THE SHERLOCK HOLMES INTERNATIONAL SOCIETY LIMITED IN THE COURT OF APPEAL

LACHES & IDENTIFYING LITIGATION FUNDER

Christopher Brockman, Guildhall Chambers

Overview

In the latest decision in the winding up of The Sherlock Holmes International Society Limited **("the Company")** the Court of Appeal upheld the decision of Mark Anderson QC, sitting as a deputy judge of the High Court, in holding that it was possible to invoke the doctrine of laches to prevent a challenge to the authority of a director to cause a company to bring proceedings if it would be "practically unjust" to allow that challenge to continue. However, given the circumstances of this case the deputy judge would not permit the proceedings to continue where there was no director capable of instructing solicitors to act for the company.

The consequential orders, made following written submissions, are of equal, if not more, interest and do not appear from the judgment. The Court also ordered that the solicitors for the appellant, Stephen Riley, should disclose the identity of the party paying them and that any application for a non-party costs order should be made to a Registrar rather than the Court of Appeal itself.

The Appeal

The judgment arises out of the long running litigation involving the Company. On 11 March 2015 Registrar Derrett wound up the Company on a petition presented by John Aidiniantz, the respondent to this appeal. Subsequently Henderson J gave the Company permission to appeal the winding up order. That appeal was due to be heard on 3 November 2016.

On 16 October 2016 Mr Aidiniantz asserted that Mr Riley, the sole director of the Company, was not in fact a director and consequently he had no authority to act on behalf of the Company or to instruct solicitors to act for it. On 27 October 2016 he made an application for a declaration to this effect.

The only question for the Court of Appeal was in relation to the finding by the deputy judge that it was not too late for Mr Aidiniantz to argue that as the articles of the Company provided for a director only to hold office until the next annual general meeting, and as no AGM had been held, Mr Riley was deemed to have left office on the last possible date upon which the next such meeting could lawfully have been held, being 31 December 2014: see *New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 at 803; and *Re Consolidated Nickel Mines* [1914] 1 Ch 883.

The deputy judge found that that the doctrine of laches could be invoked to preclude a challenge to the authority of directors to cause the company to bring proceedings if it would be "practically unjust" to allow the challenge to continue.

The only substantive argument raised in reply by the Company was that the issue was raised too late for Mr Aidiniantz to rely upon the failure to renew Mr Riley's appointment at an annual general meeting. In rejecting this argument, the deputy judge recognised that the authority point had been taken very late but accepted that this was not deliberate or tactical. The deputy judge also reasoned that those claiming to be in control of the Company were at least equally responsible, as they were under a duty to manage the Company in accordance with its constitution and could not complain, when others noticed that they were not doing so, that those others should have noticed it earlier.

The deputy judge also took into account that there was a bitter family feud lying behind the proceedings, that a great deal of money had been spent on the appeal, that the appeal might have real merit and that he was being asked to shut out one side of the dispute on a technical point taken very late. But he felt he could not ignore the fact that the Company had no director. He concluded at paragraph 114 of his judgment:

> *"I will not allow laches, an equitable doctrine, to bring about a situation whereby a company appeals against a winding-up order when it has no directors, where I know that it has given no valid instructions for its future participation in the appeal, and where, if the appeal were to succeed, it would generate a further petition to wind it up and further litigation as to the identity of its members."*

In the Court of Appeal Lord Justice Kitchin (with whom Floyd LJ agreed) confirmed the following principles:

1. An objection that an action in the name of a company is not properly constituted due to lack of authority should be raised at an early stage of the action and not by way of defence to the claim: *Russian Commercial and Industrial Bank v le Comptoir d'Escompte de Mulhouse* [1925] AC 112 at 130 per Viscount Cave. If it comes to the attention of the defendant at a later stage of the proceedings, then it can be raised at that stage, but again not as a defence to the action: *Airways Limited v Bowen* [1985] BCLC 355 (CA) at 359 per Kerr LJ.

2. Secondly, once it is clear that an action is improperly constituted, it should not be allowed to proceed. Whether the action is dismissed, struck out or stayed, the effect must be that the proceedings are brought to an end: see *Airways* at page 360 per Kerr LJ.

3. Nevertheless, and depending on the circumstances, the doctrine of laches may apply so as to prevent an objection of this kind being taken: *Re Bailey, Hay & Co Limited* [1971] 1 WLR 1357 and *Villatte v 38 Cleveland Square Management Limited* [2002] EWCA Civ and will do so where it is "practically unjust" to allow the action to continue.

In dismissing the appeal the Court found that the deputy judge had not misunderstood the extent of his task by considering that he had to ascertain and declare Mr Riley's status authoritatively so that everyone dealing with the Company would know where they stood. Secondly, he was not wrong to state that "there is not a single argument to be deployed in opposition to [the application] except that it was made late"; and thirdly, he was not wrong to reason that "to allow this appeal to proceed would cause chaos".

Identity of funder

What does not appear from the judgement is that Mr Riley was impecunious and unable to fund the appeal himself, so whilst a costs order was obtained against him with an interim payment on account, it was commercially worthless. Mr Aidiniantz did not seek a non-party costs order in the Court of Appeal. He did however seek orders to enable him to identify the true funder of the appeal.

This had been the subject of correspondence (both before the appeal and also after the draft judgment had been sent to the parties), the conclusion of which was that Mr Riley had not disclosed the identity of the funder and that he was away, which hindered the ability of his solicitors to take instructions.

Mr Aidiniantz argued that Mr Riley had shown a marked reluctance to disclose the identity of those funding the appeal. First, he could simply have answered the question when it was first raised, but chose not to do so. Secondly, it was clear that Mr Riley was away and his solicitors were having difficulty in obtaining instructions from him. There was no guarantee that he would be able to comply with the order in a reasonable timescale. Finally, the reluctance and repeated failure of Mr Riley to disclose the identity of the

funders was in itself telling; he could have avoided the need for an order by disclosing the identity of the funders before an order was required.

Making a disclosure order against Mr Riley's solicitors would overcome all of these problems and, it was argued, impose no significant burden on them.

The Court of Appeal found that the circumstances were sufficiently out of the norm and exceptional to justify making an order for disclosure by Mr Riley's solicitors. They approved a two-stage disclosure process:

1. That the solicitors disclose the identity of the person paying them;

2. In the event that was Mr Riley, he should disclose the identity of the person funding the appeal through him on the basis that, as stated above, he did not appear to have had the financial means to do so himself.

In making the order the Court also rejected the appellant's argument that this procedure was over elaborate.

The Court was also satisfied it would be just and convenient to direct that any application for a non-party costs order should be made to a Registrar of the Business and Properties Court of the High Court.

Conclusions

Whilst the appeal itself largely affirms principles that were well established and that the deputy judge carried out his functions in a way that was beyond criticism, the disclosure order against solicitors is more unusual. It provides an efficient and swift way to identify the funding party without the need for any further court applications.

Once that has been established, any non-party costs order application can be made to the Registrars, which will be cost and time efficient.

Christopher Brockman was instructed by Nicholas Yapp, Partner Dispute Resolution, of Gordon Dadds LLP and appeared on behalf of the Respondent.

A copy of the Court of Appeal judgment is available here