Neutral Citation Number: [2022] EWHC 1534 (Ch)
Case No: BR-2022-000130

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF MR MYCK DJURBERG (A BANKRUPT)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing by Teams,
Royal Courts of Justice
Rolls Building, Fetter Lane, London

Date: 06/05/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

- -

B E T W E E N:

(1) MR ADRIAN HYDE

(2) MR RICHARD TOONE

(as the Joint Trustees in Bankruptcy of MYCK DJURBERG)

Applicants

and

MR MYCK DJURBERG

Respondent

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Ms Jessica Powers (instructed by **Keidan Harrison LLP**) for the **Applicants**

Hearing date: 6 May 2022

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....17/06/22.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

1. This is an application by the Trustees of the bankruptcy estate of Mr Djurbery for a search and seizure order pursuant to ***s.365 of the Insolvency Act 1986*** ("***the IA***"). It reads as follows:

> *"365 Seizure of bankrupt's property.*
>
> *(1) At any time after a bankruptcy order has been made, the court may, on the application of the official receiver or the trustee of the bankrupt's estate, issue a warrant authorising the person to whom it is directed to seize any property comprised in the bankrupt's estate which is, or any books, papers or records relating to the bankrupt's estate or affairs which are, in the possession or under the control of the bankrupt or any other person who is required to deliver the property, books, papers or records to the official receiver or trustee.*
>
> *(2) Any person executing a warrant under this section may, for the purpose of seizing any property comprised in the bankrupt's estate or any books, papers or records relating to the bankrupt's estate or affairs, break open any premises where the bankrupt or anything that may be seized under the warrant is or is believed to be and any receptacle of the bankrupt which contains or is believed to contain anything that may be so seized.*
>
> *(3) If, after a bankruptcy order has been made, the court is satisfied that any property comprised in the bankrupt's estate is, or any books, papers or records relating to the bankrupt's estate or affairs are, concealed in any premises not belonging to him, it may issue a warrant authorising any constable or prescribed officer of the court to search those premises for the property, books, papers or records.*
>
> *(4) A warrant under subsection (3) shall not be executed except in the prescribed manner and in accordance with its terms."*

2. For the purposes of this application I have hearing bundles, a skeleton argument and an authorities' bundle. I have also heard carefully constructed and very well presented submissions from Ms Powers, counsel for the Trustees. It has been plain that she has made every reasonable effort to ensure this application is made in a manner which complies with the Trustees' duties of full and frank disclosure.

3. This is a bankruptcy with a potential deficit of over £4 million. There are currently no assets held by the Trustees. Their position is that they consider they have not been provided with anything near to the information required for them to be able to assess the affairs of Mr Djurbery, before and after the bankruptcy, or from which they can properly carry out their statutory functions, including the recovery of assets and subsequent realisations. They also consider that Mr Djurbery has failed to deliver up all of the property of his bankrupt estate and that he has destroyed documents that should also have been delivered up.

4. The Trustees request a warrant to enable them to recover property belonging to the bankruptcy estate and books, papers and records relating to Mr Djurbery's affairs which are in his possession or control specifically at his current residence at "the Swiss Chalet" by the banks of the Thames at the Hampton Riviera.

5. I have previously addressed three preliminary issues and decided that: (i) this hearing should be in private and without notice; (ii) the bankruptcy should be transferred to the High Court from the County Court; and (iii) this is not a case where evidence concerning mental capacity issues is sufficient to lead to the conclusion that this application should not be heard. Those earlier decisions are to be read into this judgment. As to mental capacity, I was satisfied that this application should be made but that the evidence will need to be borne in mind when reaching the discretionary decisions I am asked to make.

6. As a context for this type of application it is important to remember the statutory functions and duties of the trustee and the statutory duties of a bankrupt to co-operate and assist. Those duties include an obligation on the part of a bankrupt to deliver up any property, books, papers or other records which are in their possession or control and of which the trustee is required to take possession. That will include property which should be collected, realised and its net proceeds distributed by the trustee and all books, papers and records which will assist the trustee to perform their duties by providing information relating to the bankrupt's previous and existing affairs.

