



Neutral Citation Number: [2019] EWHC 1411 (Ch)

Case No: BL-2019-000139

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 6 June 2019

Before:

MR JUSTICE SNOWDEN

Between:

(1) ALASTAIR PAUL BEVERIDGE
(2) STUART CHARLES EDWARD MACKELLAR **Claimants**

- and -

(1) DEREK QUINLAN
(2) GLENN MAUD
(3) CRUZ HOLDINGS LIMITED **Defendants**

Jonathan Nash QC and Stephen Robins (instructed by Michelmores LLP) for the Claimants
Sarah Harman (instructed by Joseph Hage Aaronson LLP) for the Second and Third
Defendants

Hearing date: 24 May 2019

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.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is an application by the Claimants (the “Receivers”) for post-judgment injunctive relief against the Second Defendant (“Mr Maud”) and the Third Defendant (“Cruz”) (together, the “Defendants”). It follows an order which I made at the trial of the Part 8 Claim on 21 February 2019 (the “Order”).
2. The Receivers contend that the Defendants have recently taken action to thwart the Order. The Receivers issued their application on Monday 20 May 2019, and on Tuesday 21 May 2019 I gave permission for them to serve it short for Friday 24 May 2019.

Background

3. The background to the Order appears in the judgment which I gave on 21 February 2019: see [2019] EWHC 424 (Ch) (the “Judgment”). Mr. Maud is also involved in a related dispute which was the subject of a judgment which I gave on 11 June 2018: see Re Maud [2018] EWHC 1414 (Ch).
4. In short, the Receivers are receivers of the Defendants’ rights in respect of certain loans (the “Shareholder Loans”) which the Defendants made to Ramblas Investments BV (“Ramblas”). The Receivers were appointed on 17 January 2011 by Royal Bank of Scotland plc (“RBS”) pursuant to powers contained in a document entitled the “Subordinated Creditors’ Security Agreement” (“SCSA”) which the Defendants had executed in favour of RBS on 12 September 2008. The SCSA is governed by English law and contains a jurisdiction clause in favour of England. RBS’s rights under the SCSA in respect of the Shareholder Loans have now been assigned to Edgeworth Capital (Luxembourg) SARL (“Edgeworth”).
5. Ramblas owns a company known as Delma Projectontwikkeling BV (“Delma”), which in turn owns a company known as Marme Inversiones 2007 SLU (“Marme”). Ramblas, Delma and Marme form the “Marme Group”. The companies in the Marme Group are in insolvency proceedings in Spain. LexAudit Concursal SLP, represented by Rafael Gimeno-Bayon Cobos, is the Spanish insolvency administrator of Ramblas, Delma and Marme (the “Insolvency Administrator”).
6. The Insolvency Administrator has conducted a public auction process to sell the Marme Group’s principal asset, the property known as Ciudad Financiera, in Boadilla del Monte, Madrid (the “Property”). The highest bidder was a company known as Sorlinda Investments SLU (“Sorlinda”). A number of appeals in Spain against the ruling confirming Sorlinda’s bid as the winning bid were dismissed on 13 May 2019. Sorlinda now has two months, starting on 13 May 2019, to implement its bid and complete the purchase of the Property.
7. Subject to resolution of a number of disputes arising under Spanish insolvency law as regards the subordination and priority of various claims against the companies in the Marme Group, the proceeds of the sale of the Property will, once received, fall to be applied to pay the liabilities of Marme and Delma, before the surplus is paid into the estate of Ramblas. The Insolvency Administrator will, in accordance with Spanish

insolvency law, then apply the surplus to discharge the liabilities of Ramblas. These will include the debts owed by Ramblas under the Shareholder Loans.

