



[2023] EWHC 236 (Ch)

CR 2022-002876

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

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

Date: 14/02/2023

Before :

ICC JUDGE BARBER

Between :

MANOLETE PARTNERS PLC

Applicant

- and -

(1) NIGEL JOHN JONES
(2) ANDREA LANE JONES

Respondents

James Saunders (instructed by **Lewis Onions Solicitors Limited**) for the **Applicant**
Alexander Kingston-Splatt (instructed by **FWJ Legal Limited**
t/a Francis Wilks & Jones) for the **Respondents**

Hearing date: 5 January 2023

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 14 February 2023.

ICC Judge Barber

1. On 5 January 2023, I dismissed the Respondents' application for a stay of proceedings brought against them by the Applicant, with written reasons to follow. This judgment sets out my reasons for that decision.

Background

2. Traxx (Aggregates) Limited ('the Company') was incorporated on 3 February 2009 and carried on the business of extracting and selling sand from leasehold quarries in Newport, Shropshire and Birmingham. The First Respondent has been the sole director of the Company since 2013. The Second Respondent is the First Respondent's wife. The two shareholders of the Company are the First Respondent and a company known as Recycling Management Limited, each holding 50 shares.
3. On 11 October 2016, the Company was placed into administration pursuant to paragraph 14 of Schedule B1 to the Insolvency Act 1986 by Recycling Management Limited as the holder of a qualifying floating charge. Mr Matthew Hardy and Mr Martin Coyne were initially appointed as joint administrators. Mr Andrew Turpin replaced Mr Coyne as joint administrator by court order of 29 November 2016.
4. The administration was extended with the consent of the Company's creditors on 5 October 2017 to 10 October 2018. The administration has since been extended by court orders on 24 September 2018, 28 May 2020, 12 February 2021 and 13 September 2022.
5. The Applicant is a specialist claims and litigation acquisition company. By written agreement dated 26 May 2020, the Company and the joint administrators assigned to the Applicant all and any claims that the Company and/or the joint administrators may have against the Respondents, including but not limited to claims for breach of duty at common law, breach of fiduciary or statutory or other legal or equitable duty and any claims under the Insolvency Act 1986 ('IA 1986') and/or the Companies Act 2006 ('CA 2006') ('the Assignment').
6. The Applicant gave the Respondents notice of the Assignment by letter dated 10 June 2020.
7. Following the guidance given in *Manolete Partners plc v Hayward and Barrett Holdings Ltd* [2021] EWHC 1481 (Ch), an assignee bringing a mixture of claims under IA 1986 and CA 2006 is required in certain circumstances to commence two separate sets of proceedings; one set by way of Application Notice under rule 1.35 of the Insolvency (England and Wales) Rules 2016 ('IR 2016') and the other by way of claim form under Part 7 of the Civil Procedure Rules 1998.
8. On 1 September 2022, the Applicant issued an insolvency application notice under sections 238 to 241 of the Insolvency Act 1986 against the Respondents ('the Application'). On 2 September 2022, the Applicant commenced a Part 7 claim (claim number BL 2022 001420) against the Respondents ('the Claim'). The Application and the Claim arise from the same facts; a series of payments made by the Company

between 2014 and 2016 to the First and Second Respondents respectively, which the Applicant (as assignee) seeks to recoup.

9. By a consent order dated 30 September 2022, the Claim was consolidated with the Application ('the Consolidated Proceedings'). The Consolidated Proceedings proceed under case number CR 2022 002876. Paragraph 5 of the consent order provided for the Respondents to file and serve points of defence to the Consolidated Proceedings by 4pm on 18 November 2022. Provision was also made for points of reply by 4pm 16 December 2022 and a CMC was listed for 11 January 2023.
10. On 10 October 2022, the First Respondent and (acting by him) the Company issued an application, seeking to challenge the validity of the joint administrators' appointment ('the Validity Application').
11. Following the issue of the Validity Application (but before informing the Applicant of the same), the Respondents entered into a second consent order with the Applicant regarding conduct of the Consolidated Proceedings. By the second consent order, dated 1 November 2022: (i) the date for points of defence was extended to 4pm on 16 December 2022; (ii) an extension was agreed for points of reply; (iii) the CMC listed for 11 January 2023 was vacated and (iv) directions were agreed for the listing of the Consolidated Proceedings for a 3-day trial on a date to be fixed after March 2023.
12. Having agreed the second consent order dated 1 November 2022, by letter dated 24 November 2022, the First Respondent informed the Applicant that he and the Company had issued the Validity Application on 10 October 2022. It was further confirmed to the Applicant that the intention of the First Respondent and the Company was to serve the joint administrators with the Validity Application and supporting evidence no more than 14 days prior to the initial directions hearing listed on 3 February 2023 (the minimum period permitted by IR 2016). After some discussion regarding privilege and disclosure of the Validity Application, on 5 December 2022, the Respondents provided the Applicant with a copy of the Validity Application Notice (on a without prejudice and subject to litigation privilege basis), but not any supporting evidence, which had yet to be prepared.
13. On 15 December 2022, the Respondents issued an application (inter alia) to stay the Consolidated Proceedings pending determination of the Validity Application ('the Stay Application'). The Stay Application was directed to be listed in the ICC Judge Interim Applications list and came before me on 5 January 2023.

