Neutral Citation Number: [2019] EWHC 2548 (Ch)

Case No: CR-2019-005198

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**
**INSOLVENCY AND COMPANIES LIST**

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 02/10/2019

**Before** :

**CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS**

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**Between :**

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| **BARROWFEN PROPERTIES LIMITED** | **Applicant** |
| **- and -** | |
| **(1) HAMBROS INVESTMENTS LIMITED** | **Respondents** |
| **(2) ANUPAM INVESTMENTS LIMITED** | |

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**Tim Matthewson** (instructed by **Gardner Leader**) for the **Applicant**
**Robert-Jan Temmink QC** (instructed by **Teacher Stern**) for the **Respondents**

Hearing dates: 26 September 2019

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# 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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

## Chief Insolvency and Companies Court Judge:

## Introduction

1. This is the final hearing of an application made by Barrowfen Properties Limited ("Barrowfen") for an injunction to restrain Hambros Investments Limited ("Hambros") and Anupam Investments Limited ("Anupam") from presenting a winding up petition.

2. The application is dated 2 August 2019. On the return date of the hearing on 8 August 2019 ICC Judge Jones granted an interim injunction and gave directions for the final hearing. The final hearing was listed for half a day, heard on 26 September 2019.

3. When listing for the half day hearing the parties did not provide time for pre-reading. Upon receipt of skeleton arguments counsel asked that 1.5 hours to be allocated prior to the hearing for this purpose. The applications list was full making the requested time allocation impossible. Submissions took longer than counsel expected. At the end of submissions references were provided for the Court to consider before giving judgment. I therefore granted a further interim injunction to hold the ring until the handing down of this judgment.

## Order on the Application

4. The application is dismissed. Hambros claims that monies are due from Barrowfen that had been advanced pursuant to a loan agreement dated 5 February 2015 (the "Loan Agreement"). The parties have focussed on one part of the debt claimed by Hambros totalling £160,000. I shall find that the sum is due and owing In my judgment Barrowfen has failed to meet the threshold test that there is a genuine and substantial or serious dispute in respect of part of the debt claimed by Hambros.

## Background

5. Prashant Patel is currently a director of Barrowfen. In a witness statement dated 2 August 2019 he explains the connection between Barrowfen, Hambros and Anupam.

> "Rajnikant Patel ("Rajnikant"), Yashwant Patel ("Yashwant"), Girish and Suresh Patel ("Suresh") are brothers. They live in Australia, the USA, the United Kingdom and Singapore respectively. They, their children (which include me as Rajnikant's son, and Kiraj), and other family members own and control an extensive network of companies and businesses across various jurisdictions, including Malaysia, Singapore, and the United Kingdom. Historically, the Patel family companies and businesses were run on the basis of an informal arrangement between the adult family members that a Patel family member resident where a business was located would have operational control of that business. Issues relating to the companies and businesses would, nevertheless, ordinarily be discussed amongst the adult Patel family members before any significant decisions were taken in relation to them. For the last decade the Patel family had been engaged in a bitter global dispute between Girish on the one hand and the other family members on the other hand. Proceedings in numerous jurisdictions involving the family members and their companies have largely been

resolved but other matters are still ongoing which are relevant to this application."

6. Girish was a director of Barrowfen at the time it entered into the Loan Agreement. He explains that Barrowfen "is an SPV which holds property in Tooting which has development potential" and that it was agreed by the board of directors, recorded in a minute dated 20 January 1997, that "all the powers capable of exercise by all or any of the directors of the company whether pursuant to the Companies Act 1985 (as amended), the articles of association of the company or otherwise be and are hereby delegated to [Girish] without restriction….". Prashant states that by August 2002, "the Patel family had taken full ownership and control of Barrowfen through the acquisition of the other families' shareholdings. From 2006 until 16 July 2018, the shares in Barrowfen were held in equal proportions, for the benefit of the children of Rajnikant, Girish and Suresh". It is agreed that the Tooting property was the principal asset of Barrowfen, and that development work began after Girish resigned as a director in 2016.

