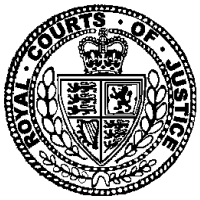

Neutral Citation Number: [2019] EWHC 554 (Ch)

Case No: BL-2018-000367

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

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

Date: 22/01/2019
Start Time: **15:11** Finish Time: **15:46**

Before:

MR JUSTICE FANCOURT

- -

Between:

NICOLE CHARLOTTE LEDERER (1) **PURRINOS INVESTMENT LIMITED (2)** **HANNAMAY INVESTMENTS LIMITED (a company incorporated in the British Virgin Islands) (3)** **HILLAM PROPERTY HOLDINGS LIMITED (a company incorporated in the Bailiwick of Guernsey) (4)** **TOWTON LIMITED (a company incorporated in the Bailiwick of Guernsey) (5)**	**Claimants**
- and -	
THE PERSONS LISTED AT SCHEDULE 1 (1) **THE PERSONS LISTED AT SCHEDULE 2 (2)** **LENDY LIMITED (a company incorporated in England and Wales) (3)** **SAVING STREAM SECURITY HOLDINGS LIMITED (a company incorporated in England and Wales) (4)** **ANNIKA KISBY (5)** **VICTORIA LIDDELL (6)** **TAMMY WILKINS (7)**	**Defendants**

- -
- -

MR T. ROE Q.C. appeared on behalf of the **Claimants**
MR D. HALPERN Q.C. and Mr D. PEACHEY appeared on behalf of the third and fourth **Defendants**
MR F.C. MORAES appeared on behalf of the fifth, sixth and seventh **Defendants**

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Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE FANCOURT :

1. This is a claim by property owning and property development companies and their guarantor against a peer to peer lender, Lendy Limited, and against receivers appointed by Lendy over two development properties which I call, for convenience, Mutton Row and Homer Row.

2. The claim began as long ago as February 2018, with an application by the first claimant, Ms Lederer, to restrain a sale by receivers of Mutton Row. Ms Lederer claims to be the beneficial owner of the second claimant, Purrinos, and the third claimant, Hannamay, and she is the guarantor of their liabilities arising from certain loan agreements made with Lendy, or with Lendy's investors, or both.

3. The claimants claim that Lendy is in breach of warranty of authority to lend money on behalf of its investors and that it made fraudulent misrepresentations to the claimants in regard to its readiness to lend funds on behalf of those investors. Further, the claimants claim that certain of the loan agreements were ineffective to create binding contractual obligations between the claimants and the investors. They claim the loss of all the profit that they say they would have made on the two developments, as well as declarations that three of the four loan agreements are void and of no effect.

4. I was due to hear today the first case management conference in this claim. The order for a CMC before a judge was made in October last year by Nugee J as a result of the claimants being given permission to add, as defendants to the claim, the individual investors who had made funds available through Lendy's website and being ordered to serve the claim on those investors who were within the jurisdiction by mid-November last year. There are, quite literally, thousands of those investors who invested in the four loans that were agreed to be made to the claimants.

5. In the event, the claimants did not serve their claim on any investors. They applied, without notice, to Rose J to extend without limit the time for service and were granted such an order. Although subsequently varied by Mann J in certain respects, the effect of Rose J's order still stands. None of the intended investor defendants have been served with the claim.

6. The reason why such an unusual order was made is that Ms Lederer's mother, Ms Szekeres, provided detailed evidence to the Court of threats that had been made, apparently by a foreign investor in the loans, to kill her and her daughter if further steps were taken by the claimants to pursue their claims. That was, of course, reported to the Police who are still investigating the matter. It was, understandably, considered inappropriate that the claimants should have to pursue their claims at such apparent risk, or be intimidated into abandoning them.

7. On the other hand, the claims issued and served on Lendy which have been publicised to all the investor clients of Lendy make serious allegations of fraud and invalid lending practices, which are highly detrimental to Lendy's business model. Lendy is therefore entitled, without inappropriate delay, to have the claimants decide whether or not to pursue their claims and, in particular, whether or not to sue the investors as well as Lendy itself. Evidence has been filed by solicitors acting for the claimants to the effect that the Police expect that their investigation may run for a further six to eight weeks. The claimants seek a general stay of the action for that period of time.

