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Re Bitumina Industries Ltd (in administration) Manning and another v Neste AB and another

[2022] EWHC 2578 (Ch), [2022] All ER (D) 58 (Oct)

The Chancery Division ruled on an application made by the joint administrators of Bitumina Industries Ltd (the company) for directions as to the validity and enforceability of a charge given to the second respondent by the company in January 2020. The court held that the charge had been a validly created security, and it was effective against the joint administrators. The charge had not been invalidated by s 245(2)(a) of the Insolvency Act 1986 at the date of its creation, and was valid to the extent of the value derived by the company from its acquisition of the shares of another company.

Catchwords

COMPANY – ADMINISTRATION – SHARES

Background

The proceedings concerned a company established in Dubai in April 2019. It was owned by the second respondent (F). Its main (and apparently only) asset appeared to have been a cash balance of $2,350,000. In November 2019, F entered into a sale and purchase agreement (the SPA) to sell another company (DMCC) to the company in consideration of the issue by the company to him of 2,332,750 convertible secured loan notes of $1 each (the notes). The security for the notes was to be constituted through a separately executed debenture granting a floating charge over the assets of the company. The terms of the notes were recorded in a document (the CLNI).

In January 2020, the company gave F a charge (the charge). The charge constituted a grant of a floating charge to a connected person at a relevant time, and was therefore prima facie invalidated by s 245 of the Insolvency Act 1986 (IA 1986). However, IA 1986 s 245 provided that such a charge was not invalidated if consideration was given for it at the time of or after its creation.

F alleged that he had given such consideration, both at the time when the charge had been created and thereafter. The issue was whether, as a matter of law, his interactions with the company had constituted the giving of good consideration at the same time as or after the creation of the charge so as to validate it.

The first respondent (which was the largest unsecured creditor of the company) argued that the charge, although validly created, had been invalid under IA 1986 s 245 at its moment of creation, and that it was not validated by any of the subsequent actions of F.

Issues and decisions

(1) Whether the charge was invalid under IA 1986 s 245 by reason of having been granted after the relevant consideration had been received by the company. Four questions arose: (i) whether the transfer constituted 'consideration' specifically for the grant of the charge; (ii) whether the value that had been given, had been given 'by reason of' the charge; (iii) whether the shares had been capable of constituting 'consideration'; and (iv) what the value of the consideration given had been.

First, on the case law and statute, the purposes of IA 1986 s 245, 'consideration' meant value actually supplied, regardless of the contractual position (see [60] of the judgment).

Second, at any time after the failure of the first debenture, F had been contractually bound to transfer the shares, and could in equity have been compelled to do so. However, at the same time, the company had been obliged to create a charge, had not done so, and could in equity have been compelled to do so. It was highly implausible that any order could have been secured to mandate one without mandating the other. That emphasised the fact that the performance of each obligation was in fact dependent on the performance of the other (see [64] of the judgment).

Third, 'goods' in the present context encompassed not only goods in the Sale of Goods sense, but also things in action (such as money receivables) and intangibles (such as intellectual property) which were of a kind which (a) were received by the company pursuant to its ordinary trading activity; and (b) had a clear value, such that transfer of their ownership to the company necessarily swelled the assets of the company. In that context, the shares in DMCC satisfied that criterion (see [73], [74] of the judgment).

Fourth, if a valuation could not be agreed between the parties, it was a matter which ought to be determined at a further hearing (see [77] of the judgment).

Seal v Claridge [1881] 7 QBD 516, 50 LJQB 316 considered.
Jackson and Bassford Ltd, Re [1906] 2 Ch 467, 75 LJ Ch 697 considered.
Columbian Fireproofing Co Ltd, Re [1908-10] All ER Rep Ext 1126, [1910] 2 Ch 120 considered.
Love (Gregory) & Co, Re, Francis v Gregory Love & Co [1916] 1 Ch 203, [1914-15] All ER Rep Ext 1215, 60 Sol Jo 221 considered.
Fireproof Doors Ltd, Re, Umney v Fireproof Doors Ltd [1916] 2 Ch 142, [1916-17] All ER Rep 931, 60 Sol Jo 513 considered.
Tyrell's Ltd, Re [1929] SASR 450 considered.
Rushingdale Limited SA & Another v Byblos Bank SAL [1985] Lexis Citation 1514 considered.
R v Registrar of Companies, Ex Parte Central Bank Of India [1986] 1 QB 1114 considered.
JJ Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (n Liquidation) (1987) 13 ACLR 77 considered.
R (on the application of Mercury Tax Group) v Revenue and Customs Comrs [2008] All ER (D) 129 (Nov), [2008] EWHC 2721 (Admin) considered.
Re Peak Hotels and Resorts Ltd Crumpler and another (joint liquidators of Peak Hotels and Resorts Ltd) v Candey Ltd [2019] All ER (D) 48 (Mar), [2020] 1 BCLC 505, [2019] EWCA Civ 345 considered.

(2) Whether the renegotiation constituted the giving of new consideration in accordance with IA 1986 s 245(2)(a).

The meaning of the term consideration in the current context was not entirely free from doubt. However, IA 1986 s 245(2)(a) was limited to consideration which took the form of 'money paid, or goods or services supplied'. The issue was whether F's conduct in agreeing the renegotiation could be construed as the provision of a service to the company (see [86] of the judgment).

It was not the case that the noteholder of a company who agreed to a renegotiation of the terms of the note which he held was supplying services to the company for that purpose. On the case law, the key to that was whether the result of the arrangements was an increase in the amount of assets available for creditors. It was clear that the provision of intangible services could have that effect. However, where the 'service' provided was no more than a renegotiation of an existing arrangement, and there was no immediate material benefit to the company from the renegotiation, then there was no 'consideration' (see [87] of the judgment).

The consequence of a failure of the renegotiation would potentially have been the liquidation of the company. That demonstrated the significance and importance of the agreement eventually reached to the company. However, it did not mean that entry into that agreement was capable of constituting consideration. The concessions made by F in the renegotiation had not swelled the assets of the company available to creditors by any measurable amount, and therefore could not constitute consideration for the purposes of IA 1986 s 245 (see [88] of the judgment).

(3) Whether the note exchange had resulted in a discharge of a debt of the company within the meaning of s.245(2)(b). F could only succeed on that ground if the restructuring could be analysed as a cancellation of the existing debt due from the company, and the creation of an entirely new obligation in exchange for entirely new consideration. Two questions arose: (i) whether the note exchange constituted an entirely new transaction, and (ii) whether, even if it did, that transaction would satisfy the requirements of IA 1986 s 245.

The form of the new certificates was consistent with the transaction being an amendment of the terms of the existing Notes, and was inconsistent with the transaction being an issue of entirely new instruments. In particular, the fact that the new certificates described the notes as being those notes whose issuance had been approved by the original board resolution in relation of 22 November 2019 suggested very strongly that the transaction had simply been an amendment of those notes. The position might have been different if there had been a new board resolution authorising the issue of new notes on new terms, but there had not been (see [95] of the judgment).

Where a creditor of a company agreed to reduce or extinguish a money claim on that company as part of a transaction whose consequences were that it would acquire a new claim on that company of roughly equal value, that reduction or extinguishment would not constitute consideration for the purposes of IA 1986 s 245. In such a transaction, no new resources ever would become available to the company. Therefore, on the authorities, any exchange transaction where a company's liabilities on existing debt were extinguished, but only on condition that the company became liable for a new debt to the same creditor, would fail that test. The problem was not the exchange, but the automaticity. If a noteholder sold debt instruments issued by a company back to that company, and then reinvested the proceed of sale in new notes issued by the same company, that problem would not arise. The issue arose where the terms of the transaction placed the company in a position where incurring the new debt was the necessary price of being released from the old debt (see [106] of the judgment).

It was not the case that any transaction which substituted one debt obligation for another was 'a transparent subterfuge', and therefore could not constitute the provision of consideration under IA 1986 s 245. The striking down of a floating charge under IA 1986 s 245 did not carry any implication of wrongfulness (see [107], [109] of the judgment).

Ellis (Matthew) Ltd, Re [1933] B & CR 17, [1933] Ch 458, [1933] All ER Rep 583 applied.
Destone Fabrics Ltd, Re [1940-1942] B & CR 97, [1941] 1 All ER 545, [1941] Ch 319 applied.
Whyte (G T) & Co Ltd, Re [1983] BCLC 311 applied.
Fairway Magazines Ltd, Re [1992] BCC 924, [1993] BCLC 643 applied.
Re Comet Group Ltd (in liquidation) Kahn and another (in their capacity as the joint liquidators of Comet Group Ltd) v Institute of Charted Accountants in England and Wales [2018] All ER (D) 176 (Jun), [2018] EWHC 1378 (Ch) applied
Re Peak Hotels and Resorts Ltd Crumpler and another (joint liquidators of Peak Hotels and Resorts Ltd) v Candey Ltd [2020] 1 BCLC 505, [2019] EWCA Civ 345, [2019] All ER (D) 48 (Mar) applied.

(4) Whether the release of funds from DMCC pursuant to the renegotiation constituted money paid to the company within the meaning of IA 1986 s 245(2)(a).

The starting point was to return to the idea that consideration in that regard was that which swelled the assets of the company concerned and became available for creditors. On an insolvency of the company, it seemed likely that F's power to restrict the utilisation of the account would in effect have terminated. Consequently, at all material times after the company had acquired DMCC, the assets of DMCC would have been available to creditors of the company in a winding-up. F's agreement to partially remove his veto over their deployment had had the effect of increasing the assets of the company, and for that reason, it had not constituted consideration under IA 1986 s 245 (see [115] of the judgment).

Overall, the charge was a validly created security, and it was effective against the joint administrators. The charge had not been invalidated by IA 1986 s 245(2)(a) at the date of its creation, and was valid to the extent of the value derived by the company from its acquisition of the shares of DMCC (see [116] of the judgment).

Judgment date
12 October 2022

Judge
Simon Gleeson (sitting as a deputy judge of the High Court) (Chancery Division Court)

Representation
Olivier Kalfon and Joseph Bunting (instructed by Locke Lord (UK) LLP) for the applicants.
Daniel Petrides (instructed by McCarthy Denning) for the first respondent.
Christopher Brockman (instructed by Keystone Law) for the second respondent.

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