Case No: CR-2023-006096
Neutral Citation Number: [2023] EWHC 3441 (Ch)

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

IN THE MATTER OF ZAUM UK LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Monday, 18 December 2023

BEFORE:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PARFITT

BETWEEN:

(1) ROBERT KURVITS
(2) SANDER TAAL

Petitioners

- and -

ZAUM UK LIMITED

Respondent

(1) TÜTREKE OÜ
(2) YESSIRNOSIR LIMITED
(3) KAUR KENDER

Third Parties

MADELEINE HEAL (instructed by Horwich Farrelly) for the Petitioners
JAMES SHAW (instructed by Greenberg Traurig LLP) for the Respondent
ANDREW THOMPSON KC (instructed by Harbottle and Lewis LLP) for the Third Parties

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JUDGMENT

(approved)

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Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
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(Please note that due to the poor standard of audio recording it has not been possible to produce a high quality transcript in this case)

1. DEPUTY ICC JUDGE PARFITT: These proceedings are a just and equitable winding up petition presented by the Petitioners, Robert Kurvits and Sander Taal, in respect of Zaum UK Limited (the "Company"). This is an application under CPR 19.4, relying on CPR 19.2, to join as additional respondents to the petition three individuals who, between them, hold 60 per cent of the shares in the Company (the "60% Shareholders"). The Petitioners hold 40 per cent of the shares in the Company and at present are bringing the petition solely against the Company as the only respondent to their petition. The 60% Shareholders have invited the Petitioners to consent to their joinder in correspondence, but describe themselves as having met implacable opposition, which they consider to be unreasonable, in response to that request.

2. The parties' positions are focused on essentially the same test, which is set out in CPR 19.2(2)(a):

> "The court may order a person to be added as a new party if -
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings ..."

The key issue is whether or not it is desirable to add the 60% Shareholders as respondents to this petition. As to that question, the first thing the court has to identify is what the issues are in this dispute. As described in the Petition, this is a just and equitable winding-up petition based on an alleged loss of the substratum of this company and the destruction of a relationship of mutual trust and confidence that previously existed between all the shareholders, said to give rise to a quasi-partnership.

3. The basis for the argument that the Company has lost its substratum is that there was a shareholders' agreement at the outset of the parties' involvement as shareholders, to which the Company was a party, which provided (in essence; I will not quote it) that the Company was formed for the development of the intellectual property that Mr Kurvitz (one of the

Petitioners) had been involved in creating. It is said on behalf of the Petitioners that it is entirely clear what that means and that the subsequent exclusion of Mr Kurvitz from participation in the Company, by the Company but at the hands of the 60% Shareholders, means that the Company cannot do what it was originally set up to do and it is therefore within the relatively rare category of cases where it is just and equitable to wind the Company up because its substratum has gone. As to those cases I have been referred to *Duneau v Klimt Invest SA & Ors* [2022] EWHC 596 (Ch) and the old case of *Re German Date Coffee Co* (1882) 20 Ch D 169, which explain the sort of factors that can lead to a finding that the substratum of a company has gone.

4. Before determining whether the substratum of this company has gone, the court needs to work out what the substratum was. Identifying the substratum in the present case involves construing that shareholders' agreement, an agreement whose participants include persons who are presently non-parties. In response to a question during the course of her submissions, Ms Heal (who appears for the Petitioners) said that it would be possible for the 60% Shareholders, who will be witnesses in the trial, to make submissions about the proper construction of the shareholders' agreement from the witness box. It seems to me that that is not the function of oral evidence at trial, nor would a witness advocating in a witness statement be properly compliant with the rules and the provisions of the Chancey Guide and the Practice Direction on witness statements, nor (without wanting to tie Ms Heal's hands) is the advocate for the Petitioners likely to invite a witness to advocate contrary to her own client's interests during the course of her cross-examination. It seems to me that asking these gentlemen to construe and make submissions from the witness box is entirely impracticable. It is contrary to the rules, and it is contrary to the reality of the way in which the meanings of agreements are determined in this court.

5. Another unusual feature of the non-joinder of the 60% Shareholders would be the position taken by the Petitioners that the Company's money should not be used to fund the opposition to the petition but that the 60% Shareholders should fund the Company's defence using their

own money and hope to win it back by using a non-party costs order application in the event that the petition is ultimately unsuccessful. Conversely, the Petitioners no doubt foreshadow a similar non-party costs application of their own against the 60% Shareholders in the event the petition is successful. While a non-party costs order may be a way around the issue identified by Ms Heal, it seems to me that it is an entirely unnecessary diversion from a much more straightforward alternative. The much more straightforward alternative is to identify who the real parties are to this dispute, to make them the parties before the court, and to enable the winning side to seek its costs under the normal rules from the losing side at the end of the dispute.

