

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY**  
**COURTS OF ENGLAND & WALES (ChD)**  
**INSOLVENCY AND COMPANIES LIST &**  
**FINANCIAL LIST**  
**[2019] EWHC 1035 (Ch)**



**Claim Nos:**  
**FL-2018-000017**  
**BR-2018-001687**

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

Friday 8 February 2019

**Before:**

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

**Between:**

- (1) **DEBUSSY DTC PLC**  
(2) **U.S. BANK TRUSTEES LIMITED** (in its capacity as Security Agent)  
(3) **U.S. BANK TRUSTEES LIMITED** (in its capacity as Issuer Security Trustee)  
(4) **ELAVON FINANCIAL SERVICES DAC** (in its capacity as Facility Agent)

Claimants

- and -

- (1) **SOLUTUS ADVISORS LIMITED**  
(2) **NEIL JOSEPH FORKIN**  
(3) **BOLLINWAY PROPERTIES LIMITED**  
(4) **TOYS “R” US PROPERTIES (UK) LIMITED**  
(5) **TIMOTHY ROLLESTON GILBERT PERKIN**  
(6) **JOHN DAVID BARBER**

Defendants

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**Mr Tom Smith QC, Mr Adam Al-Attar and Mr Alex Riddiford** (instructed by **Brown Rudnick LLP**) appeared on behalf of the **Claimants**.

**Mr David Wolfson QC and Mr Adam Rushworth** (instructed by **DLA Piper**) appeared on behalf of **First and Second Defendants**.

**Mr Andreas Gledhill QC** (instructed by **Freeths LLP**) appeared on behalf of **Third and Fourth Defendants**.

**The Fifth and Sixth Defendants** were not present and were not represented.

Hearing date: 8 February 2019

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**Approved Judgment**

**MR JUSTICE MARCUS SMITH:**

- 1 I have before me an application to amend an application for the appointment of administrators over a company. I shall refer to the application to appoint administrators as the “Appointment Application” and the application to amend the Appointment Application as the “Amendment Application”. The Appointment Application is based on or justified by what I shall term “Ground 1”. The Amendment Application, that is before me today seeks, to insert into the Appointment Application a new ground: “Ground 2”.
- 2 It is necessary to understand the facts before I explain the nature of Grounds 1 and 2. My statement of the facts draws substantially on the agreed case memorandum that the parties have helpfully provided to me. Both the Appointment Application and the Amendment Application – which are made in proceedings in the Insolvency and Companies List – are closely associated with other proceedings in the Financial List. The agreed case memorandum deals with facts and matters relevant to both the Insolvency and Companies List proceedings and the Financial List proceedings.
- 3 The Financial List proceedings arise in the context of commercial mortgage-backed securitisations of various UK properties from which the toy store chain, Toys “R” Us, conducted its UK business. Specifically, the proceedings concern the validity and effect of certain transactions – the “Standstill Letter”, the “Call Option” and the “Deed of Release”, documents which I shall describe in due course – which the Claimants in the Financial List proceedings allege were entered into in breach of the fair dealing rule and are, therefore, liable to be set aside by the court.
- 4 The Claimants in the Financial List proceedings are: (i) the First Claimant, the issuer of various notes; (ii) the Second Claimant, the security agent; (iii) the Third Claimant, the security trustee; and (iv) the Fourth Claimant, the facility agent.
- 5 On 25 March 2018, the Claimants and the Fourth Defendant entered into a £263 million odd facility agreement pursuant to which the First Claimant advanced a loan to the Fourth Defendant on the terms and subject to the conditions set out in the loan documentation (the “Loan”). The Loan has been subject to a number of amendments, restatements and accessions: the most recent version in force is dated 22 June 2018 and is referred to as the AARA, standing for “Accession, Amendment and Restatement Agreement”. I shall, however, refer to it as the Loan.
- 6 To provide security for the Fourth Defendant’s obligations under the Loan and under various other ancillary agreements relating to the Loan, the Fourth Defendant entered into certain security arrangements in favour of the Second Claimant, which included first ranking legal mortgages and first ranking fixed charges over all of the Fourth Defendant’s rights to and interest in various properties located in the UK and the disposal proceeds of such properties (the “Property”).
- 7 On 24 July 2013, the First Claimant issued notes of various classes (the “Notes”) in order to fund the advance of the Loan to the Fourth Defendant. On the same date, the First Claimant executed a deed of charge and assignment by which it granted various fixed and floating charge security over its rights under the Loan in favour of the Third Claimant, to be held on trust for its secured creditors. On the same date, the Claimants and Situs Asset Management

