Bankruptcy - reasons for granting the relief sought

[2020]JRC105

ROYAL COURT
(Samedi)

4 June 2020

Before : R. J. MacRae, Esq., Deputy Bailiff sitting alone

IN THE MATTER OF THE REPRESENTATION OF SERGIO MOURAO CORRÊA LIMA

AND IN THE MATTER OF PROBANK S.A., PROBANK PARTICIPAÇÐES S.A.,

VIA TELECOM S.A. AND VIA PARTICIPAÇÐES S.A.

("THE PROBANK ENTITIES")

Advocate L. C. Gregory for Representors

JUDGMENT

THE DEPUTY BAILIFF:

1. On the 14th May, 2020, the Court made various orders in respect of the Representation of Sergio Lima ("Mr Lima") in respect of the above named Entities. The orders were made in response to a Letter of Request from the Court of Justice of Minas Gerais, Common District of Belo Horizonte, Brazil dated the 20th of March 2020 ("the Letter of Request"). I now give reasons for that decision.

Background

2. The Probank Entities were primarily engaged in the business of providing telecommunication services, including electronic voting, to the Brazilian government.

3. They were originally owned by the Machado Guimarães family. This consisted, principally, of Mr Jacir Guimarães Esteves, his wife Célia Maria Machado Guimarães Esteves and their three children. One of these three children was Mrs Peônia Guimarães Machado (referred to as

"Peônia" in the Representation and other papers before the Court) who was married to Mr Paulo Cezar Martins ("Paulo"). Paulo died in September 2016 at the age of 46 in a car accident.

4. In 1996, the first elections using electronic voting machines took place in Brazil, eventually becoming Brazil's official voting mechanism. Two of the companies, Probank S.A. ("Probank") and Via Telecom S.A. ("Via") specialise in electronic voting machines and maintained all 470,000 such machines that the Brazilian government was using by 2010. The two companies subsequently won the contract for provision of electronic voting services for the 2004, 2006, 2008 and 2010 Federal and State elections.

5. Between 2004 and 2006 the group of companies was restructured to unify its administration and, in part, to conceal the Machado Guimarães family's involvement and ownership. This included turning most of the companies into joint-stock companies which did not have to publically disclose their shareholders, and creating corporate vehicles outside Brazil as registered shareholders which held shares on behalf of family members.

6. The goal of this restructuring was, according to Mr Lima, to enable the siphoning of funds from the Probank Entities for the benefit of the family and to shield the principals from liability to the group's consequential mounting debt.

7. By 2008 the Probank Entities were, in consequence of the payment of "dividends" to various entities connected to family members outside Brazil, suffering severe financial distress. The family placed substantial funds in a number of jurisdictions outside Brazil, including the United States, United Kingdom and, it seems to a limited extent, Jersey. With the restructuring of corporate ownership, the family began to use entities unburdened by the mounting debt accrued by the Probank Entities to carry on the same business formerly contracted through the Probank Entities and was thus able to secure the government contracts relating to the 2012 and 2014 Brazilian national elections.

8. In 2010, Probank and Probank Participaçõe filed for court-supervised reorganisation under the Brazilian bankruptcy law. The other two companies did the same in 2011. Material gathered in the course of those bankruptcies evidenced the removal of funds from Probank by the use of false invoices. Ultimately the reorganisation failed and Probank filed a voluntary petition for liquidation in September 2013, as did the other three companies at about the same time.

9. Mr Lima was appointed Judicial Administrator in respect of all four entities and the Brazilian Court consolidated the bankruptcy proceedings in relation to all four companies in October 2014.

10. Very shortly prior to this, on the 29th July 2014, and upon the application of Mr Lima, the Brazilian Court extended the effect of the bankruptcy order to twenty-eight connected individuals and entities who were related or associated to the Probank Entities or to the misapplication of their assets. These included Peônia and Paulo. They are described as 'Related Persons'.

