Neutral Citation Number: [2024] EWHC 573 (Ch)

Case No: CR-2022-002455

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

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

Date: 18/03/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

(1) MARK WILSON **(2) JAMES DOWERS** **(As joint liquidators of Westcountrytruffles Limited)**	**Applicant**
- and -	
(1) BRIAN BRYAN FROST **(2) ALISON FROST**	**Respondents**

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- -

Mathew Parfitt (instructed by **Womble Bond Dickinson LLP**) for the **Applicants**
Nicholas Leah (instructed by **Rix & Kay Solicitors LLP**) for the **First Respondent**

Hearing dates: 12.03.2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 18.03.2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

Chief ICC Judge Briggs:

1. By an application dated 5 March 2024 ("Application"), the First Respondent seeks a stay of proceedings alternatively an adjournment of a trial listed on 11 March 2024. The ground relied upon is that the First Respondent is unable to engage in the trial process as he is currently suffering from mental health issues. The Application is supported by a witness statement of Mr Richard Ludlow, a solicitor at Rix & Kay Solicitors LLP, acting on behalf the First Respondent. The Application is resisted.

2. The trial concerns an application dated 3 August 2022 made by the Applicants (the "Liquidators") against the directors of Westcountrytruffles Ltd (the "Company"). The Liquidators seek the balance of overdrawn directors' loan accounts (a debt action), alternatively they claim against the directors for causing the Company to pay unlawful dividends, losses arising from breaches of directors' duties, and equitable compensation for loss caused to the Company.

3. The Company is alleged to have been part of a scheme involving the marketing and sale of tree saplings inoculated with truffle spores to members of the public as an investment opportunity. The plantation of trees is in the UK, Spain and South Africa. The company managed the UK plantation only. Viceroy Jones New Tech Limited ("VJ") marketed the investment opportunity to potential investors using a combination of websites brochures and introducers. On 7 April 2017 the Secretary of State presented 5 linked public interest winding up petitions that included the Company and VJ. The Company and VJ were wound up on 12 October 2018 following trial. Judge Barber found that the allegations in the petition had been made out. In short, investment monies raised from the public were rapidly and unlawfully dissipated, and the Company's payment banking and contractual arrangements were contrived so that investors could have no or limited recourse in respect of their investments. The Company was left with no means to support the plantations which were to mature after 15 years. The Judge found that the Company and the First Respondent had been involved in the scheme.

4. The claim made by the Liquidators is that the Company was always insolvent and its bank account was used as a conduit to provide approximately £408,000 to the First Respondent.

5. The First Respondent defends the claim on the following notable grounds:

    5.1. The First Respondent resigned as a director more than 6 years before the Application was issued and any claim in debt is statute barred;

    5.2. The Company was not involved in the marketing of the scheme;

    5.3. Although the Directors' loan account figures produced by the Liquidators is admitted the Liquidators are put to proof: "It is necessary to substantially revise [the Company's] accounts to properly record the…business";

    5.4. The claim made pursuant to the Companies Act 2006 (s 197) is denied, and the claim of unlawful distributions is denied;

    5.5. The First Respondent claims relief if found liable for any sum claimed, pursuant to section 1157 of the Companies Act 2006.

6. The reply pleads:

   6.1. a standstill agreement had been entered. The agremeent suspended time from running;

   6.2. in any event section 21(1)(b) of the Limitation Act 1980 applies;

   6.3. the Company was always insolvent and the Duomatic principles will not save the First Respondent; and

   6.4. the honest and reasonable defence (s1157 of the 2006 Act) does not apply in fact or law: the First Respondent cannot rely on his own wrongdoing and in any event his actions were not reasonable.

Extensions of time and adjournments

7. By a consent order dated 17 February 2023 the parties agreed to exchange witness statements by 4pm on 5 June 2023. Judge Jones extended the time for witness statements to 4pm on 5 September 2023 and on 23 August 2023 the time was further extended to 4pm on 26 September 2023 by Judge Prentis. The last extension of time was granted by Judge Jones on 13 October 2023 so that the deadline for the parties to file and exchange witness statements of fact was 4pm on 21 November 2023. The First Respondent failed to comply with the last order.

