Neutral Citation Number: [2021] EWHC 746 (Ch)

Case No: BL-2021-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building,
Fetter Lane,
London EC4A 1NL

12 March 2021

Before:

Chief Master Marsh

- -

Between :

Riverside CREM 3 Ltd	**Claimant**
- and -	
Virgin Active Health Clubs Limited	**Defendant**

- -
- -

Mark Warwick QC (instructed by **Ince Gordon Dadds LLP)** for the **Claimant**
Ryan Perkins (instructed by **Travers Smith LLP**) for the **Defendant**

Hearing date: **12th March 2021**

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JUDGMENT

Chief Master Marsh **Friday 12 March 2021**

1. This is my judgment on the hearing of two applications. The first is made by the claimant landlord seeking judgment under CPR 24.2; the second is made by the defendant tenant applying for a stay of the claim or, alternatively, a stay of a judgment.
2. The claimant is the defendant's landlord of premises at 343 Westferry Circus, Canary Wharf, London E14. The defendant occupies the premises under an underlease dated 20 February 2003 for a term of 35 years from 7 May 1999. The passing rent is £741,047.20 per annum. It is common ground that there are currently arrears, that include an element of turnover rent, amounting to £928,727.04 plus costs under the underlease and interest. There is no dispute about the defendant's liability for the arrears of rent.
3. It is helpful at the outset of this judgment to record my gratitude to counsel Mr Warwick QC, who appeared for the claimant, and Mr Perkins who appeared for the defendant. I am most grateful to them for their assistance.
4. The key elements of the chronology can be set out in seven steps.
   (1) This claim was issued on 8 January 2021. The defendant had failed to pay rent that fell due on 1 April, 1 July, 1 October 2020 and 1 January 2021.
   (2) On the same day, as it happens, the defendant wrote to the claimant and to other landlords in terms which invited them, as it was put, to "bear with us a little longer". It was suggested that the defendant would be in a position to discuss shortly what were termed as "proposals for recovery". There was no indication at that stage of an intention to apply for a restructuring under Part 26A of the Companies Act 2006.
   (3) The claim was served on 22 January 2021.
   (4) The claimant applied on 19 February 2021 for summary judgment.

(5) On 24 February 2021, just a few days later, the defendant said it was then in a position to discuss proposals with the claimant and the claimant was invited to sign a non-disclosure agreement on the basis that the proposals included matters that were confidential. The claimant declined to sign the non-disclosure agreement on the basis that there were ongoing proceedings. Although it is not a matter which is in any way determinative, it does not appear to me that was a necessary conclusion for the claimant to have reached. In response to the claimant's refusal to sign the non-disclosure agreement, the defendant indicated that it was not as a consequence in a position to proceed with discussions.

(6) On 25 February 2021, the defendant made a request for the hearing of the claimant's Part 24 judgment, listed for today, to be adjourned. That request was refused.

(7) On 5 March 2021, the defendant made its application for a stay under CPR 3.1(2)(f), alternatively under the inherent jurisdiction. The defendant applies for a stay of execution in the event that the court declines to stay the claim. The period of stay that is sought by the defendant is some seven weeks, up to 30 April 2021.

5. The defendant's application is supported by a full statement from Mr Archibald. In substance, it is said is that the defendant, together with Virgin Active Health Clubs and Virgin Active Limited, are pursuing a restructuring plan under Part 26A of the Companies Act 2006. The chronology for that application is as follows:

   (1) On 10 March 2021, so just two days ago, the three companies sent out the Practice Statement Letter giving notice of its intention to proceed with the application for a restructuring. The letter was sent under the provisions contained in the Practice Statement issued by the Chancellor on 26 June 2020. The letter summarises the proposed restructuring for the benefit of all those affected by it.

   (2) On 25 March 2021, the court will hold the first hearing, the Convening Hearing;

(3) If the court agrees to the initial arrangements proposed at the Convening Hearing, or to other arrangement, there will be creditors' meetings held on 16 April 2021;

(4) The Sanction Hearing will take place on 23 April 2021.

6. Both hearing dates, the 25 March 2021 and 23 April 2021 are reserved in the court's diary. They are not a matter of aspiration; they are a matter of fact.

