IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (ChD)
[2022] EWHC 2834 (Ch)

No. CR-2017-000422

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 28 October 2022

IN THE MATTER OF **HARLEQUIN PROPERTY (SVG) LIMITED**
AND
IN THE MATTER OF **THE CROSS-BORDER INSOLVENCY REGULATIONS 2006**

Before:

INSOLVENCY AND COMPANIES COURT JUDGE PRENTIS

B E T W E E N :

BRIAN GLASGOW — Applicant

- and -

DAVID EDWARD AMES — Respondent

MR M. OUWEHAND (instructed by Jones Day) appeared on behalf of the Applicant.

THE RESPONDENT appeared in Person via telephone (not present for the judgment).

J U D G M E N T

INSOLVENCY AND COMPANIES COURT JUDGE PRENTIS:

1 On 19 January 2017, Brian Glasgow was recognised by this court, under the Cross-Border Insolvency Regulations 2006, as the foreign representative of Harlequin Property (SVG) Limited. As the company's name indicates, that is a company incorporated in Saint Vincent and the Grenadines. It had commenced what this court recognised as foreign main proceedings on 3 October 2016, when it initiated the restructuring process under the local Bankruptcy and Insolvency Act.

2 The appointment of the foreign representative engaged Article 21 of Schedule 1 to the Cross-Border Insolvency Regulations. Thus:

> "Upon recognition …, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief …".

That is the general power and then there are examples of which, which include at letter (g):

> "… any additional relief that may be available to a British insolvency officeholder under the law of Great Britain …".

3 On 16 November last, Mr Glasgow issued this application under that paragraph, relying on s.234 and s.236 of the Insolvency Act 1986.

4 The respondent to the application is David Ames. He was the sole director of the company and he was the man behind what was known as, and promoted as, "the Harlequin Group".

5 On 31 January, Judge Burton gave directions. They included the ability for Mr Ames to file and serve evidence by 4 April. The directions also listed the matter to today's date for disposal. In the event, no evidence was forthcoming from Mr Ames. Mr Glasgow filed evidence in support of his application and, hearing the matter today, I have had the benefit as well (and I gave permission for it to be relied on) of an affidavit from James Robert Bennett of Interpath, who are assisting Mr Glasgow.

6 Mr Ames' mind may have been on other matters as he was involved in a substantial SFO prosecution, which resulted, on 3 August, in his conviction for fraud; and he is now serving a twelve year prison sentence. That is in respect, in part, of the operations of the Harlequin Group.

7 I have had the benefit of submissions from Mr Ouwehand and I am pleased to say that, notwithstanding yesterday's transfer of Mr Ames from one prison to another, he was able to attend, at least until noon, in order to convey to the court his views on the application.

8 He was anxious to convey that he has himself no reason to prevent access to the documents sought, but he had concern about total access to those documents under two categories, which led him to say that about 70 per cent of the documents would not be relevant. They being, firstly, the documents which are privileged under privilege resting in others than the company; and, secondly, that the documents would, many of them, not relate to this company's affairs.

9 It is one of the difficulties which Mr Glasgow faces as foreign representative that, notwithstanding his appointment coming up six years ago, he has yet to find out very much about the company's operations beyond their generality. As I have already indicated, the Harlequin brand was one which was applied by Mr Ames across a raft of different companies incorporated in different jurisdictions. They were companies held not under a topco and subsidiary company structure but directly, for the most part, by Mr Ames and his family.

10 The company appears to have been the holding company for the main assets of the Group, being development plots in Buccament Bay in Saint Vincent and Grenadines and Merricks Resort in Barbados.

11 In December 2016, Coulson J handed down a judgment in which the company was one of the claimants. In the course of that, he described the company's business and how the construction works at the resort (para.6 of his judgment):

> "… were funded by deposits made by Harlequin investors who wanted to purchase cabanas (a small bungalow with one or more bedrooms) or apartments, either at this resort, or other resorts planned by Harlequin round the world. But the deposits were not ring-fenced, so there was no link between an investor's 30% deposit for a property at one of the Harlequin resorts, and the destination of that money. The money might go to any other of the numerous Harlequin developments, or might be used for entirely different purposes altogether, such as the generous commissions paid to Harlequin's sales agents, the large sums paid to the Ames family as directors of the web of related Harlequin companies, or separate enterprises altogether, such as the Harlequin travel agency, and the sponsoring of Port Vale FC."

