Neutral Citation Number [2022] EWHC 3939 (Ch)

Case No: CR-2020-MAN-000473

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

IN THE MATTER OF SAINT BENEDICT'S LAND TRUST LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

1 Bridge Street West
Manchester
M60 9DJ

Wednesday, 23rd December 2020

Before:

HIS HONOUR JUDGE HALLIWELL

B E T W E E N:

LONDON BOROUGH OF CAMDEN & PRESTON CITY COUNCIL

and

SAINT BENEDICT'S LAND TRUST LIMITED

MR T A GOSLING and MR A S WORTHINGTON appeared on behalf of the Applicant
MR C R WOLMAN appeared on behalf of the Respondent Company

APPROVED JUDGMENT (No. 2)

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HHJ HALLIWELL:

1. This is the adjourned hearing of a winding-up petition in respect of St. Benedict's Land Trust Limited ("the Company"). It has been adjourned part heard from hearings in November, including a hearing on 18 November when I gave the judgment at *[2020] EWHC 3738 (Ch)*.

2. The Petition was presented by Camden Borough Council and Preston City Council in respect of the Company's putative liability for costs and national non-domestic rates.

3. Before me, Mr Gosling of counsel has appeared for the Petitioners and Mr Wolman of counsel has appeared on behalf of the Company. In addition to Mr Wolman's services, the Company has received assistance from a company named Harrison Carter Limited. I am advised Harrison Carter Limited has recently been re-named H&C Associates Limited. However, in the interests of simplicity, I shall refer to it as "Harrison Carter". Although Harrison Carter has provided the Company with assistance in connection with these proceedings, it is not a firm of solicitors.

4. I concluded that the Company was indebted to the Petitioners in the sum of £46,976.46 and did not have a *bona fide* defence or cross claim sufficient to warrant an order dismissing the petition. In my judgment, on 18 November, I thus indicated that I was minded to make a winding-up order. However, at that point Mr Wolman for the Company submitted that his client could be put in funds to discharge the petition debt and requested time to do so. To afford it the opportunity, I adjourned the hearing until 20 November.

5. A third party, Mr Gregory, Mr Clive Nicholas Gregory, undertook to raise the funds required and, with this end, transferred the sum of £47,000 from the bank of a Gibraltar-registered company called Norseman Holdings Limited ("Norseman"), a family company with a bank account over which he was the sole signatory and administrator. The sum was transferred to Harrison Carter. Mr Gregory's connection with the Company is that his brothers, Keith Charles and Kevin Edward are respectively a trustee and secretary of the Company. The sum of £47,000 was rounded up from the petition debt of £46,976.46.

6. Although Norseman is a Gibraltar company, the payment was funded from its UK bank account in Romford. Once Harrison Carter had been credited with the sum of £47,000, which it held on client account, it transferred that amount to the Petitioners' solicitors,

Greenhalgh Kerr.

7. The hearing on 20 November took place during the afternoon at around 3pm. By that time the sum of £47,000 had already been transferred to Greenhalgh Kerr's client account. In his subsequent witness statement dated 16 December, Mr Hamza Adesanu has confirmed that the money would have been credited to the Greenhalgh Kerr bank account at the very latest by 12.35pm that day.

8. This is not disputed by the Petitioners. However, they maintain that, by then, they had reason to believe the payment was suspicious and resolved to make a suspicious activity report to the National Crime Agency. They were precluded by the provisions of the *Proceeds of Crime Act 2002* from advising the Company about the action they intended to take. To do so could potentially have exposed themselves or their advisors to prosecution for the criminal offence of tipping-off.

9. The Petitioner's legal representatives thus sought an adjournment for a further period of 14 days. Mindful of their duties under the *2002 Act,* they did not do anything to alert the Company to what they were doing although they did notify the Court by email. If this has led to some bewilderment on the part of the Company and furnished it with a sense of grievance, this primarily arises from the statutory regime itself and action taken under it. The Petitioners' solicitors cannot legitimately be blamed.