7. I refer in particular to ***ss.305, 312 and 333 of the IA***. It is readily apparent that the purpose of ***s.365 IA*** is to enforce those duties of a bankrupt. Therefore, whilst it is and must be treated as draconian relief, the bankrupt concerned should be co-operating to achieve the result it seeks in any event. For example, pursuant to ***s.312 IA***, a bankrupt is obliged to "*deliver up to the trustee possession of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession.*". It being noted there are further provisions in subsections (2) and (3) relating to that duty. The underlying point is that a trustee should not have to take active steps to ensure such delivery: there is a specific requirement for the bankrupt to do so. Equally, ***s.333 IA*** requires a bankrupt to "*give to the trustee such information as to his affairs, attend on the trustee at such times, and do all such other things as the trustee may for the purposes of carrying out his functions … reasonably require.*". A bankrupt is also responsible for giving information concerning his property post-commencement of the bankruptcy.

8. It is also a feature of context that these sections establish a criminal offence in the event of breach without reasonable excuse. This for the purposes of applying ***s.365 IA*** emphasises the importance of compliance with the obligations imposed upon a bankrupt, and the importance of the civil courts ensuring compliance, if and to the extent practicable and proper to do so.

9. This is an application brought not only because of a failure to comply with ***ss312 and 333 IA*** but also because of the stated belief of the Trustees that there is a real risk of dissipation, destruction and disposal of such property and books, papers and records. That belief is reached against a background of a series of events and judicial opinions which are relied upon to contend that "bad character" has been established. I refer to paragraphs 10-15 of Mr Hyde's witness statement. They do not in themselves establish the case for that belief and the fact of "bad character" is not evidence that Mr Djurbery has in this instance breached his duties. However, the fact of a disposition towards misconduct, which those events and opinions identify, is a factor to be borne in mind when considering the facts and matters relied upon for the purposes of this application.

10. The starting point of those facts and matters is the failure to provide income and expenditure information and the fact that only limited accounting information has been provided throughout the bankruptcy which began on 20 September 2021. I refer to paragraphs 41-42 of Mr Hyde's witness statement which include particulars of the limited information provided. I note in particular the reference to the documentation provided in paragraph 45, the non-disclosure of bank accounts referred to in paragraph 53 and the conclusion at paragraph 54 of continued non-compliance with ***s.333 IA***.

11. The evidence then moves to the Swiss Chalet, which was sold on 11 February 2022 to third parties without vacant possession by receivers. Mr Djurbery still resides there. This raises the question whether there is property of the bankruptcy estate there that should be delivered up, and/or books papers and records which are relevant to his dealings before the commencement of the bankruptcy and after the making of the bankruptcy order. The dealings would potentially address, amongst other matters, what the evidence indicates are a number of transactions involving the dissipation of assets. The paperwork is needed to potentially recover assets, or commence proceedings, including for the purpose of recovery by tracing. This being Mr Djurbery's place of residence one would reasonably expect such information to be there.

12. With respect to the potential for valuable items being at the premises, two inventories are referred to, both for 2018, (see paragraphs 58-59 of the witness statement) together with a valuation report of contents made in February 2017 but with a page and comments by Mr Djurbery apparently for September 2021 (see paragraph 61). There is also a reference within the witness statement to descriptions of contents in newspapers of March 2020 and April 2021.

13. My overall observation is that the information concerning the existence of valuable assets, potentially worth in the hundreds of thousands of pounds in total, is out of date as at May 2022. It may be that some or many of the valuable assets have been sold. Nevertheless, the position is that other assets appear to remain. The problem for the Trustees, according to the evidence, is not the absence of existing assets, but the failure of delivery up and of disclosure. There is no other known premises where the assets or papers might exist.

14. At this stage of the evidence, therefore, I conclude there is cause to believe that potentially valuable assets together with books papers and records may have existed but not been disclosed up to April 2021. That some at least have been sold but that others may remain. That the reason for uncertainty is the failure of Mr Djurbery to give information to the Trustees which they require to collect in bankruptcy property. That failure and his consequential unreliability, meaning that he cannot be relied upon to have delivered up all the bankruptcy estate's property in his possession or under his control, point to a real need for orders which ensure such property, books, papers and records are delivered up to the Trustees.

15. The evidence moves next to a pre-bankruptcy dissipation concerning a £50,000 "bounce back" loan. I refer to paragraphs 64-65. This evidence, it seems to me, adds to "the bad character" category of conduct. It is also further evidence of non-

compliance with the duty to provide information, in this instance concerning this loan and its use, to the Trustees.

