Neutral Citation Number: [2021] EWHC 2003 (Ch)

Case No: CR-2021-001057

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

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

Date: 16/07/2021

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

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IN THE MATTER OF CLAVIS SECURITIES PLC
AND IN THE MATTER OF CLAVIS OPTIONS LIMITED
AND IN THE MATTER OF INTERTRUST MANAGEMENT LIMITED
AND IN THE MATTER OF INTERTRUST CORPORATE SERVICES LIMITED
AND IN THE MATTER OF INTERTRUST DIRECTORS 1 LIMITED
AND IN THE MATTER OF INTERTRUST DIRECTORS 2 LIMITED

Between :

(1) CLAVIS SECURITIES PLC **(2) CLAVIS OPTIONS LIMITED** **(3) INTERTRUST MANAGEMENT LIMITED** **(4) INTERTRUST CORPORATE SERVICES LIMITED** **(5) INTERTRUST DIRECTORS 1 LIMITED** **(6) INTERTRUST DIRECTORS 2 LIMITED** **(7) PAIVI HELENA WHITAKER**	**Claimants**
- and -	
(1) RIZWAN HUSSAIN **(2) DIGITAL ASSET PARTNERS LTD** **(3) HIGHBURY INVESTMENTS LIMITED** **(4) AMANDA WATSON** **(5) ANNABEL WATSON** **(6) THE REGISTRAR OF COMPANIES**	**Defendants**

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Ms Charlotte Cooke (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimants**
The **Defendants** did not appear and were not represented

Hearing date: 15 July 2021

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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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 16 July 2021 at 10.30am.

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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGEA

Mr David Halpern QC :

1. This is my judgment following the hearing yesterday of a Part 8 Claim by the Claimants, who claim that the First to Fifth Defendants ("**the Defendants**") have purported to remove the Fourth to Seventh Claimants as directors and secretary of the First and Second Claimants and have appointed some of their number as directors and secretary of these companies. The Registrar of Companies has been joined as Sixth Defendant but has written to say that she is content to abide the outcome of these proceedings and takes no active part.

2. There are three principal issues which I must consider:

   i) Should I proceed to hear the claim in the absence of the Defendants and in circumstances where they are disputing the court's jurisdiction?

   ii) If so, have the Claimants established that all the steps taken by the Defendants are null and void?

   iii) If so, what relief should I grant?

The facts

3. I take my summary of the facts from the witness statement of Ms Paivi Whitaker, the Seventh Claimant ("**Ms Whitaker**" or "**C7**"), who is a director of each of the Claimant companies.

4. The First to Sixth Claimants ("**C1-6**") are the different parts of a corporate structure created in relation to notes issued pursuant to the securitisation of portfolios of residential mortgages ("**the Notes**"):

   i) C1 is the issuer of the Notes;

   ii) C2 acts as post-realisation purchase option holder;

   iii) C3 provides corporate services for C1 and C2;

   iv) C4 is the Share Trustee of the shares in C1 and C2 pursuant to Share Trust Deeds dated 30 May 2006 and 11 April 2006 respectively and is also the company secretary of C1 and C2; and

v) C5-7 are the directors of C1-2.

5. Each of the Share Trust Deeds provides by clause 9 as follows:

"***Appointment and removal of trustees***

9.1 ***Power of appointment*** *The statutory power of appointing new or additional trustees as modified under this Deed shall apply to this Deed and the Trusts and shall be exercisable by the person or persons who are for the time being the Trustees.*

9.2 ***Modifications to statutory power*** *The statutory power of appointing new or additional trustees shall be modified as follows:*

(a) where new or additional trustees are appointed for the whole or any part or parts of the Trust Fund, the appointor or appointors may appoint any person or persons as trustee or trustees, notwithstanding that such person or persons may be resident, domiciled, carrying on business or (if a body corporate) incorporated outside the United Kingdom, and the receipt of such person or persons for the whole or such part or parts of the Trust Fund as may be paid or transferred to such person or persons pursuant to such appointment shall be a good discharge to any other Trustee or Trustees accordingly;

(b) the statutory power of appointing new trustees shall be exercisable notwithstanding that a trustee remains out of the United Kingdom for more than twelve months; and

(c) the statutory power of appointing additional trustees shall be exercisable notwithstanding that one of the trustees for the time being is a trust corporation.

9.3 ***Retirement of a Trustee***

(a) A Trustee of this Deed may retire at any time without assigning any reason and without being responsible for any costs occasioned by such retirement.

(b) A retiring Trustee shall be discharged from the trusts of this Deed even if only one trustee which is not a trust corporation thereafter is or remains a Trustee under the Trusts.

(c) The retirement of any such Trustee shall not become effective until a successor trustee is appointed, if necessary, so that there shall be a trust corporation or at least one individual to act as Trustee under the Trusts."

6. On 16 April (all dates are in 2021 unless otherwise stated) the First Defendant ("**Mr Hussain**") wrote to C3-7 enclosing the following resolutions made, or purportedly made, on 15 April by the Third Defendant ("**Highbury**"), who claims to be an investor with a beneficial interest in more than 50% of the Notes:

i) A resolution removing C4 as Share Trustee and taking receipt of the issued share capital of C1 and C2; and

ii) Resolutions removing C5-7 as directors of C1 and C2.

7. On 16 April Mr Hussain also wrote to HSBC Trustee (C.I.) Ltd and Bluestone Mortgages Ltd purporting to remove them as Security Trustee and General Treasurer respectively.

8. The Claimants instructed Bryan Cave Leighton Paisner ("**BCLP**"), who first wrote to Mr Hussain on 20 April refuting his purported actions. Mr Hussain maintained his position and has sent a number of notices to Noteholders purportedly on behalf of C1 and C2.

9. On 30 April and 6 May the Fourth Defendant ("**D4**"), purporting to be an officer of C1 and C2, filed changes of registered office for C1 and C2. On 7 May forms were filed terminating the appointments of the directors of C1 and C2, appointing Mr Hussain and Highbury as directors of C1 and C2, appointing C2 as a director of C1, terminating the appointments of C4 as corporate secretary of C1 and C2, appointing the Second Defendant ("**D2**") as corporate secretary of C1 and C2, and recording Highbury as a PSC (person with significant control) in lieu of C4. The Register was altered pursuant to these notices, so that the Defendants are now registered as officers of C1 and C2 and all correspondence is sent to D2's registered office. BCLP have corresponded with Companies House who have declined to make any further alteration to the Register without a court order.

10. On 21 May D4, purporting to act on behalf of D2, wrote to Ms Whitaker, stating that criminal proceedings had been brought against her by the Crown in the Westminster Magistrates Court on 14 counts of fraud by false representation. BCLP wrote to that court, who responded on 8 June saying that it was unable to locate this matter. I am satisfied that no such proceedings were ever brought.

11. The current Part 8 Proceedings were issued on 11 June.

12. D4 has not acknowledged service and is out of time for doing so. The other Defendants all acknowledged service on 2 July but stated that they intended to dispute the court's jurisdiction. Under the Rules, they must do so within 14 days, i.e. by 16 July (today).

13. On 18 June Highbury had written to say that it disputed the court's jurisdiction on the ground that:

> "*we are an entity that is owned by the Islamic Republic of Pakistan and not distinct from the executive organs of the government of the State. Furthermore, we would be deemed to be property of the State Bank of Pakistan*".

No evidence was given in support of that proposition. On the same day Mr Hussain had written to say that he disputed the court's jurisdiction but did not say on what grounds. No reasons for disputing the jurisdiction were given by

D2 or the Fifth Defendant ("**D5**"). (It is not clear whether Amanda Watson is the same person as Annabel Watson, but I have assumed that they are not the same person; hence I refer to them as "D4" and "D5".)

14. On 6 July BCLP wrote inviting the Defendants who had acknowledged service to make any application to dispute the court's jurisdiction at the start of this hearing. None of the Defendants responded to BCLP, but Highbury and Mr Hussain both wrote to the court on 9 July, repeating the contents of their earlier letters disputing jurisdiction. Highbury added:

> "*The court should bear in mind when, we are led to believe, there may be a hearing listed in a 3-day window commencing on 14 July 2021. In light of our right to file our application on Friday 16 July 2021, we will not be attending or be represented at this hearing*."

Mr Hussain's letter contained a paragraph in almost identical terms.

15. On the same day (9 July) Daniel Quirk, purporting to be a director of C1 and C2, filed applications (which have not been sealed) seeking to remove C1 and C2 as parties to these proceedings and to stay the proceedings pending the determination of proceedings issued in the Commercial Court. I note that in his witness statement:

i) Paragraph 22 states that:

> "*Mr Hussain informs me that he procured and arranged for [C4] to be appointed as the Share Trustee of the Applicants pursuant to sham [his underlining] share trust deeds … The sham share trust deeds, he states, were designed and intended to give a false impression of the rights and obligations to any third parties*."

He exhibits a letter from Mr Hussain dated 21 April which repeats the allegation that the Share Trust Deeds were shams and says that he (Mr Hussain) "*designed and led the Clavis Programme*".

ii) Paragraph 53(c) states that the directors of C1 and C2 (meaning the Defendants) intend to take steps to redeem some or all of the Notes.

