BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2006/0176

BETWEEN:

VIJAY KIRTILAL MEHTA

Claimant

AND

(1) RAJESH KISHOR MEHTA
(2) LUNGHIN CAPITAL LIMITED

Respondents

BVIHCV2006/0177

BETWEEN:

VIJAY KIRTILAL MEHTA

Claimant

AND

(1) RAJESH KISHOR MEHTA
(2) WALLACERY PROFITS LIMITED

Respondents

BVIHCV2006/0178

BETWEEN:

VIJAY KIRTILAL MEHTA

Claimant

AND

(1) RAJESH KISHOR MEHTA
(2) DARLINGFORT COMPANY LIMITED

Respondents

Appearances:

Janet Giret Q.C. with Michael Fay, Claire-Louise Wiley of WSmiths for the Claimant
Francis Tregear Q.C. with Christopher Young, Keisha Durham of Harney, Westwood & Riegels for the First Respondents

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2006: October 27th, 30th, November 10th

JUDGMENT

(Company law – appointment of liquidator - just and equitable ground – claimant one of two directors and shareholders of three companies – directors unable to hold meetings or to

co-operate in the management of companies – whether companies deadlocked - whether conduct of claimant causative of rift between the two directors so as to preclude the court from granting relief on the unclean hands principle – whether alternative remedy available and conduct of claimant unreasonable in seeking relief– The Insolvency Act 2003, as amended)

[1] Joseph-Olivetti J.: Case law is replete with stories of internecine warfare within wealthy families[1] and the lengths they will go to seemingly lavish their fortunes on pursuing costly litigation among themselves, often on distant shores far removed from the source of the problem, rather than on each other. The reality behind this application for the liquidation of three BVI companies ("the BVI Companies") is U.S.$40M+ and an uncle's and nephew's inability to, both figuratively and metaphorically, no longer be able to sit at the same table and break naan bread together.

[2] The Court is called upon to deal with three identical applications each in respect of three companies all pertaining to applications to liquidate the said companies. No separate issue arises in relation to any of the individual companies and counsel agreed that it was fitting that the applications be heard together and they were. It is noted, not surprisingly in the circumstances, that although properly served none of the companies were represented or took any part in these proceedings.

The Applications

[3] The applications[2] in respect of each company (collectively "the BVI Companies") are:-

a. an application for the appointment of a provisional liquidator ("PL"), or alternatively,

b. an application for the appointment of a liquidator

c. an application by the First Respondent, Mr. Rajesh Kishor Mehta ("Mr. Rajesh") to strike out both of the foregoing applications.

Relevant Procedural Background

[4] This will help to put the applications in perspective.

[5] 11th July 2006 -- applications by the Claimant, Mr. Vijay Kirtilal Mehta ("Mr. Vijay):--

[1] See for example - BVICV111/2005 Imran S. Chaudhray v Sat Star Distributions Ltd.
[2] Applications See Trial Bundle Tabs 1, 2, 8

(a) Originating Notice of Application for the appointment of a liquidator;

(b) Ordinary application for the appointment of a provisional liquidator ("PL")

(c) Notice of application for directions.

[6] 24th July, 2006 – Consent order on the hearing of the application for appointment of PL and the application for directions.

[7] The consent order was made expressly without prejudice to Mr. Rajesh's liberty to apply to stay the substantive application. It was to the following effect:-

(a) adjourning the PL application generally (but with liberty to restore);

(b) requiring Mr. Rajesh to file and serve his evidence in reply to the substantive application by 15th September, 2006; (It is noted that Mr. Rajesh filed his affidavit on 4th October, outside the time limited for so doing and without leave, but no issue was taken with that).

(c) listing time for Case Management Conference on first available date after 25th September, 2006;

(d) dispensing with the need to advertise the substantive application;

(e) reserving costs to the trial judge.

[8] It is significant that the initial applications for the appointment of a PL were made on two grounds. The first was that the registered agents of the BVI Companies, all international business companies ("IBC's") incorporated in the British Virgin Islands ("the BVI") had resigned and that Mr. Rajesh was refusing to co-operate with Mr. Vijay in adopting the necessary resolutions to appoint a new registered agent. This is a matter of import as under the IBC Act an IBC is liable to be struck off the register if it does not have a registered agent.[3]

[9] The second ground in essence was that the BVI Companies were hopelessly deadlocked and that the BVI Companies' assets were at risk as Mr. Rajesh had alleged in the Hong Kong Proceedings (as hereafter defined) that Valuable Resources Ltd, ("VRL") the majority of whose shares were held by the BVI Companies, was trading with the Settlement Monies (as hereafter defined) and that Mr. Vijay had no information about this or the whereabouts of the Settlement Monies.[4]

[3] Section 99 of the IBC Act

[4] Trial bundle Tab.10 Vijay 1 paras. 82-97

[10] 28th September 2006 – renewed applications by Mr. Vijay for the appointment of a PL on same grounds as those of the 11th July applications save those relative to the registered agents.[5] (This was because the parties had agreed to appoint agents subsequent to the making of the consent order).

[11] 6th October 2006 – ordinary applications by Mr. Rajesh to strike out or stay the Originating Application or alternatively for directions pursuant to para. 4 of the consent order.[6]

[12] 12th October 2006 – ordinary applications by Mr. Vijay for final relief on his Originating Applications of 11 July for the appointment of a liquidator.

The Form of the Evidence

[13] The bulk of the evidence is contained in the following affidavits:-

a. Mr. Vijay's first – 9th July – see Trial Bundle Tab 10;

b. Mr. Vijay's second – 14th July – see Tab 13;

c. Mr. Rajesh's first – 4th October – see Tab 15;

(Counsel for Mr. Rajesh painstakingly analysed this evidence thus:- "a great volume of evidence has been sworn in this case. Vijay's initial application was supported by a lengthy affidavit sworn on the 9th July 2006 and 883 pages of exhibits. Rajesh's affidavit of 16th October 2006 is on an equal scale."

[14] In addition, there are other pro forma affidavits dealing with the identity and consent of the proposed PL and the affidavit of Mr. Robert Clarke, solicitor of Messrs Deacons of Hong Kong, of 27th October with the transcript of the proceedings on 21st September 2006 in the HK Proceedings (as hereinafter defined). This was filed on behalf of Mr. Vijay.

[15] I mention here that both learned counsel filed skeleton submissions on which they elaborated at the hearing. These were of immense help and I am grateful.

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[5] Tab 7

[6] Tab 8

Two preliminary points on procedure

[16] I shall first consider what is in effect two preliminary points on procedure taken on behalf of Mr. Rajesh although they were made during the course of his Counsel's response. Learned Queen's Counsel for Mr. Vijay, Ms. Giret, had submitted that the court should grant the final relief prayed for (the appointment of a liquidator) as it was readily apparent from the solicitors' correspondence between the parties exhibited to Mr. Vijay's second affidavit that the BVI Companies were hopelessly deadlocked. Counsel contended that accordingly there was no need to hold a lengthy trial and that the court should deal with the matter in a summary manner on the affidavit evidence as was done in Blythe v. Sams[7].

[17] Learned Queen's Counsel, Mr. Tregear, for Mr. Rajesh objected to that application during the course of his arguments. In summary he said that the provisions of CPR 2000 Part 15 which provide for summary judgment were expressly excluded from insolvency proceedings by the Insolvency Rules 2005 Rule 4.2. And, further that it would be a grave injustice to Mr. Rajesh if he were not given an opportunity to contest the serious allegations of fraud leveled at him by Mr. Vijay in these proceedings. He also said that there were issues to be determined in considering final relief in particular whether or not Mr. Vijay had clean hands within the concept explained by Lord Cross in Ebrahimi v. Westbourne Galleries[8] and applied and explained in Vujnovich v. Vujnovich [9] and that these called for a full trial.

[18] Counsel however conceded that if Mr. Vijay withdrew the allegations of fraud then perhaps Mr. Vijay might have a case for the appointment of a PL with very limited powers of making inquiries of VRL.

[19] Mr. Tregear submitted secondly, that, by section 170(3) of the Insolvency Act 2003, leave is required before a member can apply for the appointment of a PL and that no leave had been sought or obtained here.

[20] On the aspect of leave, Ms. Giret responded that the consent order of the 24th July gave Mr. Vijay liberty to renew his applications for a PL and that that was sufficient. On the

[7] Blythe v. Sams unreported English Court of Appeal 15th Dec.1999.(Chadwick LJ and Sir Christopher Slade)
[8] [1973] AC 360
[9] [1990] BCLC 227

issue of summary judgment, Ms. Giret, in brief, submitted that she was not asking for summary judgment as envisaged by CPR 15 which she agreed did not apply to insolvency proceedings but simply that the court exercise its case management powers under CPR 2000 Part 26 to find that there was sufficient evidence before it to determine that the BVI Companies were hopelessly deadlocked and that a decision on the issue of fraud was not necessary and so dispense with the need for a prolonged and costly trial. Counsel submitted that the English High Court in Blythe adopted that approach using rules with similar effect to our case management provisions and was commended by the Court of Appeal and urged us to follow suit.

Decision on the procedural points

[21] First, the question of leave. Mr. Tregear is correct that under Section 170(3) of the Insolvency Act leave to apply for a PL is necessary where the application is being made by a member and he is also correct that no application for leave was made. I note that this point was not taken as a preliminary point. Rather, counsel made it during the course of his response after we had heard approximately three hours of argument by Ms. Giret, indeed, after she had finished her arguments on all three applications. I trust that his timing was not an indication of the degree of faith counsel placed in his submissions on these issues.

[22] Can this omission be cured or is it fatal? According to the Insolvency Rules, Rule 4.1, the provisions of CPR 2000 apply generally to insolvency proceedings except insofar as they are inconsistent and subject to Rule 4.2, which specifically excludes the parts specified in Schedule 1. CPR Part 15 is one of the parts so excluded. However, CPR Parts 25 and 26 (Case management provisions) are not excluded save for Part 26.1 (2) (a) and (2)(b) which are not relevant here. Therefore, the CPR case management provisions apply as they are not inconsistent with the Insolvency Rules.

[23] CPR Part 26.9 gives the court power to rectify procedural irregularities and provides that an irregularity does not invalidate the proceedings. Rule 26.9(4) empowers the court to make an order to rectify matters with or without an application being made. This is a case which cries out for that approach. It would be a travesty of justice and a colossal waste of the Court's time not to mention the parties', if the court were to now dismiss the applications for a PL on a procedural ground after hearing full arguments on the merits.

[24] I note that the consent order on its face does give liberty for Mr. Vijay to renew his applications for the appointment of a PL but as there was no application for leave in the first place I very much doubt, although I may be mistaken in this, that either party had Section 170(3) in mind when he consented to that. However, in the circumstance, having regard in particular to the time at which the objection was taken, to the consent order, to the fact that prima facie there is merit on the applications and that Mr. Rajesh responded in full on the merits of the applications I will exercise my discretion and treat this combined hearing as including a hearing for leave to apply for appointment of a PL as well as a hearing on the merits.

[25] Next, can the application to appoint a liquidator be determined in a summary manner in the circumstances of this case? Mr. Tregear is again correct that Rule 4.2 has expressly excluded the provisions of CPR Part 15 on summary judgment from insolvency proceedings. However, I agree with Ms. Giret that hers is not an application for summary judgment as contemplated by Part 15 but an invitation for the court to exercise its case management powers to deal with the matter in a summary manner that is, without a full trial.

[26] CPR Part 26 gives the court wide powers to manage cases to achieve the overriding objective which is to deal with cases justly as explained in CPR Part 1.1. And, it is the duty of the parties to help the court to further the overriding objective. See CPR Part 1.3.

[27] CPR Part 25 sets out the case management objective. The court's duty is to further the overriding objective by actively managing cases. This may include, among other things, actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party, considering whether the likely benefits of taking a particular step would justify the cost of taking it, dealing with as many aspects of the case as is practicable on the same occasion, dealing with as many aspects of the case as it appears appropriate to do without requiring the parties to attend court; dealing promptly with issues; deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others and deciding the order in which issues are to be resolved.

[28] CPR Part 26 sets out the court's case management powers. Some of the general powers include, the power to, decide in what order issues are to be tried, direct that any evidence

be given in written form, exclude an issue from determination if the court can do substantive justice between the parties on the other issues and determines it would therefore serve no worthwhile purpose, try two or more claims on the same occasion; take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

[29] Having regard to those provisions, in my judgment, the mere exclusion of CPR Part 15 from insolvency proceedings does not preclude the court from determining a matter without a full trial or without having parties attend for cross-examination which can be the only substantive complaint here as Mr. Rajesh has had every opportunity to reply to Mr. Vijay's affidavits in support of his applications and has done so painstakingly and comprehensively. I am therefore of the view that the court has power, in the appropriate circumstances, to determine the application for the appointment of a liquidator in a summary manner as was done in Blythe, that is without ordering cross-examination on the affidavits and a full-blown trial.

[30] Of course, having regard to the issues raised it will be necessary to consider the law on the substantive applications and the evidence to decide whether that power should be exercised here and final relief granted. Further, I must add, that on consideration of the undisputed correspondence it strikes me that prima facie this is a classic case of deadlock. If a case for appointing a liquidator on the just and equitable ground can be satisfactorily made out on the correspondence as has been submitted it can be, then it follows that the applications can be disposed of without further evidence being adduced and without a trial. In that case there will be no need to make any conclusions on the allegations of fraud and/or conspiracy leveled against Mr. Rajesh which are vehemently disputed and clearly cannot be decided on the affidavit evidence. And, the law is well established that one does not have to prove, for example fraud, to claim relief on the just and equitable ground.[10] Now to the applications to appoint a Liquidator as this is the primary relief sought. If they are successful we will have no necessity to consider of the applications for PL. I must add too that all the arguments on the three sets of applications were rolled up so to speak

[10] See Ebrahimi [1973] AC 360 p. 381para. H - "To confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words.

which was a very sensible course to adopt having regard to the similar if not to the almost identical issues arising.

The Law Governing Appointment of a Liquidator on the Just and Equitable Ground

[31] The Insolvency Act 2003, as amended, governs. Under section 159(1)(a) the Court has power to appoint the Official Receiver or an eligible insolvency practitioner as liquidator of a company on an application under section 162. These applications are made under section 162 (1) (b) of the Act, that is, on the just and equitable ground.

[32] Section 167(3) is also pertinent. It provides:-

> "Where an application to appoint a liquidator is made by a member under section 162(1) (b), if the court is of the opinion that
>
> (a) the applicant is entitled to relief either by the appointment of a liquidator or by some other means; and
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> (b) in the absence of any other remedy it would be just and equitable to appoint a liquidator,
>
> it shall appoint a liquidator unless it is also of the opinion that some other remedy is available to the applicant and he is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy."

[33] Our courts have had ample occasion to consider the just and equitable ground for winding up a company under the provisions of the Insolvency Act and similar provisions in earlier legislation. These provisions are similar to those of the English Companies Act 1948 section 222(f) which empower the English court to make a winding up order if, "the court is of the opinion that it is just and equitable that the company should be wound

up".[11] And, the English approach has been adopted by and large and followed subject to any difference in the governing legislation.[12]

[34] The established starting point as far as case law is concerned is the well known decision of the House of Lords - Ebrahimi. Lord Wilberforce, in considering the meaning of the concept of "just and equitable" as used in the English Companies Act, said that there was a tendency to create categories or headings under which cases must be brought if the clause were to apply and that that was wrong. He explained that illustrations may be used, but that general words should remain general and not be reduced to the sum of particular instances. He stated further that the words must not be confined to such circumstances as affect the applicant in his capacity as shareholder and that the applicant could rely "upon any circumstances of justice and equity which affect him in his relations with the company or, with the other shareholders".[13]

[35] The Learned Law Lord concluded by holding that the words were a recognition of the fact that in company law there is room behind the legal entity for individuals with rights and expectations and obligations inter se which are not necessarily submerged in the company structure. He held that the concept does not entitle one party to disregard the obligation he assumes by entering into a company nor the court to dispense with it but enables the court to subject the exercise of legal rights to equitable considerations arising between one individual and another which may make it unjust or inequitable to insist on legal rights or to exercise them in any particular way.[14]

[36] However, a claimant seeking relief on the just and equitable ground must come to the court with clean hands as this is an equitable remedy. That is, his conduct must not have caused the breakdown of the relationship relied on by him. See Vujnovich.[15] It is part of Mr. Rajesh's case that Mr. Vijay's conduct was causative of the breakdown. Mr. Vijay denies this. This is a matter to be resolved here if it is possible do so on the evidence before the court.

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[11] See Lord Wilberforce – Ebrahimi, cited at p.374 G.
[12] Loch v Blackwood [1924] A.C. 783, BVI Civil Appeal No. 6 of 203 – In the Matter of RBG Global S.A., BVI Civil Appeal No. 9 of 2003 – In the Matter of Sinocan Lianxing Ltd.
[13] See Lord Wilberforce – Ebrahimi, p. 375.
[14] See Ebrahimi p. 379 B-D
[15] [1990] BCLC 227

[37] And, finally we must consider the question of an alternative remedy as mandated by the proviso to section 167(3) of the Insolvency Act. Again, it is part of Mr. Rajesh's case that an alternative remedy is available to Mr. Vijay as the possibility to hold meetings on terms still exists. Mr. Vijay disputes this and we must, if we can, resolve this issue. Now, to consideration of the evidence.

Findings of Fact on the Evidence

[38] In considering the affidavit evidence with their voluminous exhibits I remain acutely aware that facts in dispute cannot be resolved on affidavit evidence unless they are to be inferred from common or undisputed documents which speak for themselves and only need interpretation by the court.

[39] If we are called upon to decide all disputed facts, especially those relating to the alleged conspiracy and fraud, in determining whether or not to grant final relief or even interim relief then we cannot proceed without a full trial. However, it is Ms. Giret's submission, if I understand it correctly, that it is not necessary to decide the issue of fraud or the peripheral issues, as, on the exchange of correspondence between the lawyers alone the court can come to the conclusion that the BVI Companies are hopelessly deadlocked, that there is a loss of confidence in the directors, that Mr. Vijay acted reasonably in coming to the court to appoint a liquidator as he has no alternative remedy and that in all the circumstances it is just and equitable to wind up the BVI Companies.

[40] In my judgment, the court would be in no better position at the close of a full trial than it is now, to decide on the effect and significance of this correspondence. We have affidavit evidence on the context in which the correspondence took place (there is no issue on that) and full submissions from both sides as to the meaning to be attributed to that correspondence. They were both parties' attempts to arrange meetings of the BVI Companies albeit each on his own terms. The issues to be determined on this correspondence are threefold – are the BVI Companies deadlocked, did Mr. Vijay cause that deadlock, is there another remedy open to Mr. Vijay if the BVI Companies are deadlocked other than the appointment of liquidators and is Mr. Vijay being unreasonable in pursuing his claim?

[41] On the issue of deadlock we have some salient evidence and even concessions by Mr. Rajesh to begin with. Of course, it is his position that the BVI Companies are not deadlocked and that if they are then that is due solely to Mr. Vijay's own fault and that on that ground alone he is barred from the relief he seeks. He also claims that Mr. Vijay has another remedy if there is a deadlock that is the possibility of what I would term constructive directors' meeting if he meets Mr. Rajesh's terms.

[42] It is pertinent to note that Mr. Rajesh in para. 13 of his affidavit has not seen fit to give any information about what use the balance of the Settlement Monies has been put save to say that it was paid to VRL. And, at para. 210 Mr. Rajesh accepts that the BVI Companies have held no directors' meetings since the date of the settlement agreement (9th March 2004) although he says that that is not through want of trying on his part. He also deposes that because of the family disputes in India he has not had any direct contact with Mr. Vijay since early 2005.[16] Undoubtedly then the boards of directors of the BVI companies have not been exercising any management control over their affairs since March, 2004.

[43] In paragraph 180 of his affidavit Mr. Rajesh says "I have also made it clear that if there really is a deadlock, once that meeting is held, Vijay can revive any application to appoint liquidators or provisional liquidators." And at paras 172 - 181 Mr. Rajesh himself addresses the issue of attempted meetings that is dealt with in paragraphs 72 – 79 of Mr. Vijay's affidavit. Thus, both parties commented in full on each other's version of events. And, essentially, their counsel's submissions on the meaning to be attributed to that series of correspondence reflect their clients' evidence and the inferences their respective clients drew or is asking the court to draw from these letters.

Brief Family background of Individual Parties

[44] Mr. Vijay and Mr. Rajesh are uncle and nephew, respectively, scions of an immensely wealthy Indian family. Mr. Vijay is 74 years old and can be regarded as the head of the Mehta family as his father; Mr. Kirtilal Mehta is now deceased. The elder Mr. Mehta was a reputable diamond merchant. He had four sons and two daughters including Mr. Vijay, the eldest child, and Kishor, Mr. Rajesh's father.[17] Apart from his diamond interests in India,

[16] Tab 15 page 48 para. 116
[17] See Ex. VKM 1 page 1 family tree

Belgium, Hong Kong, New York, Tokyo and Bangkok[18] he founded the Lilawati Hospital in Mumbai, India.[19] It appears that all his children and some, if not all of his grandchildren were involved in his businesses.

The BVI Companies

[45] The BVI Companies – Lunghin Capital Limited, Wallacery Profits Limited and Darlingfort Company Limited were all incorporated in the BVI on the 5th March 2004. Mr. Vijay says – "the BVI companies were at all times and are, as far as I am concerned, a mere private/quasi partnership with their sole purpose being to hold the shares in VRL. The BVI Companies have no business or trading activity, and they do not have any employees or hold any bank accounts."[20] Mr. Rajesh does not dispute that.

[46] Mr. Vijay and Mr. Rajesh are the only two directors of each of the BVI Companies and each one holds 50% of the issued shares in each company. Each one holds his shares on trust – Mr. Vijay holds his on trust for his two grandchildren and Mr. Rajesh for his two children.[21] These beneficiaries, not surprisingly, are all minors.[22]

[47] There is a dispute as to who actually authorized the corporate structure of the BVI Companies. Mr. Vijay says that he left it to Mr. Rajesh and that Mr. Rajesh structured them in such a way as to engineer a deadlock.[23] Mr. Rajesh denies that saying that it was done on tax advice obtained by Mr. Vijay with the intent of him relocating to India from Belgium. We are not called upon to resolve this dispute here for the purpose of these proceedings.

[48] The BVI Companies' only assets are shares in VRL, a Hong Kong Company. The BVI Companies hold among them 998 of the 1000 shares issued in VRL. Rashmi and Prabod (Mr. Vijay's brothers and Mr. Rajesh's uncles) hold the remaining two shares of VRL beneficially for Mr. Vijay as to one share and Mr. Rajesh as to the other share.

[18] Tab 10 TB Vijay - Affidavit para. 3
[19] Tab 15 Rajesh para. 108
[20] Tab 10 Vijay 1 para. 51
[21] Tab 10 Vijay 1 para. 51 Exhibit VKM1 pages 2 - 5 declarations of trust
[22] Tab 15 Rajesh para. 9 - Mr. Vijay's grandsons – Zane (13) and Shawn (11); Mr. Rajesh's children- Harshvardham (13) and Kaivan (11)
[23] Tab 10 Vijay paras 50-52

[49] There is a dispute about the purpose for which VRL was formed. Mr. Vijay claims it was solely for the purpose of holding his investment in an Indian airline and not to trade. Mr. Rajesh seems to agree that it was incorporated for the purposes of the investment but that in addition it was intended as a trading company and that after receipt of the Settlement Monies he and Mr. Vijay agreed that VRL would trade with those monies. Mr. Vijay denies this.[24]

[50] Both parties rely on the first affidavit of Mr. Jindal filed in proceedings in the Isle of Man ("IOM") as to VRL's corporate history.[25] Therefore, it is common ground that VRL was incorporated in Hong Kong on 27th May, 1993 and that its first shareholders and directors were corporate bodies. Two shares were issued. On 24th September 1993 the shares were transferred to Prabodh and to Rashmi, one share each. On 23rd June, 2000 the shareholders resolved to authorize the directors to issue 499 shares each to Mr. Vijay and to Mr. Rajesh. On 3rd March, 2004 Mr. Vijay and Mr. Rajesh were appointed directors and the corporate directors resigned. On 18th March, 2004 Mr. Vijay transferred one of his shares to Prashant (his nephew and Mr. Rajesh's brother) and the other remaining 498 shares to Charu, Mr. Rajesh's mother and on the same day Mr. Rajesh transferred all his shares to Niki, Mr. Vijay's son. On 30th March, 2004 Prashant transferred his share to Darlingfort, Charu transferred her 498 shares to Wallercery and Niki transferred his 499 shares to Lunghin. On 3rd April Mr. Vijay and Mr. Rajesh resigned as directors and Prashant and Charu were appointed directors in their stead. On 10th March 2005, Mr. Jindal was appointed director. To sum up, the current position is that the BVI Companies together hold 998 of the 1000 shares issued in VRL and the remaining two shares are held as to one each by Rashmi and Prabodh. The directors are Charu, Mr. Jindal and Prashant.

[51] In 1993 Mr. Vijay invested US$2.5M in an Indian airline venture with Mr. Naresh Goyal shortly after India instituted its "open skies policy" in 1990. His brother, Kishor (Mr. Rajesh's father) introduced him to Mr. Goyal. In May 2000 VRL and Mr. Vijay instituted proceeding in IOM against Mr. Goyal to recover Mr. Vijay's investment in Jet Airways Ltd. Mr. Vijay says, and that is not disputed, that by March 2004 he had agreed to share his

[24] Tab 15 Rajesh para 50
[25] See VKM 1 page 78

investment with Mr. Rajesh by way of the trusts for the children and grandchildren and that is why the shareholding in VRL was restructured. The IOM litigation was settled on the terms of a Settlement Agreement dated 9th March, 2004. In short, Mr. Vijay gave up his personal interest in favour of VRL and Mr. Goyal agreed to pay to VRL, U.S. $40.25M ("the Settlement Monies")[26]. On 6th April, 2004 the Settlement Monies were paid to Mr. Vijay's and VRL's lawyers in the IOM, Messrs Cains. The whereabouts of or the use to which the Settlement Monies will be or has been put by VRL is the real bone of contention here as Mr. Vijay claims not to know what VRL has done with it and he alleges that both VRL and Mr. Rajesh have conspired to defraud the ultimate beneficiaries of the monies. Mr. Rajesh takes issue with those allegations.

[52] Mr. Vijay sought information from Mr. Rajesh and VRL about the Settlement Monies in his capacity as director and shareholder of the BVI Companies but to date has received no proper answers. Mr. Vijay began making inquiries as to the whereabouts of the Settlement Monies in the summer of 2004. In May 2005 he retained lawyers, Gough & Co. in the IOM to continue to make inquiries and he took court action in the IOM against Cains to access the court files. Interestingly, this action was strenuously opposed by VRL. See Mr. Jindal's first affidavit at VKM1 p 78. He eventually obtained a court order for disclosure of court documents and VRL had to pay costs. See order of Deemster Sullivan - VKM 1 p. 64-65.

[53] Mr. Rajesh alleges that it was not necessary for Mr. Vijay to take this action and that he did so to paint VRL and Mr. Rajesh in a bad light. I find it hard to believe that anyone would go to such lengths and expense merely for that purpose. In any event it was always open to VRL and Mr. Rajesh to give Mr. Vijay the information he wanted then and now or if Mr. Rajesh himself did not have the information for him to join with Mr. Vijay to request it of VRL as directors of the BVI Companies. It is significant that rather than doing so or cooperating with Mr. Vijay to obtain the information from VRL, Mr. Rajesh has chosen to oppose these applications, a stance similar to that taken by VRL in the IOM.

[26] See Vijay 1 paras. 44-49.

The HK Proceedings

[54] As a result of VRL's failure to disclose information and its adversarial stance in the first IOM proceedings brought by Mr. Vijay[27] and Mr. Rajesh's failure to cooperate with Mr. Vijay to request information from VRL, Mr. Vijay eventually convened a shareholders' meeting of the BVI Companies on 14th December 2005 in London after he had attempted to call a directors meeting on 15th November. He claims that he notified Mr. Rajesh of the meetings. (This specific issue of notice is now before the Hong Kong court and I will not trespass on that court's jurisdiction by even commenting on it and in any event it is not necessary to make a finding on this for the purposes of this application.) Mr. Rajesh failed to attend and Mr. Vijay passed resolutions authorizing himself to act on behalf of the BVI Companies ("the Disputed Resolutions").[28] Thereafter, he attempted to take over control of VRL in Hong Kong ostensibly to investigate what had happened to the Settlement Monies and to collect it and distribute it to VRL's shareholders. Accordingly, relying on the Disputed Resolutions he called an extraordinary general meeting of VRL for February 28th, 2006. However, on 24th February, 2006 Mr. Rajesh obtained an ex parte injunction in Hong Kong to restrain him from so doing.

[55] The inter partes hearing was scheduled for June, 2006 but was adjourned. The precise reason for the adjournment is unclear and is not really relevant in these proceedings. I remark that Mr. Vijay maintains that this is an attempt by Mr. Rajesh to spin out the action in Hong Kong and that this is vehemently denied by Mr. Rajesh. Counsel for Mr. Rajesh told the court that the inter partes hearing is next scheduled for the 20th November 2006. In the interim, Mr. Vijay sought and obtained security for costs.[29] VRL is now a party to that action.

[27] Mr. Vijay later took two other actions in the IOM alleging fraud by Mr. Rajesh (in relation to the payment of the Settlement Monies) but I do not consider that we need go into these for these purposes, merely to note them.
[28] Disputed resolutions See VKM 1 pages 815 –817
[29] See Affidavit Mr. Clarke with transcript of HK proceedings on application for security for costs.

The Correspondence

[56] Now to the letters. They span a period of approximately seven months – March to September 2006 and document the parties' attempts to convene meetings of the BVI Companies.

[57] On the 15th March 2006, Messrs Allan & Overy, ("A & O"), Mr. Rajesh's HK Lawyers, wrote Messrs Deacon's ("Deacons"), Mr. Vijay's HK lawyers, informing them that their client would like to arrange directors' meetings of the BVI Companies. They indicated, "the agenda for any such directors meeting would be a broad one dealing with how our respective clients wish to proceed in so far as Valuable Resources Limited is concerned and in so far as the BVI Companies are concerned." They asked that Deacons take instructions and revert to them with proposed dates. See Tab 13 - Exhibit VKM2, page 9. Note, this is written well after the commencement of the HK Proceedings by Mr. Rajesh.

[58] On 21 March A & O followed up with another letter. See Exhibit VKM2 page 11. This was a formal notice that a meeting would be held at the St. James Hotel, London, England at 2:30 p.m. on Tuesday 30th May 2006. It set out the proposed agenda as:-

1. discussion of all matters concerning VRL
2. discussion of all matters concerning the management of the BVI Companies and
3. any other business raised by either director.

[59] By letter dated 30th March 2006 Mr. Vijay wrote directly to Mr. Rajesh. See VKM1 p. 847. In it Mr. Vijay repeated his allegations against Mr. Rajesh and the current directors of VRL that they were responsible for misappropriating the Settlement Monies and set out the basis for his allegations. He also repeated allegations he had made in Indian proceedings against other members of the Mehta family which do not have any direct bearing on these proceedings. He said that he had no objection to attending the meetings called by Mr. Rajesh as they would be without prejudice to the HK proceedings. Mr. Vijay stated that the matter was urgent and that 30th May 2006 was too far away. He gave notice that he would convene meetings on 6th April, gave notice of the proposed venue in London and set out his proposed agenda which is at VKM1 p. 851. These repeated the text of the Disputed Resolutions.

[60] On 31st March Deacons followed this up with a formal letter to A & O calling for a directors' meeting on 6th April 2006 in London instead of 30th May. The proposed agenda was the same as that proposed by their client. See VKM1 p. 851.

[61] A & O responded on Mr. Rajesh's behalf by letters of 3rd April 2006. See VKM1 p. 857 and 859. They denied the allegations of fraud and took issue with the short notice and the proposed agenda. They stated most tellingly: - "The fact that our client does not agree with the proposed resolutions is clearly no more than an indication that our client does not wish companies in which he has a 50% interest being controlled by one individual excluding himself." This seems to be the only thing that Mr. Rajesh and Mr. Vijay have in common. They explained why the 30th May was proposed in the first place, essentially to give time to Mr. Vijay to prepare for the meetings. They said that Mr. Rajesh could not attend on the 6th April personally and sketched different scenarios for what would happen if the meetings went ahead. They said that if Mr. Rajesh appointed an alternate, the alternate would be instructed to vote "No".

[62] A & O said that a wide ranging agenda was called for to progress matters relating to VRL and the BVI Companies. They asked for confirmation that the meetings of the 6th April would not proceed and that that of the 30th May would go ahead instead.

[63] On 4th April Deacons responded. See VKM1 p. 861. They indicated among other things that Mr. Rajesh's objection to the proposed Resolutions 1 and 2 might be considered strange having regard to their content which only dealt with making inquiries of VRL which ought not to have been in the least controversial. They pointed out that the 6th April meeting could be held by telephone in accordance with the Articles. They confirmed that the meetings would proceed on the 6th April and supplied a telephone number for Mr. Rajesh to contact Mr. Vijay at a scheduled time.

[64] A & O wrote on 6th April 2006. See VKM1 p. 863. In essence they said that as the proposed resolutions were substantially the same as the disputed resolutions, the inference was that Mr. Vijay wanted to exclude Mr. Rajesh from management and it was for this reason that Mr. Rajesh would not consent. They indicated that Mr. Rajesh had appointed Mr. Sachdeva, one of the lawyers at A & O, as his alternative to have the meeting by telephone on the 6th April.

[65] Deacons took issue, inter alia, with the propriety of the appointment of Mr. Sachdeva. They also again queried why Mr. Rajesh would take issue with proposed resolutions 1 and 2. See VKM1 p. 872-3.

[66] By letter of 6th April 2006 A & O then indicated that the new alternate Ms. Sarah Garvey would attend the meetings in person. See VKM1 868. The meetings as convened by Mr. Vijay were held on the 6th April in London. Ms. Garvey attended all the meetings as Mr. Rajesh's alternate and voted against each resolution. When asked why, it is recorded that Ms. Garvey said that she had no instructions other than to vote no and that she did not know the background at all. See copy of the Minutes at VKM1 p. 874. This opportunity to hold constructive meetings and engage in at least some dialogue on some if not all of the issues involving the BVI Companies was therefore lost by Mr. Rajesh's stance.

[67] At those meetings under 'any other business' it is noted by Mr. Vijay that he asked some pointed questions which all went unanswered. He asked that Mr. Rajesh as director of Lunghin explain what happened to the US$40M+ and where it is. At the Darlington meeting he asked that Mr. Rajesh give him complete details of what transpired in the IOM after Mr. Vijay's departure. That Mr. Vijay would like Mr. Rajesh to answer all previous correspondence (by past and present directors of VRL) about subsequent siphoning of assets without Mr. Vijay's consent. Mr. Vijay stated that he was in suspense about VRL since August 2004. See VKM1 p. 876. Mr. Vijay records similar queries as having been put by him at the Wallacery meeting. See VKM1 p. 877.

[68] On 17th May 2006 A & O wrote saying that given what had transpired at the directors' meetings of 6th April they proposed that the meetings fixed for the 30th May should be postponed after the hearing in the HK Proceedings that were carded for 20th to 22nd June. See VKM1 p. 879.

[69] Deacons responded by letter of 26th May 2006. See VKM1 p. 880. They pointed out, among other things, that the BVI Companies continued to remain paralysed and the Boards wholly ineffective. They did not agree to the postponement but instead asked that the proposed resolutions tabled at the 6th April meetings be put on the agenda together with the appointment of a new company secretary, registered agent and registered office.

[70] By letter of 29th May A & O informed Deacons that Mr. Rajesh would not attend the meetings as Mr. Rajesh did not see any value in attending them but that was not to say

that meetings could not be held at a later date. They pointedly remarked that if their client did not attend the meetings would be inquorate and therefore no resolutions could be passed. See VKM1 p. 883. Thus, Mr. Rajesh is taken to have known precisely what the result of his not attending would be – effectively that the BVI companies could take no action to oversee its interests in VRL or conduct any other business. This is at the least a curious attitude for Mr. Rajesh to adopt as ostensibly, putting aside personal differences, he had and still has the same directors' obligations as Mr. Vijay to secure the BVI Companies investment in VRL.

[71] What followed next of course was an adjournment in the HK Proceedings in June, 2006 and the institution of these actions by Mr. Vijay. It is also pertinent to note that during 2005 disputes broke out among the family in India between what I would call "the Vijay side" of the Mehta family and "the Kishor side". Yes, this unfortunate family is now divided. It puts us in mind of the blood feud in the House of Atreus between Atreus and his brother Thyestes. Atreus' sons, Agamemnon and Menelaus, continued it and this resulted in the death of Agamemnon on his return from Troy by his own wife aided by his nephew, Aegisthus (Thyestes' son). The vendetta reached its unspeakable climax when Agamemnon's son, Orestes, avenged his father's death by murdering his cousin, Aegisthus and his own mother, Clytemnestra. It remains to be seen if the House of Kirtilal Mehta re-enacts a similar scenario, tailored to modern times of course. But, I digress.

[72] The action now moves to the BVI where the ball of discord is taken up by BVI lawyers. On 26th July WSmiths (Mr. Vijay's BVI Lawyers) wrote to Harney Westwood & Riegels ("Harneys"), Mr. Rajesh's BVI Lawyers. See VKM 2. This was after they had both appeared at the hearing here on the 24th July and had entered into the consent orders. WSmiths referred to their clients' efforts to have meetings which culminated in the 'recent applications to the court' and of their client's purpose for wanting the meetings – the appointment of a registered agent (this had been resolved) and 'the question of the whereabouts of the Settlement Monies'.

[73] WSmiths also took issue with Mr. Rajesh's allegations in his affidavit in the Hong Kong Proceedings that Mr. Rajesh had made an oral agreement with Mr. Vijay that VRL were to use part of the Settlement Monies to commence trading. That is the reference to the Lilak Diamond Agreement dated 5th August 2004 at VKM1 p. 67-77 in which VRL agreed to buy

US$9+M worth of diamonds. So, this clearly highlighted another concern of Mr. Vijay's, which was that the Settlement Monies were being used for trading purposes and that the majority shareholders had no knowledge of the trading activities being undertaken. They stated that Mr. Rajesh had not had any contact with VRL about either the monies or trading matters since August 2004. This tallies with what Mr. Rajesh said at para. 210 of his affidavit.

[74] WSmiths stated:-

> "Given the fact that for nearly two years the directors of VRL (initially your client's brother and mother, and now his associate) have been trading with, effectively, a start-up capital of some $40 million (provided by 99.8% of its shareholders) and during that period they have:
>
> - Not provided their shareholders with any information as to the nature of the trading being undertaken.
> - Not provided the shareholders with any form of accounting information be it trading accounts or otherwise.
> - Not called any meetings of VRL's shareholders.
> - Not provided our client (a known director and shareholder in the Companies, being the 99.8% shareholders of VRL) with any information about VRL, even to the extent of refusing to respond to any of our client's formal requests for information.
> - VRL is in default of filing its annual return.
>
> It seems inconceivable that the directors and shareholders of the Companies should not share overwhelming concern as to what has happened to the Settlement Monies.
>
> Our client therefore proposes that the Companies each send letters to the directors of VRL urgently seeking information as to VRL's trading position and/ or as to the whereabouts of the Settlement Monies."

[75] They indicated that the matter was urgent and that if they did not receive a positive response by 31st July they would consider restoring the application for PL.

[76] This idea of sending a joint letter to my mind was not an unreasonable proposal as the information requested on the trading activities of VRL was such that one would normally expect a trading company to provide in the normal course of business to its shareholders.

[77] Unfortunately Harneys did not think so. On 11th August, they responded after sending two holding letters. See Tab 13 p. 6. They refuted the allegations about the purported attempts to have meetings and the Settlement Monies. They did not think it necessary to reply in detail on the issue of the whereabouts of the Settlement Monies in view of the fact that VRL was due to file evidence in the HK Proceedings answering those allegations. They said:- "… in respect of any discussion about seeking information from VRL it would be appropriate for our respective clients to await the service of VRL's evidence which is due in only 7 days." (Emphasis added) Clearly, from this statement one can infer that Mr. Rajesh had a good idea of how VRL was progressing with its part in the HK Proceedings. I had omitted to mention I think that VRL had applied to be joined in the HK Proceedings.

[78] On the 'attempted meetings' issue they said at para. 5:-

> "Our client has always been and remains prepared, in principle, to hold a meeting with your client, at an appropriate time, at which all the issues in dispute between our respective clients (including matters currently pending in Hong Kong, India, the Isle of Man and the BVI) can be discussed." (Emphasis added)

[79] WSmiths responded by letter of 31 August. See Tab 13 p. 14. The salient points of the letter can be summed up thus. WSmiths had now received VRL's evidence in the HK Proceedings – the affidavit of Charu Mehta. Her evidence about the whereabouts of VRL's assets was simply this – "VRL will provide information in relation to the Settlement Proceeds upon the request of the shareholders of VRL. No such request has been made." This then was the relevant long awaited revelation from VRL about the Settlement Monies.

[80] WSmiths proposed that if VRL would respond upon request of the BVI Companies as indicated by Mrs. Charu then Mr. Vijay and Mr. Rajesh should send a joint request. They sent a draft for Harneys' consideration. The draft letter of request is at Tab 13 page 16. I will set out the relevant part in full:-

> "Please provide us with the following information, in writing, on or before 14 September 2006. This information should be sent to us care of both of the following addresses:
>
> WSmiths, Qwomar Complex, 4F, P.O. Box 3170, Road Town, Tortola, British Virgin Islands; and Harney Westwood & Riegels, Craigmuir Chambers, PO Box 71, Road Town, Tortola, British Virgin Islands.
>
> 1. Full details of the current assets of VRL as at 31st August 2006.
> 2. Full details of all Bank accounts held by and on behalf of VRL since 1st April 2004 together with copies of bank statements relating to each and every account from 1st April 2004 to 31st August 2006.
> 3. Full details of all commercial and trading contracts entered into by VRL since 1st April 2004 and an up to date report on each such contract.
> 4. Full details of all expenditure incurred by VRL since 1st April 2004 including payments made to the Directors, whether by way of salary or expenses.
> 5. Copies of all minutes of meetings attended by the Directors of VRL since 1st April 2004, including copies of all Board Meetings.
> 6. Copies of all Accounts produced by VRL since 1st April 2004, whether monthly management accounts or annual accounts.
> 7. An explanation as to why VRL have not held any Shareholders Meetings since 1st April 2004. Furthermore, if

no accounts are produced in accordance with the previous request, an explanation as to why no such accounts exist."

[81] Harneys finally responded on 15th September 2006. See Tab 13 p. 19. Perhaps surprisingly Harneys chose to revisit the entire history of allegations made by both parties again rather than deal directly with the proposed request. Maybe they doubted that WSmiths had been fully briefed by Mr. Vijay's overseas lawyers? They took exception to WSmiths' letter as being premised on the basis of very serious and wholly unsubstantiated allegations about their client and went into detail about alleged false and misleading evidence and Mr. Vijay's inconsistent position in various jurisdictions.

[82] However, despite this lengthy preamble which one might think did nothing to pour oil on troubled waters, they proposed "a way forward" as follows:-

"The Way Forward

In light of the evidence filed by VRL and the demonstrably inconsistent positions your client has taken in various jurisdictions around the world, our client considers the following to be a reasonable way forward in the BVI and Hong Kong:

(a) Your client decides whether he wishes either to contest the validity of the Disputed Resolutions or to continue with the current BVI Proceedings. If he wishes to continue the BVI Proceedings, your client should withdraw his opposition to our client's inter-partes summons in Hong Kong (along with the ancillary jurisdiction challenge and the application for security for costs). If he wishes to continue the Hong Kong proceedings, your client should discontinue these proceedings.

(b) If your client wishes to proceed with the BVI proceedings, your client agrees to a stay of the same pending (d) below; and

(c) your client withdraws the unsubstantiated complaint made in Mumbai as against all parties pending (d) below;

(d) our respective clients have a face-to-face meeting of members and/or directors of the BVI Companies (with lawyers present, should your client so wish).

If points (a) to (c) are fulfilled, our client will agree to pass a resolution at a meeting of the members and/or the directors of the BVI Companies to seek information from VRL as to the Settlement Monies, on the condition that your client will also discuss the other outstanding issues between our respective clients in good faith.

In the event that, after that meeting, there is truly a deadlock between our respective clients, your client would be at liberty to restore his application to appoint liquidators." (Emphasis mine)

[83] Not surprisingly on 19th September 2006 WSmiths rejected "the way forward" and thus the final golden opportunity to hold constructive meetings was lost.

[84] To my mind the fallacy in the line of reasoning put forward on behalf of Mr. Rajesh here that the BVI Companies are not yet deadlocked is also apparent in Harneys' letters in particular that of 15th September. See Tab.13 at page 25. The thinking appears to be that there can be no true deadlock so long as a genuine meeting of directors has not been held. This to my mind translates into saying that to claim a deadlock you need to show first that there was a meeting and then that a decision could not be reached because the directors could not agree. This cannot be correct. A deadlock in a company's affairs is not premised on the directors' first having a "genuine" meeting. If so what would be the situation as here where the relationship has deteriorated to the point where the directors cannot even agree on an agenda much less agree to convene a meeting? Must the company then be consigned to limbo, a state that even the Holy Roman Catholic Church has recently abolished?

[85] From the authorities a genuine meeting is not a condition precedent so to speak to establishing a deadlock or right to relief on the just and equitable ground. It would be ludicrous to so hold unless the court has the power to compel directors to meet in such

circumstances which it does not have. In Loch v. John Blackwood Ltd.[30] a Privy Council decision from Barbados, the directors did not hold meetings and the court did not require them to do so before coming to court. Likewise, in Re Yenidje Tobacco Co.[31] In that case the meetings held were termed "a farce" or "a comedy".

[86] Having perused the letters and considered the submissions on them I am of the view that they show without a doubt the wide chasm which has developed between Mr. Rajesh and Mr. Vijay, that the relationship has broken down and that neither reposes the mutual trust and confidence in each other on which the BVI Companies were presumably established and which was necessary to be maintained if the companies were to function properly. The ensuing result is that the BVI Companies are at sea and rudderless since at least late March of 2004.

[87] In my view the position adopted by Mr. Rajesh here is unreasonable. The question which was posed so passionately and so frequently by Ms. Giret and which remains unanswered resonates throughout these proceedings. If Mr. Rajesh has no knowledge of the whereabouts of the Settlement Monies and the use to which they have been put by VRL then why is he not joining with Mr. Vijay to make inquiries of VRL?

[88] In my view, Mr. Rajesh as a director of the BVI Companies should hasten to put his personal interests aside and the perceived affronts Mr. Vijay has allegedly offered him by making allegations of fraud against him and by taking action against the Kishor side of the family in India. He should have had no difficulty in joining with Mr. Vijay to ascertain what VRL has done or is doing with the monies. At the very least he ought to have had no difficulty about sending the joint request for information as proposed by WSmiths in their letter of 31st August. That he has opted not to do so makes very little sense from the point of view of the BVI Companies and their ultimate beneficiaries.

[89] In my judgment Mr. Rajesh has allowed his personal interest in the Mehta family warfare to affect his decision as a director and shareholder of the BVI Companies and has failed to cooperate with Mr. Vijay in conducting the business of the BVI Companies. In short, the BVI Companies are in a deadlock situation as a result of the loss of confidence between the directors. The nature and structure of the BVI Companies are such that they can be

[30] [1924] A.C.783
[31] [1916] 2 Ch.426

said to have been intended to operate as a quasi partnership and therefore the loss of trust and confidence between the directors and the resulting deadlock is sufficient to invoke the just and equitable ground for the appointment of a liquidator.

[90] I am supported in this by the dictum of Lord Shaw of Dunfermline in Loch: - "…It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

[91] However, this is not the end as I must go on to consider the question of clean hands as we have seen that the law is that if the relationship broke down as a result of Mr. Vijay's actions he cannot rely on the breakdown or deadlock to seek relief.

[92] Mr. Tregear submitted that Mr. Vijay caused the breakdown in the relationship because of the unjustified allegations of fraud and conspiracy he has made against Mr. Rajesh in these and other proceedings in other jurisdictions. Further, Mr. Rajesh's counsel submitted that the breakdown must be seen in the context of the global warfare taking place between factions of the Mehta family. However, he was unable to cite any date from which Mr. Rajesh claims that the breakdown in the relationship between Mr. Vijay and Mr. Rajesh ensued as a result of that and that Mr. Vijay in any event is responsible for the global family warfare.

[93] Did Mr. Vijay cause the breakdown in the relationship between he and Mr. Rajesh which led to the deadlock in the BVI Companies' affairs? It is instructive that Mr. Rajesh says at para. 102 of his affidavit that an unfortunate battle broke out in the family in India whilst the release of the Settlement Monies was being attended to in the IOM. And at para. 108 he referred to another serious dispute between Kishor, Charu and Rajiv against Mr. Vijay re

the Hospital Trust Fund. He stated at para. 116 that in the light of the disputes in India he had had no direct contact with Mr. Vijay since early 2005.

[94] The foreign proceedings, in particular those in Mumbai, India are not germane in so far as the merits of those cases go. However, their nature and who instituted them might shed some light on this issue. Therefore, I will look briefly at them, as the parties to them, the dates and who instituted them are not in issue.

Foreign Actions Commenced by Mr. Vijay

[95] June 2005 - Proceedings begun by Mr. Vijay in the IOM courts seeking discovery of the court file in the court proceedings which gave rise to the payment of the Settlement Monies. This action allegedly resulted from Mr. Rajesh's failure to give him information as to when the Settlement Monies were paid. The court found his action justified. (See VKM1 p. 10 – 482)

[96] November 2005 - Proceedings begun by Mr. Vijay in the IOM alleging that his signature on the letter put before the IOM court supporting the application for the release of the last tranche of the Settlement Monies was a forgery. (See VKM1 p. 483 – 494)

[97] This allegation, I gather, is that the forgery was committed by Mr. Rajesh or someone on his behalf. Mr. Rajesh denies the allegation. This action was discontinued by Mr. Vijay after it was shown that his son Nicket had given false testimony, although Mr. Vijay alleges that this was not the reason for discontinuing the action. That his son gave false testimony is not disputed however. Note that the date is after the payment of the Settlement Monies and after Mr. Vijay's first attempts to obtain information about the Settlement Monies.

[98] February 2006 - Proceedings in the IOM, A.G.'s Reference See VKM1 483 - 494. This is Mr. Vijay pursuing his allegation of forgery in the IOM. Mr. Rajesh has denied the allegations.

[99] June 2006 – Mr. Vijay commenced proceedings in India against Mr. Rajesh, Charu, Kishor and Prashant. These concern allegations of fraud in respect of the Settlement Monies. See para. 117 of Mr. Rajesh's affidavit and RKM pages 291-316.

[100] In the light of the dates that these actions were commenced can they really be said to be the cause of the breakdown? Rather, having regard to the complaints made they seem to me that they were the consequences of the breakdown in the relationship between Mr.

Vijay and Mr. Rajesh which to my mind appears to have begun shortly after the Settlement Agreement in March 2004 was signed and seem to stem mainly from Mr. Vijay's claims that he was not told what was happening with first, payment, and then use, of the Settlement Monies. Whether the complaints were justified or not is of course not a matter for this court but for the courts which are seized of the actions and as already pointed out the IOM court allowed Mr. Vijay access to the court files even though such access was opposed by VRL which means that this application was justified. The actions clearly evidence that there is an irreparable breakdown in the relationship between Mr. Rajesh and Mr. Vijay and I am not persuaded that the filing of these actions caused the breakdown which led to the stalemate in the affairs of the BVI Companies.

[101] We have already referred to the Hong Kong proceedings filed by Mr. Rajesh on 24th Feb 2006 and need say no more on that as its genesis is clear.

[102] We must complete this exercise by looking at the other side of the coin so to speak, the actions taken against Mr. Vijay by members of the Kishor side of the Mehta family just to highlight that the breakdown in the relationship arose on a balance of probabilities as a result of a bigger rift in the Mehta family and cannot in any event be attributed solely to Mr. Vijay.

Actions Commenced Against Mr. Vijay in Mumbai, India

[103] 23rd May, 2005 - complaint by Rajiv (Mr. Rajesh's brother) to the Mumbai Police against Mr. Vijay. This complaint was that Mr. Vijay had grossly misused a company's letterheads to his advantage by creating some backdated falsified correspondence. See Mr. Rajesh's affidavit para. 104 and RKM1 p. 92.

[104] 5th June 2005 – complaint by Prashant (Mr. Rajesh's brother) identical to that of Rajiv's. See Mr. Rajesh's affidavit para. 107 and RKM1 p. 94.

[105] 8th July 2005 – Complaint by Rajiv to the police. This complaint was that Mr. Vijay, Niket and a Mr. Shetty barged into Kishor's hospital room and Mr. Shetty then proceeded to make certain threats against Kishor. See Mr. Rajesh's affidavit para. 109 RKM1 p. 97.

[106] 28th April 2006 - Charu Mehta against Mr. Vijay – (See Rajesh 112 and RKM 1 p. 101-150.) This is a civil claim brought against Mr. Vijay, Niket and others and relates to the Lilavati Kirtilal Mehta Trust and her position as trustee.

[107] May 2006 – Mr. Kishor commenced two separate sets of proceedings against Mr. Vijay in the Chief Metropolitan Magistrate's 4th Court. See Rajesh 113 RKM1 151-197

[108] These actions without any further analysis simply reinforce what I have already held that the rift in the family is such that one brother's family feels obliged to pit itself against the family of the other and that the breakdown in the management of the affairs of the BVI companies cannot be laid exclusively at Mr. Vijay's door so as to debar him from the relief that he is seeking here.

The Question of an Alternative Remedy Available

[109] Mr. Tregear submitted that an alternative remedy in the form of meetings is available. On that issue, I do not consider that the offer Harneys made to hold meetings on condition essentially that Mr. Vijay withdraw or put a moratorium on proceedings in other jurisdictions is reasonable and amounts to an alternative remedy.

[110] There is no real likelihood that the parties can ever meet and hold constructive meetings. I recall the results of the meetings that were held in London on 6th April when Mr. Rajesh sent a representative with instructions to vote "NO" to every resolution. Nothing has changed to ensure that this farce would not be repeated.

[111] In this case it is apparent that the parties, despite what each considers reasonable efforts on his part, have not been able to meet much less come up with an agreed agenda. They could not even agree to take a decision to send a request to VRL in the terms of WSmiths draft letter of request or even in an amended form even though they could have done that without calling a formal meeting. Harneys, on their client's instructions of course, insisted that all matters in dispute be dealt with at once and not issue by issue which might have started the ball rolling. For example, the whereabouts of the Settlement Monies must surely have been seen as a matter of priority to both parties and their lawyers yet Mr. Vijay's offer to send a joint request for information was rejected in toto. What possible justification can there be for that?

[112] The BVI companies have held no meetings, as Mr. Rajesh readily admits, since May of 2004. Each director has equal say in the affairs of the BVI Companies at both board and shareholders meetings, therefore the shareholders cannot even hold a meeting for that matter to remove the directors and say, appoint new directors. The validity of the one

shareholders' meeting which Mr. Vijay convened after the rift is the subject of litigation in Hong Kong.

[113] Another indicator of the deep rift between the directors is the fact that they could not even agree on such a fundamental proposition as the appointment of a registered agent until after Mr. Vijay had applied for relief from this court in July 2006. Must we then in the face of this alarming state of affairs insist that the parties go away and have a meeting and then depending on the outcome of that meeting decide whether or not there is a deadlock? That, it seems to me, is what Mr. Rajesh's counsel is saying and if that is so then that is untenable. In my view this is a classic deadlock situation.

[114] As a result of Mr. Vijay and Mr. Rajesh's inability to discuss the affairs of the BVI Companies there is no one to the manage the affairs of the BVI Companies. What is more, the BVI Companies do not have any effective representation on the board of VRL and ultimately no control over VRL's assets, which in the main is the Settlement Monies, and represent the BVI Companies' assets. The court is also mindful of the fact that infants are the ultimate beneficiaries of the BVI Companies. This situation cannot be allowed to continue, as it is clearly not in the best interests of the BVI Companies that its affairs should be so stalemated indefinitely and its assets put at risk. In short, there is no proper alternative remedy available to Mr. Vijay and taking all the circumstances into consideration I hereby exercise my discretion by granting his applications for the appointment of liquidators.

Should Proceedings be Stayed?

[115] I must mention the question of a stay as Mr. Tregear submitted that the court should stay these proceedings until after the determination of the HK Proceedings. For the reasons just given this cannot be entertained as the BVI companies cannot be allowed to exist in this condition indefinitely and the application for a stay must be dismissed.

[116] Further, by section 168 of the Insolvency Act the court is mandated to dispose of an application within six months after it is filed although the court has authority to extend the period upon such conditions as it thinks fit for one or more periods not exceeding three months if special circumstances justify the extension. This, if I may say so, underscores Parliament's recognition that the appointment of a liquidator is what has been justly called

a draconian remedy and the need to deal with it with dispatch. This section has been given a very strict construction[32]. I note that the hearing scheduled in Hong Kong on 20th November is only the inter partes hearing on the injunction. The reason advanced for staying the actions do not amount to special circumstances and this court as the court of the jurisdiction in which the BVI companies were incorporated must act in what it perceives to be in the best interests of the companies which cannot be served by staying these actions.

[117] I also note that by virtue of section 175(1) (b) of the Insolvency Act the directors and other officers of the company remain in office on the appointment of a liquidator but that they cease to have any powers, functions or duties other than those required or permitted under the Act. Thus the liquidators would have ample powers to take such part in the HK Proceedings as they might be advised upon taking independent legal advice.

Applications to Appoint PL

[118] Having regard to the decision arrived at to appoint liquidators there is no need to consider the question of the appointment of a PL which is only an interim remedy pending final determination of an application to appoint a liquidator.

General Observations

[119] In view of the deep discord between the parties, I feel constrained to make it abundantly clear that this court has not made any determinations on the allegations of fraud and conspiracy made by Mr. Vijay against Mr. Rajesh as such a finding was not necessary for the determination of the issues before the court. In passing I note that these allegations are the subject of proceedings in India and doubtless both parties would have their day in court there if they see fit.

[120] Both counsel made submissions on the significance to be attributed to arguments advanced and even answers given to the Hong Kong court by counsel in the HK Proceedings as reflected in the transcript exhibited to the affidavit of Mr. Clarke. I am not sure that such statements have any binding effect in law on the parties as they are not the

[32] See Hariprashad-Charles J in BVIHCV2006/0127B Safe Solutions Accounting Ltd. et or v. French Connections Ltd.

subject of judgments and one is all too aware that counsel adopts different positions in different forums based on instructions and the issues at hand. Accordingly, with all due respect to learned counsel I have not given any weight to these matters.

Costs

[121] On the issue of costs both parties have agreed that the prescribed costs regime laid down by CPR Part 65 applies and that the value to be attributed to the claim is $50,000.00 as no application was made to determine the value. Mr. Vijay as the successful party is therefore entitled to his prescribed costs of $14,000.00.

Conclusion

[122] For the reasons advanced, I am satisfied that the BVI Companies are hopelessly deadlocked and further that there is a total lack of trust and confidence between the two directors on which the BVI Companies were based such that the companies have ceased to function effectively or at all since late March 2004. As a result, the BVI Companies have not been able to exercise any control over their majority shares in VRL which main asset comprises the Settlement Monies with the result that the Settlement Monies might be dissipated so damaging VRL's worth and thus the BVI Companies assets. I find that in all the circumstances it is just and equitable to appoint liquidators as there is no alternative remedy available to Mr. Vijay and his actions did not cause the deadlock or the breakdown in the relationship between he and Mr. Rajesh. The court therefore orders as follows:-

i. Mr. Andrew Bickerton is appointed Liquidator of each of the BVI Companies with the full powers given to him by section 186(1) and (2) of the Insolvency Act.

ii. WSmiths is to ensure that his consent and all other formal requirements for his appointment are in order and filed with the court forthwith,

iii. Mr. Rajesh's applications to strike out or stay the proceedings is dismissed,

iv. Mr. Rajesh shall pay prescribed costs of $14,000.00 to Mr. Vijay.

Footnote

[122] I have just had sight of a letter dated 9th November, from WSmiths to the Registrar of the court which was copied to Harneys. They refer to an affidavit filed in these matters by Nadia Menezes, a Solicitor with WSmiths on the 8th November. Apparently the affidavit is to the effect that a company search on VRL was carried out after the hearing on the 27th and 30th October and that this revealed that Charu Mehta and Prashant Mehta recently resigned as directors and that a Mr. Bhatai has been appointed. This development, if true, perhaps signals the dawn of prudence, but in any event it serves to underscore the need for the BVI Companies to take up their proper role in conducting and supervising the affairs of VRL.

Rita Joseph- Olivetti
Resident High Court Judge
British Virgin Islands

Postscript:-

When this judgment was delivered in draft on the 10th November, Mr. Faye drew to the Court's attention the aforesaid affidavit of Ms. Menezes and the second affidavit of Mr. Rajesh filed on 9th November 2006 in response. He asked to make further submissions and that I refused as I was of the view that further submissions by both sides on a change in the directors of VRL since the hearing could not affect the substance of my judgment and that in any event it was imperative to bring an end to these proceedings.

I did indicate to Mr. Young that I would note the effect of the affidavit of Mr. Rajesh filed on 9th November 2006. This in essence is that Charu and Prashant sent letters of resignation to the other directors of VRL dated 30th September 2006 and that Mr. Rajesh knew of these resignations when Charu phoned him on 5th November 2006.

By consent it was ordered that the formal order to appoint Mr. Andrew Bickerton as liquidator should not take affect until Mr. Bickerton had filed his consent (he having only filed consent to act as Provisional Liquidator) and that the time for appealing from this judgment should run from the date of the filing of the consent.

Rita Joseph-Olivetti
High Court Judge