7. The premise for the proposed restructuring is that the defendant is in serious financial difficulty and that conditions A and B in section 901A(2) and (3) of the Companies Act 2006 are met. It is not in dispute between the parties that condition A is met by the defendant.

8. Mr Perkins drew my attention to section 901G and pointed out that the court is able to override the wishes of a dissenting class, or classes. Under that provision there are again conditions A and B. The court needs to be satisfied under condition A that the creditors are no worse off than under the relevant alternative, as it is defined; in this case that would be administration. Under condition B, the court must be satisfied that at least one class has approved the restructuring by the requisite majority.

9. In this case, it is clear by virtue of arrangements that have been made before the proposed restructuring was launched that the class of secured creditors will vote by a majority of more than 75 per cent in favour of the restructuring. It is therefore possible for the court to conclude, at this stage, there is, as a minimum, a reasonable prospect that the restructuring will receive the sanction from the court. Whether it will do so, of course, is a matter for the court to consider at the future hearings.

10. Mr Archibald's evidence explains that the defendant has been adversely affected by the pandemic and that, as at the end of February 2021, the United Kingdom clubs run by the defendant had been closed for seven of the preceding months. The defendant is therefore facing a cash flow crisis and is on the verge of running out of money altogether.

11. It is right to say that the claimant points out that there are underlying shareholders who are solvent who are in a position, if they choose to do so, to support the defendant, but it is not suggested that they are under any obligation to do so.

12. It is helpful just to refer to one passage from Mr Archibald's witness statement where he says:

> "Absent the implementation of the Restructuring Plans, given the Plan Companies' deteriorating liquidity positions, it is highly unlikely that there would be sufficient time to obtain the requisite level of creditor consent to implement any alternative transaction before the liquidity position becomes such that the Plan Companies have no choice but to file for administration."

13. He then goes on to say that:

> "... an administration would produce a lower recovery for the ... creditors ... than the outcome under the Restructuring Plans."

14. The jurisdiction of the court to make the orders sought by the defendant are not in doubt. The court has power under CPR 3.2(1)(f) to stay the claim and, under CPR Rule 87.3(4)(a), where there are special circumstances which render it inexpedient to enforce the judgment, the court may grant a stay.

15. It seems to me that there is little difference between the principles that apply under each of these rules in the current context. The court is unlikely to exercise its power under CPR 3.2(1)(f) in the absence of special circumstances, but it must be emphasised that the exercise of the court's discretion under each of these rules is highly fact-specific.

16. That said, some assistance can be obtained from the authorities. I have been referred to two authorities in particular. The first is a decision of Thomas J in *Sea Assets Ltd v PT Garuda Indonesia* [2001] 6 WLUK 58. The facts in that case decision are some distance from the circumstances that I am dealing with today. It was an application made under RSC Order 47, but it is of interest that Mr Justice Thomas makes reference in his judgment to Lord Brandon's speech in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 WLR 301 at 307 H.

17. It is important, of course, to emphasise that *Roberts Petroleum* was a case concerned with whether an interim charging order should be made final; but it seems to me that similar considerations apply because when the court is considering whether to make an interim charging order final, it is under a statutory requirement to have regard to the interests of other creditors.

18. Lord Brandon made the following observation which was cited by Thomas J:

> "The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute:
>
> (1) the fact that the judgment debtor is insolvent; and
>
> (2) the fact that a scheme of arrangement has been set on foot for the main body of creditors and has a reasonable prospect of proceeding."

19. In *Sea Assets Ltd v PT Garuda*, Thomas J was influenced to grant a stay particularly by two factors. First, there was a very short period of time during which the stay would last before the arrangement was considered and, secondly, that if the stay were not granted, as he put it:

> "... there must be a real and substantial risk that the whole of this scheme will fail."

20. That second consideration is not one that is applicable here.

21. The second authority of importance is the decision of Blair J in *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group and Others* [2013] EWHC 1146 (Comm). In that case the defendant was facing two separate claims by creditors. At paragraphs [8]-[10], Blair J summarised the immediate background to the application. I do not propose to read those paragraphs into this judgment. I merely observe that the immediate background, in relation to both claims that were before the court, was essentially similar to the circumstances in this case: a claim had been issued for a debt, an application for judgment came before the court and, at that point, the court considered an application for a stay.

