Neutral Citation No. [2008] NICh 12 | *Ref:* **CAM7186**

Judgment: approved by the Court for handing down | *Delivered:* **23/7/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

BETWEEN:

DANIEL McATEER

Plaintiff;

-and-

JOHN JOSEPH MULLAN
AND
MARIA MULLAN

Defendants.

_____

CAMPBELL LJ

[1] In these proceedings Mr McAteer, a certified chartered accountant, seeks specific performance of an agreement entered into on 2 August 2004 with Mr and Mrs Mullan for the purchase by Mr McAteer of their shareholdings in JJ Mullan Limited together with a declaration that he is the holder of one half of the total of the shares issued by the company and in addition a declaration that he is a director of the company.

[2] At the commencement of the retrial of the action Mr and Mrs Mullan, who had served a defence in the form of a denial that there was any agreement and a counterclaim in negligence, did not appear and were not represented. Mr McAteer appeared on his own behalf.

The background facts

[3] JJ Mullan Limited was incorporated on 31 July 1997 with Mr and Mrs Mullan as directors of the company and each holding one share. The company traded from premises known as Mullan's Bar that it owned in Little

James Street, Londonderry. When it experienced financial difficulties money was advanced by way of a loan from two employees John Crossan, a chef and Patrick McGilloway who was the bar manager. The company experienced further financial difficulties during the year 2004 and as a result the bar was placed on the market for sale. Mr and Mrs Mullan, as directors, were advised at that time by their accountant to consult a firm of insolvency practitioners.

[4] When Mr Crossan and Mr McGilloway became aware that the bar was on the market and heard that an offer had been received in the region of £1.4m they became anxious that at this price with the amount due to other creditors they would receive nothing in return for their loans. On 17 July 2004 they entered into an agreement with the company and Mrs Mullan, who was the licensee, for the purchase of the bar for a sum of £1.8m. It was stated in the agreement that they had advanced £200,000 to the company making the balance due from them £1.6m. They were to be allowed 90 days from 16 July 2004 to complete and should they fail to do so the premises could be sold to any other purchaser but in this event the sum of £200,000 would be a first call on any purchase money. During the 90 day period the bar was leased to Mr Crossan and Mr McGilloway at a rent of £2,000 per week which was to be paid to the firm of accountants acting on behalf of the company.

[5] According to Mr McAteer he heard that the bar was on the market and contacted Mr Mullan and expressed an interest in buying it. They met on a number of occasions and Mr McAteer discovered that Mr Mullan and his wife owned the company and that they had signed an agreement with Mr Crossan and Mr McGilloway which would raise £1.8m for the creditors of the company. According to Mr McAteer he was told by Mr Mullan that Mr McGilloway and Mr Crossan were prepared to "stand aside" from their agreement if a higher offer was received.

[6] Mr McAteer said that he understood from Mr Mullan that the creditors, including Mr McGilloway and Mr Crossan, amounted to £1,784,000. Mr Mullan told him that there were other debts that he could not recollect from memory and that he and his family had introduced £53,000 into the company. Mr McAteer indicated to Mr Mullan that he was interested in purchasing the company with funds to be raised from various sources including Diageo. He arranged a meeting with Ms. Ann Quinn of Diageo in Belfast which was attended by Mr Mullan when the state of the account of JJ Mullan Limited with the Diageo subsidiary Guinness was discussed. Mr McAteer then held a private meeting, in the absence of Mr Mullan, with Ms Quinn to discuss the financing of the purchase of JJ Mullan Limited.

[7] Mr McAteer said that on the following day he discussed the purchase price with Mr Mullan who said that if he and his wife got £200,000 and the debts of £1.8m were paid they would be satisfied. Mr McAteer told Mr Mullan at this meeting that he would be interested in proceeding by way of

share purchase as this would incur a lower rate of stamp duty and the transaction could be completed sooner.

[8] On Monday 2 August 2004 Mr McAteer and Mr Mullan met and agreed that payment would be made by payment of a deposit of 10% on a certificate from the auditors of the amount of the liabilities of the company with the balance due four months after the date on which the deposit was paid. As the creditors were pressing Mr Mullan asked Mr McAteer to deal with them and he agreed to do so as he was purchasing the company and would become a director. Mr McAteer then agreed to meet Mr Mullan that evening when the agreement would be signed.