12 In the next paragraph Coulson J observes that:

> "… despite the limited land purchased by Harlequin at Buccament Bay, and the very obvious physical restraints of the site as a whole, there was no limit to the number of deposits which were taken for the proposed resort there, with the result that there was a huge imbalance between the properties for which a 30% deposit was paid to Harlequin, and the number of properties that had been (or were realistically going to be) built at the Buccament Bay resort. This discrepancy was exacerbated by the fact that, of all the numerous Harlequin projects in the Caribbean and elsewhere, it was/is only the Buccament Bay resort that has ever been built. So, although more than 1,900 deposits were taken for Buccament Bay, and 8,200 overall for all Harlequin developments worldwide, only 195 units have been built at Buccament Bay and none anywhere else."

13 It is worth drawing one other matter from his judgment as well. At para.333, he referred to Mr Ames:

> "… Mr Ames has ruthlessly exploited the idea of the limited company in order to set up over 40 different companies, some of which bear the Harlequin name, and some of which bear the Buccament Bay name.

> None of that was of any benefit to anyone except Mr and Mrs Ames. It is not appropriate for those who set up particular companies to perform particular functions for their own benefit to be heard to say, when it suits them, that somehow there has been damage to the overall brand for which a particular company, with no link to the defendant, can then claim damages."

14 The mess of contractual relationships is demonstrated by the few bits of information and documents which we do have. Mr Ouwehand has taken me to some of these, including the following. Daniel Abrams, the legal counsel to the Group, was in February 2017 asked questions by David Collins of KPMG in Barbados. They were by way of statement of the current understanding of the officeholders. The first bullet point was this:

> "Investors (a large group if not all) of H Hotel (Barbados), Marquis Estate (St Lucia) and 2 Rivers (Dominican Republic) have entered contracts with [the company]; YES."

There is then this qualification:

> "The above contracts should not have been sent out in the name of [the company] and instead should have been sent out in the name of the landowner of the property they intended to purchase (e.g. Harlequin Resorts (St Lucia) Limited for Marquis Estate)."

That acknowledges that there were contracts sent out and entered into in the company's name. That may or may not have been the correct thing to do on this slight evidence. It was another part of the current understanding that:

> "The contracts in place with [the company] did not allow for them to act as agent on behalf of the entities and therefore had no right to sell another Company's assets; [Reply] I DON'T KNOW OF ANYTHING IN WRITING HOWEVER ALL OF THE COMPANIES ARE COMMONLY OWNED AND CONTROLLED BY DAVID AMES."

15 We have some guidelines for purchasers which have been produced. These were up-to-date as at 16 April 2012. These guidelines describe Harlequin Management Services (South East) Limited, which traded as Harlequin Property, as "being the exclusive sales agent for Harlequin Hotels and Resorts and the selling companies in the Caribbean." It says that (South East) Limited (or SSE as I had best call it) "is the UK based primary selling agent for the selling/owner companies in the Caribbean." This discloses that "there is a common thread in each of the companies that own the land upon which the resorts are being built -- the controlling shareholder of each company is David Ames." It confirms that payments are received by Harlequin Property (SSE) "as agent for the Seller." The seller is not, as I can see, identified but may be taken to be the owner of the relevant Caribbean properties or it may mean the company which actually contracted for sale, in which case it would be, in some instances, the company. It is disclosed that:

> "Part of the funds you pay are retained by [SSE] to cover marketing expenses … The rest of the money will be used for the development of the resorts in the Caribbean … Funds are not specifically earmarked for the construction of the resort you are purchasing in."

And the contact details were for the Harlequin Property, the SSE, address in Basildon.

16 We have as well something described as a Master Agency Agreement of 24 May 2011 between the company, which was described as "the developer", and SSE. It records by way of recital C that:

> "The Developer has engaged the Agent [that is the description of SSE] to assist it in the sales and marketing of freehold properties in Buccament Bay and Merricks."

It is recorded by recital A that:

> "The Developer owns land in an area known as Buccament Bay … and land known as Merricks …".

Recital D:

> "The purpose of this Agreement is to set out the basis of the long standing agency agreement that has existed between the Developer and the Agent …".

17 One of the agent's duties specified (and, of course, as Mr Ouwehand says, they would apply anyway) was the keeping of "full and proper books of accounts relating to all sales processed by the Agent". The agent was also obliged to "manage bank accounts" (the company never had its own bank account and, therefore, all payments were made into the bank accounts of others) "… to include funds held by [among others] the Developer and maintain records to identify funds belonging to the Developer. The Agent shall pay all deposits received on behalf of the Developer into the Bank Accounts in a timely manner and shall make payments from the Bank Accounts on instruction from the Developer." A monthly report was also to be provided of the sales made and payments received.