Evidence

14. For the purposes of determining the Stay Application I have read and considered the following witness statements and their respective exhibits:
 - (1) the witness statement of Mr Stephen Downie, the Respondents' solicitor, dated 15 December 2022;
 - (2) the witness statement of Mr Stuart Turner, the Applicant's solicitor, dated 3 January 2023.

Approved Judgment

15. I have also read and considered the other documents (including the Validity Application Notice) contained in the agreed bundle before me, to which reference will be made in this judgment where appropriate.

The Validity Application Notice

16. The Validity Application Notice seeks (inter alia) a declaration that the appointment of the joint administrators was invalid and of no effect. In broad summary, it alleges that the floating charge held by Recycling Management Limited was not enforceable when the out of court appointment was made, as no ‘enforcement event’ (as defined) had yet occurred.

The Respondents’ case for a stay

17. On behalf of the Respondents, Mr Kingston-Splatt of Counsel argued that a stay of the Consolidated Proceedings should be ordered, as it would avoid the Respondents having to incur substantial legal fees in the preparation of their points of defence. He contended that such costs would be ‘entirely wasted’ if the Validity Application is successful, as ‘the appointment of the Administrators would be set aside and the assignment to [the Applicant] would be a nullity’.
18. He also contended that unless the Validity Application had been determined, ‘large parts of the points of defence would need to be devoted to the factual matters (and legal arguments) which support [the Respondents’] underlying arguments about the validity of the appointment’.
19. He submitted that the ‘proportionate’ course was for the Consolidated Proceedings to be stayed pending the outcome of the Validity Application. The consequences of the success of the Validity Application, he argued, would be direct, as it would afford the Respondents ‘a complete and immediate answer to the present claim’.
20. Conversely, allowing the Consolidated Proceedings to continue, he argued, would simply serve to increase the Applicant’s exposure to adverse costs in the event that the Validity Application later succeeded.

The Applicant’s position

21. The Applicant opposes a stay. Mr Saunders of Counsel pointed out that the Respondents had already agreed to two consent orders timetabling the future conduct of the Consolidated Proceedings, including their own timeline for providing points of defence and directions up to and including trial. They had agreed the second consent order (of 1 November 2022) and the timings therein knowing that they had issued the Validity Application on 10 October 2022.
22. The initial hearing of the Validity Application listed for 3 February 2023 was simply a 15-minute directions hearing and would not bring a resolution to the application, which would only be heard some months later.
23. The Respondents, Mr Saunders argued, could have challenged the administration in 2016. The First Respondent had taken issue with the joint administrators’ appointment from 2016 but had done nothing to bring the matter before the court until

Approved Judgment

the issue of the Validity Application on 10 October 2022. Mr Saunders argued that it did not lie in the Respondents' mouths to suggest that they would suffer prejudice in filing a defence to the Consolidated Proceedings, relying on an application that ought to have been made promptly in 2016 if it was to be made at all.