[9] At around 9.45 pm Mr McAteer arrived at the Mullans' house and he said that he brought with him:

(i) The final version of the Share Sale Agreement.
(ii) Stock Transfer Forms to be signed by Mr and Mrs Mullan.
(iii) Form 296 for the Appointment of a Director.

He said that he brought in addition two copies of each document and that he explained to the Mullans that he would pay them £200,000 for their shares on the assumption that the creditors did not exceed £1,750,000. Any money owed to the Mullans and members of their family by the company would be repaid and if they owed any money to the company they would have to repay it. It was agreed that Mr Mullan and Mr McAteer would meet with Messrs McGilloway and Crossan on the following day when they would "step aside" from their earlier agreement. There was some discussion about Mr McAteer becoming a director of the company immediately and Mr McAteer pointed out that this would require a form of consent to be witnessed by one of the current directors. Mr McAteer suggested that a Mr Eamon Lynch be invited to join them to act as the witness to the execution of the agreement.

[10] Mr Lynch was summoned by telephone and he came to the Mullans' house. He gave evidence that he witnessed the execution of the agreement by Mr and Mrs Mullan and by Mr McAteer and that in his presence a change of director pro forma was signed by Mr McAteer and Mr and Mrs Mullan each signed a stock transfer form as transferor of a holding of £1 share for a consideration of £100,000. The name of the transferee on these forms was left blank. According to Mr McAteer Mr Lynch inquired before leaving if it could now be made public that the company was being purchased by Mr McAteer and it was agreed that this would be in order. Mr McAteer said that he went on to discuss with the Mullans aspects of the business and towards the end of their conversation Mr Crossan telephoned and Mr Mullan spoke to him. Mr McAteer gathered from what he overheard of the conversation that Mr Crossan had been told, presumably through Mr Lynch, about the sale and was displeased that a deal had been done.

[11] Mr John Crossan gave evidence that he and Mr McGilloway met Mr McAteer on 3 August 2004 and although it was not provided for in the agreement that they had entered into with JJ Mullan Limited and Mrs Mullan on 17 July 2004 there was an understanding with the Mullans that they would "step aside" if during the 90 day period an increased offer was made for the business. At a meeting with Mr McAteer he told them that he was now a director and shareholder in the company and they agreed not to stand in the way of the purchase of the business by him on the understanding that they would receive £200,000. They agreed also to continue to rent the bar at £2,000 per week and did so until they were ordered by the court on 21 October 2004, on the application of the liquidator, to vacate the premises.

[12] On 13 August 2004 HM Customs and Excise presented a petition for the winding up of JJ Mullan Limited as it had neglected to pay the sum due on a statutory demand and was therefore deemed to be unable to pay its debts. The hearing of the petition was due to take place on 30 September 2004 and was adjourned pending a meeting of the creditors. This was to take place on 29 September 2004 when a creditors' voluntary winding up was to be proposed with Mr David Lovesy of McCambridge Duffy, Accountants nominated as liquidator.

[13] The meeting of the creditors took place and the resolution was passed however, the creditors' voluntary winding up of the company was set aside on 29 June 2005 by order of Girvan J. On 30 June 2005 an order was made for the winding up the company by the court on the original petition of HM Customs and Excise of 13 August 2004. By virtue of his office the Official Receiver became the liquidator of the company and on the same date, on his application, the Department appointed Mr David Lovesy to act as liquidator in his place.

[14] The agreement which was produced to the court by Mr McAteer provides for the sale by Mr and Mrs Mullan, as beneficial owners, and the purchase by Mr McAteer of the two shares in JJ Mullan Limited registered in their names. The consideration is stated to be £200,000. The agreement provides that the schedule of payment is to be by mutual agreement. It is a condition precedent that the obligations of the parties under the agreement do not arise until the directors have passed a resolution to rescind any agreements relating to the disposal of the company's assets to any third parties.

[15] Mr McAteer explained in the course of his evidence that he met Mr Mullan on 10 August 2004 and he told him that following discussions with his family he now wished to remain involved in the business assuming responsibility for drink sales and marketing while Mr McAteer looked after the commercial and financial aspects. In return for this arrangement two £1

ordinary shares in the company would be allotted to Mr McAteer at par with Mr McAteer reserving the right to complete the agreement of 2 August 2004.

