

Neutral Citation Number: [2022] EWHC 2325 (Ch)

No: BL-2020-MAN-000114

**IN THE HIGH COURT OF JUSTICE
PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTER OF WORLDWIDE FOODS (BIRMINGHAM) LTD AND IN THE
MATTER OF THE COMPANIES ACT 2006**

DERIVATIVE CLAIM

Date: 5 September 2022

Before :

His Honour Judge Halliwell

BETWEEN

**(1) MR PERVEZ ALAM
(2) MR ZAHID IQBAL
(3) MR SHAHID IQBAL**

Claimants

- and -

**(1) MR MOHAMMED ARSHAD ALAM
(2) WORLDWIDE FOODS SMALL HEATH LIMITED
(3) WORLDWIDE FOODS SALTLEY LIMITED
(4) WORLDWIDE FOODS SPARKHILL LIMITED
(5) WORLDWIDE FOODS (BIRMINGHAM) LIMITED**

Defendants

**Ian Croxford QC and James Walmsley (instructed by Kuit Steinart Levy LLP) for the
Claimant**

Paul Chaisty QC and Richard Tetlow (instructed by Gateley Plc) for the Respondent

Hearing dates: **5th September 2022**

APPROVED JUDGMENT

Judgment by HIS HONOUR JUDGE HALLIWELL

1. We have now reached Day 34 of the trial of preliminary issues in respect of five separate sets of proceedings relating to Worldwide Foods (Birmingham) and a series of other companies associated through their connection with Pervez Alam and his brothers, Arshad, Shahid, Zahid and Kashif.
2. Pervez Alam and two of his brothers, Zahid and Shahid Iqbal, now apply for permission to amend their particulars of claim in the Birmingham proceedings by modifying the summary of their claim for declaratory relief and the claim itself, historically denoted as the prayer for relief.
3. The amendments in paragraph 53.1 of the body of the particulars of claim and paragraph (i)(a) of the prayer involve deleting a restriction or qualification on the ambit of the declaration and clarifying that, in its residual form, the declaration encompasses ownership of shares in the company.
4. Originally, the claimant sought a declaration that the purported issue of a further 20,000 shares of £1 each in the share capital of the Birmingham company - caused by Arshad on or around 12 August 2014 - was void and ineffective with the result that the share capital of the Birmingham company is presently held as to 200 shares of £1 each by each of Pervez, Arshad, Zahid, Shahid and Kashif subject to Pervez's ultimate beneficial ownership of such shares.
5. The words "and owned" are now to be added after the word "held" and the qualification at the end of the declaration is deleted. This is the provision that the shares are in Pervez's ultimate beneficial ownership. The draft amendment is reflected in the amendment to the prayer at (i)(a).
6. In his submissions before me, Mr Croxford has touched on a legitimate criticism that the amendments do not reflect any amendment to the factual allegations in the particulars of claim on which the claimant's case is founded. In its original form, the claim was and is, in substance, for a declaration that the shares are held on sub-trust for Pervez. This is a point that I canvassed with Mr Chaisty in his submissions. The claimants (that is Pervez, Shahid and Iqbal) now seek to withdraw that part of the declaration on the footing that the shares are held and beneficially owned by Pervez, Arshad, Zahid, Shahid and Kashif absolutely.
7. No point has been taken about the failure to join Kashif as a party to the declaration, but he is fully aware of the claim. He has participated in the proceedings by attending most days of the hearing. He is here today. He has given evidence as a witness. If I were to make a declaration that affects

him as a non-party, it might theoretically be open to him to apply for an order setting aside the declaration, but if he were so minded, he would by no means have a straightforward task.