- Limited as servicer and special servicer (hereafter “Situs”) entered into a servicing agreement (the “Servicing Agreement”).
- 8 On 4 January 2018, notice was given by Situs that, an event of default had occurred because the Fourth Defendant had failed to pay the interest due or to remedy this defect within 20 business days. As a result of this event of default, the Loan security granted by the Fourth Defendant to the Second Claimant became enforceable.
- 9 On 22 February 2018, following the failure by the Fourth Defendant to remedy the event of default within the relevant grace period, the Loan became a specially serviced loan under the Servicing Agreement and Situs’ obligations as special servicer under the Servicing Agreement commenced.
- 10 On 23 February 2018, the First Defendant replaced Situs as the special servicer under the Servicing Agreement and was thereafter granted powers of attorney by each of the Claimants. On 13 and 19 March 2018, Solutus caused the Second Claimant to enter into deeds of appointment with the Second Defendant, Mr Forkin, whereby Mr Forkin was appointed as the fixed charge receiver over the Property and over the shares in the Fourth Defendant. On 23 March 2018, the Fourth Defendant, acting by the Second Defendant in his capacity as receiver, appointed FI Real Estate Management Limited (“FI Real Estate”) to manage the Property. On 10 April 2018, the Second Defendant, as fixed charge receiver, sold the shares in the Fourth Defendant to Acepark Limited (“Acepark”).
- 11 On 12 August 2018, various agreements were entered into, the validity and effect of which are in dispute. I shall refer to them as the “Disputed Agreements”. The Disputed Agreements – which I referenced in paragraph 3 above – include the Standstill Letter, whereby Solutus, in its capacity as special servicer and as attorney for the Claimants purported to cause various of the parties to enter into a standstill arrangement. One of the purported effects of the Standstill Letter was to suspend the rights contained in clause 19.20 of the Loan, which includes the right to accelerate the Loan.
- 12 The other Disputed Agreements are the Call Option and the Deed of Release. It is not necessary, for the purposes of this ruling, to describe these Disputed Agreements any further.
- 13 In light of this factual background, I will now proceed to describe the two grounds that I mentioned earlier. By Ground 1, it is said that the Disputed Agreements are liable to be set aside and are void because they were entered into in breach of the fair dealing rule. Ground 2 asserts that the Standstill Letter, assuming it to be not void, but valid, has been terminated and came to an end with effect from the end of November 2018.
- 14 Whichever ground prevails, whether it be Ground 1 or Ground 2, it is contended that there arises an indebtedness of the Fourth Defendant to First Claimant in the amount of some £267 million. Obviously, that indebtedness is contingent upon either Ground 1 or Ground 2 being established.
- 15 The Financial List proceedings that I have mentioned, which raised Ground 1, were commenced in October 2018. The Appointment Application, in its present unamended form, raising only Ground 1, was issued on 15 November 2018, along with a whole suite of other matters, including the letter terminating the Standstill Letter and a letter of demand made, pursuant to Ground 1, seeking repayment of the indebtedness. The background to the various matters done in October and November 2018 are set out in my ruling of 13 December 2018

([2018] EWHC 3848 (Ch)) and I do not, save where necessary for this ruling, set out those facts any further.

- 16 For ease of reference, I am now going to refer to the parties in the Financial List proceedings and the applicants in the Appointment Application and the Amendment Application as the “Claimants”, I shall refer to the parties who are defendants in the Financial List proceedings, but also the respondents to the Applications, as the “Defendants”.
- 17 The Defendants say that the Disputed Agreements are entirely proper and that, pursuant to their terms, there will be payment under these documents in July 2019. It is quite evident, and I so find, that the Claimants have been doing their level best to obtain substantive relief, either in the form of a trial of the Financial List proceedings or in the form of an administration order pursuant to the Applications, before that date. To that end, there has been a number of abortive efforts. There was an attempt to expedite the Financial List trial, so as to have a five-day trial in May of this year; there has been an attempt to expedite the Appointment Application; and now there is the Amendment Application to amend the Appointment Application, with a view to having Ground 2, but not Ground 1, heard and determined in May of this year. Now, there is, of course, nothing wrong in trying to have a matter dealt with expeditiously. The question is whether the Claimants should succeed in this effort.
- 18 The Defendants, for their part, say that the Amendment Application to introduce Ground 2 into the Appointment Application is a late amendment that should not be permitted. If Ground 2 is to be advanced at all, it should be advanced as an amendment to the Financial List proceedings and be dealt with during a trial of those proceedings.
- 19 On the question of amendment, and in particular late amendment, I will refer to the decision of Coulson J, as he then was, in *CIP Properties AIPT Limited v. Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC). The facts of this case are not material, but there is a helpful summary of the right approach to late amendments in [19] of Coulson J’s judgment. Omitting reference to the cases cited, Coulson J said:
- “(a) The lateness by which an amendment is produced is a relative concept. An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert’s reports) which have been completed by the time of the amendment.
  - (b) An amendment can be regarded as “very late” if permission to amend threatens the trial date...even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason...
  - (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise...In essence, there must be a good reason for the delay...
  - (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused...
  - (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being “mucked around”...to the disruption of and additional pressure on their lawyers in the run-up to trial...and the duplication of cost and effort...at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments...