10. In these circumstances, I adjourned the hearing - at the Petitioners' invitation - for further consideration on 8 December in anticipation that, by then, the matter would be resolved.

11. In the period leading up to the adjourned hearing, the National Crime Agency advised Greenhalgh Kerr that they did not intend to investigate the matter further. However, somewhat unexpectedly, the Petitioners then elected - on 4 December – to return the fund.

12. It is at least implicit in Richard Kerr's witness statement of 18 December that part of the Petitioners' reason for returning the fund was that, following the NCA's decision not to investigate the matter further, any deal would be at his clients' risk. In paragraph 11, he stated that the matter was drawn to his attention as his firm's Money Laundering and Compliance Officer because the funds were in an incorrect amount so as to require a refund and they came from a company that was registered abroad.

13. In his submissions before me this morning, Mr Gosling submitted that the Petitioners' decision to refund the payment could be explained on four grounds although, at least in part,

those shade into an *ex post facto* justification of the decision itself.

14. Firstly, he submitted they were transferred because the Petitioners perceived, at the time, that they ought to have been paid directly by the Company itself, not through Harrison Carter.

15. Secondly, he submitted that there were aspects of the transaction which justified a Suspicious Activity Report based on the tick box exercise which their solicitors apply when addressing the source of funds for a transaction. In particular, he said the transaction had been unexpectedly funded by a third party based overseas without any commercial relationship to the Company. They also considered there were grounds for suspicion on the basis that the payment had been rounded up by £23.54 from £46,976.46 to £47,000.

16. Thirdly, Mr Gosling relied on the additional increment of £23.54 as a separate ground for repaying the sum of £47,000 in full. As I mentioned during the hearing, I found this submission to be surprising. No doubt, the process of repaying such a small amount would be disproportionately expensive. However, it was always open to the Petitioners to repay the sum of £23.54 and retain the balance.

17. Finally, Mr Gosling submitted that the Petitioners were fully entitled, given the procedural background to the case, to seek to limit the involvement of third parties in the dispute.

18. In my judgment, these considerations would not have furnished the Petitioners with a convincing basis on which to repay the sum of £47,000 in full. The sum was plainly transferred on behalf of the Company with a view to discharging the Petition debt. The fact that it was transferred from third party funds did not, in itself, amount to a good reason for refunding the payment. No doubt, the matters identified in support of the decision to file a Suspicious Activity Report may have warranted such a report but, in the absence of further investigation or enquiry, they did not provide the Petitioners with good reason for peremptorily repaying the sum of £47,000.

19. It is true that the initial source of funds was Norseman, a company registered in Gibraltar. However, Mr Wolman was open at the hearings before me that the transaction was being funded in that way. Mr Gosling indicated that he would have expected the funds to be transferred from the Company but this does not, in itself, amount to grounds for reasonable suspicion about the source of the funds. If the Petitioners had reason to challenge the source of the funds, it was always open to them to make further enquiries of Harrison

Carter.

20. The overpayment of £23.66 was made as part of a simple rounding-up exercise, it is not cause for suspicion, nor did it provide the Petitioners with a good reason for repaying the full amount of £47,000.

21. The procedural background is unfortunate but it did not warrant the decision to peremptorily repay £47,000 without further enquiry.

22. Whilst Harrison Carter provides some legal services, it is not a firm of solicitors and it is not regulated as such. However, I am advised that it is entitled to provide some legal services under *Section 23* of the *Legal Services Act* and, at each hearing, the Company has instructed Mr Wolman to appear as counsel on its behalf. It is not suggested that there was or is anything to preclude him from doing so or, indeed, to suggest any kind of impropriety on his part.

23. I have not been provided with a convincing basis for Greenhalgh Kerr's decision to repay the monies transferred without further enquiry. I have seen nothing to indicate that the monies were funded from criminal activity. I have seen nothing to indicate that they are held on trust for an unidentified third party. Whilst they were initially transferred from the UK bank account of a company registered abroad, this is not good reason, in itself, to reject the payment.