8. It is common ground, as things stand, that there cannot sensibly be an effective case management conference before it is known whether there will be thousands of additional defendants to the claim. The CMC itself must therefore be adjourned to be heard in due course. Nevertheless the parties have seized the opportunity of the two hour hearing reserved for the CMC today and have issued three applications.

9. First, on 9 January, Lendy issued and served an application for security for its costs against all five claimants.

10. Second, on 15 January, the fifth, sixth and seventh defendants, the receivers, issued an application to seek to enforce an order for costs made against Ms Lederer and Purrinos for £30,000 that was ordered to be paid by 27 March 2018 but has not been paid. The application was also for security for their costs against all the claimants except Ms Lederer.

11. On 16 January, barely two clear days before the hearing, the claimants issued an application for the general stay of proceedings that I have just mentioned. The claimants argue the defendants' application should not be heard at this time and that the general stay should be granted instead. The defendants argue that whatever stay or adjournment is granted, the Court should deal with their applications first.

12. Since all the parties have attended, prepared to address Lendy's and the receivers' applications and since the claimants' application is straightforward and the defendants are not prejudiced by the short notice, it seems to me that to give effect to the overriding objective I should hear the applications today, unless there is any good reason not to do so.

13. As to this, the claimants say that they should not be forced to choose between abandoning their action or risking their lives by being seen to pursue the claim. I agree. However sceptical the defendants may be, I must at this stage take the evidence of Ms Szekeres about the threats to kill at face value. The claimants are entitled not to be seen to be pursuing the litigation at this stage.

14. The claimants, however, do not apparently consider that issuing an application and appearing in court to argue it puts them at inappropriate risk. The claimants have openly issued and filed, on the CE file, the application that is before me and they have attended today in open court to argue their application and have not sought to have it heard without notice or on paper, or indeed in private.

15. I do consider that I should not make any order that requires the claimants at this stage, before the period of up to eight weeks has expired, to take openly any step that would be capable of being seen to be in furtherance of the proceedings or as seeking to preserve or to sustain their claims. Notwithstanding the involvement of the Police and protection that has already been given to Ms Szekeres and Ms Lederer, that would create an undesirable risk. The claimants should therefore not be put in the position of having to make payments of money in order to prevent the claim from being struck out or to serve further statements of case, at least not before the end of the eight week period.

16. Mr Roe QC, on behalf of the claimants, nevertheless says that proceeding to hear the defendants' applications is inconsistent with the position I have just started. I do not

see why proceeding to hear applications issued by the defendants is objectionable if it is acceptable for the claimants to issue and have heard an application and attend at Court to argue it. As I have said, there was no application to hear any of these matters in private.

17. Mr Roe submits that dealing with the defendants' applications might show a determination to progress the action but I do not see it that way. The Court is hearing the applications issued by the defendants and the claimants' presence and argument is purely responsive. The claimants are not seeking to take any substantive step to progress the claims.

18. What does seem to me to be important is that an effective case management conference can take place as soon as possible, with the participation of the domestic investor defendants or their representatives. All parties today have attended at considerable expense, ready to argue the security for costs applications, if necessary. It would be a considerable waste of the parties' and the Court's resources for that time and money to have to be spent again in three months' time. In my judgment, there is sufficient prejudice to the defendants, in the wasted costs that would thereby be incurred and in having to wait three or more months to have their applications determined, to make an adjournment of the applications inappropriate.

19. The period of eight weeks, in my calculation, expires on about 21 March. I therefore consider that the claimants should be required to serve the claim form on the investors, if they are minded to do so, within a short period thereafter. I will say by 4 p.m. on 1 April of this year. Even so, given the steps that will need to be taken consequently on that service, that means that an effective case management conference will not be able to take place before the end of April at the earliest.

