Neutral Citation Number: **[2020] EWHC 2685 (Ch)**

CR-2019-005589

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (ChD)
IN THE MATTER OF CHF 2 LIMITED
(AND 23 OTHER COMPANIES IDENTIFIED IN SCHEDULE 1 TO THE APPLICATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL.

Date: 16/10/2020

Before :

ICC JUDGE PRENTIS

- -

Between :

CARL STUART JACKSON and PHILIP DUFFY (as Joint Officeholders of the Schedule 1 Companies)	**Applicants**
- and-	
1. HUDA F Q H ALSHAMMARI	**Respondents**
2. HAITHAM F ABUL	
3. LEELA P T SINGAM	
4. OMAN MIDLAND INVESTMENT LIMITED	
5. NIKOLAY SHEMIGON	

- -
- -

Thomas Robinson (instructed by Crowell & Moring) for the Applicants
James A Davies (instructed by Gateleys) for the First, Second and Fifth Respondents
Tom Carpenter-Leitch (instructed by Shortlands) for the Third Respondent
Jonathan Edwards (instructed by Charles Russell Speechlys) for the Fourth Respondent

Hearing dates: 2, 5 October 2020

JUDGMENT

ICC JUDGE PRENTIS:

1. The Carlauren Group acquired hotels and care homes for conversion into luxury care homes. Each home was owned by a separate property company (a "PropCo"). The PropCos offered to the public 125-year leases of individual studios at their premises. Each investor selected the same of the three options on offer, being a fixed 10% per annum return payable monthly through an underlease with another Group company, Accordiant Limited. That return was due whether the studio was in occupation or not; whether it was renovated or not; or even whether it was built or not. Absent substantial capitalisation the Group therefore depended on cashflow, largely generated by further sales, to survive. From mid-2019 there were severe cashflow difficulties. The one company before me which is in liquidation, CHF 3 Limited, was wound up on 8 July 2019. All of the others entered administration over the Autumn of 2019, either through the Court or outside, save for one in which administrators were appointed earlier this year.

2. An estimated £79m was collected in by the Group. However, while the purchasers of studios ("Investors") believed, rightly or wrongly, that their purchase monies were ringfenced, to be applied only to the property in which their studio was located and hence for the relevant PropCo, in fact monies were all passed up to one of the two topcos, Carlauren Group Limited, and then distributed on an as-needed basis to the subsidiaries, without any accompanying contractual documentation. Until about the last quarter of 2018, 10% was also paid to the Group's founder, Sean Murray.

3. According to a valuer's desktop estimate from late 2019, were the PropCos' properties sold they would raise about £24.75m; and that only if the Investors' leasehold interests were extinguished. The companies before me granted 781 leases (the "Leases"). Carl Jackson and Philip Duffy are the joint officeholders for each PropCo (the "Officeholders"), being those particularised in Schedule 1 to their 23 June 2020 application. Mr Jackson describes their strategy as being to sell the freeholds on the open market, but "unencumbered" by the Leases. That way maximum value will be achieved.

4. The Officeholders' application (the "Application") seeks directions under paragraph 63 of Schedule B1 and section 168 of the *Insolvency Act 1986* (the "Act"). Mr Jackson has provided the evidence in support. His first statement identifies that the Application is "for an order under the court's jurisdiction to grant directions to its officers and under the jurisdiction set out in *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32", which he says will "certainly apply" to Investors with equitable liens or equitable leases. The Officeholders "seek an order entitling them to payment of their remuneration, costs and expenses incurred in getting the PropCos into administration, investigating the Investors' interests in the Properties and administering and realising the Properties owned by each PropCo, from the proceeds of sale of those Properties".

5. Were there any doubt that the aim of the Application was to meet costs and expenses from certain Investors' property, that is allayed by the next sentence which promises that "the investors be notified of this application": nothing is said about the creditors.

