THE HIGH COURT OF JUSTICE No.CR-2019-003515
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF A & C RESTORATION LLP (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

MANOLETE PARTNERS PLC

Applicant

- and -

ANDREW MICHAEL RICHES

Respondent

NOTE OF JUDGMENT OF ICC JUDGE JONES – 1 MAY 2020

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1. I have before me an application by Manolete Partners Plc against Mr Andrew Michael Riches, which results from his previous position as a member of A & C Restoration LLP. The application seeks judgment in debt for a sum of £126,871, and as part of that the claim seeks a declaration that a deed of retirement on 10 October 2017 was a transaction at an undervalue within the meaning of s.238 of the Insolvency Act 1986, and asks for an order under s.241A to restore the position to what it would have been had the deed of retirement not been entered into. As a further alternative claim, the applicant relies on s.214A of the Insolvency Act 1986 and as a yet further alternative seeks equitable compensation of the same sum on the basis that the Defendant acted in breach of duty to the LLP in causing it to enter into deed of retirement.

2. The respondent Mr Riches has previously taken part in proceedings and has been represented in this matter. He has filed evidence in answer. He has not, however, attended at today's hearing and I should say that at 10.30 on finding him not present and after discussions with Mr Curl, who appears for the applicant, I decided to adjourn until 11am to provide further time for him to appear. I also asked the Applicant's solicitor to try to contact Mr Riches to ascertain the position. They did send an email and had no response. In these circumstances, and in the circumstances I shall mention in a moment, I am satisfied that it is right that this matter proceed.

3. Additional matters relate to the bundle filed by the Applicant yesterday. It consists of correspondence by email. It clearly establishes that the previous representation by Mr Riches by Jonro Law Limited lasted until 27 April 2020. It also demonstrates that, through those solicitors, Mr Riches was aware of the hearing and the Applicant had served the bundle upon them. The change of solicitors occurred on the basis of the retainer being terminated and Mr Riches deciding to act in person. There is reference in that bundle to him contacting the Applicant by telephone at that stage, or at least the Applicant's representatives by telephone. The telephone was not answered and a message was left, but attempts to contact Mr Riches thereafter have been unsuccessful.

4. The Applicants served the trial bundles on him. It apparent that Mr Riches must have decided not to take any further part in this matter. In so far as there might be technological difficulties in his taking part in this Skype hearing, they could have been drawn to the Applicant's attention by email and that has not occurred.

5. I have therefore allowed Mr Curl to open the case. He relied upon his skeleton argument for this purpose. That was more than sufficient as an opening both on the background facts and also the law that applies.

6. The evidence comes from the witness statement of Mr Needham. He is the liquidator of A & C Restoration LLP. His witness statement is dated 9 May 2019. He explains within that witness statement that the Applicant's entitlement to bring this application relies on a deed of 20 December 2018, which amongst other claims against Mr Riches this claim was assigned by the LLP and the liquidator to the Applicant. This was an assignment of an asset of the company upon the terms set out in the deed, and was therefore a valid assignment and the Applicant is permitted to bring this claim in law. The assignment followed the entering into creditors' voluntary liquidation on 19 July 2019.

7. The starting point is the fact is that Mr Riches was a member of A & C Restoration LLP until he retired under the terms of a deed of 10 October 2017. The Applicant relies on the LLP's accounts through to and including the financial year ending 29 June 2017 to identify the debt owed by Mr Riches of £126,871. The relevance of the retirement deed is that its terms include a waiver of any sums owed as a result of drawing which exceeded profits whether from Mr Riches' capital or current accounts. The terms expressly refer to his liabilities being shown within the leaving accounts to be drawn as at the deed of the deed, but plainly nothing turns on that when we have accounts through to 29 June 2017.

8. The Applicant argues that the release is prospective and has not occurred, alternatively that the LLP was insolvent and that this was a transaction at an undervalue within the relevant time so that, as I have mentioned, the provisions of the *Insolvency Act 1986* apply, alternatively as I have equally mentioned that there has been a withdrawal of property within the meaning of s.214A, and finally breach of duty. The statutory claims in relation to the *Insolvency Act 1986* are available in relation to the liquidation. The *Limited Liability Partnership Regulations 2001* (SI 2001/1090) applies, amongst other parts, Parts IV, VI and VII of the *Insolvency Act 1986* to LLPs.

