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Case No: CR-2022-MAN-000180

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
INSOLVENCY & COMPANIES LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Friday 22 April 2022

Before HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Between:

JAMES BORG-OLIVIER

Applicant

-v-

(1) ANDREW KNOWLES
(2) MICHAEL VINCENT LENNON
(3) GOLDCREST FINANCE LIMITED
(4) IMPACTT PROPERTIES LIMITED

Respondents

MR NICHOLAS JACKSON (instructed by MSB Solicitors) appeared on behalf of the Applicant
MR IAN TUCKER (instructed by Addleshaw Goddard) appeared on behalf of the First and Second Respondents
MR TOM LONGSTAFF (instructed by Addleshaw Goddard) appeared on behalf of the Third Respondent
THE FOURTH RESPONDENT did not appear and was not represented

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Central Court, 25 Southampton Buildings, London WC2A 1AL
Tel: 0330 100 5223 | Email: uk.transcripts@escribers.net | uk.escribers.net

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment on an application brought by way of what is described as an originating application notice, issued on 2 April 2022 by Mr James Borg-Olivier, under case number CR-2022-MAN-000180. The applicant is one of the two directors of, and a 75 per cent shareholder in, the fourth respondent company, Impactt Properties Limited, which is purportedly in administration. He brings this application with the knowledge and authority of the other director and remaining 25 per cent shareholder, Mr Neil Moir.

2. The first and second respondents, Mr Andrew Knowles and Mr Michael Vincent Lennon, are the appointed administrators of the fourth respondent company, Impactt. They were purportedly appointed out of court on 2 March 2022 by the third respondent, Goldcrest Finance Limited, under the terms of a fixed and floating charge over the assets of Impactt, dated 5 August 2020, pursuant to paragraph 14 of schedule B1 to the Insolvency Act 1986. The notice of appointment was filed under case number CR-2022-MAN-000157. The application is said to relate to paragraph 16 of schedule B1 to the Insolvency Act 1986 (as amended). That paragraph provides that an administrator may not be appointed under paragraph 14 whilst a floating charge on which the appointment relies is not enforceable.

3. The evidence in support of the application is contained within the witness statement of the applicant, dated 18 March 2022. Although the third respondent states that it has not been properly or validly served with this application, it has been notified of it by the first and second respondents; and it has filed evidence in answer in the form of a witness statement from Mr Steven Mark Gildea, the commercial director of the third respondent, dated 19 April 2022. There is also before the court a witness statement from Mr Andrew Knowles, the first respondent, made with the authority of his joint administrator, the second respondent, dated 13 April 2022.

4. The applicant is represented by Mr Nicholas Jackson (of counsel). The first and second respondents, the joint administrators, are represented by Mr Ian Tucker (also of counsel); and the third respondent is represented by Mr Tom Longstaff (also of counsel). The fourth respondent, Impactt, does not appear and is not represented before me. All three counsel have filed skeleton arguments. I also have a 208 page hearing bundle.

5. As clarified by Mr Jackson at this hearing, the relief now sought by the applicant is a declaration that the purported appointment of the administrators, and the administration, were nullities, and an order that the joint administrators should refund such monies as they may have received in their capacity as joint administrators to the fourth respondent. The applicant also seeks an order, under paragraph 21 of schedule B1, that the third respondent do indemnify Impactt against all liability arising solely as a result of the nullity of the joint administrators' appointment; but, as Mr Tucker has pointed out, in fact the indemnity provided for in that paragraph (where a person purports to appoint an administrator under paragraph 14 and the appointment is discovered to be invalid) merely empowers the court to order the person who purported to make the appointment to indemnify the person appointed, ie, the joint administrators, and not the company, against any liability which arises solely by reason of the appointment's invalidity.

6. The grounds upon which the applicant claims to be entitled to the relief he seeks are that the sums secured by the floating charge had been repaid to the third respondent in full, and the charge had been redeemed, or should have been treated as redeemed, on 6 August 2021, such that the third respondent did not have the power to appoint the first and second respondents under paragraph 16 because the floating charge was not then enforceable. It is also said that the fourth respondent is solvent; but the solvency of a company is no basis for impugning the validity of the appointment of administrators if the charge pursuant to which they were appointed is, at the time of the appointment, enforceable and the other conditions of paragraph 14 of schedule B1 are satisfied, which, in the present case, they are.