22. One difference, however, between the circumstances in *Bluecrest* and the circumstances before this court is that in *Bluecrest* both claimants had had some involvement in the discussions that ultimately

led to the proposed restructuring and the discussions that had been involved overall had taken a substantial period of time.

23. It is common ground between counsel that the essence of Blair J's decision can be found in paragraphs [40]-[41].

> “40. Whether a stay should be granted is ultimately a matter of discretion. The main prejudice to the claimants in granting a stay is the fact that they will be precluded from taking steps to enforce judgments on claims to which there is no defence. That seems to me to be a substantial matter which carries great weight.
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> 41. As against it, there would, in my view, be prejudice to the lenders generally in allowing the claimants to go ahead and enforce now. It is clear that a vast amount of work has gone into this restructuring and, now that the requisite majority of lenders are agreed and 25 June 2013 is provisionally booked for the hearing, there is at least a reasonable prospect of the scheme finally going ahead. I agree with Vinashin that matters have now reached a delicate stage. I am satisfied that unless I grant a stay now, there is a risk of exactly the kind of free-for-all that Thomas J feared in the Garuda Airlines case. The balance, in my view, is in favour of a stay of the proceedings."

24. Mr Perkins does not rely upon there being a risk of a free-for-all. As I will explain, the application is put on a different basis.

25. I am now turn to the restructuring plan which I can summarise quite briefly. The plan has involved a great deal of input from a team that includes Deloittes, as the restructuring advisers, Grant Thornton and Mason Partners who are dealing with valuation, two eminent City law and leading and junior counsel.

26. The restructuring plans at present are not yet complete and have not been approved but in substance they comprise, so far as material the following elements:

    (1) Shareholders will provide an additional £45 million of funding;

(2) There would be compromises under brand licences which will produce further liquidity support of approximately £22.3 million up to April 2023;

(3) Landlords will be placed in a series of classes that are allocated by reference to the operating profit that is derived from the relevant company's occupation of the respective premises, with some adjustment for head office overheads, for the year to 31 December 2019.

27. I need only give two examples of the classes: class A includes landlords of premises where the operating profit is, or is equal to, 25 per cent. They will receive under the restructuring 100 per cent of the arrears of rent and full payment of future rent. Class B includes landlords where the operating profit is less than 25 per cent but equal to, or more than, 10 per cent. In the case of landlords falling within class B, the arrears of rent that have accrued up to the date of sanction are entirely written off and replaced with a sum which is equivalent to 120 per cent of the sum the landlord would receive in Administration. Rent going forward will be paid in full, save that the rent will be paid monthly. The claimant is classified as a class B landlord for the purposes of the restructuring.

28. Mr Perkins has suggested that there are four issues for the court.

(1). Does the restructuring plan have a reasonable prospect of being approved by the requisite statutory majority and sanctioned by the court? The answer to that question is clear, as I have already indicated. It is not in contention between the parties that the restructuring plan does have a reasonable prospect of being approved. Indeed, Mr Perkins would submit that there is a very strong likelihood that it will be approved. That of course remains to be seen.

(2) Would the purpose of the restructuring plan be undermined? Would there be a risk of unequal treatment of creditors? The answer to that is equally plain. If the claimant obtains judgment today and is able to enforce it successfully, then the claimant would receive substantially more than other landlords placed in class B.

(3) What is the timetable for the plan and how long need the stay last? I consider this is a highly material consideration. As I have indicated, the total period of stay from today is some seven weeks up to 30 April 2021. That date gives a margin of one week after the sanction hearing.

(4) Would a stay prejudice the legitimate interests of any relevant person and, if so, where does the balance of convenience lie? Plainly, this is the core question on this application and, as I have indicated, the answer is highly fact-specific; and the time at which the court considers the question may well have a material effect on the court's decision.

29. From the claimant's perspective, there are least four considerations to be brought into account.

(1) The claimant has held off from taking enforcement steps for a lengthy period of time. It would have been open to the claimant to have pursued proceedings for arrears of rent at any time after 1 April 2020. It is suggested by Mr Warwick that what the claimant has done is to, in the public interest, follow guidance from the Government and not to press the defendant too hard.