8. The claimants' factual case, in paragraph 6 of the particulars of claim, is based on an understanding that is set out in the appended schedule to the statement of case. It is then stated that:
9. "... it was the common understanding of all of the Brothers that all shares held in the respective companies making up the Worldwide Foods Business group of companies through which the Worldwide Foods Business is conducted that were held by members of the Family other than Pervez were held on resulting or constructive trust for him and directors of those companies other than Pervez were required to act in accordance with his instructions ..."
10. The body of the particulars of claim is thus predicated on that basis that, as with the shares in the other companies, the Birmingham shares are held on trust or sub trust for Pervez. It is not alleged that they are vested in each of the brothers as to 20% beneficially or absolutely. It follows that, if I give permission, the case advanced in the body of the statement of case will not be precisely reflected in the amended declaration.
11. Nevertheless, I am satisfied that I should give Pervez, Zahid and Shahid permission to amend for the following reasons.
12. As Mr Chaisty submitted, the application is not simply to be determined by applying the principles generally applicable to a "late" or "very late" application in the sense commonly understood in applications of this kind. The touchstone in such cases is whether the amendments are likely to result in delay to the trial or an adjournment. In the present case, the application is very late in the sense that it has been issued during the middle of a trial. However, there is no suggestion that either party would have reason to seek an adjournment if the application succeeds nor, indeed, that the relevant amendments will substantially add to the length of the trial. The main issues are thus whether it would be just and fair to grant permission mindful of the principle in *Cobbold v Greenwich LBC [1999] EWCA Civ 2074* that "amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs". With obvious good reason, Mr Chaisty submits that the material amendments will be more consistent with the case his clients now wish to present than their statements of case in their un-amended form.
13. There is a wider reason to accord the parties a measure of latitude in the formulation of their statements of case. Whilst their statements of case have been formulated in substantial detail, there

is potentially a multiplicity of issues and the nature of those issues is such that, once the evidence has been fully explored, it will emerge that the rights of the parties are not precisely reflected by their statements of case. However, there is only a limited risk of issues being lost or obscured or of one party or the other being prejudiced owing to a failure to scrutinise the evidence of the witnesses properly in cross-examination. Obviously, such a risk can potentially arise owing to a failure of one party to fully apprehend the scope of the other party's case. However, in the present case, the cross-examination of each witness has so far been carried out in meticulous detail by leading counsel, dealing comprehensively with the range of issues that could potentially arise. The oral evidence of a large number of outstanding witnesses remains outstanding but I have no reason to believe that the evidence of those witnesses will not continue to be examined thoroughly with the same high level of skill that has been exhibited until now even if it becomes necessary to impose restrictions to ensure that the case is heard within a reasonable time scale.

14. A balance must be maintained. I must be fully alive to the risks of a party being taken by surprise where an issue has not been fully pleaded. However, I am also mindful that if the parties are narrowly tied to the precise formulation of their case on the pleadings, there is a real risk that, after a trial lasting perhaps upwards of eight weeks with commensurate costs and expenses, I will be driven to the conclusion that neither party has proved their case, with the result that the parties would be back at square one when the case comes to an end. In a case of this kind, there is an overwhelming need for finality.
15. In their statements of case, the parties have focused on alternative forms of common intention trust. In the case of the Birmingham company, the Gateley parties have contended, in the body of their statement of case, that the shares were divided or held on trust for five brothers; in substance, that the shares were held on sub-trust for Pervez. The Kuits parties contend that they were held on the understanding that the beneficial ownership was vested in the party or parties that operated the business from the relevant premises.
16. However, between those positions, there is logically a range of different possibilities, including, for example, the possibility that the shares are held by or on trust for the five brothers equally. Before me, Mr Croxford accepted that this possibility would remain open for determination. It is the possibility now earmarked in Gateley's amended declaration.
17. Another possibility would be that the shares are held subject to a different common intention trust or indeed that they are held on some form of implied or resulting trust for the party, parties or indeed

companies that provided the assets and assumed the liabilities necessary to commence the business. It is even possible that shares are held for the parties subject to a purpose trust if that possibility has been lawfully achieved.

