THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

Claim No: BVIHCM (COM) 2017/134
IN THE MATTER OF DURANT INTERNATIONAL CORP (In Liquidation)

Claim No: BVIHCM (COM) 2017/135
IN THE MATTER OF KILDARE FINANCE LTD (In Liquidation)

Claim No: BVIHCM (COM) 2019/0020
IN THE MATTER OF MACDOEL INVESTMENT LTD (In Liquidation)

EX PARTE:

[1] MATTHEW RICHARDSON
[2] KEVIN HELLARD
(As Joint Liquidators of Durant International Corp, Kildare Finance Ltd and MacDoel Investment Ltd, all in Liquidation)
Applicants

Appearances:

Mr. Alex Hall Taylor and Mr. Scott Tolliss of Maples and Calder for the applicant liquidators
No appearance by the creditors

2019: December 4;
December 5.

JUDGMENT ON POOLING

[1] **JACK, J [Ag.]**: There came before me on 4th December 2019 a number of applications made by the liquidators of three BVI companies, Durant International Corp ("Durant"), Kildare Finance Ltd ("Kildare") and MacDoel Investment Ltd ("MacDoel"). I determined issues of remuneration and the financing of the future conduct of the liquidation of MacDoel. I also dealt with the question of pooling of the liquidations. The pooling relief sought was that the estates of Durant, Kildare

and MacDoel be treated as being and be notionally pooled for the purposes of (i) the payment of the liquidators' fees and expenses, (ii) reporting, and (iii) distributions.

[2] Although I am told pooling orders have previously been made by this Court, there has not yet been any published judgment confirming that this is a form of relief available within this jurisdiction. I have therefore put my reasons for allowing such relief in the case of these three companies in writing.

[3] The background of this matter is a substantial fraud carried out between 1993 and 1996 by Paulo Salim Maluf, the then mayor of São Paulo in Brazil. He and his son were alleged to have taken massive kick-backs and bribes at the expense of the municipality. These monies were laundered through to Durant and Kildare (MacDoel's receipt of monies was only discovered much later). São Paulo and the Brazilian state brought proceedings before the Royal Court of Jersey and recovered judgment against Durant and Kildare. An appeal went to the Privy Council: **Federal Republic of Brazil v Durant International Corp**[1]. The Board dismissed Durant's appeal and held that tracing was a more flexible remedy than previously thought and was available in respect of the monies misappropriated.

[4] I discussed the new principles of tracing in **Otkritie International Investment Ltd v Urumov**[2]. There I was dealing with the beneficial ownership of £5 million held in Jyske Bank (Gibraltar) Ltd and considered whether victims of an earlier fraud might be able to trace their losses to this money. I said:

> "79. …It always used to be thought that in order to trace money it was necessary to show identifiable monies passing from A to B to C to D to E. If, for example, the money was paid by B into an overdrawn account of C, then the money lost its identity. Thus even if C were to pay exactly the same sum out to D the next day, tracing would no longer be possible.

[1] [2015] JCPC 35, [2016] AC 297

[2] Supreme Court of Gibraltar, unreported, 9th June 2016; appeal dismissed (Court of Appeal of Gibraltar), unreported, 16th December 2016

> 80. The Privy Council in [**Durant**] held that this is not an invariable rule of law. It held that 'backwards tracing' was potentially legitimate and explained:
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> > '38. The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry."
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> 81. This would imply that the payment from C to D in the above example (assuming it was always intended to represent the monies originally coming from A) could be relied on as part of a tracing claim against E. Further in a money-laundering case it may be arguable that there is a presumption that monies paid in at one end are represented by the monies paid out at the other end. In other words, in the above example, suppose the claimant who was seeking to trace was unable to prove the way in which monies moved from B to C (say, because B converted the money into cash) or did not even know of the existence of C. So long as A could show that B and D had an intention to launder the money, it may be possible for the Court to presume that the money in E's hands represented the money transferred by A to B, without any need to prove C's rôle or even C's existence.
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> 82. If that is right, then the Russian victims of the earlier frauds might have a claim to the US$5 million."

[5] It can readily be seen that analyzing the movement of monies between each of Durant, Kildare and MacDoel is likely to be a time-consuming exercise, especially under the new flexible approach. Moreover, it would have no practical advantage. The only creditors of all three companies are São Paulo and Brazil. It is a matter of indifference to them from which company a distribution comes. Accordingly, in my judgment it is appropriate to make a pooling order, if I have a power to make such an order.

[6] Schedule 2 to the Insolvency Act 2003 gives liquidators of BVI companies the following powers:

> "2. Power to make a compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging that they have any claim against the company, whether present or future, certain or contingent, ascertained or not.
> 3. Power to compromise, on such terms as may be agreed
> (a) calls and liabilities to calls, debts and liabilities capable of resulting in debts, and claims, whether present or future, certain or contingent, ascertained or not, subsisting or supposed to subsist between the company and any person; and
> (b) questions in any way relating to or affecting the assets or the liquidation of the company;
> and take security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it."

[7] These powers are mirrored in those given to the current liquidators by the orders appointing them as liquidators.

[8] In **Bank of Credit and Commerce International SA (No 3)**[3] Nicholls V-C said at p111:

> "The pooling agreements are not conditional upon acceptance by creditors. Despite this, I am in no doubt that the agreements are so plainly for the benefit of the creditors that I should approve them without further ado. I am satisfied that the affairs of BCCI SA and BCCI Overseas are so hopelessly intertwined that a pooling of their assets, with a distribution enabling the like dividend to be paid to both companies' creditors, is the only sensible way to proceed. It would make no sense to spend vast sums of money and much time in trying to disentangle and unravel."

[9] The Court of Appeal dismissed an appeal against that holding. Dillon LJ (with whom Russell and Farquharson LJJ agreed) said[4]:

> "As I see it, in a liquidation… there can be a departure from the pari passu rule if it is merely ancillary to the exercise of any of the powers which are

[3] [1993] BCLC 106
[4] [1993] BCLC 1490 at p1510

exercisable with the sanction of the court under Part I of Schedule 4 to the Insolvency Act 1986.[5]

There are some things that cannot be done without a scheme of arrangement and in the normal run that would include a very large number of proposals, and indeed almost all, if not all, proposals for rearrangements of rights as between creditors of different companies or different classes of creditors. But the compromise powers within their scope are an alternative way of doing things, and I do not believe that the **British Eagle** decision[6] precludes that being exercised in a way which may, in an ancillary fashion, involve the departure from the strict pari passu rule. If any compromise is dissected, it may involve elements of give and take as to who is to have what, which may make it quite impossible to fit the compromise in with the strict pari passu rule. Here the condition is that these two aspects I have mentioned are part of the scheme of the Contribution Agreement, but not negotiable."

[10] The current case is *a fortiori* since there is no breach of the pari passu principle if a pooling order is made.

[11] Similar pooling orders have been made in Jersey: **Re the Representation of Roberts, Toynton and Rhodes (as Joint Liquidators) of Huelin Renouf Shipping Ltd (In Liquidation)**[7]; and in the Cayman Islands: **Re Bank of Credit and Commerce International (Overseas) Ltd**[8].

[12] In my judgment I have the power to make an order sanctioning the pooling of the liquidations and for the reasons I have given I do therefore make such an order.

Adrian Jack (Ag.)
Commercial Court Judge

By the Court

Registrar

[5] Which contain identical terms to the passages of the BVI legislation which I have cited above.
[6] British Eagle International Airlines Ltd v Air France [1975] 1 WLR 758
[7] [2015] JRC 206
[8] [2000] CILR 1