



[2022] EWHC 1672 (Ch)

CR 2019 001949

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 07/07/2022

Before :

ICC JUDGE BARBER

Between :

(1) MR FINBARR O'CONNELL
(2) MR ADAM HENRY STEPHENS
(3) MR COLIN HARDMAN
(4) MR LANE BEDNASH
(AS JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED)

Applicants

- and -

LPE SUPPORT LIMITED
(IN COMPULSORY LIQUIDATION)

Respondent

Andrew Shaw (instructed by **Mishcon de Reya LLP**) for the **Applicants**

Hearing date: 20 June 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be sent to The National Archives for publication. The date and time for hand-down is deemed to be 10 a.m on 7 July 2022

.....

ICC Judge Barber

1. At a hearing on 20 June 2022, I granted a declaration that an assignment dated 28 April 2017 by London Oil & Gas Limited of its rights under an £8 million loan facility to LPE Support Limited for consideration of £1 was void for want of authority, together with attendant relief, with written reasons to follow. This judgment sets out my reasons for granting the relief sought.

The Application

2. This is the application of the administrators of London Oil and Gas Limited ('LOG') who seek an order setting aside an assignment by which LOG purported to assign all of its rights against one of its borrowers ('Atlantic Petroleum') to the Respondent ('LPE Support') for consideration of £1 ('the Assignment').

Background

3. LOG is the single largest debtor of London Capital & Finance Plc ('LCF'). LCF issued 'mini-bonds' to investors until it was ordered to cease trading by the FCA in December 2018. Shortly thereafter, on 30 January 2019, LCF entered administration, owing its investors around £237 million. LCF was the sole source of income for LOG, which consequently itself entered administration on 18 March 2019. LOG owes LCF around £122 million.
4. LCF would generate returns by on-lending sums raised from its investors to other businesses. All of the businesses to which LCF lent money, including LOG, were connected to LCF. Substantial sums were misappropriated from LCF both directly and via other entities, including LOG. These misappropriations are the subject of separate proceedings in which the LOG Administrators and LOG are among the Claimants. Claims for, inter alia, fraudulent trading and breach of duty are being pursued against various persons including (i) two of the directors of LOG, Simon Hume-Kendall and Elten Barker; and (ii) the ultimate beneficial owners of LOG, Michael Andrew Thomson, Spencer Golding, Simon Hume-Kendall and Elten Barker. In these proceedings, the Claimants contend that LCF was operated as a Ponzi scheme.
5. LPE Support is ultimately owned by the same persons who are the ultimate beneficial owners of LOG: Michael Andrew Thomson, Spencer Golding, Simon Hume-Kendall and Elten Barker. Mr Hume-Kendall and Mr Barker were also at various times directors of LPE Support. LPE Support borrowed over £18 million from LCF (of which Mr Thomson was a director).

The Assignment

6. By the Assignment, which is dated 28 April 2017 and was executed by Mr Barker on behalf of LOG and Mr Hume-Kendall on behalf of LPE Support, LOG purported to assign all of its rights, title, interest and benefits in (i) sums owed to it by Atlantic Petroleum, (ii) a facility it had granted to Atlantic Petroleum on 25 May 2016 ('the Facility'); and (iii) debentures granted by Atlantic Petroleum to LOG together with any other security granted by Atlantic Petroleum or any other obligor in relation to the Facility, to LPE Support for the nominal sum of £1. The Facility was for a sum of up to £8 million. At the time of the Assignment, approximately £1 million of this sum had

been drawn and, following the Assignment, LOG lent a further £2.8 million to Atlantic Petroleum. As at the date at which LOG entered administration, none of these sums had been repaid. The LOG Administrators have not identified any proper purpose for the Assignment.

Summary of the Applicants' case

7. The LOG Administrators maintain that (i) the Assignment was executed by Mr Barker without the authorisation of LOG's board; that (ii) Mr Hume-Kendall knew that LOG's board had not authorised the Assignment; and that (iii) Mr Hume-Kendall's knowledge is to be attributed to LPE Support. They contend that the Assignment is void for want of authority. As a fallback, they maintain that the Assignment is a transaction at an undervalue for the purposes of s238 of the Insolvency Act 1986.

Legal Principles

8. The ability of a director of a company to bind the company is determined by the ordinary principles of agency law: *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, per Lord Nicholls at [4].
9. Under the ordinary principles of agency law, a director does not have authority to bind the company in relation to an agreement, the entry into which is a breach of that director's duties to the company. Where the other party to the agreement is on notice that the director is acting in breach of duty, it cannot rely on the director's apparent authority: *Criterion Properties* (loc cit) per Lord Scott at [31]:

“If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority”

10. An agreement entered into by a director in breach of duty, where the other party has notice of the breach, will be void: *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369, per Newey J at [170]-[171]:

“[170] As for whether the transaction is binding, ordinary agency principles indicate that a company can disavow a contract which a director has caused it to enter into if: (a) the director was acting in his own interests rather than those of the company, its members or (where appropriate) its creditors as a class, and (b) the other party to the contract had notice of the director's breach of duty. Thus, ‘Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal’ (*Bowstead & Reynolds*, para 8-049). The transaction may also

be open to challenge on equitable principles: 'A contract made or acted on by an agent which is, to the knowledge of the other party involved, in violation of the agent's equitable duties to his principal entitles the principal to equitable relief against the third party' (Bowstead & Reynolds, para 8-217).

