Neutral Citation Number: [2022] EWHC 3232 (Ch)

CR 2022 000062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF RODUS DEVELOPMENTS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 20/12/2022

Before :

ICC JUDGE BARBER

- -

Between :

GRAHAM PAUL BUSHBY AND NICHOLAS JOHN EDWARDS
(as Joint Administrators of Rodus Developments Ltd)

Applicants

- and –

ACTUA INVESTMENT LLC

Respondent

- -

James Morgan KC (instructed by **Osborne Clarke LLP)** for the Applicants
The Respondent did not attend and was not represented

Hearing date: 3 November 2022

- -

Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30a.m. on 20 December 2022

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ICC Judge Barber

1. On 3 November 2022, I granted the Applicants permission to serve their Paragraph 63 and Paragraph 71 Applications out of the jurisdiction on the Respondent in Dubai, United Arab Emirates and made various related orders on service. I also granted a declaration that an equitable charge claimed by the Respondent to have been created by a loan agreement purportedly entered into between the Company and the Respondent on or around 3 April 2018 was void for non-registration by virtue of section 859H of the Companies Act 2006 and ordered that the Respondent's pending application to HM Land Registry for a unilateral notice in respect of the equitable charge against certain properties be cancelled and/or vacated forthwith by the Chief Land Registrar. This judgment sets out my reasons for granting the relief summarised above.

Background

2. Rodus Developments Limited ('the Company') was incorporated on 9 June 2017 as a special purpose vehicle to develop a 'build to rent' scheme at Middlewood Plaza in Salford. On 16 July 2018, it purchased two parcels of freehold land at 4 and 26 Liverpool Street (the 'Properties') for a combined price of just over £2 million.

3. The Properties now comprise 127 residential units, which were marketed for sale off plan, with purchasers entering into agreements for leases. Since sales commenced in March 2020, there have been 90 completed sales, 20 agreements for leases which have yet to complete, and 7 reservations, leaving 10 units unsold.

4. The Company was primarily funded by secured loans from Topland Jupiter Ltd ('Topland') totalling £14.8 million. Following a creditors' administration application, Topland intervened and appointed the Joint Administrators on 13 January 2022 pursuant to paragraph 14 of Schedule B1.

5. On about 7 February 2022, without any prior notice to the Joint Administrators, Glaisyers Solicitors LLP filed an application at HM Land Registry to enter a unilateral notice on behalf of a Dubai company, Actua Investment LLC ('Actua'), in respect of a purported equitable charge over the Properties (the 'UN1 Application'). The only address given for service on Actua was 'c/o Brandsmiths SL Limited, Old Pump House, 19 Hooper Street, London E1 8BU'. Brandsmiths SL Limited ('Brandsmiths') is a firm of solicitors.

6. Brandsmiths wrote to the Joint Administrators on 8 February 2022, stating that they acted for Actua. Their letter claimed (i) that Actua had lent the Company £2.1m pursuant to a facility agreement entered into on 3 April 2018 (the 'Actua Facility Agreement') and (ii) that Actua was entitled to register a charge pursuant to clauses 7.2 and 7.3 of that facility. No such charge had previously been registered at Companies House or HMLR.

7. On 25 February 2022, the Joint Administrators informed Brandsmiths that it was not possible for the Company to create a new charge post-administration.

8. On 14 April 2022, the Joint Administrators found out about the UN1 Application. In late April and May 2022, the Joint Administrators sought to engage with Brandsmiths

to obtain consent to lease sales pending resolution of the dispute, but without any success. Thereafter, on 8 June 2022, Osborne Clarke LLP ('Osborne Clarke') wrote to Brandsmiths and Glaisyers setting out the Joint Administrators' position that (i) Actua did not have any enforceable equitable charge (for a variety of reasons, including that any such charge would be void for non-registration); (ii) that even if Actua did have a charge, it would rank below Topland; and (iii) that the UN1 Application should be withdrawn.

9. Despite Brandsmiths seeking (and being granted) extensions of time in which to provide a substantive response, no substantive response was ever given.

10. On 5 and 6 September 2022, Osborne Clarke sent Brandsmiths letters before application, repeating the point that any equitable charge was void for non-registration. The letters sought an address for service on Actua but also warned that, if necessary, the Joint Administrators would seek an order dispensing with service or for service to be effected by an alternative method, including service on Brandsmiths itself.

11. The UN1 Application is preventing completion of agreed sales and progress in respect of remaining units. This is prejudicing the administration by imperilling sales against the backdrop of a turning market. It is also preventing the Joint Administrators from making further distributions to Topland, which is owed upwards of £8.1m excluding default interest, with interest accruing at around £170,000 per month.

