

**THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

Claim No: BVIHC (COM) 230 OF 2019

IN THE MATTER OF SVOBODA CORPORATION (IN LIQUIDATION)

BETWEEN:

**PAUL PRETLOVE
(in his capacity as sole liquidator)**

Applicant

and

SVOBODA CORPORATION

Respondent

Claim No: BVIHC (COM) 231 OF 2019

IN THE MATTER OF KOSHIGI LTD (IN LIQUIDATION)

BETWEEN:

**PAUL PRETLOVE
(in his capacity as sole liquidator)**

Applicant

and

**[1] KOSHIGI LTD
[2] DEMITRY KOSTYGIN**

Respondents

Appearances:

Mr. Michael Fay QC and Mr. Shane Quinn of Agon Litigation for Mr. Pretlove, the BVI liquidator of Svoboda Corp and Koshigi Ltd
Ms. Tameka Davis and Ms. Jane Fedotova of Conyers, Dill & Pearman for Mr. Kostygin and purportedly for Koshigi Ltd
Mr. John Carrington QC of Sabals Law for Rossolution Ltd
Ms. Jean Dyer of J M Dyer & Co for Mr. Romney, the Anguillan liquidator of Svoboda Corp

2019: November 27;
November 29.

JUDGMENT

[1] **JACK, J [Ag.]:** This matter came before me as an urgent application on Wednesday 27th November 2019 made by Mr. Fay QC for a declaration that Mr. Pretlove, as liquidator of Svoboda Corp (“Svoboda”) and Koshigi Ltd (“Koshigi”), was entitled to instruct legal representatives in Cyprus to act on behalf of both companies, to file an application in the Cypriot courts for delivery up of the files held by Patrikios Pavlou & Associates LLC, and to defend the Cypriot proceedings. I give this judgment in order to assist the Cypriot court to understand what has been happening.

The facts

[2] The background to this matter is a dispute over a shareholder agreement, which went to arbitration before the London Court of International Arbitration (“LCIA”). The parties to the arbitration were Donna Union Foundation (“Donna Union”), a Liechtenstein foundation, on the one side, and Svoboda and Koshigi on the other. Ulmart Holdings Ltd (“Ulmart”), a Maltese company, in which Donna Union, Svoboda and Koshigi held all the issued shares, was the owner of one of the largest retailers in Russia. The sole shareholder and director of Svoboda is a Mr Meyer. The sole shareholder and director of Koshigi is Dmitry Kostygin.

[3] In the event the arbitrators (Barbara Dohmann QC, Michael Collins SC and John Beechey CBE) firstly found against Svoboda and Koshigi on liability (award of 23rd March 2018) and secondly ordered that Svoboda and Koshigi were jointly and severally liable to buy out Donna Union’s shares in Ulmart at a price fixed at US\$67,159,546 (award of 16th July 2018). The companies failed to pay.

- [4] On 7th February 2018 Chivers J in this Court made freezing orders against both companies. There were technical issues as to whether the making of those orders required the sanction of the LCIA arbitrators. This resulted on 9th May 2018 in the simultaneous discharge of the earlier freezing orders and the re-imposition of the freezing orders by Adderley J. He appointed Mr. Pretlove as receiver of both companies to preserve their assets. The two companies appealed, but on 19th January 2019, the Court of Appeal dismissed the appeal.¹
- [5] On 20th December 2018 Donna Union issued two applications for the appointment of a liquidator, one against Svoboda, the other against Koshigi. The applications were both amended on 18th April 2019. The long titles of these proceedings are those at the head of this judgment. The two applications were heard by Adderley J in April and May 2019. He delivered two judgments on 14th May 2019 granting both applications.²
- [6] In the meantime, on 24th April 2018 Svoboda had redomiciled from BVI to Anguilla. No explanation for the redomiciliation has been given to the Court. Both Adderley J and the Court of Appeal (and for that matter, the LCIA arbitrators) found that Mr. Meyer and Mr. Kostygin were dissipating the assets of Svoboda and Koshigi. In the absence of an explanation for the redomiciliation, it is a reasonable inference that it was done in bad faith in order to hamper Donna Union's attempts to enforce the LCIA arbitration award. Whether it is possible as a matter of BVI law to redomicile a company against the assets of which a receivership order has been made is unclear.
- [7] Although he does not say so expressly in relation to Svoboda, the form of the order made on 14th May 2019 by Adderley J is one suitable to the appointment of

¹ BVIHCMAPP 2018/0043 and 0050 Koshigi Limited et al v Donna Union Foundation (delivered 17th January 2019, unreported)

²BVIHCM2018/0230 Donna Union Foundation v Svoboda Corporation (delivered 14th May 2019, unreported) and BVIHCM2018/0231 Donna Union Foundation v Koshigi Limited (delivered 14th May 2019, unreported)

a liquidator over the universal assets of the company, rather an appointment limited solely to assets with the Territory of the Virgin Islands.

- [8] Further orders made by Adderley J on 3 May 2019 permitted Mr. Meyer in respect of Svoboda and Mr. Kostygin in respect of Koshigi to appeal against the making of the orders and insofar to act in the name of their respective companies. It did not permit either Mr. Meyer or Mr. Kostygin to act on behalf of their companies for any other purpose.
- [9] The claims which have been made against Svoboda include US\$79,961,085.90 and £627,689.67 sterling owed to Donna Union, US\$54,925.14 owed to TMF (BVI) Ltd (Svoboda's former registered agent in the BVI) and US\$15,800 owed to Appleby, the law firm.
- [10] After redomiciliation, the registered agents of Svoboda in Anguilla were Paragon Corporate Services Ltd ("Paragon"). Mr. Pretlove communicated with Paragon to ask for the statutory papers of Svoboda, but Paragon refused to cooperate. It may well be that they were taking instructions from Mr. Meyer. On 21st June 2019 Rossolution Ltd ("Rossolution") presented a winding-up petition in Anguilla against Svoboda for an alleged debt of, I am told, US\$2 to 3 million. The petition was served in the usual way on Paragon and advertised by Rossolution. Paragon did not inform Mr. Pretlove of the petition, even after it was advertised (so that no issue of confidentiality could have arisen).
- [11] On 23rd July 2019 Innocent J sitting in Anguilla made a winding-up order nisi against Svoboda. The return day on the order nisi was 16th September 2019, when the judge ordered that Svoboda be liquidated. On 30th September 2019, he appointed Mr. Claudel Romney of BDO Anguilla as the liquidator. Mr. Carrington QC appeared on behalf of Rossolution on those hearings. The appointment of the liquidator was, or at least purported to be, a universal appointment. Innocent J was aware of Mr. Pretlove's appointment as liquidator in the BVI, as were Rossolution Ltd.

- [12] Earlier this week on Monday 25th and Tuesday 26th November, Mr. Romney sought directions from Innocent J. This was an *ex parte* application by him. Although by chance Mr. Carrington QC was present in court on another matter on the Monday, he did not formally appear before Innocent J. It is unclear why Mr. Romney did not inform the major creditors, including Donna Union, of his appointment and of his application.
- [13] For reasons which are also unclear, Mr. Romney did not inform Mr. Pretlove of his appointment. It was only when Mr. Carrington QC appeared on behalf of Rossolution at the hearing before me on Wednesday, that Mr. Pretlove learnt of Mr. Romney's appointment.
- [14] Innocent J's order of 26th November 2019 is in an unusual form. It has a recital that "the Court [is] minded to act in the interests of the general body of creditors and members of Svoboda Corporation and to intervene because the proper distribution of its assets depends upon the Liquidator's ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them and the Court [is] of the view that there is no jurisdiction other than that of Svoboda Corporation's domicile in which that just result can be achieved." That is a surprising recital, since it implies that a liquidation in the BVI would not achieve the same result, which, so far as I am aware is not the case.
- [15] The order gives the liquidator authorization to seek recognition of the Anguilla liquidation proceedings as main liquidation proceedings. It empowers the liquidator "to secure third party funding in order to carry out his duties and responsibilities", which seems premature, given that the liquidator has not approached Donna Union to fund any litigation. It then fixes his and his counsel's remuneration, again something on which normally one would expect creditors to be given input.

The Eastern Caribbean Supreme Court

- [16] At this point, I should say something about the Eastern Caribbean Supreme Court. It consists of two divisions: the High Court and the Court of Appeal. It is the superior court of record for six independent countries and three British Overseas Territories, including the BVI and Anguilla. Although it is one court, it exercises its jurisdiction on a territorial basis. Thus I, sitting in the BVI, cannot, as a general rule, make orders which automatically apply in Anguilla.
- [17] The Eastern Caribbean Civil Procedure Rules (“CPR”), however, provide in CPR Part 26 for a case to be transferred to be heard in another territory. The Court in Anguilla could thus transfer the Anguillan winding-up proceedings to be heard by the Court in the BVI. Further the Chief Justice, as an *ex officio* judge of the High Court in all the territories, can make such an order. On 29th May 2018 Pereira CJ ordered that any proceedings issued in Anguilla by Donna Union to enforce the LCIA award or any interim relief in respect thereof should be heard by this Court, the Commercial Court, in the BVI.
- [18] On learning of the parallel proceedings in Anguilla on the Wednesday, I caused an email to be sent to the Chief Registrar for consideration by the Chief Justice and by Innocent J as to whether a similar order to that of 29th May 2018 should be made in respect of the Anguillan liquidation, so that issues in both the Koshigi and the Svoboda liquidations should come before the same tribunal. Neither the Chief Justice nor Innocent J have yet decided whether to accede to that suggestion. Mr. Carrington QC for Rossolution and Ms. Dyer for Mr. Romney oppose any transfer from Anguilla to the BVI. Whether or not a transfer should be made is not a matter for me.
- [19] Mr. Fay QC submits that because the winding up order of Adderley J predates the order of Innocent J, it has the effect of “trumping” Innocent J’s order. The Eastern Caribbean Supreme Court is, he submits, one court, so Adderley J’s order necessarily has priority. This submission, it seemed to me, has potentially far-

reaching consequences. I adjourned consideration of it to Wednesday 4th December.

- [20] At the hearing today, Mr. Romney indicated that he intended, at least at present, to continue to instruct Patrikios Pavlou & Associates LLC to act on Svoboda's behalf in the Cyprus proceedings.

The position in Cyprus on Monday

- [21] I turn then to the position in Cyprus at the hearing on Monday 2nd December. It is of course entirely a matter for the Cypriot court to consider what the appropriate way forward is. This judgment is given solely so that the Cypriot court can understand the relevant BVI law.

- [22] So far as BVI law is concerned, Mr. Pretlove's position in relation to Koshigi is straightforward. He is entitled to act on the company's behalf in the Cypriot proceedings and to instruct and disinstruct lawyers as he sees fit. Accordingly, as a matter of BVI law, he can disinstruct Patrikios Pavlou & Associates LLC and direct that firm to pass all of its papers to Chryssafinis & Polyviou LLC.

- [23] So far as Mr. Pretlove's position in relation to Svoboda is concerned, the position is more complicated. Adderley J appointed him as universal liquidator of Svoboda. Thus, as a matter of BVI law, he is entitled to represent Svoboda in the Cypriot proceedings. Whether Adderley J's order is superseded by Innocent J's order (or *vice versa*) is, as I have said, a difficult question.

- [24] Normally, one would expect experienced liquidators such as Mr. Pretlove and Mr. Romney to work together to minimize costs. To date there has not yet been that interaction. I have not determined who as a matter of BVI law has the better claim to have conduct of the litigation in Cyprus on Svoboda's behalf.

- [25] I assume that the court in Limassol would be reluctant to have Patrikios Pavlou & Associates LLC disinstructed on Svoboda's behalf, when Mr. Romney (at least at

present) wishes them to continue to act. The Cypriot court may think (it is of course a matter entirely for it) that there is no good reason why Patrikios Pavlou & Associates LLC should not deliver a set of their papers in Svoboda to Chryssafinis & Polyviou LLC. Mr. Pretlove is an officer of the BVI court and can be trusted to behave responsibly with them.

Adrian Jack (Ag.)
Commercial Court Judge

By the Court

Registrar