20. The defendants' applications for security for costs seek an order striking out the claimants claims in the event that security is not provided, not simply staying the claims until it is provided. In the circumstances, that is understandable but the consequence is that any security ordered should not, as things stand, have to be paid before the expiry of the eight week period and the same would apply, in principle, to the order sought by the receivers in relation to enforcement of the outstanding debt of £30,000. On the other hand, there should be no other restriction on the ability of the receivers to seek to enforce that debt, if so advised.

21. Subject to that, it seems to me to be inevitable that there must be a stay until, I will say, Friday 22nd March 2019. I will therefore also order that the claimants' reply to the existing defences of Lendy and the receivers must be served by 4 p.m. on 1st April 2019.

22. I turn then to the substance of the applications for security for costs and the application to enforce the existing debt of £30,000 in the case of the receivers. Lendy's application is for security against all defendants in the sum of £1,126,345. However, it realistically recognises that the Court may, and is likely, to order the provision of security in such an amount in stages. The obvious first stage is up to and including the adjourned case management conference. Further stages would be up to and including disclosure, up to and including the pretrial review, and the trial itself as the final stage.

23. So far as the application against Ms Lederer is concerned, the only gateway under Part 25.13(2) of the Civil Procedure Rules is paragraph (e). It is accepted by her that she

did not include her address on the original claim form. That gives the Court jurisdiction but it does not answer the question of whether security should be ordered, which is a matter of discretion. The omission to give the address was not, in my judgment, suspicious as Ms Lederer had provided her student address on an earlier application notice and she was, at that time, acting in person in issuing the claim form.

24. So far as the other claimants are concerned, the application by Lendy and by the receivers are on the basis that they are all limited companies who appear to have no assets of their own of any value capable of being deployed to pay Lendy's costs. In the case of all the companies, other than Purrinos, it is made additionally on the basis that they are overseas companies in jurisdictions where none of the reciprocal enforcement treaties apply, in this case Guernsey and the British Virgin Islands. The only known assets of the companies are the two properties and these properties are in very substantial negative equity as they stand, undeveloped.

25. The claimants accept that Purrinos and Hannamay are single purpose vehicles with no other assets. There is no suggestion by the claimants that the fourth or fifth claimants who are the registered owners of Homer Row have any other assets. Purrinos is in breach of its duty to file at Companies House its first annual accounts.

26. Mr Roe accepts that the gateways under Part 25.13(2) are established in the case of the corporate defendants. The question of whether to order security for costs therefore becomes an exercise of discretion. By reference to the factors identified in the *Sir Lindsay Parkinson and Co v Triplan* case, the position is as follows. First, the claim is bona fide and is properly arguable. Second, there have been no admissions or offers by the defendants. Third, the application is made in good time.

27. The remaining factors, which are the ones in issue in particular here, are first of all is the claim for security being used oppressively, in that if it is granted it will stifle the claim because the claimants cannot make payment? Secondly, does the claim have good or strong prospects of success?

28. Mr Roe submits I should form the view that the claimants' claim is a strong one, such that it is unlikely the claimants will be paying any costs at a later stage. He submitted that there is really no answer to the allegations of misrepresentation in the development funding agreements. However, I accept Mr Halpern Q.C.'s arguments that there are arguable answers that there are express terms of the contract that there is no representation that Lendy has obtained sufficient lenders and that there is no obligation to lend until sufficient lenders have subscribed. Secondly, that the claimants need to prove reliance as well as misrepresentation and that they may have difficulty in showing that they relied, in particular, on the terms of the loan agreement.

29. Mr Roe also submitted that Lendy have a problem with both the Homer Row agreements in identifying who the principal lenders were, and that if there were no principal lenders identifiable then there can have been no valid agreements. He relies on a letter dated 24 August 2018 in which Lendy's solicitors appear to say that Lendy remains unable to attribute individual lenders to one Homer Row loan agreement or the other because the funds were not allocated that way internally.

30. Mr Halpern's answer was that Lendy's platform entitles it to allocate particular funds as between different loans at a later time and that it still has the right to identify to the claimants which lenders lend funds for each of the loans.

