Case No: BL-2019-000139

NEUTRAL CITATION NUMBER: [2019] EWHC 424 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)

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

Date: 21 February 2019

Before:

Mr Justice Snowden

- -

Between :

1) ALASTAIR PAUL BEVERIDGE

(2) STUART CHARLES EDWARD MACKELLAR

Claimants

-and-

(1) DEREK QUINLAN

(2) GLENN MAUD

(3) CRUZ HOLDINGS LIMITED

Defendants

Jonathan Nash QC and **Stephen Robins** (instructed by **Michelmores LLP**) for the **Claimants**

Joseph Wigley and **Edward Crossley** (instructed by **Joseph Hage Aaronson LLP**) for the **Defendants**

Hearing dates: 20-21 February 2019

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APPROVED JUDGMENT

MR JUSTICE SNOWDEN Thursday, 21st February 2019

(14.09pm)

Ruling by MR JUSTICE SNOWDEN

1. This is the expedited trial of a part 8 claim brought by Alastair Paul Beveridge and Stuart Charles Edward Mackellar, (the "Receivers"), against Derek Quinlan, Glenn Maud and Cruz Holdings Limited ("Cruz") (together, the "Defendants").

2. In summary, the Receivers seek declaratory and mandatory injunctive relief in order to enable them to collect certain monies which are subject to security arrangements created by the Defendants.

Background

3. On 12 September 2008 Ramblas Investments BV ("Ramblas"), a company incorporated in the Netherlands, entered into a facility agreement (the "Junior Loan Agreement") with Royal Bank of Scotland plc ("RBS") for a loan facility in the sum of €200 million (the "Junior Loan"). In addition, on the same day, Ramblas entered into a fee agreement with RBS (the "Fee Agreement").

4. As security for its obligations in respect of the Junior Loan and the Fee Agreement, Ramblas created certain security in favour of RBS (the "Ramblas Security").

5. Mr Quinlan and Mr Maud are shareholders in Ramblas. Cruz is a company connected with Mr Maud.

6. On 12 September 2008, each of the Defendants entered into a loan agreement with Ramblas (the "Shareholder Loans"). The amounts currently due and owing from the Defendants in respect of the Shareholder Loans total €148.5 million euros, being €36,750,000 due from Mr. Maud, €37,500,000 due from Cruz , and €74,250,000 due from Mr. Quinlan.

7. At the same time, the Defendants entered into a subordination agreement with RBS (the "Subordination Agreement"), by which they agreed that their claims against Ramblas in respect of the Shareholder Loans would rank below the claims by RBS against Ramblas in respect of the Junior Loan and the Fee Agreement.

8. In the Subordination Agreement, the Defendants were defined as the "Subordinated Creditors"; and the "Subordinated Debt" consisted of the liabilities payable or owing by Ramblas to the Defendants. The Junior Loan was defined as the "Senior Debt".

9. Clause 2(a) of the Subordination Agreement provided for the Subordinated Debt (i.e. the Shareholder Loans) to be subordinate in right of payment to the Senior Debt (i.e. the Junior Loan). Clause 2(b) provided that payment of any amount of the Subordinated Debt was conditional upon Ramblas having irrevocably paid in full all of the Senior Debt.

10. The Subordination Agreement was governed by English law and subject to the exclusive jurisdiction of the English courts.

11. On 12 September 2008, the Defendants created third party security in favour of RBS to secure the repayment of the Junior Loan by Ramblas (the "Subordinated Creditors' Security Agreement" or "SCSA"). In summary of the key provisions:

(1) The term "Secured Liabilities" was defined to include the Junior Loan.

(2) By clause 1.2(a) of the SCSA, the SCSA incorporated by reference to definitions contained in the Junior Loan Agreement. In clause 1.1 of the Junior Loan Agreement the term "Subordinated Debt" was to have the meaning given to it in the Subordination Agreement. As a result, the term "Subordinated Debt" included the Shareholder Loans owed by Ramblas to each of the Defendants.

(3) By clause 2.1(a)(iii), the Defendants agreed that the security created by the SCSA was for the payment and satisfaction of the Secured Liabilities.

(4) By clause 2.2, the Defendants assigned their rights in respect of the Subordinated Debt to RBS absolutely, subject to a proviso for reassignment on redemption.

12. As a result, in accordance with the definition in clause 1.1 of the SCSA, the rights of the Defendants against Ramblas in respect of the Shareholder Loans are "Security Assets" as defined.

13. Clause 8.1 of the SCSA entitled RBS to appoint a receiver of the Security Assets in certain circumstances. In conventional form, the powers of any such receiver expressly included:

(1) The power to give a valid receipt for any monies and to execute any assurance or thing which may be proper or desirable for realising any security asset.

(2) The power to:

(i) do all other acts and things which the Receiver might consider desirable or necessary for realising any Security Asset.