6. Mr Jackson goes on to describe how of the 781 Leases, 687 are registered and 94 unregistered. Those registered take effect as legal interests. The advice the Officeholders have received is that there is "no real market" for the freeholds unless they are sold free of the leasehold interests, so they have been negotiating, unsuccessfully, for the surrender of Leases "in return for an agreement to share in the net sale proceeds of the Property". He describes their concern about the time and cost of bringing the properties to the point of sale, and hence this application being brought to "seek the Court's direction that the Joint Office-Holders be permitted to incur fees and costs in carrying out those tasks, and may recover those fees and costs from the proceeds of sale of the Properties". Among the categories of costs identified are communicating with each Investor, as well as "holding costs", being "insurance, security and, where relevant, energy costs".

7. His concluding basis for the Application is wider than his first. The direction sought is "clearly analogous to *Berkeley Applegate* relief, but I am advised that the equitable nature of the *Berkeley Applegate* jurisdiction means that it may be necessary for the court to use its jurisdiction to grant directions to its officers in order to achieve the same effect as *Berkeley Applegate* relief in this case. That is because of the apparent presence of legal interests as well as equitable interests in the Properties… the only viable strategy to make any recovery for creditors is to investigate the interests of each investor and then effect a sale of each of the Properties on an unencumbered basis". "It is proposed, if the relief sought in this application is granted, that the Properties will be sold at the best value achievable and that each investor, whatever category they fall into, will be paid pari passu out of the net sale proceeds of

each Property after deduction of the costs of dealing with the relevant PropCo and realising the Property".

8. The relief proposed would not, though, achieve the purpose of a sale on an "unencumbered" basis, nor effect a mutation of existing legal or equitable rights into those of a pari passu creditor: at this point, what the Application sought was that the Officeholders "be entitled to pay, from the proceeds of sale of each of the freehold properties owned by the companies listed in Schedule 1, the Applicants' costs and expenses relating to (i) investigating the claims of investors in the respective company and property, (ii) realising the proceeds of sale of the respective property, (iii) the holding costs of the respective property, and (iv) the administration of the respective company and property". Nothing was said about the priority of those categories, nor the subsequent distribution of any remaining proceeds; as to priority, presumably the ordinary categories expressed in rule 3.51 *Insolvency (England and Wales) Rules 2016* (the "Rules") would apply. Nor were the "proceeds of sale of each of the freehold properties" otherwise defined, but one must take from Mr Jackson's evidence that these were in some way to incorporate the Investors' interests, whatever the status of their Leases.

9. On 2 July Deputy ICCJ Barnett directed that by 4pm the next day "all creditors" of the companies were to be notified that representatives "for categories of creditors" were sought; any "creditor" wishing to act was to provide details by 4pm on 10 July.

10. The second statement of Cathryn Williams, solicitor to the Applicants, addressed communications consequent on the 2 July order. It makes no

mention of any communication with any creditor; instead, notification was to certain Investors. I note as well that she has equated creditors with Investors. In a fifth statement, filed following circulation of this judgment in draft, she has said that the Application and supporting evidence were uploaded onto the relevant creditor portal for each PropCo on 27 June, and that the 2 July order was also uploaded "when that Order was made"; no creditor responded. Further as the only "active creditors" have been the Investors "there has been no distinction in practice". She tells the court that twelve of the PropCos have creditors' committees, and these are filled entirely with Investors.

11. On 15 July Deputy ICCJ Baister ordered the Officeholders to provide a draft of the order they sought at the final hearing; and on the attendance of those who are now the First to Fourth Respondents gave directions for evidence leading to an expedited hearing before himself if possible which would determine any CPR19.6 representation order.

12. The Officeholders' draft final order (the "Draft Order") was an extension from the original application notice. I must set it out as it is the order in issue before me. Two declarations are now sought.

"1. The Applicants are entitled to pay, from the proceeds of sale of each of the respective freehold properties owned by the companies listed in Schedule 1, their fees, costs and expenses of:

1.1 holding and protecting that respective property, and remedial works where required by local authorities, to include insurance, security and energy costs where applicable;

1.2 investigating the claims and interests of investors in the respective company and property;

1.3 liaising with the investors to achieve consensual realisation of the value in the respective properties;

1.4 the costs of sale of the respective property, including liaison with legal chargeholders regarding redemption and release of legal charges to allow sales to proceed;

1.5 to the extent not otherwise covered, the administration of the company owning the respective property.