18 Of the same date is an inter-company loan agreement between a number of Harlequin companies, including the company and also including SSE. By recital D:

> "… the Developers [and SSE was here again described as the Agent but the other companies as the Developers] agree that an inter company loan arrangement be set up to enable loans to be freely transferable between the Agent, [one other specified company, Harlequin Hotels and Resorts (Cayman) Limited] and the Developers subject to the terms set out in this Agreement."

Again, the specified obligation under this agreement, clause 3.3, was:

> "The Agent shall keep a schedule of all funds received and keep and maintain a record of all inter-company loans."

19 This agreement for the free flow of monies between these various entities and the keeping of records by SSE was reiterated in subsequent inter-company loan agreements. There was also, it is fair to say, a service provider agreement to which SSE was not a party, the 18 August 2014, the service provider there being Bell Associates LLC incorporated in Florida. That may relate, I know not, to marketing of the resort in that jurisdiction.

20 Mr Glasgow's investigations have revealed that at some point within 2017 the services which had been provided by SSE were transferred to another similarly named company, being Support Services (Essex) Limited. They ran the office and operations from what has been called the "Wickford office", being on the High Street at Wickford.

21 This application is directed, in particular, at a database which was compiled initially in 2017. It is also from early 2017 and following the recognition of Mr Glasgow that there is the correspondence with Mr Ames concerning the disclosure of documents and the discovery of the company's affairs. Mr Glasgow says that that has been extensive and he describes how in December 2017 Mr Ames' solicitors at the time, Cartwright King (he has been through a number of firms), arranged for forensic images to be taken by Cyfor Legal Limited of the company's servers, which were by then held in the Wickford office.

22 Those documents were then held for the benefit of the criminal trial by Cyfor, and they continue to be held by Cyfor. They comprise not only five servers, which were forensically imaged in late December 2017, but also, it seems, a further hard drive delivered to Cyfor. Those documents have happily been ingested into a Nuix platform, which means that in their current form they are not duplicative. That, at least, is the theory. They are, and have been, available in the criminal trial and viewable on a Relativity workspace. There are some 64 million items within the documents.

23 By s.234(2):

> "Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder."

Insofar as documents belonging to the company are within those electronic documents then that would apply between Mr Ames and the court. Mr Ames confirmed to the court that he was able to give instructions for the disclosure of those documents, which instructions he anticipated would be through his solicitors, Blackfords.

24 The alternative route in is s.236, which allows the court to require an officer of the company, or indeed any person the court thinks capable of giving information concerning the "promotion, formation, business, dealings, affairs or property of the company", to produce any books, papers or other records in his possession or under his control relating to such matters.

25 Mr Ouwehand has very properly drawn my attention to the case of *Re Mid East Trading Limited* [1998] 1 All ER 577, in which Chadwick LJ, delivering the judgment of the court, revised parts of the judge's order under s.236 in that case, observing that documents produced under that section:

> "… must satisfy the factual test … -- that is to say they must be documents relating to the company. It is not enough that [they] may relate to the company or may be thought to relate to the company; unless the documents do relate to the company there is no power to order their production."

Later he said:

> "Those powers can only be used to order production of documents relating to the company in whose liquidation the application under that subsection is made. The evidence does not establish that all the documents in the possession of the Lehman companies and which relate to IFCO or Sigma must necessarily also relate to Mid East."

Mid East was the liquidating company. IFCO and Sigma were separate companies.

26 As that indicates, this is a judgment which was conditioned by the facts before the Court of Appeal, where the evidence did not establish that IFCO and Sigma were connected to the company's business. Further, insofar as s.236 is applicable to this application, one must recollect the words of Buckley J in *Re Rolls Razor Ltd* [1968] 3 All ER 698, approved by the Court of Appeal in *Re Esal (Commodities) Ltd* [1989] BCLC 59:

> "The powers conferred by section 268 [which is the 236 equivalent] are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible, to complete his function as liquidator, put the affairs of the company in order and to carry out the liquidation in all its various aspects …".

27 It would seem very curious if *Mid East Trading* were to be read literally, with the result that where there was a lack of clarity in the evidence as to the precise ownership of documents, a liquidator of a company ought to be excluded from considering them even where there was solid evidence, and indeed evidence on the balance of probabilities, that they might be relevant to the liquidation. That is particularly so where, as here, it would be open to the respondent to identify which documents, or categories of document, were relevant. Here, given 64 million documents, that would have to be by indicative search words. But no positive search words have been put forward. Further, while Mr Ames expressed his concern that the order might impinge upon other companies' documents, the example he gave was of the company, which I have already mentioned, in the Dominican Republic where there is necessarily, under the laws of that country, local ownership, or at least local directors. He was the man behind those companies whatever their ownership or direction.