## The Loan Agreement and debt

7. The Loan Agreement is made between Girish who is defined as the Original Lender and Barrowfen (the Borrower). It provides for an "advance of the Facility which a Lender (in the absolute discretion of the Original Lender) may make to the Borrower pursuant to the terms of this Agreement….". The reference to "a Lender" is obscure save that a definition provision provides that "Lender" is the Original Lender and "such other person as provides a Loan under this Agreement as notified to the Borrower in the relevant Form of Acceptance". As regards the loan itself, the "Original Lender makes available to the Borrower an uncommitted on-demand facility in an aggregate maximum amount of £5,000,000….". By clause 3 the Borrower could only use the facility for certain purposes such as paying contractors, professional fees in connection with developing the Tooting property and working capital. The interest "payable on the outstanding balance of each Loan at 18% per annum" was to accrue on a daily basis and compounded on a quarterly basis. The payments to be made "to each Lender by the Borrower…..shall be paid by the Borrower….to such account as shall have been previously notified for this purpose by the Original Lender to the Borrower….or in respect of a Loan made by a Lender other than the Original Lender, such other account as that Lender may notify to the Borrower..". A default rate applied to payments not made by the "due date". By clause 10 of the Loan Agreement the Borrower is not permitted to assign or transfer any of its rights or obligations but the "Lender will be entitled to assign, novate or transfer to any other lender or person". In order to achieve an assignment, novation or transfer, the Borrower is obliged to "execute all documents the Original Lender may reasonably require.". By clause 14 no third party is entitled to enforce the Loan Agreement unless there has been an assignment, novation or transfer. Accordingly, there is a restriction on a third party enforcing the Loan Agreement and the Borrower was obliged to execute any transfer, novation or assignment. It has not been suggested that there has been an assignment, novation or transfer.

8. In his witness evidence Prashant explains that Hambros claims that it made the following advances to or for the benefit of Barrowfen:

> "The sum of £160,000 being the amount defined as the Existing Loan in Clause 4.1 of the Loan Agreement allegedly paid by Hambros to Girish's former solicitors, Stevens & Bolton LLP, on or around 5 November 2014;
>
> The sum of £200,000 paid by Hambros to Barrowfen's bank account on 16 February 2015;
>
> The sum of £20,000 paid by cheque into Barrowfen's bank account by Anupam on 2 April 2015; and
>
> The sum of £5,000 paid by cheque into Barrowfen's bank account by Anupam on 8 January 2016.".

9. Barrowfen accepts that it received the last three payments. Initially Prashant argued that due to a lack of records left by Girish after he resigned as a director of Barrowfen, he had been unable to verify receipt of the £160,000 tranche. It was argued that the money had been paid straight to the solicitors Stevens & Bolton's client account, but he did not know the reason for the payment. On 3 August 2016, he wrote to Stevens & Bolton's credit department requesting a copy of Barrowfen's running ledger to discover how funds paid to the firm were applied. It is now the case that Barrowfen accepts that £157,000 was paid to Stevens & Bolton on 14 November 2014 and applied for the benefit of Barrowfen. The identity of the payor is not admitted.

10. The reason for the payment, now undisputed, is that Barrowfen wished to develop the Tooting property but vacant possession was required. There was a sitting tenant and compensation was to be paid to that tenant. Compensation is payable where a landlord wishes to develop his property but the property is occupied by a tenant that has protection under the Landlord and Tenant Act 1954. The statutory compensation to be paid was £157,000. There is no dispute as to this sum. The evidence is that a notice was served on the tenant, Dadu Limited, in October 2014, pursuant to a s.25 Landlord and Tenant 1954 Act notice. It was Hambros who provided those funds by making a payment to Stevens & Bolton (the solicitors acting for Barrowfen at the time) for onward transmission to the tenant. The difference of £3,000 is explained by professional fees having been incurred in dealing with the tenant.

11. It is unarguable that the loan of £160,000 was advanced prior to the Loan Agreement. Likewise, it is unarguable that the Loan Agreement states that the advance was made by the Original Lender who is defined as Girish. If a different lender advanced sums, the Loan Agreement provided that notification should be given by way of a "Form of Acceptance". The evidence before the Court is that a Form of Acceptance carrying the same date as the Loan Agreement was served on Barrowfen. The Form of Acceptance stated that the lender was Hambros. It has not been argued that the Form of Acceptance is defective. A Form of Acceptance for the other loans outlined above are also in evidence, and no argument has been advanced that they are in any way defective or cannot be relied upon. There is a general submission that any evidence provided by Girish is not to be trusted or relied upon by the Court. I shall come on to this shortly.

12. By a letter dated 5 June 2019 Gardner Leader acting for Barrowfen wrote to Murdochs Solicitors (acting at that time for Hambros) asking for evidence that the monies lent had been used for the purposes set out in clause 3 of the Loan Agreement

"our client is concerned that the monies purportedly paid under the Loan Agreement may have been used not for proper purposes…".