2. The Applicants are entitled to pay, from the proceeds of sale of each of the freehold properties owned by the companies listed in Schedule 1, an apportionment of the common costs of the administrations of the Carlauren Group companies, to be apportioned pro rata to the amounts invested into each company. For these purposes, 'common costs' are fees and expenses incurred by the Applicants as office-holders of Carlauren Group companies, for the benefit of all creditors of the Carlauren Group companies, such as the costs of actions to recover assets and/ or compensation from Mr Sean Murray".

13. There is a proposed qualification to these declarations, being that "Nothing in this Order shall affect the parties' rights under Chapter 4 of Part 18 to the Insolvency Rules 2016, including to challenge the remuneration or expenses of the Applicants under rule 18.34 of the Insolvency Rules 2016".

14. On 31 July Deputy ICCJ Baister gave the directions which have led to this hearing.

15. The First, Second and Fifth Respondents were joined to "represent those investors listed in Schedule 2… who have registered leases (whether or not over an identifiable care studio) or who have paid money and been granted an unregistered lease of an identifiable care studio, or their successors in title". They were to "take the lead on arguing and submitting evidence on… whether the Applicants are entitled to be paid their fees, costs and expenses as listed in paragraph 1 of the draft Order and, if so, which…".

16. The Third Respondent was joined to represent "those investors listed in Schedule 2… who have registered leases (whether or not over an identifiable care studio) or their successors in title" and to take the lead on "From where the Applicants are or may be entitled to be paid their fees, costs and expenses as listed in paragraphs 1 and 2" of the draft order.

17. The Fourth Respondent was joined to represent the same investors as those of the Third Respondent but taking the lead on "the argument that the Court should not make an order in the terms of paragraph 2 of the draft Order, and whether different terms are appropriate or no such order should be made at all".

18. The 31 July order also records that "the Applicants state that this Application seeks no order that any registered or unregistered lease is 'expunged', 'expropriated' or otherwise terminated". As already observed, that is right, but it was plainly intended to intrude upon the rights of the Investors who were joined to it: it would not otherwise be founded on *Berkeley Applegate*.

19. In her subsequent evidence, the Third Respondent who, like many Investors, is foreign and resident abroad, says that she represents 222 others. She has been

astute enough to become aware of other applications by officeholders in unitized investment schemes to seek forcible surrender of leasehold rights, or sale of leasehold interests without consent of the holders, and was concerned that that was the Officeholders' intention. "We as Leaseholders have 125 year leases" she states "and are not obliged to do anything in respect of freeholder requests other than what might be required in the obligations in the leases themselves". She, like the other Respondents in their evidence, underlines that she is entitled to rely on the rights acquired through grant of her Lease. In general terms those rights included that until the underlease end-date, the underleases being for 10 years, there was no obligation on the Investor to pay rent to the PropCo under the Lease, nor any obligation to pay sums for insurance or rates, taxes, utilities, or maintenance of the common parts.

20. The Third Respondent suggests a way forward. "What we seek is either a sale for an agreed percentage of the proceeds of sale coming back to each Leaseholder or a transfer or purchase of the reversion into an SPV or trust for the benefit of the Leaseholders so that we can manage the property into profit or benefit from the sale ourselves". Her group's preferred proposal for all the properties is "a transfer of the freehold reversion to the Leaseholders for no value or as little as possible. This will enable the Leaseholders to (i) sell, (ii) refurbish and sell or (iii) refurbish and trade the property into a profit. Since we are purportedly victims of a scam, it is hard to see why the Joint Administrators would oppose this positive outcome". The "scam" is the Ponzi nature of the Group's trading, and the Investors' alleged overpayment for their studios, the example given being CHF 11 Ltd's Shires Care Home, investment in which was £2.943m, but for which Sean Murray paid £751,999. I observe

that while the Third Respondent acknowledges that to the purchase price must be added the estimated £500,000 for completion of works, the overpayment point when put in these terms can be made good only once there is factored in not only the existing cost of works, but also the benefits to be received under each Lease.