28 It is also impossible in this case to say that each company within what I have called "the Group" is entitled to full and separate respect for its individual personality. Coulson J found that could not be the case and one can read that it is not the case from such contractual documentation as we have, which refers to the flow through of funds. Reflective of that, it was open to an investor, and there were some 1,900 individual investors, largely from this country, to switch their funds from a unit in one development to a unit in another. Thus, the intermingling of funds was always, and, indeed, on the contractual documentation, openly made part of this company's mode of carrying out business. That itself may be said to raise the question of what its business was but, so far as one can discern from these documents, it was indeed the holder of these resorts and was, in certain cases, the contracting party for units in the resorts, whether that was as a matter of ownership correct or not. Funds were also received on its behalf and it was receiving funds through the inflow of money from the private investors. That money was substantial: some £140 million was invested. It is

possible, as Mr Glasgow says, that the creditors in this company are some £190 million and their return may be a penny or two in the pound.

29 That is going to depend on realisations in the company, which is going to depend upon the intercompany accounts. That was another matter on which Mr Ames relied. He said, "Well, look, a lot of the other companies are owed a lot of money by this company." That just indicates the importance to Mr Glasgow of sight of these documents in order to establish what the company's position is. It is, of course, open to any of the other companies to make their own applications for disclosure of documents to assist them insofar as they do not already have them. Whatever, I am not satisfied that this order would be sufficiently disruptive of those other unidentified companies' rights that any such rights ought to stand in the way of relief being granted on this application. It was for Mr Ames to identify the difficulties that there might have been with precision. He has had the opportunity to do that and he has not taken it.

30 If one needed any further evidence as to the intermingling of financial interests, and the questions over the precise nature of the company's business, one needs only to refer to an interview by Mr Bennett and Mr Fellows of KPMG with Sarah Tricker, who besides working for Support Services (Essex) was also an investor. In June 2017, she confirmed that SSE collected money on behalf of the company. There were two bank accounts, a current account and a client account, and investors' monies would be paid into the client account. She at least, as an employee, has treated the incoming monies as being attributable in the first instance to the company.

31 Thus, I am satisfied that it is appropriate to make an order for disclosure of the electronic documents notwithstanding that they, or some proportion of them, may, as it turns out, not be related to the company's business. The court has not been put into the position of being able to identify other categories which could be stripped out. Neither has the foreign representative. As I read the decision of Colman J in *Yasuda Fire & Marine Insurance Co. of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd*, albeit in a slightly different context, it is for the court to consider as well the practicalities of the order and how it may best be structured. I will come onto the scheme of that in a moment.

32 As to the privileged documents, the question of privilege is acknowledged by the foreign representative and there have been significant efforts in correspondence to try to arrive at a scheme by which it can be respected. The position proposed to the court by the foreign representative is for negative search terms to be applied which would strip out documents which, on their face, may well be subject to others' privilege. I have not counted them up but there are probably 200 or 300 of these search terms. They are by name and one can recognise a number of legal advisers.

33 What is intended is that at the request of Mr Ames- a request which, as I have said, he is happy to make, though he asks that Jones Day, solicitors to the foreign representative, provide a letter for him, which I understand that they will do- Cyfor will transfer these documents to an independent host, such that Mr Glasgow will not have access to them. The negative search terms will be applied. That will permit the release of the not potentially privileged documents and then there will be a mechanism in place by which the potential privilege may be investigated with those to whom it may belong. The costs of that exercise are to be borne by the applicant.

34 I am entirely satisfied that in the circumstances of this case that represents a feasible scheme which does all it can to preserve the privilege of others. I am told as well that, given the

volume of documents, the foreign representative would intend to investigate those by the inputting of relevant search terms, such that there will not be a direct investigation of non-relevant document. There will be no order to that effect but, of course, it makes sense in terms of the foreign representative properly and proportionately carrying out his duties.

35 So, for those reasons, I intend to grant this order, the details of which I will discuss now with Mr Ouwehand. I should add that from the draft order which was provided to me, I have, in the course of argument, and by way of concession and instructions by Mr Ouwehand, taken out from its ambit other documents which, while they would fall within either s.234 or s.236, depending upon whether they were the company's documents or not, are not in the electronic documents but are physically in the control of Mr Ames. I have done that, first of all, because it is not clear that there are any such documents, and secondly because Mr Ames is, at the moment, in no position to provide copies of any documents. But that is a matter which can be reviewed, including by further application that he gives information as to where any missing categories of documents may be. I will discuss the terms of the order now with Mr Ouwehand.

CERTIFICATE

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