6. I do not accept it is an appropriate solution, even if it may be a possible solution, for non-party costs orders to be used at the end of the litigation to shake down the appropriate paying party in circumstances where the real parties behind the litigation are being kept away from the court. Indeed, the basis of the non-party costs order that would be sought by the Petitioners would be that the 60% Shareholders were truly responsible for the costs incurred by the Petitioners. It seems to me that that very principle points to a matter that makes it desirable to add them as parties at this stage so that all the matters in dispute in the proceedings can be resolved now.

7. A further peculiarity is that the court would be being asked to rule on the interpretation of a contract having been addressed only by the Petitioners and the Company, without the 60% Shareholders being joined as parties. The 60% Shareholders would not be bound by any finding the court could make as to the appropriate construction of that contract. This would lead to confusion, the risk of inconsistent judgments, unnecessary costs and, in the event the Petition is unsuccessful but litigation somehow continued for these parties, a complete duplication of time and effort. That seems to me to be undesirable and points to the desirability of joining the 60% Shareholders to this litigation.

8. As I mentioned earlier, I have been referred to the case of *Duneau v Klimt*, in which, in particular, at paragraph 226 HHJ Mark Cawson QC (sitting as a deputy judge) said this:

> "In seeking to reconcile the various authorities identified above, it is necessary, in my judgment, to focus upon why loss of substratum ought to provide a basis for a contributory to seek to wind up a company. As to this, it is important to bear firmly in mind Lord Parker's observation in *Cotham v Brougham* (supra) at 520 that the question is fundamentally one of equity between the company and its shareholders."

When Ms Heal read me that passage during the course of her submissions I asked her whether, when the judge was referring to the shareholders of the company, it did not mean all of the shareholders. He did not say it is a question of equity between the company and the petitioning shareholder. It seems to me that, on the proper reading of that paragraph of the decision, all the shareholders in the company have an interest in whether or not its business is brought to an end; all the shareholders in the company have an interest in whether their association should continue; and the question of equity between the company and the shareholders is one that in an appropriate case may involve all the shareholders being joined as parties so the court has all the relevant parties before it to make a decision one way or the other as to whether the company's substratum has gone.

9. There is an ad hominem point in *Duneau v Klimt* that although the company was a party to litigation, there were two other respondents, including a 48 per cent shareholder who was the only represented party opposing the making of the winding-up order sought by the petitioner. That is an entirely familiar battleline in cases of this sort. In truth, a just and equitable winding-up petition is not a dispute between the petitioner and the company, it is a dispute between the shareholders about whether their association should continue. It is a dispute, as in the present case, that looks at what the basis of that association was, whether it has been irretrievably brought to an end, and whether the court should require these parties to remain as shareholders together even if they cannot agree about what the company ought to do. It is,

in the present case at least, much closer to a shareholders' dispute than hostile litigation between the company and the petitioners.

10. As well as considering whether or not it is desirable to join the 60% Shareholders as respondents, it seems to me also to be important to consider the fairness of these proceedings and the overriding objective of dealing with cases justly and at proportionate cost.

11. As to fairness, it seems to me most important that the real persons with an interest in the outcome of the litigation are joined as parties from as early as possible so that they can advance their case on an entirely standard basis as parties, taking the risk if they lose but seeking the benefits if they win.

12. As to dealing with matters at proportionate cost, we have not yet considered the appropriate directions for this case, but it does not seem to me to be a real fear that there will be unnecessary costs if the proper parties are made the effective respondents at this early stage. It seems to me that the approach of first pursuing the Company and then seeking to deal with matters by way of a non-party costs order at the end is likely to increase the costs, is likely to create procedural headaches and may well lead to satellite litigation in relation to issues I identified during the course of argument about the proper incidence of privilege and who can have disclosure of what documents in litigation where not all of the parties seeking legal advice are joined as parties to the litigation.

13. The Company, for its part, sees the good sense in the petition being contested by the 60% Shareholders. Of course, the Company is controlled by them, but I take its position on board, for what it is worth.

14. For all those reasons, I consider it is desirable to join the 60% Shareholders as respondents to this petition. It seems to me that if the case proceeds with those parties it will be capable of being dealt with in a more just fashion, at more proportionate cost and with all the matters in

dispute being capable of resolution in a way that is wholly desirable. I will accede to the application of the 60% Shareholders.

