

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHCV2011/57

**IN THE MATTER OF VIP. COM PLC
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

JAMES EARP AND NICHOLAS WOOD

Applicants

and

**(1) AGAPE VENTURES LIMITED
(2) SWANSON LIMITED
(3) OVERSEAS MANAGEMENT COMPANY TRUST (B.V.I.) LTD**

Respondents

Appearances: Mr Peter Leckey for the Applicants

JUDGMENT

[2011: 23, 26 May 2011]

(Order in aid of foreign proceedings – liquidators appointed by High Court in London on 18 February 2009 over company incorporated in England – company with deficiency of some £1.2 million – liquidators compromising claims against director of the company upon director's agreement to pay £548,620 by 18 March 2011 – money not paid – director making himself bankrupt on 23 March 2011 – director's estimated statement of affairs showing deficiency of £2 million including debt of £1.4 million to BVI incorporated company ('ACo') – liquidators applying under Part XIX Insolvency Act, 2003, for order that proper officers of ACo, ACo's BVI incorporated corporate director and ACo's registered agent appear for examination and produce scheduled documents – sections 467(3), 467(5), 282, 283 and 284 to 286 Insolvency Act, 2003 considered)

[1] **Bannister J [ag]:** On 23 May 2011 I dismissed an application brought by the Joint Liquidators of an English registered company called VIP.Com PLC ('the Liquidators', 'the Company') under Part

XIX of the Insolvency Act, 2003 ('Orders in Aid of Foreign Proceedings'). These are the reasons for that decision.

Background

- [2] The Company was incorporated in England on 24 February 2000. Although the sequence of events is not precisely clear it appears to have succeeded in around 2005 to a business previously carried on by an associated entity called VIP Communications Limited. Although I do not pretend (and there is no need for me) to understand the technical mechanics of the business, it appears to have involved buying cell phone time from British Telecommunications Plc ('BT') and selling it to third parties at a profit. In fact, it seems that the Company was selling short, since when it went into liquidation it owed BT over £335,000. On 23 December 2008 BT petitioned for the Company's winding up and a winding up order was made by the High Court in London on 18 February 2009, with the Official Receiver being appointed provisional liquidator. The Liquidators were appointed by the Secretary of State on 6 April 2009.
- [3] The affidavit sworn in support of the application by one of the Liquidators ('Mr Earp') explains that there is a deficiency in the Company's winding up of over £1.2 million.
- [4] The Company appears to have been owned jointly by one Thomas Baptiste McCabe and his wife ('Mr McCabe', 'Mrs McCabe' (together 'the McCabes')). Mr McCabe claims that the Company was sold in September 2007, but the sale appears to have been either fictitious or imaginary or both. Mr Earp's affidavit states that the Company's directors at all material times were Mr and Mrs McCabe, although entries at the English Companies Registry are said to show that they resigned on 26 November 2007. Nothing turns on that.
- [5] The Liquidators formed the view that a fraud had been perpetrated on BT by or through the Company and in July 2010 they notified Mr and Mrs McCabe that they intended taking proceedings against them for breaches of fiduciary and other duties. On 7 July 2010 the McCabes gave undertakings not to dispose of residential properties owned by them without giving 21 days notice to the Liquidators. On 29 October 2010 the McCabes disclosed to the Liquidators the existence of a company, said to be based in Dubai, to which £1.25 million was owed and which the creditor company (not then identified) was seeking to secure against property of the McCabes in Richmond, Surrey. The alleged creditor turned out to be called Agape Ventures Limited ('Agape').

The Liquidators' researches have shown that Agape was incorporated in the BVI on 11 April 2008 and there is clear evidence that it is closely connected to Mr McCabe and has had involvement in other business ventures with which he has been associated. In contempt proceedings brought in the United States District Court for the Southern District of California against Mr McCabe in the context of an intellectual property dispute involving another of his companies the judge has found that Agape is controlled by Mr McCabe and that is a finding which I accept for the purposes of this application.

- [6] On 15 November 2010 the McCabes withdrew their undertakings and on 2 December 2010 the Liquidators applied for freezing order relief against them in the Companies Court in London. That Court granted freezing relief on 27 January 2011, referring in passing to the 'sheer implausibility' of certain aspects of Mr McCabe's evidence. Two days earlier, on 25 January 2011, Mr McCabe made a witness statement alleging, for the first time, that Agape had provided him with a £1.2 million loan facility in July 2008. Some six weeks later, on 11 March 2011, a firm of accountants acting for Mr McCabe produced a copy of the alleged loan agreement dated 30 July 2008. Agape's sole director is a BVI registered company called Swanson Limited ('Swanson') (also based in Dubai) and that Agape's registered agent is Overseas Management Trust (BVI) Ltd of Road Town, Tortola ('OMT'). The accountants also provided a two page schedule purporting to show how Mr McCabe's indebtedness to Agape was built up, to a total of just under £1.4 million (some £200,000 more than the amount of the agreed borrowing).
- [7] On 7 March 2001 the Companies Court proceedings were stayed pursuant to an order in Tomlin form. Paragraphs 1, 2, 4 and 5 of the scheduled terms provide:

- *1. The Applicants and Respondents agree the terms set out in this schedule in full and final settlement of all claims VIP.com plc or the liquidators of VIP.com plc have or may have against the Respondents arising out of or in connection with the subject matter of this Application, whether pleaded or not in the Points of Claim dated 14th January 2011;
2. For the avoidance of doubt, paragraph 1 of this schedule does not affect the Respondents' liability under the Order of HHJ Hodge QC dated 27 January 2011 to pay the Applicants' costs in respect of their application for a freezing injunction dated 2 December 2010;

3. The Respondents agree to pay to the Applicants:
 - (a) £366,709.84;
 - (b) The sum of £6,910.29 being the amount set out in schedule B to the Points of Claim;
 - (c) £175,000 in respect of the costs of the insolvency; (the said sums totalling £548,620) by 4pm on 18 March 2011.

4. The Respondents shall pay to the Applicants the Applicants' costs to be assessed if not agreed, as reflected in the order to which this schedule is attached."

[8] None of the principal sum of £548,620 or of the agreed costs orders has been paid. On 23 March 2011 the McCabes made themselves bankrupt. An unsigned estimated statement of affairs shows that as at 17 February 2011 Mr McCabe had a deficiency of just over £2 million, with the Richmond property showing a negative equity of some £325,000. Agape is shown as an unsecured creditor in the sum of just under £1.4 million. An unsigned estimated statement of affairs for Mrs McCabe shows a deficiency of just over £600,000.

The application

[9] The present application was issued on 17 May 2011. It is expressed to be an application for orders under Part XIX and sections 284 and 285 of the Insolvency Act, 2003 ('IA, 2003'). Paragraph 1 seeks relief against Agape in the following terms:

- "1. That AGAPE VENTURES LIMITED ("Agape") of OMC Chambers, P O Box 3152, 2nd Floor, R.G. Hodge Plaza, Road Town, Tortola, do by its proper officer attend for private examination concerning the Company, including its business dealings, accounts, assets, liabilities and affairs at a time and place to be fixed, and do produce at the examination the books, records and other documents in its possession or control that relate to the Company specified in the Schedule to the draft Order attached hereto."

Relief in identical terms is sought against Swanson and OMT.

[10] The Liquidators rely upon section 467 IA, 2003, which is the principal operative provision in Part XIX. The material parts of section 467 for present purposes are in the following terms:

"Order in aid of foreign proceeding

467. (1) For the purposes of this section "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized.
- (2) A foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.
- (3) Subject to section 468, upon an application under subsection (1), the Court may
- ...
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
- ...
- (h) make such other [order]¹ or grant such other relief as it considers appropriate.
- (4) An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest.
- (5) In making an order under subsection (3), the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding."

[11] There is no doubt that the Liquidators are foreign representatives with standing to make an application under section 467. Sub-section 467(3)(f) empowers the Court to authorize the examination of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor. In my judgment and on the facts of this particular case the

¹ the text of the statute as printed reads 'make such other or grant such other relief', but the sense must be as set out above

words 'the debtor' and 'a debtor' where they appear in the sub-section refer to the Company (i.e. the company in respect of which the Liquidators are foreign representatives).

[12] IA, 2003, makes provision for two species of examination in insolvencies. The first, which may be described as an informal examination, is carried out pursuant to section 282:

"Power to obtain information

282. (1) An office holder may, by notice in writing, require a person
- (a) to provide him with such information concerning the company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs as he reasonably requires;
 - (b) to attend on him at such reasonable time and at such place as may be specified in the notice; or specified in subsection (2)
 - (c) to be examined on oath or affirmation by him, or by his legal practitioner, on any matter referred to in paragraph (a)."

Sub-section 282(2) lists the persons from whom information may be sought under subsection 282:

- "(2) A notice under subsection (1) may be sent to
- (a) an officer or former officer of the company;
 - (b) a member or former member of the company;
 - (c) a person who was involved in the promotion or formation of the company;
 - (d) a person who is, or within the relevant period has been, employed by the company, including a person employed under a contract for services;
 - (e) a person who is, or at any time has been, a receiver, accountant or auditor of the company;
 - (f) a person who is or who, at any time has been, an officer of or in the employment of a company which is an officer of the company;
- or

- (g) if the office holder is the Official Receiver or a liquidator or provisional liquidator to any person who has acted as administrator, liquidator or provisional liquidator of the company."

[13] Section 283 IA, 2003 deals with the conduct of an examination under section 282(1)(c):

"Examination by Office Holder

- 283. (1) This section applies to the examination of a person under section 282(1)(c) by an office holder.
- (2) The office holder, or the legal practitioner conducting the examination on his behalf, may administer an oath to, or take the affirmation of, a person to be examined.
- (3) A person required to be examined is entitled to be represented by a legal practitioner.
- (4) The office holder shall ensure that the examination is recorded in writing or by means of a tape recorder or other similar device."

[14] It will be noticed that an examination conducted under sections 282 and 283 is conducted by the office holder himself without the need for the intervention of the Court. No formalities are prescribed and although the office holder is empowered under section 282(1)(c) to administer the oath he is not obliged to do so and may seek information under sub-sections 282(1)(a) and (b) without doing so.

[15] Sections 284 to 286 of IA, 2003, (upon which the Liquidators rely), on the other hand, establish a different, formal regime for examination before the Court:

"EXAMINATION BEFORE COURT

Application for examination before Court

- 284. (1) Where a company is in liquidation, an application may be made to the Court, ex parte, by the liquidator or by the Official Receiver, for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company.
- (2) An application under subsection (1) may be made in respect of

- (a) a person specified in section 282(2);
 - (b) any other person who the applicant considers is capable of giving information concerning the company or a connected company; or
 - (c) any other person who the applicant knows or suspects has in his possession or control any asset of the company or is indebted to the company.
- (3) An application under subsection (1) shall state whether the applicant seeks a public or a private examination."

"Order of examination

285. (1) In this section, "examinee" means the person to be examined before the Court.
- (2) On hearing an application made under subsection 284, the Court may order the examinee to appear before the Court to be examined.
 - (3) An order under subsection (1)
 - (a) shall direct the examinee to appear before the Court to be examined at a venue specified in the order;
 - (b) shall state whether the examination is to be a public or a private examination;
 - (c) may require the person concerned to produce at the examination any books, records or other documents in his possession or control that relate to the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company;
 - (d) may provide for an alternative method of service of the order on the examinee;
 - (e) shall state the action that may be taken against a person if he does not appear before the Court as required by the order; and

(f) where the examination is to be a public examination, may require the examination to be advertised, specifying the method of such advertisement.”

“Conduct of examination

286. (1) This section applies to an examination held pursuant to an order made under section 285.
- (2) An examinee shall be examined on oath and he shall answer such questions as the Court may put, or allow to be put to him.
- (3) Subject to subsection (2), an examination is conducted by the applicant, or by his legal practitioner, and the person examined is entitled to be represented by a legal practitioner who may put such questions to the examinee as the Court may allow for the purpose of explaining or qualifying answers given by him.
- (4) The examinee may also be examined
- (a) if the applicant is the Official Receiver, by the liquidator; or
- (b) if the applicant is the liquidator of the company, by the Official Receiver.
- (5) At a public examination questions may, with the leave of the Court, be put to the examinee by any creditor or member of the company present at the examination or by the legal practitioner representing such creditor or member.”

[16] The scheme of examinations conducted under sections 284 to 286 is quite different from that laid down in sections 282 and 283. First, no such examination can be conducted unless the Court orders it after consideration of an application made under section 284(1). Second, the examination may be either in private or in public, whereas an examination pursuant to section 282 is clearly intended to be private. Third, the sanction for non-appearance must be spelt out in the order – in other words and in contrast to the scheme of section 282, the prospective examinee is from the outset compellable. Fourth, provision is made for re-examination by the examinee’s counsel. Finally, the privilege against self incrimination is expressly removed in the case of Court examinations by section 287(1).

[17] In my judgment section 467(3)(f), empowers the Court to authorize the foreign representative to conduct the type of examination which he would have been entitled to conduct pursuant to sections 282(1)(c) and 283 had he been appointed in insolvency proceedings taking place within this jurisdiction. The use of the word 'authorize' indicates, in my view, that the object of the sub-section is to remove any possible question of infringement of sovereignty which might arise were a foreign insolvency representative to attempt to interrogate persons within the jurisdiction in support of foreign proceedings. Once such authorization has been given to the foreign representative, he is free to conduct an examination of any person who could have been examined by him in a BVI insolvency proceeding without challenge on jurisdictional grounds. Sub-section 467(3)(f) is not, in my judgment concerned with nor does it envisage examination before the Court. Nor does it confer a power to compel the attendance of any witness (as sought in the Liquidators' application). Contrast the language of sub-section 454(1)(d) in Part XVIII², which clearly empowers the Court to make an order for an examination before the Court and of any witness, rather than merely 'authorizing' the foreign representative to examine persons who could be examined in a Virgin Islands insolvency of the relevant debtor.

[18] If that is right, then it seems to me that the scope for examination by the foreign representative must be limited to those classes of person who are listed in sub-section 282(2). It is clear that none of Agape, Swanson or OMT fall into any of those categories. It is true that sub-section 467(3)(f) refers to 'any person' who could be examined in a Virgin Islands insolvency proceeding concerning the Company and that on their literal meaning those words extend to all those categories of person listed in sub-sections 284(2)(b) and (c), in addition to those listed in sub-section 282(2), but in my judgment 'any person' in the context of sub-section 467(3)(f) must mean any person whom the foreign representative would have been entitled to examine without more, not any person falling under sub-section 284(2)(b) or (c) - who it would take a Court order under section 285 to make compellable. It seems to me that the notion of 'authorizing' a foreign representative to examine a person who would otherwise be free to refuse on the grounds that no order had been made against him under section 285 is unsustainable and illustrates that such persons are not within the contemplation of sub-section 467(3)(f).

² Sub-section 454(1)(d), which has yet to be brought into force, is in these terms: 'providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities

- [19] If I am wrong about that and if persons included within sub-sections 284(2)(b) and (c) are examinable pursuant to an authorization given under section 467(3)(f), then I have to consider, first, whether any of Agape, Swanson or OMT are persons considered by the Liquidators to be capable of giving information of concerning the Company or as persons known or suspected by the Liquidators as having possession or control of any asset of the Company or of being indebted to the Company and secondly, if they are, whether they are persons in respect of whom an order could properly have been made under section 285. If it could not, then it seems to me that it would be contrary to principle to 'authorise' their examination pursuant to sub-section 467(3)(f).
- [20] As to that, Mr Earp's evidence is that Mr McCabe is connected with a number of other companies incorporated in or operating from a number of jurisdictions, either having very similar names or the same addresses and 'having connections with the Company.' He goes on to say that of particular concern to the Liquidators is 'the possibility' that funds or other assets once in the possession or disposition of the Company may have been siphoned off or diverted to persons not entitled to them, or transferred for no consideration or used for purposes other than those properly of the Company. He says that Agape is a company whose role in the affairs of the Company has been inadequately explained by its directors, whose answers to questions about Agape have been at best evasive. He does not explain what, if any, role he considers Agape to have played in the affairs of the Company and there is no material before me to suggest that it played any role at all.
- [21] I do not consider that this evidence would have justified an order for examination made under section 285. The mere fact that the insolvency practitioner may consider that a person is capable of giving relevant information does not, in my judgment and on a true construction of this legislation, oblige the Court to order the examination of that person. The fact that the insolvency practitioner is of that view is a *sine qua non* for the ordering of an examination, but he must, in my judgment, show that he has reasonable grounds for forming that opinion. Otherwise the Court would be obliged to order the examination of individuals at the mere whim of an insolvency practitioner or by way of fishing expedition. I do not believe that the legislation is intended to operate in that way. In my judgment, if an insolvency practitioner wishes to examine a person falling within sub-sections 284(2)(b) or (c) he must show cause why the Court should make such an order. I do not think that sufficient reason is provided in this case.

[22] The evidence put forward by Mr Earp does not give rise to even the weakest inference that Agape (or its officers or agents) played any role in the affairs of the Company nor does it give rise to any suspicion that it has dealt with or is in possession of assets of the Company. A mere 'possibility' is not, in my judgment, enough and neither of the cases to which Mr Leckey referred me in the course of argument suggests that it is. There is no material before me to suggest that the Liquidators would be any more successful in obtaining any valuable information from the officers of these three offshore vehicles than they have been in obtaining any from Mr McCabe himself, whose puppets they are said to be. So that if I had been of the view that persons falling within sub-section 284(2)(b) and (c) were potentially within the purview of sub-section 467(3)(f), I would not have made an order for the examination of any of Agape, Swanson or OMT on the basis of the material before me.

[23] There is a further point. On 7 March 2001 the Liquidators, as I have said, entered into a full and final settlement of all claims which the Company or the Liquidators had or might have against the McCabes arising out of or in connection with their alleged breaches of duty, whether pleaded or not. Instead, those claims were converted into a debt due by the McCabes to the Company. As a matter of fact and reality that settled the Liquidators' claims against Mr McCabe and any creatures of his, even though the latter were not parties to the proceedings. No money can have leaked from the Company to Agape, Mr McCabe's creature, except as a result of a breach of duty to the Company on his part. The Liquidators' real concern, in my judgment, is not to elicit further information about the Company to enable them to take further steps in its liquidation (no such prospective steps are identified in Mr Earp's affidavit), but to elicit further information about Agape in order to be able to mount a challenge to its claims in Mr McCabe's bankruptcy. That, however, is a matter for Mr McCabe's trustee in bankruptcy. I am not prepared to make an order in favour of the Liquidators who (from the best of motives) are, in my judgment, attempting to use assistance available to them (or, rather, not available to them) in their capacity as liquidators of the Company in an effort to protect their position as creditors in Mr McCabe's bankruptcy.

[24] In any case and irrespective of whether this reasoning is correct, sub-section 467(3)(f), as I have said, confers a power only to *authorize* examinations by the foreign representative. It does not provide for the exercise of coercive powers against a potential witness.

Other matters

[25] Mr Leckey relied upon sub-section 467(5) as entitling me to make an order under section 236 of the UK Insolvency Act ('section 236'). Whatever may be the true meaning and effect of sub-section 467(5), I do not think that it could override the express wording of sub-section 467(3)(f), which confines the targets of any examination to persons who could be examined in a Virgin Islands insolvency. To the extent, therefore, that section 236 catches persons who could not be examined in a Virgin Islands insolvency, I do not think that it would be open to the Court to apply it to extend the purview of sub-section 467(3)(f). Similarly, I do not consider that section 467(5) justifies the exercise, by reference to foreign law, of compulsive powers which are not expressly provided for in sub-section 467(3). That seems to me clear from the opening words of sub-section 467(5): 'in making an order under sub-section (3)'.

Conclusion

[26] This application is accordingly dismissed.



Commercial Court Judge

26 May 2011