12. Topland has priority ahead of all other creditors. According to the Joint Administrators' current Estimated Outcome Statement, there will be a significant shortfall to Topland. In addition, a significant number of purchasers had already entered unilateral notices against the titles to individual units comprised within the Properties prior to the UN1 Application. These would have priority to Actua in respect of any purchasers' liens arising as a result of the payment of deposits: Eason v Wong [2017] EWHC 209 (Ch). It is therefore extremely unlikely that any distribution would be made to Actua, even if it did have a valid second ranking equitable charge.

Service Attempts

13. The Joint Administrators have made numerous attempts to serve the applications on Actua at the address provided for communications to Actua in clause 20.1 of the Actua Facility Agreement, which is '*office SM1-09, Al Kunooz Business Centre, PO Box 624407, Dubai, UAE*' (the 'Al Kunooz Address'). After several unsuccessful attempts at service on the Al Kunooz address by Royal Mail and UPS courier delivery, Osborne Clarke made enquiries of a law firm in Dubai (Al Tamini) which confirmed that the 'Al Kunooz Business Centre' no longer exists as such and that the building is occupied by an apparently unconnected company known as Mountain Gate.

14. No company called Actua Investments LLC has been identified in the searches carried out in Dubai. The licence number previously given for it (800186) is now registered to a company known as High Street Holding LLC. No address has been identified for High Street Holding LLC.

15. The Applications were also sent to Brandsmiths, by email and special delivery, on 11 October 2022. The emailed files were accessed on 12 October 2022 and the hard copies were signed for on the same day. Mr Forrester of Brandsmiths acknowledged receipt of 'a bundle of documents' but repeated that the firm was not instructed to accept service. Notably, however, he did not suggest that Brandsmiths had ceased to be instructed by Actua in relation to the matters upon which Brandsmiths had previously corresponded with the Joint Administrators.

Service: Applicable principles

16. Under Schedule 4 to the Insolvency Rules 2016, service is ordinarily to be carried out in accordance with CPR Part 6 as it applies to a claim form (para 1(2) Schedule 4). This is subject to the caveat that if, for any reason, it is *'impracticable'* to effect service as so provided, then service may be effected in such other manner as the court may approve or direct: para 1(5) Schedule 4.

17. Mr Morgan KC maintained that, on the facts of this case, in relation to the Paragraph 63 Application, permission to serve out is not required, as the Joint Administrators can rely on CPR 6.33(2B)(b)-(c) and (3) in light of clause 21 of the Actua Facility Agreement. Clause 21.1 provides that English law applies. Clause 21.2 also contains an exclusive jurisdiction clause in favour of the Courts of England and Wales in respect of 'any dispute or claim (including non-contractual disputes or claims) that arises out of, or in connection with this agreement or its subject matter or formation'. Mr Morgan submitted that a claim challenging the validity of a charge purportedly granted under the express terms of the Actua Facility Agreement must be caught by these provisions.

18. Out of an abundance of caution, however - and because of the accepted different position in respect of the Paragraph 71 Application - Mr Morgan KC also addressed me on the threshold requirements that need to be satisfied when permission to serve out is required.

19. Paragraph 1(8) of Schedule 4 to the IR provides that where permission to serve out is required, CPR Part 6 applies with such modifications as the court may approve or direct.

20. An order for service out may be granted where:

(1) any of the gateways in CPR PD6B, para 3.1 apply: CPR 6.36;

(2) the claimant satisfies the court that the claim has a reasonable prospect of success: CPR 6.37(1); and

(3) the court is satisfied that England and Wales is 'the proper place' in which to bring the claim: CPR 6.37(3).

21. I shall deal with these in turn.

Gateways

22. In my judgment the gateway threshold is amply satisfied on the facts of this case. The contract is governed by English law (para 3.1(6)(c)), the Paragraph 63 Application

concerns property in England (para 3.1(11) and also concerns an enactment (para 3.1(20)). The Paragraph 71 Application also concerns an enactment.

Reasonable Prospects of Success

23. The court plainly has power under paragraph 63 Schedule B1 to give directions in order to resolve issues or disputes between the Joint Administrators and third parties, including creditors or putative creditors of the Company.

24. Clause 7.3 of the Actua Facility Agreement provides that:

> 'As security for the Loan the Borrower agrees to provide the Lender with a Legal Charge over the Land subject to 7.3 below'.

25. For the purpose of these applications only, the Joint Administrators are prepared to proceed on the basis that the Actua Facility Agreement created an equitable charge over the Properties.

