Neutral Citation Number: [2022] EWHC 3472 (Ch)

Case No: BR-2022-000548

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (Chd)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 29th December 2022

Before:

MR. JUSTICE FANCOURT
Remotely via Microsoft Teams

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IN THE MATTER OF CIMOLAI S.P.A
AND IN THE MATTER OF LUIGI CIMOLAI HOLDINGS S.P.A.
AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

MR. ADAM AL-ATTAR and MS. LOTTIE PYPER (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Foreign Representatives of Cimolai S.p.A and Luigi Cimolai Holdings S.p.A.**

MR. MAURICE HOLMES (instructed by **Bonelli Erede Lombardi Pappalardo LLP**) for **Natixis SA**

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Approved Judgment on Application

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE FANCOURT:

1. I have before me an urgent application issued on behalf of Patrizia Paier, said to be the Foreign Representative in relation to court proceedings in Italy relating to two companies, Cimolai SpA and Luigi Cimolai Holdings SpA, which I will refer to, as everyone else has, as "Cimolai" and "Luigi", to distinguish them where necessary.

2. The urgent application is for interim relief ahead of the hearing of a recognition application in relation to the insolvency proceedings in Italy under the Cross-Border Insolvency Regulations 2006. The substantive application may not be heard for a number of weeks and in the meantime the Foreign Representative seeks an interim order in the following terms:

> "1. Pursuant to Articles 19(1)(c) and 21(1)(g) of Schedule 1 to the CBIR and paragraphs 42 and 43 of Schedule B1 to the Insolvency Act 1986, until after determination of the Recognition Application or other order in the meantime, no legal process (including legal proceedings, execution, distress and diligence or any winding up or administration) may be instituted or continued against the Companies, or property of the Companies located in England and Wales, except: (a) with the consent of the Foreign Representative; or (b) with the permission of the Court."

3. It is proposed that interim relief, if granted, should continue until the substantive hearing of the recognition application which, in turn, it is suggested should happen before about the middle of February 2023. The draft order does, however, provide an opportunity for any creditor affected or any other person to apply to the court to vary or discharge any relief granted, on two clear days' notice.

4. The recognition application is made in the context of proceedings in relation to both companies started in Italy under Article 44(1) of Royal Decree number 267/1942 (Italy) (Regulation of Bankruptcy, Arrangements with Creditors, Receivership and Compulsory Administrative Liquidation), which is commonly referred to as the "Crisis Code".

5. The application made in relation to both companies under Article 44(1) of the Crisis Code is for a period of time, in the first instance 60 days, in which the companies can formulate one of three types of restructuring proposal to present to the creditors. The second stage of the procedure begins if the debtor does present a restructuring proposal to the Italian bankruptcy court, and then there is a further period of time for the supervising judge to investigate the proposal and for the proposal to be considered by relevant classes of the creditors of the company.

6. At the first stage of the process, there is no automatic stay on any actions by creditors against the companies, but the Crisis Code provides, by Articles 54 and 55, for an order to be capable of being made staying or suspending further proceedings against the company. That is what happened on this occasion. The Companies applied to the court in Trieste to initiate proceedings under the Crisis Code and the proceedings were commenced by orders made on 24 October 2022.

7. Discretionary relief under Article 55 of the Code was granted in relation to Cimolai and Luigi on that occasion in the following terms, in translation:

> "Having regard to of Articles 44, 54, paragraph 2, first sentence, and 4, 55, paragraph 3, CCII
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> "(1) confirms that as of the date on which the application is filed in the Business Register under Art. 44 CCII, the creditors are not entitled to initiate or give course to remands and enforcement procedures involving the capital of Cimolai S.p.A. or on the assets and rights according to which the company pursues business."

8. The evidence on behalf of the Foreign Representative given by an Italian lawyer, Ugo Giordano, is to the following effect:

> "The Italian Bankruptcy Court confirmed on an *ex parte* basis that the company's creditors both secured and unsecured could not begin or continue enforcement actions, including seeking precautionary measures on the assets of the companies with effect from 25 October 2022, the date on which the companies' applications under section 44(1) of the Crisis Code were published in an Italian public register."

As I have said, the question of whether there should be recognition of those foreign proceedings is to be determined on another day, which in my view should be before about the middle of February 2023.

9. In those circumstances, the application for interim relief falls to be considered, as Mr. Al-Attar submitted on behalf of the Foreign Representative, under three heads: first, is there an arguable case for recognition of the foreign proceedings as foreign main proceedings in due course? If so, second, is there evidence which establishes a need for the stay that is sought to protect the assets of the debtor companies and/or to protect the rights of the creditors of the companies as a class? If so, third, does the balance of convenience favour granting the stay as sought or in some other terms?

10. So far as the first of those matters is concerned, the case for recognition in due course, I can deal with this relatively swiftly, because all that has to be established on the hearing of this application is that there is an arguable case for recognition in due course. Under Article 17 of Schedule 1 to the Cross-Border Insolvency Regulations, which is the UNCITRAL Model Law, a foreign proceeding is to be recognised (there being no discretion) if: first, it is a foreign proceeding as defined in subparagraph (i) of Article 2; second, the Foreign Representative applying for recognition falls within the definition of a Foreign Representative in Article 2(j); third, the evidential requirements in that regard have been met; and, fourth, that the application has been submitted to the right court.

11. The particular type of Italian proceedings with which I am concerned have not directly been considered before by a court in England and Wales, although they have been

considered in the Federal Court of Australia on a similar application, where such proceedings under the predecessor legislation of the Crisis Code were recognised as foreign proceedings as defined in Schedule 1.

12. Having heard Mr. Al-Attar at some length as to why the definition of "foreign proceedings" in Article 2(i) is met in this case, I am perfectly satisfied that there is an arguable case. In order to be a foreign proceeding, the proceedings have to be a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency, and a proceeding in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation.

13. I am satisfied, as I say, that each of these requirements is arguably met on the facts of this case, on the basis of the *concordato* proposal which it is intended to be made under Article 44 of the Crisis Code.

14. The next question, therefore, is whether the applicant, the Foreign Representative, has established a sufficient basis for the grant of a stay in this country. The evidence principally relied upon is this. First, the risk of an insolvency proceeding being started in this country could have a damaging effect on the reputation of the two companies, which it is proposed will be restructured and survive as trading entities following the Italian proceedings. Second, that any insolvency proceedings in this country could have a destabilising effect on the conduct of the Italian proceedings in the interest of all the creditors of the company. Third, that not granting a stay at this time would cause the companies to have to incur substantial expenditure in the form of legal fees in defending a number of actions that have been brought against Cimolai or Luigi in this country by creditors who seek to advance claims under English law against those companies.

15. The claims, as I understand it, are numerous claims relating to derivative transactions entered into between the companies and the counterparty claimants. In relation to three of the claims in particular there is a deadline soon approaching for the companies to file defences and in one other case there is a hearing to be scheduled on an application by Cimolai to set aside a default judgment that was entered against it. It is said that substantial money will have to be spent dealing with that litigation if the stay is not granted, which might turn out to be a waste of time and money depending on the outcome of the proposal made in due course to the court in Trieste and any parallel restructuring proceedings that may be issued in this country.

16. The terms of the stay that the Foreign Representative seeks mirrors the stay that would be imposed automatically under paragraphs 42 and 43 of Schedule B1 to the Insolvency Act 1986, in the case of an administration application or administration order in this country, which in very many cases is also for the purposes of restructuring and the survival of the company as a going concern. It is well established that, on the making of a substantive Recognition Order in such a case, the English court is generally willing to grant relief in the form of a broader stay than the stay which would otherwise automatically apply under section 130(2) of the Insolvency Act 1986. Mr. Al-Attar therefore submits that it is appropriate for the same relief to be granted in those terms on this interim application.

17. On the basis of the evidence that I have read, which at this stage is all in one direction because none of those notified of this application have yet sought to challenge formally the application or put in any evidence themselves, there is a sufficient case for a stay to be granted at this stage, in order to protect the assets of the companies and the interests of the creditors as a class and not simply those creditors who have issued claims against the companies in this jurisdiction.

18. As to the terms in which the stay is sought, Mr. Holmes, counsel who appeared on behalf of Natixis (one of the claimants in the English claims against the companies) said that on the basis of Mr. Giordano's evidence, to which I have referred, relief is being sought in this country that is wider than the effect of the relief that appears to have been granted under Article 55 of the Crisis Code in Trieste, and that for that reason the court, if it is to make an order at this stage on an interim basis should only make it in terms that fully mirror the terms of the Trieste order.

19. Mr. Holmes also said that in any event, to make an order that has the effect of staying the English litigation against the companies would amount to clear prejudice to the English claimants, because it prevented them from being able to proceed with those claims and establish their rights.

20. In response to his points, Mr. Al-Attar submitted that it was not accepted that there was a difference between the relief being sought in this country and the effect of the relief granted under the order made under Article 55 in Trieste, but that in any event looking at the matter in terms of the balance of convenience it was more appropriate to grant a stay in the terms of the order sought because it would serve the purpose of saving the companies from having to expend potentially quite large sums of money defending proceedings that, in the event, would be overtaken by the future restructuring of the companies' debts.

21. As to Mr. Holmes's point of prejudice caused to the English claimants, I similarly consider that that prejudges the issue of what may happen by about the middle of February in relation to the proposed restructuring. If a restructuring in Italy and a parallel restructuring of the companies' English law debts are proposed by then that meet with the approval of the creditors as a body, and are then sanctioned by the courts, any money spent by the claimants in pursuing the litigation up to that point and money spent by the companies in defending that litigation will prove to be wasted on both sides, and it is not therefore possible to say in black and white terms that the stay now sought will necessarily prejudice the interests of the English claimants.

22. I look at this matter as a short-term interim remedy, to hold the position until there is greater clarity, which there will be either by the time when the substantive recognition application is heard and an order made, or, if that does not happen before the middle of February, by the time that the companies' restructuring proposals are known.

23. The balance of convenience seems to me to favour granting the stay in order to ensure that there is no significant loss of the assets of the companies before those matters are determined, and so that the companies can focus their attention on the restructuring proposals that they intend to put to the creditors.

24. It does seem to me that relief which broadly mirrors that which is already in effect in Italy is likely to have the result of ensuring fairness as between the various creditors of

the company, whether English, Italian or of other nationalities. I accept that there is an argument, namely that raised by Mr. Holmes, as to whether the relief actually sought by the Foreign Representative in this court goes further than the relief that has been granted in Trieste, but that is not a matter that I am able to resolve on the basis of the evidence as it stands, there being some doubt about the exact effect of the Trieste order.

25. In any event, for reasons that I have already given, it does seem to me that the order as sought is appropriate in the short term. I emphasise, of course, that I am not prejudging any considered arguments that may being brought to bear on the question by any of the creditors in due course. They have been given less than 24 hours' notice of the fact of this application and it is, therefore, understandable that only one of them was able to instruct counsel to attend and make limited submissions in relation to the matter today.

26. The order that I will make gives any such person liberty to apply on two clear business days' notice to vary or discharge the stay that I am going to order today.

(For continuation of proceedings: please see separate transcript)