31. Although Lendy may have some difficulty on this point, I cannot say at this stage, on the basis of very limited reference only to the contractual documents, that the claimants' case is more likely than not to succeed on this point. I cannot, at this stage, say other than the claimants appear to have a good arguable case. That therefore, in my judgment does not impact to any extent on the exercise of my discretion.

32. As to the stifling of the claim, the burden of proving that an order for security will stifle the claim lies on the claimants on a balance of probabilities: see *Goldtrail Travel v Onur Air* [2017] 1 WLR 3014, per Lord Wilson JSC, at paragraph 17 he said:

> "It is clear that even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not stifle its appeal if it can raise the required sum. As Brandon L.J. said in the Court of Appeal in the *York Motors* case, cited with approval by Lord Diplock, the fact that the man has no capital of his own does not mean that he cannot raise any capital. He may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need. One might add, these days he may be able to obtain third party or commercial litigation funding to provide the necessary security."

33. That was a case about granting permission to appeal conditionally on payment into Court of the judgment sum, but it is clear that the same principle must apply in the case of security for costs.

34. Lord Wilson added the following at paragraph 24:

> "The criterion is simple but its application is likely to be far from simple. The considerable forensic disadvantage suffered by an appellant which is required as a condition of the appeal to pay the judgment sum or even just part of it into Court is likely to lead the company to dispute its imposition tooth and nail. The company may even have resolved that were the condition to be imposed, it would, even if able to satisfy it, prefer to breach it and to suffer the dismissal of the appeal than to satisfy it and to continue to the appeal. In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the Court can expect to receive an emphatic refutation at the suggestion both by the company and perhaps in particular by the owner. The Court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position and by reference to all aspects of its relationship with its owner, including obviously the extent to which he is directing and has

> directed its affairs and is supporting, and has supported it in financial terms."

35. In principle, that observation seems to be me to be as readily applicable in the current circumstances. In other words the Court should regard sceptically and critically a bare assertion made by a claimant that they do not have funds with which to provide security for costs.

36. Ms Lederer says that she is an impecunious student with no other assets or resources. I accept that. I am not minded to make an order for security for costs against her personally in any event. The claim that she brings is really dependent on the companies' claims in any event. Any order should be made against the companies, who are property owning or property developing companies. If their claim falls away as a result of any order I made, that means Ms Lederer's claim will not automatically fall away, but because it is largely parasitic on the companies' claims it may well then be regarded by the Court as being premature if no attempt has been made by any of the defendants to call on her guarantee.

37. It is very clear to me that Ms Lederer is not the property developer behind the business activities of the corporate claimants, for all that she may be a nominal director and shareholder. These property acquisitions and the loan agreements coincided with the bankruptcy of Ms Szekeres, her mother, who is an experienced property developer. I am satisfied that the reality of these transactions is that Ms Lederer had to be the shareholder, director and guarantor because her mother could not be at that time. There is no other person identified by the claimants as being the operating mind behind the developments. Ms Szekeres has assisted her daughter in bringing the claims and has provided evidence on her behalf.

38. It is also evident that there are family trusts or funds somewhere in the background. In paragraph 27 of his judgment on the application for an injunction to restrain the receivers, Mr Hollander QC sitting as a deputy judge said that on 13 February Ms Lederer had sent an email in relation to Mutton Row in the following terms:

> "Can you agree a stay of the pending auction date urgently, so we may negotiate redemption? Your response would be needed urgently."

39. Then again on the following day, a further email:

> "The proof of funds would be from a private family fund. They would not show this to you. Please take urgent instructions."

40. That was in connection with the redemption of the Mutton Row loans, where over £730,000 including interest for the term of the loan had been advanced. Ms Lederer provided evidence on the injunction application that her grandmother had purchased Mutton Row in 2007 for £665,000 and that it had been held on trust for her since that time, prior to the purchase by Purrinos.

