Neutral Citation Number: [2014] EWHC 3540 (Ch)

Case No: 2128 of 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 28/10/2014

Before :

MR D HALPERN QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

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IN THE MATTER OF BUSINESS ENVIRONMENT FLEET STREET LIMITED (In Administration)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
Between :

(1) NICHOLAS GUY EDWARDS **(2) PETER ALLEN** **(As Administrators of Business Environment Fleet Street Limited (In Administration)**	**Applicants**
- and -	
(1) BUSINESS ENVIRONMENT LIMITED **(2) BUSINESS ENVIRONMENT CENTRAL SERVICES LIMITED** **(3) BANK OF LONDON & MIDDLE EAST PLC**	**Respondents**

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Ms Felicity Toube QC (instructed by **Eversheds LLP**) for the **Applicants**
Mr Stephen Atherton QC (instructed by **Mishcon de Reya LLP**) for the **First and Second Respondents** (the Third Respondent was not represented)

Hearing date: **27th October 2014**

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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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MR D HALPERN QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

Mr D Halpern QC :

1. Business Environment Fleet Street Ltd ("the Company") is the owner of long leases of Bouverie House, 154-160 Fleet Street, and 17 Johnson's Court, London EC4 ("the Properties"). It is common ground that the Company is in the business of granting short-term subleases of units within the Properties as serviced offices. (I have not been shown any such subleases but I shall refer to them generically as "the Subleases".) The Company mortgaged the Properties as security for debts which are now said to exceed £40m. The lenders appointed the Applicants, who are two members of Deloitte LLP, as administrators of the Company ("the Administrators"). The Administrators have agreed to sell the Properties together with the Assets and subject to, and with the benefit of, the Subleases, for £29.6m, subject to the court deciding that they are entitled to sell the Assets. According to the second witness statement of Mr Edwards (one of the Administrators) dated 24th September 2014, the deadline for completion is 31st October 2014. I heard the application yesterday and I am giving judgment now in order to enable this deadline to be met, in case the matter goes any further.

2. The Second Respondent ("BECSL"), which is in the same group of companies as the Company, claims to own the equipment at the Properties which forms part of the proposed sale ("the Assets"). I am told that the Third Respondent has transferred its interest to the other Respondents. Mr Stephen Atherton QC appears for the First and Second Respondents. For the purpose of this application no distinction arises between these two Respondents and I shall refer to them both as "BECSL". The Administrators do not accept that the Assets are owned by BECSL, but it is common ground that this is a moot point which cannot be determined at today's hearing. I therefore assume against the Administrators (i) that the assets are not owned by them and (ii) that they are owned by BECSL.

3. On 5th September 2014 the Company issued the present Application seeking leave under paragraph 72 of Schedule B1 to the Insolvency Act 1986 ("the Act") to dispose of the Assets. The Application should have been made by the Administrators, who now seek to be substituted. They also seek permission to add an alternative basis for their application under paragraph 68. Mr Atherton sensibly accepts that I should permit the Application to be corrected in these respects pursuant to Rule 7.55 of the Insolvency Rules 1986 in order to enable the real issues between the parties to be determined, and I so order.

4. Accordingly the issues which I must now decide are as follows:

   4.1 Does the court have jurisdiction under paragraph 72 to grant the Application? As a subsidiary question, did the Assets come into the Company's possession pursuant to a chattel leasing agreement?

   4.2 Alternatively, does the court have jurisdiction under paragraph 68 to grant the Application?

   4.3 If the answer to (a) or (b) is yes, should the court grant the Application?

5. The Administrators have urged on me that the proposed order would be of enormous benefit in the administration of the Company and that any prejudice to BECSL can be met by directing the retention of sufficient moneys to cover their potential claim. Be that as it

may, the court cannot proceed to any evaluation of the balance of convenience until satisfied that it has jurisdiction.

Does the court have jurisdiction under paragraph 72 of Schedule B1?

6. Paragraph 72(1) empowers the court to authorise the Administrators to dispose of "goods which are in the possession of the company under a hire-purchase agreement" as if all the rights of the owner were vested in the company. Paragraph 111 defines "hire-purchase agreement" as including (inter alia) a chattel leasing agreement. Section 251 of the Act defines "chattel leasing agreement" as meaning an agreement for the bailment of goods which is capable of subsisting for more than 3 months.

7. In his skeleton argument Mr Atherton indicated that he might have a further argument on the meaning of "possession" in paragraph 72 but this did not form part of his oral submissions. Accordingly, on the facts of this case, the question of jurisdiction under paragraph 72 turns on whether the Administrators have satisfied me on the balance of probabilities that the Assets were let under an agreement for the bailment of the Assets.