11. This extension of the bankruptcy to third parties is a feature of Brazilian bankruptcy law which is not known to Jersey law. We were provided with a copy of a translation of the decision of the Brazilian Court which recites, *inter alia*, that:-

> ***"It is well known that, as a rule, the partners do not answer for the debts of the company, because they are different people, who are not to be confused, according to the theory of legal personality, adopted in our legal system.***
>
> ***…..***
>
> ***On the other hand, the theory of disregard of the legal entity no longer considers the effects of the personification or legal autonomy of the company to achieve and bind the responsibility of its partners, with the purpose of preventing the consummation of fraud and abuse of rights committed in name of the legal entity, that cause harm or damages to third parties.***
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> ***The Civil Code, in art 50, adopted the theory of disregard of legal entity, explicitly providing for the possibility of departing the shield of the patrimonial separation existing between partner and company when in the event of embezzlement."***

12. The judgment then went on to give examples of embezzlement involving Peônia and Paulo respectively although the court, did not, at that stage have evidence of their activities extending to Jersey. The judge concluded:-

> ***"Therefore, it remains evident, even in a superficial first analysis, the occurrence of legal personality abuse, asset confusion and an actual economic group, in order to bring losses to the creditors of the bankrupt estates."***

13. Mr Lima explains:-

"Under Brazilian bankruptcy law, where there has been 'patrimonial confusion' of assets of a company with those of another person; or if assets have been misappropriated from a company by a director or shareholder; or if there has been an abuse of the corporate form or bad faith by means of the diversion of assets; the Brazilian Court of first instance can extend the jurisdiction of the bankruptcy estate by ordering the bankruptcy of any person who has been unjustly enriched by, or involved in, such wrongful activity. This can result in the bankruptcy of persons, including shareholders or directors, who form a part of a common economic group that has been involved with, or participated in, such activity (all of those persons' assets are available to the bankruptcy)."

14. In relation to Peônia and Paulo he says:-

"Peônia and Paulo were controllers (among others) of the Probank Entities, whose insolvency was held to have taken place because of its controllers' mismanagement and diversion of assets. All Peônia and Paulo's assets are liable to be brought into the bankruptcy (i.e. not just those that can be traced back to the diversion of assets from the Probank Entities). The Judicial Administrator has exactly the same powers over their assets as over the Probank Entities' assets."

15. Currently the Probank Entities' debt is estimated at $154,281,226.

16. Investigations are ongoing in a number of jurisdictions. Bankruptcy procedures have been authorised in other jurisdictions auxiliary to the bankruptcy in Brazil. In the United States, an extensive discovery exercise has taken place in Florida pursuant to the so-called 'Chapter 15' procedure. In August 2019 this revealed the existence of Jersey bank accounts connected to Paulo.

17. Between November 2014 and August 2016, that is to say after the Probank bankruptcy proceedings began, a British Virgin Islands company named Pacific Financial Partners Limited, which is owned as to 75% by Paulo, made a number of transfers into a bank account in Paulo's name held at HSBC in Jersey. The transfers ranged between $20,000 and $60,000. Mr Lima believes that Peônia and Paulo worked together wrongfully diverting cash from the Probank Entities and, on the evidence of other financial misconduct available to him, he believes it is possible that both Paulo and Peônia may hold funds at HSBC Jersey or alternatively Peônia now holds funds as a beneficiary of Paulo's estate.

18. Mr Lima says that he does not know whether the account in the name of Paulo at HSBC Jersey ("HSBC") still holds funds but if it does then it is his wish that the monies contained within it are ultimately remitted to Brazil for the benefit of creditors.

19. At the convening hearing, the Court ordered that HSBC be notified of these proceedings but should be prohibited from disclosing the existence of the Representation and the claims made with it to Peônia, the estate of Paulo, the Probank Entities and or / any of the Related Persons until fourteen days have elapsed after HSBC has provided any disclosure required which the Court may ultimately order. Counsel for HSBC indicated that the bank would not be represented at the hearing of the representation and would be content to rest on the wisdom of the Court.

20. Mr Lima says that although he does not currently have any evidence which suggests that the Probank Entities themselves or any other of the Related Persons have accounts at HSBC, given the close connection between the various individuals and the corporate entities and their links to the Machado Guimarães family, it would not be surprising if other persons who are subject to the bankruptcy proceedings had accounts at HSBC. Accordingly he requested that HSBC inform him if there are any such accounts.

21. Mr Lima also hopes that any disclosure of banking records in relation to the account may enable him to trace whether any monies have been transferred to other bank accounts about which he currently has no information.

The Letter of Request

22. The Letter of Request states that the requesting Court exercises jurisdiction in relation to insolvency legislation in Brazil and refers in particular to the Appointment Order pursuant to which Mr Lima was appointed as Judicial Administrator of the Probank Group. The Letter of Request sets out the history to this matter, some of which is summarised above. It requests an order from the Jersey Court, *inter alia*, that the Appointment Order be recognised and that the Judicial Administrator (Mr Lima) be granted the relief sought in the Representation which is summarised in the Letter of Request itself.

23. The Letter of Request concludes:-

> *"This Court therefore considers it desirable for the Jersey Court to make orders in the exercise of its inherent common law and / or equitable powers which recognise the Appointment Order and the appointment of the Judicial*

Administrator….. This Court hereby respectfully requests the Jersey Court to assist and act in aid of and be auxiliary to this Court by granting judicial assistance in the terms set out in the Representation and such further or other relief as the Jersey Court deems appropriate".

24. The Letter of Request did not say that the Brazilian Court would give effect to equivalent orders made by the Royal Court. That would have been a useful evidence and we note that the Canadian Letter of Request in the recent case of Lydian International Limited [2020] JRC 049 (paragraph 35) did provide such an assurance to this Court. However, the Representor has procured evidence from an expert in Brazilian law, Rodrigo Kaysserlian. In respect of the Brazilian bankruptcy he explains in his report:-

"The Judicial Administrator steps into the shoes of the directors [of the Probank Entities] and he becomes entitled to exercise the powers of the Probank Entities. All these powers are equally applicable to the Related Parties. Brazilian bankruptcy law does not distinguish between the original bankrupt entities and any further entities or individuals to which the bankruptcy is extended. The powers of the Judicial Administrator are the same in relation to all of them."

25. He says that he is:-

"…of the opinion that the Brazilian Court would offer reciprocal assistance to the Royal Court and / or to a Jersey liquidator in analogous circumstances."

26. He refers to articles 29 and 30 of the Brazilian Civil Procedure Code, which provide for requests for direct assistance to be *"forwarded by the competent foreign out of Court body to the central authority"* and for *"direct assistance"* in cases provided for in treaties to which Brazil is a party to include, *inter alia*, any judicial or extrajudicial not prohibited by Brazilian law.

27. In this case there is no treaty between Brazil and the United Kingdom dealing with mutual legal assistance extended to Jersey, or any direct insolvency relationship between Jersey and Brazil, either as a matter of Brazilian law or pursuant to Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the 1990 Law").

28. Nonetheless, Mr Kaysserlian concludes:-

"…that if the Brazilian Court were satisfied that the assistance being sought was available under Jersey law, is necessary for the performance of the liquidator's functions, and is consistent with the substantive law and public policy of Brazil, in the interests of comity it would grant the recognition and assistance sought."

29. Mr Lima gives evidence to this effect in his affidavit too. Although he accepts that there are elements of Brazilian bankruptcy procedure, in particular the extension to related parties, which are not a feature of the Jersey insolvency regime, he makes the point that the powers that he is seeking in the Representation (in effect identification and control of the bank accounts attributable to Paulo and Peônia) are powers that would be available to an equivalent Jersey office holder in respect of a Jersey bankruptcy. This is correct and the powers that are sought are co-extensive with the powers that the Viscount has under Article 8 of the 1990 Law, when all the property and powers of the debtor vest in the Viscount immediately upon the making of a declaration of désastre.

