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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2018] EWHC 1425 (Ch)



No. BL-2018-000367

Royal Courts of Justice

Thursday, 29 March 2018

Before:

MR JUSTICE ZACAROLI

B E T W E E N :

(1) NICOLE CHARLOTTE LEDERER
(2) PURRINOS INVESTMENTS LIMITED

Claimants

- and -

(1) ALLSOP LLP
(2) ANNIKA KISBY
(3) VICTORIA LIDDELL

Defendants

MR T. ROE QC (instructed by Pinder Reaux & Associates) appeared on behalf of the Proposed Claimant.

MR D. HALPERN QC (instructed by DAC Beachcroft LLP) appeared on behalf of the Proposed Defendant.

J U D G M E N T

MR JUSTICE ZACAROLI:

- 1 This application raises two short matters for decision: first, the joinder of parties and, secondly, disclosure of the names of lenders.
- 2 The current parties to the proceedings are, as claimants, Ms Nicole Lederer and Purrinos Investments Limited (“Purrinos”) and, as defendants, Annika Kisby and Victoria Liddell, who are receivers appointed over property owned by Purrinos. As between the existing claimants and the existing defendants, the proceedings have been settled. Ms Lederer, alone among the existing parties, has an interest in the claim which is now sought to be pursued.
- 3 The proposed new claimant is Hanamay Limited (“Hanamay”). Hanamay was the borrower in respect of a land loan and a building loan for the purposes of purchasing developments and land at Homer Road. The identity of the lenders (of whom there are many) is unknown (and is the subject matter of the disclosure application). The lenders’ agent is a company called Lendy Limited (“Lendy”), represented by Mr Halpern QC.
- 4 The proposed claimants contend that the lenders under the building loan breached their obligation to lend, that this constituted a repudiatory breach, and that this was accepted by Hanamay. The proposed claimants therefore seek the joinder of Hanamay, together with two other companies which owned separately a part of the property, as claimants and the joinder of Lendy as defendant. In due course, it appears that the claimants would wish to join the lenders as well.
- 5 There is no substantive objection to the joinder. Mr Halpern QC, however, contends that the joinder should be on terms that security for costs is provided. There is understandably, given the speed with which this matter came on, no separate application for security. I have some intimation of the grounds on which it will be made, but it has not been formally made and I have no indication, for example, what sums will be requested or how the security should be satisfied.
- 6 In my judgment, the short answer to this point is that there would be nothing to stop the proposed claimants simply beginning new proceedings in circumstances where the issues in the existing claim, relating to a different property, another company and a different loan, have been settled. If that were done, while the defendants could apply speedily for security for costs, they could not object to the new claim being commenced. Joinder to the existing proceedings (as opposed to commencing wholly new proceedings) is sought for reasons of convenience. In those circumstances, and where no formal application or supporting evidence is before me, I do not think it is appropriate to make it a condition of joinder that security be provided.
- 7 Turning to the question of disclosure, Mr Roe QC for the proposed claimants contends that this is a very straightforward issue. The loan agreements are between Hanamay and a number of lenders whose identity is not disclosed, a list of whom is maintained by Lendy who acts as agent under the loan agreement. In circumstances where the claim being asserted is one where the lenders have wrongly, in repudiatory breach of contract, failed to comply with their obligations to lend money, Mr Roe QC submits that it is the lenders who are the proper defendants, and the agent should be ordered to disclose their identity.

8 Mr Halpern QC says that this is a case where by reason of the terms of the loan agreement and related documents, Lendy is the only person who is liable to be sued under the contract. He relies in particular on the following provisions. First, a document headed “contract details” entered into between Hanamay and Lendy, which is dated the same date as the loan agreement. He relies in particular on clause 3.7 of that document which provides as follows:

“Once you have accepted the loan request offer, you [i.e. Hanaway] automatically enter into a separate and legally enforceable loan contract with each of the lenders for each relevant loan part. The identity of the lenders will not be disclosed to you and may change during the term of the loan contract.”

9 He also relies on clause 3.9:

“In [all relevant documentation], we will quote each lender’s address as being care of Saving Stream [a division of Lendy] acting as agent on behalf of the lenders and state Saving Stream’s postal address. Each borrower agrees that all notices and communications to be given to a lender will be sent to Saving Stream and this is sufficient to identify the lenders for the purposes of the loan contracts.”

10 He also relies on clause 3.11 which relates to the permission for lenders to be changed during the course of the agreement, without any notification being given to the borrower of the change in lenders.

11 Finally, he refers to clause 6.1 dealing with security, which appoints (or at least contains the provision for possibly appointing) Savings Free Security Holding, acting as agent and trustee on behalf of the lenders, to enforce the security created by the legal charge. I note in passing that the agreement therefore recognised the difference between an agent and a trustee, and specifically the availability of a trust mechanism in circumstances where lenders wished not to be in a legal relationship with the borrower.

12 He also referred me to the terms of the loan agreement itself, in particular: (1) recital B which provides that any lender may cease to be a lender and any person approved by the agent may become a lender during the term pursuant to the terms of the agreement; and (2) clause 13, which contains the detailed provisions for the changes to the lenders.

13 So far as authority is concerned, Mr Halpern QC cites the case of *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370. At page 371, Wright J said:

“There is on doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal, and not that of the agent ... *Prima facie* at common law, the only person who may sue is the principal and the only person who can be sued is the principal.”

At p.372 Wright J said:

“Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.”

- 14 There are a number of features of the loan agreement and connected documents which clearly identify the lenders and not the agent as the real contracting party. These were identified by Mr Roe QC as including the following. First, Lendy's standard terms as regards lenders, which mirrors the document it entered into with the borrowers I have already identified, states on the first page as follows:
- “If you decide to become a member of [what is described as] the Lendy platform, you must comply with these terms and conditions.”
- 15 The fourth paragraph on that page states:
- “Each agreement between each lender and borrower comprises a loan agreement.”
- 16 Over the page at clause 1.2, it defines Lendy's authority as follows:
- “Lendy is authorised by the lenders who entered into the loan contract as agent for the lenders. Lendy will act as agent on behalf of the lenders in relation to the loan contract... Lendy's role on behalf of the lenders is limited solely to administrative functions.”
- 17 At clause 7.4 of the document, the following appears:
- “The loan contract will detail the legal terms of the loan made directly by you as lender to a borrower and the loan amount will be detailed in your lender account on the platform.”
- 18 Then clause 7.5 identifies the address of service as that of the agent. Clause 7.8 states:
- “A loan contract and any related security is a bilateral agreement between the lender and the borrower. Lendy and/or Saving Stream Security Holding has no liability for payment or repayment of any amounts due in relation to the loan contract or any security document.”
- 19 So far as the loan agreements themselves are concerned, they are on the face of it entirely consistent with the position that the agent acts only as agent and that the principal is the real party in interest. For example, at the first page of the agreement dated 25 April 2017, the parties are defined as the borrower and Saving Stream, a division of Lendy, as agent for the lenders. “The lenders” is a defined term being:
- “The persons who have agreed with the agent from time to time to provide all or part of the loan to the borrower and whose names and addresses are maintained by the agent.”
- 20 Clause 2 contains the principal obligation of the lenders and states:
- “The lenders agree to lend to the borrower the aggregate amount of the loan on the terms of the loan agreement in the proportions that they have agreed with the agent.”
- 21 In my judgment, these indicate quite clearly that the real contracting party is the lender, not the agent. Far from there being an express provision removing liability of the principal, the contract clearly indicates that the lenders and not the agent have the obligations, and are

liable, under the agreement. I note that the provisions referred to by Lendy to an extent reinforce this. For example, in clause 3.11 of the terms and conditions of the borrower, the consequences of a transfer and rights of obligations of lenders is stated as follows: the original lender will be released from any obligations to the borrower and the new lender and the borrower will at the point of the transfer assume those obligations towards each other as if the new lender had been the original lender in respect of the relevant loan parts. In other words, it clearly contemplates real obligations resting on the lenders.

- 22 Similarly, clause 13.2.2 of the loan agreement itself envisages that the existing lender on a transfer is released from all the obligations under the agreement and the new lender (at 13.2.3) correspondingly becomes bound by those obligations. In my judgment, there is insufficient in the terms of the second sentence of clause 3.7 of the borrower's terms and conditions, which is the clause stating the identity of the lenders will not be disclosed, to displace the clear intention provided by the loan agreement and other documents as a whole that the lenders are parties who assume the obligations under the agreement. In other words, there is clearly insufficient, in my judgment, to amount to an implied term of the type referred to in the paragraph of Wright J's judgment in *Montgomerie*.
- 23 The only other possible objection to disclosure is the very statement in clause 3.7. So far as that is concerned, I accept Mr Roe's submission that such a statement cannot amount to an agreement that, for all purposes, the lenders' identity shall remain secret. I note in particular there is no such provision in the terms and conditions between the lenders and Lendy, which is where one would expect to find a provision requiring the agent to keep the lenders' identity secret. At most, clause 3.7 amounts to a statement that Lendy would not voluntarily disclose the identity of the lenders. Where, however, the borrower has (what is accepted to be for the present purposes) an arguable cause of action against the lenders, in my judgment, that provision cannot override the requirement that the borrower is entitled to discover the identity of those against whom it has a claim.
- 24 For those reasons, I will order the joinder asked for and the disclosure sought. I note that what is to occur hereafter is a matter for consideration on another occasion. If, which is suggested, there are some thousands of lenders who are parties to the loans to this borrower then there will have to be some very careful case management thereafter.

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This transcript has been approved by the Judge