41. At a very late stage, Ms Lederer made a witness statement in response to the applications for security. She asserts that she would not be able to continue with this claim if the applications for security were successful. That was in the context of an

application for over £1.1 million worth of security to be provided immediately in respect of Lendy's costs and £170,000 for the receivers' costs. She says that her only family are her mother and grandmother and she says, "My mother cannot provide me with any financial assistance." She also says that solicitors and counsel acting for the claimants have not been paid, except to the extent that costs have been awarded against the defendants. She then says, "Alternative funding avenues are being pursued, including private funding of the claim by third parties and/or commercial litigation funders and should these avenues come to fruition, I will inform the defendants of this accordingly."

42. In my judgment, this rather thin evidence consisting mainly of assertion is not sufficient to discharge the burden that lies on the claimants to establish that requiring them to pay any amount of security for costs will stifle their claim. There are a number of important matters that are not addressed in that evidence.

43. There is nothing about the private family funds, previously invoked by Ms Lederer as a possible basis for redeeming a loan of over £700,000. There is nothing but assertion about Ms Szekeres' interest in the developments or about her position as a property developer or her current financial position after her bankruptcy. Nothing is said about the grandmother who previously spent £665,000 on acquiring Mutton Row, other than that she is still alive. There is no disclosure of the person or persons who are behind the single purpose vehicles or about who is the shareholder or shareholders of Hannamay or about how a 21 year old impecunious student apparently owns all the properties and shares, and there is no detail given about attempts to obtain third party funding or litigation funding.

44. I am also troubled by the assertion that the solicitors and counsel acting for the claimants are doing so without any funding arrangement being in place, other than recovery from the defendants of such costs as are ordered to be paid by them. In the absence of any disclosed funding agreements, it seems to me to be most improbable that the lawyers are so acting unless there is confidence on their part in their ability, in due course, to recover the fees from someone on the claimants' side.

45. I am therefore not persuaded, on a balance of probabilities that making an order for security for costs will stifle the claims. That is particularly so as I am minded to apply a discount to the gross amount of costs estimated by the applicants and to order that, at this stage, only costs relating to the first phase of the proceedings, up to and including the adjourned first case management conference should be paid as security. If the claim is still proceeding by the date of the adjourned CMC, the amount of any further instalment of security can be assessed at that hearing, depending on the nature of the proceedings at that time. For the avoidance of doubt, it is only the quantum and timing of the further instalments that will be determined at the CMC, not the question of principle, which I have decided.

46. I will therefore make an order for security for costs to be provided by the second to fifth claimants. Lendy asks for costs to date of £258,000, £73,000 for the costs associated with the hearing today, and five per cent of the total budgeted costs of about £900,000, being the costs going forward to the adjourned CMC, that I make a total of £310,300. Those costs are quite high and though I accept that these are not cheap proceedings to defend, I am minded to apply a discount of 25 per cent to reflect the likely irrecoverable element of the costs. That makes a sum of £232,725.

47. On the receivers' application, their costs are £43,000 up to the adjourned case management conference and £16,500 for the security for costs application. Mr Moraes, who appeared for the receivers, accepts that a discount of 20 per cent should be applied on these much lower total costs figures and I am willing to accept that. Accordingly, the figure for the receivers' security is, in my calculation, £47,600. If any of my arithmetic is faulty, I am happy to be corrected in due course. I will not order payment to be made before the expiry of the eight week period, as I have indicated. That means that the claimants will have more than the usual amount of time in which to make arrangements to raise the necessary money from other sources. I will say that unless the sums that I have identified are paid into Court as security for costs by 4 p.m. on 1st April 2019, the second to fifth claimants' claims will be struck out.

48. Given the substantial amounts of security that I have ordered, I do not consider that I should exercise my discretion to make an unless order in respect of the £30,000 costs order to be paid to the receivers in March, particularly as I have accepted that Ms Lederer personally is not in a position to pay those costs.

49. The decision in *Crystal Decisions v Vedatech*, to which I was referred by Mr Moraes, would apply if I were confident that Ms Lederer and Purrinos had the funds with which to make payment but were deliberately not doing so, but I am not satisfied that in fact they have the funds available to them. But are refusing to pay.

50. Of course, the receivers have their ordinary remedies in relation to the unsatisfied order for costs and I make no order that limits or restricts their ability to take any such steps as they see fit.

See separate transcript for proceedings after Judgment