8. The correspondence between solicitors adds context. Following the consent order made by Judge Prentis, Simon Burn Solicitors (then acting for the First Respondent) sought a 3-month extension by letter dated 12 May 2023 because the firm was involved in a heavy piece of litigation: "we are currently unable to comply with the existing deadline of 5 June 2023…". Womble Bond Dickinson "reluctantly" agreed. Ostensibly this was a solicitor issue and nothing to do with the First Respondent.

9. On 14 August 2023 Simon Burn solicitors asked for a further extension due to the firm's lack of capacity stating: "we have commenced work in relation to our clients' evidence in response, as a result of the combined effect of the extension to the disclosure exercise and the writer's pre-arranged annual leave from 28 August 2023 to 4 September 2023, we will unfortunately not be in a position to finalise our clients' evidence ahead of the deadline of 5 September 2023."

10. Womble Bond Dickinson agreed to this extension of time requested due to the unavailability of Simon Burn solicitors.

11. On 20 September 2023 Simon Burns solicitors wrote:

> "Urgent… we have recently been instructed that our client Mr Brian Frost, has recently experienced a significant mental health set back for which he has received care from a medical professional and the crisis team. We enclose for your reference a letter from NHS Somerset dated 24 August 2023 to evidence our client's appointment with a mental health worker on 6 September 2023, in addition to evidence of our client's recent prescriptions of medication… On the basis that the current deadline to file and serve evidence is 26 September 2023 we

> write to respectfully request your client's consent to a 14 day extension to the deadline to file and serve witness statements to 10 October 2023 to avoid the need for an application..."-

12. The extension of time was agreed.

13. Simon Burns solicitors sent the medical records of the First Respondent under cover of a letter dated 2 October 2023 and asked for a further extension to 23 December 2023: "to allow us time to undertake these measures." The measure envisaged included instructing an expert to consider how the First Respondent could engage with the proceedings without "causing undue risk to his health". Womble Bond Dickinson noted that the letter of 2 October 2023 did not include any medical evidence to support inability to produce a witness statement. Nevertheless, a short extension was agreed to 21 November 2023. The extension came with a warning:

> "Further extension would prejudice the trial. Any further requests for amendments to the directions for exchange of statements (or seeking a revision to the trial directions) would need to be obtained by application to the court supported by expert medical evidence specifically addressing why Mr Frost's ill health is such that he requires further time."

14. By 22 November 2023 Rix and Kay solicitors had been instructed to replace Simon Burn solicitors. On that date Richard Ludlow of Rix and Kay solicitors wrote to Womble Bond Dickinson by e-mail:

> "We are instructed by Mr Brian Frost in connection with the ongoing proceedings related to Westcountrytruffles Limited (in liquidation). Our instruction, at this point, relates specifically to our client's ability to deal with and, indeed, whether our client is medically fit enough to have to deal with the ongoing proceedings – we believe, based on the evidence, that he is not and that the proceedings should be stayed in relation to our client.
>
> As you will see, from the report, the instruction – by our client's previous instructed solicitors – was to determine, in the professional opinion of Dr Akenzua, the ability of our client to deal with the proceedings, to be able to produce a witness statement, whether our client is fit to attend trial (and to be cross-examined) or, if our client is not fit to attend trial, whether our client will ever be fit to attend a trial or does there need to be a stay of the proceedings and, if so, the length of the stay which is required as a result of the risk to our client's health.
>
> The expert carried out a number of tests on our client in order to determine the position in relation to his instructions – the full details of these can be seen in the attached report from Dr Akenzua. In summary the conclusions are, in our opinion, definitive. Our client is currently suffering from a recurrent

> depressive disorder, current episode moderate without psychotic symptoms and complex post-traumatic stress disorder (PTSD).
>
> Following from this, Dr Akenzua, has confirmed that our client will not currently be able to take an active role in the proceedings including the witness statement in his defence to due his impaired concentration. In addition to this immediate forecast – Dr Akenzua – has confirmed that our client will need at least one year of treatment to be mentally able to meaningfully participate – with that year to commence when our client's treatment begins.
>
> We would ask that, as a result, you agree to consent to an initial 12 month stay of the proceedings – with the possibility of a further extension should the condition of our client not improve with treatment or the opinion of Dr Akenzua change as the 12 month progresses.
>
> Clearly, given the above, if your client is not minded to agree – by consent – to the stay of the proceedings, in respect of our client, then we anticipate receiving instructions to make the application that will be necessary."