13. The letter concluded "pending receipt of the further evidence requested above, and without prejudice to any arguments that Barrowfen may have about the validity of the Loan Agreement and/or the advances made thereunder, Barrowfen is presently prepared to repay £115,000…". This sum was calculated by accepting that "alleged" advances of £385,000 had been made but £270,000 had been paid to Stevens & Bolton solicitors to meet Girish's personal legal fees and not for the purpose set out in clause 3 of the Loan Agreement. The sum offered also includes interest of 5%. It is accepted by Hambros that Barrowfen did pay £115,000 on 29 July 2019.

14. Teacher Stern LLP succeeded Murdochs as solicitors acting for Girish and Hambros. They wrote to Gardner Leader on 12 July 2019. In that letter they explained that the November 2014 tranche was used for a proper purpose (payment to the tenant occupying the Tooting property). It was paid to the solicitors Stevens & Bolton for onward transmission. The sum of £200,000 was used for working capital which was supported by the Company's accounts. The smaller sums were paid by Anupam for the purpose of meeting urgent invoices of the Company. Teacher Stern asserted that the debt to Hambros had been accepted by (i) it appearing on Barrowfen's accounts and not being challenged; (ii) reason of it being included by the liquidator in a proof of debt (the liquidator accepted the proof as agent of Barrowfen); (iii) Girish received a bank cheque in the sum of £462,746.89 in settlement of the debt. It was rejected as it should have been in favour of Hambros; and (iv) Prashant wrote to Kiraj Patel acknowledging that Barrowfen owed money to Hambros.

15. In a letter dated 25 July 2019 Gardner Leader wrote to Teacher Stern LLP explaining why the sums received by Barrowfen are not repayable:

> "The fact of the loan and the loan terms have not been admitted….Barrowfen has rescinded the Purported Loan Agreement….the purported loan and its terms are therefore denied…in any event…Hambros was not a party to it and would not be entitled to enforce any of its terms…..Girish Patel's knowledge of the intended use of the funds transferred to Barrowfen is therefore attributable to Hambros…..Girish Patel did not intend to use the funds for the proper purposes of Barrowfen but rather for his own purposes…..any payment by Hambros will not have been a payment of a loan to Barrowfen at all…further or alternatively, Barrowfen has a cross-claim against Hambros".

16. Some of these objections were canvassed before the Court to support an injunction on the basis that there is a genuine and substantial dispute. Mr Matthewson says that the interest said to be due of £651,119.20 is disputed; loans of £225,000 less the paid £115,000 are disputed and the payment made to Stevens & Bolton in the sum of £160,000 is disputed. Mr Temmink QC submitted that he only had to succeed on one of these sums for the application for an injunction to be dismissed. Any one of these sums is greater than £750, the minimum sum for a petition. Both counsel focussed their oral submissions on the last mentioned payment to Stevens & Bolton.

## The legal test

17. The parties are agreed on the legal test to be applied, namely a requirement to demonstrate that the debt or debts are disputed on genuine and substantial grounds. The test is well established. In *Coulson Sanderson & Ward* (1986) 2 BCC 99, 207 the Court of Appeal explained that the Court "should not on an interlocutory motion restrain what would otherwise be the legitimate presentation of a winding-up petition by someone qualified to present it, unless the company establishes on the evidence a prima facie case for holding that the petition would constitute an abuse of process.". It will be an abuse where the presenting party has no standing as a creditor. A substantial dispute is sufficient to demonstrate, for the purpose of injunctive proceedings, that a creditor has no standing: *Re a Company (no 00751 of 1992)* [1992] BCLC 869. I have been directed to *Tallington Lakes Ltd v South Kesteven District Council* [2012] EWCA 443 where Etherton LJ (as he was) explained (at para 22) "that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one….and may even be reached even if, on an application for summary judgment, the defence could be regarded as "shadowy"". This is the test and the standard I shall apply.

**£160,000 tranche paid to Stevens & Bolton**

18. At the hearing Prashant was effectively putting Hambros to proof that the £157,000 plus £3,000 was advanced by Hambros. That said, Mr Matthewson argued that Hambros could not demonstrate satisfactorily that the money came from Hambros. Gardner Leader had asked on numerous occasions since late July 2019 for a copy of Hambros' bank statement identifying the lender but no statement had been produced. Although no bank statement has been produced Stevens & Bolton (solicitors acting for Barrowfen at the relevant time) has produced evidence including (i) invoices for professional work it undertook in connection with the Tooting property tenant (ii) its ledger recording "[payer: Hambros Investments Limited] Monies received from Hambros Investments Limited….credit £157,000"; (iii) evidence of a CHAPS payment request of £157,000 in favour of Dadu Limited; (iv) an e-mail from Stevens & Bolton dated 9 January 2015 "Re possession of property occupied by Dadu Limited" stating "I write to confirm that the sum of £157,000 has today been remitted to your account."; and (v) a letter from Stevens & Bolton dated 7 August 2019 stating that with the exception of one document, the requested documents had been sent to solicitors acting for Barrowfen three years ago and "Suresh and Prashant Patel were offered access to all of your client's files at the time Kingsley Napley acted for them." The reference to "your client" is a reference to Barrowfen.