21. Mr Jackson's statement in reply responds to these suggestions. As to the fixed percentage, "no indication is given of the percentage they would be seeking". As to the transfer for no or little value, this was consistent with the position of a number of Investors before the Application was issued, "and indeed explains why the application was needed. The investors' position had been that properties be gifted to them, with no contribution being made by them to the costs of holding and realising those properties". He proceeds to explain the obligation on the Officeholders to maximise value, and that a free transfer to the Investors would serve only their interests while being "entirely to the detriment of both secured and unsecured creditors and to the detriment of the Joint Office Holders being able to make a recovery of any of the costs and expenses incurred in dealing with very complex administrations": reasonable points.

22. Ms Portman, solicitor to the First, Second and Fifth Respondents, has in her fourth statement noted that "the legal basis upon which the Application is made remains unclear" both as to jurisdiction and "in what circumstances the relief sought in this application will benefit the Joint Office-holders" over and above their usual entitlement under the Act and Rules.

23. Two elements in Mr Jackson's response to that can be picked up. His overall theme is that the Investors could not sell their studios on an individual basis as there was no market and many required completion; in order to realise value they were therefore reliant on the Officeholders selling the freehold "either subject to the leases or free from the leases"; and value would be maximised if sold free from the Leases. Those are factual rather than legal remarks, which do not describe any benefit to the Application unless it is in some way intended to deal non-consensually with the Investors' interests.

24. The other point made by Mr Jackson was that while negotiations were ongoing with Investors, "In the meantime, there are costs of holding each of the properties which include insurance, security, boarding up and essential repairs, as well as utility costs. It appears that the investors oppose any of those costs being borne out of anything other than the value of the freehold reversion" (as to which Mr Jackson was right). "That would mean that all costs relating to the protection of the properties in which the investors hold their leases are not borne by the investors, for whose benefit the costs or securing etc. the properties have been incurred, but entirely by unsecured creditors. That does not seem to me to be right. The Joint Office Holders are taking steps to protect and realise the value in the assets in which the investors hold their interests, for the benefit of those investors. It should follow that the value attributable to the leases in any sale of the freehold should bear (1) a reasonable proportion of the costs directly relating to the relevant property and also (2) a proportion of the common costs of seeking to preserve and realise assets and conduct investigations into the affairs of the Carlauren Group as a

whole. Those common costs are for the benefit of all investors, and other creditors".

25. What can be taken from that is that a purpose of the Application is in some way to right the wrong of the Investors not being liable to meet the ongoing costs which are apparently being incurred for their benefit in respect of the properties and more generally, through a deduction from the "value attributable to the leases" on any sale of the freehold.

26. Counsel for the Respondents, Mr Davies, Mr Carpenter-Leitch and Mr Edwards each in their skeletons questioned the basis and utility of the Application. Mr Robinson for the Applicants managed in his skeleton to confine mention of *Berkeley Applegate* to sub-paragraphs 40.1 and 40.2 and note 55. He did so in the context of the passage I have just quoted from Mr Jackson's second statement. Mr Robinson identified the benefits to both freehold and leasehold interests in protecting the assets and suggested that therefore the Investors should be charged with them. Secondly, of the argument that "the order sought imposes costs on investors beyond the terms of the lease agreements they signed" he says "That is true, albeit that the costs are not imposed on investors so much as drawn from sale proceeds of the relevant company's assets that the investors argue are attributable to their leases. The answer to this point is that the lease agreements make no provision at all for a situation such as the properties are now in, and the same equitable reason as underlies the *Berkeley Applegate* jurisdiction should lead to all of the sale proceeds of the freeholds being available for this category of costs". If explanation as to the basis is still lacking, again the Officeholders'

view is that this order will in some way permit the attribution of certain costs which they would not otherwise bear to the leasehold interests.