8. One of the outstanding challenges in the insolvency of Ramblas is an appeal by Edgeworth against a decision that another loan to Ramblas (the “Junior Loan”) should be subordinated to rank *pari passu* with the Shareholder Loans. The Insolvency Administrator has previously indicated that no distribution will be made by Ramblas to the relevant creditors until this issue is resolved. There is, however, a dispute on the evidence as to when that might occur. Mr. Maud’s evidence is that Edgeworth’s challenge has not yet even been set down, but the evidence of the Receivers’ Spanish lawyer is that the Spanish court could decide the issue and hand down judgment at any point (and potentially in the very near future).
9. At present, the Defendants are listed as creditors in the Spanish insolvency of Ramblas in respect of the Shareholder Loans. However, by virtue of the security rights which the Defendants and Cruz granted under the SCSA, and the appointment of the Receivers, the Receivers contend that any monies which might become payable by the Insolvency Administrator on behalf of Ramblas in respect of the Shareholder Loans are receivable by, and should be paid to, the Receivers, rather than to the Defendants.
10. On 15 January 2019, the Receivers commenced a Part 8 claim to seek declaratory and injunctive relief in this regard. The Receivers sought a declaration against the Defendants that they were entitled to receive payment of any monies otherwise payable by Ramblas to the Defendants in respect of the Shareholder Loans, and a mandatory injunction requiring the Defendants to provide written instructions to the Insolvency Administrator directing him to pay any monies in respect of the Shareholder Loans to the Receivers, rather than to the Defendants.
11. Although the Defendants indicated in correspondence that they would oppose the Receivers’ claim, they elected not to serve any evidence in opposition. Further, at the hearing of the claim before me on 21 February 2019, counsel for the Defendants indicated that the relief sought was opposed, but he did not make any substantive submissions in opposition to the orders sought.
12. In the Order, I granted a declaration in the form sought by the Receivers, together with a mandatory injunction requiring the Defendants to provide their written confirmation in the form of notices addressed to the Insolvency Administrator and validly notarised by a Spanish notary in accordance with the laws of Spain, instructing the Insolvency Administrator that any sums in respect of the Shareholder Loans should be paid to the Receivers and not to the Defendants (the “Notices”).
13. After some difficulties in identifying a Spanish notary in England, the Insolvency Administrator indicated in an email of 26 March 2019 to the Receivers’ Spanish lawyers that he would accept the Notices if they were notarised by an English notary and apostilled. At the same time, however, the Insolvency Administrator also stated that, when he had received the physical documents, he would contact the Defendants to inform them of the receipt of the same, and would provide them with a period of 15 days to raise any objections if they considered the Notices were not authentic.

14. On that basis, on 28 March 2019 the Defendants provided Notices to the Receivers' solicitors which had been notarised by an English notary who is also a Spanish lawyer, and which had also been apostilled. The Notices each contained the following statements,

“As a matter of English law, all my rights to receive payment from Ramblas have been assigned to the Receivers who alone have the authority to prove for the [Shareholder Loans] and to give directions to you as to payment of any distributions in respect thereof. It follows that any such directions that you receive from any other party is made without proper authority and is ineffective.

If, as a matter of Spanish law, you are unwilling or unable to recognise the rights of the Receivers set out above, I hereby direct that you make any and all payments that would otherwise be payable to me in my capacity as a [lender in respect of the Shareholder Loans] direct to the Receivers at the account details set out below or such other account details as may be nominated to you by the Receivers from time to time.”

15. On 24 April 2019, the Insolvency Administrator confirmed receipt of the Notices and sent emails to the Defendants informing them of the same. The Insolvency Administrator then also told the Defendants,

“As this is a declaration before a notary, duly apostilled, I hereby inform you of this fact, warning you that, unless you make a statement to the contrary within fifteen calendar days of sending this communication to this email address, when the time comes, this insolvency administration will follow the instructions provided by you.”

16. On 9 May 2019, Mr. Maud and Cruz (acting by Mr. Tim Southern, a director) each sent an email in substantively the same terms to the Insolvency Administrator. Those emails sought unilaterally to impose obligations of confidence upon the Insolvency Administrator in relation to their contents, and then stated,

“I now respond as follows:

(i) that in relation to the letters to which you refer which relate to one debtor [sic] instructing the Insolvency Administrator to pay another, were signed and notarised under compulsion of an English court order and were not signed voluntarily by me. I attach for your information a copy of the English court order and judgement;

(ii) I remind you that Lex Audit as Insolvency Administrator is subject to Spanish law, in respect of both Spanish Law provisions regarding payments in an insolvency, appropriate recognition or non-recognition of foreign warranties or foreign court resolutions, cancellation of

guarantees of any kind in favour of subordinate creditors and the provisory measures to be taken while the subordination is challenged to avoid any irreparable harm and as regards any liability incurred by the Insolvency Administrator;

(iii) the letters to which you refer were signed before Manuel J. Doña Martin who is qualified and practises as a Spanish lawyer (Abogado), English Solicitor and English Notary Public, appointed by the Court of Faculties of the Archbishop of Canterbury, in the exercise of the powers conferred by the Ecclesiastical Licences Act 1533.”

