BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2005/0168

IN THE MATTER OF OLYMPIC PERU INCORPORATED

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN

CARIBBEAN PACIFIC ENERGY CORPORATION

Applicant

And

(1) OLYMPIC PERU INCORPORATED
(2) JUAN ENRIQUE RASSMUSS
(3) UF HOLDINGS S.A. LLC
(4) TEXXON OIL AND GAS CORPORATION

Respondents

Appearances:

Mr. Andrew Jones QC with him Mr. Michael Pringle for the Applicant
Mr. Robin Hollington QC, Mr. Paul Webster QC and Mr. Christopher Russell for the 2nd and 3rd Respondents
Mr. John Carrington for the 4th Respondent

2005: December 14
December 15

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: This is an application by the 2nd and 3rd Respondents to dismiss or to strike out such parts as are liable to be struck out of the application brought by Caribbean Pacific Energy Corporation (CPEC) for the appointment of a liquidator for the 1st Respondent, Olympic Peru Incorporated on the just and equitable grounds under section 162 (1) of the Insolvency Act 2003.

The facts

[2] The following summary of the factual background is largely taken from the skeleton argument of the 2nd and 3rd Respondents and appears to be non-contentious. I can do no better than to gratefully adopt it.

[3] Olympic Peru Incorporated ("the Company") was originally incorporated in the State of Delaware, USA on 8 August 1991. On 26 September 1996, it ceased to exist under the laws of Delaware and continued as an International Business Company under the laws of the British Virgin Islands. In September 2000, it became the vehicle for a joint venture in oil and gas exploration and extraction between CPEC and the 2nd and 3rd Respondents, each of whom essentially held one-third of the issued shares. Its shares are at present held in the following proportions and have been so held since about April 2002 (when CPEC transferred a 20% shareholding to the 4th Respondent ("Texxon"), bringing its original 33% shareholding down to 13%):

- 13% CPEC
- 20% Texxon
- 67% the 2nd and 3rd Respondents (who have at all material times acted in concert).

[4] At the outset, the Company was under the sole ownership and control of Mr. Billy G. Underwood, an American with experience in the oil business and interests in Peru. It was Mr. Underwood who in May 1996 obtained a Licence from Peru Petro (the Peruvian state licensing authority) for the extraction of oil and gas in an area called Block 13, along the north-west coast of Peru. In order to obtain such Licence, the Company had to have a Peruvian branch, called Olympic Peru Inc, Sucursal Del Peru (the "Peruvian branch"). There was, however, one corporate entity, the Company. It was a condition of the Licence that the Company carries out exploration in specified stages. This necessitated very substantial upfront investment. The financing of that investment appears to have dominated the life of the Company and the relationship between the parties in this case.

[5] Caribbean Pacific Energy Corporation ("CPEC") is Mr. Underwood's corporate vehicle for his investment in the Company. It is now the registered holder of 13% of the issued share capital of the Company.

[6] The 2nd Respondent, Juan Enrique Rassmuss ("Mr. Rassmuss") is a businessman based in Chile with substantial mining and other business interests throughout South America, including a major acrylic fibre plant in Lima, Peru. It is alleged that Mr. Fuller introduced Mr. Rassmuss to Mr. Underwood as a source of finance.

[7] The 3rd Respondent, UF Holdings Limited ("UF Holdings") is the investment vehicle of two Americans, Mr. Fuller and Mr. Ungerer. It became first involved in the venture in 1999 as a source of finance.

[8] The 4th Respondent, Texxon Oil and Gas Corporation ("Texxon") is a Company controlled by members of a Peruvian family, the Liziers. Mr. Lizier, Senior had been a senior officer of Peru Petro and its predecessor. It is acknowledged by Mr. Underwood that Texxon had a possible claim to share in the Licence by reason of the fact that Texxon originally introduced Mr. Underwood to Block 13.

The Investment Agreement

[9] By an Investment Agreement dated 21 September 2000, CPEC, Mr. Rassmuss and UFH entered into a written agreement whereby:

- UF Holdings acquired a 33% shareholding in the Company.
- Mr. Rassmuss acquired a 34% shareholding in return for a commitment to invest US$3.8 million.
- To control expenditure, Mr. Rassmuss would have the right to nominate the administrative controller of the Company, who would be a necessary signatory to any check or other payment.
- Mr. Underwood assumed personal responsibility for satisfying any claim that Texxon might have in respect of the Licence.