(ii) exercise in relation to any Security Asset all the powers, authorities and things which the Receiver would be capable of exercising if he were the absolute beneficial owner of the Security Asset and;

(iii) use the name of any of the Defendants for any of those purposes.

14. Importantly for present purposes, clause 13 of the SCSA then provided:

> "Each Chargor must, at its own expense, take whatever action the Facility Agent or a Receiver may require for:
>
> (a) creating, perfecting or protecting any security intended to be created by this Deed; or

(b) facilitating the realisation of any Security Asset, or the exercise of any right, power or discretion exercisable by the Facility Agent or any Receiver or any of its delegates or subdelegates in respect of any Security Asset.

This includes:

(i) the execution of any transfer, conveyance, assignment or assurance of any property, whether to the Facility Agent or to its nominee; or

(ii) the giving of any notice, order or direction or the making of any registration which, in any such case, the Facility Agent may think expedient."

15. The SCSA is governed by English law and the English courts have exclusive jurisdiction to settle any dispute in relation to it.

16. On 17 January 2011, RBS appointed the Receivers, pursuant to the SCSA, to be the receivers of the Defendants' rights in respect of the shareholder loans.

17. Also in 2011, RBS assigned its rights in respect of the Junior Loan Agreement, the Fee Agreement, the Subordination Agreement and the SCSA to Edgeworth Capital (Luxembourg) SARL ("Edgeworth") and Aabar Investments PJS ("Aabar"). After the conclusion of Commercial Court proceedings between Edgeworth and Aabar last year, Aabar assigned its interests in those assets to Edgeworth. Edgeworth served notices of assignment on the Defendants during December 2018.

18. Ramblas owns 100% of the issued share capital of Delma Projectonwikkeling BV ("Delma"), which in turn owns 100% of the issued share capital of Marme Inversiones 2007 SLUI ("Marme"). Ramblas, Delma and Marme form the "Marme Group".

19. On 17 February 2014, the directors of Ramblas, Delma and Marme applied to the Commercial Court of Madrid for the commencement of voluntary insolvency proceedings in respect of those three companies.

20. On 4 March 2014, the Spanish court acceded to that request and commenced voluntary insolvency proceedings, appointing an "Insolvency Administrator" of each of the companies.

21. On 4 March 2015, the companies moved into liquidation in Spain. On 26 October 2015, the Spanish court approved a consolidated liquidation plan (the "CLP"), which was subsequently amended by an order of the Spanish court dated 15 September 2016.

22. The sole asset of the Marme Group was the property known as the Financial City in Boadilla del Monte in Madrid, which is occupied by Banco Santander (the "property").

23. The CLP provided for the sale of the property by public auction. The auction process commenced on 25 July 2018 and has now concluded. A company known as Sorlinda Investments SLU ("Sorlinda") was accepted by the Insolvency Administrator and approved by the Spanish court as the winning bidder. That acceptance and approval is, however, subject to a number of appeals, and completion of the sale, and payment of the price has not yet occurred.

24. As and when the sale is completed, the proceeds of sale of the property will be applied first to pay the liabilities of Marme and Delma, before the surplus (which is a defined term under the CLP) is paid to Ramblas.

25. In light of the Subordination Agreement, Edgeworth contends that the surplus should be paid to it in partial repayment of the Junior Loan, leaving nothing available to repay the Shareholder Loans, which it contends have been subordinated to the Junior Loan. However, the Insolvency Administrator has concluded that the Junior Loan should rank pari passu with the Shareholder Loans. Edgeworth has challenged this decision in the Spanish insolvency, but if it is upheld, the Insolvency Administrator's decision will result in monies being available for the repayment of the Shareholder Loans by Ramblas.

26. In this case, the Receivers contend that given the security arrangements which I have described, if and to the extent that any monies are payable by the Insolvency Administrator on behalf of Ramblas in respect of the Shareholder Loans, then as a matter of English law those monies should be paid to the Receivers, rather than to the Defendants.

27. The Insolvency Administrator has, however, indicated that he will require confirmation that the monies payable in respect of the Shareholders Loans should be paid to the Receivers rather than to the Defendants. In essence, it would appear that the Insolvency Administrator's concern is to ensure that he pays, and gets a good receipt from, the right person.

28. In these circumstances, by letters sent on 16 November 2018 the Receivers asked the Defendants, pursuant to clause 13 of the SCSA, to provide confirmation in writing that the monies payable in respect of the Shareholder Loans should be paid to the Receivers rather than to the Defendants.

