



Neutral Citation Number: [2020] EWHC 1295 (Ch)

Case Number 001122 of 2020

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (Ch D)**  
**IN THE MATTER OF PICTURE LOANS (NO.1) LIMITED ( IN MVL )**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice  
7 The Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Date: 29/05/2020

Before :

**DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC**

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Mr Philip Hinks ( instructed by Reed Smith LLP ) on behalf of the Applicants

Hearing date: 29 April 2020

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**APPROVED JUDGMENT**

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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Deputy Insolvency and Companies Court Judge Agnello QC

## **Introduction**

1. On 29 April 2020, I heard an application for directions issued by the Liquidators of the above named company. In essence, the Liquidators sought directions to be at liberty to discharge and release mortgages in which the company only had legal title and where the Liquidators believed there was no value in the outstanding mortgages. I heard the case and made the order sought. As the application raises an issue in relation to the ability of the Court to be able to give such a direction, I set out now my written reasons for the order I made on 29 April 2020. I have been much assisted by Mr Philip Hinks, Counsel on behalf of the Liquidators for his detailed submissions as well as his assistance before me in court.

## **Background**

2. The factual background is set out in the witness statement dated 13 February 2020 of Sarah Rayment, one of the Liquidators and I have taken the helpful summary set out in the skeleton of Mr Hinks. The company was incorporated on 11 June 2008 as a special purpose vehicle to hold the bare legal title to the rights arising from the mortgage loans which originated from two other companies, being Picture Financial Limited Services plc and Button Financial Services Limited. The loans all pre date 2007 and were secured by second ranking residential properties in England, Wales and Scotland.

3. The beneficial interest in the loans was held by a Jersey registered company, Picture Financial Jersey Limited ( PFJL). This company held the interest on trust for two other companies, being Scannan Finance Limited ( an Irish registered company ) and Picture Financial Funding ( No 3 ) Limited.

4. Title to the mortgage loans is held by the Company as governed by a written instrument, 'Deed of Assignment of Legal Title' which was entered into in 2008 ('the Assignment')

4.1 The final recital states:

“At the request of the Mortgages Trustee [being PFJL], the Sellers [being the originators of the loans] have agreed to sell, and the Legal

Title Holder [being the Company] has agreed to purchase, the bare legal title to the Assigned Mortgage Property [being the mortgage loans] to the Legal Title Holder to hold upon trust for the Mortgages Trustee...”

4.2 The said assignment was effected by clause 2.1 of the Assignment, which provides that the Company shall hold the mortgage loans on bare trust for PFJL.

4.3 As regards the Company’s ‘duty to account’, clause 3.1 provides:

“If at any time after Completion the Legal Title Holder holds or there is held to its order or it receives or there is received to its order, any monies, property, interest, right, title or benefit in, to, under or in respect of the benefit of such Assigned Mortgage Property, the Legal Title Holder will forthwith account for the same to the Mortgages Trustee and the Mortgages Trustee shall hold the same on the terms of the trust constituted by the Mortgages Trust Deed and until any of the same are so accounted for by the Legal Title Holder, the Legal Title Holder will hold such monies and such other property, interest, right, title or benefit upon trust for the Mortgages Trustee (pursuant, where applicable, to the relevant Scottish Declaration of Trust).”

4.4 In clause 3.2, the Company gave certain contractual undertakings, including (a):

“The Legal Title Holder shall not permit any rescission or cancellation of any Assigned Mortgage Property except:

- (i) in accordance with or pursuant to the terms of the Servicing Agreement (or any replace [sic] thereof); or
- (ii) as ordered by a court of competent jurisdiction, tribunal or governmental body.”

5. The ‘Servicing Agreement’ referred to in clause 3.2(a) was entered into on 25 June 2008 (‘the Servicing Agreement’). The company is not a party to that agreement, but by its terms, PFJL engaged a third party servicing company, Target Loan Servicing Limited (now Target Servicing Limited) (‘Target’), to service the mortgage loans on PFJL’s behalf. The company executed a power of attorney dated 24 June 2008 (‘the Power of Attorney’). By that power, the Company authorised representatives of Target to take any steps they considered desirable “*in connection with the discharge of any charge over any property that is secured against any loan that is owned by the Principal and serviced by Target Loan Servicing Limited*”.

6. As Ms Rayment sets out in her evidence, when mortgage loans were repaid in full, then the loan should have been discharged and released by Target. The company itself had no employees and was not involved in this process and the contractual terms set out above did not give it the power to deal with the mortgages in the way sought now by the Liquidators. As a special purpose vehicle holding the legal title, it is not surprising that the company had no active role in this respect.