15. On 21 December 2023 Womble Bond Dickinson wrote making a number of observations, refusing to agree to agree to a stay or adjournment of the trial and suggested reasonable adjustments.

16. No application was made to remove the trial from the trial list. On 2 February 2024 an e-mail was sent to Womble Bond Dickinson:

> "In terms of the current process, we understand that your client wishes to have this matter resolved – a view shared by our client – as soon as possible, we would argue that until our client has had the opportunity to present the full picture to you, and the court if necessary, that there should be stay on the current process. With that in mind we would ask that your client agrees to a mini stay of the proceedings, for a 3 month period, to enable our client to obtain the critical documents so that we can then present the position to your client and they can make an informed view on our client's request for a stay to obtain the treatment that he needs. This initial 3 month will then be the initial period of the previously requested 12 month period."

17. The Liquidators responded that if a stay or adjournment was sought an application would need to be made to the court. The Liquidators continued to prepare for trial.

The evidence of Dr Akenzua

18. Dr Akenzua is a fully licensed medical practitioner; a Consultant Psychiatrist in General Adult Psychiatry; Fellow of the Royal College of Psychiatrists; a Fellow of the West

African College of Physicians and approved under Section 12(2) of the Mental Health Act 1983 in England and Wales as having special experience in the diagnosis and treatment of mental disorders. He has prepared expert reports for courts since 2006 and is aware of his duties to the court. He has experience in the diagnosis and treatment of patients with severe and enduring mental disorders, including mood disorders and psychotic disorders. He was a consultant psychiatrist to a psychiatric intensive care unit for about eight years. There has been no criticism of his qualifications and no doubt has been cast on his ability to provide a suitable report.

19. The report was produced on 26 October 2023. His instructions were to opine on:

    19.1. Whether Mr. Frost is fit to take an active role in the Application including the provision of a witness statement in his defence.

    19.2. Whether Mr. Frost is fit to attend trial where he will be subject to cross examination.

    19.3. If Mr. Frost is not fit to defend the Application, the report should address to what extent it is considered that Mr. Frost can ever be sufficiently fit to defend the Application and if so what steps and or treatment need to be taken in order to establish and maintain fitness.

    19.4. Whether the Application needs to be subject to a formal stay whilst Mr. Frost obtains treatment and if so, the appropriate length of any stay.

    19.5. Whether any special measures (including but not limited to allowing Mr. Frost to give evidence remotely by video-conference facilities, allowing suitable breaks or questioning him through an intermediary) or any other support that could be put in place for him to defend the Application whilst reducing the risks to his health.

20. He interviewed Mr. Frost on 22 October 2023 for three hours. The interview was done remotely by video conference. Mr. Frost's brother had confirmed to Mr. Frost's legal team that Mr. Frost is unable to cope with the demands of the litigation as a result of his mental health difficulties. During the interview, Mr. Frost completed the Beck's Depression Inventory (BDI -II) Beck et al, 1993, the Generalised Anxiety Disorder 7-item scale (GAD 7) Spitzer et al, 2006 and Work and Social Adjustment Scale (WSAS) Mundt et al, 2002.

21. He opined that:

    21.1. Mr. Frost fulfils the diagnostic criteria for recurrent depressive disorder, current episode moderate without psychotic symptoms and complex post-traumatic stress disorder (complex PTSD).

    21.2. His mental disorders may impair executive functioning i.e. skills that include working memory, flexible thinking and self-control.

