



Neutral Citation Number: [2023] EWHC 3009 (Ch)

Case No: CR-2021-002022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 24 November 2023

Before :

MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

IN THE MATTER OF EMERY HOUSE PROPERTY LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

(1) NIGEL FREEBORN
(2) CAROLINE RUTHERFORD AND
RICHARD ALLAN WAIGHT
(3) PETER GRIMLEY

Petitioners

- and -

(1) EMERY HOUSE PROPERTY
LIMITED
(2) EAMMON JUDE McELENEY

Respondents

Ms Zhen Ye (instructed by Fairhurst Menuhin & Co Ltd) for the **Petitioners**
The **Respondents** did not appear and were not represented

Hearing date: 24 November 2023

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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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

Mr David Halpern KC :

1. This morning I heard a petition under section 994 of the Companies Act 2006 (the “Act”) in relation to Emery House Property Ltd (the “Company”). On 2 March 2023 the court gave permission for substituted service on Mr McEleney, the Second Respondent, who lives in Tenerife and directed that the trial take place remotely. A link was sent to Mr McEleney but he has not attended. I am told that the last communication he had with the Petitioners’ solicitors was in March 2023.
2. He has served a Defence but without a statement of truth, and he has failed to provide disclosure and a witness statement as ordered by the court.

The facts

3. Emery House is a property in Bishop’s Stortford which has been divided into 13 flats, each of which is held on a 125-year lease. The Land Register shows that title was transferred to the Company on 10 February 2015 in consideration of £53,850.
4. The Company had been incorporated by Mr McEleney on 20 August 2013, in advance of, but presumably in anticipation, of the Company’s acquisition of the freehold. The Company adopted the Model Articles for private companies without any amendments. (I take this from the Company register. This evidence should have been in the trial bundle but was omitted; however I take judicial notice of it.)
5. The Company’s annual return as at 20 August 2015 showed the directors as being Mr Freeborn (the First Petitioner) and Mr McEleney and showed that there were 13 issued shares, of which 5 were held by Mr McEleney and the remaining eight by other shareholders holding one share each (including Mr McEleney’s daughter, who purchased a long lease of Flat 11).
6. I heard live evidence from two witnesses, Mr Nigel Freeborn and Miss Nicola Tait. I was satisfied that both were honest and reliable witnesses.
7. Mr Freeborn’s evidence is that he and his wife Elizabeth completed their purchase of Flat 10, where they live, on 10 April 2014. The building was originally owned by a different landlord, who indicated that he wished to sell the freehold. Mr McEleney expressed interest in buying, as did two other tenants. Mr Freeborn had a conversation with Mr McEleney and had the foresight to record it in an email to Mr McEleney at 19:42 on 28 May 2014. The email is addressed to

“eddiemceleney”; Mr Freeborn confirmed that “Eddie” is the name by which Mr McEleney is known.

8. In his email Mr Freeborn confirms his understanding, including the following:
 - (1) The Company is offering Mr Freeborn the opportunity to buy the freehold of his flat (I take this to be a layman’s way of expressing the fact that Mr Freeborn will be buying a share in the company that owns the freehold of his flat).
 - (2) There will be a maximum of 13 shareholders with equal holdings and voting rights.
 - (3) Anyone who buys a share will not have to pay ground rent on their flat.
 - (4) Only shareholders may serve as directors.
 - (5) Any leaseholder who is not a shareholder will be entitled to buy a share.
 - (6) Upon any sale of an apartment the seller’s share will be transferred to the purchaser. No person may retain a share who is not a leaseholder.
9. Mr McEleney responded at 20:10 confirming that this is “*precisely what I agreed with you and Elizabeth*” and “*my response to your email is legally binding*”.
10. Mr Freeborn thereupon purchased a share for which he paid £3,550. His evidence is that some leaseholders chose not to purchase shares, which is why Mr McEleney retained five shares.
11. Miss Tait gave evidence that she bought her long lease of Flat 7 in early 2016 from a Mrs Compton. Mr McEleney refused to register the transfer of Mrs Compton’s share to Miss Tait unless she paid £1,000. Although she was advised that she was not required to pay, she did so because it would have cost more to have an argument. She fully supports the petition but did not become a petitioner because she was heavily involved in looking after a cousin who has sadly died.
12. Miss Tait’s evidence is that she spoke to a number of the original leaseholders who all told her that the understanding with Mr McEleney was in the terms of the agreement referred to by Mr Lancaster, to which I now turn.
13. A hearsay notice was served in respect of the witness statement of Mr Ian Lancaster, who is currently in South America. His statement says that he is a shareholder and is the leaseholder of Flat 12. He exhibits a document entitled “Emery House Property Ltd Shareholder Agreement”, signed by himself and Mr McEleney and witnessed by Mr Peter Grimley, the tenant of Flat 1 (the Fourth Petitioner). I should say that Mr McEleney has sent an email alleging that his signature is a forgery, but he does not say so in his Defence, he has not made a witness statement, and he has not sought to call expert evidence on this point. I confirm that I accept the Agreement as genuine. I have not been told why Mr Lancaster is not a petitioner, but it is clear from his evidence that he supports the petition.
14. The Agreement is undated but Mr Lancaster says it was drafted by Mr McEleney and signed in March 2016. It states that there are 13 shares, one per flat, that

eight shares have been issued to leaseholders and the remaining five have been retained by Mr McEleney. It says that the apartments are “freehold” with no requirement for lease renewal and no payment of ground rent.