19. In the teeth of this evidence Prashant produced a second witness statement dated 8 August 2019:

> "I note that despite repeated requests for evidence of this payment; the failure to provide any such evidence; Teacher Stern stating in their letter dated 23 July 2019 that their clients did not possess the requested evidence, the Respondents have now belatedly provided further (albeit incomplete) details of this purported payment. Importantly, it has now emerged that despite Girish advancing that £160k was remitted to Stevens & Bolton, only £157k was actually received by them……However, despite requests Hambros has still not provided evidence of its bank statements showing that it made the payment. Accordingly, this part of the Purported Debt remains

fully disputed on substantial grounds until such time as the Respondents properly evidence the payer and source of funds for this payment.".

20. Mr Matthewson adopts Prashant's position adding that the lack of a bank statement demonstrating that the money came from an account held by Hambros assumes great importance due to Girish's propensity to lie on oath. He referred the Court to proceedings between Girish and Yashwant Patel carrying neutral citation [2017] EWHC 133 (Ch). In that case having given evidence and been released from the witness box, Girish was recalled by the Deputy Judge. In his judgment Andrew Simmons QC, the Deputy Judge, explained "Girish immediately accepted that he had lied about when he had last met with Ranjanbala and Jayshree. I am bound to say that, even at this juncture, I was left with the unsettling impression that Girish did not consider this to be a particularly serious matter…". Committal proceedings followed ([2017] EWHC 3229 (Ch)) where it was found that Girish was "guilty of contempt of the most serious kind, and that he was the architect of a dishonest scheme to mislead the Court at the substantial expense of the Claimant. He forged the 2005 Will. It matters not why he did so. Self-evidently, he considered it in his interests to displace the 1986 Will with the forged 2005 Will.".

21. Mr Matthewson argued that if he cannot be trusted to tell the truth, only primary documentary evidence is sufficient. The absence of the bank statement raises a genuine and substantial argument not just because it could have ended any dispute as to the source of the money, but because it was necessary for Girish to prove his position by disclosing the bank statement. In a situation where a witness has been found to have been in contempt of court, that person's good character will be diminished. However, in my judgment the finding of contempt does not mean that the Court will take as a starting point (or presume) that a person found to have been in contempt in previous proceedings will perjure himself in subsequent proceedings. He may have lied before but that does not mean that the Court should treat his evidence in subsequent proceedings on the basis that he will deliberately deceive everyone, on every issue, all of the time. The Court jealously guards against an unfair hearing. The right approach is to take account of all of the evidence and reach conclusions without fear or favour.

22. It is true that Girish has failed to provide a bank statement demonstrating the money came from Hambros' account, but I accept the submissions of Hambros. First, the bank statement cannot be located. Secondly the requests for the bank statement were met with a reasonable response from Teacher Stern on 15 August 2019 when they wrote "the disclosure [you seek] is clearly required from Stevens & Bolton, we suggest that this be undertaken on a joint basis…we would invite you to write to Stevens & Bolton and confirm that they should provide us with evidence that the payment shown in their ledger of £160,000 as received from our client in November 2014 (out of which a compensation payment under section 37 of the Landlord & Tenant Act 1954 of £157,000 was made to Dadu Limited, a tenant of 190-198 Upper Tooting Road in January 2015) is supported by their other financial records. Despite your client's protestations to the contrary, we understand that Stevens & Bolton have always been entirely willing to co-operate."

23. The reply from Gardner Leader did not engage with the suggestion. Thirdly, the request for the bank statement became otiose as disclosure made by Stevens & Bolton

objectively, and sufficiently, demonstrate, for the purposes of this matter at least, that Hambros paid £157,000 to Stevens & Bolton's client account in November 2014. In my judgment the failure to produce the bank statement does not, in all the circumstances, give rise to a genuine and substantial dispute.

24. Mr Matthewson properly concedes that the evidence supports the view that the £157,000 was used for proper purpose as it was used to assist in gaining vacant possession of the Tooting property. However, the concession self-evidently accepts the evidence provided by Girish in his witness statement on this issue is true (albeit that he did not accept that £3,000 of the £160,000 had been so used).