16. There is then evidence of shredding in November 2021 and for some time before including during December 2019 (see paragraphs 71-78). Whilst it is to be noted there is no up-to date evidence of any similar events, plainly this evidence establishes that destruction is a risk and must be borne in mind within the overall context of evidence establishing a disregard for a bankrupt's duties under ***ss312 and 333 IA***. In certainly cannot conclude that there will now be no relevant information referring to the £50,000 or other dealings pre-bankruptcy in the property because it has all been destroyed. Mr Djurbery has not given information to the Trustees about the existence of such evidence, or explained what documents were shredded or provided information establishing there are no other relevant documents.

17. Paragraphs 79-86 of the evidence in support establishes reason to believe that Mr Djurbery at the beginning of this year sold assets for some £69,790. Assets which on their face belonged to the bankruptcy estate and which should have been disclosed and delivered up to the Trustees. That does not mean there are no further assets.

18. Property appears to have been moved from the Swiss Chalet on 11 February 2022 using a Bentley motor vehicle and a flatbed truck. As at 7 March 2022 palm trees and other plants, bushes and trees appear to have been ready for transportation (see paragraphs 90-92), although whether they could be said to be the bankrupt's when he no longer owns but occupies the property must be in potential issue

19. It has also been drawn to my attention from the evidence that there are two bank accounts frozen in criminal proceedings which were not disclosed to the Trustees, although Mr Djurbery disputes his. There are a number of points to be made with respect to that. First, they are not disclosed in the bankruptcy questionnaires. Mr Djurbery's response to that may be that he does not accept that they are his monies. Nevertheless his responsibility was to tell the Trustees about accounts which criminal authorities contend contain his assets and which have been frozen. They contain substantial sums after all. There has been disclosure of an account holding £400,000. The second point is that the £400,000 is a potential assets available to the estate, subject to the criminal proceedings. If that is the case, that will still leave a substantial deficit remembering that the sum identified by the Trustees is a deficit of £4 million. It cannot be suggested that this order is not required because of those funds.

20. Overall at this stage of the evidence, therefore, Mr Djurbery is to be assessed as though a bad character direction is given, he has in breach of his duties not provided the information and documentation to the Trustees he ought to have done. He has not only not delivered up property of the bankruptcy estate but has sold/dissipated property of his estate without disclosure and without accounting for its proceeds or its current whereabouts.

21. According to the evidence, there may well be valuable furnishings and other assets at the Swiss Cottage premises he currently occupies which should be delivered up to the Trustees as estate property. There should also be books papers and records which have not been delivered including two Apple Mac Computers.

22. It is to be concluded from the evidence that there is certainly a real risk that he may be hiding property at the Swiss Chalet and may continue to sell/dissipate bankruptcy estate assets them. In addition that there are books, papers and records there required to be seen to enable the Trustees to fulfil their duties and functions as a result of having a clear picture of his past and current affairs. He has provided no information to the Trustees to suggest otherwise. There is need for a warrant authorising seizure, potentially the breaking open of premises. Insofar as the Swiss Cottage is to be treated as premises not belonging to him, ***s.365(3) IA*** will apply.

23. All this leads to the conclusion that an order under ***s.365 IA*** is required. As an overview description of the position, the evidence before me leads to the conclusion that Mr Djurbery cannot be trusted and will not comply with his statutory duties with the real risk that this will be detrimental to the creditors of the bankruptcy estate whether because of sale, dissipation and/or destruction

24. However, that conclusion is subject to addressing the exercise of the discretion conferred by ***s.365 IA*** including considering the mental health issue evidence. I refer in particular to paragraphs 16-27 of the evidence in support and to the accompanying exhibits. Mr Djurbery has in other proceedings himself referred to mental health issues. There is also the decision of D.J. Smart in the County Court of Kingston Upon Thames. I refer to his 10 January 2022 Order, which contains a recital which states "*AND UPON the court reading the report of Dr Okon-Rocha of 9 February 2021 and being informed by counsel for the Official Solicitor that the Official Solicitor has received a further report confirming that the Defendant currently lacks capacity*". In light of that recital, the Official Solicitor is acting for him. I have, of course, to take into account that this was only in January 2022, but based on a report dated 9 February 2021, the year before. I have been taken to and read that report.

25. The mental health evidence can be divided into two strands without suggesting that a holistic approach is unimportant. First, serious depression with reference to mention of suicide, and, second, difficulties that lead to the suggestion that he lacks capacity. I do not conclude that he lacks capacity in particular because of his correspondence. On their face his writing demonstrates someone able to deal with their personal and business affairs.