26. At the time of the alleged entry into the Actua Facility Agreement (3 April 2018), the Company did not own the Properties and therefore any charge could not arise at law. It was, however, possible to create an equitable charge of future property, which would take effect as a security interest on the later date (16 July 2018) on which the Properties were acquired by the Company: Fisher and Lightwood's Law of Mortgage (15th ed) at 6.4.

27. Ultimately, however, even assuming that an equitable charge arose in Actua's favour on 16 July 2018, this does not assist Actua, because any such equitable charge is now void by virtue of Part 25 of the Companies Act 2006. As rightly noted by Mr Morgan KC,

(1) any such charge was 'created' by the Company pursuant to the Actua Facility Agreement and was therefore required to be registered within 'the period allowed for delivery': s859A(1) and (2) CA 2006;

(2) that period was 21 days beginning with the day 'after the creation of the charge' unless an order allowing an extended period was made (and no such order has been made in this case): s859A(4);

(3) the charge instrument was not a deed and it either had effect on execution (alleged to be 3 April 2018) or on the date that the Properties were acquired by the Company (16 July 2018): s859E(1);

(4) the charge was not registered within 21 days of either of these dates or at all and it was therefore void as any form of security against the Joint Administrators and the creditors of the Company: s859H;

(5) in these circumstances, Actua has no valid interest to protect, it has made the UN1 Application without reasonable cause and it is thereby prejudicing the interests of the Joint Administrators and the creditors of the Company.

28. Actua has no answer to the foregoing points. It has repeatedly failed to respond substantively to Osborne Clarke's correspondence on the same, notwithstanding having requested (and having been granted) several extensions of time in which to do so.

29. The substantive relief claimed by the Joint Administrators in their Paragraph 63 Application is a declaration that the equitable charge is void, together with consequential orders designed to free title to the Properties from the UN1 Application. In my judgement, on the evidence before me, the Joint Administrators have made out their case for the substantive relief sought on their Paragraph 63 Application. A fortiori, they have also cleared the requirements of CPR 6.37(1) (reasonable prospects of success) on their Paragraph 63 Application. Whilst, in light of my conclusions on the Paragraph 63 Application, it is very unlikely that the Joint Administrators will ever need to pursue substantive relief on their Paragraph 71 Application, I am also satisfied that the Joint Administrators have shown reasonable prospects of success on the Paragraph 71 Application, should it ever prove necessary to pursue substantive relief on the same.

England and Wales as 'the proper place' to bring the claim

30. In my judgment, England is the proper place for the claims, given that (i) Actua lent the monies to an English company; (ii) the lending was made pursuant to an agreement governed by English law; (iii) the lending was purportedly secured on real property in England, security challenged on the grounds that it is void by virtue of CA 2006; and (iv) the Company is now in administration and Actua has submitted to that process by advancing a claim to the Joint Administrators and inviting them to grant it a charge.

Conclusions on service out

31. For the reasons summarised in paragraph 17 of this judgment, there is a strong argument that permission to serve out is not required in relation to the Paragraph 63 Application. On the facts of this case, however, the point is academic as, for the reasons addressed at paragraphs 18 to 30 above, in my judgment the Joint Administrators have more than cleared the threshold requirements for permission to serve out both applications in any event.

Service by an alternative method

32. On the evidence before me, I am satisfied that it is impracticable for service to be effected directly on Actua. The Joint Administrators have taken all reasonable steps to serve Actua in Dubai and there is little further that they could reasonably be expected to do.

33. On the evidence before me I consider it legitimate to conclude that Actua has deliberately avoided providing an address at which it may be served directly. In reaching this conclusion, I take into account in particular the following factors:

(1) Whilst Actua is no longer to be found at the Al Kunooz address, it failed to notify the Company of any new address in accordance with clause 20.1 of the Actua Facility Agreement.

(2) Actua's solicitors, Brandsmiths, have failed to reply to Osborne Clarke's request dated 5 September 2022 for it to identify an address for service on Actua.

(3) Despite extensive enquiries, it has not been possible for the Joint Administrators to identify an alternative address for service on Actua in Dubai.

(4) Although Actua gave authority for Brandsmiths' address to be used in the UN1 Application as its service address for that application and that firm continues to act for it in this jurisdiction, Brandsmiths refuses to accept service of these proceedings.

(5) Despite having started a process by the UN1 Application which has led to these applications, Actua has made it practically impossible for service to be effected upon it directly.

34. On the evidence before me, I am satisfied that the court should make a retrospective order for service by an alternative method; the relevant method being by way of post and email to Actua's solicitors, Brandsmiths: Sch 4, para 1(5); CPR 6.15(2). Brandsmiths' address is used in the UN1 Application as Actua's service address. Brandsmiths has been instructed on behalf of Actua and has communicated with the Joint Administrators in relation to the matters that have given rise to these applications. Brandsmiths has not stated that it has ceased to act for Actua. I consider it legitimate to conclude that it continues to act for Actua.