The Claim

29. In light of the responses received to their letters, the Receivers commenced this part 8 claim. In the claim the Receivers seek:

(1) A declaration that, by reason of their appointment as the receivers of the sums owed to the Defendants by Ramblas in respect of the Shareholder Loans, the Receivers are entitled to:

(i) receive payment of such sums (if any) as would otherwise be payable by Ramblas to the Defendants in respect of the Shareholder Loans; and

(ii) use the names of the Defendants to collect the said sums;

(2) A mandatory injunction requiring the Defendants to execute notices in the terms sent to the Defendants on 16 November 2018 or such other terms as the Court might approve; and.

(3) An order under section 39 of the Senior Courts Act 1981 that if any of the Defendants does not execute such a notice within 48 hours of service of the Court's order on that Defendant, the notice shall be executed on behalf of that Defendant by a Chancery Master or such other person as the Court may appoint.

30. The declarations are sought as a precursor to seeking recognition of the position under English law in Spain. Although I have been told that the Defendants have now executed the letters in the form originally sought by the Receivers, the Receivers have produced further evidence explaining that they have been advised that in order to ensure that the notices also have the desired effect in Spain, they should be executed before a Spanish notary in accordance with Spanish law.

31. The Defendants have not filed any evidence in opposition to the relief sought. Mr Wigley, who appears for them, indicated that they opposed the relief sought, but he did not intend to make any submissions as to why it should not be granted.

Conclusions

32. I am satisfied that, by reason of their appointment as Receivers of the sums owed to the defendants by Ramblas in respect of the Shareholders' Loans, the Receivers are entitled by the terms of the security documents to which I have referred (i) to receive payment of any sums that would otherwise be payable by Ramblas to the Defendants in respect of the Shareholders' Loans; and (ii) to use the names of the Defendants to collect the said sums. If such monies are received, the Receivers would, of course, be obliged to deal with them in accordance with the terms of the

security documents and any duties which they might owe at law or in equity to those interested in the security or in the equity of redemption.

33. In Rolls-Royce plc v Unite the Union [2010] 1 WLR 318 Aikens LJ summarised the principles applicable to the grant of declarations at paragraph 120:

> "For the purposes of the present case, I think that the principles in the cases can be summarised as follows.
>
> (1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the Claimant does not need to have a present cause of action against the Defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the Claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue ...
>
> (5) The court will be prepared to give declaratory relief in respect of a 'friendly action' or where there is an 'academic question' if all parties so wish, even on 'private law' issues. This may particularly be so if it is a 'test case', or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
>
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all of those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

34. I also refer to the decision of Neuberger J in Financial Services Authority v Rourke [2002] CP Rep 14, in which Neuberger J (as he then was) said:

> "It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

35. Applying those tests, I am satisfied that it is appropriate to grant declaratory relief in this case as a matter of discretion. There have been many disputes between the parties who stand to benefit from the receipt of money by the Receivers and between the Defendants and other parties to the Spanish insolvency proceedings. All relevant parties are before me, and although the Defendants have executed the letters sought (albeit not in notarised form) they have formally opposed the claim and have not accepted the legal position as outlined by the Receivers nor consented to the relief sought. I consider that to promote certainty for the purposes of all parties here and in Spain it is desirable that the matter should, at least as far as English law is concerned, be finally determined by a declaration.

36. The Receivers also seek a mandatory injunction requiring the Defendants to execute notices before a Spanish notary confirming to the Insolvency Administrator that any sums payable in respect of the Shareholder Loans should be paid to the Receivers.

37. I am satisfied that such a requirement falls within the terms of clause 13 of the SCSA. Under clause 13 of the SCSA, each of the Defendants must take whatever action a Receiver may require for facilitating the realisation of any Security Asset, and the giving of a notice is expressly included as an example of what might be required. The request by the Receivers is in my judgment plainly reasonable given the request of the Spanish Insolvency Administrator, as is the requirement to have any such notice in notarised form, given that the Receivers have been advised that that is most likely to achieve the desired effect in Spain. Given the history of

disputes and litigation between the parties for whom the Receivers act and the Defendants here and in Spain, I think it is appropriate to make an order to that effect.

38. The Receivers also seek an appropriate order under section 39 of the Senior Courts Act 1981 in order to address the possibility that the Defendants may fail or refuse to comply with the order to execute the relevant documents. In their skeleton argument the Receivers submitted that it would be convenient to deal with such a possibility now in order to save the time and cost that would be occasioned by a further hearing.

39. I do not agree. The note to the White Book refers to Savage v Norton [1908] 1 Ch 290 as authority for the proposition that such an order under section 39 should not be made in anticipation of a failure to execute unless a defendant has already shown by his conduct that he refuses and will refuse to execute.

40. That is not the case here. When I put the point yesterday to Mr Wigley for the Defendants, he took instructions, and the terms of the order as regards execution of the notices before a suitable Spanish notary have been drafted for the convenience of the Defendants and in the expectation that they will comply with the order.

41. There should, however, be liberty to apply in that respect.

42. I shall deal with the question of the costs of the claim at a later stage.