



**In the matter of Mitco Retail One Limited et al &
in the matter of Part XXI of the Companies
(Guernsey) Law, 2008, as amended**
Royal Court
14th July, 2014

**JUDGMENT
31/2014**

Applications for administration orders.

**Approved Text
14.07.2014**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

**IN THE MATTER OF
MITCO RETAIL ONE LIMITED
MITCO RETAIL TWO LIMITED
MITCO RETAIL THREE LIMITED
MITCO RETAIL FOUR LIMITED
MITCO RETAIL FIVE LIMITED
MITCO RETAIL SIX LIMITED
MITCO RETAIL SEVEN LIMITED:**

And:

**IN THE MATTER OF
PART XXI OF THE COMPANIES (GUERNSEY) LAW, 2008, AS AMENDED
Applications for Administration Orders**

Final Applications heard on: 19th June, 2014

Reasons for decision handed down on: 14th July, 2014

Before: John Russell Finch, Esq., Judge of the Royal Court

And Jurat B J Bartie; Jurat P S T Girard and Jurat D P L Hodgetts LVO

Counsel for the Applicant: Advocate A Horsbrugh-Porter

Counsel for the Companies: Advocate A C Williams

Cases and Materials referred to in Decision:

The Companies (Guernsey) Law, 2008 (as amended), Section 374
In the Matter of Propinvest Group Limited (Royal Court Judgment 34/2011);
Hammonds v Pro-Fit USA Ltd [2007] EWHC 2941 Ch.

Introduction

1. On 27th May, 2014, the Nationwide Building Society (“NBS”) applied for the Mitco Companies, seven in all (“the Companies”), to be placed under administration under Sections 374 and 375, of Part XXI of the Companies (Guernsey) Law, 2008, as amended (“the Law”). The appointment of Messrs Michael Roland Bane and Alan Michael Hudson of Ernst and Young LLP as joint administrators was sought. At that first hearing (presided over by the Deputy Bailiff) the court required further information about (in summary) the financial position of the Companies, the transfer of the loans outstanding from NBS to another entity OCM Adelaide Debt Co S.à.R.l (“OCM”), the individual amounts owed by each individual company, the reasons for an administration order rather than liquidation, a copy of a report dated 14th February, 2014 on the market value of properties owned by the Companies, and further information on re-financing. This information was duly produced at the adjourned hearing on 5th June, 2014, see especially the second affidavit of Richard James Furniss in NBS’s bundle for that hearing.
2. However, Advocate Williams appeared on 5th June, 2014, for the first time in this matter. He sought an adjournment of fourteen days, mainly for the Companies to take proper advice and deal with NBS’s standing in making the application. He had only been instructed at very short notice (the previous afternoon) and there was a good deal of detailed documentation to go through. The adjournment was granted, but it was emphasized that something concrete needed to come up at the resumed hearing on 19th June, 2014. At that hearing the court had a full skeleton argument from Advocate Williams plus affidavits and supporting documents. Also both counsel supplemented their respective skeletons with oral submissions. One preliminary point, as mentioned, was the standing of NBS as a “creditor”. This was dealt with by the judge alone, who gave a brief reasoned judgment to the effect that NBS were entitled to be considered as the creditor. The case then went to the Jurats on the question of the Administration Orders.
3. At the end of the hearing the Jurats retired, assisted by the Judge, and reached a decision. As time appeared to be of the essence the decision was given and the reasons were to follow. It was a majority decision of the Jurats (2-1) and both majority and minority reasons will follow in this document. The procedure is in accordance with the Royal Court (Reform) Law, 2008, particularly Section 16.