(2) There is no dispute that there is a substantial debt owed and, if a stay is granted, the claimant will be prevented from taking steps to obtain payment, a matter which Blair J characterised as "a substantial matter which carries great weight".

(3) At the time the claim was issued, no restructuring plan had been put forward. There was, however, a letter from Virgin, that happened to be sent on the same date the claim was issued. It was only after the application for summary judgment was issued that proposals for the restructuring emerged, and indeed it was only on 10 March 2021, two days ago, that the Practice Statement Letter was dispatched.

(4) The circumstances in this case are not on all fours with those that pertained in *Bluecrest*. It is not possible for the defendant to say that there will be, or may be, an unseemly rush of creditors.

30. From the defendant's perspective, there are again a number of considerations:

(1) Taking the position today, the Practice Statement Letter has been sent and so the restructuring process has been triggered.

(2) The court dates that will see the restructuring process through to an end have been booked, so that the process is not merely aspirational. It is a process that will take place.

(3) The period up to the date of the sanction hearing is short; it is just six weeks. The total period of stay is just seven weeks from today.

(4) If a stay is refused, it is clear that there will be some disruption to the restructuring process by virtue of the likelihood of the sum due to the claimant being removed from, as it were, the pot of money that is available to creditors.

(5) There are safeguards that can be applied. In particular the order, if it is made, can include a permission to apply provision and it can include a recital to the effect that the claimant is entitled to judgment, but for the stay, so that the claimant would not need to, if the restructuring were to fail, return to court for a contested hearing.

(6) Importantly, it is clear that if the stay is refused, the purpose of the restructuring would be to a degree undermined by virtue of the claimant receiving full payment instead of the amount that it would receive as a class B landlord creditor.

31. The purpose that lies behind Part 26A that was introduced last year is clearly a factor that is in the court's mind. It is significantly different in some ways to Part 26, for example there is a lower consent threshold. The interests of creditors who dissent can more easily be overridden.

32. Here the restructuring process is now underway. It is perhaps obvious that the court must consider whether to exercise its discretion as at the date of the hearing. To my mind, the fact that the claim was issued before the Practice Statement Letter was sent, or indeed before there was discussion about restructuring, is not a major consideration, albeit that it is a relevant one.

33. Faced with the position today, I do not consider that the claimant should be permitted to trump the effect of the proposed restructuring simply because of the timing of the issue of the claim. As it

happens, this claim has come on for hearing very quickly. It might easily have been the case, subject to court diaries and the diaries of the parties, that the application for summary judgment could have come on some time after the date of the sanction. As it happens, it has come on today, but that is simply part of the application of issuing dates on a first come, first served basis in the court diary.

34. In my judgment, it is right to have regard to the wider principle that creditors should be treated equally where a company meets conditions A and B in section 901A and the court is faced with an application for judgment. The process under Part 26A should be permitted to proceed without being impeded by a judgment being entered or enforced.

35. In short, balancing the interests of the claimant and the wider class of creditors, it seems to me that the interests of the wider class of creditors trump the private interests of the claimant. I have concluded, therefore, that it is right to grant an order for stay.

36. The final question to consider is whether the court should make an order for a stay of the claim, or should make an order to stay judgment. I have in mind the approach adopted by Blair J in *Bluecrest*. In the course of submissions, Mr Perkins suggested, albeit it does not appear from the judgment, that the reason why Blair J adopted the approach he did, by staying the claim rather than permitting judgment to be entered and staying the judgment, was the fact that there were foreign assets. A stay of a judgment can be enforced domestically but is rather more difficult to enforce it internationally. Such circumstances are unlikely to apply, or indeed less likely to apply in this case.

37. But there is another factor which I must take into account. The scope of an order for a stay under CPR 83.7(4) is, to my mind, not certain. The claimant, if there is a judgment and a stay of enforcement under that rule, may still be entitled to take steps to pursue other remedies. It seems to me that the right course of action here is to follow the approach adopted by Blair J. There is, as far as I can see, very limited and possibly no prejudice to the claimant in doing so.

38. I will therefore make an order for stay under CPR Rule 3, with the rule to include a recital of the claimant's entitlement to judgment and an order for permission to apply.