9. Whilst dealing with the applicable law, I should also mention that I am satisfied that designated members will include the same duties that directors owe to limited companies as set out in the *Companies Act 2006* and also as a matter of common law and equity. I will not spell out my reasons for that, which can be found in the decision *McTear v Eade & Eade* [2019] EWHC 1673, [2019] BPIR 1380. I am satisfied that those duties involve a duty to take into account the interests of creditors at a time when the company is insolvent. I appreciate that the decision *BAT Industries plc v Sequana SA* [2019] EWCA Civ 112, [2019] Bus LR 2178 provides for a wider test than I have just stated but I do not need to rely on a wider test for these purposes.

10. The evidence shows and I accept that the LLP carried on the business of restoration and general maintenance of property. There is a members' agreement of 2 June 2008, which

includes the following terms, which I accept from the evidence of the Applicant and summarise as follows to establish the background to my decision.

11. The LLP owned all its property. The members contributed £100 as capital. They were not required to contribute further capital in the event of insolvency. Profits and losses would be shared in the same proportions as capital contributions. Profits and losses would be credited or debited to the members' current accounts. Drawings on account of annual shares of profits would be paid at the end of each month, it being agreed on the date of incorporation that this would be £2,800. Excess drawings at the end of each year would be repaid. Those provisions would apply but for the issue of the waiver. That is why this claim starts off with a claim in debt. I will expand on the nature of the debt in due course. The deed also provides that the LLP may admit members and members may retire, which would be deemed at the age of 65 or by reason of mental incapacity. I note in this regard that retirement in this case did not occur on the basis of notice or the deeming provisions. Retirement occurred because Mr Riches no longer wished to be a member and the agreement set out an agreement between all parties to set out how that would occur. Returning to the terms of the members agreement, an outgoing member is not entitled to any share or interest in the LLP's property and is not entitled to any property after the leaving date.

12. [*At this point the connection deteriorated such that about thirty seconds could not be noted.*]

13. The deed of retirement, as I have mentioned, was entered into to achieve Mr Riches' retirement and the admission of the father of Mr Sawyer as a member. The Defendant would retire and after that date the continuing members would instruct the LLP's accountants to prepare the leaving accounts. We have accounts in any event to 29 June 2017 and they will not have changed. It was also provided that the Defendant would be entitled to an equal share of the net profits and entitled to the net losses down to 30 June 2017. It was agreed that the Defendant's capital would be transferred to the continuing members and he would not receive any payment for his capital but the continuing members would waive any balance of the monies owed to the LLP by the Respondent as shown in the leaving accounts. Again, in summary, Mr Riches was not released from his guarantee of the LLP's liabilities to the bank or to Funding Circle Limited but was to be indemnified by Mr Sawyer. There was a term within the deed providing for post-retirement restrictions including in the briefest summary not to do anything detrimental to the LLP or to use the LLP's name. He would have limited access to information and was required to return the LLP's property on demand. There is also a confidentiality clause.

14. The accounts for the year ended 29 June 2017 can be summarised quite simply. They record a loss of £3,598 before profit share. The balance sheet records a debt due from the members of £190,380. The breakdown of that liability was that Mr Sawyer owed £63,509 and Mr Riches £126,871. It is plain that Mr Riches should be bound by those accounts unless he can provide any evidence to the contrary. He does not do so. Those accounts are not challenged and therefore that is a debt he owes to the LLP subject to the waiver provision in the retirement deed.

15. As to that, I have raised with Mr Curl my reaction on pre-reading to the argument that this clause is prospective and therefore has not taken effect. It seems to me that without having heard argument from Mr Curl that it is plain applying the usual principles of

construction that the LLP has agreed it will waive the balance shown in the leaving accounts when they are drawn. The *"procure"* does not seem to me to alter that plain meaning. The purpose is to ensure the waiver agreement is kept to. Mr Curl does not need to argue that point for the purposes of succeeding on this claim. In light of my express initial views, he decided to reserve the Applicant's position on this, and that my judgment should proceed, subject to that reservation, on the basis that there is a waiver provision in the waiver deed that is effective subject to the other arguments.

