Neutral citation number: [2023] EWHC 2509 (Ch)

Case No: CR-2023-MAN-000950

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Friday, 4 August 2023

BEFORE:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

BETWEEN:

(1) MS LENDING GROUP LIMITED
(2) MS LENDING SPV 1 LIMITED

Applicants

- and -

(1) LVR CAPITAL LTD
(2) THE REGISTRAR OF COMPANIES

Respondents

MR JON COLCLOUGH (instructed by **Brecher LLP**) appeared on behalf of the Applicants
Neither of the respondents was present or represented

APPROVED JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

JUDGE HODGE KC:

1. This is my extemporary judgment in the matter of LVR Capital Ltd (Case number CR-2023-MAN-000950). This is an administration application issued on 25 July 2023 by two companies, MS Lending Group Limited and MS Lending SPV 1 Limited, in their capacity as secured creditors of the first respondent, LVR Capital Ltd. The second respondent is the Registrar of Companies.

2. The reason for the presence of the second respondent is that, in addition to seeking the making of an administration order in relation to the company, and the appointment of Mr Edward Avery-Gee and Mr Daniel Mark Richardson as joint administrators of the company, the applicants also seek an order pursuant to section 859M of the Companies Act 2006 rectifying the register of the company to remove incorrectly filed statements of satisfaction in respect of the applicants' secured lending to the company.

3. The supporting evidence is contained in the witness statement of Mr Christopher Andrew Wright dated 25 July 2023. Mr Wright is a solicitor and partner in the solicitors practice of Brechers LLP, which represents the applicants.

4. The applicants are represented by Mr Jon Colclough (of counsel), who has produced a detailed and helpful written skeleton argument, dated 2 August 2023, which I have had the opportunity of pre-reading.

5. The applicants assert that the company is indebted to them in a sum in excess of £800,000. That sum was advanced to the company in respect of two properties, Barnsdale House, Halifax, and 47 Church Street, Huddersfield.

6. In respect of Barnsdale House, there was an original advance by the first applicant in August 2021. The sum in question was £455,000, which was secured by a debenture and a legal charge. That advance was refinanced in September 2022 for a six-month term. That further advance was secured by a debenture dated 13 September 2022 and a legal charge, with the advance being made by the second applicant. The Barnsdale House debenture contained a floating charge. Clause 3.2 expressly provided that paragraph 14 of Schedule B1 to the Insolvency Act 1986 (as amended) applied to the

floating charge created by or under the debenture. The debenture was registered at Companies House. In fact, it was mistakenly registered twice, the second registration representing a mistake made by the company's solicitors who should have registered the legal charge instead. That mistake is currently the subject of a separate application, and it is not a matter for the court today.

7. In respect of Church Street, the first applicant advanced £84,000 to the company in January 2022 for a 9-month term. That loan was secured by a debenture and a legal charge. The Church Street debenture included a floating charge and contained a provision in the same terms as clause 3.2 of the Barnsdale House debenture. Both those security instruments were registered at Companies House.

8. Neither loan has been repaid by the company. Letters of demand were sent to the company on 10 May 2023. The total amount outstanding is said to be in excess of £800,000, with over £700,000 owing in respect of the Barnsdale House loan and over £100,000 owing in respect of the Church Street loan.

9. In response to the letters of demand, the company, acting by its sole director, Mr Ryan, filed a series of statements of satisfaction with Companies House, incorrectly stating that the charges have been satisfied. As a result, the record at Companies House now shows the company as having no outstanding charges.

10. On 25 May 2023 the proposed administrators, Mr Richardson and Mr Avery-Gee, were appointed as receivers of the two properties. The receivers took the view that their appointment as receivers of Barnsdale House was invalid, although they did not take the same view in relation to the Church Street property. I understand that no material action has been taken by the receivers in relation to that property.

11. The reason why Mr Ryan appears to have filed the statements of satisfaction appears from correspondence that Mr Ryan has produced, and which is at pages 198 to 202 of the hearing bundle. On 1 May 2023, Mr Ryan, on behalf of LVR Capital, wrote to the applicants enclosing what he described as "promissory notes as payment and redemption for agreement." The letter percipiently stated, "You may not wish to accept this"; but it went on to assert that under the Bills of Exchange Act 1882, the

applicants lawfully must do so, and the delivery notification was said to be deemed acceptance. The two promissory notes were for £660,108.76, and promised repayment on 1 May 2028, and for £93,785, and promised repayment (again) on 1 May 2028.