[10] The Investment Agreement was acted upon and Mr. Underwood, Mr. Fuller and Mr. Rassmuss were appointed the directors of the Company. Mr. Underwood continued to manage the Company's business, as he had done until then.

[11] It is Mr. Underwood's case (which is unpleaded and denied by the 2nd and 3rd Respondents) that the Investment Agreement was only part of a wider oral agreement between the parties reached in September 2000, including an agreement that, until a written shareholder's agreement was entered into, no corporate action (including action to change the composition of the board) should be taken in respect of the Company.[1] Mr. Underwood says that this term was documented by a board resolution he alone signed dated 21 September 2000.[2]

[12] At paragraph 4.8 of his witness statement, Mr. Underwood refers to a "corporate resolution" dated 14 June 2001.[3] This bears the signatures of Mr. Underwood, Mr. Fuller and Mr. Rassmuss. It considerably narrowed the "70% rule" to specified corporate actions. Mr. Underwood claims that he and Mr. Fuller signed this resolution, but that Mr. Rassmuss refused to sign it in 2001 and dishonestly signed and relied upon it three years later as a means of removing him as a director in May 2004. The 2nd and 3rd Respondents emphatically denied this allegation and have produced in answer a copy of the resolution, signed by all parties and notarized in March 2002.

[13] In January 2002, the Company obtained substantial loan facilities from Banco Wiese Sudameris ("BWS") which were needed in order to finance the next stage of the investment required under the Licence.

[14] In January 2004, the BWS loans fell due for repayment. Mr. Underwood alleges that BWS "agreed to renew the loan on much more favourable terms and to extend the repayment date for a further period which I think was five years" and that Mr. Rassmuss, as "part of his dishonest scheme to take over the Company", refused to take up BWS's offer, paid off

[1] See paragraph 3.5 of Mr. Underwood's witness statement where he describes this as the "70%" rule.
[2] Exhibit 5 to Mr. Underwood's witness statement.
[3] Exhibits 10/11 to Mr. Underwood's witness statement.

the loan thereby stepping into BWS's shoes by virtue of the right of subrogation, and thereafter cut the Company's cash-flow and forced the company to borrow money from him on highly unfavourable terms.[4]

[15] At an Extraordinary General Meeting ("EGM") of the Company held on 14 May 2004, Mr. Underwood was removed as a director. This is pleaded as a ground for the appointment of a liquidator, on the basis that the Company was a quasi-partnership so that Mr. Underwood had a right in equity to be a director.

[16] In June 2005, Mr. Rassmuss and Mr. Fuller proposed an issue of shares. This was due to be discussed further at an EGM to be held on 1 July 2005. This is pleaded as a ground for the appointment of a liquidator, on the basis that the Company was a quasi-partnership and the proposed issue of shares would dilute Mr. Underwood's shareholding. The EGM did not take place, having been injuncted by order of this court dated 30 June 2005.

[17] On 30 June 2005, CPEC presented its application seeking the appointment of a liquidator over the Company. Subsequently, CPEC was granted leave to amend its application. The purpose of the amendment was twinned-pronged: (i) to allege that any new finance should be raised in a manner which did not disturb the relative shareholdings and (ii) to rely upon an offer made by CPEC of US$40 million for the shares of the 2nd and 3rd Respondents.

The present application

[18] This is a further pre-trial review for a trial of the application by CPEC to appoint liquidator for the Company. Some directions have already been given for the trial to commence on 30 January 2006 with a time estimate of 5 days. At the last pre-trial review which took place on 18 November 2005, certain directions were given in the presence of all Counsel. At paragraph 7, it was expressly ordered that there will be further pre-trial review and any pending applications will be dealt with on Wednesday, 14th and Thursday, 15th December 2005. In other words, two days were reserved for any pending applications of any party.

[4] See paragraph 5.1 et seq of Mr. Underwood's witness statement. The 2nd and 3rd Respondents states that these allegations are unpleaded and which they deny.

[19] On 29 November 2005, the 2nd and 3rd Respondents filed the present application pursuant to CPR 29.5 and 26.3 and/or the inherent jurisdiction of the Court to strike out the proceedings in its entirety, or such parts of the proceedings as are liable to be struck out, on the grounds that:

1. CPEC has failed to allege and prove that there would be a surplus for contributories in the event of a liquidation of the Company.

2. There would be no such surplus.

3. The application fails to disclose a reasonable cause of action. It is frivolous and/or vexatious and/or an abuse of the process of the court and it is bound to fail.

[20] The 2nd and 3rd Respondents seek, alternatively, an order that such parts of the said Application and/or the witness statement of Mr. Billy Underwood as are liable to be struck out or dismissed as aforesaid be struck out. These respondents also seek further relief by way of the discharge or variation of the interim injunction granted in CPEC's favour.

Pleading and proof of tangible asset

[21] Mr. Hollington QC argues that CPEC's application for the appointment of a liquidator is demurrable under the court's inherent jurisdiction; does not disclose a reasonable cause of action and is an abuse of the process of the court, because CPEC does not allege that it has any tangible asset as a shareholder to be protected by a winding up ; even if there were such an allegation, CPEC would not satisfy this court on the evidence that there would be such a surplus.

[22] CPEC submits that it is no longer necessary in an application under section 162 (1) (b) of the Insolvency Act 2003 to plead and prove a surplus on liquidation. Mr. Carrington appearing as Counsel for Texxon supports CPEC's interpretation. For my part, I do not think that this issue ought to be determined at this hearing. It should be left for the trial if there is going to be one. However, I have one thing to say of an oral application that CPEC attempts to make at this hearing. Such application should be made in writing.

[23] It is common ground that the Court will only strike out the application to appoint liquidator at such a preliminary stage if it is plain and obvious that the application will not succeed: Re a Company (No. 003096 of 1987).[5] This issue needs to be fully argued. I am not prepared to draw any inferences at this preliminary stage of the proceedings except to say that it warrants further argument which will be done at trial.

Unpleaded, unparticularized allegations of fraud

[24] Paragraphs 4.8, 5.1, 5.3, 5.5, 5.7, 5.9, 6.2, 9.3, 9.4 and 9.6 of Mr. Underwood's witness statement are replete with unpleaded and unparticularized allegations of fraud. It is trite law that fraud must be specifically pleaded. There is a litany of judicial authorities to support this well-established principle of law. Mr. Hollington QC referred to some of them. To come to the Court at the eleventh hour seeking an amendment to the already amended statement of claim is inimical to the overriding objectives of the Rules. Accordingly, I would order that those parts of Mr. Underwood's witness statement dated 20 October 2005 as are highlighted on the copy annexed hereto, and the words "in bad faith" in paragraph 13 of the Liquidator Application be struck out.

No real prospect of success

[25] CPEC asserts that the Company can be characterized as a "quasi-partnership" which is based on a relationship of trust and confidence between Mr. Underwood, Mr. Rassmuss and Mr. Fuller which was created when they joined together as equal shareholders and directors. CPEC further asserts that the relationship has now irretrievably broken down, and Mr. Underwood was wrongly excluded from the management of the Company without affording him any chance to sell the shares. Furthermore, asserts CPEC, the 2nd Respondent has run the Company as if it were his own. He has placed himself in a position of actual conflict of interest by acting at one and the same time as banker and director to the Company. In the circumstances, it was unjust and inequitable for the 2nd and 3rd Respondents to exclude Mr. Underwood from management without offering to purchase CPEC's shares as a fair or reasonable price.

[5] [1987] 4 BCC 80 and 81.

[26] The 2nd and 3rd Respondents say that on CPEC's own evidence, the assertions are unfeasible for the following reasons:

a. The relationship between the parties had all the hallmarks of an ordinary arm's length commercial relationship. They had not been in business before. They entered into a detailed written agreement (The Investment Agreement).

b. The parties manifestly failed to agree upon a shareholder's agreement.

c. There was an agreement whereby no corporate action, including removal of any of them as director, could be taken unless they all agreed to it.

[27] Therefore, in light of the foregoing, it is impossible to see what facts or circumstances can justify the assertion that the relationship between the shareholders was based on trust and confidence, giving rise to the superimposition of equitable principles of good faith preventing the removal of Mr. Underwood as a director. Mr. Hollington QC referred to passages from the locus classicus of Ibrahimi v Westbourne Galleries Limited and Others[6] as well as the judgment of Lord Hoffmann in O'Neill and another v Phillips and others, Re a Company (No. 00709 of 1992) [7].

[28] Mr. Hollington QC insists that if there was any agreement or understanding in good faith as alleged by CPEC, why was then a need for the 70% rule? Mr. Underwood states that "the point of the 70% rule was to prevent any two directors /shareholders from "ganging up" on the other one and excluding him from the decision making process." Mr. Hollington QC opines that this sort of arrangement is the very antithesis of a relationship based on trust and confidence.

[29] In the BVI case of Fifth Avenue Capital Inc. v (1) Julian Michael Edward Lee (2) Kettering Services Limited[8], this very court was confronted with a similar issue of whether a quasi-partnership existed. The Court quoted extensively from the case of Re Westbourne Galleries. Lord Wilberforce indicated that the use in many cases of the terms "quasi-partnership" and "in substance partnership" may be convenient but also confusing. He said at page 379:

[6] [1973] A.C. 360.
[7] [1999] 2 All ER 961.
[8] BVIHCV2004/175 (unreported) High Court Civil.

> "It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies, where these are absent…; the words 'just and equitable' sum these up in the law of partnership itself."

[30] At page 380, he said that these expressions may also be confusing,

> "…if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is *a company not a partnership or even a quasi-partnership* (emphasis added] and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

[31] No doubt, the burden of establishing the existence of a quasi-partnership rests with CPEC and the Court will not lightly find a quasi-partnership to exist. It must be borne in mind, as was pointed out in Re a Company (No. 003096 of 1987) [supra] that the mere fact that parties join together to form a small company is not sufficient to constitute the company a quasi-partnership in the eyes of the court. Peter Gibson J. stated at page 84, "there must be averments that something equivalent to partnership obligations were created."

[32] There is no doubt that at trial, the Court will have to decide whether the relationship between the parties fell in the category of a quasi-partnership. To make such a pronouncement now would be premature without cross-examination of Mr. Underwood, Mr. Rassmuss and Mr. Fuller. Mr. Underwood himself may seek to clarify the issue of why was there a need for the 70% rule even though, he has already provided an answer. At trial, the Court will be fully apprised of all the facts which will enable it to conclude positively whether or not a "quasi-partnership" exists.

Frivolous or vexatious or an abuse of the process of the Court

[33] CPEC maintains that the application to appoint a liquidator is not frivolous or vexatious or an abuse of the process of the Court. On the contrary, it submits that it was left with no other alternative but to bring the application.

[34] Some core facts are relevant here. In June 2005, CPEC offered to purchase the 2nd and 3rd Respondents' shares for US$ 28.6 million, reflecting the value of the Company as a whole for US$40 million. This offer was made with the backing of Gold Oil Plc.

[35] In his reply of 11 July 2005, Mr. Rassmuss said: "after analyzing CPEC's offer, we have decided that we are not interested in the offer." Mr. Rassmuss alleges that that offer was a sham.

[36] CPEC has also offered to sell its shares to the 2nd and 3rd Respondents. This was rejected and no counter-offer was made at any price.

[37] In my opinion, without going into much detail at this preliminary stage, I am of the opinion that this application should be heard in its entirety so that all of the evidence is put on the table. It seems to me that if an offer to purchase the shares of the 2nd and 3rd Respondents is rejected and CPEC then offer to sell its shares and no counter-offer is made, then CPEC is "locked-in" as a minority shareholder. It cannot buy. It cannot sell. In the case of O'Neill v Phillips [supra], Mr. Hollington QC who was representing Mr. O'Neill seemed to have been expressing similar sentiments.[9] Lord Hoffmann delivering the Judgment, had this to say at page 972 (g):

> " There are cases, such as *Re a Company (No. 006834 of 1988), ex p Kremer [1989] BCLC 365*, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as it this case) without either side having done anything seriously wrong or unfair. *It is not fair to the excluded member, who would normally have lost his employment, to keep his assets locked in the Company* (emphasis added)."

The Injunction

[38] Mr. Hollington QC emphasized that the Order of the Court dated 23 August 2005 made provision for the 2nd and 3rd Respondents to be at liberty to apply to vary or discharge the injunction. Indeed, the Order does make such provision. But if there has been no change of circumstances, I do not see on what basis the Court could vary or discharge the 23

[9] see page 13.

August Order unless it is of the opinion that wrong principles of law were applied. The injunction was granted on the basis that CPEC's shareholding would not be diluted. Mr. Hollington QC emphatically declared that the allegation of dilution of shares is baseless. Both Mr. Jones, QC and Mr. Hollington QC have sufficiently address this issue in their respective skeleton argument which I have bore in mind.

[39] The 2nd and 3rd Respondents as well as Texxon submit that because of evidence of financial difficulties associated with CPEC and Mr. Underwood, there should be a cross undertaking supported by collateral in the region of $US4.0 million. At the point in time, there is no quantifiable amount of damages, if any, that the 2nd and 3rd Respondents have suffered. To ask CPEC to deposit $US 4.0 million into Court or as Mr. Carrington suggested, his application should be dismissed, in my view, is concluding that damages have been suffered. No such evidence exists at this time. Relying on the words of Mr. Hollington QC that there is no likely threat that the members and/or directors of the Company will be passing any resolution to amend the Memorandum of Association of the Company whereby the authorized capital of the Company is increased, I will accordingly discharge the injunction.

Other issues

[40] Some other issues have been raised at this hearing but were not addressed. For present purposes, I did not consider them to be of any substantial significance to the outcome.

[41] On a previous occasion, this Court ordered, amongst other things, that the application to appoint liquidator was fixed to commence on 30 January 2006 with a time estimate of 5 days. For the reasons given above, I shall re-confirm that Order. Consequent upon this Order, the parties have all consented to further directions being given. These are reflected in the Order.

The Order

[42] Accordingly, the Order of the Court will be:

UPON the Second and Third Respondents' application to dismiss the Applicant's application to appoint liquidators filed on 30 June 2005 and to strike out the witness statement of Billy Underwood dated 30 October 2005 or to vary or discharge the injunction granted by order dated 23 August 2005 ("the Respondents' Application") coming for hearing on 14 December 2005.
AND UPON HEARING Mr. Robin Hollington, QC, Mr. Paul Webster QC and Mr. Chris Russell for the Second and Third Respondents, Mr. Andrew Jones, QC and Mr. Michael Pringle for the Applicant and Mr. John Carrington for the Fourth Respondent

AND UPON the Applicant undertaking to re-amend the Liquidator Application so as to add the words "(as hereinbefore pleaded)" after the words "Mr. Rassmuss" in paragraph 26

IT IS HEREBY ORDERED THAT:

1. Those parts of Mr. Underwood's witness statement dated 20 October 2005 as are highlighted on the copy annexed hereto, and the words "in bad faith" in paragraph 13 of the Liquidator Application be struck out.

2. Save as aforesaid, no order on the Respondents' Application.

3. The Applicant do have leave to amend the Liquidator Application in the terms set out in paragraph 8 of the Applicant's Skeleton Argument for this hearing ("the Applicant's Skeleton") and so as to give effect to the Applicant's undertaking above.

4. Save as aforesaid, the Applicant's application for permission to re-amend the Liquidator Application be dismissed.

5. The Applicant shall serve the Liquidator Application re-amended as aforesaid upon the parties on or before 16 December 2005.

6. The Respondents shall have leave to serve and file Amended Defences on or before 9 January 2006, together with any further evidence they wish to rely upon on the issues raised in the re-amendment to the Liquidator Application relating to paragraph 8 of the Applicant's Skeleton.

7. The Applicant shall have leave to serve any evidence in reply on the issues raised in the said re-amendment not less than 7 clear working days before the commencement of trial.

8. The Applicant's oral application for an order for specific disclosure in the terms set out in paragraph 37 of the Applicant's Skeleton be dismissed.

9. The 2nd and 3rd Respondents do serve any further evidence they wish to rely upon at trial (other than on the issues raised in the re-amendment to the Liquidator Application but limited to statements of Mr. Carbajal and Mr. Rassmuss) on or before 20 December 2005.

10. The Applicant shall have leave to serve (if so advised) any evidence in reply (other than on the issues raised in the said re-amendment) by 20 January 2006.

11. The Applicant do serve ay evidence they wish to rely upon in relation to the identity, standing and experience of its proposed liquidator by 23 December 2005.

12. The Respondents do serve any evidence they wish to rely upon the issues set out in the preceding paragraph by 15 January 2006.

13. All witnesses whose evidence shall be relied upon at trial shall attend the trial for cross-examination, unless all other parties shall by notice in writing agree to excuse such attendance. In the event that a witness shall not attend trial for cross-examination whose attendance has not been excused as aforesaid, any written statement or affidavit or other evidence of that witness shall not be relied upon by the party proposing to call that witness without the leave of the trial judge.

14. The Applicants do serve on the other parties' solicitors a draft trial bundle index by 21 December 2005. The parties to use their best endeavours to agree such index by 5 January 2006.

15. The Applicants' solicitors do prepare and distribute to the other parties paginated trial bundles by 15 January 2006.

16. Skeleton arguments to be exchanged 2 clear working days before the commencement of the trial.

17. The Applicant do serve with the skeleton argument a draft chronology (in word format). The parties to use their best endeavours to agree such chronology by the commencement of the trial.

18. Costs of this hearing to be costs in the cause.

Indra Hariprashad-Charles

High Court Judge