30. Mr Lima also says that the Brazilian Court has reached the firm view that Paulo and Peônia were heavily involved in misconduct amounting to the illicit extraction over many years of millions of dollars from a major commercial group causing its collapse, leaving very substantial creditors including the Brazilian state.

The Court's jurisdiction

31. There is no statutory jurisdiction to assist the Brazilian Court. Article 49 of the 1990 Law provides that:

"(1) The court may, to the extent that it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law.

…

(4) In this Article 'relevant country or territory' means a country or territory prescribed by the Minister."

The provisions of the order made by the Minister under Article 49, as contained in the Bankruptcy (Désastre) Jersey Order 2006, list a number of countries and territories which do not include Brazil.

32. As the Court of Appeal said in Montrow International Limited v Tacon [2007] JLR Note 49:-

> ***"The Royal Court has a discretion, on receiving a letter of request from a foreign court seeking assistance in a foreign bankruptcy, whether it should provide assistance and it should take into account all material factors. The fact of the request for assistance is a weighty factor to be taken into account."***

33. This was not a foreign bankruptcy order that was challenged in the home jurisdiction.

34. There are some similarities between this case and the recent decision of the Royal Court in Lydian International Limited in that, in that case, the Court was being invited to make orders ancillary to those made in the Ontario Court which could not be obtained in any Jersey bankruptcy or insolvency procedure as there was no equivalent process in Jersey.

35. In that case the Royal Court considered the relevant principles in respect of comity and applied them to the facts of that case as follows:-

> ***"22. It is true that the relief available under the CCAA including, for example, the appointment of the Monitor and certain other orders made by the Canadian Court, are not features of Jersey law. Accordingly, the Court would be going rather further than the Royal Court went in Tacon v Nautilus and others in granting the relief sought. In that case, although Jersey does not have the concept of a provisional liquidator, it was not suggested that a liquidator of a Jersey company did not have the power to obtain information envisaged by the order that was sought.***
>
> ***23. In this case, the Court is being invited to make orders ancillary to those made in the Ontario Court which could not be obtained in Jersey bankruptcy or insolvency procedure, as there is no equivalent process in Jersey.***
>
> ***24. It was accepted by counsel for Lydian International that there were elements of the Canadian process which were not known to Jersey law, but it was said that there was nothing about the relief that was sought that was***

inconsistent with public policy or contrary to any fundamental principles of Jersey law. We accepted this argument.

25. Accordingly, the Court found that it did have jurisdiction to make the order sought in the letter of request."

Exercise of our discretion

36. The Court decided to exercise its discretion in favour of granting the relief sought in the Representation. The reasons for doing so were, in summary, as follows:-

(i) The Letter of Request. This was a factor which the Court gave significant weight.

(ii) This was a complex fraud, and the Courts of Jersey have long been astute to assist victims of financial or commercial misconduct wherever it has occurred.

(iii) The relief that is being sought is not unknown to Jersey law and consistent with the powers that the Viscount has in a domestic *désastre*.

(iv) Mr Lima is unable to act in Jersey without his appointment being recognised by this Court, so that HSBC may be required to comply with his instructions as if he was giving instructions on behalf of Paulo and Peônia.

(v) The relief that is being sought is limited - extending only to the assets which may be held by Paulo and Peônia in this jurisdiction through HSBC.

(vi) It is in the interests of reciprocity / comity to grant the relief sought, having regard to the expert evidence and the evidence from Mr Lima that the Brazilian Court would show the same courtesy to a Jersey Court in similar circumstances.

(vii) The Viscount has been contacted in connection with this application and is content with the form of relief sought and the Attorney General, who was ordered to be served with the Representation, has not objected.

(viii) Courts in other jurisdictions have also made orders assisting the Judicial Administrator pursuant to requests from the Brazilian Court.