24. The Respondents, he contended, had stood by whilst five extensions to the period of administration have been agreed by consent or granted by court order, the latest being an application on 13 September 2022, extending the administration to 10 April 2024.
25. Mr Saunders observed that, even now, the Respondents had not prepared their evidence in support of the Validity Application against the administrators. They had also made clear that they intended to provide the application and the evidence to the administrators on the last day possible provided by the IR 2016, 14 days prior to the hearing of 3 February 2023 (some 101 days after issuing their application). As Mr Saunders put it: 'the theme of delay continues'.
26. Mr Saunders submitted that the manner in which the Respondents had conducted themselves and the timing of the Validity Application had led the Applicant to the justifiable conclusion that the challenge to the administration was merely 'a tactical manoeuvre designed to forestall the [Respondents] having to formally address the claims being made against them'.
27. Mr Saunders further contended that the suggestion that the Respondents were unable to file a defence because they were concentrating on the Validity Application should be rejected. The timing of the Validity Application was entirely of their own making and so too was the consequence of any prejudice they had brought upon themselves.
28. Mr Saunders went on to argue that in any event, the Respondents had known of the Applicant's claims for two years and had questioned the validity of the administration since 2016. One would expect them to have explored their positions on both with their legal representatives in some detail by now. Indeed, instructions had been taken over this period to put forward the Respondents' position in correspondence exchanged between the parties' solicitors. It followed that preparation of a defence would not involve starting from scratch.
29. Mr Saunders also noted that the possibility of Alternative Dispute Resolution had been discussed by the Applicant and the Respondents. That, he submitted, was a process which would benefit from the Respondents 'putting their cards on the table and producing a defence'.
30. For these reasons, Mr Saunders submitted that a general blanket stay should be refused.

Discussion and conclusions

31. It was common ground that the court has a discretionary power to stay the whole or any part of proceedings pursuant to the court's general case management powers under CPR 3.1(2)(f) and/or its inherent jurisdiction under section 49(3) of the Senior Courts Act 1981. It is also clear from the authorities that the mere fact that a party has agreed given directions in a consent order approved by the court does not of itself preclude the court from later granting a stay of proceedings on that party's

application. In deciding whether or not to grant a stay, the court must have regard to the overriding objective set out in CPR 1.1.

32. Naturally I am mindful of the need to ensure that all cases are dealt with justly and at proportionate cost. The Respondents emphasise the need to ensure that the parties are on an equal footing and can participate fully in the proceedings, and that parties and witnesses can give their best evidence (CPR 1.1(2)(a)), claiming that they will be in difficulty preparing points of defence in the Consolidated Proceedings whilst at the same time preparing their evidence on the Validity Application. In my judgment, however, these difficulties are both over-stated and self-imposed. They should not be afforded significant weight in the circumstances of this case.
33. The Respondents have been aware of the Applicant's proposed claims since June 2020, when a letter before claim was sent. They were sent draft proceedings for comment in 2021. The payments spanning 2014-2016 which form the subject matter of the Consolidated Proceedings have been explored in correspondence exchanged between the parties and their respective solicitors since 2020. As put by Mr Saunders, the Respondents and their solicitors will not be 'starting from scratch' when preparing points of defence. Moreover, the fact that the validity of the joint administrators' appointment remains the subject of challenge at the time of preparation of the points of defence does not of itself pose any great difficulty; any points of defence prepared can simply flag that they are prepared and filed without prejudice to the Respondents' contention that the appointment of administrators and subsequent Assignment are invalid and of no effect.
34. Similarly, the grounds upon which the First Respondent seeks to challenge the validity of the joint administrators' appointment were first raised in 2016. They are largely document based and have been aired at length in correspondence exchanged over a number of years. Again, in preparing evidence in support of the Validity Application, the First Respondent and his solicitors will not be 'starting from scratch'.
35. The timetabling agreed by the Respondents' solicitors in the second consent order was agreed after issue of the Validity Application. I consider it legitimate to conclude that at the time of agreeing that timetabling, the Respondents' solicitors considered it to be achievable notwithstanding the issue of the Validity Application. There was no evidence before me of any material change in circumstance which would serve adequately to explain the Respondents' volte-face following agreement of the directions through to trial set out in the second consent order.
36. I also take into account that any residual (if overstated) problems that may arise from the timing of the Validity Application are entirely of the Respondents' own making. The First Respondent first took issue with the validity of the administration in 2016 and yet did nothing to bring that issue to court until October 2022, after issue and service of the Consolidated Proceedings.
37. During the course of submissions, Mr Kingston-Splatt candidly confirmed that the Validity Application had been prompted by the issue of the Consolidated Proceedings; as Mr Kingston-Splatt put it, this was the 'main reason' why the Validity Application had been issued. Such confirmation would appear to validate the Applicant's concerns, as expressed in Mr Turner's statement, that the Validity Application has been made 'in an attempt ... to avoid addressing the claims against

[the Respondents] that are raised in the [Consolidated] Proceedings of which they have been aware since the letter of claim sent to their solicitors by my firm dated 10 June 2020’.