[16] At the conclusion of the evidence Mr McAteer was invited to bring to the attention of the court any relevant binding authority or other matter in point whether for or against his contention. Before arriving at a decision I considered that other interested parties ought to be given an opportunity to apply to be heard. A period of 7 days was allowed for interested parties to advise the court if they wished to be heard as to why the orders sought should not be made. Within this period the solicitors acting for the liquidator gave notice that their client had legitimate reasons to object to an order declaring that Mr McAteer was a director or deemed to have been allotted two ordinary shares of £1 each.

[17] The matter was re-listed on 28 November 2007 and Mr McEwen, of counsel, appeared on the instructions of the liquidator and advanced the following reasons why his client should be heard;

i. By virtue of Article 109 (2) of the Insolvency (NI) Order 1989 the date of the insolvency in a winding up by the court relates back to the presentation of the petition on 13 August 2004.

ii. Article 107 of the 1989 Order provides that in a winding up by the High Court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of a winding up is, unless the Court otherwise orders, void.

iii. Article 32 (2) of the Companies (NI) Order 1986 provides that, (other than subscribers of the memorandum) "Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."

iv. Clause 9 of the Articles of Association of the company gives the directors an absolute discretion to decline to register any transfer of any share. They did not register the transfer to the plaintiff and the liquidator, who is now in their place, is not prepared to do so.

v. Should an order for specific performance be made the liquidator would then be obliged to register Mr McAteer as a shareholder.

[18] I was satisfied that the liquidator had made a sufficient case to be made a party so as to ensure that all matters in dispute were effectually and completely determined and adjudicated upon.

[19] Mr McEwan submitted that to establish that he was a shareholder in the company Mr McAteer had to prove that there was an agreement for the sale of shares to him and that his name was entered in the register of members in accordance with article 32(2) of the Companies (NI) Order 1986. Counsel said that the authenticity of the agreement produced to the court was questionable as a different version the agreement had been exhibited by Mr McAteer to an affidavit sworn by him in the proceedings leading to the order of Girvan J in which he set aside the creditors' voluntary winding up. The share sale agreement which is dated 2 August 2004 and exhibited to this affidavit has two versions of the first page. The main difference between them being that in one the schedule of payments of £200,000 is "Ten per cent on delivery of auditors' confirmation of statement of assets and liabilities and the disclosure letter from the Company solicitor; Balance of purchase monies four months after the deposit has been paid" and in the other copy "The schedule of payment will be by mutual agreement." The signatures of the parties and of Mr Lynch appear on the last page.

[20] In those proceedings before Girvan J. Mr Lovesy, as liquidator, filed an affidavit in response to the affidavit of Mr McAteer. In this he refers to Mr Mullan as having informed him that another version of the share sale agreement was presented to him and to his wife for their signatures. This version, which is exhibited to Mr Lovesy's, affidavit has 'Final' in handwriting on the cover and the layout of the first page is different to the other versions. This copy though dated 2 August 2004 has not been executed by the parties.

[21] Mr Lovesy referred also to an affidavit sworn by Mr Mullan on 30 May 2007, in which he accepted that he and his wife executed an agreement with McAteer and exhibited a copy of it. Section 3 of this copy contains a condition precedent in these terms;

> "Notwithstanding any other provision of this Agreement, the obligation of the parties hereunder shall not arise until the Board of Directors of the Company shall have passed a board resolution to rescind any agreements relating to the disposal of the company's assets."

[22] In an earlier affidavit, sworn by Mr Mullan on 19 October 2004, he accepted that Mr McAteer came to his house on 2 August 2004 and talked to him and to his wife. He said he produced some papers and asked them to sign and then phoned for a witness to come to the house. The witness turned up almost immediately. On being shown the share sale agreement and stock transfer form Mr Mullan agreed that it appeared to bear his signature though the stock transfer form was not filled in and he was asked to sign a single page of the agreement. Before he signed he recollected his wife asking

whether they should get legal advice before doing so and Mr McAteer telling them that it was not necessary. Mr Mullan continues that Mr McAteer asked to be appointed as a director but they refused his request and Mr Mullan said that he did not recall signing the Form 296 or having its effect explained to him. He did accept that it appeared to bear his signature. He added that if he did sign the form he saw only one side of it and that he did not accept that Mr McAteer became either a director or shareholder of the company.

