third defendants are not therefore powerless in terms of protecting their position. 34. The above conclusions do not mean that the plaintiff is not required to make his case clear in terms of valuation long before trial. To that extent I have sympathy with the second and third defendants' position and their desire to understand the plaintiff's case on value sooner rather than later. However, in my judgment, the clarity required from a plaintiff can only be provided following discovery. I address later how this should occur. 35. Prior to the hearing, I also expressed concerns about the breadth of some of the language used by Carey Olsen in paragraph 10 of the letter of 7 th April, 2020, which were also explored further in argument. This is because while the plaintiff is entitled to discovery, the process should be proportionate and the plaintiff should not be permitted to put the defendants to unnecessary expense. Otherwise discovery could become oppressive with tactical requests being made in an attempt to put pressure on a defendant to an unfair prejudice application. While therefore I consider I should order discovery, by reference to the sub paragraphs of paragraph 10 of Carey Olsen's letter some of the requests go too far and are too broad and so the following limitations will apply:- (i) I am not persuaded at this stage that tax returns are relevant for a company that did not make a profit. (ii) Requests ix-xii should be subject to a materiality threshold of £50,000. (iii) The information covered by requests xiv and xv should start from 1 st January, 2017. (iv) Requests xviii and xix are too detailed and not necessary given the other requests that are approved. (v) In relation to request xx, what is to be discovered is documentation showing the nature of the relationship with Scottish Friendly Assurance and some form of reporting documentation showing sums paid by Scottish Friendly Assurance. I consider this should initially be reports covering a quarterly basis. (vi) In relation to request xxi, the documentation to be discovered is to record any understanding of the basis upon which investments were made or disposed of by the entities listed in this request. (vii) For requests xxiv and xxv, the discovery required only has to relate to information produced by third parties in the possession custody or power of any of the defendants. The starting date for such discovery is 1 st January, 2017. (viii) The same starting date applies to request xxvi. 36. I consider that these limitations on the list of categories of discoverable documents identified by the plaintiff should lead to a proportionate approach when coupled with appropriate use of artificial intelligence software. At this stage, it is a matter for the defendants and the e-discovery providers retained to determine the best approach that they will take to provide discovery. 37. However, the approach adopted must be set out in the relevant affidavit of discovery with sufficient detail for the plaintiff to understand the approach taken. The list of names identified by the plaintiff will also assist in determining relevance and a proportionate approach when combined with the list of categories, artificial intelligence and the list of issues produced by Baker & Partners as amended by Carey Olsen. I approve use of this list of issues as amended as appropriate for determining what is in issue between the parties. 38. In terms of how long the parties should have to provide discovery, although I consider the application for a stay was never going to succeed, in part underpinning this application by the second and third defendants was a genuine and appropriate concern about the scope of

discovery. The plaintiff also did not raise his suggestions about what is relevant until early April and only six weeks has passed since that time. Any earlier period of delay is not due to the fault of any of the parties. 39. Accordingly, I will allow the parties as requested by the second and third defendants until the end of September to provide their discovery. However, as I explained during the hearing I will not be sympathetic to any extensions of time beyond this date without very good reason. 40. In respect of the plaintiff making his case clear as to value sooner rather than later (including the date on which he says he should be bought out), prior to the hearing I had suggested that the way to address the second and third defendants' concerns was that expert evidence on the value of the first defendant should be exchanged sequentially, as the next step after discovery. This approach means that the second and third defendants, by the time they are required to produce their expert evidence on value, will know the case they have to meet. The provision of expert evidence would also occur without witness statements of fact. Witness statements are not necessary for production of expert evidence of the value of the first defendant in this case. Issuing directions on this basis addresses the concerns referred to at paragraph 32 of the Profinance case cited above about a plaintiff making his case clear well in advance of trial. It also allows the parties to then explore settlement, as they will have the key information about the issues in dispute. 41. Finally it is right to record the following:- (i) Neither party had any objection to the sequential exchange of experts' reports on valuation. (ii) Neither party objected to a stay for ADR following a sequential exchange of expert evidence. (iii) Advocate Thomas reserved the right to come back at a later stage to argue for a split trial once the evidential position had become clearer. (iv) In relation to whether or not the entirety of the valuation obtained by the second defendant for 2017 and 2018 referred to in paragraph 19 of Mr Garmon-Jones' Affidavit should be produced, I gave Advocate Thomas more time to reflect on this question, albeit the issue should be dealt with quickly. This is because the issue arose during the hearing without any advance notice. 42. In terms of the time for production of expert evidence, I consider the plaintiff should produce his expert's report within six weeks of discovery with the second and third defendants having four weeks to respond. This takes the parties close to the end of year. I therefore consider that a stay should operate until the end of January 2021. If the matter does not settle during that period, then the parties must then immediately fix a hearing before me for further directions. Authorities *Pender v GHH (Jersey) Limited and Ors*

[2019] JRC 228 . Companies (Jersey) Law 1991. Rule 6/17(5) of the Royal Court Rules 2004, as amended. *Profinance Trust SA v Gladstone*

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