16. The Defendant's evidence in answer is reasonably short. I have obviously read it and the exhibits. It is sufficient to refer to the following matters that appear within that evidence. First that the retirement deed was drawn and executed as the result of an oral agreement on Easter Sunday 2017, which he made with Mr Chris Sawyer, the other member. Under that agreement, Mr Sawyer would take over the business and debts of the business if Mr Riches would continue to work for him (meaning the LLP I anticipate) and as a result help Mr Sawyer to pay off the debt. On that basis, the Defendant would retire and continue working not as a member by an employee. The evidence explains this is what happened: *"Chris has never said to me I owe him money or I'm part of the debt. He said he's 'taking it on' but needed my help working for him to pay back his debt."*

17. The problem with that *"defence"* is that the statement *"Chris has never said to me I owe him money or I'm part of the debt"* plus the statement *"He's taking it on"* is a problem because the statements concerns Mr Riches' arrangement with Mr Sawyer, not with the LLP. The LLP is an independent legal personality with its own assets and liabilities. They remained with the LLP's assets and liabilities. As a result the accounts as we have seen establish that within its assets was the debt owed by Mr Riches in the sum of £126,871. That remains notwithstanding the agreement between himself and Mr Sawyer. The LLP of course was not a party to any such oral agreement. That means that those passages that I have read do not assist Mr Riches as a defence. As between himself and Mr Sawyer there can and may have been an agreement that Mr Riches would assume the liability, but it would not affect the LLP.

18. The question that flows is whether such an agreement can be binding on the LLP, it having been a party to the retirement deed. The answer is that the LLP could indeed agree to waive the liability. That is of course what the deed states on its face and as a matter of law it was able to do that. The problem was that the agreement was reached at a time when the LLP was hopelessly insolvent. Mr Curl has very rightly referred me to the decision of the Supreme Court in what is known as the *Eurosail* case, that is *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3 BL plc* [2013] UKSC 28, [2013] 1 WLR 1408. I need not in fact spell out the test that is provided within that decision to explain how to assess insolvency; this is one of those cases where it is quite apparent that the LLP is insolvent and one could not possibly raise an argument to the contrary. It is in those circumstances that two members have got together and agreed that one should not have to repay their debt. If that agreement was enforceable with the LLP, the creditors in the insolvency would obviously suffer. The creditors are entitled to expect the designated members (i.e. the equivalent of the directors) to recover the LLP's debts, not to release them.

19. The fact that the LLP was insolvent means that the designated members, when deciding whether or not to agree to a waiver clause, had to consider the interests of the creditors. The decision of the LLP to be a party to the retirement deed was a breach of duty, a

misfeasance, to cause the LLP to agree to the retirement deed. I have applied an objective test. That is the correct approach when there is no evidence from Mr Riches to explain the exercise of his decision-making discretion. In fact, there is no evidence to explain his decision at all. The authority for an objective test is *Re HLC Environmental Projects Ltd (in liquidation)* [2013] EWHC 2876, [2014] BCC 337. I therefore conclude that the entering into the retirement deed with a clause of waiver was a breach of fiduciary duty. It follows in fact that it seems to me that Mr Riches will be estopped from relying upon that clause and as a result his liability of debt will exist as shown in the accounts. Further the fact that it is a breach of duty means that the damages claim results and the claim in so far as the waiver is to be treated as binding will be measured by the amount of that debt. Before closing on this judgment I should deal with a number of other matters.

20. The first is that Mr Curl, very properly bearing in mind that Mr Riches was a litigant in person, raised a possible argument on behalf of Mr Riches. He observes that there is no version of the retirement deed executed by Mr Riches himself. In those circumstances, it might be possible for Mr Riches to assert that he was not a party to the breach. As Mr Curl observes, that will not assist him at the end of the day, except possibly with regard to interest, as he will be liable for the debt. However, Mr Curl makes the point that Mr Riches in his evidence in answer, in particular at paragraph 13 and following in fact adopts the retirement deed and does not raise any issue with his being bound by it. In those circumstances I agree with Mr Curl that while he was right to raise this is has no merit.

21. The other matter that Mr Curl rightly drew to my attention is that Mr Riches has available to him the provisions of s.1157 of the *Companies Act 2006*. He is able to ask the court to grant relief for any breach of duty providing he can establish that he acted honestly and reasonably. I do not address honesty, because it is clear that it cannot be a reasonable decision to waive one’s own liabilities in the context of insolvency. That decision means that I need not deal with the questions of whether the transaction should be treated as a transaction at an undervalue or whether s.214A of the *Insolvency Act 1986* applies. There are in regard to the transaction at undervalue potential arguments against it being such a transaction and with regard to s.214A I think I would observe that it complicates what is otherwise a clear scenario. In those circumstances Mr Curl was content to reserve his position should for any reason the Applicant need to rely in due course on those matters. I accept that reservation but I will give judgment on the basis of the reasoning I have already set out.

22. Judgment accordingly.