Background

4. NBS lent to each of the seven Mitco Companies under separate loan agreements originally dated 2005-2007. The Companies are part of an investment structure set up to invest in commercial properties in Germany. Each of the companies holds one or more of the properties in the portfolio. The investment aim (see paragraph 10 of the first affidavit of Mr Furniss) was to generate rental income as well as capital gain. It is not contested that NBS (or OCM depending on how the parties see it) is entitled to bring the application for administration orders as the Companies owe an aggregate of €57,133,911.06 plus interest etc. on these loans. NBS has entered into an agreement to transfer the loans to a third party OCM, but it has been held by the Judge in this application that at present NBS is the “creditor”. A formal demand was served on 21st May, 2014. The full amounts owed by each company are set out at paragraph 13 of Mr Furniss’s second affidavit. The loans were restructured in 2011 and the facility extended to 31st December, 2013. Since that date NBS and the directors of the Companies have been in negotiation in relation to repayment. The sticking-point is the

amount of any discount on the loans in the event of repayment. A valuation of the properties shows the Mitco Companies are also balance-sheet insolvent in relation to Mitco Four, Five, Six and Seven, as well as cash flow insolvent for not paying back the loan (see the summary at paragraph 20 of Mr Furniss’s second affidavit). In relation to Mitco One, Two and Three default interest is accumulating and each of the Companies owes material amounts to shareholders from £1.8 million (Mitco Six) to £7.8 million (Mitco Two), so they are also balance sheet insolvent.

5. The second affidavit of Mr Furniss also sets out the various offers for repayment that have been made to NBS. See paragraphs 26-31. It is understood that unsuccessful negotiations continued right up to the date of the final hearing. Accordingly the parties have reached an impasse which the Court must resolve. NBS seek administration rather than liquidation for the reasons set out in paragraphs 23-25 of Mr Furniss’s first affidavit and 13-18 of his second affidavit. Essentially there is a wish to carry on trading rather than liquidate to a “fire sale” of the assets at a gross undervalue. It should be noted that at the first court hearing on 27th May 2014, Mr Geoffrey Le Page, a director of Mitco Three, Four, Five, Six and Seven appeared and confirmed that the Mitco Companies were technically insolvent and that an administration order may achieve a beneficial result for the creditors. Mr Brown, his colleague, confirms this in his second affidavit (in the Companies’ bundle, paragraphs 63-64) and indicates he would have given similar answers had he not been absent from the Island. However, it is suggested that now circumstances have changed and the directors do not consider Administration Orders to be preferable for the creditors.
6. Both parties referred to the relevant Guernsey legislation, which can be found conveniently at Tab 3 of the Companies’ skeleton argument bundle. The kernel is at sections 374(1) at (2) and (3) of the Law, which states:

“Administration orders

374. (1) Subject to the provisions of this section, if the Court –

- (a) is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test, and
- (b) considers that the making of an order under this section may achieve one or more of the purposes set out in subsection (3),

The Court may make an order under this section (an “**administration order**”) in relation to that company (or that cell, as the case may be).

(2) An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company (or cell, as the case may be) shall be managed by a person (the “**administrator**”) appointed for the purpose by the Court.

(3) The purposes for the achievement of which an administration order may be made are –

- (a) the survival of the company (or cell, as the case may be), and the whole or any part of its undertaking, as a going concern, or
- (b) a more advantageous realisation of the company’s (or cell’s, as the case may be) assets than would be effected on a winding up,

and the order shall specify the purpose for which it is made.”

7. Negotiations having failed NBS rest their application on the admitted insolvency of the Companies and that situation continuing since December 2013. As indicated, the Companies are to be placed under administration rather than liquidation, for the reasons set out. The Companies are “massively insolvent” and administration may achieve one of the purposes specified in section 374(3), the survival of the Companies or a more advantageous realisation of the assets. No discount will be accepted by the creditor. Re-financing has been tried for over a year, but without success. It was also pointed out that an Administration Order is bound to depress the value of the assets that is implicit in the process and no reason to deny it such an order. Any offers were in existence before the date of the application. NBS accepted that a discretion is conferred, but in its proper exercise Administration Orders should follow, in essence it amounts to €57 million outstanding now for six months. It was also suggested that re-financing does not address Mitco Three, Four and Seven. Nothing in the process of administration will stop re-financing.
8. In his wide-ranging submissions Advocate Williams, for the Companies opposed the applications. His points can be summarized under the following heads:
 - (i) an Administration Order would not achieve the purpose of administration; and
 - (ii) there is an underlying discretion not to make the Orders sought; and
 - (iii) if the Orders are granted there should be a delay until 2nd October, 2014, for re-financing.

These are all referred to in the second skeleton in the Companies bundle, tab 2, and developed in detail in the oral submissions.

9. In relation to point (i) it was submitted that refinancing is unlikely if the companies are placed under Administration and the shareholders will not inject equity to meet any funding gap. It would not be viable for the Administrators to carry on trading and the likelihood is that the assets will be realized. Any Order would run up a signal of weakness to potential purchasers and place the Companies at a disadvantage when re-negotiating property transactions. This will be the only viable option.
10. In relation to (ii) it is plain from the words of the statute (“may”) that a discretion is conferred. This is made clear from the Guernsey case of Propinvest Group Limited (Royal Court, Judgment 34/2012) at the Companies` bundle, Tab 4. At paragraph 33, Collas DB (as he then was) said:

“The use of the word “*may*” in section 374(1) indicates that the Court has a discretion to exercise in deciding whether to make an administration order, even though all other conditions were satisfied.”

Advocate Williams suggested that NBS’s reliance on winding-up cases in their skeleton argument of 3rd June, 2014 was “*wholly misconceived*”. The correct position was set out in the English case of Hammonds v Pro-Fit USA Ltd [2007] 2941 Ch. At paragraph 52 (Tab 7 of the bundle), where Warren J indicated: “*In my judgement, the Court’s discretion is at large*”. There is therefore an unfettered discretion to exercise. On the facts the Administration Order ought not to be made, especially as re-financing is well advanced, there are genuine expressions of interest in selling the German properties (see paragraphs 79-80 of Mr Michael Brown’s second affidavit) and the leases themselves are being negotiated, a process inevitably prejudiced by Administration Orders. The primary goal, however, is to re-finance.

11. The “delay” point is relevant even if the court is minded to accede to the applications. There is no compelling need to make an order at this time. In the Hammonds case (supra) a delay

was ordered, see paragraph 334 of the judgment, so this can be done. The rationale for any delay is that there is, it is suggested, a genuine and objective likelihood of refinancing and/or sale of the German properties. In the mean-time these properties would be generating sufficient rental income to service all penalty and default interest due. It should be noted that Advocate Horsbrugh-Porter sought to confine the applicability of the Hammonds case, which on the facts involved a counter-claim (see especially paragraph 50 of this judgment) and this does not take the matter any further, he submitted.

Directions to the Jurats

12. There were no disputes on the surrounding facts. The Jurats were referred to the terms of section 374 of the Law, in particular sections 374(3)(a) and (b). It was necessary to consider whether either or both applied, viz, the survival of the Companies and/or a more advantageous realisation of their assets than would be effected on a winding-up. The resolution of this aspect of the applications involved a balancing exercise. The Jurats were entitled to take into account the history of the loans, the financial position at present and projected of the Companies, the nature and value of their assets and the question of re-financing, together with any other considerations they deemed relevant. In assessing this and other points the Jurats were told that authorities on winding-up, which is a different remedy than administration, were of little help, as set out in the Companies' second skeleton at paragraph 24. The key question as seen by counsel was the effect of administration – would it, putting it shortly, simply kill off the Companies as viable entities or give a breathing-space with re-finance still on the cards? On the other hand, it was suggested that here there is nothing that Administrators can do that the present directors cannot do. All these submissions needed to be evaluated.
13. The Jurats were referred to the use of the permissive word “may” in section 374(1) of the Law and the words of Collas DB already mentioned at paragraph 10 above were given. There is therefore a discretion conferred, which must be exercised judicially. It was not necessary to go beyond these words to the English Hammonds case, where the facts were quite different, but there is nothing inconsistent between these two decisions. “May” confers an unfettered discretion, as there are no words of qualification or limitation beyond section 374(3). It is for the Jurats to consider and weigh all the facts before rationally deciding how this discretion should be dealt with. The Jurats were reminded of the submissions of counsel, but appreciated they should assess them for themselves.
14. The Hammonds case was cited as authority for the proposition that an order can be delayed. In paragraph 334 Warren J, at the end of his long judgment delayed making an order so as to allow an opportunity to surrender an onerous licence that was a very important part of the proceedings. The Jurats were told that, in general terms, if a discretion is conferred by statute, it is normally implicit that an order made thereunder can be deferred. The Hammonds case confirms this is the situation in the High Court and on this point can be regarded as persuasive. Again this aspect of the application calls for a careful weighing of all the facts and a judgment based on the importance that the Jurats attach to them.

Majority Decision

15. Jurats Bartie and Hodgetts were in favour of granting the applications. They would have been minded to do so at the first hearing on 27th May, 2014, but there was insufficient information. They noted that Mr Le Page, a Mitco director, had stated the Companies were unable to pay the sums due to NBS and that they should be placed into administration. It is true that his position is now altered, but the surrounding facts have not changed that significantly. The Companies have been insolvent since December 2013. There have been abortive negotiations with NBS and various indications of re-financing, but none acceptable to the creditors. A discount is not acceptable, nor should the position of the creditor be prejudiced if a discount is not agreed. The Jurats note that administration is preferred to liquidation and that re-

financing is not put entirely out of the picture. They agreed with the suggestion that any Administration Order is bound to depress the assets, but that if this were regarded as a block in the process, hardly any company would be placed in administration. The offers were looked at and caveats remain. It should also be noted significantly, that there appear to be no offers for Mitco Three, Four and Seven. There is still a funding gap.

16. The nub of the matter is that €57 million have been outstanding for six months, financing is still not ready in an acceptable amount and efforts have been made in that area for around a year. Administration offers the opportunity, within the terms of section 374(3) for the Companies to survive or for a better realization of the assets. In effect, enough rope has already been given. The Jurats, in passing, did not find the observations of counsel for NBS on whatever practice there may be in England to be helpful. Guernsey is not a District Registry of the English High Court, but a separate jurisdiction. The case could have been concluded earlier had the available information been more properly detailed.
17. Accordingly the majority found (as was admitted) that the Companies were insolvent and that the terms of section 374 were met on the facts. A Micawberish approach to refinancing is no longer justifiable and, notwithstanding the very able submissions of Advocate Williams, the orders now fall to be made.

Minority Decision

18. Jurat Girard also accepts the facts and would concur in the evaluation of the case given by the majority up to the last point. In his opinion the Order should be delayed until 2nd October, 2014. It is a question of weighing the options available and the Companies should be given an opportunity, albeit limited to that date, to refinance the loans and/or sell the German properties. This would, as was submitted, be a relatively short delay and outweighs the potential prejudice that making Administration Orders now would cause. The offers have not been accepted to date, but there does not seem to be a yawning gap between the creditor and the Companies, and there is still room for a commercially realistic resolution. It is not possible to resurrect the Mitco Companies from administration which could potentially lead to a lack of confidence and what counsel referred to as a “fire sale” of the assets at considerable undervalue, which would do no-one any good. Looking at the history of this matter, counsel for the Companies was right to submit that there is no compelling reason to make orders at this time. The shareholders would not lend in the event of administration. Jurat Girard also endorsed the views of his colleagues on Advocate Williams’ submissions.

Decision

19. Accordingly, by a majority of 2:1 the applications for Administration Orders succeed.

J R Finch
Judge of the Royal Court