12. It would appear that Mr Ryan takes the view that the company is entitled unilaterally to create and issue promissory notes to discharge the secured indebtedness of the applicant companies. That is plainly a legal nonsense; but the relevance is that although Mr Ryan has, in some of the correspondence, disputed the validity of the debentures, by issuing the promissory notes he does appear to have accepted the underlying indebtedness.

13. I am entirely satisfied that it is not open to Mr Ryan, or the company, to seek to discharge the applicants' secured indebtedness by way of these promissory notes.

14. The present application was issued on 25 July 2023. The draft application notice, the supporting witness statement and exhibit, and a draft order were sent by email to the company at about 5.25 pm on afternoon of Tuesday 25 July 2023, that is six clear days before this hearing.

15. Mr Ryan responded by email shortly after 12.15 pm on Thursday 27 July 2023. Mr Ryan's email attached what Mr Colclough describes, at paragraph 12 of his skeleton argument, as a series of curious documents. In his covering email, Mr Ryan explained that the most important of these documents were “the Cease and Desist Order, Legal Notice and Demand and Brecher Decline Cover”. These documents included the two promissory notes to which I have already made reference.

16. Mr Ryan followed that email up with a further email sent just before 11 o'clock on the morning of Monday 31 July 2023. Accompanying that email were further documents, including a copy of the administration application notice bearing the company's seal stamped in red and in capital letters with the wording, "offer to contract declined". There was also an invoice to various solicitors at Brechers LLP in the sum of £24 million, with payment being demanded in "physical gold."

17. Mr Colclough submits, at paragraph 14 of his written skeleton argument, that the above correspondence shows that both the company and Mr Ryan are fully aware of this application and of the hearing today but have elected not to engage seriously in the application and have instead sent a series of what Mr Colclough describes as "non-sensical legal notices" to the applicants' solicitors. That is a restrained way of characterising the documents sent by Mr Ryan.

18. Mr Ryan sent an email to the court at 8.29 pm on the evening of Monday 31 July 2023. In that email he stated that he would be abroad from 3 to 10 August 2023 and asked for this hearing date to be changed. That email attached various documents which show that Mr Ryan and members of his family were due to be flying from Manchester Terminal 1 to Gibraltar early on the morning of 3 August 2023 (yesterday), and would be returning on a flight late on the morning of 10 August 2023. There was also a reservation at a hotel in Sotogrande on the Costa del Sol in Spain. I note that the reservation date was 24 July 2023, and thus before Mr Ryan was given notice of this application; but that he was able to cancel the hotel reservation up to 26 July 2023, by which time he had received such notice, for a cancellation charge of only £15.

19. The court referred the email from Mr Ryan to me on the morning of Wednesday 2 August 2023. I directed the court to respond, which it did by email at about 11.20 am on that morning, stating that if Mr Ryan wished to have this hearing adjourned, he should approach the applicants' solicitors for their agreement. If they should decline, then the company should issue an application notice, joining the applicants as respondents, seeking an adjournment, supported by appropriate evidence, and should pay the appropriate court fee.

20. As far as I am aware, Mr Ryan has not responded to the court's email. There is certainly nothing on CE-file. Mr Ryan has not sought to approach the court to attend this hearing remotely.

21. Before coming into court, I was handed a bundle of further relevant correspondence. In an email at 11.37 am on 2 August 2023 Mr Ryan informed Brechers LLP that he was on holiday and requested an adjournment. He stated that failing that, he could issue an application notice joining the applicants as respondents that day. Brechers

LLP responded at 12.34 pm on 2 August 2023 thanking Mr Ryan for his email and commenting:

> "(1) It is not understood why this holiday was not brought to our earlier attention when we first notified you of this application filed at court on 25 July 2023 and explicitly brought to your attention that we have requested this application be listed on 4 August 2023 in Manchester.
>
> (2) In any event and notwithstanding the above point, you are not a party to the proceedings and your personal attendance is therefore not required. As for the company, LVR Capital Ltd can arrange for legal representation for this hearing.
>
> (3) We will continue to proceed with the hearing and should you be in any doubt about your position, we suggest you obtain independent legal advice.
>
> (4) Our clients' rights and remedies remain fully reserved, including our right to bring this correspondence to the court's attention and seek costs of this application should it become necessary."

22. Mr Ryan responded to those points in an email sent just before 1 o'clock on 2 August 2023. As to point (1) he stated:

> "I may have not been going on it due to a family bereavement and waiting for funeral directions, not that this concerns you in any way, shape or form."

In response to point (2) Mr Ryan stated: "Given LVR Capital belongs to a foreign non-domestic trust, no UK legal representation is applicable."