25. Nevertheless, Mr Matthewson went on to submit that Stevens & Bolton may have made a mistake. I understood his submission in reply went further, that Stevens & Bolton deliberately made a false entry in their ledger. The submission either way was that the Court could not rely on the evidence produced by the solicitors for the purpose of demonstrating that the loan came from Hambros. I do not accept those submissions. They are mere assertion and not grounded in evidence. A mere assertion of a mistake does not demonstrate a genuine and substantial dispute. If it was suggested that there was serious misconduct it was wholly inappropriate, and particularly inappropriate when made against a professionally qualified lawyer who is not present in Court to challenge the assertion. The submissions struck me as a weak attempt to raise an argument that may lead the Court to conclude that there was a genuine and substantial dispute of fact and as such, cross-examination would be required to determine the issue.

26. I am mindful of the observation made by Oliver L.J. in *Re Claybridge Shipping Company SA* [1981] Com LR 107, 109 that it is all to easy for an unwilling debtor to raise a cloud of objections in witness statements and then to claim that because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all, but the matter should be determined in some other proceedings. The mere assertion made is, in my judgment, an objection without foundation and is of a type disapproved of by Oliver L.J. I am satisfied that the documentary evidence produced by Stevens & Bolton undermine Barrowfen's argument that there is a genuine and substantial dispute.

27. I mention that it was argued, briefly and not advanced with great vigour, that as Girish submitted a proof of debt in his own name to the administrators of Barrowfen, appointed on 17 February 2016, the identity of the lender is substantial. The letter heading in the covering letter containing the proof of debt is that of Hambros. The letter also enclosed loans and interest statements. The proof of debt form does contain Girish's name but "source of loan" in the statements clearly identify Hambros as the lender. Although the threshold test for an injunction is not a high one, the argument based on the proof of debt is insufficient to displace the evidence when taken as a whole.

28. Similarly, I find that the invoices of Stevens & Bolton in respect of work done for Barrowfen are not challenged on genuine and substantial grounds.

**The Loan Agreement is impugned**

29. I shall deal with the interest payment arguments briefly due to the limited amount of time spent by counsel on the argument and it being unnecessary for the determination of this application. Mr Matthewson argues that Girish entered into the Loan Agreement as director of Barrowfen and in breach of his duties owed to Barrowfen. It is said that when entering into the Loan Agreement he breached his duty to declare his interest in the transaction; failed to act with reasonable care and skill and acted contrary to good faith. Further, he acted dishonestly and as a result did not have authority to act on behalf of Barrowfen. A lack of authority impugns the Loan Agreement. There is no evidence to support this assertion. I find it striking that the Particulars of Claim in the current claim against Girish and Stevens & Bolton (BL-2018-0020280) which run to some 44 pages and 118 paragraphs, contain no claim for breach of directors' duties by reason of entering into the Loan Agreement. If there were a serious claim it is likely that leading and junior counsel (who drafted the pleadings) with the assistance of experienced solicitors would have included the claim in the Particulars.

30. There are other factors. It is argued that the Loan Agreement has been admitted or ratified by reason of conduct. First, the debt is stated in the accounts of Barrowfen and was never challenged. Secondly, Barrowfen sought to vary the Loan Agreement, negotiating a reduction to the contractual interest rate. Thirdly, this led to a cheque in the sum of £462,746.89 being tendered in satisfaction of the sums due under the Loan Agreement at a reduced interest rate. The cheque was not cashed because, says Girish, it was made out to him personally and not to Hambros. Barrowfen argues that the oral agreement to vary the Loan Agreement was conditional upon an arrangement that any disputed sums would later be returned by Girish or Hambros. I observe that even if it was said that some of the sums sent were intended to be returned if they were not found to be due and owing pursuant to the Loan Agreement, there was an intention to settle and it can be inferred that Barrowfen would not have sent a cheque for nearly £500,000 if it had not thought it did not owe any money pursuant to the Loan Agreement. The fact of sending a cheque of this size on the basis that Hambros would return sums not found to be due at a later date, puts pay to the argument now made, that it does not wish to pay any sums said to be due under the Loan agreement (other than the £115,000) due to a real risk that it will not be repaid if they are found not to be due later.

31. These are matters for another day. For now, Barrowfen has accepted that it will be obliged to repay any tranches made pursuant to the Loan Agreement as principal, on the basis that it will have been enriched at the expense of Hambros and Anupam, even if even if it is able to impugn the Loan Agreement.

32. I have found that there is no genuine and substantial dispute in respect of the sum claimed to be due from Hambros of £160,000. There is no genuine or substantial grounds for arguing that this loan to Barrowfen was not made in accordance with the Loan Agreement.

33. Order accordingly.