CR-2024-002669

[2024] EWHC 1194 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

No. CR-2024-002669

Rolls Building

Fetter Lane

London, EC4A 1NL

Thursday 16 May 2024

IN THE MATTER OF THE COMPANIES ACT 2006

Before:

SIR ALASTAIR NORRIS

(Sitting as a High Court Judge)

In the Matter of C-Retail Limited

(Applicant)

-

Mr Tom Smith KC and Mr Matthew Abraham (instructed by Macfarlanes LLP) appeared on behalf of the Company.

Mr Philip Morrison (instructed by Hogan Lovells International LLP) appeared on behalf of Prudential Assurance Company Limited

---

J U D G M E N T

SIR ALASTAIR NORRIS:

1. This morning I gave an ex tempore judgment upon the application of C-Retail Limited ("the Plan Company") for an order convening 13 meetings of creditors to consider a restructuring plan proposed under part 26A of the Companies Act 2006. Yesterday afternoon an informal application was made by the Prudential Assurance Co Ltd ("the Prudential") for the disclosure of certain documents. This disclosure application was the subject of correspondence and negotiation until minutes before the commencement of the convening hearing itself. At the hearing I heard oral argument on the disclosure application but decided that I needed a short time for reflection and said that I would give a reasoned judgment. This is that judgment.

2. The Prudential is the landlord of the Superdry Group's flagship store at 360-363 Oxford Street having granted a lease dated 23 July 2021 to the Plan Company, the tenant's obligations being guaranteed by the Plan Company's parent Superdry. The passing rent is £4.375 million per annum. The Plan Company considers the Oxford Street site to be unprofitable and the business conducted at it is not regarded as sustainable. Under the proposed plan rent the payable to the Prudential is to be reduced to nil, the guarantee of Superdry is to be released, the landlord is to be given the benefit of a rolling break clause (as is the Plan Company), and existing arrears and any dilapidation claims are to be compromised in full in return for a payment. The sum to be paid comprises (a) 4 weeks contractual rent (b) 150% of the estimated return in the alternative scenario of an administration of the Plan Company and (c) 150% of the estimated return in an administration of Superdry in respect of a claim under its guarantee. (There is a mechanism for avoiding double counting).

3. The disclosure application in the present case was made informally by means of a witness statement on behalf of the Prudential. Normally if an order is sought then a Part 23 application notice should be issued: that is a good discipline because it identifies the enactment, rule or practice direction which is said to give the Court jurisdiction to grant the order sought and invites a focus upon the principles upon which that jurisdiction is customarily exercised.

4. An originating application relating to a scheme or a plan is commenced by a claim form under CPR Part 8. Practice Direction 57 AD, which relates to disclosure in the Business and Property Courts, does not apply to Part 8 claims: see paragraph 1.4(7). One must therefore look to other provisions of the CPR.

5. Part 8 itself requires a claimant to file any written evidence on which they intend to rely with the claim form: CPR 8.5(1). This evidence will in the ordinary way exhibit the material documents so that there is no routine disclosure obligation. But a party may require more. That might arise in the case of a scheme or a plan because there are documents which the applicant company could not, for entirely sensible commercial reasons, put into the

public domain but might be material to some or all of the creditors. If the company does not put such documents into a data room with controlled access then a creditor might have to seek disclosure and inspection, accepting confidentiality restrictions in return.

6. Paragraph 1.12 of PD 57 AD says that the party seeking an order for disclosure in a Part 8 claim must serve and file a "List of Issues for Disclosure" in relation to which disclosure is sought which sets out the Models that are to be adopted for each issue. The Court may then adapt PD57AD to make a disclosure order. I do not think that that is necessary in this case: and given the nature of the Explanatory Statement I doubt that such a procedure will often be appropriate in the case of schemes and plans (though it might be). What is sought here is not general disclosure of documents relating to an issue but rather the disclosure of specific documents. The Court has power to do that under CPR 31.

7. Under CPR 31.14 the Court has power to order the inspection of any document mentioned in a witness statement. Under previous discovery rules it was held that in that circumstance the onus lies upon the claimant to say why there should not be inspection: Quilter v Heatley (1883) 28 Ch.D. 42 at 51. The White Book suggests that the position is the same in relation to the CPR. I agree.

8. Under CPR 31.12 a party might apply for an order for specific disclosure and inspection of identified documents provided that evidence was given (i) as to the source of or grounds for the belief that such documents existed and (ii) which set out the relevance of the documents sought to an identified issue in the proceedings.

9. In each case the Court has a discretion to be exercised in accordance with "the overriding objective". In relation to schemes and plans are there are other factors in play including:-

   (a) the need to provide such information as is reasonably necessary to enable creditors to make an informed decision (i) as to whether the scheme or plan is in their interests (ii) whether losses are being appropriately allocated and (iii) whether the value created by the scheme or plan is being fairly apportioned;
   (b) the need to do so in an even-handed way that does not breach listing rules;
   (c) that the purpose of the sanction hearing will be to examine the scheme or plan proposed in the Explanatory Statement (perhaps with immaterial amendments) not to consider a range of alternatives to that scheme or plan;
   (d) that at the sanction hearing the issue for determination by the Court will not be whether the proposed plan is the best or the fairest but whether it is such that an honest creditor looking after his own interests as such creditor might reasonably approve it and (in case of a "cramdown" fairly apportions losses and benefits;
   (e) that schemes are propounded and plans promoted by companies that are in financial distress and that disclosure and inspection requests must not come at a time or be at a level so burdensome as to distract from the progressing of the proposal through its statutory process.

10. The present application for disclosure sought a wide range of documents but was made in a commendably focused way notwithstanding its informality. The request for 10 categories of documents was set out over four pages of a witness statement. Equally commendably the Plan Company engaged with the request and a large measure of agreement has been reached, not least because the Plan Company (having the benefit of the protection of an established "confidentiality ring") has adopted a fairly generous approach. At the hearing I was shown a draft order containing many agreed paragraphs. I address only those that remain in dispute.

11. Paragraph 1.5 of the draft sought an order for the production and inspection of

> "*Any cash flow forecasts (along with underlying assumptions) in respect of each of the Plan Company and Parent for the period following the implementation of the Plan".*

The Plan Company is willing to provide

> *"Any cash flow forecasts (along with underlying assumptions) in respect of the Group for the period following the implementation of the Plan".*

Mr Smith KC said on instructions cash flow forecasts were prepared on a Group basis and a separate cash flow forecasts for the Plan Company and for the Parent did not exist. Mr Morrison countered by saying that a Group forecast must depend upon the buildup of individual elements. I propose to make an order in the terms of the Plan Company formulation. Just as the Court would accept a Disclosure Statement which said that the document sought did not exist so I would accept Mr Smith KC's statement of the position. Even if a Group forecast must consist of an agglomeration of information it is not necessarily the case that information is contained in a cash flow forecast for the Plan Company or for the Parent as individual entities. It is I think clear that the Plan Company and Superdry stand or fall together as part of the Group and that it is the restructured Group which will benefit from any surplus generated by the adoption of the plan. The search for underlying granular data would in my judgment be burdensome and disproportionate.

12. The relevant alternative to the adoption of the Plan is said by the Plan Company to be an accelerated sale of part of the Group business excluding all retail units (for which it has been advised there would be no buyers) and then an orderly wind down over a 12 to 18 month period. The estimated recoveries as a result of that process (which will be used as the basis for computing the payments to be made to impaired creditors under the plan) were calculated (according to the evidence of Mr David, the Interim CFO of the Plan Company) on the basis of an independent report prepared by Newmark HDH Ltd assessing the ERV Rent, the Estimated Void Period, dilapidations and rent free period offered to new tenants of each of the Premises for each of the Rate Concession Premises. (It is possible to convey the nature of the report without referring to each of the definitions used in Mr David's evidence). The Plan Company is willing to provide this report but "*redacted so as to show only information for the Oxford Street Premises".*

13. I propose to make an order in the form sought by the Prudential without the amendment proposed by the Plan Company. This is a document referred to in a witness statement. Upon ordinary principles under CPR part 31.14 it should be disclosed and might be

inspected in full, the burden lying upon the Plan Company to show why that should not be so. The Plan Company resists such disclosure on the basis that the document contains highly confidential commercial material. I will accept that that is so. But if that is relevant then that confidence is protected by the confidentiality ring established by the Non-Disclosure Agreement dated 5 March 2024. On the other hand, the report seems to form a significant element in the calculation of the Estimated Recoveries (i.e. the likely total return to creditors of the Plan Company in the relevant alternative). First, it is the Estimated Recoveries as a whole (not the estimated recovery from the Oxford Street premises) which determine the compromise payment to the Prudential. Second, the assessment of "ERV" seems to bear upon class composition: if there is a point to be made by the Prudential upon class composition then that point should ideally be made before the plan meetings are held (so that the convening order can be readdressed) and the Prudential enabled to do so.

14. The evidence of Mr David refers to an overall turnaround strategy from the group comprising (a) the restructuring plan (b) a new equity raise by the Group and its delisting and (c) a revised operating, brand and pricing strategy. These three elements are together a referred to as "a new target operating model ("the TOM"). In the evidence the term "TOM" is thus a label given to a concept or strategy: it is not obviously a document. The label is adopted in a report prepared by Grant Thornton and also in a report prepared by Teneo. The Prudential evidence assumes that this label is a document not a strategy. But there *does* appear to be a document which sets out the TOM: it is referred to in a footnote Grant Thornton report as the "Superdry Target Operating Model Iteration 2": and there is an reference to a document in an e-mail from the Plan Company's solicitors dated 18 April 2024 (" a turn-around operating model which sets out the projected financial position of the group if the restructuring plan and other turn-around measures are successfully implemented"). I shall assume that this is what the Prudential seeks. On 8 May 2024 by email the Plan Company sent a hardcoded Excel spreadsheet which it said was the TOM. The Prudential says that there must be another document (probably an Excel workbook) containing underlying calculations assumptions or other details.

15. So far as I can see the TOM is not a document referred to in a witness statement; there is a reference to such a document in a footnote in an exhibit. This is therefore an application for specific disclosure. It has not been made plain to what precise issue in the Part 8 claim the underlying calculations, assumptions and details sought relate. The TOM is a financial projection illustrating the anticipated benefit flowing from the implementation of the plan, which benefit helps (along with the equity raise and the amended and restated facilities) fund the payment of 150% of the estimated return in accelerated-sale-and-administration scenario across all compromised classes. At the sanction hearing the Court will not be concerned with whether a better plan could be devised which paid 200% of the estimated return: or whether a plan could be devised that kept Superdry as a paying, trading tenant at the Oxford Street premises. It will be (to put the matter in a very summary way) assessing whether what is actually being proposed deals equitably with the plan creditors , particularly as regards the burden of losses. The underlying calculations, assumptions and details of the TOM do not seem to me to bear upon that.

16. If there is something other than what has been provided already then I would order the production of the TOM; but I would not order that the document (if such exists) must include the underlying assumptions/calculations. Mr Smith KC suggested that if genuine issues arose they would be addressed in a meeting. Provided that this does not involve a

significant distortion of the information available to some creditors but not others now that the matter is before the Court. I regard that as a sensible approach.

17. In his concluding remarks Mr Morrison suggested that the disclosure order should address how confidential information might be deployed at the sanction hearing. Techniques developed in intellectual property cases provide a good model. I invite the parties to agree the terms of an order dealing with confidential exhibits, confidential hearing bundles, supplementary confidential skeleton arguments and applications for part of the hearing to be in private.