7. In 2011-12, those loans which were considered to have value were sold to third parties. After that sale, the company was left with legal title to a number of defaulting, disputed or redeemed mortgage loans. No steps apparently had been taken prior to the sale to deal with these loans. Thereafter, as set out by Ms Rayment, PFJL was voluntarily struck off the register of Jersey companies on 28 June 2013, Scannan Finance Limited was dissolved under the relevant Irish companies provisions effective from 18 July 2012 and Picture Financial Funding ( No 3 ) Limited was voluntarily struck off the register of companies in England and Wales on 26 September 2017. From communications with Target, Ms Rayment believes that documents relating to the residual mortgage loans were destroyed by Target in or around April 2019 apparently in compliance with Target's obligations as the data processor of that information.

8. From the investigations carried out by the Liquidators, 24 mortgages remain registered in the name of the company, 9 relating to properties in England and Wales and 15 relating to properties in Scotland. Details of these mortgages are set out in the schedule to the order I made on 29 April 2020. Ms Rayment states that there may be other mortgages which remain registered in the company's name which have not as yet been identified by the Liquidators.

### **The Court Application**

9. The Liquidators seek directions from the Court pursuant to section 112 of the Insolvency Act 1986 and/or under its inherent jurisdiction or pursuant to its powers pursuant to section 57 of the Trustee Act 1925. Section 112 states,

“The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.”

Section 57 of the Trustee Act 1925 states,

“Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”

10. As Mr Hinks points out in his skeleton, there are many examples of the width of the type of directions the Court has given in the case law. The jurisdictional test needs to be satisfied and then the question for the court is whether, in all the circumstances, it is ‘just’ to make the order sought. As explained by Mr Justice Snowden in *Re Nortel Networks UK Ltd [2017] EWHC 1429(Ch)* at paragraph 93,

“the discretionary question is whether it is just for the court to give directions of the type sought, having regard to the need to protect the interests of persons who might have ... claims, but also recognising the need to facilitate an efficient conclusion to the insolvency process.”

11. In that case, Mr Justice Snowden also recognised the limitations of the use of the section 112 discretion, stating that directions would not be given which had the effect of illegitimately extinguishing the rights of creditors or varying the statutory waterfall or amounting to judicial legislation. In my judgement, this is not supposed to be an exhaustive list of the limitations upon the use of the section 112 jurisdiction. Mr

Hinks also referred to authorities relating to the parallel ‘directions’ provisions in relation to administrations, being paragraph 63 of Schedule B1 of the Insolvency Act 1986. *Re Allanfield Property Insurance Services Ltd* [2015] EWHC 3721 (Ch) at [49-50] per HHJ Keyser QC and *Hunt (Liquidator of Total Debt Relief Ltd) v Financial Conduct Authority* [2019] EWHC 2018 (Ch) at [10] per HHJ Monty QC are two cases where the Judges considered the exercise of the ‘directions’ jurisdiction as well as accepting in both cases that the court also had the ability to utilise its inherent jurisdiction. Both of these cases related to applications seeking directions relating to a distribution plan proposed in relation to the sums held on trust and in the hands of the office holder.

12. In *Re Pritchard Stockbrokers Ltd (in special administration)* [2019] EWHC 137 (Ch), a case concerned with determining interests under statutory trusts where the company in question was in special administration, Norris J held as follows at [25]:

“An application for directions under paragraph 63 of Schedule B1 is the appropriate vehicle. Where an insolvent company is a trustee, how the company should discharge its duties as trustee and execute the trusts upon which it holds property, and how it should avoid the generation of claims for breach of trust which would lie against its assets, are key questions to be addressed by the administrator: and he or she can properly seek directions as to how to perform their function in that regard...”

Again this was a case seeking a process for determining the interests in the trust and the proposed distribution. In relation to the inherent jurisdiction also relied upon by Mr Hinks, I reminded him of the useful passages of the judgment of Mr Justice David Richards (as he then was) in the case *Re MF Global UK Ltd (in special administration) (No 3)* [2013] EWHC 1655 (Ch). These were relied upon by HH Judge Keyser in *Re Allanfield Properties* and I set out the discussion and relevant passages from *MF Global* therein,

‘52. The inherent equitable jurisdiction was considered by David Richards J in *In re MF Global UK Ltd (in special administration) (No. 3)* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 . The company was a failed investment bank and held client moneys on statutory trusts pursuant to CASS 7 and CASS 7A. The special administrators applied for directions to enable them to distribute in circumstances where there was uncertainty as to the extent of valid claims against the trust pool. Very considerable difficulties would have attended an attempt to defer distribution until the extent of all valid individual claims was known: see in particular [9] and

[13]. David Richards J referred to the comment of Lord Neuberger of Abbotsbury MR in *In re Lehman Bros International (Europe) (No. 2) [2010] Bus LR 489* at [86]:

“I hope, indeed I would expect, that, if the administrators decide to make an application under the Trustee Acts or pursuant to the court's inherent equitable jurisdiction, in relation to dealing with beneficiaries' rights, the court will provide effective assistance, by arriving at a practical and fair outcome, while ensuring that delay and costs are kept to a minimum.”