7. Mr Longstaff, for the third respondent, has questioned the basis upon which this present application is made. He has pointed out that the application merely identifies paragraph 16 of schedule B1. He assumes that what is actually sought is the removal of the administrators; and he says that that would require an application under paragraph 88 of schedule B1. I do not accept that submission. This is not an application to remove administrators; it is an application

for a declaration that the charge pursuant to which they were purportedly appointed was unenforceable and, therefore, the appointment was invalid, because paragraph 16 provides that an administrator may not be appointed under paragraph 14 while the floating charge on which the appointment relies is not enforceable.

8. Mr Jackson has pointed to observations of Sir Andrew Morritt, the Chancellor, at the end of his judgment in the case of *Minmar (929) Limited -v- Khalastchi* [2011] EWHC 1159 (Ch), reported at [2011] BCC 485, where (at paragraphs 69 and 70) the Chancellor addressed the standing of a director to raise the issue of the validity of the appointment of administrators. The submission there was that since the applicant in that case was but one of five or six directors, and had no interest in any shares in the company, he did not have the necessary standing to challenge the appointment of administrators. Sir Andrew Morritt, having referred to CPR 3.3(4), saw no reason to accede to any objection to the standing of the sole director on the basis that either he had standing, and the Chancellor could make an order on his application, or, if he did not, the Chancellor should make the order on his own initiative so as to give effect to the true legal position.

9. In the present case, the applicant is one of two directors who makes the application with the authority of his co-director; but he is also a 75 per cent shareholder in the company, which has been placed in administration by the appointment purportedly made by the third respondent. In those circumstances, I have no doubt that the applicant has the necessary standing to seek a declaration as to the invalidity of the appointment of administrators on the footing that, on his case, since no monies were due under the floating charge, it was unenforceable at the time of the appointment.

10. The real issue for determination in this case is whether or not the monies due under the fixed and floating charge had been repaid on 6 August 2022. On that day, formal notice had been issued for repayment of the sum of £378,464.84. Mr Longstaff accepted that that was the sum due under the fixed and floating charge as at 6 August 2021. There are recitals to that effect at paragraphs (f) and (g) of a draft settlement agreement which had been proffered by the solicitors acting for the third respondent for completion by the fourth respondent company. As to that sum, two separate sums, totalling £58,464.84, were received from Impactt on the afternoon of 6 August 2021.

11. The balance then due (of £320,000) was paid into the bank account of the third respondent at Barclays Bank plc by way of CHAPS transfer, at 3.57, from Newsham Park Estates Limited. That payment was immediately rejected by the third respondent on the basis that it did not know the identity of the payer. However, the monies were not, in the event, returned until 12 April 2022.

12. It was immediately made clear by the applicant, on behalf of Impactt, in an email to the third respondent from the applicant, dated 6 August 2021 and timed at 4.02 pm, that the £320,000 had been paid by Newsham Park Estates Limited. The applicant states that: *"After you had sent me a formal demand at 11 am this morning via email, only giving me five hours' notice to pay,"* he had been *"forced to pay the full balance of £378,464.84 from three of my different bank accounts, the third of which, in the sum of £320,000, was from Newsham Park Estates Limited."* The applicant stated that he was fully aware of the requirements of anti-money laundering, and he stated that the monies had been raised from the sale of a property at Whiston, at £620,000 from Newsham Park Estates. He attached the latest bank statements from that entity.

13. After that, negotiations took place between the parties' solicitors as to the conclusion of a settlement agreement evidencing the discharge of the indebtedness and the basis upon which this had been effected; but such negotiations eventually broke down, apparently because of the refusal of Impactt to accept provisions in the settlement agreement as to confidentiality. That resulted in the service of two further letters of demand by the third respondent on the fourth respondent, the second of which was served on 22 February 2022; and when that demand was not satisfied, the first and second respondents were appointed as joint administrators by the third respondent on 2 March 2022. The payment made by Newsham Park Estates Limited was returned on 12 April 2022, although Mr Jackson told me that that had not, in fact, been received. That is the factual background that gives rise to the present application.