24. It was suggested at one point that the Petitioners were not required to accept payment because the payment was being made under protest. However, this suggestion was not pursued by Mr Gosling today and does not substantially advance their case. This is not a classic case of tender. The Company's agent simply transferred the funds into the Petitioners' agents' bank account without their cooperation and concurrence. However, it is well established that "a tender of a sum of money under protest or where the debtor states he considers the amount tendered to be all that is due, or where the debtor reserves a right to dispute the amount due, is not a conditional tender and is therefore valid, the reason being that no condition has been imposed that the creditor must make an admission when accepting the money", see *Chitty* on *Contracts (2018) 33rd edition*, *volume 1*, at *paragraph 21-094*. "The fact that the creditor disputes the amount due and refuses to receive the amount tendered by the debtor, does not affect the validity of the tender or render it a conditional tender". In my judgment, there can be no good reason why a payment into the

creditors' account should not have the same consequences if it is made with the same intention.

25. Since the money was credited to Greenhalgh Kerr's client account for the purpose of satisfying the Company's liability to meet the Petition debt, it remains necessary to consider whether there is some legal basis on which it may have failed to achieve that purpose. If there is no such basis and there was and is no reason why the money could not have been applied in satisfaction of the Petition, I am satisfied that the Petition should be dismissed in the absence of supporting creditors.

26. No doubt, the Petitioners are entitled to provision for their costs although there has not yet been full argument on this aspect of the case. However, in view of the nature of the jurisdiction for winding up companies, the procedural history, the way in which this case has evolved and the undesirability of repeated adjournments and delay, I am disinclined to adjourn the hearing yet again to await a further payment in respect of the costs of the Petition.

27. In these circumstances, the critical question is whether there is a sound legal basis on which I can conclude that the £47,000 payment did not discharge or cannot be treated as having discharged the Petition debt. I have come to the conclusion that the answer to that question is no.

28. In his submissions for the petitioners, Mr Gosling has advanced two alternative arguments. Firstly, he argues that the payment is a disposition of the company's property and is void by virtue of the provisions of *Section 127* of the *Insolvency Act 1986*. If not, he submits that the Petitioners were not obliged to accept the payment and did not do so in satisfaction of the petition debt.

29. Mr Gosling's arguments were skilfully presented. In support of the first argument, he took me to the provisions of *Section 127* of the Insolvency Act 1986. This is as follows.

> "In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alterations in the status of the company's members, made after the commencement of the winding up is, unless the Court otherwise orders, void".

30. Mr Gosling referred me to *Officeserve Technologies Ltd and Another v Annabel's (Berkeley Square) Ltd and Others* [2018] EWHC 2168, in which His Honour Judge Paul Matthews in made the following observations at [21].

> "In the context of s 127 (as also in the case of personal bankruptcy), the legal consequence of the transaction *at the time it was carried out* depends on what happens *subsequently*. If the winding-up order is eventually made, the disposition is and always was void from the beginning, although the court has the power to validate it in an appropriate case. If however the winding-up order is not made, the disposition is and always was valid".

31. Mr Gosling submitted that, in the present case, the payment of £47,000 is to be treated as a disposition of the Company's property and the Petitioner is thus not obliged to accept the payment or assume "the unknowable and unquantifiable risk" that it will be avoided. He then drew an analogy with the judgment of the Court of Appeal in *Smith (a bankrupt) v Ian Simpson & Company (A Firm)* [2001] Ch 239. In the *Smith* case the debtor tendered a banker's draft to a petitioning creditor in respect of the full amount of the petition debt but conditional upon dismissal of the petition. She did so notwithstanding that five other creditors had given notice of their intention to support the petition and would thus be entitled to be substituted for the petitioner and given carriage of the petition. The petitioner refused to accept the condition. The case came before a deputy district judge who adjudged the debtor bankrupt. In due course, appeals to the circuit judge and the Court of Appeal were dismissed.