26. Of great concern to me is the first strand and the need to balance mental health issues with the need for the application under ***s365 IA*** bearing in mind the conclusions drawn in the evidence in support of the application. I refer in particular to paragraph 106 in the Witness Statement of Mr Hyde. I also note the matters at paragraphs 93 and 94.

27. To address that balance, it is helpful to look at what should happen in principle and in practice in an ordinary bankruptcy. I will first look at what should have occurred to date had the statutory duties been complied with. Mr Djurbery should have co-operated with the Trustees. He should have provided all information relevant to his affairs before and after the bankruptcy required to enable the Trustees to fulfil their duties, including the recovery and realisation of assets. That applies both to physical assets and to intangible assets including claims for the recovery of property and assets. Performance of his duties should not have led to arguments or stress. It required delivery up of the relevant documents and property, and sitting down to be

interviewed in the context of co-operation. There is also no reason why he should not invited the Trustees to the Swiss Chalet, and reach agreement with respect to delivery up once there. The obvious course here would be for Mr Djurbery to show the Trustee around the Swiss Chalet, to discuss its contents and to reach agreement as to how best to deliver up property, books papers and records belonging to the estate. There is no reason to conclude that mental health issues prevented or prevent this. There would not be a need for the Trustees to come to Court for any order requiring or enabling that to be done had Mr Djubery performed his duties.

28. This illustrates how the orders sought by the Trustees could and should have been achieved by Mr Djubery's active co-operation. This is relevant to the draconian nature of the order sought. With respect to forced entry, the reality is that Mr Djurbery can and should, on receiving the order to deliver-up, open up and assist. The draconian power is there to effect a process which should occur without difficulty. There is only a difficulty where a bankrupt fails to comply with their duties. The balance needs to considered in that perspective.

29. In this case it has been shown that there has been dissipation of assets and destruction of records. The Court is asked to put the Trustees in the position which ought to have existed through co-operation. It is because of the lack of co-operation, that this application had had to be made and to be made without notice. The evidence establishes there is a real need to avoid the further opportunity for Mr Djurbery to dissipate or destroy or conceal assets and/or documents. The evidence in this case supports the conclusion that the order should be made on an application without notice because of the risk of further dissipation and further destruction.

30. This is a case where need for the Court's assistance has been established because of a failure to co-operate, a failure to disclose assets and information relevant to the conduct of the bankruptcy, a dissipation of assets and the destruction of books and records. Injunctive relief in accordance with the provisions of ***s.365 IA*** is appropriate to cure these breaches. Orders which will relate to property and documentation belonging to the estate and/or to which the Trustees are entitled.

31. Whilst this is a draconian remedy and safeguards are required, their existence are important for the purposes of the exercise of the discretion and the balancing exercise referred to. I refer to the Lasytsya decision to identify them, *Lasytsya v Koumettou; Re Lasytsya* [2020] B.P.I.R. 874 at [in particular at 22-33].

32. At this stage the scales are in favour of the order sought because of the risk, which definitely exists and in my conclusion presents a real prospect, of the bankrupt taking steps to hide/dissipate assets or their proceeds and/or to hide and destroy relevant documentation. However, I have identified six points for further consideration before reaching my decision.

33. The first, that this may be a case where the horse has already bolted. That is certainly a possibility in the light of the evidence of past breaches of duty. However, it is to be noted that the possibility only exists because Mr Djurbery has not fulfilled his duties. For example, has not identified the Swiss Chalet contents and the books papers and records belonging to the estate or relevant to his affairs past and present. In any event the conclusion to be reached on the current evidence is that there is still cause for the

relief. There is a real prosect that there will be assets of the estate still within the premises, there should still be relevant documentation and the fact of previous dissipation means there should be documents to assist recovery of assets previously wrongly sold, including by tracing.

34. The second point is delay. However, I have concluded that whilst it may well be said that it would have been better to proceed in September 2021 or earlier, that does not mean the need for the remedy no longer exists, that it is no longer proportionate or that it should be refused.

35. Third, is the fact that this draconian order is being sought in the context of evidence of mental health problems, including suicide risks. That is evidence is relevant even though the correspondence from Mr Djurbery (to which I referred when addressing this as a preliminary point) on its face evidences someone very capable and able to manage their day to day affairs both personal and business. What the court needs to be particularly wary of are adverse mental health consequences.