38. The Respondents emphasised the need for the court to consider CPR 1.1 (2)(b) and (c) (saving expense and dealing with the case proportionately) and CPR 1.1(2)(e) (allotting to the case an appropriate share of the court’s resources) when deciding whether or not to grant a stay. Naturally I take such matters into account.
39. When considering these factors, however, the court must also have regard to the range of possible outcomes on the Validity Application. The Respondents invite the court to proceed on the unqualified assumption that, in the event that the Validity Application is successful, any work done by the Respondents on their defence to the Consolidated Proceedings or in progressing the Applicant’s claim towards trial would inevitably be wasted in its entirety.
40. In my judgment, the position is not as clear-cut as the Respondents suggest. Even if the Respondents succeed in establishing that the out of court appointment was invalid, it may be open to the court on the evidence before it to consider granting a retrospective administration order on the application of a creditor or any other person with standing. In my judgment, any court considering the Validity Application would give serious consideration to this expedient, given that the administration has spanned more than 6 years and has been the subject of 5 extensions, 4 of which were by court order. If a retrospective administration order was granted, the Assignment would remain valid.
41. Moreover, even if the Validity Application was successful and no retrospective administration order was granted, it would be wrong to proceed on the assumption that all claims currently being pursued by the Applicant against the Respondents would simply disappear. If at the time that the Validity Application is determined, the Company is insolvent, the Company may be wound up or a fresh prospective administration order may be granted. Even if the Company is not placed into another formal insolvency process and ‘officeholder’ claims fall away, on any footing the ‘company’ claims would survive and would remain with the Company. In such a situation, it would in principle be open to the Company to pursue such claims, subject to any limitation points that may arise, whether by way of application to be joined as an applicant in place of the Applicant in the Consolidated Proceedings, or by way of fresh proceedings; and in that regard clearly CPR 19.5(3) and ss 21 and 32 of the Limitation Act 1980 would be the subject of scrutiny.
42. It follows that, even on the Respondents’ ‘best case scenario’ (ie that the Validity Application succeeds and no retrospective administration order is granted), it cannot be said that all work done by the Respondents in setting out and evidencing, in their defence to the Consolidated Proceedings, their proposed explanations and justifications for sums alleged to have been wrongly paid out to them by the Company, will inevitably have been ‘entirely wasted’, as Mr Kingston-Splatt put it.
43. A further factor I take into account is the fact that the Applicant is a well-resourced concern, plainly capable of meeting any costs order in favour of the Respondents, should the need arise.

Approved Judgment

44. I also take into account the potential benefits of all parties ‘laying their cards on the table’, as Mr Saunders put it, with a view to maximising the prospects of a successful ADR.
45. All such factors must be weighed in the balance when considering the stay application.
46. A further (and in my judgment important) factor to take into consideration is that set out in CPR 1.1(2)(d) (the need to ensure that the Consolidated Proceedings are dealt with ‘expeditiously and fairly’). In the current context, this falls to be considered together with CPR 1.1(2)(a) (ensuring that parties and witnesses can give their best evidence).
47. The Applicant is not a party to the Validity Application and has no control over the time it will take to reach a final conclusion. The payments forming the subject matter of the Consolidated Proceedings span 2014-2016. The longer that points of defence, points of reply, disclosure, exchange of witness statements and trial are deferred, the greater the risk that memories will fade and relevant documents will no longer be available.
48. Given the circumstances that triggered the issue of the Validity Application (outlined in paragraph 37 above), there is in my judgment an appreciable risk that if a stay of the Consolidated Proceedings pending final disposal of the Validity Application was granted, the First Respondent (and through him the Company) would have little incentive to pursue the Validity Application with any vigour. In the regard I take into account the matters outlined in paragraph 25 above.
49. Taking all such matters into account, in my judgment it would be contrary to the overriding objective to put off indefinitely resolution of the Consolidated Proceedings to await the outcome of the Validity Application.
50. For all these reasons I have dismissed the stay application.

ICC Judge Barber