In response to point (3) Mr Ryan stated:

> "If you are in any doubt of your position, remember that assets that used to belong to LVR now belong to a non-domestic trust under copyright and seal which took place after discharge without Land Registry charges in play. And by legal advice I presume you mean the same corrupt legal system that deems its paying clients third in line after the courts and public. The same legal system can only contract with the corporation and not the living man, see attached."

In response to point (4) Mr Ryan stated:

> "Bring the attached statute law of Waters Maritime Admiralty to Court's attention too, the only costs you will be able to seek are against the work [?] of fiction, not the living man. For order, I do not consent to these proceedings. Your offer is not accepted. I demand the bond immediately brought forward so I can see if they will indemnify me if I am damaged. I also draw your attention to the next email I suggest you share with the courts and add to your bundle."

A number of further curious documents were attached to that email.

23. There was then a further email from Mr Ryan at 1.14 pm on the same day, but it does not, so it seems to me, add anything to what he had previously said. There was a further email from Mr Ryan at 4.19 pm on 2 August 2023, and yet another on 2 August 2023.

24. Brechers LLP responded on 2 August 2023 at 5.09 pm. The email noted that LVR Capital Ltd declined to avail itself of legal representation and noted that Mr Ryan's position was that no legal representation was applicable. Brechers LLP said that they will draw the judge's attention to the same and the contents of his email.

25. I do not think there is anything of any further relevance in the supplemental bundle.

26. I am satisfied that it is appropriate to proceed with this hearing today. Mr Ryan was told by the court, at about 11.20 am on Wednesday 2 August 2023, that he could apply for an adjournment. He has not sought to do so. Indeed, given the contents of Mr Ryan's emails and their attachments, and, in particular, the way in which he has declined to accept the administration application, I do not consider that Mr Ryan, on behalf of the company, is likely to seek to engage sensibly with the merits of the present application. Certainly he has not sought to do so thus far in his various emails. For those reasons, I intend to proceed with the application.

27. So far as the application for rectification of the register is concerned, I have been handed this afternoon a letter from Companies House, dated 3 August 2023, acknowledging receipt of the administration application, supporting witness statement and draft order. The letter states that the Registrar's interest is limited to the matters set out in paragraphs 1 and 2 of the draft order, seeking the removal of documents from the

register pursuant to section 1096 of the Companies Act 2006, and rectification of the register pursuant to section 859M in relation to the company. The writer confirms that the Registrar of Companies has no objection to that application. The Registrar has indicated that they do not wish to attend or be represented at any hearing in order to save time and costs.

28. Section 859M, which applies in relation to company charges, enables the court, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, to order that the omission or misstatement in any statement or notice delivered to the Registrar in accordance with this Chapter to be rectified if the requirement in subsection (2) is met. So far as material, the requirement in subsection (2) is satisfied if the omission or misstatement (a) was accidental or due to inadvertence or to some other sufficient cause; or (b) that on other grounds it is just and equitable to grant relief.

29. I am satisfied here that there has clearly been an omission or misstatement in the purported statements of satisfaction of the various charges because it is quite clear that those charges have not been satisfied. The reason for the misstatement is that Mr Ryan, on behalf of the company, has filed notices of satisfaction which are false. The charges have not been satisfied. The reason he has done so would appear to be that he has taken the view that it was open to him to discharge the secured indebtedness by the creation of promissory notes without any acceptance of them by the secured debtors. That is not a course that is legally available to the company.

30. I am satisfied that the provision of statements that are legally incorrect is "some other sufficient cause" within the meaning of section 859M (2) (a) (i) or, alternatively, renders it "just and equitable" to rectify the register within the meaning of section 859M (2) (b).

31. I will therefore order that the Registrar shall rectify the register by removing the erroneous documents and filings identified at paragraph 1 of the draft order; and I shall further rectify the register in respect of the company by showing the charges identified in paragraph 2 of the draft order as being "outstanding" rather than "satisfied".

32. I turn on then to the administration application. This is brought on two separate grounds. First, that the applicants are floating charge holders and, as such, entitled to apply for the appointment of administrators under paragraph 35 of Schedule B1. Alternatively, the administration order is sought by the applicants as creditors of the company under paragraph 12 (1) (c) of Schedule B1. I will consider each of those bases of the application in turn.