32. Mr Gosling submitted that, following *Smith,* a payment made in circumstances where it will be avoided if a winding-up order is subsequently made on the petition is not to be treated as a payment. If not, it must be conditional on the dismissal of the petition and cannot thus not have been tendered in cleared funds as a creditor is otherwise obliged to accept.

33. Mr Gosling submitted that, although it was applied in a case of individual insolvency, the *Smith* principle applies to corporate insolvency – winding up – in the same way and he extends the principle so as to invalidate any payment that could be characterised as a disposition of the Company's property within the meaning of *Section 436* of the *Insolvency Act 1986*.

34. I am not persuaded this analysis is correct. Mr Gosling has not referred me to an authority in which the *Smith* principle has been applied to a corporate winding-up in the way he suggests. It was an important part of His Honour Judge Maddocks's analysis in *Smith,* endorsed by the majority of the Court of Appeal, that *Rules 6.31* and *6.32* of the *1986 Rules* provided that the creditor could not accept a payment from the debtor's property without the

sanction of the Court. There was specific provision in the *1986 Rules* that a petitioner who applied to the Court for the petition to be dismissed or, indeed, for leave to withdraw, was required to file an affidavit specifying the grounds for his application, to identify any dispositions of the debtor's property and confirm that it was made with the approval of the Court or ratified by the Court. It was also provided that no order should be made giving leave to withdraw the petition until the petition was heard.

35. *Section 271* of the *1986 Act* provides that the Court shall not make a bankruptcy order on a creditor's petition unless satisfied that the petition debt is one which, having been payable at the date of the petition or having since become payable, has neither been paid nor secured or compounded for. In the *Smith* case Jonathan Parker LJ's view, endorsed by Laws LJ, was that, if *section 271* permitted the debtor to bring the petition to an end by paying the petition debt in the face of supporting creditors seeking a bankruptcy order, it would have the effect that the Court's jurisdiction to make a bankruptcy order would be removed by a disposition which would otherwise have been liable to be avoided had a bankruptcy petition been made on the petition.

36. The statutory regime for the winding-up of companies is quite different. *Section 127* of the *Insolvency Act* 1986 provides that dispositions of the company's property after commencement of the winding-up are void. In a case such as the present, this takes effect on winding-up but is generally backdated to presentation of the petition.

37. In those circumstances, caution must obviously be exercised where a company seeks to discharge out of its assets its liability to a creditor following presentation of the petition since it is likely the disposition will be avoided if the company is subsequently placed in liquidation. This is particularly so where supporting creditors have given notice of their intention to attend the hearing of the petition.

38. However, if there are no supporting creditors at the final hearing of the Petition and the Petition debt has been fully discharged out of the Company's assets, the Petition is likely to be dismissed subject to any directions the Court might make as to costs. There is nothing in the *Insolvency Rules* to provide otherwise. Dismissal brings to an end the prospect of winding up the Company on the Petition itself and there can then be no issue specifically about the use of the Company's assets to discharge the Petition debt.

39. In the present case, there are no supporting creditors. If I simply dismiss the Petition today,

as the Company urges me to do, the issue raised by Mr Gosling is essentially academic.

40. However, in my judgment there is another problem with this part of Mr Gosling's case. To succeed, he must show that the £47,000 payment to Greenhalgh Kerr was a *disposition* of the *Company's* property. Dispositions of property are sufficiently wide to include payments. However, the payment must be a disposition of property vested in or otherwise available to the Company for the repayment of its general indebtedness. In the present case, the Company did not make the payment. It was made by Harrison Carter. Nor did the Company provide the funds for the payment. It was funded by Norseman. No doubt the Company authorised Norseman to make the payment on its behalf but it does not follow that the payment was a disposition of the Company's property or that it was held on trust for the Company.

41. The Company accepts that when the monies were credited to the client account held by Harrison Carter, they were held and applied for the benefit of the Company. However, they were plainly transferred to Harrison Carter with the intention that they would be applied for the sole purpose of meeting and discharging the Petition debt and they were never at the Company's free disposal. Had Harrison Carter applied them for any other purpose without the authority of Norseman, they would almost certainly have committed a breach of trust. The funds were not available and they were never intended to be available to meet the Company's ordinary business liabilities. It appears from the evidence of Mr Adasanou that the Company agreed to treat the payment as a loan but the money was never released to the Company for its general purposes. In my judgment it follows that the payment was not a disposition of the Company's assets and Mr Gosling's first alternative submission fails.

42. Mr Gosling's second submission was not developed at length. It amounts to a submission that, if the payment was from a third party - no doubt Norseman or the firm - his clients were under no obligation to accept it. No authority was cited in support of this submission and, in my judgment, as a freestanding proposition, it is not a correct statement of the law. The issue is whether the Company authorised Harrison Carter to make the payment and, in doing so, Harrison Carter can be treated as its agent. Payment on behalf of a person will generally suffice as its payment regardless of whether it is funded by a third party. In my judgment the law on this issue is correctly stated in paragraph 21.042 of *Chitty's Law of Contracts* in which the editors state as follows.

> "Where payment of a debt is made by a third person who is not jointly

> liable, e.g. as a co-contractor, the debt is not discharged unless the payment is made by the third party as agent for and on account of the debtor and with prior authority or subsequent ratification".

43. This proposition is consistent with the analysis in *Chitty (supra)* at *paragraph 21-097* in relation to the law of tender by an agent:

> "A tender need not be made by the debtor personally but may be made on its behalf by its agent whether the agent is previously authorised by the debtor or its unauthorised tender has been subsequently ratified by a debtor, so, where an agent was authorised to tender part of a sum but it tendered, at its own request, the whole sum, at its own risk the whole sum, the tender was held valid after it had been ratified by the debtor".

44. In the present case, although the payment was funded by Norseman and transferred to Greenhalgh Kerr by Harrison Carter, it was plainly made on behalf of the Company with the intention that it would be applied towards the Company's indebtedness to the Petitioners.

45. This is sufficient to dispose of this part of the Petitioners' case. However, Mr Gosling has sought to provide an explanation for the Petitioners' decision to repay the funds.

46. Firstly, he states that, before the payment was made, he indicated on behalf of the Petitioners that it would not be acceptable for the money to be paid as a direct third party transfer. It is implicit in this submission that it would thus have to be made from the Company's assets. Given Mr Gosling's arguments under the provision of *Section 127* of the 19*86 Act* it is, perhaps, fortuitous that the money was not transferred from the Company's general assets available for payment to its ordinary creditors. However, in my judgment it suffices for the payment to have been made and applied on the Company's behalf.

47. Next, Mr Gosling submits that the transfer engages the money laundering issues to which I have already referred. Payment was funded from the UK assets of the third party, Norseman, which is registered abroad. However, obviously it doesn't follow that the payment was funded from illegal activities so as to give rise to money laundering issues. As I say, the NCA has declined to take the matter further at this stage. Mr Gosling submitted that, if Norseman proves to be insolvent, the payment could be treated as a

transaction at an undervalue and set aside under the provisions of the *Insolvency Act*. No doubt, this is true. However, no evidence has been adduced to suggest that Norseman is insolvent or might be insolvent. The Petitioners could have made their own enquiries about the source of the funds and Norseman's financial position. However, there is no evidence that they did so before peremptorily returning the £47,000 payment.

48. If I do not allow the petition to wind up the company, the Petitioners invite me to adjourn the Petition. However, in view of the procedural background and the length of time that has already passed since the winding-up petition was first presented, any further delay in this case would be most unsatisfactory. The winding up petition is dismissed.

End of Judgment

Transcript from a recording by Ubiqus

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