- (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered...Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise..."

20 I adopt this statement of the law gratefully, but I must note that the Amendment Application arises in a rather different context and, for that reason, this helpful statement is, perhaps, not so much on point as it might be in a conventional case of late amendment. I consider that I must approach the Amendment Application having regard to the context. By that I mean, I must consider, amongst other things, the fact that there are ongoing what might be said to be parallel Financial List proceedings and that the objective of the Amendment Application is to obtain a Ground 2 hearing in May 2019, instead of in January 2020, which is when it is anticipated that the Financial List matter will be heard.

21 I have listened most carefully to the arguments of counsel before me and read their written submissions with great care. After due consideration, I refuse the Amendment Application for the following reasons:

- (1) There is an appropriate vehicle for moving Ground 2 in this case, namely, the Financial List proceedings. This is not a case where, were the Amendment Application to be refused, the point could not be made at all. Ground 2 can be advanced, albeit in a different context.
- (2) Even if a May 2019 hearing of Ground 2 were possible – and I consider that to achieve this would require an order for expedition and considerable court time – the expedited trial of a significant issue that has yet to be pleaded by the Claimants will, I consider, prejudice the Defendants. A three-day hearing, or more, is contemplated with cross-examination and expert evidence. Now, it is fair to say that Mr Smith QC, for the Claimants, disputes the extent to which cross-examination and expert evidence will be required. But the fact remains that, in the directions that were drafted for the purposes of the hearing and determination of Ground 2 (drafted on the basis that the Amendment Application were granted), provision was made both for cross-examination and for expert evidence. This is, therefore, going to be a heavy matter and I bear in mind that Ground 2 has only been articulated in fairly broad-brush terms in the draft Amended Appointment Application, although the point was set out with a little greater specificity in the original letter of 15 November 2018 purporting to terminate the Standstill Letter and in the second statement of Mr Dixon (at [38]) in support of the Amendment Application. I note in passing that the grounds, as set out in 15 November 2018 letter and in the second statement of Mr Dixon, are different. The fact remains that those grounds have not been specifically set out in a pleading and there has been, as yet, no pleaded response.
- (3) No real prejudice has been articulated by the Claimants in having Ground 2 heard and determined in January 2020 in the Financial List proceedings, rather than in the Appointment Application in May 2019. It has been asserted, but in somewhat nebulous and certainly unspecific terms, that the holders of the Notes will be prejudiced. But the parties have agreed interim protection regarding dealings with the Property and, additionally, the Claimants have taken steps to protect themselves, for instance, by unilaterally registering restrictions on dealings on the Property that the Defendants hope to realise pursuant to the Disputed Agreements. I note, and I would stress, that, if further protection is needed, then the courts are there to provide interlocutory relief.

- (4) Mr Smith QC, for the Claimants, suggested that the court should move expeditiously to resolve questions regarding insolvent companies. So it should. But that argument does not apply here. The Fourth Defendant is only contingently insolvent. When granting an administration order, a court must be satisfied, first, that the company is or is likely to become unable to pay its debts and, secondly, that one of the purposes of the administration is reasonably likely to be achieved:
- (a) As to the first point, I recognise that there is a considerable dispute between the parties on the point. I certainly do not consider, on the basis of the material before me today, that either Ground 1 or Ground 2 is susceptible of summary judgment. There is reasonable argument to be had on both. For this reason, an attempt to wind up the Fourth Defendant would fail as an abuse of process.
- (b) As to the second point, whether the purposes of the administration are reasonably likely to be achieved, given the fundamental dispute about the realisations ongoing under the Disputed Agreements, I really cannot be confident that any of these purposes are achievable. The three purposes of an administration are (i) vesting the company as a going concern or (ii) achieving a better result for the company's creditors as a whole would be likely to be achieved if the company were wound up or (iii) realising the property in order to make a distribution to one or more secured preferential creditors. These grounds – or any one of them – really can only be established if I am satisfied that the realisation process under the Disputed Agreements is truly questionable and that, it seems to me, is the very point in issue.
- (5) Turning to my earlier ruling in this matter, I was taken then to a decision of Warren J in *Hammonds (a firm) v Pro-Fit USA Ltd* [2007] EWHC 1998 (Ch). In that case, Warren J considered the extent to which the jurisprudence in relation to statutory demands and winding-up petitions could be read across into administration orders. For the reasons he there gave, he was doubtful as to whether a precise read across was possible. What he did say, however, at 176 was this:

“The court may, in the exercise of its discretion [that is to say the discretion to grant an administration order] require the dispute about the debt or the cross-claim to be decided before making an order, either requiring the matter to be determined in a separate action or by deciding the issue itself. In such a case, of course, the court would not need to make a determination about solvency unless and until the dispute had been resolved.”

It seems to me that what Warren J said in that case is very important here. Here, as it seems to me, Ground 2 should be determined in the Financial List proceedings (or, immediately thereafter, in the Appointment Application, if that is more appropriate) for all the reasons that I have given. Additionally, I am not satisfied that Ground 1 and Ground 2 are entirely separate from one another. I appreciate that I am hampered in reaching a view on this by the lack of specificity in the very grounds advanced by the Claimants, but it does seem to me that there is a real likelihood of interconnection between Grounds 1 and 2, necessitating their hearing and determination together.

For that reason, ground two does not seem to me to be appropriate for a preliminary issue which is, effectively, what ground two is. There are various points that can be made against a preliminary issue in this case; notably that ground two could be rendered academic depending on the way in which ground one is resolved.

(7) Finally, I have a real concern about making a final order – namely, the appointment of an administrator – before the trial of the Financial List proceedings. It seems to me that there would be a real concern that certain issues – namely, in particular, who is to be receiver – might well be predetermined by the appointment of an administrator. I note in passing that the question of who is the receiver in this matter is a defined issue in the Financial List proceedings. The agreed list of issues contains, at issue two, the question of whether the appointment of the Second Defendant as receiver was validly terminated on 24 August 2018 or whether the appointment of the Fifth and Sixth Defendants, as joint receivers, was validly effected. The point has been made by the Defendants and was not gainsaid by the Claimants that one of the consequences of the appointment of an administrator is that the appointment of the Second Defendant could be terminated. That would remove from the ambit of the trial of the Financial List proceedings this particular point which is presently, as I say, in issue. There are other questions that would concern me were an administration order to be made prior to the hearing of the Financial List proceedings, notably the question of the control of the Fourth Defendant and the manner in which the Fourth Defendant’s role in the Financial List proceedings would be conducted (including the question of access to the Fourth Defendant’s privileged documents by administrators who are, I am informed, funded by the Claimants).

22 So, for all those reasons, I refuse the Amendment Application. The alternative would be to permit it, but to direct that the relevant issues be resolved in the Financial List proceedings. I do not consider that second course to be desirable here. The Claimants need to consider, and it is for them to consider, whether they wish to move Ground 2 in the Financial List proceedings or whether Ground 2 should be moved in any Appointment Application subsequent to the trial of the Financial List proceedings. It will be for the trial judge to consider whether, after such a trial, an administration order on either Ground 1 or Ground 2 should be made. I make it clear now that my refusal to allow the Amendment Application to introduce Ground 2 is not intended to preclude the hearing of Ground 2 in the future, whether during or after the trial of the Financial List proceedings.

**There then followed an argument as to costs.**

23 I have before me an application for costs of two matters in the Administration Application. They have been referred to in argument as the strike out application and the interim order application. The significant thing about both is that neither application was finally determined by the court and they were, effectively, not abandoned, but overtaken by events. What was moved before me on 13 December, when these applications should have been made, was something entirely different.

24 In the circumstances, both parties were minded to argue the merits of these applications in order to determine the appropriate order as to costs. That, it seems to me, is a waste of everybody’s time. These costs are, as I see it, best regarded as costs incurred generally in the management of the Appointment Application and the Financial List proceedings. What I am minded to do is to order that these costs be costs in the Financial List trial. In other words, the winner of that trial will recover the costs of these applications.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

This transcript has been approved by the Judge