[23] Mr Mullan said in his affidavit that on the following day after the meeting at his house he went to Mr McAteer's office and told him that it was not right what he had done and that he had not paid them for their shares in the company. He did not see Mr McAteer again for about a month. On 1 October 2004 Mr McAteer called at his house and asked him to sign another share sale agreement which was marked "Final". He asked him to sign other documents which were not explained to him and he thought that these could be the share certificate, the form 296 and the allotment form. According to Mr Mullan he was at such low ebb at that time that he would have been prepared to sign anything as he thought that as he had now lost the company he would lose everything.

[24] Counsel referred to a letter dated 8 September 2004 from Harrisons, solicitors, to Mr Brendan Kearney solicitor to the company in which they refer to their client as "G & A Barrs Limited". In this letter they state that they have been instructed on behalf of their client through Mr McAteer in relation to the proposed purchase of the assets of J J Mullan. The writer goes on to state that this relates to a previous agreement between Messrs McGilloway and Crossan "who either both or one of whom will be directors of the above-named company". The letter goes on to say that they understand that the position is that the purchase price for the premises and business, stock, goodwill and licence will be the sum of £1.8m with a completion date to be agreed as between the parties as soon as possible. In this letter the parties referred to are not the same as those in the agreement witnessed by Mr Lynch on 2 August 2004 and the purchase price is £1.8m.

[25] The liquidator's challenge to the validity of the agreement was based on the number of versions that exist together with the case advanced in earlier proceedings by the Mullans that they had not understood what they were signing.

[26] With at least three versions of the agreement in existence the liquidator questioned whether any one version is capable of being specifically enforced. He relied on *Pigot's case* (1614) 11 Co Rep 26b which established that if a promisee intentionally alters a written agreement, in a material respect, after it has been executed without his consent the promisor is discharged. Counsel referred also to the duty of candour (of which Mr McAteer had been advised at the earlier hearing) and his failure to bring the various versions of

the agreement and affidavits that did not accord with his case to the attention of the court. As there is reason to doubt the authenticity of the agreement relied upon it was submitted that the court should decline to exercise its discretion by making a declaration.

[27] Mr McAteer, in his response on this issue, said that there were numerous versions of the agreement in draft and he relied upon the copy that was executed by the parties and acknowledged by Mr Mullan in his affidavit of 30 May 2007.

[28] A further issue raised by the liquidator was whether the condition precedent contained in the agreement relied upon has been fulfilled. Messrs McGilloway and Crossan gave evidence that they had agreed to "step aside" from the agreement on 3 August 2004 yet they served notice to complete the purchase on 14 October 2004 and issued a writ of summons on 26 October 2004 seeking an order of specific performance of the agreement of 17 July 2004 to purchase the premises at 13 Little James Street. The liquidator said that these proceedings were not withdrawn until 28 April 2006. There is nothing in the company's records to indicate that the directors convened a meeting to rescind the agreement to dispose of the company's assets to third parties. I find it difficult to reconcile the evidence of Messrs McGilloway and Crossan with their actions. They were not subject to cross-examination when they gave evidence at the first hearing and have not had an opportunity to offer an explanation. As it has not proved necessary to resolve the issue in order to decide the case I do not intend to return to it.

[29] Assuming that there was an agreement entered into for the sale of the Mullans' shareholding and the condition precedent was fulfilled Mr McAteer cannot show that his name was entered on the register of members prior to 13 August 2004 and it was submitted on behalf of the liquidator that he therefore is not entitled to a declaration that he is a shareholder in the company.

[30] Article 107 of the Insolvency (NI) Order 1989 states that in a winding up by the Court any disposition of shares or alteration in the status of the company's members made after the commencement of the winding up is void unless the Court otherwise orders. The winding up is deemed by article 109(2) of the Insolvency Order to have commenced on the presentation of the petition on 13 August 2004 and no application has been made from the year 2004 to date under article 107. In addition article 9 in the Articles of Association of the company provides;

> "The directors may, in their absolute discretion and without assigning any reason therefore, decline to register any transfer of any share, whether or not it is a fully paid share."