17. As indicated above, on 13 May 2019 the Spanish Court confirmed Sorlinda as the winning bidder for the Property. On 14 May 2019 the Receivers’ Spanish lawyer asked the Insolvency Administrator for confirmation that any payments which would otherwise be paid to the Defendants would be paid to the Receivers in accordance with the Notices.

18. However, on 15 May 2019, the Insolvency Administrator replied, stating,

“I regret to inform you that I have received a reply from Glenn Maud and Cruz Holdings Limited opposing the effectiveness of the acknowledgement made before an English notary”.

The replies to which the Insolvency Administrator was referring, were the emails from the Defendants of 9 May 2019.

19. After asking the Insolvency Administrator for copies of the emails from the Defendants (which were not provided), the Receivers issued their application on 20 May 2019 and sought an urgent hearing without notice on 21 May 2019. They did, however, email a copy of the application to the Defendants’ solicitors in the evening of 20 May 2019.

20. Shortly before the hearing on 21 May 2019, I was supplied by the Receivers’ lawyers with a copy of an email from Mr. Maud (writing on his own behalf and on behalf of Cruz with the agreement of Mr. Southern). That email protested that the Defendants had received insufficient notice of the application; it set out, in some detail, the background and the text of the emails passing between the Defendants and the Insolvency Administrator on 24 April and 9 May 2019; and it asserted that there was no urgency in the application arising from the status of the Sorlinda bid given the stated view of the Insolvency Administrator that he would not make a distribution until after the question of subordination of the Junior Loan had been resolved.

21. Mr. Maud’s email further denied that he or Cruz had not complied with the Order, and concluded as follows,

“Both Cruz Holdings and I confirmed in our reply to the Insolvency Administrator that we signed, notarised and apostilled in Spanish and English the notices, which are self-explanatory. We have not disputed the validity of the notices nor to our obligations under English law.

We did advise the circumstances in which the notices were sign and notarised, that is, pursuant [to] a non-consensual English court order but this is true and does not make the notices invalid.

The remainder of our correspondence to the Insolvency Administrator is factual and, in my opinion, cannot be in breach of the order.”

22. At the hearing on 21 May 2019 I declined to grant the mandatory orders which the Receivers were seeking on a “without notice” basis, but gave directions for the matter to be brought back before me urgently on (short) notice on 24 May 2019.

23. At the *inter partes* hearing, the Defendants were represented by counsel (Ms. Harman). Mr. Maud had also produced a witness statement which reflected in large part the terms of his earlier email of 21 May 2019. As regards the effect which his email of 9 May 2019 had had in the Spanish insolvency, Mr. Maud commented,

“The Insolvency Administrator’s conclusion that this amounted to an “objection” and his apparent decision (if that is the case) that in his administration under Spanish law of a Spanish insolvency he will not agree to direct any payment due under the [Shareholder Loans] to the [Receivers] is not a decision for which I or Cruz am responsible or accountable. The Insolvency Administrator is in charge of the Spanish insolvency, and I am concerned to reserve and retain any rights I may have under those Spanish legal provisions”.

24. The latest statement which I had of the position of the Spanish Insolvency Administrator was in an email dated 23 May 2019 in which he stated, in response to a request from the Receivers’ Spanish lawyers,

“In my opinion, the alteration of the list of creditors or of the payment to them, according to the list of liabilities that was prepared, cannot be done without the clear consent of the parties affected or judicial resolution.

I had hoped that the discrepancies could be resolved out of court, but in view of how the facts have developed, I believe that any initiative to unblock the conflict lies with the parties.”

The rival contentions

25. At the hearing, the Receivers contended that Mr. Maud’s and Cruz’s email of 9 May 2019 was either designed to cause, or at very least had the effect of causing, the Insolvency Administrator to refuse to give the desired effect to the Notices. The Receivers contended that in circumstances in which it would not be possible for several months to obtain recognition in Spain of my Judgment and Order declaring the rights of the Receivers to any payments otherwise due to the Defendants from Ramblas in respect of the Shareholder Loans, I should grant further relief in order to ensure that the Notices given in accordance with the Order were effective.