8. No authority was cited to me on the meaning of paragraph 72 itself, but I was taken to *Re David Meek Plant Ltd* [1994] 1 BCLC 680. This is a decision of HH Judge Weeks QC on subsection 11(3)(c) of the Act, which formed part of the original administration regime under the Act. That subsection provides that, during the period when an administration is in force, no steps may be taken to repossess goods "in the company's possession under a hire-purchase agreement", except with the consent of the administrator or leave of the court. Judge Weeks QC held that the section applies only where the goods are in the company's possession during the period when the administration order is in force. However, he considered that there would be a major lacuna in the Act if a hire-purchase owner could avoid the operation of subsection 11(3)(c) by terminating the agreement shortly before presentation of an administration petition. He therefore sought, if possible, to provide a purposive construction and he concluded that it was sufficient that the goods came into the Company's possession by virtue of a hire-purchase agreement, even if that agreement was terminated before, or upon, presentation of the petition for administration. Mr Atherton suggested in his skeleton argument that *Meek* had been wrongly decided, but he did not develop this in his oral submissions. I ought to follow *Meek* unless satisfied that it was wrongly decided, and I am not so satisfied. Although the wording of paragraph 72 as a whole is different from section 11(3)(c), the phrase which I have quoted also appears in paragraph 72 and it was not suggested that the phrase should bear a different meaning in paragraph 72.

9. Ms Felicity Toube QC, for the Administrators, argues that the Assets are in the Company's possession under a chattel leasing agreement, this being within the extended definition of hire-purchase agreement. In order to answer this question I must turn to the relevant agreement, which is the Central Services Agreement ("the Agreement") dated 17th December 2010 and made between the Company and BECSL. The relevant provisions are as follows:

    9.1 The recitals say that the Company as owner of the Property has requested BECSL as owner of the Assets "to provide services (including the operation of a serviced office centre at the Property, utilising the Service Assets) on behalf of [the Company]".

9.2 Clause 1.1 contains definitions, including a definition of the Service Assets as meaning "all assets … in Schedule 3 and which may be added to from time to time upon notification to [the Company]". "The Service Provider's Employees" is defined as "those persons employed by [BECSL] to assist in the provision of the Services in accordance with this Agreement."

9.3 Clause 2.1 provides that "the Company appoints and engages BECSL … to provide the Services to [the Company] on the terms set out in this Agreement". The services are defined in Schedule 1.

9.4 Clause 2.2 provides:

> "Save as (i) specifically provided for in this Agreement or (ii) otherwise expressly authorised by [the Company] or (iii) in the ordinary course of the business of running and operating a service office, [BECSL] shall not, without the prior express approval of [the Company], enter into any material transactions or commitments on behalf of [the Company] … or hold itself out as being an agent of [the Company]."

The Roman numerals have been added by me.

9.5 Clause 4.3 provides that BECSL may appoint specialist advisers and third party contractors/consultants "in the name of and on behalf of [the Company] and at the expense of [the Company]".

9.6 Clause 4.4 provides that BECSL shall dedicate sufficient staff to the provision of the Services and "shall be responsible for all management and supervision and other responsibilities and actions in respect of its employees".

9.7 Clause 10.1 provides that the relationship "shall not constitute a partnership, joint venture or agency".

9.8 Schedule 1 sets out the services to be provided. Paragraph 1.2 requires BECSL to "procure at [the Company]'s expense the provision of centre staff". Paragraph 1.3 requires BECSL to "procure in [the Company]'s name and expense" various services, including CCTV and manned security, secretarial services and cleaning of offices and common parts.

9.9 Paragraph 4.2.7 of Schedule 1 requires the Company to keep the Assets in good repair and to replace them where they are beyond repair. It is common ground that the Company had no employees. Ms Toube argued that this obligation was to be performed by using BECSL employees as the Company's agents. Mr Atherton argued that the parties never intended the obligation to be performed or that the Agreement was varied, but Ms Toube riposted by noting that any variation was required to be in writing.

9.10 Schedule 3 contains a list of assets which BECSL claims are the assets that were the subject of this Agreement.

10. There was no dispute between the parties as to the principles to be adopted in construing the Agreement. I was referred to the well-known passages in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 at [21], [28] and [30], which should be treated as incorporated into this judgment. I was also taken to the judgment of Lewison J in *A1 Lofts v. HM Revenue & Customs* [2009] EWHC 2694 (Ch) at [40], which was approved by the Supreme Court in *Secret Hotels2 Ltd v. Revenue & Customs Commissioners* [2014] STC 937 at [31]. This adds a gloss by reference to the principle in *Street v. Mountford* [1985] AC 809 to the effect that the label which the parties choose to attach to their agreement cannot turn an agreement which is properly characterised as *X* into an agreement characterised as *Y*.

11. I was taken to a number of passages in *Palmer on Bailment*, in particular paragraphs 1-001 and 1-002 on the meaning of bailment. It requires the bailee to be in possession to the exclusion of the bailor for a limited period. It requires more than just possession; it appears that there is also a mental element on the part of the putative bailee. I was taken to a number of authorities but these all turned on their own facts and were of limited assistance to me. In the end I have to decide the question by construing the Agreement.

12. I start with the commercial context. I have not been taken to any of the Subleases, nor have I been taken to any authority, textbook or evidence as to any industry norm relating to sublettings of serviced offices. In the absence of any evidence, I take judicial notice of the fact that, in my experience, a subletting of serviced offices usually involves:

    12.1 A lease of an office within a larger building owned by, or let to, the landlord;

    12.2 The use of equipment, which or might not amount to a fixture, the likelihood being that the equipment will form part of the subletting if it is situated within the demised premises and that it will be the subject of a licence if it is outside the demised premises; and

    12.3 The provision of services, some of which will be provided for all the subtenants (e.g. a reception desk and cleaning services) and some of which might be bespoke services provided at an additional cost (e.g. secretarial).

13. If A contracts to provide goods or services to B and does not specify who is to provide those goods or services, A is prima facie entitled to fulfil that contract by making a separate contract with C that C will provide A with the personnel necessary to discharge A's obligation to B. Any personnel employed by C would not necessarily be acting as A's agents; they would simply be enabling A to fulfil its contractual obligation to B. Hence, the fact that the Subleases might well require the Company to provide to the subtenant both the Assets and certain services is not determinative of the question whether BECSL's agreement with the Company amounted to a contract of bailment.

14. Mr Atherton focused particularly of clause 10.1, which says that the relationship between the Company and BECSL is not one of agency, and clause 2.2, which expressly prevents BECSL from holding itself out as agent of the Company, save in the respects expressly stated. He says, and I accept, that the burden is on the Administrators to establish the contrary. He also focused on the contrast between clauses 4.3 and 4.4, pointing out that BECSL remains responsible for the management and supervision of its own staff, in contrast to the specialist advisers referred to in the previous clause. He concluded that

BECSL's staff, acting as such, remained responsible for looking after the Assets and that BECSL had not parted with possession of the Assets to the Company.

15. Ms Toube focused on the recital, which requires BECSL to provide services, utilising the Assets "on behalf of" the Company. Whilst she accepted the proposition I have set out in paragraph 13 above, she argued that the position was different where the owner of the assets provided both the assets and the personnel needed to operate them. Mr Atherton argued that "on behalf of" simply meant "for" the Company. In other words, the Agreement was intended to enable the Company to discharge contractual obligations to its subtenants without necessarily engaging BECSL's staff as the Company's agents. I note that the words "on behalf of" also appear in clause 4.3, where they do seem to contemplate an agency relationship, but this cannot be sufficient to govern the meaning of the recital where the result would be that the recital was inconsistent with the operative part of the Agreement. In order to succeed, Ms Toube needs to find a provision in the operative part of the Agreement which overrides clauses 2.2 and 10.1.

16. She focused on the exceptions at the start of clause 2.2. I will take these in turn:

    16.1 As regards (i), she needs to show that there is a provision in the Agreement which makes BECSL's employees into the Company's agents, such that the Company then has sufficient dominion over the Assets.

    16.2 No reliance was placed on (ii).

    16.3 She also relied on (iii) but in my judgment this does not assist her, for the reason given in paragraph 13 above.

17. The high point of Ms Toube's argument was paragraph 4.2.6, which requires the Company to keep the Asset in repair. Had this stood alone, I can see the argument that this contemplates that the Assets will be under the Company's control and that, since the Company does not have any employees, the employees of BECSL must be acting on behalf of the Company when performing that function. However, in my view it is a step too far to treat that as governing and overriding the rest of the Agreement. It would indeed a case of the tail wagging the dog.

18. Ideally I would have wanted more time to consider this issue, to hear evidence about the industry norm (which might well provide part of the factual matrix) and to read the Subleases (at least if and insofar as a standard form was in existence at the date of the Agreement). However I am required to make a decision at short notice and my decision is that I am not persuaded on the balance of probabilities that the Agreement gives possession of the Assets to the Company. On the assumption that the Assets belong to BECSL, in my judgment either BECSL has retained possession or it has transferred possession to the subtenants. This makes it unnecessary for me to consider whether the necessary mental element is present.

Does the court have jurisdiction under paragraphs 67 and 68 of Schedule B1?