[31] It was argued that on the presentation of the petition on 13 August 2004 the duties of the directors of the company came to an end and the management duties passed to the liquidator. It is now for the liquidator to exercise the directors' discretion under article 9 and, in his opinion, it would not be to the financial benefit of the creditors to register Mr McAteer since the bar, which was the principal asset of the company, has been sold. With various copies of the share sale agreement in existence it was submitted on his behalf that he would in any event be entitled to decline to register Mr McAteer as a shareholder.

[32] The first issue to be decided is whether Mr McAteer was the holder of two ordinary shares in JJ Mullan Limited prior to 13 August 2004 when the petition for the winding up of the company was presented. In the absence of any satisfactory evidence from the Mullans to the contrary I accept that they entered into the agreement with Mr McAteer on 2 August 2004, which was witnessed by Mr Lynch, for the purchase by him of the two shares that they owned in JJ Mullan Limited for the sum of £200,000. It was part of this agreement that if the liabilities of the company exceeded £1,750,000 this amount was to be deducted from the share price of £200,000. It is not in dispute that no part of the purchase price has been paid and Mr McAteer relies on the share transfer forms signed by Mr and Mrs Mullan to support his claim to be the holder of two shares previously held by them. To become a member and shareholder in the company Mr McAteer had to be entered on the register and to date he has not been registered. Mr McAteer may have had a claim in damages against the Mullans once it became a transfer for value of shares if they were shown to have breached an implied obligation not to prevent or delay the registration of the transfer (*Hooper v Herts* [1906] 1 Ch 549) but there is no such obligation on the liquidator who has now replaced them.

[33] Although the liquidator does not have to assign any reason for declining to register a transfer in the exercise of his absolute discretion under article 9 of the Articles of Association he has done so. I am satisfied that he believes that he is acting in good faith in the interests of the company and of the creditors and I am therefore not prepared to interfere with the exercise of his discretion by compelling him to do so. I would have declined to exercise the powers under article 107 of the Insolvency Order if an application had been made at this late stage for an order declaring that the transfer of shares that was incomplete on the 13 August 2004 was valid.

[34] The same considerations apply to the allotment of two shares on 10 August 2004 which was not put on the register. For the same reason as with the transfer which was not registered I hold that Mr McAteer is not a shareholder in the company. I do not find it necessary to consider the further issue concerning article 6 of the Articles of Association and the expiry of the

time limitation placed on the directors for the allotment of shares. It is arguable that article 90(10) of the Companies (NI) Order 1986 may have saved the validity of the allotment.

[35] The last issue to be decided concerns the application for a declaration that Mr McAteer is a director of the company. It was accepted by the liquidator that under the articles of the company a director does not have to be a shareholder. It appears from a statement made by the Official Receiver that a search at the Companies Registry revealed that a form 296 was submitted to the Registry on 4 October 2004 showing Daniel McAteer as a director of the company from 2 August 2004 although Mr Mullan denied in an affidavit sworn on 19 October 2004 that he and his wife had agreed to him becoming a director, I have found so many contradictions in the statements and affidavits of Mr Mullan that I regard his evidence on this issue to be unreliable.

[36] Assuming that Mr McAteer was appointed a director of the company on 2 August 2004 his appointment was determined by operation of the winding up order which made the board of directors *functus officio* – see *Measure Brothers Limited v Measures* [1910] 2Ch 248. In my view the argument advanced by Mr McAteer that a distinction is to be drawn between the powers of directors which come to an end and their duties which continue must be rejected. As Buckley LJ said in *Measures*, at page 256, by operation of the winding-up order the office itself comes to an end. It would be open to the directors, on giving security for costs to appeal against the making of a winding-up order (*Re Desmond Fuel Co.* (1879) 13 Ch D 400 at 404,405) but the time for appealing the order in the present case has long since elapsed and there would be nothing to be gained now by having been a director when the order was made.

[37] For the reasons that I have stated I hold that Mr McAteer is not entitled to a declaration that he is a shareholder in JJ Mullan Limited. If Mr McAteer was at any time appointed a director of the company he ceased to hold office at the latest when the winding- up order was made, if not when the petition was presented. He is therefore not entitled to the declaration that he seeks namely that he is a director of the company. The application for specific performance of the agreement of 2 August 2004 was not pursued which was a realistic approach for Mr McAteer to have adopted in view of the elapse of time and the intervening event of the winding- up of the company.