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

BVI HC (COM) 2012/0083

BETWEEN:

1) ANDRIY MALITSKIY
2) IGOR FILIPENKO

Applicants

and

OLEDO PETROLEUM LTD

Respondent

AND BETWEEN:

OLEDO PETROLEUM LTD

Claimant

and

1) ANDRIY GRIGORYEVYCH ADAMOVSKY
2) STOCKMAN INTERHOLD S.A.

Defendants

Appearances: Mr Justin Fenwick QC and Mr Malcolm Arthurs for the Applicant/Claimant
Mr Peter McMaster QC and Mr Andrew Willins for the Defendants

2012: 18 December; 2013: 18 January

JUDGMENT

(Derivative proceedings – principles to be applied when sanctioning proceedings under section 184C Business Companies Act, 2004 ('BCA') – meaning of 'good faith' in section 184C (2) (a) - whether claim under section 184I BCA an 'alternative remedy' for the purposes of section 184C (2) (e))

[1] **Bannister J [Ag]:** On 15 August 2012 Wallbank J, on an *ex parte* application, gave provisional leave to Mr Andriy Malitskiy and Mr Igor Filipenko ('the Applicants') to bring proceedings pursuant to section 184C of the Business Companies Act, 2004 ('section

184C', 'the Act') in the name and on behalf of a BVI registered company called Oledo Petroleum Limited ('Oledo') against Mr Andrey Grigoryievyich Adamovsky ('Mr Adamovsky') and a company then owned by Mr Adamovsky[1] called Stockman Interhold SA ('Stockman'). The purpose of the Judge's sanction was to enable Oledo to seek to recover the sum of US$71.5 million alleged to have been wrongly transferred from Oledo's bank account in Latvia to an account at the same bank in the name of Stockman as long ago as 18 January 2010.

[2] The background to this application can be very shortly stated. Oledo, through its wholly owned[2] subsidiary, Charleston Investing Company Limited ('Charleston'), owned a business in the Ukraine, Vik Oil, which appears to have started as a distributor of imported Russian crude to refineries in the Ukraine and ended up running a very successful chain of filling stations. Having originally been an investor in the business, Mr Adamovsky subsequently became a 50% shareholder – the other 50% being held by the Applicants. Mr Adamovsky was the sole director of Oledo and, until 15 January 2010, a joint signatory, together with Mr Malitskiy, on its Latvian bank account. In late 2009 the Applicants.and Mr Adamovsky agreed to sell Oledo's interest in Vik Oil to TNK-BP for a little over US$71.5 million. The price was due to be paid into Oledo's bank account on 18 January 2010 and was in fact credited to the account on that date. On 15 January 2010, however, and using his authority as sole director of Oledo, Mr Adamovsky, without informing Mr Malitskiy, caused him to be removed from the mandate. As soon as the money had been credited to Oledo's account, Mr Adamovsky caused US$71.5 million of it to be transferred to Stockman's account. All the money has been subsequently disbursed and Oledo is an empty shell.

[3] The Applicants say that this amounted to a bare misappropriation, in breach of fiduciary duty, by Mr Adamovsky of Oledo's property. Mr Adamovsky says that it was an act of commercial probity, motivated by a desire to keep the money out of the hands of the Applicants, who would have disappeared, he says, with their 50% share of the proceeds of the sale of Charleston, leaving creditors of the group of companies in which the parties had previously conducted business in partnership (but which did not include Oledo) unpaid. Mr Adamovsky claims to have applied US$71,128,488 and 40 cents in satisfying such former partnership debts and there is some evidence that money which has passed through the hands of Stockman has discharged former partnership debts to the tune of around US$39 million. These activities were supposedly carried out pursuant to a loan and agency agreement between Oledo and Stockman. It is unnecessary and would be inappropriate for me at this stage to say any more about those documents.

[4] The bewildered reader might ask why Oledo's money should be used to discharge the debts of companies other than Oledo. Mr Adamovsky's answer to that is that by a series of 'guarantees'[3] which he had caused Oledo to enter into some time between February

[1] it appears that he has subsequently transferred Stockman to one of his sons, although upon what terms as to beneficial ownership is not known

[2] in fact, 20% of Charleston had been sold off in July 2007

[3] in fact, there are two conflicting series of guarantees, but I do not have to concern myself with that difficulty on this application

and August of 2009, Oledo promised to provide various constituent companies of the former partnership with funds to pay off various of their debts. These documents are not guarantees as the term is ordinarily used. No creditor of any of the partnership companies is party to any of them. They are no more than gratuitous promises by Oledo to put various former partnership companies in funds to discharge their liabilities. In point of law, they are unenforceable promises by Oledo to make gifts to the named counterparties.

[5] Mr Adamovsky relies on background in support of what he did. He says, and it is not seriously in issue, that in April/May 2009 the parties had decided to distribute the companies that went to make up the former partnership *in specie* and to accept primary responsibility (as between each other but without, of course, affecting the liability of the various companies, or of sureties for those companies, to their respective creditors) for their debts, with the value of the assets and quantum of the various debts being adjusted to achieve fairness. Indeed, sometime around April/May of 2009 a dissolution agreement was prepared embodying these arrangements, containing elaborate schedules showing the proposed distribution of assets in specie and the loans for which, *inter se*, the parties were to assume responsibility. Although a translation of the dissolution document itself was in the evidence presented to Wallbank J when he made his order, it is to be regretted that translations of the schedules which showed the workings of the dissolution scheme were not attached to it and were to be found only in the original Ukrainian in documents which were never shown to the Judge.

[6] Mr Adamovsky complains that one of the loans for which the Applicants had agreed, pursuant to the dissolution arrangements, to shoulder responsibility, was a loan from Alfa Bank, for which Mr Adamovsky had provided security. The Applicants failed to discharge the loan and as a result Alfa obtained a judgment against Mr Adamovsky in November 2009 for the amount outstanding and sold the property put up by Mr Adamovsky at (he says) a significant loss in partial discharge of the debt.

[7] Another event upon which Mr Adamovsky relies is an alleged attempt on the part of the Applicants to procure that one half of the purchase money to be paid by TNK-BP for the sale of Oledo's interest in Charleston should be paid direct to a Panamanian company owned by the Applicants. That proposal did not go forward, but Mr Adamovsky says that these events demonstrated, to his satisfaction, that the Applicants were not going to honour their obligations under the dissolution arrangements and that these circumstances justified him in taking matters into his own hands and ensuring that the proceeds of the sale of Charleston were made available to satisfy debts of the former partnership.

[8] The Applicants say that part of the proceeds of sale of Charleston (some US$35 million) was used by Mr Adamovsky to fund the purchase by Stockman of shares in a company called Assofit Holdings Limited ('Assofit') from a company called Arricano Trading, which is owned by one Hillar Teder. Mr Teder is held up by Mr Adamovsky as a sinister *eminence grise*, at loggerheads with Mr Adamovsky and as supporting the present litigation by way of collateral attack. I say straight away that all of this is based on nothing more than bare assertion. It is relied upon by Mr Adamovsky as explaining the

sudden commencement of these proceedings some two and a half years after the events in question (the suggestion being that the chess game supposedly being played out between Mr Adamovsky and Mr Teder reached some sort of crux in mid-2012 which made it fruitful for Mr Teder to cause the Applicants to vex Mr Adamovsky with the present proceedings). That, for all I know, may be true, but it is unsupported by any cogent evidence and for present purposes I place absolutely no reliance upon these allegations, which are put forward in an attempt to show that the Applicants are acting in bad faith in seeking to pursue the derivative claim.

[9] The relevance, from the point of view of the Applicants, of the purchase by Stockman of Assofit shares with the proceeds of sale of the Charleston disposal is that because this was money taken from Oledo by Mr Adamovsky in breach, as the Applicants say, of fiduciary duty, Stockman, as his creature, is fixed with knowledge of that fact and cannot, therefore, in conscience retain the Assofit shares (or at any rate such of them as were purchased between 3 February 2010 and 24 March 2010, after the proceeds of sale had been received by Stockman) as against Oledo.

[10] Attempts were made by Mr Peter McMaster QC, who appeared together with Mr Andrew Willins for Mr Adamovsky and Stockman, to show, by reference to a schedule showing movements on Stockman's bank accounts and on the accounts of certain other Adamovsky related entities, that at most some US$54,000 of the cash from the sale of Charleston could have been applied in the purchase of Assofit shares between February and the end of March 2010. Mr Justin Fenwick QC, who appeared together with Mr Malcolm Arthurs for the Applicants, said, relying upon the same material, that the probability is that the funds used, after 18 January 2010, to pay for Assofit shares, had their origin in the proceeds of the sale of Charleston. The Court does not have sufficient evidence to enable it, at this stage, to say any more than that there appears to be a serious possibility that at trial and after full disclosure it will be shown that Oledo has a good claim to a beneficial interest in the Assofit shares - or some of them. There are as yet unanswered questions. The Court does not know, for example, whether the payments made after 18 January 2010 were in respect of separate tranches of shares, title to which passed upon each separate payment, or whether they were made in satisfaction of outstanding liabilities due in respect of shares the beneficial interest in which had passed before Oledo received the proceeds of the sale of its stake in Charleston. What the Court does know (while reminding itself that the legal burden is upon the Applicants/Oledo to prove their/its case) is that Mr Adamovsky has not produced evidence to show that the funds used after 18 January 2010 to pay for Assofit shares came from sources distinct from the proceeds of the sale of Oledo's stake in Charleston.

[11] That, I think, is all that I need, or should, say at this stage about the background to these proceedings. I now have to deal with the applications before me.

The derivative proceedings

[12] The notice of application asks, first, that the provisional leave granted to the Applicants on 15 August 2012 to commence these proceedings in the name of Oledo be made final.

Taking the claim in isolation, the Applicants would appear to have good grounds for being permitted to mount a claim in the name of Oledo for the return of the US$71.5 million. It must, objectively speaking, be in the interests of Oledo that it should recover the money and it is clear that its present board (Mr Adamovsky) is not going to take steps to enable it to do so. Oledo's claim to the Assofit shares is evidentially weaker, but it seems to me that, other things being equal, the Applicants make out a sufficient case on the merits for being permitted to pursue that part of its case also.

[13] Mr McMaster QC says that the Applicants should not be permitted to proceed with these derivative claims. He says, first, that the Applicants do not satisfy the good faith requirement of section 184C(2)(a). He says that they have presented a case of simple theft against Mr Adamovsky without breathing a word about the dissolution arrangements between the parties or about Mr Adamovsky's claimed desire to ensure that Oledo's money was applied in payment of its debts, so that the Court was essentially misled when it granted provisional leave for the derivative claim to be brought. Their own attempts to divert half of the proceeds of sale show, it is said, that they do not come to the Court with clean hands. Further, says Mr McMaster QC, the delay in making the application, coupled with what he describes as the absurd excuse that until recently the Applicants were too impecunious to make the application[4] shows that the Applicants have no real belief in the merits of the claims. Mr McMaster QC relies, further, upon an unsubstantiated allegation that the Applicants are responsible for the risible forgery of a document supposed to have emanated from this Court addressed to the Ukrainian (if I remember correctly) prosecuting authorities. All of this, he says, point to the present application as being a ploy in a game rather than a genuine attempt to recover property for the benefit of Oledo.

[14] I was referred to no authority upon the meaning of good faith where it occurs in section 184C(2)(a).[5] In my judgment the provision is designed to enable the Court, in a proper case, to withhold permission to commence derivative proceedings from a shareholder who wishes to use the procedure otherwise than for the benefit of the company in question – in other words, in order to achieve a collateral purpose. On the other hand, and in accordance with generally accepted principles it seems to me that, once it is shown that it is in the interests of the company for the proposed claim to be brought, that the claim has a real prospect of success and that the true object of the shareholder in seeking leave to bring it is to seek redress on its behalf for a wrong done to the company, it is not relevant that the shareholder has some improper *motive* in advancing it. In other words, and provided that the other conditions are satisfied, the fact that the applicant may be motivated by spite or malice against the proposed defendant is nothing to the point – otherwise, as has been pointed out elsewhere, only persons of established and universal goodwill would be permitted to institute derivative proceedings. Beyond that, in the absence of authority, I do not think that it is possible to go.

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[4] the dissolution documents appear to show that they had a significant interest in partnership assets valued at some US$169 million – although what their net realizable value was it is not possible to establish

[5] **Nurcombe v Nurcombe** [1985] 1 WLR 370, mentioned in Mr Adamovsky's skeleton, but not referred to in argument, was about estoppel by election and has nothing to do with the issues which arise in the present application

[15] So far as concerns the matters which the Court is required by subsections 184C(2)(b) and (c) to take into account in determining whether to sanction derivative proceedings (whether the proposed proceedings are in the interests of the company taking into account the directors' views on commercial matters; and whether the proceedings are likely to succeed), it seems to me that neither of those factors on their own causes any difficulty for the Applicants here.

[16] Another of the matters, however, which the Court is required to take into account in deciding whether to sanction derivative proceedings is whether an alternative remedy is available. In this case the Applicants commenced proceedings under section 184I of the Act before they made their application under section 184C, although they did not serve them until after Wallbank J had granted his provisional leave.[6] The section 184I claim is defective as it stands, since it seeks to combine claims which can be made only by Oledo itself (or by members of Oledo with permission to bring derivative proceedings on its behalf) with claims made by the Applicants in their own right under section 184I. It has, by agreement, been stayed pending the outcome of the present proceedings. The application notice before me asks that the section 184I claim be consolidated with the derivative proceedings.

[17] Mr McMaster QC says that a section 184I claim affords the Applicants an alternative remedy for the purposes of subsection 184C(2)(e). It will not be an answer to every application by a member of a company for leave to bring a derivative action to say that it would always be open to him to seek to be bought out under section 184I. If a member, for example, of a trading company has a proper case for being permitted to commence derivative proceedings in its name so that its business may be continued with the matters complained of having been put right, it is no answer to tell him that he could always ask for his shares to be bought out under section 184I as an alternative. Furthermore, it must not be overlooked that section 184C is there to put right wrongs suffered by a company, whereas section 184I provides remedies for members in their character as members.

[18] In the present case, however, there can be no question of restoring Oledo to commercial life. The purpose of the derivative claim is not to remedy abuses done to Oledo so as to enable it to continue in business more prosperously or successfully. From the point of view of the Applicants, success in the derivative action would achieve no greater benefit than would success in the section 184I proceedings (provided that they were amended to claim only relief properly claimable under that section). In principle, therefore, it seems to me that on the particular facts of this case a claim under section 184I (properly pleaded) affords to the Applicants a true alternative remedy. Its juridical basis is quite different, but so far as remedy goes it is capable of giving them everything which they could obtain if they were successful in the derivative proceedings.

[19] Two inconsistent claims seeking different remedies arising out of the same set of facts cannot be allowed to proceed in tandem. Consolidation is not an answer – the claims are

[6] the Applicants mentioned the fact that they had commenced the section 184I claim on the application to Wallbank J

brought in different characters and seek different remedies. I had considered whether the proper course was not to put the Applicants to their election, but on reflection I think that that would be to avoid the issue. The section 184I claim was brought before the derivative proceedings and clearly sought compensation under section 184(2)(b) – requiring the Defendants to pay compensation to the Applicants as members. The derivative proceedings can only be seen, in the light of the prior commencement of the section 184I proceedings, as an attempt to put pressure on the Defendants to buy the Applicants out. The Applicants can have no genuine interest in having Mr Adamovsky forced to pay into the empty shell which is all that is left of Oledo twice the amount of money to which on any footing they may establish an entitlement. For that reason, it seems to me that the derivative proceedings are to be treated as not having been commenced in good faith *as that term is to be understood in the context of section 184C(2)(a)*. I cannot stress too strongly that that finding carries no implication whatsoever of misconduct, still less of dishonesty.

[20] In my judgment, therefore, not only is there an alternative remedy available to the Applicants in this case – the derivative claim itself must be taken to have been mounted to put collateral pressure on Mr Adamovsky. In those circumstances, the right course seems to me to leave the Applicants to their remedy under section 184I. For these reasons I refuse to make final the provisional sanction granted by Wallbank J for the Applicants to prosecute claim No BVIHC(COM)2012/0083. The application for consolidation accordingly falls away.

[21] I wish to make clear that while it follows from this decision that there is no longer before the Court any person with a proprietary claim to the Assofit shares, it remains open to the Applicants, in seeking compensation in their character as members of Oledo in the section 184I claim, to contend that that compensation should reflect the value of any property into which the proceeds of the Charleston sale can be traced. For this reason, disclosure in the section 184I claim will include (a) all documents and copy documents directly relevant to the disbursement and ultimate application of the sum of US$71.5 million received by Stockman from Oledo on 18 January 2010; (b) all documents directly relevant to the acquisition by Stockman of shares in Assofit; and (c) all documents directly relevant to the value from time to time of the Assofit shares. On the basis of the evidence which I have seen in this application, Mr Adamovsky will be regarded as having control of Stockman's documents.

[22] I will not, however, make any immediate order for disclosure. The reason for that is that the termination of the derivative proceedings means that the proprietary freezing order falls away – there being no longer anyone before the Court with locus to maintain it. There is therefore no need for any policing of such an injunction, nor any pressing reason why disclosure in respect of these matters should not be given in the ordinary course of the proceedings. I therefore make no order on paragraph 7 of the Applicants' application notice of 6 December 2012.

[23] I will, however, direct that all documents disclosed to date in the now terminated derivative proceedings may be used for the purposes of the section 184I claim.

Freezing relief

[24] Although Mr McMaster QC urged me not to make final the Applicants' provisional permission to prosecute the derivative proceedings, an application which I have acceded to (although for reasons not corresponding precisely to those which he advanced), he did not suggest that that would remove the need for freezing relief to be continued. Indeed, he offered an undertaking that Mr Adamovsky would not deal with any assets above a reasonable value without giving notice of such intended dealings to the Applicants. Mr Fenwick QC, rightly, did not find the offer of such an undertaking something to which he should in principle object. That makes it unnecessary for me to analyse the risk of dissipation or the question of non disclosure in this application.

[25] I regret to say, however, that I took no note of and cannot now recollect the exact form which it was proposed that such an undertaking should take. Subject to any submissions which Counsel may wish to make on the handing down of this judgment, I tentatively suggest that Mr Adamovsky and Stockman be invited to offer undertakings that until after judgment in these proceedings or further order in the meantime, neither of them will enter into any transaction or series of transactions involving a dealing with any assets or series or collection of their assets amounting in aggregate to a value of US$100,000 or more without giving not less than 21 days notice in writing to the Applicants or to the Applicants' legal representatives of the intention to effect such dealing; and that 'dealing' for these purposes includes all types of transaction, whether by way of sale, gift, exchange, declaration of trust, mortgage, pledge, hypothecation or lease or by way of grant of any right or interest of whatever sort over, in or to any such assets. If no satisfactory undertakings are offered, I propose to make an order to similar effect.

[27] As things now stand, these undertakings will be offered in the section 184I claim. They must be backed by the usual cross undertakings in damages, to be given by each of the Applicants personally as Claimants in the section 184I proceedings.

[28] If undertakings are proffered and accepted in this or some similarly structured form, it seems to me that the requirement for immediate fortification is significantly reduced, although the question might arise again if some future proposed dealing was objected to by the Applicants. It is conceivable, however, that some loss could be sustained by reason of inability to deal during the notice period (although it would always be open to the Applicants to agree to shorten the period). It seems to me that this would be adequately catered for if the Applicants were to procure and provide to the Defendants a bank guarantee in an acceptable form providing cover for losses caused by the giving of such undertakings up to a limit of US$1 million. If such guarantee is not in place by 4 pm BVI time on Friday 8 February 2013, any undertakings or orders to similar effect will lapse.

Reeferway

[29] The Applicants seek an order permitting them to use documents obtained in the course of these proceedings to date to write to the Liquidator of a company called Reeferway Limited ('Reeferway'), owned by Mr Adamovsky and which has been put into liquidation

in this Court. Given my decision on the derivative claim, this application can no longer be supported. I therefore make no order on paragraphs 5 and 6 of the application of 6 December 2012. I may add that even if I had confirmed Wallbank J's permission for the prosecution of the derivative claim, I would not, in all the circumstances, have permitted the Applicants to escape from the usual restriction on the use of documents obtained in the course of proceedings.

Cypriot proceedings

[30] Wallbank J gave permission on 15 August 2012 for Oledo to seek parallel or satellite orders in the Republic of Cyprus. That order can plainly be of no further effect in the light of my decision on the derivative action.

Conclusion

[31] I hope that the parties will be in a position, when this judgment is handed down, to have agreed a form of order and directions for the further conduct of the section 184I claim.

Commercial Court Judge
18 January 2013