Unfair prejudice petitions in profile—company funding and contractual undertakings (Re Profile Partners Ltd)

17/06/2020

Dispute Resolution analysis: This judgment is helpful to litigants involved in section 994 of the Companies Act 2006 (CA 2006) petitions, especially where company funding is concerned. It related to an application for injunctive relief to prohibit the use of corporate finances to fund a dispute between shareholders pending the determination of the petition. The court granted an interim injunction in support of the unfair prejudice petition, ruling that ancillary proceedings were not distinct from the petition and company funds would give majority shareholders an unfair financial advantage in the litigation, which could not be adequately compensated by way of damages. Written by Natalie Todd, partner, and Anastasia Tropsha, trainee solicitor, at PCB Litigation LLP.

Re Profile Partners Ltd [2020] EWHC 1473 (Ch)

What are the practical implications of this case?

Where company financing is needed to conduct litigation, it will be necessary to show that this is in the interest of the company and, if not necessarily so, it would assist to show difficulty with proceeding without it. Evidence of the financial status of both the entity and the individuals should be adduced.

Where there are multiple connected proceedings underway and only some may be financed by the company, it is important to ensure that the timing of issue and apportionment of costs are carefully tended to. Where a petitioner is seeking to prevent the use of company funds, it is crucial to examine the effect of the expenditure on the entity and its group and whether any proceedings are deployed by way of subterfuge, as well as adequacy of damages as compensation for the alleged wrongdoing, including breach of duty.

What was the background?

This was an application by a minority shareholder in a holding company of a media consultancy group for an injunction to prevent the majority shareholder and shadow director from using company funds to defend a CA 2006, s 994 petition. Following an undertaking by the respondents to abstain from relying on group financing, the respondents and certain group entities initiated ancillary proceedings by way of counterclaim and parallel litigation in Germany. The respondents argued that because their undertaking only related to defending the main claim, company funds could be used to pursue the other proceedings. The applicant argued that the additional proceedings were not distinct and were brought to side-step the American Cyanamid Co v Ethicon Ltd [1975] AC 396 and Jones v Jones [2002] EWCA Civ 961 principles.

What did the court decide?

Andrew Lenon QC granted the injunction sought on the basis that company money should not be spent on disputes between shareholders, which all the proceedings in this case were, and that the test in American Cyanamid had been satisfied.

The defence, counterclaim and foreign claim were held to not be brought for a proper purpose in the companies’ interests, but are ‘part and parcel of the dispute between the shareholders’ (paras [43.1] and [49]). The counterclaim and German proceedings were brought after the main claim and concerned the same facts, even though certain bases of claim had been known for years. This raised suspicions that the respondents intended on breaching the undertaking and justified injunctive relief in circumstances where damages would not have been adequate to compensate for the unfair advantage due to company funding.

Further, the respondents offered no undertaking and no information about their own and the companies’ finances which may have supported the refusal of an injunction; and did not provide for sufficiently distinct legal representation or apportionment of the cost of the other proceedings. The fact
that the shareholders concerned may not hold a direct stake in a counterclaimant subsidiary is irrelevant (paras [50]–[51]).

As there was a serious issue to be tried in the context of CA 2006, s 994 petition, damages would not be an adequate remedy to the applicant (but would be to the respondents) (para [72]), and on the basis of maintaining the status quo, the injunction was justified.

Case details

- Court: Chancery Division (Companies Court)
- Judge: Andrew Lenon QC (sitting as a deputy judge of the High Court)
- Date of judgment: 08 June 2020