18. I make these observations on an entirely hypothetical basis since, until the evidence has been concluded and I have heard from the parties in their closing submissions, it would be wholly inappropriate for me to express any view about the merits of the case or, indeed, the issues on which it is based or likely to be based.
19. However, in my judgment, it is important that, within reason, I am able at the end of the case to reach a determination which is broadly aligned with the outcome sought by one or other of the parties or at least an intermediate position between them without precisely reflecting their pleaded case if it is open to me to do so on the evidence or, indeed, if the evidence dictates that I should and it can fairly be achieved.
20. The wider point is one of which I was mindful at the beginning of the case and, on that basis, I sought a measure of clarification from Mr Croxford in a passage on Day 1 to which I referred Mr Chaisty during the course of his submissions this morning. The gist of Mr Croxford's answers was that I should not take an unduly literal view of the statements of case and, if necessary, permission to amend could be sought during or at the end of the trial. The current application presents an obvious opportunity for me to take the approach Mr Croxford himself envisaged in my discussions with him at the beginning of the hearing.
21. Until the application was issued, I must confess that, regardless of the claimants' prospects of success on the issue, I had assumed it was open to me to make a declaration in the terms sought in their amended case without giving permission to amend. I remain of that view. Nevertheless, if parties seek permission to amend their case so as to embody a declaration in this form on the basis that it more accurately reflects their case, I can see no good reason to stand in their way.
22. As I understand it, Mr Croxford's position is quite close to such a view. Obviously, he submits the amendment has a bearing on issues such as credibility. This will be a matter for me at the end of the trial. However, Mr Croxford submits that, if I am minded to give permission to amend, I should only do so subject to directions requiring the applicants to explain why they seek permission and, more specifically, why they have only applied for permission at this late stage.
23. In ordinary course, I am satisfied that there might be something to be said for this but, in my view, it would be disproportionate for me to make such a direction now.

24. Mr Croxford has made, with his customary skill, a number of specific submissions. Although they are each of some merit and I have thus taken them into account in reaching my conclusion, I am not satisfied they warrant refusal of permission.
25. Firstly, Mr Croxford submitted that the applicants have ignored the presence and significance of their statements of truth. As initially presented, their case can be taken to have been accurately set out in their statements of case supported by their statements of truth and, if a party changes his factual account, this is likely to have an important bearing on credibility. These matters relate to issues of procedure and they have a bearing on the merits. If it has not already been done, the applicants' amended statement of case should certainly be supported by a statement of truth. I have been provided with a draft copy only. Mr Croxford is also correct in his submission that the changes to the Gateley parties' case could have a material bearing on the credibility of the accounts of their witnesses. However, this will ultimately be a matter for the court to determine at the end of the case. The procedural defects in the application, if any, can be met with appropriate directions and, to the extent Mr Croxford's objections transcend issues of procedure, they do not justify refusal.
26. Mr Croxford also submitted that it is wrong to assert, as the Gateley parties do, that the inconsistency has only become apparent during cross-examination. Again, I do have some sympathy for that point. Again, there are serious questions about the process by which the statements of truth came to be signed. This also has a bearing on issues of credibility. However, in my judgment, it does not warrant refusing permission altogether.
27. Mr Croxford contended that the amendments are likely to cause his clients prejudice. He submits that if permission is given, his clients would be put to the burdensome task of examining and re-examining their case. A significant amount of expense will be incurred on work to be carried out by Mr Walmsley, junior counsel for the Kuits' parties. No doubt, this is correct. However, I am satisfied that this can substantially be met through an order as to costs. I shall not determine the issue of costs until I have heard further from counsel. However, unless Mr Chaisty persuades me to the contrary, I am satisfied that the costs consequential upon the amendment – as distinct from the costs of and incidental to the application itself – are likely to be borne by his clients, the Gateley parties.
28. If the costs consequential upon the amendment are borne by the Gateley parties and costs are reasonably incurred by the Kuits parties as a result of the amendment, I am satisfied that their prejudice can be adequately met by the adverse costs order.

29. Mr Croxford submits that his clients are not opposing the application on a tactical or opportunistic basis and I have no reason to believe otherwise. Although they have been unsuccessful in doing so, I am satisfied they had a substantial case for doing so.
30. However, the application for permission to amend is allowed. I shall dispense with service unless a request is made to the contrary. Again, unless a request to the contrary is made, I shall dispense with the need for the Kuits parties to file an amended defence in response but they are entitled to do so, if so advised.