27. At the hearing the Officeholders' position altered.

28. The Respondents' bemusement at the proposed first declaration within the Draft Order is entirely comprehensible. It seeks to attribute categories of costs to the "respective freehold properties" without further definition. To the extent that those properties are something other than the freehold interest held by each PropCo, the Draft Order makes no provision for the establishment of the different interest; hence the attribution of costs might never arise. To the extent that those properties are the freehold interest held by each PropCo then the declaration is as to no more than the usual course: paragraph 99(3) of Schedule B1 to the Act as elucidated in *Re MK Airlines Limited* [2012] EWHC 1018 (Ch), [2012] 3 All ER 781 as to the source, rule 18.16(1) and rule 3.51 of the Rules for, respectively, entitlement and priority (rules 18.16(1) and 7.108 for the liquidation).

29. At the outset of his submissions Mr Robinson clarified, to my questions, that the "proceeds of sale" were the gross proceeds, being the sale price received by the PropCo's solicitors; and that the "freehold properties" were the freehold estates in whatever state they were sold, whether subject to Leases or not. In other words, the declaration was not intended to adjust Investors' rights, and was as to the usual course.

30. In support of the first declaration being made nevertheless, Mr Robinson suggested it would be useful as in negotiations the Investors had not agreed the attribution of costs. That may be because the Officeholders' stance had

until now been that they should be taken without consent from their leasehold interests. In any event, as Mr Davies recognised in what remained of his submissions, each category of fees, costs or expenses in the proposed first declaration is capable of being properly charged to the relevant company; the Investors also have professional advisers.

31. The Court is not apt to grant declarations without a purpose, and I am not going to do so here.

32. I should add that we had some discussion about the degree of precariousness of the holders of the 94 unregistered Leases in the event that there is a sale of the freehold from which they derive title, given the terms of section 29 of the *Land Registration Act 2002*. There was, though, general agreement that they held a present equitable right and that their exact status was not in issue in, nor relevant to the disposition of, the Application.

33. Neither in issue is the Third Respondent's proposal for a free or low-value transfer of the freehold interest; hence I reject Mr Robinson's characterisation of it as a "grey area". At the hearing the limit of Mr Robinson's submissions on *Berkeley Applegate* was that were the Third Respondent to claim such a right, there must fall to be set against the transfer of value the costs incurred in preserving and maintaining the freehold in the meantime. Exactly how that right would be characterised would depend on how the Third Respondent ever made claim to such right, and Mr Carpenter-Leitch, while maintaining it might be relied on in future negotiations, did not choose to sketch out its legal (or equitable) basis.

34. The second declaration, as to the apportionment of "common costs", is also in terms fraught with issues.

35. On the small-scale issues, "proceeds of sale of each of the freehold properties" is explained in the same way as for the first. Also, while the declaration refers to an entitlement to "pay" these common costs, it seems better expressed as an entitlement to charge them to the estates, leaving the appropriate processes of analysis and approval by creditors and the Officeholders themselves to be undertaken.

36. The large-scale issues are rougher.

37. Mr Robinson explains that what the Officeholders are concerned about is the allocation of costs, comprising all remuneration and expenses, which are incurred within the course of their duties and for the benefit of the companies or some of them, but which are incapable of being certainly attributed, in principle or amount, to any of those companies. Some of the expenses are presently being met from the Officeholders' own accounts. On current analysis, it is only the PropCos which have immediately realisable assets of any value.

38. Thus this is not a declaration which seeks to address allocation only, but payment (or ability to pay). The Officeholders are of course entitled to remuneration for their proper services, and to an indemnity for proper expenses incurred. That is not to say that they will be paid or indemnified, though, because the assets of the companies concerned may be insufficient. Further, to the extent that the Officeholders are paid or indemnified, the return to unsecured creditors is diminished.

39. These common costs seem to fall into two categories. The first is that of mandatory functions: reporting to the Secretary of State for disqualification purposes, for example, where each report is (I imagine) going to cover matters outside the particular company and overlap with the other reports: there is going to be amalgamated time which will need to be allocated. Secondly, there are the actions which the Officeholders have considered appropriate to undertake, such as the litigation against Mr Murray which is the example in the draft declaration.