(ix) Although there are features of this foreign bankruptcy, in particular the status of the Related Persons, and the remedy of extending the bankruptcy to third parties considered to be responsible for the improper extraction of funds which are not known to Jersey law, there are no aspects of this foreign law and procedure which are contrary to Jersey's general public policy that it ought to give effect to the decisions of overseas courts which are aimed at restoring misapplied assets in order to satisfy creditors.

37. Accordingly the Court:-

(i) recognised the order of the Court of Justice of Minas Gerais appointing the Representor as Judicial Administrator of the Probank Entities, as defined in the said Representation;

(ii) recognised the Representor's status as Judicial Administrator so it has effect in Jersey and, so far as is consistent with Jersey Law, enables the Representor to exercise his powers under Brazilian Law;

(iii) directed that HSBC Jersey shall within 21 days of the date hereof be required to act upon the instructions of the Representor as it would the instructions of Paulo and Peônia and shall:

(a) provide to the Representor upon request any and all documents and information in its possession, custody or power with respect to any property (personal, tangible or intangible) held in any capacity for, on behalf of, or at the direction of Paulo and Peônia (including cash, investments, bank accounts, any other assets, books, records or papers) as well as any books, records or other documents or papers in respect of Paulo and Peônia; and

(b) confirm to the Representor whether the Probank Entities and/or any of the other Related Persons, as defined in the Representation, hold or have held accounts at HSBC Jersey;

(iv) ordered that if the disclosure referred to in paragraph 3 above confirms that any assets remain in Jersey, paragraphs 5 to 8 will have effect;

(v) ordered the Representor to advertise in the Jersey Gazette within 14 days of receiving disclosure confirming that assets remain in Jersey, to ascertain whether there are creditors

of Paulo and Peônia in Jersey, and, in the event of any Jersey creditors being identified, to seek further directions from the Court as to what, if any, steps need to be taken to protect their interests to allow for the distribution of the assets among such persons entitled to receive them in accordance with their respective claims in the event of désastre, as provided by Article 32 of the Bankruptcy (Désastre) (Jersey) Law 1990;

(vi) ordered that, at the same time as complying with paragraph 5 above, the Representor shall use his best endeavours to notify Peônia and the estate of Paulo forthwith that this Order has been made, so that they can challenge it if they so wish within 28 days of service of this Order upon them, by application to the Royal Court;

(vii) ordered that the Representor shall not remove assets from Jersey until 28 days after the notifications referred to in paragraphs 5 and 6 above have taken place and, if an objection is lodged by a creditor or if Peônia and/or the estate of Paulo challenge this Order, not to remove assets until the objection or challenge is determined or until further Order of the Court;

(viii) ordered that the Representor be confirmed as having the authority to take into his custody and control any and all property of Paulo and Peônia (personal, tangible or intangible), and HSBC Jersey shall act in accordance with the Representor's instructions to:

(a) pay, transfer and/or deliver up to the Representor or to hold to the Representor's order any property (personal, tangible or intangible) held in any capacity for, on behalf of, or at the direction of Paulo and Peônia;

(b) sell, realise, or otherwise dispose of such assets;

(c) take any and all steps necessary to remove any and all existing parties authorised to provide instructions for or on behalf of Paulo and Peônia and replace them with the Representor and/or any other party(s) nominated by the Representor;

(d) cease to act in any capacity in which it is currently appointed and facilitate a handover to the Representor and/or any other party(s) nominated by the Representor of any such position and/or the assets held for or on behalf of Paulo and Peônia attendant to it;

(e) take any and all other steps which Paulo and Peônia would be entitled to instruct it to take in respect of assets held by HSBC Jersey; and

(ix) directed that any persons affected by this Order shall have liberty to apply.

Authorities

Lydian International Limited [2020] JRC 049.

Bankruptcy (Désastre) (Jersey) Law 1990.

Montrow International Limited v Tacon [2007] JLR Note 49.