14. Mr Jackson's case is simple: He says that subject to any contrary provision in the relevant contract, payment of a debt may be made by a third party as agent for and on account of the debtor. He refers the court to <u>*Chitty on Contracts*</u>, 34th edition, at paragraph 24-039, headed *'Payment by agent or third party'*. I quote: *"Where payment of a debt is made by a third person who is not jointly liable, eg, as co-contractor, the debt is not discharged unless the*

payment is made by the third person as agent for and on account of the debtor and with his prior authority or subsequent ratification."

15. Mr Jackson also points to subclause 9.2 of each of the facility agreements, whereby Impactt was required to make all payments in cleared funds to the third respondent at its named bank account with Barclays Bank plc. In so stipulating, the third respondent was said to have constituted Barclays Bank its agent to receive the payment, which was made as soon as the bank received payment in a manner equivalent to cash, the result of which was to give the third respondent the unfettered, or unrestricted, right to the immediate use of the funds transferred.

16. Mr Jackson relies upon the statement at paragraph 24-043 of ***Chitty on Contracts***, headed '*Payment or transfer into a bank account'*, which states: *"Where the creditor instructs the debtor to pay a sum due to him by making a payment to the credit of a specified bank account, the creditor has made the bank his agent to receive the payment which is made as soon as the bank receives payment in cash or by means of a banker's cheque, draft, payment order or transfer, which is treated by the bank as equivalent to cash."*

17. Mr Jackson submits that the sums demanded had been repaid when the transfer of £320,000 from Newsham Park Estates Limited was received into the third respondent's account at Barclays Bank. He invites the court to note that the third respondent had afforded Impactt less than five hours to repay the whole indebtedness; that until 12 April 2022 at the earliest, the third respondent had retained the whole of the £320,000; and that the third respondent had subsequently, by the terms of the draft settlement agreement, demanded that Impactt should pay its substantial legal costs, and waive all rights or claims, and keep the matter confidential.

18. He states that Impactt had been content to enter into that settlement agreement, and pay Goldcrest's legal and other expenses in the full sum demanded, save only as to the waiver of rights and confidentiality; and that Goldcrest had only sought to appoint the administrators after Impactt had indicated that it would seek a declaration as to redemption in Part 8 proceedings. He invites the court to infer that Goldcrest was then satisfied with all the warranties sought by the settlement agreement as to the solvency of Newsham Park Estates Limited. Be that as it may, however, Impact had complied with all of the applicable provisions of the facility agreements. Had Goldcrest wished to protect itself against the risk of transactions at an

undervalue, it should have provided against third party payments being made under the facility agreements.

19. Mr Jackson therefore submits, in conclusion, that there had been no debt due under the security; Goldcrest had no power to appoint administrators; their purported appointment was a nullity; and the administration should be set aside.

20. Mr Longstaff submits that the application is wholly misconceived and should fail. The relevant loan documentation had defined the fourth respondent and its co-debtor, Anglo Chinese Property Corporation Limited, as 'the company' and it was a term of the loan that the company should repay the loan in full on the repayment date. Accordingly, the payment was to be made either by the fourth respondent and/or by Anglo. There was no open invitation in either the loan agreement or the further advance for an unknown third party to make payment on behalf of the fourth respondent or Anglo, in circumstances where the origin of such a payment would be wholly unclear to the third respondent, including for money laundering purposes. The third respondent's concerns as to the source of the funds it had received, and its investigations, were only consistent with its statutory obligations pursuant to the Money Laundering Regulations.

21. Mr Longstaff submits that by failing to make payments in accordance with the loan documentation, the fourth respondent, and its co-debtor, were in breach of the terms of the lending, and the third respondent was therefore entitled to appoint administrators, which it did. He submits that a lender is under no obligation to accept payments from a third party in purported satisfaction of the obligations of the borrower. He cites a Court of Appeal decision in the case of *Paratus AMC Limited v Fosuhene* [2013] EWCA Civ 827. Mr Longstaff took me to paragraph 36 of the judgment in that case of Floyd LJ, with which the other two members of the court (Leveson and Longmore LJJ) both agreed.

22. Mr Longstaff accepts that the facts of the *Paratus* case were quite different; but he relies upon what is said at paragraph 36, where the point was made that when money was being paid by the defendant into Paratus's account, it could have had absolutely no knowledge of who was paying, and it had no knowledge that the money was coming from the defendant or that she was in occupation of the property. Those observations were not made in the context of the repayment of a debt. They were made in the context of a case in which the issue was whether,

by accepting payments from the defendant, the mortgagee had thereby constituted the defendant its tenant of the property. The question was whether Paratus had arguably waived the right to treat the defendant as a trespasser or were estopped from doing so. I do not consider that the *Paratus* case is any authority on the issue of whether a third party may validly repay, and thereby discharge, a debt due from a debtor to a creditor.

23. Mr Longstaff submits that if it is alleged that it was an implied term of the loan that the third respondent was obliged to accept payment from a third party at the instigation of the fourth respondent, then the court should also imply a term that the fourth respondent would co-operate with any reasonable requests from the third respondent for documents and information relating to the identity of the payer and the origin of the funds, and provide reasonable assurances as to the third respondent's ability to retain the funds. This, it is said, the fourth respondent has failed to do.

24. Those were the submissions. Mr Tucker, for the joint administrators, adopts a position of neutrality.

25. Apart from the passages in *Chitty*, I have been referred to no authority on the question of whether a creditor is obliged to accept repayment of a debt from a third party. I have already indicated that the *Paratus* case is of no assistance on the point. I acknowledge that paragraph 24-039 of *Chitty* does not state in terms that a third party who is authorised by the debtor may discharge a debt by payment to the creditor, but it seems to me to be implicit in that statement in *Chitty* that he may do so. The passage states that where payment of a debt is made by a third person who is not jointly liable, the debt is not discharged unless the payment is made by the third person as agent for, and on account of the debtor, and with his prior authority or subsequent ratification. It seems to me implicit in that statement that if the payment is made by the third party as agent for, and on account of, the debtor, and with his prior authority or subsequent ratification ---

(Mr Longstaff was disconnected from the Teams hearing)

(Mr Longstaff reconnected to the Teams hearing)

26. I had essentially been saying that the passage in *Chitty* does not state, in positive terms, that where a payment of a debt is made by a third party with authority, the debt is discharged, but that it seemed to me to be implicit in what was said there that where payment of a debt is made by a third person as agent for, and on account of, the debtor, and with his prior authority or subsequent ratification, then that duly discharges the debt. That seems to me to be the position in the present case. It was made clear, within minutes of a query being raised as to the identity of the payer, what was the basis upon which payment was being made by Newsham Park Estates Limited, which was identified as the payer. It seems to me clear on the evidence that the balance of the full amount then due was paid into the nominated bank account of the third respondent at Barclays Bank plc by Newsham Park Estates Limited as agent for, and on behalf, and with the authority, of the fourth respondent, Impactt.

27. Although there were negotiations as to whether the basis of that payment should be documented and recorded in a settlement agreement, the sum had not been returned by the time of the joint administrators' appointment. In those circumstances, it seems to me that, as at the date of the joint administrators' appointment, the floating charge was not then enforceable. It follows that, in my judgment, the provisions of paragraph 16 rendered the appointment ineffective because, at the time it was purportedly made, the floating charge on which the appointment relied was not enforceable.

28. It follows that I should declare that the appointment was not valid and that the company was not validly placed into administration. That seems to me to accord with the merits of the case: At the time of the appointment, the third respondent still retained the full amount which it had demanded on 6 August; and, in those circumstances, in my judgment, it was not open to the third respondent to enforce the floating charge by appointing the first and second respondents as administrators.