(After further submissions)

15. Before I consider questions of costs, I have to make sure I have dealt with all of the substantive matters that are before me at this hearing. One of those is an application made on 24 November 2023 by the Petitioners to set aside the order of Chief ICC Judge Briggs dated 13 November 2023 and to transfer the matter to the Business List. It is right, as the Petitioners have identified, that the Chief ICC Judge's order was made on the basis that this was an unfair prejudice petition, and it reflects the standard directions given in unfair prejudice petitions. In particular, and inappropriate for this present context, it requires the "respondents other than the company" to file and serve points of defence. Given that, at the time the order was made, the only respondent was the company, it was clear that something had gone wrong in framing those directions without reference to the actual parties to the dispute.

16. It was, in my view, necessary for this order to be amended but, having acceded to the joinder application, it is clear that the way in which this order needed to be amended was by adding in the 60% Shareholders as respondents who could then participate in the proceedings. This would then allow this order to make sense. Indeed, it has been possible to frame the appropriate case management directions for this case simply by way of amendment of this order, having made minor further amendments in consequence of the joinder application. Accordingly, although the order may not have been appropriate at the start, it is essentially appropriate now, and it seems to me that I should not set it aside. Reflecting on the position as we now find it, with the additional respondents joined, it can simply be varied and it now forms a suitable framework for continued progress of this matter through the court process. I therefore do not set aside the order of Chief ICC Judge Briggs. I have varied it.

17. I am also asked to transfer this matter to the Business List. The basis for that application is that underlying this dispute are said to be issues of intellectual property law concerning the interests in the underlying intellectual property created by Mr Kurvitz and pursued by the Company. The dangers of transferring this now to the Business List will be that it will be case-managed by a Master and there would be no guarantee, as Ms Heal acknowledges, that a specialist intellectual property judge will be found even within the Business List, because although there may be intellectual property aspects to this case, it is not an intellectual property claim. It is a just and equitable winding-up petition. It seems to me the focus is much more likely to require the specialist knowledge of a company law expert judge, and it follows that this is best case-managed and in all likelihood best heard by somebody with that background.

18. I will not transfer it to the Business List now, but by way of a fallback submission, the Petitioners have asked me to stand that application over to the CCMC so that the question of the appropriate list in which this case should proceed can be reconsidered at that point if by then the pleadings have enabled the focus of the dispute on intellectual property matters to become more apparent.

19. It seems to me that it would be most unusual to have a just and equitable winding-up petition tried other than in the Insolvency and Companies List. That is the appropriate list for proceedings of this nature. It may be that it is necessary for a judge to have some familiarity with intellectual property matters, but ultimately the question is whether or not this company should be wound up, not anything to do with intellectual property. The fundamental question for the court is the insolvency question, a company law question.

20. Looking at it at this stage, where only one side has set out its case in a pleading, it does seem to me to be appropriate to leave matters where they stand and it is not an appropriate time now to transfer the matter, nor does it seem to me to be necessary to avoid grasping the nettle of the application by adjourning it to the forthcoming CCMC. I do, however, note that it has been

raised by the Petitioners at this point and that it is important, where the allocation of court resources between appropriate lists is concerned, that the parties raise the point as early as possible.

21. I do not at this stage think it is appropriate to make a transfer but I am happy to record that the possibility has been raised so that, should the dispute blossom into a pure IP dispute with merely a background of a just and equitable winding-up petition, then the Petitioners will be able to say on any future transfer application in those different circumstances that that they took the point at an earlier stage and cannot be criticised for failing to do so.

22. For those reasons I will dismiss the 24 November 2023 application.

(After further submissions)

23. Having made my decision on the joinder application and on the 24 November 2023 application, I now turn to the question of costs. The parties' positions are that the 60% Shareholders seek their costs on the indemnity basis for the joinder application; they seek their costs of the 24 November application on the standard basis. The Petitioners, for their part, accept they are liable to pay the costs of the joinder application on the standard basis but say that the 24 November application costs should be costs in the case.

24. The basis for ordering indemnity costs, as is well known, is that there are circumstances, in particular in this case unreasonable conduct, which takes the case outside of the norm. While it is unusual for there to be circumstances outside of the norm, it is not uncommon. A party that loses a perfectly valid argument is not thereby going outside the norm; however, what the 60% Shareholders say is that the Petitioners have exhibited an unreasonable position in that they should have made their position clear, they could have done so at an earlier stage than they did, and once they saw the writing on the wall they should have conceded the joinder application.

25. I have been taken through the correspondence. I will not refer to it in detail now in the interests of time, but I have reviewed the letters of 22 November, 28 November, 30 November, 4 December, 6 December and then Mr Leverton's witness statement, which was filed in support of the joinder application. What this demonstrates to me is that the Petitioners did not indicate one way or the other whether they would oppose the application for joinder. They invited an application to be made against them and that application was made. Having seen that application, they took the view that they should oppose it, and they indicated their opposition when they filed their skeleton argument for this hearing.

