



Neutral Citation Number: [2020] EWHC 1088 (Ch)

Case No: BL-2020-BRS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 05/05/2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) MARTIN WILLIAMS
(2) GARETH WILLIAMS
(3) WENDY MCCREATH

Claimants

- and -

RUSSELL PRICE FARM SERVICES LTD

Defendant

TA Matthews Solicitors Ltd for the Claimants
The Defendant did not appear and was not represented

Application dealt with on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii on the date shown at 12 noon.

HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim made by claim form issued on 26 March 2020 under CPR Part 8, for an order under section 125 of the Companies Act 2006 to rectify the register of members of the defendant company. The claimants are the three named executors of the will dated 28 February 2020 of the late Russell John Price (“the deceased”). He was the sole shareholder in and director of the defendant company, and died on 8 March 2020. After consideration on the papers and some correspondence with the claimant’s solicitors, I made the order sought on 7 April 2020, saying that, as it was an unusual case, I would give my written reasons in due course. This judgment contains those reasons.

Facts

2. The unchallenged evidence before me was contained in a witness statement of the claimant’s solicitor Derek Malcolm Backhouse dated 25 March 2020. It established that the defendant company was founded by the deceased, and incorporated on 13 February 2006. It carried on a farm-contracting business serving the farming community in Herefordshire and adjoining counties. Although, as I have said, the deceased was the sole shareholder in and director of the defendant, the deceased’s daughter Lucy Price was appointed company secretary on 27 January 2020. The claimants were respectively a long-standing friend of the deceased, a cousin of the deceased and the deceased’s bookkeeper for many years. The will made a number of pecuniary and other gifts, but 90% of the shares in the defendant company and the residuary estate were left to Lucy Price and her brother Thomas Price (the son of the deceased) equally.
3. At the time of making the application to the court, the claimants had not yet applied for probate of the will, although it was their intention to do so. The problem was that the estate included personal assets in addition to two business interests and a farm. A full inheritance tax return would have to be submitted before the probate application could be made, but this return required detailed information about assets and liabilities. This would involve formal valuations, which in turn would require input from third parties. As is well-known, however, a will speaks from death, and executors appointed by a will have authority to deal with the deceased’s estate from that time, even though third parties will not be completely protected in dealing with the executors until probate is subsequently granted. The grant of probate dates back to the date of death, thus in effect ratifying the executors’ actions in the meantime. As Newey J put it in *Goodman v Goodman* [2014] Ch 186, [15](a),

“an executor derives title from the will, and the property of the deceased vests in him from the moment of the testator's death...”
4. The Articles of Association of the defendant company incorporated Table A in the Schedule to the Companies (Tables A to F) Regulations 1985 (as amended). Under regulations 29 to 31 of Table A the deceased’s shares on his death had passed by

operation of law to the claimants as his executors. However, there was no provision in the Articles for the executors to appoint a director or directors in the event of the death of the sole director and shareholder (the deceased). Only members could do this. But the claimants were not members, because their names were not on the register. If once the claimants were able to secure their entry on the register of members, they could pass a written resolution to appoint a director or directors. So, until the claimants' names were on the register, the company would have no director. This created an obvious problem.

5. The defendant company's bank had written to the claimants to advise them that it would not be able to operate the defendant's bank account without the necessary authorities in place. In effect, therefore, that bank account was frozen, so that the defendant could not pay its creditors. At the date of the witness statement (25 March 2020) there was a total of some £110,064.99 owing to creditors. In addition, the defendant's business was stated to be seasonal, and it was particularly busy in spring, summer and early autumn. At the time that the claim was made, planting should have been taking place. It had contracts to do so. But it needed to pay for the relevant machinery and for other things necessary to enable it to carry on its business. The danger was that if it did not pay its debts and it could not fulfil its contractual obligations and carry on its business, that business would fail. Although there were long-standing members of staff to carry on the day to day operations of the defendant company, they were not directors, and did not have the powers of directors. So the matter was urgent.
6. Given that urgency, it was obvious to the claimants that matters could not wait until probate had been applied for and obtained. A solution had to be found immediately in order to enable the defendant company to continue to pay its way and run its business. Accordingly, the present application to the court was made under section 125 of the Companies Act 2006. Lucy Price as company secretary indicated that she consented to this.

The law

7. Section 125 provides as follows:

“(1) If—

- (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
- (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to the registrar of companies, the court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.”

8. On the application of this section, I was referred to the decision of His Honour Judge Hodge QC, sitting as a judge of the High Court, in *Kings Court Trust Ltd v Lancashire Cleaning Services Ltd* [2017] EWHC 1094 (Ch). That too was the case of an application under section 125 of the 2006 Act, in circumstances which bear more than a passing resemblance to the present. In that case a Mr Eric Pilling was the sole shareholder and director of the defendant company, and he died leaving a will appointing the claimants as his executors. There, as here, the deceased’s shares had passed by operation of law to the claimants as his executors. Similarly, there was no provision which would permit the executors to appoint a director where as a result of death the company had no shareholders or directors. There, as here, there was an urgent need for the appointment of a director or directors, otherwise the business of the company would be irreparably damaged.
9. One difference between that case and this was that evidence was (eventually) supplied to the court to show that an application for probate had already in fact been made, although probate had not yet issued, whereas in our case no application for probate had yet been made, nor was likely to be made for some time. Another difference was that in that case there was not only no director in office, but neither was there a company secretary, whereas in the present case Lucy Price was the company secretary. I come back to these differences below.
10. The judge was satisfied in the *Lancashire Cleaning Services* case (see at [13]) that it was

“open to the claimants, who have not yet proved, to bring these proceedings. In the normal course, I recognise that a company will not register executors until they are able to prove their title as such by production of a grant of probate.”
11. The judge went on to consider the terms of section 125, and said this:

“14. In the normal case, it does not seem to me that directors of a company could be said to be in default in refusing to enter on the register the name of the personal representatives of a deceased member without production of a grant of probate or letters of administration in respect of the deceased member. In such case, there will generally be sufficient cause for omitting the deceased member from the company’s register, and no default or unnecessary delay in entering the executors, until such time as a grant of probate or letters of administration have been produced. However, it seems to me that in determining the question of

whether there is sufficient cause to omit a deceased member from the register, and to enter his executors in his place, the court is entitled to have regard to all of the circumstances.

15. The circumstances of this case are quite exceptional. There is no power, without the intervention of the court, to enter the executors in the register or for any director to be appointed in place of the now sole deceased director. There is also no company secretary. In those circumstances, and given the imminent failure to be able to draw sufficient funds to pay wages and salaries to employees and to account for unpaid value added tax due to Her Majesty's Revenue and Customs, it is inappropriate to wait until the grant of probate has been obtained. Section 125(3) recognises that a court may, on an application under section 125, decide questions relating to the title of someone in the position of the present claimants.

16. In my judgment, in the exceptional circumstances of this case, it does seem to me that unnecessary delay is taking place in entering the names of the named executors on the company's register of members. The company is presently completely directionless, with no officer capable of acting on its behalf. It is only the court that can rectify that situation by ordering rectification of the register. Normally the company should await the grant of probate; but, in this case, it may be too late for company if it does."

Discussion

12. I respectfully doubt whether the framers of the relevant sections of the Companies Act 2006 had specifically in mind the problem that confronted HHJ Hodge QC in the *Lancashire Cleaning Services* case, and me in this one. But I must focus on the particular words used by the legislature in enacting section 125. In the light of the exceptional urgency of the situation, where matters could not wait for the application for, and then the grant, of probate, I was satisfied that there was an "unnecessary delay" taking place "in entering on the register the fact of" the deceased's "having ceased to be a member". That opened the jurisdictional gateway to the court's making an order under section 125. I considered that in principle an order of the kind sought could be justified, as it was in the *Lancashire Cleaning Services* case.
13. But, as I have said, there were two factual differences between that case and the present one. As to the first, the fact that Lucy Price was the company secretary simply went to the question of service of the claim. In the case before him, where there was neither director nor company secretary, HHJ Hodge QC dispensed with service. That was not necessary here. On the other hand, the fact that the claimant executors had not yet applied for probate of the will, although as I say it was their intention to do so, was in my view more significant. I was concerned that the court might make an order that the claimants be substituted for the deceased as members of the defendant company, and then for some reason the claimants did not apply for, or initially applied for but did not in the end obtain, probate. For example, they might balk at personally paying the inheritance tax in advance. In correspondence with the solicitors, I therefore sought an undertaking from the claimant that (1) they would not renounce probate, that (2) they would apply for it as soon as possible, making all reasonable efforts to obtain the necessary information for that purpose, and that (3) they would pay all necessary taxes as required so that probate could issue.

14. The claimants were initially unhappy at giving the third part of that undertaking in unconditional terms, instead offering an undertaking to pay all necessary taxes *from the estate* as required. But in my judgment that would not have been good enough, because if the estate did not have sufficient assets, or sufficient liquidity, there could be a lengthy hiatus during which the claimants would be on the register without being able to obtain probate. As it happened, there was advice from accountants that the shares in the company would be eligible for 100% business property relief, so that it did not seem that there would be a problem in practice. Nevertheless, in my view the risk (if there was one) should be taken by the claimants, who would have knowledge of the facts and be in control of the assets, rather than by the court, which would have no means of knowing what was going on, and no direct control. After all, everything which personal representatives properly do in the administration of the estate carries a personal risk for them, although usually the right of indemnity out of the estate is a sufficient answer. I could not see why this case should be different.

Conclusion

15. Accordingly, the claimants ultimately gave the undertaking sought by the court, and the order was made, as I said above, on 7 April 2020.