35. Brandsmiths received these applications on 12 October 2022, over three weeks before the hearing before me. It is plainly in the interests of the efficient conduct of this litigation to order retrospective service by the alternative method proposed. On the evidence before me I am satisfied that retrospective service by such method has given more than adequate notice to Actua. It also avoids unnecessary and harmful delay in the administration of the Company and, in particular, in the efficient realisation of the assets of the Company in a turning property market.

36. The principles developed in caselaw relating to CPR 6.15 serve to support the approach that the Joint Administrators invite the Court to take in relation to service pursuant to Sch 4 IR 2016: see generally Abela v Baadarani [2013] UKSC 44. Had it been necessary for the Joint Administrators to establish a 'good reason' for the order sought, they would plainly have done so, having regard to the factors outlined in this judgment.

37. Mr Morgan KC very properly reminded me that the UK has entered into a Treaty on Judicial Assistance in Civil and Commercial Matters with the UAE dated 7 December 2016 ('UAE Treaty') and that, under the UAE Treaty, requests for judicial assistance are usually made through the central authorities, to be transmitted through diplomatic channels. The caselaw considering the UAE Treaty thus far, however, establishes that it does not oust the courts power to order alternative service: Cesfin Ventures LLC v Dr Al Ghaith Al Qubaisi [2021] EWHC 311 (Ch) at [21] – [26]. Moreover, whilst there is some debate in the authorities as to whether the existence of a treaty such as the UAE Treaty requires the court to find 'special' or 'exceptional' circumstances rather than simply a 'good reason' (Integral Petroleum SA v Petrogat FZA [2021] EWHC 1365 (Comm) at [35]-[36]), having regard to the factors outlined in this judgment, I would have been prepared to find the circumstances of this case

sufficiently exceptional to warrant the order for alternative service sought, had it been necessary to do so.

Substantive Relief

38. The Joint Administrators also invite the court to deal with the substance of the Paragraph 63 Application. Whilst, in many cases, it could be argued that a respondent should be given a final opportunity to put in evidence and attend an adjourned hearing before final relief is granted, in my judgment that would not be appropriate in the present case, given that:

(1) Actua has had ample notice in the pre-application correspondence and the documents served on Brandsmiths that the Court would be invited to deal with matters in this way;

(2) the equitable charge is plainly void and despite having been given a number of opportunities to articulate any alternative conclusion, Actua has failed to do so;

(3) Actua has deliberately failed to provide an address at which it could be served directly and shows no sign of being willing to address the real point in issue. It has engaged in a course of conduct that is causing real prejudice to the Joint Administrators and to the creditors of the Company; and

(4) it is essential that urgent relief is granted in order to ensure that the administration is not further prejudiced.

39. For all these reasons, I shall grant final relief on the Paragraph 63 Application today.

40. On the evidence before me, I am satisfied that the equitable charge that Actua has claimed is void for non-registration by virtue of section 859H of the Companies Act 2006. I am further satisfied that Actua has no reasonable cause to apply to HMLR for a unilateral notice in respect of the equitable charge against the Properties. I shall grant the declarations sought accordingly.

41. I shall also order that Actua's pending application to HMLR be cancelled and vacated forthwith by the Chief Land Registrar and that it be treated by him as having been withdrawn by or on behalf of Actua. In this regard I accept Mr Morgan's submission that the court has wide powers to order a person to withdraw an application to enter a unilateral notice and to order cancellation of a notice that has been entered in the register. These powers arise pursuant to s.77 LRA 2002 (Loubatieres v Mornington Estates (UK) [2004] EWHC 825 (Ch)) and/or under the inherent jurisdiction of the High Court (Sampathkumar v Wildwood CR Ltd [2020] EWHC 3753 (Ch)); Megarry & Wade: The Law of Real Property (9th ed) at 6-076. Given Actua's lack of engagement, there would be little point in requiring Actua to withdraw the application itself. In the circumstances of this case, therefore, the direct orders currently sought from the court are required.

42. In light of my conclusion on the Paragraph 63 Application, no substantive relief is required on the Paragraph 71 Application. Save for appropriate directions as to service, therefore, I shall simply stay the Paragraph 71 Application pending further order.

43. Finally, whilst it may be academic, I shall order that Actua do pay the Joint Administrators' costs of these applications. Such costs could have been avoided entirely if Actua had recognised the realities of the situation and had voluntarily withdrawn its UN1 Application.

ICC Judge Barber