David Richards J summarised the scheme proposed for his approval as set out in a draft order and said at [21]:

“The order does not purport to vary the beneficial interests of any clients and, accordingly, provides that the exclusion of any claimant from such a distribution is without prejudice to their right to participate in any subsequent distribution from the client money trust, if they duly establish their claim, and is also without prejudice to any tracing or similar remedy that might be available to them.”

Having indicated that the proposed scheme gave all potential claimants a proper opportunity to make their claims before distribution, the judge considered the scope of the inherent equitable jurisdiction in relation to trusts. At [26] he said:

“The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, *as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so*. A well established example of the exercise of the jurisdiction in this respect is the making of *In re Benjamin* orders: *In re Benjamin [1902] 1 Ch 723*. In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in *In re Green's Will Trust [1985] 3 All ER 455*, 462, an *In re Benjamin* order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them.”

53. The judge held that an *In re Benjamin* order was appropriate on the facts of that case and observed that it would provide protection to the administrators in respect of all possible claimants of whom they were unaware. However, the cases concerning such orders were concerned with “circumstances where it is impossible or impracticable to establish the facts one way or another”; an *In re Benjamin* order would not therefore provide protection in respect of known claims that had been rejected but not subjected to judicial determination. Nonetheless, David Richards J held that the inherent jurisdiction was wide enough to enable the court to give directions for distribution even though there were known claims by persons claiming to be beneficiaries. In such a case distribution would not destroy any proprietary claim but would provide protection to the trustees or administrators against claims by those claiming to be entitled: see [30] – [31].’

13. I have highlighted in the above quote that, as stated by Mr Justice David Richards in *MF Global*, the inherent jurisdiction is part of a jurisdiction to supervise and administer trusts. It permits the court to give directions to trustees to distribute trust property on a particular basis when the court is satisfied that it is just and expedient to do so. In the case before me, unlike in all the above cases relied upon, the issue is one of seeking directions so as to enable the Applicants, as Liquidators to be at liberty to take such steps which would effectively extinguish beneficial interests, in so far as those interests are still in existence. There is evidence that in certain cases, the charges should already have been released and have not been. In other cases, as Mr Hinks submitted, the mortgages may well be incapable of enforcement for a variety of reasons or they may simply have no value.

14. Despite the submission of Mr Hinks, I have some concern that the directions being sought can be made pursuant to section 112 of the Insolvency Act 1986. In all the cases referred to, the court was dealing with distributions of trust assets and in all the cases, the Court had available the inherent jurisdiction as well as the relevant 'directions' provisions. In relation to the use of the inherent jurisdiction, I again have concerns about its applicability. What is being sought in this case does not fall under the definition which I have highlighted in the passages from *MF Global* above.

15. It seems to me that the current application does easily fit into the jurisdiction available to this court relating to section 57 of the Trustee Act 1925. According to that provision, which I have set out above, the Court can exercise the power to confer on trustees the necessary power in relation to any sale, lease, mortgage surrender or release. The condition is that the trustees are unable themselves to exercise any power. That is the case here according to the evidence because the Liquidators do not have the power otherwise to release the mortgages by reason of the contractual framework which I have set out above.

16. In my judgment I am satisfied that the court has jurisdiction to deal with this matter pursuant to section 57 of the Trustee Act 1925, despite my concerns as to whether the application falls within section 112 of the Insolvency Act 1986 or within the inherent jurisdiction. Although strictly speaking such application would be

brought before this court and would progress by way of a Part 8 claim, I do not consider it is necessary to allow issues of form rather than substance, to prevent me from dealing with the case before me. The quote from *Re Lehman Europe International Europe ( No 2 )* of Lord Neuberger set out above makes it clear that when administrators ( and the position in relation to liquidators will be the same ) make an application under the Trustee Acts or pursuant to the court's inherent equitable jurisdiction, in relation to dealing with beneficiaries' rights, the court will provide effective assistance, by arriving at a practical and fair outcome, while ensuring that delay and costs are kept to a minimum. In those circumstances, I dealt with the matter at the hearing reserving the written reasons for the decision to be delivered on another day. Equally, it does not serve any purpose to make the Liquidators apply by way of Part 8 claim and would increase costs.

17. The Liquidators have notified the Treasury Solicitor, the Irish Minister for Public Expenditure and Reform and the Jersey Receiver General of this application. Under English law, any beneficial interest would fall by way of bona vacantia to the Crown. None of those bodies have indicated any objections to the proposed order in this case. The order which I made on 29 April 2020 provided in any event an express liberty to apply to those bodies upon receipt of the order. The order sought facilitates an efficient conclusion to the liquidation. It also enables those charges which should have been released to be released. It seems sensible to take these steps rather than taking steps towards the dissolution of the company and leaving this matter unresolved. That in my judgement would be unsatisfactory in those cases when there is evidence of parties to those mortgages seeking the removal of charges over properties. The mortgages which had any value were transferred on 2011-2012. I am satisfied that the order should be made and indeed did make the order. As it appears the application made was one which did not fit into the types of cases previously before this court, I have now set out my reasons for making the order.

**Dated**