IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2020] EWHC 1217 (Ch)

No. BL-2020-000714

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 6th May 2020

Before:

MR JUSTICE BIRSS

B E T W E E N :

TRAVELODGE HOTELS LIMITED — Applicant

- and -

(1) PRIME AESTHETICS LIMITED
(2) PRIME HOTELS LIMITED
(3) ORBITAL ESTATES LIMITED

Respondent

MR A. AL-ATTAR (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Applicant.

DR N. SOOD appeared as a director of the Respondents.

J U D G M E N T

(Via Skype)

MR JUSTICE BIRSS:

1 This is an application for an injunction brought by Travelodge Hotels Limited to restrain presentation of winding up petitions which might be presented by three companies, Prime Aesthetics Limited, Prime Hotels Limited, and a third company, Orbital Estates Limited, all of which are controlled by, or at least involve, an individual called Mr Naresh Sood. The reason I mention Mr Sood in particular is because he, as a director of the companies, has attended this hearing. The hearing has taken place on very short notice, and the order that is sought is only to restrain presentation of a petition over to a return day in two weeks' time.

2 The situation is that Travelodge is a company which has a hotel business in the United Kingdom, and the evidence shows, clearly in my judgment, although I bear in mind that so far Mr Sood has not had the opportunity to answer this evidence, that the business was a thriving one before the COVID-19 pandemic really started to bite, about a month or six weeks ago.

3 The evidence was that its financial performance in the last filed accounts (2018) showed total revenues of £680 million, EBITDA of £119 million, an operating profit of £59 million, and net assets of £388 million. In the period after the last accounts but prior to COVID-19, its performance was consistent with that. Revenue for 2019 was £728 million and EBITDA was £129 million. In the first two months of 2020 the total revenue was £100 million, which is more than it was for the same period in the previous year. That all indicates, as I say, that the business was in a relatively healthy state.

4 What has happened as a result of the lockdown caused by COVID-19 is that the revenue has dropped by approximately 95%. This is not surprising since the business is a hotel business. The only people now staying in the applicant's hotels, as I understand the evidence, are key workers and vulnerable groups, which are providing a negligible income for the business. However, of course, its overheads continue, even though Travelodge has maximised the relief available from the government, including furloughing over 8000 employees. The business leases the vast majority, if not all, of its properties, and one of its key overheads is rent to the relevant landlords. As a result of the catastrophic collapse in Travelodge's revenue Travelodge stopped paying the rent to its landlords for the current period.

5 The evidence shows that Travelodge has at least the possibility of strong "rebound performance" if the problems caused by the pandemic lift in the reasonably foreseeable future. Two scenarios are considered, an early summer opening and a late summer opening. Both of them involve an injection of new money from shareholders to the tune of about £60 million. However, the business is forecast to face a liquidity shortfall within a relatively short period of time and would not recover if some restructuring steps are not taken. Accordingly, a turnaround plan has been proposed, which it is hoped will be agreed to on a consensual basis, but if that cannot be done the proposal is to attempt to do it via a CVA. These are the non-confidential conclusions I draw from detailed evidence which I have maintained as confidential at least *pro tem*. The court sat in private briefly to deal that.

6 A major aspect of the turnaround plan involves proposals relating to the landlords. I will come back to that. The evidence also establishes to my satisfaction, and again bearing in mind it has so far not been possible for Mr Sood to produce evidence to challenge it, that in a winding up or an administration it is very likely that the landlords, as creditors, would receive very little recoveries and very close to zero dividends.

7 The proposal is to divide the landlords into three categories, in a similar way to what has been done in CVAs in the recent past. The scenarios that have been put forward in the turnaround proposal do not make happy reading for the landlords in any event, at least if they are in some classes. If the proposal is accepted then landlords in one category (A) will be payed 100% of the rent into the future and 100% of the arrears. The provisions for landlords in Category B, vary depending on whether there is a late summer or early summer re-opening of the business. On the worst scenario (late summer re-opening) the proposal is to pay 25% of the arrears in rent up to 30th June and 25% of the future rent until the first quarter of 2021 from when 75% of the rent is to be paid. The rest of the rent will be foregone, with the possibility of participation in the business in future if it is successful. Then Category C, the position is even tougher, 20% instead of 25%, and 50% instead of 75%, with the possibility of participation in future. On the other hand, as I have already said, at least on the evidence before me, if the business was wound up or in administration it is very likely that the landlords would have nothing at all in terms of arrears.

8 In April and early May Travelodge began to release details of its proposals to the landlords and started dealing with them, including providing more information to landlords who had entered into a non-disclosure agreement. The plan, if consent is to be given, is for that consent to be confirmed by 20th May, and if that does not work then to take an approach based on a CVA. Suitable nominees for a CVA have been identified and are willing to act.

9 Recently, and I mean over the last few days, the business has been in communication with Mr Sood's companies. Those companies, at least the ones with the name Prime, are the landlords of two Travelodges, one in Carmarthen and one in Oakhampton. The properties are under 25 year leases, which began in December 2019 and January 2020. On 4th May Dr Sood sent two letters to Addleshaw & Goddard, which acts for Travelodge. Each letter says as follows:

> "We have made several attempts to contact your clients but they have failed to do so. TAKE NOTICE that unless payment is received by us by 4.00 p.m. on Wednesday 6th May 2020 we shall have no alternative but to issue a winding up petition against your client at Companies Court without further notice. Please confirm that you are instructed to accept service of the same."

Then it says:

> "We trust that payment will be made to avoid insolvency proceedings and look forward to receiving the same."

10 Following communication from Addleshaws a further letter was sent by Mr Sood on 5th May which extended the deadline by which it was said a winding up petition would be issued to Thursday 7th May, and without further notice, and ending:

> "We trust that the payment will be made to avoid insolvency proceedings and look forward to receiving the same."

11 This application has been made on short notice and, as I said, it is only seeking to restrain presentation of the petition over for a short period, over 14 days, and that will allow Mr Sood, if he wishes, to file evidence and respond to the application. The principles that the court applies are clear enough. At this stage the task of the court, pending resolution of the

dispute, is to examine whether there is a strong *prima facie* case that would justify acting in this interim period and overall act to try and do justice, holding the ring between the parties.

12 In my judgment, the real issue in this case is whether there is a serious *prima facie* case, because it is clear that if there is such a case then the balance is firmly in favour of granting the injunction sought by the applicants.

13 The claim for the injunction is put on three grounds, although the third was not developed in detail and I do not need to deal with it. That third grounds was based on s.37 of the Supreme Court Act, but, as I said, I do not need to deal with it.

14 The grounds on which the claim is articulated before me are: first that the petition is bound to fail as a result of imminent legislation; and, second that the petition is adverse to the class interest, that is the class of creditors as a whole. In either case, whether it will fail because of the legislation or fail because it is adverse to the class interest, the petition is an abuse, is bound to fail and therefore should be prevented.

15 I will deal with the legislation point first. The circumstances relating to the legislation are that as the coronavirus crisis began the government announced that it would be making changes to insolvency law. I can pick it up relatively late in the series of press releases that came from the government, particularly one dated 23rd April 2020. That press release is entitled: "*New measures to protect UK High Street from aggressive rent collection and closure*". It contains the following passages. The first refers to what are described as aggressive debt recovery tactics by landlords putting tenants under undue pressure, and then it goes on as follows:

> "To stop these unfair practices the government will temporarily ban the use of statutory demands (made between 1st March 2020 and 30th June 2020) and winding up petitions presented from Monday 27th April through to 30th June, where a company cannot pay its bills due to the Coronavirus. This will help ensure these companies do not fall into deeper financial strain. The measures will be included in the Corporate Insolvency and Governments Bill which the Business Secretary, Alok Sharma, set out earlier this month."

16 The press releases includes a quotation from the Business Secretary which refers to commercial landlords, a reference to the scheme to prevent eviction of commercial tenants, and a quotation for the Chief Executive of UK Hospitality which welcomes the announcement and states that it will give hospitality businesses some very valuable breathing room.

17 Then also in the same press release under "Notes for Editors" it says:

> "Under these measures any winding up petition which claims that the company is unable to pay its debts must first be reviewed by the court to determine why. The court will not permit petitions to be presented or winding up orders made where the company's inability to pay is the result of COVID-19."

18 That was issued on 23rd April. Travelodge's solicitors e-mailed the government on 29th April asking what progress had been made. They received an e-mail on 29th April from a regulation executive, copied to the permanent secretary of the Department of Business Energy and Industrial Strategy, which says as follows:

> "Many thanks for your e-mail to the Right Honourable Alok Sharma. As you noted on 23rd April the Secretary of State announced measures that government will be taking to protect high street shops and other companies against aggressive rent collection by landlords. These measures will be included in the Corporate Insolvency and Governments Bill. Legislation is being prepared urgently and will be brought forward to provide these, as soon as parliamentary time allows."

19 That is what the government have said about the legislation.

20 The submission by the applicant before me is that it falls within the class which the government's explanations have said this legislation will be for the benefit of. That is for a number of reasons. The way the government put it in the press release is that high street shops and other companies under strain will be protected if the reason they cannot pay their bills is due to Coronavirus. It is fair to say that one could describe a hotel as different from a high street shop, but, in my judgment, reading the press release as a whole the applicant is highly likely to be the sort of hospitality business the legislation as described in the press release is intended to cover and is in the sort of situation envisaged by that press release. Both the landlord and the tenant in this case are commercial, the petition relates to arrears of rent and it is clear that the financial difficulties faced by the tenant (Travelodge) are the result of COVID-19.

21 That provides a contrast to the case which recently came before Snowden J, on 27th April 2020, *Short Gardens v London Borough of Camden* [2020] EWHC 1001 (Ch). An order restraining the presentation of a winding up petition was sought. Snowden J refused the order. One of the grounds advanced was based on the same impending legislation and the press releases put to me. However the various liabilities in issue in that case were costs orders and liability orders made in relation to business rates. The reasons why the applicants for an injunction were not meeting these liabilities were obviously nothing to do with coronavirus, although it is right to note that the impact of COVID-19 was itself advanced as a reason for restraining the presentation of the petition.

22 The judge made the point at paragraph 74 that the clear focus of the announcement was on the plight of tenants of retail and commercial properties facing rent demands from their landlords, but noted the applicants' submission that it could interpreted very widely to cover other entities and situations. This is rejected in paragraph 83 of the judgment is as follows:

> "83. Secondly, it seems overwhelmingly likely that the proposed legislation will be limited to companies in certain identified sectors of economic activity, and to relate to statutory demands and petitions based upon claims by landlords for arrears of rent. Although the press statement does contain phrases that might, if taken out of context, suggest a wider prohibition, when those phrases are read in the broader context of the announcement as a whole, I anticipate that the prohibitions are not intended to extend to entities such as SBLT and Shorts Gardens, neither of which is a tenant in the retail or hospitality industry, or to petitions which are not based upon arrears of rent, but are based upon outstanding court orders and longstanding arrears of NNDR owing under liability orders to local authorities."

23 I should also address what Snowden J said about the law. The judge said the following at paras.80 to 81:

> "80. At present, although the indication in the Government's press announcement is that the proposed restrictions are intended to apply from next Monday, 27th April

2020, no draft legislation has been published. The scope of the intended restriction and precisely how it will be implemented is unclear.

81. Mr Clarke therefore accepted, rightly, that I had to make my decision on the basis of the law as it stands; but he submitted that I could and should exercise my discretion as to whether it was just and equitable to grant an injunction on the basis of the new statements from Ms Harper and Mr Van Huysteen, viewed in the light of the Government's announcement."

24 In paragraph 81 above Snowden J described as correct the acceptance by counsel that the judge had to make his decision on the basis of the law as it stands. Snowden J did not have the benefit of the citation authority that I have had in this case. The submission from counsel, Mr Al-Attar, on behalf of his client, the applicant, is that the court does not necessarily always have to make its decision only on the basis of the law as it stands but can, in a proper case, take into account what the law may become. That is established by the decision of the Court of Appeal in the majority in *Hill v Parsons* [1972] 1 Ch 305, the majority being Lord Denning MR and Sachs LJ, although it is important to note that Stamp LJ dissented on the point. The case concerned an application for an interim injunction to prevent the dismissal at short notice of an employee who had declined to join a union recognised by his employer. At first instance the judge held there was no jurisdiction to make the order. The Court of Appeal allowed the appeal and held that the court should grant interim relief in the case, on the footing that the law was about to change and the change would take away the basis on which the employee could be dismissed. The court held that in such exceptional circumstances the court was entitled to take into account evidence of a likely change in the law in exercising is discretionary power to grant or refuse interim injunctions. In my judgment, that describes precisely the current circumstances.

25 I also refer to the judgment of Sedley J in *Sparks v Harland*, [1997] 1 WLR 143 in which the judge had to consider whether to stay or dismiss proceedings, recognising that there was a real possibility that the law was about to be retrospectively changed, but had not yet been changed, to remove a limitation defence which would otherwise, as the law stood at the time, be a complete answer to the case. The situation was that the European Commission on Human Rights had advised that the limitation legislation was incompatible with the ECHR, but it was still not clear, necessarily, whether the Court would agree with the Commission or what exactly the UK Government would do in order to implement whatever decision had been made by the court if the Government had decided to do so.

26 Sedley J said at para.157 as follows:

"Accordingly, there is, in my judgment, no rule of law that impending legislative change is never a material consideration in the exercise of the court's powers and discretions. Everything, it seems to me, turns upon the subject matter and the relevance of the pending legislation or possibility of change to the issues which the court has before it."

And then this:

"In my judgment there is no legal impediment to the grant of a stay in the particular circumstances in which this case comes before me, and the balance of justice in my view comes down firmly in favour of staying rather than dismissing the plaintiff's case."

27 Accordingly, with the benefit of much fuller authority and argument than was available before Snowden J, in my judgment it is not the case that the court necessarily always has to make its decision only on the basis of the law as it stands. The court can in a proper case take into account imminent changes in the law.

28 It is highly likely that the proposed legislation will cover the situation which I am dealing with in this case and I can take that into account. When I do so, the right answer in this case is that I should grant an injunction, at least at the interim stage, over for 14 days to restrain the presentation of this petition. I recognise that it is never certain what will happen, and one does not know exactly how the legislation will be formulated or when it will take effect. But taking all those factors into account, it seems to me that the right thing to do in this case is to grant the injunction.

29 I turn to consider the other ground on which I am asked to grant the injunction. This is on the basis that the petition is abusive because it is adverse to the class interest. Essentially the point is, first, that petitions are for the benefit of the class of creditors as a whole (I accept that) and second, it is said, on the evidence, that this petition would be adverse to the interest of the class as a whole having regard to the situation which Travelodge finds itself in. That situation is characterised by three features, as follows. The first is that there is likely to be a nil return on a winding up, which I agree with. The second feature is that the turnaround proposal now on the table is likely to produce a better return for all creditors, including Mr Sood's businesses, than the nil dividend they would receive from a winding up. The evidence establishes that matter to my satisfaction as well, at least at this stage. The third aspect is that allowing an insolvency process like this petition to be presented in this way would itself jeopardise the proposed turnaround and the ability to have that proposal accepted either consensually or via a CVA. That is for a number of reasons, including the fact that the terms of many of the leases held by Travelodge would lead for those leases to be terminated if a petition of this kind was presented. I agree.

30 Another important dimension is that there is no evidence that there is any other reason why there should be a winding up petition presented in this case. There are no transactions at an under value which are said to have taken place, and there is positive evidence that the advisors to Travelodge are making sure that their future trading will comply with the relevant law.

31 I also take into account what is clear from the quoted parts from the letters Mr Sood wrote to Addleshaws, that the purpose of the threat of the petition is to seek payment for Mr Sood's companies as creditors, advancing their interests ahead of other creditors. That on its own would not be a justification for refusing the petition but it is a factor in the circumstances which the court is entitled to take into account.

32 Mr Sood objects to this application on a number of grounds. He says that he does not know whether the company in fact are sitting on a large amount of cash and could pay its rent now. In the evidence I have seen, there is a cash analysis, which is in the confidential part of the evidence, which shows that there is a real need for this company to raise new money if it is to trade out of the situation in which it finds itself. As I said, Mr Sood can challenge that evidence in future if he wishes.

33 Mr Sood also objects to the fact the landlords have been put into different categories. However as he, I suspect, knows, it is a common features in CVAs of this kind, if there is to

be a CVA in this case, to categorise different landlords in this way. Now is not the time to examine the detail of the individual categories.

34 One of Mr Sood's fundamental objections is that he says the right thing to do is to allow the petition to go forward in order for the presentation of the petition to be a forum for landlords who do not like the proposals that have been made by the company to deal with them. However that, as Mr Al-Attar has submitted, misunderstands the circumstances. A petition would have an effect detrimental to the class as a whole for the reasons already explained. The discussions ought to take place but the right place to have them is in the context of the attempt to reach a consensus, which the company is aiming to do, by 20th May, and if they cannot be agreed, then in the context of a CVA. So, an important answer to the point made by Mr Sood is that neither he nor the creditors as a whole, are being deprived of the opportunity to negotiate about these proposals. In fact an injunction of this kind will facilitate the orderly resolution of this matter rather than the opposite.

35 The other point taken is that the company is not able to raise money on the markets because of its asset position, because it does not have any collateral, or because essentially all the properties it uses are leased. That is true, and it seems to me that, if anything, supports the proposition that there is a need for consensual process or a CVA rather than operates against it.

36 Finally, I refer to the analysis of Rose J in *Re Maud, Maud v Aabar Block* [2015] EWHC 1626 (Ch), in which the judge there dealt with a situation which is similar to the present one, in which the court is to considering whether the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed would amount to abuse. In paragraph 29 Rose J identified two situations which amounted to abuse. The first is where the petitioner does not really want to obtain liquidation or bankruptcy of the company or the individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take, and the second is where the petitioner does want to achieve the relief sought but is not acting in the interests of the class of creditors of which he is one, or where the success of his petition will operate to the disadvantage of the body of creditors. I respectfully agree with that. Both situations described by Rose J are applicable in the present circumstances.

37 For all these reasons, I will grant the injunction over for a period of 14 days to restrain presentation of a winding up petition by all three of the companies, the respondents to this application.

THEN LATER:

38 I now need to resolve a question which arose at the very end of the hearing today, where I have decided to grant an injunction over 14 days restraining presentation of a winding up petition. The question is whether I should require a cross-undertaking in damages. Mr Al-Attar, for the applicant, submits that I should not and submits that the general principle is that the applicant is not required to offer a cross-undertaking in these circumstances. He refers to two cases, *Bryanston Finance* [1976] 1 Ch 63, and *Re A Company* No. 7339 of 1985, an unreported decision of Harman J on 15th November 1985.

39 The *Bryanston Finance* decision, and in particular the judgment of Sir John Pennycuick in that case, at p.80 to 81, makes it clear that in his view applications to restrain a presentation

of a winding up petition on abuse grounds are not the class of case which *American Cyanamid* was dealing with.

40 In the *Re A Company* decision, Harman J was considering objections to the admissibility of evidence in an application to restrain publicity in a winding up petition. The judge considered *Bryanston* in the following passage:

> "Mr Lyndon-Stanford also referred me to *Bryanston Finance v De Vries* [1976] Ch 63, [1976] 1 All ER 25 and asserted that there was a close analogy between that decision and this case. I entirely accept and agree with that. It seems to me that it makes little if any difference whether proceedings are by way of a Motion in an action brought before presentation of a Petition to restrain presentation when, in a sort of sense, the proceedings are even more interlocutory than this present application before me because, upon such a Motion, unless it be treated as the trial, the order restraining presentation will, technically speaking, be made until trial or further order although nobody ever expects that there will be a trial in any such case. In this case, of course, this is a Motion brought after a Petition had been presented and seeks to have the Petition taken from the file. It is thus in a form more final than the form in Bryanston Finance.
>
> Nonetheless, in my view, those are differences of form only and in no way differences of substance. Each of them, as it seems to me, seeks an order which does determine a present issue. That issue is not whether the petitioner is a creditor at all but whether a petitioner is a creditor within the meaning of the Companies Act so as to be entitled to present a petition. It determines the standing, the locus standi to use the latin tag, of the petitioner at this time. It is a final order in the sense that it strikes the matter from the file in a case such as this where the Motion is brought after presentation of the Petition. Thus there are many final aspects about this matter and Mr Lindsay, for the company, accepted before me that none of the *American Cyanamid v Ethicon* [1975] AC 396, [1975] 1 All ER 504 tests had any relevant applicability to a case of this sort. <u>There is no question of a cross-undertaking in damages being given. There is no question of whether damages will be an adequate remedy. There is no question of balance of convenience.</u> These features are common both to a Motion in an action to restrain a petition as in *Bryanston Finance v de Vries* and to a Motion in a Petition already presented to have it taken from the file, as in the present case. Thus, there are very many reasons for saying that these proceedings have many final aspects to them."
>
> [*my emphasis*]

41 Mr Sood submits that I should require the applicant to give a cross-undertaking in damages. I must say that the primary ground on which these decisions can be taken as holding that no cross-undertaking in damages should be given and that the application was not one to which *American Cyanamid* applies, is not a good point in this case because the injunction I have been asked to grant is only for 14 days pending the ability of the respondent to file evidence and, if necessary, challenge the continuation of the injunction. If an injunction is granted in 14 days time then that will be final, I can understand that, but this is not one of those cases.

42 It is also relevant to take into account things which are likely to be claims which the respondents might wish to make. The first will be the sums they claim to be due from the company. This injunction makes no difference at all to their rights to claim those sums, although it does affect their ability to use the petition process to put pressure on the company. The second kind of claim will be for legal costs.

43 Accordingly the respondents do not need a cross-undertaking from the applicant to be able to be sure that the court has the power to make a proper order in their favour, both in relation to any legal costs and in due course, if necessary, in relation to the claimed debt, with interest. I cannot imagine what other loss a company might suffer. In my judgment therefore it is appropriate in this case not to require the company to give a cross-undertaking in damages, even though this is only a temporary order.

44 I should mention the other aspect of this matter which came up today. This was brought on very short notice, however it was treated by the applicants, rightly in my judgment, as effectively an *ex parte* application and on which the applicant owed a duty of full and frank disclosure to the court. I am satisfied, to the extent I can be, that the applicant did that on this application.

45 That is my decision.