[171] The better view appears to be that, where a director has caused his company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a class, and the other contracting party had notice of that fact, the contract is void rather than voidable: see eg Bowstead & Reynolds, paras 8-067 and 8-220, Richard Nolan, Controlling Fiduciary Power [2009] CLJ 293 esp at 317-319, Heintz v Jyske Bank (Gibraltar) Ltd [1999] 1 Lloyds Rep (Banking) 511, and Hopkins v T L Dallas Group Ltd [2005] 1 BCLC 543. On this basis, it is hard to see how it could matter whether the requirements of s.239 of the 1986 Act are satisfied."

11. In considering whether the other party to the agreement has notice that the director is acting in breach of duty, the court may conclude that circumstances are such that a person acting in good faith would be bound to be put on enquiry as to whether the director was acting with the authority of the company and if that party fails to make such enquiry, it cannot rely on the ostensible authority of the director: Wrexham Association Football Club Ltd v Crucialmove Ltd [2007] BCC 130, per Sir Peter Gibson at [44] to [45].
12. It is open to a principal to ratify otherwise void acts. In order for ratification to occur, the principal must have full knowledge of all material circumstances in which the act was done. Ratification may be express or implied and will be implied if the principal adopts the transaction (or part of the transaction) entered into. Ratification can be effected on behalf of the principal by a duly authorised agent: Suncorp Insurance and Finance v Milano Assicurazioni SpA [1993] 2 Lloyds Rep 225, 234-235.
13. In the case of a company, it is open to the board to ratify a transaction if it is acting within the powers set out in the company's constitution. Acts outside the powers of the board can only be ratified by the company's members.

Evidence

14. For the purposes of this hearing, I have read the first and second witness statements of Adam Stephens dated 10 December 2021 and 14 June 2022, filed on behalf of the Applicants. By the time of the hearing before me, the application was unopposed.

Articles of Association

15. LOG was incorporated under the Companies Act 2006 and adopted the model articles at Schedule 1 to The Companies (Model Articles) Regulations 2008 as its articles of association (the 'Model Articles').

16. Article 7 of the Model Articles stipulates that any decision of directors must be taken at a meeting or in accordance with Article 8, which provides that a decision may be taken by written resolution where all eligible directors have indicated to each other that they share a common view on the matter.

Discussion and Conclusions

17. On the evidence before me, I am satisfied that no such decision to enter the Assignment was taken by the directors of LOG. At all material times after 28 April 2017, LOG's loan to Atlantic Petroleum continued to be treated by LOG as an asset in its books and records. The board of LOG also approved the advance of further sums to Atlantic Petroleum after 28 April 2017. I consider it legitimate to conclude that the board would not have done so had they known of (still less decided that LOG should enter) the Assignment.
18. On the evidence before me, I am satisfied that Mr Barker had no actual authority to execute the Assignment on behalf of LOG, because no decision to enter into the Assignment had been taken by LOG's directors. I am further satisfied that the Assignment was of no commercial benefit to LOG and was contrary to its interests. I am satisfied that at all material times Mr Barker knew that the Assignment was of no commercial benefit to LOG and was contrary to its interests. In executing the same on behalf of LOG, Mr Barker acted in breach of his fiduciary duties to LOG and in furtherance of his own interests as one of the ultimate beneficial owners of LPE Support. I so find.
19. On the evidence before me, I am satisfied that, as a director of both LOG and LPE Support at all material times, Mr Hume-Kendall knew at the time of executing the Assignment that Mr Barker had no authority to enter into the Assignment on behalf of LOG. I find that Mr Hume-Kendall knew that LOG's board had not authorised the Assignment, that the Assignment was of no commercial benefit to LOG and that in executing the same Mr Barker was acting in breach of his fiduciary duties to LOG.
20. I am fortified in these conclusions by the evidence before me of evasive conduct on the part of both Mr Barker and Mr Hume-Kendall following execution of the Assignment. From the evidence it is clear (and I so find) that when later questioned at a board meeting of LOG held on 12 February 2019, Mr Hume-Kendall informed the board, incorrectly, that he had not signed the Assignment. At the same meeting, he asked Mr Elliott about the valuation of Atlantic Petroleum, in context giving the impression that he considered LOG's loan to Atlantic Petroleum still to be an asset of LOG. Mr Barker has also subsequently attempted to disavow the Assignment, maintaining in a s.236 interview with the LOG Administrators, for example, that he believed the loan to Atlantic Petroleum to remain an asset of LOG.
21. Both Mr Barker and Mr Hume-Kendall were directors of LPE Support. On the evidence before me I am satisfied that their knowledge falls to be attributed to LPE Support: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. LPE Support therefore knew that Mr Barker had no actual authority to execute the Assignment on behalf of LOG. In light of that knowledge, no question of apparent authority arises: *Criterion Properties* per Lord Scott at [31].

22. For the sake of completeness, I would add that there is no evidence before me to suggest that LOG's board at any time attempted to ratify the Assignment. In the absence of any such evidence and in all the circumstances of this case, I consider it legitimate to conclude that it did not. It is therefore unnecessary for me to go on to consider whether any such ratification would be within the board's powers.

Conclusion

23. For all these reasons, I find that the Assignment is void for want of authority.
24. In the light of my conclusions, it is unnecessary for me to address the alternative claim brought under s.238 of the Insolvency Act 1986.

ICC Judge Barber