    21.3. He is unable to take an active role in the Application including the provision of a witness statement in his defence due to the impaired concentration.

22. After setting out the background to the First Respondent's mental health history, covering two attempted suicides and current medication, he explained that the First Respondent's

score on a functioning test (which is said to be a reliable and valid measure of impaired functioning) demonstrated the First Respondent was suffering severe impairment of executive functioning and was unfit to attend trial: "Executive function is a set of mental skills that include working memory, flexible thinking, and self-control."

23. As regards the production of a witness statement Dr Akenzua stated that the First Respondent:

> "will struggle to provide written evidence and will find being questioned in a court a challenge because of his impaired attention and current feelings of low self-worth and feelings of guilt"

24. The extent of the "struggle" is uncertain and there appears to be a conflation between the exercise of providing a witness statement and attending court for cross examination.

25. There is a difference between the stresses suffered in cross-examination and the stresses involved in providing a witness statement. After stating that the First Respondent will need to provide a lengthy and detailed witness statement and concluding that his mental disorders may impair executive functioning, Dr Akenzua opines that the First Respondent "is currently unable to take an active role" in the provision of a witness statement.

26. Later in his report [104] Dr Akenzua discusses the medication the First Respondent was taking in October 2023 and concludes that he will not be able to "participate actively in the Application as he will not be able to focus adequately."

27. The prognosis given is that the First Respondent shall be able to engage in the proceedings following 15 weekly psychiatry sessions, 6 months of therapy followed by 6 months for recovery. Dr Akenzua did not think reasonable adjustments would assist. There is an obvious time gap between the report and the date this application has been heard (some 5 months).

Legal guidance on adjournment

28. There is no discernible difference between the parties as to the legal guidance. The first and foremost principle is that an adjournment is in the discretion of the court. It is a case-management decision where the focus (when an application is made to adjourn a trial) is whether it is fair to adjourn the trial having regard to CPR 1.1: *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221 at [30].

29. In *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) Norris J memorably explained what typical evidence should include to support an adjournment on medical grounds [33]-[37]:

> "… Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent

> opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

30. In that case the court had an unsigned witness statement for the party seeking an adjournment. On appeal the Judge had a letter from a doctor stating that the appellant is "very distressed and upset with multiple problems." The doctor's letter explained that he is "suffering from anxiety depression" and that he would refer him to a specialist. Norris J refused to accede to the appeal on the ground that there is a refusal to adjourn at first instance because (i) there was a history of making applications adjournments (ii) there was no cooperation in preparing for the trial and (iii) the additional medical evidence was insufficient.

31. I have been referred to and read *FCA v Avacade* [2020] EWHC 26 (Ch); *GMC v Hayat* [2018] EWCA Civ 2796; *Decker v Hopcraft* [2015] EWHC 1170 (QB); *Forrester Ketley v Brent* [2012] EWCA Civ 324; *Teinaz v London Borough of Wandsworth* [2002] IRLR 72; *Bilta (UK) Ltd and others v Tradition Financial Services Ltd* [2021] EWCA Civ 2211 and *Fox v Graham*, The Times, 3 August 2001. *Fox* is cited for the proposition that: "a court faced with an application to adjourn on medical grounds made for the first time by a litigant in person should be hesitant to refuse the application". Neuberger J (as he then was) added that the merits of the case are a relevant consideration. There is no point in adjourning a case when there is no defence, or the defence is hopeless. In *Bilta (UK)* the Court of Appeal emphasised that the task for the court is to ask itself if there will be a fair trial in all the circumstances. The significance of a witness's inability to attend through illness will vary from case to case, but will usually be material, and may be decisive.

Analysis of the medical report

32. It was argued that the report of Dr Akenzua is not adequate and little weight should be given to it. It is said, relying on *Levy-v-Ellis Carr*, that Dr Akenzua is not the First Respondent's usual medical practitioner. That is true, but this alone is not sufficient to disturb the findings of Dr Akenzua who is well qualified to make a diagnosis and provide a prognosis.