26. This approach has been described by Ms Heal as being not entirely unreasonable, a phrase she used more than once to describe the approach. It is correct that there would have been more reasonable ways for the Petitioners to respond to this application. However, it seems to me that their position is not entirely unarguable. It was an argument they were entitled to run, albeit they lost, but it is not so unreasonable or so hopeless that it takes this case outside of the norm. It would have been better if they had agreed, but that is a point which is made with hindsight, having seen the way my earlier judgment went. It does not seem to me that this is a case of such unusual character to take it outside the norm. I have particular regard to the relatively quick timeframe in which all of this took place. Although the Petitioners might have changed their position at an earlier stage, that would have been only a matter of three or four weeks ago. This is not a situation where an entrenched position has been adopted from the very beginning and an increasingly unreasonable position has been adopted in the face of substantial opposition.

27. Accordingly, I will order that the Petitioners pay the 60% Shareholders' costs of the joinder application on the standard basis.

28. I turn then to the 24 November application costs. The 13 November 2023 order was, at least at the time, made on an erroneous basis in referring to respondents who were not in fact joined at that stage, albeit that prophetically it anticipated the effect of the joinder application and it

reflects the directions which I have now given for the further progress of the case. It seems to me that the parties were bound to have to come here to set a proper timetable for directions, and notwithstanding that the 24 November application goes hand in hand with the Petitioners' refusal to accept the joinder application, the case management element of today would have needed to have taken place in any event, and in all likelihood justifies the time in court.

29. That deals with the aspect of the 24 November application which sought to set aside the 13 November 2023 order.

30. The transfer application has barely detained the court at all and I do not consider that it merits separate treatment. Accordingly, I will order the costs of the 24 November application as costs in the case, so I will not need to have regard to the costs schedule in relation to that application on this occasion.

31. I do then have to decide whether or not to order a summary assessment of the joinder application costs. I have had regard to the submissions made by the Petitioners, in particular drawing my attention to certain figures which appear to be duplicated and to the possibility that other work outside the joinder application has somehow been subsumed within this costs schedule.

32. As to the figures, as Mr Thompson said, what has happened is that there has been a division of labour between the two costs schedule so the same figure may appear in both. That is, in my judgment, an acceptable way to prepare a schedule for a summary assessment. As to the costs outside the joinder application, it seems to me there is in fact no basis for that challenge, not least because, looking at the signed statement at the end of the costs schedule, Ms Heal does not challenge the propriety of that signature at the bottom and the statement above it. In the absence of a challenge along those lines or any reasons to doubt the basis on which the schedule has been prepared, I do not think that there is a danger of permitting costs to be

recovered which ought not properly to be recovered at this stage. I will therefore summarily assess this costs schedule.

(After further submissions)

33. I now turn to the summary assessment of a statement of costs for the joinder application and I do so on the standard basis, reminding myself that I have to consider reasonableness and proportionality, resolving any doubts about those elements in favour of the paying party.

34. The only point of substance taken by Ms Heal on this costs schedule is in relation to counsel's fees, where her broad submission is that, rather than having leading counsel do the hearing, it should have been done entirely by junior counsel who is instructed on the case and who has indeed billed for time which has been included in the costs schedule.

35. On both sides in this case there are leading and junior counsel, and the approach taken by the petitioners was to send their junior counsel to argue the application, whereas the alternative approach was taken by 60% Shareholders who have had both counsel working on the application but have sent Mr Thompson KC to do the hearing. The basis on which they justify that as being reasonable and proportionate is that without this application they would have been shut out entirely. They say that it is an important matter for them, and without succeeding on it, they would have no voice in these proceedings. They claim the Petitioners cannot have it both ways, saying it is reasonable to oppose the joinder application but then not reasonable for the 60% Shareholders to deploy heavy firepower to seek to overcome that opposition. It has been stressed that the involvement of Mr Thompson's junior has reduced the number of hours that would be required by Mr Thompson at silk rates, and had there been no junior at all the figure could have been even higher.

36. It seems to me that this is a relatively marginal case. It is, in my judgment, an important matter, albeit not a heavy application of the sort that leading counsel would without question be

required to attend for. Accordingly, I propose to reduce the fees in the costs schedule to reflect an element of doubt as to the reasonableness and proportionality of leading counsel appearing in the Applications List before an ICC Judge. The reduction before VAT would be to reduce the figure from £34,383 to £32,383. I will assess the costs in that sum, with VAT included on top. That is the only alteration to the claimed costs on this summary assessment.

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Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge