Solutus Advisors Ltd v Aurium Real Estate London Ultra Prima

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Blampied, Thomas
Judgment Date:	04 June 2019
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Text

[2019] JRC 102

Royal Court

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Blampied **and** Thomas

In the Matter of Bayswater Road (Holdings) Limited

Between
Solutus Advisors Limited
Representor
and
Aurium Real Estate London Ultra Prima Limited
Respondent

Advocate J. D. Garrood **for the Representor**.

The Respondent did not appear and was not represented.

Authorities

Trusts (Jersey) Law 1984.

Security Interests (Jersey) Law 2012.

Re S Settlement [2001] JRC 154.

Trusts — application approving the sale of share capital

THE COMMISSIONER:

1 This is an application by the Representor for an order approving the sale of the share capital of Bayswater Road (Holdings) Limited ("BRHL") which it holds as collateral pursuant to a security interest agreement. The application is brought both under Article 51 of the Trusts (Jersey) Law 1984 ("the Trusts Law") and under Article 52 of the Security Interests (Jersey) Law 2012 ("the Security Interests Law").

2 At the conclusion of the hearing, the Court granted its approval to the Representor's decision under the Trusts Law but held that it did not have jurisdiction to do so under the Security Interests Law. We now give our reasons for that decision.

Factual Background

3 The transactions in question emerge from a number of very detailed and complex agreements. However, the position for our purposes can be described fairly shortly.

4 BRHL, a Jersey company, has four wholly owned subsidiaries ("the Subsidiaries") which own various adjoining properties in London. The Respondent ("Aurium") is the sole owner of BRHL.

5 Stornoway Finance SARL is a Luxembourg company with different compartments or cells. Acting through its compartment 19/Bayswater (we shall refer to the company acting through this compartment as "Stornoway"), Stornoway has granted a facility ("the Facility") to BRHL as borrower in connection with the acquisition and redevelopment of the properties owned by the Subsidiaries ("the Property"). There have been a number of agreements and amended and re-stated agreements in connection with the Facility but for present purposes it is covered by an amended and re-stated agreement dated 6 th October, 2017, a

Supplemental Facility Agreements dated 13 th June, 2018, and a Second Supplemental Facility Agreements dated 16 th October, 2018, ("the Facility Agreementss").

6 The Representor is the Security Trustee appointed under the Facility Agreements to hold and if necessary enforce any security provided in support of the Facility. It holds any such security and the proceeds of any sale thereof on trust to repay to Stornoway any amount owing under the Facility and to hold any surplus after repayment of the Facility upon trust for the provider of the security.

7 In support of the Facility, Aurium as the sole beneficial owner of BRHL, has granted a security interest under the Security Interests Law over the share capital of BRHL ("the Collateral"). The terms of the security interest are set out in an amended and re-stated Security Interest Agreement dated 3 rd March, 2016 ("the SIA") entered into between Aurium and the Representor as Security Trustee.

8 BRHL is in default under the Facility and Stornoway has now directed the Representor, as Security Trustee, to realise the Collateral by selling it (i.e. the shares in BRHL) to an associated company of Stornoway nominated by Stornoway in consideration of a purchase price equal to the amount outstanding under the Facility as at the date of completion. As at 14 th February, 2019, the amount outstanding under the Facility was just under £162.3 million. The terms upon which the sale of the Collateral would be effected are set out in a draft share purchase agreement ("the SPA") produced to the Court.

9 The reason for the sale to an associate of Stornoway in exchange for cancellation of the debt under the Facility is that it has not proved possible to sell the Property to a third party and Stornoway therefore intends either to improve the Property and then seek to sell it or to carry out the development of the Property itself.

10 The Representor considers the sale of the Collateral in such circumstances to be a momentous decision and accordingly seeks the blessing of the Court.

Procedure

11 When the representation was first presented to the Court, Advocate Garrood submitted that it was not necessary to convene Aurium as the position was so clear cut that there would be nothing that Aurium could usefully say in opposition to the application. The Court disagreed entirely with that submission. In circumstances where Aurium would be entitled to the surplus (if any), it is clearly a matter of fundamental fairness that it should have the opportunity of putting forward any arguments against the proposed course of action in exactly the same way that beneficiaries under a conventional trust are convened to an application for the blessing of a trustee's decision. The Court therefore ordered that Aurium be convened as a party. Having been convened, Aurium has chosen to take no part in the

proceedings but that is entirely a matter for it. We make it clear that in any future application of this nature, the person entitled to a surplus upon the realisation of any security interest should be convened so as to have an opportunity of putting forward any arguments against the course which the security trustee is proposing.

Jurisdiction

12 We consider first whether the Court has jurisdiction to grant the relief sought under the two statutes mentioned.

(i) Security Interests Law

13 The relevant provisions of the Security Interests Law are in the following terms:—

> ***"45 Methods of sale of collateral***
>
> ***A secured party may effect a sale of collateral under this Part by auction, public tender, private sale, or another method*** .
>
> ***A secured party is not prevented by this Part from buying collateral that the secured party sells under this Part*** .
>
> ***46 Duty to obtain fair valuation or fair price***
>
> > ***(1) …***
> >
> > ***(2) A secured party who sells collateral under this Part owes a duty –***
> >
> > > ***(a) to take all commercially reasonable steps to obtain fair market value for the collateral, as at the time of the sale;***
> > >
> > > ***(b) to act in other respects in a commercially reasonable manner in relation to the sale; and***
> > >
> > > ***(c) to enter any agreement for or in relation to the sale only on commercially reasonable terms*** .
> >
> > ***(3) A duty under this Article is owed to the following persons –***
> >
> > > ***(a) the grantor;***
> > >
> > > ***(b) …***
> > >
> > > ***(c) …"***

'The grantor' means the person granting the security interest; in this case Aurium.

14 Article 52 confers certain powers upon the Court in connection with the realisation of collateral. It provides as follows:—

> ***"52 Court may facilitate realization of collateral***
>
> ***The Royal Court may, on application by the secured party when an event of default occurs in relation to a security agreement, make any of the following orders if it appears to the Court reasonably necessary to do so in order to make it possible or practicable for the secured party to exercise his or her rights under this Part –***
>
> > ***(a) an order for delivery of collateral to the secured party;***
> >
> > ***(b) an order transferring collateral into the name of the secured party;***
> >
> > ***(c) an order vesting title to the collateral in the secured party free of the right of redemption or reinstatement under Article 54;***
> >
> > ***(d) an order enforcing an instruction given under Article 43(2)(c)(iii);***
> >
> > ***(e) any other order."***

15 Advocate Garrood submitted that the Court has jurisdiction to make the order sought under Article 52. He accepts that the order requested does not fall within (a) – (d) of the Article but submits that it falls within (e) as being " *any other order"*.

16 We cannot accept that submission. All of the possible orders listed under (a) – (e) of the Article are governed by the introductory words, namely that the order must be one which the Court considers reasonably necessary to make in order to make it ' *possible or practicable'* for the secured party to exercise his rights of enforcement in relation to the security. Thus (a) – (d) are all concerned with putting the secured party in a position so that it can sell or appropriate the collateral. It follows that ' *any other order'* the Court may make under (e) must also be an order which the Court considers reasonably necessary to make it ' *possible or practicable'* for the secured party to enforce its rights.

17 We do not consider that the order sought in this case falls within that category. The Representor does not need the Court's assistance in order to be in a position to sell the shares in BRHL. It is in a position to do that now. The Representor's concern is not that it is not in a position to sell the Collateral; it is that it wishes to have the protection of a court order in case it is alleged that it is not complying with Article 46(2) by taking all commercially reasonable steps to obtain fair market value for the Collateral. In our judgment, such an order is not one which can be considered as reasonably necessary in

order to make it possible or practicable for the Representor to sell the Collateral and therefore it cannot fall within Article 52(e).

18 We were not referred to any other provision under the Security Interests Law which gives the Court jurisdiction to make an order as requested in this case. It follows that we do not consider that the Security Interests Law confers a power upon the Court to make an order prior to any sale that such sale will comply with the requirements of Article 46. We should add that we are not surprised to reach this conclusion. Save in the case of a few specific offices such as trustees and liquidators, the Court does not advise persons before they undertake transactions. It would require clear wording in the statute to add all lenders with a security interest to that select group. It is not surprising that the legislature has not thought fit to do so.

(ii) The Trusts Law

19 As already stated, the Representor is acting as a trustee in this case and the jurisdiction of the Court to bless a momentous decision by a trustee is well established, as are the principles upon which the Court will grant such relief; see *Re S Settlement* [2001] JRC 154. There is therefore clearly jurisdiction for the Court to grant the order requested in this case.

20 However, the Court was initially concerned as to whether it should exercise such jurisdiction. That is because the jurisdiction is intended for the assistance and protection of trustees. In this case, Clause 26.3.1 of the Facility Agreements provides that, unless a contrary indication appears in a Finance Document, a Security Trustee shall exercise any power conferred on it as Security Trustee (e.g. under the SIA) in accordance with any instructions given to it by Stornoway as lender and shall not be liable for any act or omission if it acts in accordance with such instructions. The Court considered that if the decision as to whether to sell the Collateral and on what basis rested with the lender, and if any liability for failing to comply with Article 46(2) of the Security Interests Law would therefore rest with the lender because it would have to indemnify the Security Trustee against any liability, it would not be appropriate for the Court to exercise a jurisdiction which was intended for the protection and assistance of trustees, not for the protection and assistance of commercial lenders.

21 However, Advocate Garrood pointed out that, not only did the Security Trustee remain liable for any gross negligence or wilful misconduct under Clause 26.11.1(a) of the Facility Agreements but, most significantly, the duty under Article 46 of the Security Interests Law is unqualified and therefore not subject to any contrary provision in any agreement. Not surprisingly therefore, the SIA itself (which was a Finance Document for the purposes of Clause 26.3.1 of the Facility Agreements) makes it clear at Clause 9.2 that the Representor's power as Security Trustee to enforce and realise the security is subject to the provisions of the Law. Accordingly, it owes the duty set out in Article 46(2). It follows in our judgment that, were the Security Trustee to fail to take all commercially reasonable steps to obtain fair market value for the Collateral as required by Article 46(2), it would be in breach

of the duty which it owes to Aurium. Thus the Court's blessing is required for the protection and assistance of the Representor as Security Trustee, not Stornoway as lender.

22 Advocate Garrood pointed out that the introduction of a security trustee in major and complex lending transactions is a regular occurrence nowadays and that trustee companies in Jersey were well placed to provide such a service. However, given the fairly specific requirements of Article 46(2) of the Security Interests Law (which we were informed are in more specific terms than the equivalent obligation under English law), it would be of great assistance to security trustees if they were able to obtain the blessing of momentous decisions in the same way as in the case of conventional trusts. We were informed that if the Court were to refuse to exercise its discretion to bless momentous decisions by security trustees, this would affect the desirability of Jersey as a place for such business to take place because of the specific requirements of Article 46 as compared with the position elsewhere.

23 Having been taken through the documents, we are satisfied that this is not a case where, in reality, the whole economic risk in relation to the realisation of the collateral rests with the commercial lender. On the contrary we are satisfied that, because of the requirements of Article 46(2), a security trustee will invariably owe the duty set out in that Article to the person who has provided the collateral. There must therefore be a substantial risk that a breach of that duty would give rise to a claim for compensation.

24 In the circumstances, we consider it entirely appropriate that in this sort of case a security trustee should be able to request the Court to bless its decision to realise collateral if this is considered to be a momentous decision.

Decision on the facts

25 We have received detailed evidence from the reports of Knight Frank dated 14 th February, 2018, and 23 rd January 2019 and the other papers before us about the efforts over a lengthy period to sell the Property. The evidence shows that the highest firm offer in 2017 was for £138m but the purchaser ultimately did not proceed at that price. The Property was re-launched for a second time in October 2018 with sales efforts in Asia as well as elsewhere but the highest expression of interest was some £120m. Knight Frank gives as its opinion that it is unlikely that this figure could be exceeded if the Property were re-marketed.

26 As already stated, the amount outstanding under the Facility as at 14 th February was just under £162.3m. We are satisfied from the evidence therefore that a sale to an associate of Stornoway at a price equal to the amount outstanding under the Facility as at the date of completion will be comfortably in excess of the market price of the Property. We are satisfied on the facts of this case therefore that the Representor has taken all commercially reasonable steps to obtain fair market value for the Collateral and has acted in all other

respects in a commercially reasonable manner in relation to the sale. We also consider that the terms contained in the SPA are commercially reasonable terms.

27 In the circumstances, we have no hesitation in blessing the proposed sale as being a reasonable decision on the part of the Security Trustee. We have of course taken into account that a conflict of interest exists in respect of Stornoway, as one of its associated companies will be the purchaser. We have therefore scrutinised the position as carefully as we can and to that end we asked for clarification of the position as to planning consent; but we were satisfied that the other offers to which we have referred were made on the basis of a similar position as to planning permission as exists now.

28 For these reasons we gave our approval under the Trusts Law to the Representor's decision to sell the entire shareholding in BRHL for the price and in the manner specified.