33. It is said that the First Respondent may have pulled the wool over the eyes of Dr Akenzua, and this task was easier because the examination was not held face to face. It is true there was no face-to-face examination. I have no evidence before me to support the view that a reliable diagnostic assessment of mental health can only be made following a face-to-face consultation.

34. The evidence provided by Dr Akenzua is qualitively different from the evidence before Norris J in *Levy-v-Ellis Carr*. Apart from the lack of familiarity with the First Respondent, Dr Akenzua carried out series of clinical tests that are capable of objective scoring. It is not possible to find on this Application that the First Respondent "cheated", as claimed. There is nothing in the report of Dr Akenzua to suggest that the tests undertaken produced unreliable results. Quite the contrary.

35. Although the Application is made on the first day of trial it has been foreshadowed for many months. The Liquidators have had the report of Dr Akenzua since at least November last year and were informed that an application would be made.

36. Many of the extensions of time to file evidence of fact, agreed between the parties, were not due to the First Respondent's mental health issues nor his reluctance to participate. The reasons for the extensions were due to the capacity of the solicitors to get the work done. The sequence of events distinguishes this case from the facts in *Hayat* and *Levy-v-Ellis Carr*.

37. The report of Dr Akenzua is not recent. Nevertheless, the court does have the benefit of a partial update. The First Respondent has been under the care of Bridgwater Mental Health Services since January 2024. He is due to start trauma therapy in April.

38. In addition, he has been declared unfit to work by Dr Liz Stallworthy of Highbridge Medical Centre for a period at least covering 10 February 2024 to 10 May 2024.

39. Given that: (i) the report of Dr Akenzua was made 6 months ago, (ii) the First Respondent has received and continues to receive help with his condition, (iii) solicitors then acting for the First Respondent, Simon Burns, informed Womble Bond Dickinson on 14 August 2023 that work had already begun, (iv) instructions will have been taken for the preparation of the filed defence, (v) the First Respondent has provided a witness statement and was cross examined in the course of the winding up trial (vi) the application relies on the same or similar facts as those canvassed in the contested winding up trial, (vii) the defence provides the parameters for the witness statement of fact, and (viii) the impairment of executive function relates to the First Respondent's ability to offer accurate timelines and concentration, it is not clear to me, on the available evidence, why the First Respondent should not produce a witness statement to support his defence in reasonably short order or longer on debarring terms. The inability to recall timelines will be helped when contemporaneous documents are referenced. For example, impairment may be ameliorated when referencing (a) the defence filed in these proceedings, (b) the winding up petition and supporting documentation in the winding up trial, (c) the written evidence produced by the First Respondent for the winding up trial and (d) the judgment given by Judge Barber following the trial. As regards concentration, the witness statement need not be written in one sitting. No reason has been advanced why multiple sittings should not assist. I shall hear further submission on this issue.

40. The Liquidators argue that there is no point in adjourning the trial as the defence of the First Respondent is bound to fail. In this regard, Mr Parfitt for the Liquidators made powerful submissions on the effectiveness of the defence inviting me to conclude that to adjourn would merely delay the inevitable.

41. Mr Leah for the First Respondent was not able to help the court on this issue as he had not been sent the pleadings and only had instructions in respect of the Application. Troubled by Mr Leah lack of ability to respond, I shall treat this argument as part of the overall circumstances asking whether it will be fair for the trial to proceed, dealing with the case expeditiously, justly and at proportionate cost.

42. The sums involved are significant albeit the issues for trial are not complex. The court is bound to treat applications for an adjournment of a trial with circumspection. The court is aware that it needs to have regard to other cases when allotting resources. It may be that

Mr Parfitt is right about the merits of the defence. Even if he is right, reliance of section 1157 of the Companies Act raises issues of fact that the court must decide.

43. In my judgment, having regard to the report of Dr Akenzua, the current disability of the First Respondent to participate in the trial, through no fault of his own, and the need to ensure a fair trial, an adjournment should be granted. I reject any argument that the action should be stayed.

Conclusion

44. I shall adjourn the trial and give directions that will include a re-listing and the production of witness evidence.