19. Paragraph 67 of Schedule B1 provides for the administrator to take custody or control of "all the property to which he thinks the company is entitled". Paragraph 68 requires the

administrator to manage the company's "affairs, business and property" and to comply with any directions given by the court "in connection with any aspect of his management of the company's affairs, business or property". The Administrators' alternative ground for seeking relief is based on paragraphs 67 and 68. In essence, Ms Toube's submission is as follows:

19.1 Paragraph 67 requires them to take custody or control of all property to which they think the Company is entitled. There is no requirement that they should have reasonable grounds for so thinking, still less that the property should actually belong to the Company. Mr Atherton did not challenge this proposition, which I accept. It accords with the literal wording of paragraph 67 and also makes good sense. The administrator needs to take control of the assets in a hurry and should not be prevented from doing so by doubts as to ownership. However, it is important to emphasise that paragraph 67 does not itself permit the administrator to dispose of assets; it is merely concerned with safeguarding assets which the administrator thinks belong to the company. If his thinking proves to be wrong, he would have no basis for continuing to maintain custody or control. Ms Toube says that in practice many administrations (albeit not this one) proceed by way of a pre-pack, in which case there is no sense in drawing a distinction between the power to take control and the power to sell. I do not accept this. If in practice the two events occur together, then I can see no justification for permitting a sale merely because the administrator thinks that the assets belong to the company.

19.2 Subparagraph 68(1) requires them to manage the Company's property; management may include disposal. Mr Atherton did not dispute this proposition, which I accept.

19.3 "Property" in paragraph 68 should be read in the extended sense given in paragraph 67, so as to empower them to dispose of property to which they think the Company is entitled. No authority was cited in support of this submission, which I reject. In the first place, there is nothing in the literal wording of paragraph 68(2) which extends it to property that does not belong to the company, albeit that the administrator thinks that it does. Secondly, there is no warrant for reading the paragraph purposively in this way. It would confer an exorbitant jurisdiction on the administrator to convert property belonging to third parties, simply because this happened to be desirable on the balance of convenience.

19.4 Ms Toube accepted that paragraph 68(2) does not widen the jurisdiction to dispose of assets. In other words, the court may not direct this under subparagraph 68(2) unless the administrator would have had power to do so under subparagraph 68(1).

19.5 However, she sought to bolster her submission by referring to subsections 234(3) and (4) of the Act. The effect of these subsections is that, where an administrator wrongly, but reasonably, believes that he is entitled to dispose of assets, he is not liable for any loss caused to any third party by the disposal, save insofar as loss is caused by his own negligence. She argued that this was the flip-side to paragraph 68. In my judgment the purpose of section 234 is to relieve an administrator from a liability which he would otherwise have for conversion of a third party's assets where he has acted reasonably. It does not give the administrator licence to convert third-party chattels, still less does it give any such power where the administrator merely

thinks subjectively that they belong to the company, nor does it extend the court's limited powers (e.g. under paragraph 72) to override the rights of third parties.

20. Had it been necessary to reach a conclusion as to whether the Administrators genuinely thought that the Assets belonged to the Company, I would not have been satisfied on the balance of probabilities. The original application was made under paragraph 72 on the basis that the Assets were in the Company's possession under an agreement for bailment. This is inconsistent with the Administrators thinking that the Company was entitled to the Assets.

If the court had jurisdiction, would it have exercised it?

21. Given my conclusion that the court has no jurisdiction, this question is academic. However, I will deal with it shortly in case the matter goes any further. It is common ground that the court has to carry out a balancing exercise: see *Re A.R.V. Aviation Ltd* (1988) 4 BCC 708 at 712, Knox J.

22. The Administrators' case is that there is a considerable "marriage" value in disposing of the Properties together with the Assets. Their evidence shows that the purchaser has agreed to pay £29.65m for the Property together with the Assets but will pay only £22m for the Property by itself. Their expert evidence also states that there might be difficulty in reselling the Property before the forthcoming General Election and that the Property might decline in value after the Election. I agree that the evidence, as far as it goes, appears to show a considerable marriage value. However, I accept Mr Atherton's submission that there is no cogent evidence that a delay in sale would be detrimental, especially given that this part of London (now described by estate agents as Midtown) appears to be one of rapidly rising values.

23. BECSL claims that it needs the Assets for its own business and can use them profitably in other property. I accept Ms Toube's criticism that there is no proper evidence as to how BECLS proposes to extract the Assets from the Property, nor as to whether the Assets have a value to BECSL in excess of its market value.

24. The result is that I am not satisfied with the evidence on either side. Mr Atherton made a number of complaints that the Administrators were not acting independently and had not acted expeditiously. I have not been able to get to the bottom of these allegations in the time allotted for this hearing, but I do see the force of his point that the dispute could and should have been brought to court some months ago, when there would have been more time to consider these issues. That is a factor, although not a major factor, in my conclusion on exercise of the discretion.

25. In the circumstances, if I had concluded that I had jurisdiction, I would not have been satisfied that the balance of convenience lay in ordering an immediate sale. However, since I have concluded that I have no jurisdiction, this does not arise.

26. I will hear Counsel as to the form of order to be made.