40. Those two categories set up different considerations. The first applies to all the relevant companies and is a necessary function the charging of which will be based, where approved, on time. The second is a voluntary action which is for the benefit of some companies only. As to the proprietary claims, it should be clear which of the claimant company or companies are entitled, and there seems no reason why any other company should bear the costs referable to those. As to the claims for damages or compensation, it might be thought that only those companies which might benefit should pay, and then in the proportions in which they might benefit.

41. Mr Robinson confirmed that the last point was not something he could take further.

42. Unless benefit, especially within the second category, is capable of being analysed, this declaration which seeks to load costs onto the PropCos cannot presently be justified. Under Part Six of the *Insolvency Proceedings Practice Direction*, where the Court is asked to fix the amount or basis of remuneration, its object is that it should be "fair, reasonable and commensurate with the

nature and extent of the work properly undertaken or to be undertaken… in any given case": paragraph 21.1. By paragraph 21.2(4), the fourth guiding principle is that the "remuneration of an office-holder should reflect the value of the service… not simply reimburse the office-holder in respect of time expended and cost incurred". Those principles seem to me applicable here by analogy.

43. Neither is it right in principle to seek the loading of costs onto the PropCos just because they are the ones in the Group which happen to have the available assets. To determine whether that is the appropriate course would require a detailed overall view of the Group's assets and liabilities, which we do not have. I mean no criticism by that, because these companies were involved in a web of business arrangements which may be difficult, and ultimately impossible, to untangle. But any allocation of costs by the Court is going to have to await a firmer view as to whether attribution to particular companies is going to be feasible or fair, or whether some form of pooling of assets and liabilities better meets those ends.

44. It is also a little remarkable that this Court is being asked to make a declaration which necessarily affects unsecured creditors without any of them being present. The Respondents may well, as Mr Robinson suggested, be the largest overall creditors, but that is as against Accordiant for its failure to pay their 10% rental. As against the PropCos all agree that the Respondents are contingent creditors, the contingency being the Respondents' rights under the Leases to exercise a guaranteed buy-back option between years 5 and 10, at 110% of the purchase price for year 5 rising to 125% in year 10. No

Respondent is currently likely to exercise that option so the contingency is unlikely to arise. Moreover, their appearance here is pursuant to the representation order of 31 July, and they represent not creditors but the specified Investors. The Investors are unaffected by the declaration as it is now expressed.

45. The proposed proviso in the Draft Order, that nothing in it "should affect the parties' rights under Chapter 4 or Part 18 to the [Rules], including to challenge the remuneration or expenses of the Applicants under rule 18.34", does not obviate this need. It cannot be fair to make a declaration adverse to the unsecured creditors without their actually being given an opportunity to appear. That is especially so where the composite proposals circulated in January for many of the Schedule 1 companies (they are another example of a common cost) stated at paragraph 5.1.1, dealing with the fees estimate, that "…as this is a complex Administration involving numerous Group companies, it may be necessary to review and reallocate some of this time across the Group companies… The Joint Administrators propose to seek approval from creditors for each of the companies for both the basis of their fees and the total amount". In the event, the creditors of CHF16 Ltd rejected the proposals, and through a roughly even mix of nobody voting and negative votes, the Officeholders' fee proposals for about half of the applicant companies were rejected. That remains the position, there having been no subsequent application to Court.

46. I appreciate the difficult position of the Officeholders in respect of properly-charged common costs which do not fall to be attributed to any particular

company, and have sympathy with Mr Robinson's suggestion that even a generalised declaration as to entitlement might ease matters with certain creditors, as they could understand from it what rights the Officeholders had. But such a declaration would be so generalised as to be of little practical use, and to the extent it had any effect it would override creditors, including those who positively or negatively rejected the proposals, when I had neither heard from them nor any other creditor.

47. I therefore decline to grant relief on the Application.