36. In that context, the choice is to do nothing (which cannot be right), or find an alternative remedy, or grant the relief sought. An alternative remedy would be an order for delivery up by a specified date and to attend Court for an examination. That order would contain a penal notice. Non-compliance would therefore lead to possible contempt proceedings and imprisonment. That route is unattractive in this scenario of mental health. The alternative approach is to obtain entry now and effectively enforce the statutory duties which should have been fulfilled through co-operation.

37. I do not conclude that the mental health evidence suggests that there will be a greater risk or that the outcome will be more problematic whichever one of the two remedy routes is chosen. What it draws attention to, however, is the need for appropriate safeguards. The High Court Tipstaff has attended the hearing and made clear that he is willing to conduct enforcement bearing in mind and applying the specific guidelines which exist in the event of mental illness difficulties. I consider it right, therefore, to proceed on that basis and leave the application of that guidance to his discretion and experience. In this regard I take note of the fact that he will be attending personally. This leaves the scales balanced in favour of an order because the safeguards lighten the weight of this important issue.

38. Fourth, I note that the enforcement of the order as proposed will be a large scale operation. I refer to paragraphs 100 to 101 of the Witness Statement of Mr Hyde. I anticipate that this is too large scale. The Tipstaff made that observation. I agree. However, this can be resolved by considering the appropriate reduction to be made within the terms of the order.

39. Fifth, there is the feature of ownership of the Swiss Chalet by a third party and also ownership of its moored house boats. I understand that the owners do not object (see paragraphs 104-105 of the evidence).

40. Sixth, there is the question of who else may be there. The important point on the evidence before me is that it appears children will not be there (see paragraph 96).

41. Taking all those matters into consideration I conclude that the discretion should be exercised to give effect to the purposes of ***s.365 IA*** in the context of the breaches of

duty which have occurred and when there is a real prospect of continuing breaches. None of the six factors weigh heavily enough to avert that conclusion but the risk of self-harm and/or deterioration in mental health means caution is required.

42. What I have in mind subject to discussion with Ms Powers is that the order should start with injunctions for delivery up of property and books papers and records and include specific orders to restrain destruction and dissipation and with recited encouragement to allow entry and dialogue. Applying those orders, in the first instance personal service would potentially allow this matter to be resolved by consent without the need for the powers to enforce entry and seizure. However, the order for a warrant permitting seizure will be there to be enforced should there not be co-operation and, for example, the premises need to be broken into. As stated that step would be subject to the High Court Tipstaff exercising his authority in accordance with the guidelines.

43. In discussion with Ms Powers I proposed the possibility of only making the injunctions with the Trustees having permission to seek the further relief to be effected by warrant. I have decided that would be inappropriate bearing in mind the conclusions reached in this judgment and the risk of dissipation and destruction from delay. I was also influenced by the safeguards to be provided within the order, for example the role of the independent solicitor, and by the fact, for example, that the High Court Tipstaff will normally allow a period of circa two hours for advice and assistance and for discussion before enforcing the warrant through forced entry.

44. There will need to be revision of the current draft order and I will consider it further when that form is received. At this stage:

[The draft was the subject of discussion and it was concluded:

- Paragraph (2)(a) of the Order should be amended to refer to the "bankruptcy estate", and to include a reference to the property to be searched. "Any property" and "books and records" should be split up.
- Paragraph 2(b) of the Order should include "*at the premises*".
- Paragraph 2(c) is redundant as now [illegible] third property.
- Paragraphs 3 to 4:
    - There should be one supervising solicitor (if necessary a second lawyer, who is female, can attend).
    - There should be one independent solicitor to advise. Two hours should be allowed for legal advice.
- Paragraph 5: discuss the logistics with the Tipstaff, but a maximum of 10 people.
- Paragraph 8: return as soon as possible and not later than five days after execution.
- Paragraph 10: a note of hearing and a note of judgment.
- Paragraph 11(a): at the time of execution, or if that can't be done as soon as possible and no later than seven days after execution.

- Paragraph 11(b): 14 days, and a minimum value of £1,000.
- There should be a witness statement from the Trustees in Bankruptcy as to their knowledge of the houseboats at the site.]

45. Subject to those and any further considerations resulting from seeing the final form of order, I have concluded that relief should be granted pursuant to ***s.365 IA***, that there is a real risk of further dissipation, disposal and/or destruction without that relief and that it is a proportionate remedy in terms of value both financially in respect of assets and in terms of information potentially to be derived for the bankruptcy. I have reached that decision on the basis of safeguards required for the order and its implementation.

[The order in its final form was considered further during a remote hearing on 9 May 2022.]

Order Accordingly