26. Stripped of unnecessary wording, the relief which the Receivers sought against the Defendants was a mandatory order that by a specified time they should each inform the Insolvency Administrator in writing in English and Spanish that,
- i) the respective Notice was valid and authentic;
 - ii) they do not have any objection to the Insolvency Administrator complying with the instructions contained in the Notice; and
 - iii) they withdraw any objection that they had previously made in respect of the Notice or the Insolvency Administrator's compliance with the instructions in it.
27. For the Defendants, Ms. Harman first repeated the objection that the matter was not urgent and that it had been brought on too quickly, with the result that she had not been able to take full instructions from Mr. Maud who was abroad.
28. Secondly, on substantive matters, Ms. Harman submitted that, at least as a matter of English law, the Defendants could not and did not dispute the authenticity and effectiveness of the Notices, and had no objections to the Insolvency Administrator complying with the Notices. Ms. Harman indicated that the Defendants would be prepared to sign further notices to the Insolvency Administrator to such effect.
29. However, Ms. Harman objected that the English Court should not order the Defendants to give instructions to the Insolvency Administrator which might amount to the giving up of any rights which they might have under Spanish law (including Spanish insolvency law). Ms. Harman was unable to identify precisely what those rights might be, but suggested that they might include (i) a right to object to the Insolvency Administrator giving effect to the Notices on the basis that they had not been executed voluntarily, and (ii) any rights which derived from the names of the Defendants remaining on the list of creditors in the Spanish insolvency of Ramblas. Having consulted with Mr. Southern during the hearing, and reflecting Mr. Maud's comment in his evidence (see paragraph 23 above), Ms. Harman stressed that the Defendants were keen to keep any and all rights which they might have in the Spanish insolvency.
30. Mr. Nash QC's response for the Receivers was that that if the Defendants had truly considered that there was any objection arising from Spanish law to being required to give the Notices to the Insolvency Administrator, the time at which the Defendants could and should have raised such objection was at the trial of the Part 8 claim in February. He contended that in the absence of any appeal it was now too late for them to do so. Secondly, Mr. Nash contended that the alleged Spanish law rights were too vague and uncertain to provide any basis for the English Court declining to ensure that its Order had the intended effect. Thirdly, he contended that the Notices had been carefully drafted so that they did not purport to alter or affect any Spanish law rights or issues.

Analysis

31. I first reject Ms. Harman's objection on the timing of this application. Mr. Maud has been closely involved throughout the Spanish insolvency proceedings, and Ms.

Harman acknowledged that the Defendants must have given consideration to the possible effect of their actions before sending their emails of 9 May 2019 to the Insolvency Administrator. Mr. Maud did not suggest that he needed an adjournment to obtain any relevant factual information which he does not currently have, and he was able to send a detailed letter to the Court on 21 May 2019, and provided a witness statement setting out his position. Ms. Harman also accepted that the interests of Mr. Maud and Cruz were aligned, and it is notable that Mr. Southern, the director of Cruz, was present throughout the hearing and able to give instructions to Ms. Harman.

32. Although Mr. Maud's evidence suggested that payment of monies by the Insolvency Administrator was not imminent, that is not the evidence of the Receivers' Spanish lawyer. I am not in a position to resolve that conflict of evidence, and I therefore proceed on the basis that there is a possibility that payment by the Insolvency Administrator could take place in the near future. In the circumstances, I consider that the Receivers are entitled to seek to resolve, so far as possible, the uncertainty in the mind of the Insolvency Administrator as to the position as between the Receivers and the Defendants without further delay.
33. On the substance of the matter, there is no dispute between the parties that the Court has the necessary power to make ancillary orders to ensure that a remedy given to a party, including a remedy by way of injunctive relief, is effective: see e.g. J Bekhor & Co Ltd v Bilton [1981] QB 923 at page 942 (Ackner LJ), and page 949 (Griffiths LJ); and Maclaine Watson & Co Ltd v International Tin Council (No 2) [1989] Ch 286 at page 303.
34. In this case, the Order contained a declaration as to the rights of the Receivers, which, as I explained in the Judgment, derived from the express terms of the SCSA which the Defendants had voluntarily entered into. Although the Defendants may be listed as creditors in respect of the Shareholder Loans in the Spanish insolvency, there is no doubt that they have voluntarily and validly assigned all of their rights and interests in that respect by way of security in favour of RBS (and now Edgeworth), subject to a proviso for reassignment on redemption of the security. That assignment of rights was the basis for the declaration that I made as to the rights of the Receivers to receive payment from the Insolvency Administrator on behalf of Ramblas in the Spanish insolvency.
35. Further, my requirement that the Defendants send the Notices was based upon clause 13 of the SCSA, which obliges the Defendants to do whatever the Receivers might require for facilitating the realisation of the rights in respect of the Shareholder Loans in the Spanish insolvency. It was this contractual provision that justified the order for the Defendants to execute the Notices giving the Insolvency Administrator instructions to pay any monies that might otherwise be due to the Defendants in the Spanish insolvency to the Receivers.
36. In short, although the Order was formally opposed by the Defendants, the simple fact is that it was made to give effect to contractual obligations which the Defendants had voluntarily entered into.
37. Against that background, it is plain to me that the consequence of the Defendants having sent their emails to Insolvency Administrator on 9 May 2019 is that the Notices have been prevented from having the effect that my Order contemplated that

they should have. The intended effect of the Notices was that the Insolvency Administrator should act in accordance with the instruction that any monies otherwise due from Ramblas to the Defendants should be paid to the Receivers. The Insolvency Administrator's email of 24 April 2019 only required a response if the Defendants did not want the Insolvency Administrator to follow the instruction in the Notices. The consequence of the Defendants' emails is that the Insolvency Administrator has treated the emails as an objection, and he has not indicated that he will follow the instructions in the Notices.

38. As the Defendants do not challenge the authenticity of the Notices, I consider that it would be appropriate to exercise my discretion to make further orders to try to ensure that the provisions of my original Order as to the giving of the Notices achieve their intended effect.
39. I also reject, for the following reasons, the arguments relating to Spanish law which are now advanced on behalf of the Defendants as to why I should not make such further orders.
40. First, the suggestion that the further orders sought by the Receivers might interfere with, or be inconsistent with, any rights under Spanish law that the Defendants might have as a result of being on the list of creditors of Ramblas, is fundamentally misconceived. As I have indicated, whatever rights are given to persons who are on the list of creditors under Spanish law, the Defendants no longer hold such rights for their own benefit, because they consensually assigned the benefit of all such rights to RBS (and now Edgeworth) under the SCSA. The Defendants now hold such rights for Edgeworth and the Receivers on the terms of the SCSA, and their only remaining interest in such rights is by way of a right to reassignment on redemption.
41. In that regard, and consistent with my analysis, it is significant that the Insolvency Administrator did not regard the instructions in the Notices as interfering in any way with his conduct of the Spanish insolvency. Instead, he indicated in his email of 26 March 2019 that he would comply with the instructions, unless the Defendants challenged the authenticity of the Notices.
42. Secondly, I also accept Mr. Nash's point that if there was anything in the arguments relating to interference with Spanish law rights, the time for the Defendants to raise such matters would have been at trial of the Part 8 claim in February 2019. That was the occasion on which the Court considered the extent of the parties' respective rights and obligations under the SCSA, together with the orders that should be made to give effect to them. If it was thought that the Notices might impermissibly impinge upon Spanish law rights, that point should have been taken. There has been no application by the Defendants to appeal my order or seek a review of it. I consider that it is too late and an abuse of process for them to seek to raise such points now, in supposed justification for having responded as they did to the Insolvency Administrator by their emails of 9 May 2019.
43. In that regard, Ms. Harman (who was not instructed at the time) said that her instructions were that there had been some direction or indication by Hildyard J, when the Part 8 claim was first before the Court and expedition was ordered, that issues of Spanish law should not be raised at the trial. I have found no trace of that suggestion in the papers that I have seen. Indeed, as Mr. Nash pointed out, even though the

Defendants had declined the opportunity to put in evidence in answer to the Receivers' claim, the Receivers' skeleton argument for trial dealt at some length with the somewhat inchoate contention which had been raised by solicitors previously acting for the Defendants, in a letter dated 7 December 2018, that the orders sought might in some way be inconsistent with the Spanish insolvency proceedings. There was nothing to stop the Defendants taking up that point at trial if they had wished to do so.

44. Thirdly, I also accept Mr. Nash's argument that the Defendants have not identified with any clarity any supposed rights under Spanish law that might be infringed by the further relief now sought by the Receivers. Specifically, in so far as there is any suggestion that the Defendants might wish to challenge the efficacy of the Notices under Spanish law on the grounds that they were the result of a non-consensual order by this Court, it seems to me that this ignores the underlying contractual basis for the Notices. As I have said, the Notices contained instructions that the Receivers were entitled to require the Defendants to give, and reflected obligations which the Defendants had consensually undertaken in the SCSA. The only reason why my Order was required was that the Defendants wrongly did not accept that they had such obligations under the SCSA.

Conclusions

45. For these reasons I consider that it would be appropriate for me to order that the Defendants execute further documents in English and Spanish containing the statements and instructions to the Insolvency Administrator that I have set out in paragraph 26 above.
46. Subject to any further argument, I consider that such notices should be executed and apostilled in the same manner as the Notices and sent to the Insolvency Administrator with a copy of this judgment and my order.