16. On 14 July D5 wrote to the court on behalf of D2 in similar terms. She said that the Defendants would not be attending the hearing and added:

> "*Plainly the court cannot proceed to substantively hear the Part 8 Claim when it has not first dealt properly and finally with all pending applications.*"

The absence of the Defendants and the jurisdictional challenge

17. In the light of these letters, I was not expecting the Defendants to attend this remote hearing. Nevertheless, I was told that the link for the hearing had not been sent to the Defendants at the correct email addresses and I therefore delayed the hearing by 10 minutes to enable the link to be sent to the correct addresses. None of the Defendants chose to attend.

18. I must first consider whether I have jurisdiction to hear these proceedings when there is an outstanding challenge to the jurisdiction by all of the Defendants save D4, who has failed to acknowledge service. Ms Charlotte Cooke, who appeared for the Claimants instructed by BCLP, drew my attention to two authorities. The first is *Speed Investments Ltd v Formula One Holdings Ltd* [2005] 1 WLR 1233, in which Lewison J held, as a matter of jurisdiction, that the filing of an acknowledgment of service is not a pre-condition to seeking summary judgment, since CPR r. 24.4(1) enables a claimant to seek such relief if the court gives permission. He added at [18]:

> "*Although, therefore, I accept that the court does have the power to permit an application for summary judgment to be made before an outstanding challenge to the jurisdiction has been determined, it seems to me that it will be a very rare case in which the court exercises that power. In general terms, as Rix J says, the price that a claimant must pay for being able to bring foreign defendants before the court is that they have a real opportunity to decide whether or not to submit to its jurisdiction*."

In that case Lewison J refused to exercise that power, firstly because there was no formal application for permission and secondly because the claim had not been pursued with due diligence (the first challenge to the jurisdiction had been made more than three months before the hearing).

19. However, a different result was reached in *Moloobhoy v. Kanani* [2012] EWHC 1670 (Comm). In that case there were two applications before the Deputy Judge, Stephen Males QC, viz. an application by the defendant to set aside service and an application by the claimants for summary judgment. He decided both applications at the same time. Having concluded that the proceedings had been validly served on the defendant, he then referred to Lewison J's judgment and said that this was one of those "*very rare*" cases in which it was appropriate to determine both applications at the same time. His reasons included the following:

i) Gloster J had previously given directions for the parties to prepare for an effective hearing of both applications and it was therefore incumbent on the defendant at least to identify the nature of his defence. He said at [78]:

> "*The suggestion that he did not do so because he did not wish to be taken to have submitted to the jurisdiction of the court is without substance. Instead he adopted a deliberate tactical decision, contrary to the direction made by Gloster J, and (it must be assumed) with full knowledge of the possible consequences. I have no doubt that he did so because he knew perfectly well that he had no defence which could be put forward with any prospect of success.*"

ii) At [83] he noted that Lewison J's reasoning was principally concerned with the position of a typical foreign defendant without presence or assets in this jurisdiction and did not apply to a defendant who was

resident within the jurisdiction and had assets against which any judgment may be enforced.

20. In the present case Ms Cooke asks me to go further than Mr Males QC went in two respects. Firstly, she asks me to hear these Part 8 proceedings, as distinct from a summary judgment application, and secondly she asks me to hear these proceedings ahead of any jurisdictional challenge, and not merely at the same time. I am satisfied that I have jurisdiction to do so. Four of the five Defendants have filed acknowledgments of service under CPR r. 8.3, thereby giving the court jurisdiction to decide these proceedings. One defendant has failed to file an acknowledgment of service, as a result of which she has no right to take part in the hearing: r. 8.4. The acknowledgments all dispute the court's jurisdiction, but the court has power under r. 3.1(2)(j) and (k) to decide the order in which issues are to be tried and to exclude an issue from consideration.

21. I am satisfied that this is one of those very rare cases in which it is appropriate to exercise that jurisdiction, for the following reasons:

    i) The relief sought by the Claimants is required as a matter of genuine urgency. On the Claimants' case, the Defendants have purported to seize control of C1 and C2, have had themselves registered at Companies House as directors, secretary and PSC, and have written repeatedly to Noteholders claiming that they are the genuine officers and that C4-7 are the impostors, as well as falsely claiming that serious criminal proceedings have been brought against Ms Whitaker.

    ii) I am satisfied that the Claimants have not delayed unduly since 16 April. It was reasonable to write to the Defendants, and, when that failed to produce results, to write to the Registrar of Companies, before issuing these proceedings on 11 June.

    iii) For the reasons set out below, the Claimants have a very strong case to which I can see no possible defence.

    iv) BCLP sensibly suggested that the challenge to the jurisdiction could be made at this hearing, but it is clear from the letters quoted at paragraphs 14 and 16 above that the Defendants chose to ignore that suggestion. I am satisfied that they have made a tactical decision not to attend or to put forward any arguments either on the jurisdictional challenge or on the merits of the proceedings, and that they are seeking to use the Rules (and in particular the 14-day period within which to issue any challenge to the jurisdiction) to prevent justice from being done.

    v) I am satisfied that there is no merit in Highbury's jurisdictional challenge for the following reasons:

        a) The allegation that Highbury is owned by the State of Pakistan is implausible and has not been supported by any corroborative evidence.

b) This lack of evidence is especially significant, given that Highbury is a company registered in the Marshall Islands, with the consequence that no information about its shareholders is publicly available.

c) In any event, under s. 14(1) of the State Immunity Act 1978, no immunity is granted to "*any entity … which is distinct from the executive organs of the government of the State and capable of suing or being sued*". Highbury is plainly such an entity, notwithstanding its bare assertion to the contrary (see paragraph 13 above). As the Privy Council held in *La Generale des Carrieres et des Mines v. F G Hemisphere Associates LLC* [2012] UKPC 27 at [29]:

> "*Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption*."

d) Further, s. 14(2) states that a separate entity is immune only if "*the proceedings relate to anything done by it in the exercise of sovereign authority*". The test depends on the character of the act and not on its motive or purpose: *Tsavliris Salvage (International) Ltd -v- The Grain Board of Iraq* [2008] EWHC 612 (Comm), Gross J at [78]. There is no evidence to indicate that the relevant acts done were in the character of an exercise of sovereign authority; Highbury's letter does not even contain an allegation to this effect.

vi) No ground whatsoever has been put forward by Mr Hussain or any of the other defendants for their challenge. Given that the proceedings seek the rectification of the register of a company in England, and that D2 has an address in London (the purported registered office of C1 and C2), it is obvious that England is the appropriate forum.

The substantive issues

22. The starting point is the resolution of 15 April by Highbury as Noteholder removing C4 as Share Trustee. No evidence has been filed by the Claimants as to who are the Noteholders; I am told that this is for reasons of confidentiality. The Claimants say that, even if Highbury were a Noteholder (and it has produced no evidence to that effect), this would not entitle Highbury to remove C4 as Share Trustee holding the issued share capital in C1 and C2. This is because Noteholders have no power to remove and appoint the Share

Trustee under clause 9 of the Share Trust Deeds (see paragraph 5 above). That is plainly correct. Without the valid appointment of Highbury as the holder of the shares in C1 and C2, the Defendants' entire house of cards collapses.

23. Mr Hussain's case that the Share Trust Deed is a sham depends on his own evidence that he was a party to that sham (see paragraph 15.i) above). That is not a promising basis on which to found his defence.

24. Mr Hussain appeared before me in 2019 in *Kiliminjaro AM Ltd v. Mann Made Corporate Services* [2019] EWHC 1189 (Ch), where I concluded that he had perpetrated a similar fraud in relation to the securitisation structure of another corporate group and that his evidence in that case was "*profoundly dishonest*". I subsequently imposed a general civil restraint order against him ([2020] EWHC 1804 (Ch)). In *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 171 (Ch), Miles J held that Mr Hussain and Highbury were parties to a similar fraud involving yet another company.

25. I bear in mind the words of Charles J in *Re Yates (a bankrupt)* [2005] BPIR 426 at [39]:

> "*In approaching the fact finding exercise I have given myself a Lucas warning and thus reminded myself that people may not tell the truth for a number of reasons and of the points that (i) if a person has not told the truth about certain matters it does not mean that he or she is not telling the truth about other matters, and (ii) if a person has given an earlier account that is different and found (or admitted) to be untrue it does not follow that the later account is also incorrect (see R v Lucas [1981] QB 720, in particular at 74G and F/H, and R v Middleton [2000] TLR 293*)."

26. I have reached a clear conclusion as set out in paragraph 23 above without regard to the facts set out in paragraph 24 above, but those latter facts assuage any residual doubts which I might otherwise have had about deciding this case in the absence of the Defendants and without being certain that the Defendants are not Noteholders.

27. I should add that I asked Ms Cooke whether there were any facts or matters which she would have been under a duty to draw to my attention, if this hearing had been without notice, and she confirmed that there were none.

The relief sought

28. For the reasons set out above I am satisfied that I should rectify the Register pursuant to s. 1096 of the Companies Act 2006.

29. The power to make declarations is discretionary. I bear in mind what was said by Marcus Smith J in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) at [21] and I am satisfied that I should make the declarations requested in order to lay to rest any doubts as to who is

entitled to control the Claimants. In the case of D4 I do so in default of acknowledgment of service because I am satisfied on the evidence.

30. I am also satisfied that it is necessary to grant the injunctions sought on a *quia timet* basis in order to prevent further fraudulent misrepresentations.

31. The costs sought in the sum of more than £132,000 are high, but I am satisfied that I should award them in full. This is obviously a case for costs on the indemnity basis and it is a case in which the Defendants' dishonest conduct has plainly caused the costs to be much higher than they would otherwise have been.

Disposition

32. I therefore make the order as sought.