15. The following subsequent events occurred:
 - (1) On 14 July 2016 Mr Freeborn ceased to be a director.
 - (2) On 1 September 2016 Mr McEleney issued a further 12 shares and allotted them to himself, without a board or shareholders meeting and without any discussion with the shareholders.
 - (3) In 2017 Mr McEleney appointed a Mr Whitehouse and a Mr Gradica as directors, notwithstanding that they were not leaseholders.
 - (4) Mr Edward Drewitt, the tenant of Flat 6, sold his flat and his share to Ms Caroline Rutherford and Mr Richard Allan Waight (the Second and Third Petitioners). However, the Company has refused to register the transfer of the share.
 - (5) The Company was supposed to insure the building but failed to do so. For some time the building was without insurance, but the tenants have managed to arrange insurance at a higher cost than they say that ought to have paid. (I have seen no specific evidence on this point and therefore say nothing further about it.)

Discussion

16. Ms Ye, who appears for the Petitioners, has referred me to s.561 of the Act. This gives the existing shareholders an automatic right of pre-emption on the allotment of new shares, subject to narrow exceptions which do not arise in the present case. Importantly, the Model Articles do not exclude this right of pre-emption. The issue of the 12 shares is therefore plainly in breach of the Petitioners’ rights of pre-emption.
17. S.550 of the Act says that, where a private company has only one class of shares, the power to allot shares of that class may be exercised by the directors, unless prohibited by the articles. There is nothing in the Model Articles to prohibit this. Accordingly, Mr McEleney as director had the power to allot the new shares (subject, of course, to s.561). However, that is a fiduciary power which he was required to exercise in the interests of the Company. Ms Ye has drawn my attention to the judgment of Blackburne J in *Dalby v Bodilly* [2004] EWHC 3078(Ch) at [16]. In addition to the breach of s.561, I am satisfied that the allotment of the additional 12 shares to himself was plainly a breach of his duties under s.171 (duty to exercise his powers for the purpose for which they are conferred), s.172 (duty to promote the success of the Company, including the need to act fairly as between the members) and s.175 (duty to avoid conflicts of interest).
18. I am satisfied that there was a shareholders’ agreement between Mr Freeborn and Mr McEleney in the terms recorded in their email exchange. The allotment of

shares was additionally a breach of that agreement. I am also satisfied that there was a shareholders' agreement in similar terms between Mr McEleney and Mr Lancaster, and that a number of other shareholders understood that this was the arrangement in force between Mr McEleney and the other shareholders. I have heard no evidence directly from Mr Grimley, but he was a witness to that agreement. I am satisfied that Mr Grimley is entitled to rely on that agreement. This is in addition to the breaches of s.561 and ss.171, 172 and 175.

19. Each of these breaches has caused prejudice to the Petitioners as members of the Company because it has diluted their shareholdings.
20. Finally, I am satisfied that there has been prejudice to the Second and Third Petitioners in refusing, without any good reason, to register the transfer of their share. They are entitled to petition under s.994(2). The Company has no right to levy a charge on the transfer of shares (Model Articles article 26(2)).
21. I raised a concern with Ms Ye that there are a number of shareholders who have not been joined as parties and that there is no evidence that they have been served with the petition or offered the opportunity to participate. Whilst I have no reason to think that they would take a different view from the petitioners, they have not had the opportunity to decide for themselves. I have concluded that this should not prevent me from determining the case, so long as I fashion any remedy so that they are not conceivably prejudiced.
22. I should record that Ms Ye has based her case solely on s.994 and has not referred me to any statutory remedies granted to leaseholders of long leases.

Remedy

23. The petition seeks by way of remedy the grant of additional shares to restore parity. However, I suggested to Ms Ye, and she agreed, that a simpler solution is to cancel the 12 shares which Mr McEleney wrongfully issued to himself. This has the merit of not interfering with the shares of those shareholders who have not had the opportunity of taking part in these proceedings.
24. In addition, I order that the one share held in the name of Mr Drewitt be registered in the names of the Second and Third Petitioners.
25. I direct that the Register be rectified under s.125 to give effect to paragraphs 23 and 24 above.
26. There are other ongoing issues relating to the building, but Ms Ye assured me that all of these can be resolved in due course, once Mr McEleney is no longer a controlling shareholder.
27. The Petitioners are entitled to their costs as against Mr McEleney. Ms Ye should prefer a draft Order for the court to approve.