33. First, the application by the applicants as floating charge holders: Strictly speaking, the fact that the charges have been wrongly marked as satisfied at Companies House does not affect the applicants' ability to appoint administrators pursuant to their floating charges. There is authority to that effect in the decision of Deputy ICC Judge Frith in the case of *Re NMUL Realisations Limited* [2021] EWHC 94 (Ch). Having considered various statements in practitioners' works on bank security documents, company law, and company charges at paragraphs 20 through to 24 of his judgment, at paragraph 25 the Deputy ICC judge concluded that it was clear that the certificate of satisfaction mistakenly filed in 2018 did not affect the underlying charge or the debt that it secured and the liability of the company to pay it. That decision was reached in the context of a failure to give notice to the holder of a prior security pursuant to paragraph 15 of Schedule B1 prior to the appointment of an administrator. It seems to me that the decision applies also in the present context of an application for an administration order under paragraph 35 of Schedule B1. In any event, I have made it clear that I will make an order directing the Registrar of Companies to remove the notices showing the relevant charges as satisfied.

34. Irrespective of that however, this is a case where I am satisfied that the applicants could appoint an administrator under paragraph 14. Paragraph 14 (2) provides that a floating charge qualifies if created by an instrument which (amongst other things):

> "(a) states that this paragraph applies to the floating charge".

35. Sitting in the Outer House of the Court of Session in the case of *Re Stephen, Petitioner* [2011] CSOH 119, and reported at [2012] BCC 537, Lord Glennie stated (at paragraph 9 of the judgment) that on the clear wording of paragraph 14(2), a floating charge qualifies if any of the relevant sub-paragraphs applies. His view was that:

> "The word 'or' shows that the four sub-paragraphs are disjunctive. Only one of them need be satisfied for the floating charge to qualify as a qualifying floating charge in terms of paragraph 14 (1)."

36. In the present case, the requirements of subparagraph 2 (a) are clearly satisfied for the reasons I have already given. It is therefore open to the court to appoint an administrator pursuant to paragraph 35, whether or not the company is or is likely to become unable to pay its debts. Nevertheless, as Mr Colclough recognises, the court retains a discretion as to whether to make an administration order because of the use of the word "may" in paragraph 35 (2).

37. I am therefore satisfied that the applicants have the power to appoint an administrator under paragraph 14 of Schedule B1 because both the Barnsdale House and the Church Street debenture include the words:

> "This debenture contains a qualifying floating charge. Paragraph 14 of Schedule B1 to the Insolvency Act 1986 applies to the floating charge created by or under this deed."

38. Although I do not need to be satisfied that the company is, or is likely to become, unable to pay its debts, the fact is that I am satisfied that the company cannot pay its debts. It owes some £800,000 to the applicants which has not been paid. The company has put in no evidence to suggest that it can pay. Indeed, the purported issue by the company of the promissory notes for payment in five years' time suggests that the company recognises that it is unable to pay this secured indebtedness at the present time. I am satisfied that the company is cash-flow insolvent.

39. That conclusion feeds into the exercise of the court's discretion. I am satisfied that the court should exercise its discretion in favour of making an administration order, for the following reasons advanced by Mr Colclough:

(i) The applicants are qualifying floating charge holders, with the power to appoint administrators.

(ii) The appointment could have been made out of court but for the company and Mr Ryan's filing of incorrect and misleading statements of satisfaction.

(iii) The company cannot pay the significant indebtedness owing to the applicants because it is cash-flow insolvent.

(iv) In light of the conduct of Mr Ryan in terms of producing nonsensical legal documents and failing to engage properly with the present application, it is plainly appropriate for independent office holders to be appointed to take charge of the company;

(v) There is a real prospect of one of the statutory purposes of administration being achieved, namely the realisation of property in order to make a distribution to the applicants as secured creditors.

40. For those reasons, I will appoint Mr Richardson and Mr Avery-Gee as administrators of the company pursuant to paragraph 35 of Schedule B1.

41. Alternatively, and had it been necessary to do so, I would have granted an administration order to the applicants in their capacity as creditors of the company pursuant to paragraph 12 of Schedule B1. The applicants are clearly creditors of the company and therefore have the necessary standing to apply pursuant to paragraph 12 (1) (c). The company is clearly unable to pay its debts as they fall due and is therefore cash-flow insolvent. An administration order is reasonably likely to achieve the purpose of administration for the reasons I have already given. The court should exercise its discretion to make an administration order for the reasons I have already given.

42. I will therefore make an administration order, which I do at 3.17 pm on 4 August 2023. I will appoint Mr Avery-Gee and Mr Richardson as the joint administrators of the company. All of their functions as administrators may be exercised by any or all of them.

43. The costs of this application shall be paid out of the company's assets. I will invite Mr Colclough to submit an order bearing today's date and the time at 3.17 pm, and with my name, sitting as a Judge of the High Court.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk