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Nero Holdings Ltd v Young

[2021] EWHC 1453 (Ch), [2021] All ER (D) 30 (Jun)

Insolvency – Company voluntary arrangement. The applicant company, which had had a company voluntary arrangement proposal agreed by its creditors, applied to strike out the respondent creditor's challenge to that approval on the basis that it was being funded and pursued by an entity that had wished to take over the company. The Chancery Division, dismissing the company's application, held that the company had failed to establish that the respondent's challenge was being pursued for collateral or illegitimate reasons or that he had had not legitimate interest in the relief that he had sought.

Catchwords

Insolvency – Company voluntary arrangement – Strike out

Background

The applicant company (the company) was one of the principal operating companies in the United Kingdom part of the Nero Group, a leading international coffee shop retailer. In the light of the COVID-19 pandemic, the company suffered financially, becoming indebted in particular to the landlords of its coffee shops. The company proposed a company voluntary arrangement (CVA), which, in regard to the company's landlord creditors, sought to compromise the terms of the landlords' leases as of arrears of rent, further rent, service charges and insurance. The respondent (Y) was a landlord of the company and opposed the making of the CVA proposal. He entered into an agreement with EG Group Ltd (EG) under which EG would pay Y a sum and Y agreed not to agree to the CVA. EG was not a creditor of the company, but was a company that wished to acquire all of the shares in the company. The company's creditors approved the CVA and Y issued the present proceedings under s 6 of the Insolvency Act 1986 (IA 1986) challenging the approval given by the company's creditors. The company subsequently made an open offer to settle with Y the arrears of rent owed to him, which Y rejected.

By the present application, the company applied to strike out the proceedings. The company submitted: (i) Y's challenge application under IA 1986 s 6 was being pursued for a collateral and illegitimate purpose, namely, that of furthering EG's commercial interests in taking over the company; and (ii) that even if Y's purposes in the challenge were relevant, he had had no legitimate interest in the relief being sought because of the arrangement he had entered into with EG.

Issues and decisions

(1) Whether Y's application under IA 1986 s 6 was being pursued for a collateral and illegitimate purpose.

The applicable principles in relation to legitimate interest in the context of an insolvency application were: (a) whether or not the statute specified the persons who were qualified to apply under the section concerned; it was necessary for the applicant to show a legitimate interest in the relief sought; (b) that legitimate interest came into the equation when the court was considering the exercise of its discretion as to whether to grant the relief sought; (c) there did not have to be a direct financial interest in the relief sought but it was not sufficient for the applicant to say that they should be entitled to conduct a roving review of the respondents' conduct or to act as the creditors' policeman; (d) where it was clear that the applicant's purpose was adverse to the interests of creditors, which was the class in whose interests such applications should be brought, the court might consider that the evidence as to that was so clear that it justified the striking out of such an application before trial; (e) however, where the application was not clearly contrary to the creditors' interests generally, it would normally be necessary to weigh the applicant's alleged legitimate interest with other factors when the court had made factual findings after a trial and was deciding on whether to exercise its discretion in favour of granting the relief sought; and (f) it was a question of judicial restraint in that, as part of the balancing exercise in deciding whether to exercise a discretion, the court would take into account the strength and legitimacy of the applicant's interest in that relief being granted (see [73] of the judgment)

In the instant case, if there were substantive grounds for the challenge application, which it had to be accepted there were, the fact that it was being funded by a third party which had its own purposes in doing so did not detract from Y's own purposes which were to achieve a better deal for himself and, he thought, for the creditors as a whole. It could not safely be concluded, on a summary judgment application stage, that Y had so relinquished control of the proceedings. He was arguably making all decisions in relation to the challenge application under IA 1986 s 6, and even though he would have been unable to accept the company's settlement offer without the consent of EG, his evidence was that he would have rejected it anyway as he wanted to be in a position to consider his options to secure his future rental income after the CVA had been revoked. Accordingly, the company's argument based on EG's collateral purpose was rejected (see [83], [85], [86] of the judgment).

Deloitte & Touche AG v Johnson Case No - Privy Council Appeal no 44 of 1998 (1999) Times, 16 June [1999] 4 LRC 281 applied

Walker Morris (a firm) v Khalastchi [2000] All ER (D) 994 [2000] Lexis Citation 3649 [2001] 1 BCLC 1 applied

Discovery (Northampton) Ltd and other companies v Debenhams Retail Ltd and others [2019] All ER (D) 67 (Sep) [2019] EGLR 47 [2019] EWHC 2441 (Ch) applied

Lazari Properties 2 Ltd and others v New Look Retailers Ltd and others [2021] EWHC 1209 (Ch) applied

Brake and others v Lowes and others and other cases [2020] All ER (D) 157 (May) [2020] EWHC 1324 (Ch) applied

(2) Whether Y had had a legitimate interest in the application under IA 1986 s 6.

There were, no doubt, many issues that remained in relation to the challenge application and the potential takeover by EG. The only thing that could be said for certain at the present stage was that Y was still owed his rent arrears by the company. Those rent arrears had not been discharged and might be reduced by the CVA if the challenge application failed. The receipt by Y of a sum from EG had not discharged the rent arrears. Accordingly, Y still had a financial interest in the relief he was seeking. The company had failed to establish that there was no real prospect of the court granting the relief sought by Y in the challenge application. The court would have to consider whether Y had a legitimate interest in the relief that he was seeking as part of its overall balancing of relevant factors in order to decide how to exercise its discretion in the granting of relief. At the present stage, it was not possible to conclude that Y would not prove such a legitimate interest at trial. Accordingly, the company's arguments on no legitimate interest were rejected (see [90], [96], [97] of the judgment

The application would be dismissed (see [110] of the judgment).

Judgment date

28 May 2021

Judge

Michael Green J

Representation

Tom Smith QC and Henry Phillips (instructed by Linklaters LLP) for the applicant

Robin Dicker QC and Adam Al-Attar (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the respondent

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