In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 238

IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

BETWEEN:

STEPHEN JOHN HUNT

Applicant

-and-

TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Lewis Preston, Kennedys Chudleigh Ltd, for the Applicant**

Mr Tom Smith QC, Mr Keith Robinson, Carey Olsen Bermuda Limited, for Transworld Payment Solutions Limited

Dates of Hearing: **11 – 12 February 2020**

Date of Judgment: **6 March 2020**

JUDGMENT

Cross-border insolvency; recognition of a liquidator appointed in the jurisdiction of incorporation of the company; application to set aside the recognition order on the ground that the purpose of such recognition was to obtain evidence in relation to contemplated proceedings in a foreign court; alleged failure to make full and frank disclosure at the application to obtain the recognition order

Introduction

1. On 19 July 2019 the Court made an ex parte Order that the appointment on 17 November 2014 in England and Wales of Stephen John Hunt, a partner of Griffins, (the **"Liquidator**") as liquidator of Transworld Payment Solutions U.K. Limited (the "**Company")** pursuant to a compulsory winding up Order made in the High Court of England and Wales on 22 September 2014, be recognised in this jurisdiction.

2. The Court also made an order that, save with the leave of the Court or with the consent of the Company:

    1. No proceedings may be commenced within the jurisdiction of the Court for the winding up of the Company;
    2. No receiver or administrative receiver over any part of the property or undertaking of the Company within the jurisdiction shall be appointed;
    3. No attachment, sequestration, distress or execution shall be put in force against the property or effects of the Company within this jurisdiction;
    4. Where any claim against the Company secured by a charge on the whole or any part of the property, effects or income of the Company within this jurisdiction, no action may be taken to realise the whole or any part of such security;
    5. No steps may be taken to repossess goods within the jurisdiction in the Company's possession under any hire purchase agreement; and
    6. No proceedings within this jurisdiction may be commenced or continued in relation to the Company by any person other than the Liquidator or the Company.

3. By summons dated 11 October 2019, Transworld Payment Solutions Limited (**"TWPS"**), a company incorporated in Bermuda, applies for an order discharging the ex parte Order made by the Court on 19 July 2019 on the grounds that:

    1. The recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition

is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

2. Further, the information requests are barred by the terms of certain settlement agreements entered into by Mr Hunt and the issue as to the effect of these agreements is presently pending before the Curaçao courts.

3. There was a breach by Mr Hunt of his duty to provide full and frank disclosure at the hearing at which the ex parte Order was made.

The Background

4. The background to this matter is set out in the First Affidavit of Richard Charles East dated 11 September 2019 sworn on behalf of TWPS. The Company is one of a number of Transworld companies which are ultimately owned by Mr John Deuss. Through his ownership of Transworld Energy Limited ("**TEL**"), which is a Bermuda entity, Mr Deuss was the ultimate beneficial owner of the Company. Mr Deuss was not at any stage a director, officer, employee, consultant or agent of the Company.

5. Mr Deuss was also the President and CEO of the First Curaçao International Bank NV ("**FCIB**"). FCIB was formerly a commercial bank in Curaçao and has been subject to a statutory winding down mechanism since 2006. As part of this procedure, the Central Bank of Curaçao and Sint Maarten ("**CBCS**") exercises FCIB's managing and supervisory powers through proxy holders who were appointed on its behalf to run FCIB. Pursuant to a service agreement with FCIB, prior to 2006, the Company introduced prospective customers and intermediaries to FCIB and its products and services.

The Missing Trader Intra-Community Fraud

6. Before this Court Mr Hunt maintains that the Company has been presented with a number of claims from companies involved in the missing trader intra-community fraud ("**MTIC**") VAT fraud. In short, MTIC fraud involves the theft of VAT from the government by exploiting the differences in how VAT is treated in different jurisdictions. In simple MTIC cases, fraudsters sell the goods and charged the VAT to buyers without remitting the value to the tax authorities. In more complex cases, known as carousel frauds, the goods are imported and sold through a series of companies before being exported again with the first company in the domestic chain charging VAT to a customer, but not paying this to the government, becoming what is known as a "missing trader". The subsequent exporters of these goods then claim and receive the reimbursement of VAT payments that never occurred.

7. In the present case, it has been alleged that the fraud was facilitated by the banking services provided by FCIB. It is also said that the Company has liability "*for dishonestly assisting in the frauds by, amongst other things, "on boarding" them as customers of FCIB without conducting effective due diligence and without properly carrying out the compliance duties assigned to the Company by FCIB"*.

The Earlier Settlement Agreements

8. TWPS considers the proposed claims to be particularly surprising as Mr Hunt has previously participated in settlement arrangements with FCIB (and it is asserted by extension, Mr Deuss) concerning the same MTIC fraud.

9. Mr East explains that the British authorities' investigations into some of FCIB's customers for MTIC fraud led to the British authorities asking the Dutch authorities to investigate and prosecute FCIB in connection with the alleged MTIC fraud, to which the Dutch public prosecutor agreed. Since FCIB could no longer function as a bank because of the actions of the Dutch public prosecutor, FCIB voluntarily underwent "emergency measures"

whereby it was subject to the direct control of the CBCS and wound down. There arose the question of what to do about the account balances of the companies that had engaged in MTIC fraud, many of which were placed into liquidation on account of the sums owed to HMRC. Whilst the companies sought access to the deposits held on their behalf, FCIB sought recompense for the companies' role in its collapse.

10. Both Mr Hunt and his colleague at Griffins, Mr Bramston, are, or have been, liquidators (both jointly and individually) of a number of these companies that allegedly engaged in the MTIC fraud and held accounts at FCIB (the "**Griffins Companies**"). Throughout 2014, Mr Hunt, Mr Bramston and/or their English solicitors took the lead to engage in negotiations with FCIB and the Central Bank in respect of the Griffins Companies' involvement in MTIC fraud. There were other companies in a position similar to that of Griffins Companies that were in liquidation and their respective insolvency practitioners (from firms such as Baker Tilly, Grant Thornton and Kingston Smith) also participated in parallel negotiations throughout 2014. These negotiations culminated in a series of settlements entered into on or about 6 February 2015 (the "**Settlement Agreements**") between, *inter alia*, the Griffins Companies and their officeholders and FCIB under which the companies released FCIB and related parties from any and all claims and demands in exchange for receiving a percentage of account balances held at FCIB.

11. Mr East contends that the intended effect of the Settlement Agreements was to release, *inter alia*, FCIB, its former officers, directors and employees, and any corporation or entity under common control with any of them from any new claims or demands, such as requests for examination, from insolvency practitioners such as Mr Hunt or Mr Bramston. The IP Settlement Agreements, which are subject to Curaçao law and the jurisdiction of the Curaçao courts, were entered into almost a year before the present claims were asserted on behalf of the Company.

The Appointment of Mr Hunt as the Liquidator

12. The appointment of Mr Hunt, as the liquidator of the Company, took place in unusual circumstances. On 27 May 2010, the directors of the Company applied for voluntary striking off under section 1003 of the English Companies Act 2006. On 5 October 2010, pursuant to that application, the Company was dissolved. Mr East explains that unbeknownst to the directors of the Company, Chubb Electronic Security Ltd ("**Chubb**") had obtained a judgment in default in the sum of £1,833.06 in the Kingston-upon-Thames County Court on 26 May 2010.

13. On 27 June 2014, and for reasons that remain unclear to TWPS, the judgment debt is said to have been assigned by Chubb to TC Catering Supplies Limited (in liquidation) ("**TC Catering**"). Mr Bramston of Griffins was the liquidator of TC Catering at the time and has since been replaced by Mr Kevin Goldfarb, also of Griffins. Instead of approaching the former directors of the Company with a request to pay the £1,833.06 judgment debt, in a petition dated 6 August 2014, TC Catering applied to restore the Company to the register of companies and to wind it up on the basis that the judgment debt assigned by Chubb remained outstanding. Mr Bramston paid £1, 250 (by way of deposit for the winding up petition) in respect of the recovery of the debt of £1,833.06. On 22 September 2014, the High Court ordered that the Company should be restored to the register of companies and wound up. The Secretary of State appointed Mr Hunt (also of Griffins) as the liquidator of the Company on 17 November 2014. Counsel for TWPS complains that none of this was revealed by Mr Hunt to FCIB prior to the signing of the IP Settlement Agreements in February and April 2015.

14. At a meeting of the Company's creditors held on 30 September 2015, the creditors approved a remuneration policy whereby Mr Hunt is to receive 50% of all realisations in the liquidation of the company. The Liquidator's Progress Report for the period ending 16 November 2015 suggests that TC Catering (acting by way of its liquidator, Mr Bramston also then of Griffins) was the only creditor of the Company and accordingly it appears that

Mr Hunt's entitlement to receive 50% of all realisations was, in effect, approved by his partner, Mr Bramston.

Litigation in England

15. It appears that the sole asset and the sole object of the liquidation of the Company is to pursue potential claims against FCIB and other entities or individuals. Thus, in Mr Hunt's Annual Progress Report to Members and Creditors for the year ending 16 November 2017 Mr Hunt notes that: *"The principal activity in the last year has been to continue to undertake investigations in support of the Company's claim against the First Curaçao International Bank ("FCIB")".* Mr Hunt further states that he had to date received unsecured creditor claims of just under £1 billion and that based on information requests from at least another 50 potential creditors, the value of claims against the Company could double to £2 billion. In that report Mr Hunt anticipates claims of at least £180 million will be made against FCIB.

16. On 5 February 2016 a letter before action was sent by Blake Morgan solicitors, on behalf of Mr Hunt as the liquidator of the Company to, *inter alia*, FCIB. The letter advised that the Company faced claims from companies which had been involved in the MTIC fraud, and that Mr Hunt and/or the Company in turn had claims against FCIB for fraudulent trading under section 213 of the Insolvency Act 1986 and unlawful means conspiracy.

17. Subsequently Mr Hunt expanded his claims both against FCIB and Mr Deuss. The expanded claims are set out in a draft Particulars of Claim settled by Mr Christopher Parker QC and provided on 9 April 2018 and the letter from Gowling WLG ("**Gowlings**"), acting for the Company, to Quinn Emanuel, acting for Mr Deuss, dated 21 May 2019. In these documents, Mr Hunt claims that FCIB and Mr Deuss dishonestly assisted the MTIC fraud, that Mr Deuss breached fiduciary duties which he owed as a de facto and/or shadow director of the Company and made claims under section 213 of the Insolvency Act 1986 and section 1 of the Civil Liability (Contribution) Act 1978. The letter dated 21 May 2019 requested a response by 4 pm on 19 July 2019. The letter ended by advising: *"We hereby*

put you on notice that, in the absence of either your firm and/or FCIB's solicitors providing our clients with sufficient reason not to, it is our clients' intention for me to commence the Claim after the period set out at paragraph 6.1 above [4 pm on 19 July 2019] has expired."

18. In the anticipated English proceedings Jones Day, acting on behalf FCIB, has raised a number of concerns in relation to threatened claims and in respect of requests for information from both FCIB and Mr Deuss.

19. In its letter of 23 May 2018 Jones Day states that Mr Hunt's position as liquidator of the Company is clearly in direct conflict with his position, and that of his partner, Mr Goldfarb, as liquidators of all but one of the English claimants. In his capacity as the liquidator of the Company, Mr Hunt has accepted claims from the English claimants notwithstanding that those same companies are entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. This is particularly so in circumstances where Mr Hunt's remuneration as liquidator of the Company is to be 50% of all recoveries. This means that, were he to succeed in his claim against FCIB, he would be paid approximately £90 million fees alone. This, contends Jones Day, creates a clear personal incentive for Mr Hunt to accept claims from the English claimants (which are companies almost exclusively under his control and that of his colleague).

20. Second, Jones Day asserts that the issue of Mr Hunt's conflict of interest is exacerbated by the fact that Mr Hunt has accepted claims that are plainly time-barred from companies entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. Jones Day states that almost all of the English claimants' claims are out of time but Mr Hunt has confirmed that he has accepted those claims nevertheless.

21. In a letter dated 26 September 2017 Blake Morgan, acting for Mr Hunt, reconfirmed his desire to interview Mr Deuss in relation to the affairs of the Company. In a letter dated 9 October 2017 Jones Day contended that such an interview would be oppressive in the present circumstances. Jones Day pointed out that given the clear intention by Mr Hunt to issue proceedings against FCIB and Mr Deuss and that such threatened claims involve

allegations of fraud, the request to interview Mr Deuss is in reality an attempt to obtain pre-action disclosure. In the circumstances, Jones Day contended, that such a request for an interview and/or information is oppressive and would not be complied with.

The Recognition Application

22. The application for recognition of the appointment of Mr Hunt, as the liquidator of the Company, was supported by Mr Hunt's First Affidavit dated 18 June 2019. In that affidavit Mr Hunt explained that in order to progress the liquidation, he needs to be in a position where he has appropriate authority to continue the investigations involving the MTIC fraud into the Company's activities and dealings worldwide, both with third parties and within its own group of companies, including Bermuda.

23. In relation to Mr Deuss, Mr Hunt stated that while he was never a *de jure* officer of the Company, from his review of the Company's documents during the course of his investigation, it has become apparent that Mr Deuss was involved in the formation and management of the Company and exercised control over it and its *de jure* directors, who were accustomed to acting in accordance with his strategic and tactical direction. Mr Hunt stated that recognition in Bermuda may prove necessary to enforce compliance with any orders made in other proceedings and/or to give him the authority to request the relevant document from Mr Deuss in the absence of his cooperation in the liquidation.

24. Mr Hunt also referred to the statutory annual accounts of the Company for the years 2005 – 2009 and stated that as the liquidator he may need to investigate these transactions and recharges between the Company and other companies within the Group.

25. Mr Hunt concluded that recognition in Bermuda at this stage of the liquidation would provide the necessary authority to enable him at the appropriate time to continue his investigations and work in respect of persons, entities, documents, information, accounts and assets in Bermuda.

26. Counsel for Mr Hunt (Mr Potts QC) supported the application for recognition on the following factual grounds.

27. First, the claims brought by the liquidator of the entities involved in the MTIC fraud against the Company are for dishonest assistance in those frauds by the Company "onboarding" those entities as customers of FCIB without conducting effective due diligence and failing to apply adequate procedures to prevent the frauds during the lifetime of the accounts. Mr Hunt wishes to continue his investigations in Bermuda to determine the validity of claims made against the Company and to determine what consequential claims it may have against other entities and persons.

28. Second, Mr Hunt wishes to investigate the transactions the Company apparently entered into with other entities in the Group and to determine what is owed by and to those entities.

29. Third, Mr Hunt also wishes to investigate whether there are computer systems or data belonging to the Company and the source of funds for the payment of its employees.

30. Counsel submitted that these investigations may involve engaging with some or all of the Bermudian companies and residents and Mr Hunt seeks recognition by the Bermudian Court in order to pursue his investigations in Bermuda with the Court's authority.

Recognition is inappropriate and would serve no legitimate purpose

31. Mr Tom Smith QC for TWPS submits that the recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

32. I accept, as submitted by Mr Smith QC, that the concepts of *recognition* and *assistance* are different. The concept of recognition simply involves recognising, in accordance with principles of private international law, the authority of the foreign officeholder, such as the liquidator or trustee in bankruptcy, to deal with the assets of the debtor located in the foreign jurisdiction. The general rule is that the court will recognise at common law only the authority of the liquidator appointed under the law of the place of incorporation of the company: *Dicey, Morris & Collins, The Conflict of Laws, 15th ed, para 30 R-100.* In this regard Lord Mance stated in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 at para 132 *: "the essence of the principle consists, as Lord Sumption JSC notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order [in In re African Farms [1906] TS 373] restraining the disposition or seizure inconsistently with the foreign liquidation."*

33. In the present case, there could be no dispute over Mr Hunt's authority, as a matter of Bermudian private international law, as the liquidator appointed by the English court of the Company, a company incorporated under English law, to deal with any assets of the Company in Bermuda. Indeed, the Court made the Order recognising Mr Hunt's authority precisely on this basis in its Ruling made on 19 July 2019. However, Mr Smith QC submits, there is no evidence or suggestion that the Company has any assets and therefore there would be no basis for making an order recognising Mr Hunt for this reason. Mr Preston, appearing for Mr Hunt, confirmed to the Court that the Company has no assets within the jurisdiction. Accordingly, Mr Hunt cannot rely upon the existence of assets within the jurisdiction to support his application for recognition.

34. The other reason why recognition may be sought by a foreign officeholder is that it carries with it the active assistance of the court, within the limits explained by the Privy Council in *Singularis.* Mr Smith QC submits that it is clear that the real reason why an order for recognition was and is sought, is not in order to establish Mr Hunt's authority to deal with the assets of the Company in the face of some dispute, but rather to provide a platform by which Mr Hunt can then seek assistance from the Bermudian Court to obtain the

information which he wants, or simply to be able to support his request by being able to claim that he has the "*authority*" of the Bermudian Court. Mr Smith QC further submits that there is no proper basis for Mr Hunt obtaining any form of relevant assistance from this Court.

35. In *Singularis* Lord Sumption considered the limits of the common law power to assist a foreign officeholder at [25]:

> *"In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers.* ***It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed****. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation <u>in In re African Farms Ltd</u> and in <u>HIH and Rubin</u>, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in <u>Norwich Pharmacal and R (Omar) v Secretary of</u> <u>State for Foreign and Commonwealth Affairs</u> (at both levels) shows with all their,* ***common law powers of this kind are not a permissible mode of obtaining material for use***

***in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept limitations**"* (emphasis added).

36. The last sentence in the above passage in Lord Sumption's judgment makes clear that there is a specific restriction on not using the common law powers to obtain material for use in actual or anticipated foreign litigation.

37. As noted above [33], the Company has no assets in Bermuda. Indeed, there is no suggestion that the Company has any assets in any jurisdiction. The sole aim of the liquidation of the Company is to pursue claims against FCIB and Mr Deuss arising out of the MTIC fraud. This has been confirmed in all the Annual Reports produced by Mr Hunt. In the latest Annual Progress Report for the year ending 16 November 2019 Mr Hunt confirms that:

    "The principal activity in the last year has continued to be of the undertaking investigations in relation to the Company's claim against First Curaçao International Bank ("FCIB") and defending the action brought by FCIB in Curaçao.

    My investigations have also been extended in relation to an additional claim…

    Overall I am able to report that investigations have continued to make progress with enquiries now spanning four jurisdictions. There remain a number of obstacles to recovery of further information but I am confident that, <u>with the assistance of the courts, additional evidence will become available in support of claims.</u>

    …

    The overarching strategy at the current time remains to investigate necessary issue claims against FCIB and Mr Deuss" (emphasis added).

38. The allegations made in the draft Points of Claim against Mr Deuss and FCIB are based on allegations that they participated in and assisted in the marketing and promotion by the Company of FCIB's banking services to customers who were involved in MTIC fraud. The basis of the claim is that these activities have exposed the Company to liability which it is

entitled to recover from FCIB and Mr Deuss. It seems reasonably clear from the terms of the information requests, which have been made by Kennedys on behalf of Mr Hunt since the ex parte Order, that those requests are in aid of the contemplated proceedings against FCIB and Mr Deuss. Thus, many of the questions appear to be directed at establishing that TWPS exercised control over the Company, so that it can be alleged that FCIB and/or Mr Deuss exercised control over the Company through TWPS.

39. The letter from Kennedys to TWPS dated 15 August 2019 states in the opening paragraph that Mr Hunt has "*been recognised in Bermuda by an ex parte Order of the Supreme Court of Bermuda, dated 19 July 2019.*" The letter advises that the Mr Hunt's office requires him to investigate the MTIC fraud, and the general affairs of the Company including establishing *"who controls (or controlled) the Company at all relevant times"*.

40. The letter advises that it appears from Mr Hunt's investigation that "*the Company, its directors and staff received instructions from time to time from Transworld Payment Solutions Limited ("TWPS Bermuda") and/or its directors, controllers or employees"*. The letter then proceeds to elicit the following detailed information:

> *"1.Explain the business activities of TWPS Bermuda and describe the commercial relationship between TWPS Bermuda and the Company.*
> *2. Provide a copy of any contract(s) and/or service level agreement(s) that has/have existed between TWPS Bermuda and the Company.*
> *3. Explain the basis on which control was exercised over the Company in respect of guidance issued by TWPS Bermuda in relating to "knowing your customer".*
> *5. Unless otherwise detailed on invoices, provide full details of service(s) provided between TWPS Bermuda and the Company.*
> *7. Provide details of any and all tax advice taken in respect of the transactions between the Company and TWPS Bermuda that was shared between the parties.*
> *9. Confirm whether, and who, of the staff employed by TWPS Bermuda were also employed by the Company or otherwise contracted by TWPS Bermuda to the Company.*

10. Confirm whether anyone, and who, was seconded from TWPS Bermuda to work within the structure of the Company.

11. Confirm how much money each member of staff working in furtherance of the Company's activities were paid by TWPS Bermuda between 2004 and 2010, with a breakdown of each such staff member's salary and bonus.

13. Provide full details of the information technology ("IT") support function provided by TWPS Bermuda to the Company, including website maintenance, with a copy of any contractual agreement.

15. Explain the role of TWPS Bermuda in reviewing and monitoring FCIB customer and applicant complaints, and the legal capacity in which TWPS Bermuda communicated guidance on those issues to the Company.

16. Explain the legal basis upon which TWPS Bermuda had access to FCIB data for transmission to the Company.

17. Confirm whether, and, if so, how, TWPS Bermuda was involved in establishing the parameters of a long-term bonus plan for those working, both directly and indirectly, for the Company.

21. Identify and confirm whether TWPS Bermuda, or anyone acting on its behalf, ever raised concerns about the legitimacy of the activities undertaken by the Company, its staff or directors? If so, when and what concerns were raised, and to whom?

22. Confirm what information concerning the relationship between TWPS Bermuda, the Company and FCIB has been provided (voluntarily or under compulsion) to the curator acting for the Central Bank of Curaçao and St Maarten and/or the Fiscale Inlichtingen-en OpsporingsDienst ("FIOD") in the Netherlands since October 2006.

23. Provide a copy of all email communications between TWPS Bermuda and the Company staff and/or directors or otherwise confirm the current exact location of computer and/or hardcopy records evidencing the relationship and transactions between them."

41. The letter ends with the statement: *"Please provide this information and these documents and records to us within 21 days, failing which Mr Hunt will consider making an application for assistance from the Bermuda Court"*.

42. Following the ex parte Order dated 19 July 2019 letters were written by Kennedys in similar terms and requesting similar information from Transworld Oil Inc, and Mr Victor N Farag, who Mr Hunt identified as having previously acted as a Managing Director for FCIB under ultimate authority of the Chairman of the Supervisory Board, Mr Deuss.

43. Having regard to all the circumstances outlined above, it is clear to me that the sole purpose of obtaining the recognition Order was to clothe the Mr Hunt with the authority of this Court so that he could obtain information and evidence for use in the contemplated proceedings in England against FCIB and Mr Deuss. This is clear from the requests for information and evidence made by Kennedys in their letters to TWPS, Transworld Oil Inc and Mr Farag.

44. The judgment of Lord Sumption in *Singularis* sets out that the common law power of providing assistance to a foreign officeholder cannot extend to or be utilised for the purposes of gathering evidence to be used in foreign proceedings. The obtaining of evidence to be used in foreign proceedings by an officeholder must comply with the mandatory requirements of sections 27P-27S of the Evidence Act 1905 and Order 70 of the Rules of the Supreme Court 1985. The officeholder, in this regard, does not stand in any privileged position.

45. The Court has a discretion to refuse recognition if satisfied that the applicant is abusing that process for an illegitimate purpose (*In re OGX Petroleo e Gas SA* [2016] Bus LR 121, Snowden J at [60]). The use of a recognition order to obtain evidence to be used in contemplated foreign proceedings is an illegitimate use of the procedure and if there is no other legitimate reason for granting recognition the court would refuse to make such an order. In my judgment there is no other legitimate reason for the recognition order and accordingly, I discharge the ex parte Order dated 19 July 2019.

46. In this regard I have not ignored the other grounds advanced in support of granting the recognition Order. In my judgment the other grounds are makeweights and on examination, lack any substance.

47. In the letter dated 15 August 2019 to TWPS, Kennedys raise certain questions in relation to historic intercompany transactions relating to recharges, debits or credits, between TWPS and the Company. In particular, Kennedys seek an explanation as to the basis for the Company paying expenses of £146,722 on behalf of TWPS between 2004 and 2008; explanation as to why in 2008 TWPS allowed the Company bad debt recharge of £44,458 to its own accounts; and explaining the basis for TWPS making payments of £468,132 between 2006 and 2008 for expenses on behalf of the Company which were recharged and requesting evidence that the Company repaid those recharges.

48. It is not clear what useful purpose this investigation in relation to historical transactions can achieve. These three transactions relate to the Company's accounts for the period 2004 to 2009 and on any basis any potential cause of action arising from these transactions would be statute barred. It seems reasonably clear that there can be no viable cause of action arising from an investigation of these historical transactions.

49. Second, the relevant inter-company charges have been audited by the Company's auditors, Ayers Bright Vickers based in Worthing, West Sussex, England. The Auditors Report dated 27 September 2007, for the year ended 31 December 2006, is attached as an exhibit to Mr Hunt's First Affidavit dated 18 June 2019. The firm of Ayers Bright Vickers is still in existence and if Mr Hunt has any questions arising out of the audited accounts, there is no reason why he should not approach the auditors in the first instance.

50. Mr Hunt says that he does not know whether some of the charges have been repaid to the Company. The Company's auditors based in Worthing should be able to provide that confirmation. Furthermore, the Company had a bank account in the United Kingdom and Mr Hunt, as the liquidator, should be able to confirm whether payments were indeed received by the Company by analysing its bank account statements.

51. In his Second Affidavit dated 7 November 2019, Mr Hunt advances another justification in support of obtaining a recognition order. He says that he was contacted by representatives of a former employee of the Company seeking confirmation about the employee's rights under the Company's pension scheme. He says this is just a single example of a myriad of general statutory duties that the liquidator has from taking office and which will be pursued until he is satisfied that no such records exist. It should be noted that there is no mention of any pension scheme in any of the letters written by Kennedys. Mr Smith QC advised the Court that there was no pension scheme.

52. In his First Affidavit dated 18 June 2019, Mr Hunt says that the global IT manager for the Transworld Group was based in Bermuda, and there is evidence of IT security advice being provided to the Company from TWPS. He then conjectures that "there may be computer equipment or data belonging to the Respondent in Bermuda". This is pure speculation on Mr Hunt's part and if he wishes to pursue this line of enquiry he should write to the relevant party dealing with this particular issue.

53. I have also not ignored the fact that Mr Hunt states in his Third Affidavit dated 5 December 2019, that he has sought detailed information concerning all accounts, facilities, agreements with and securities held by Butterfield Bank, Clarien Bank, HSBC Bank Bermuda, and the Bermuda Commercial Bank on behalf of the Company. Mr Preston confirmed to the Court that the Company has no such accounts in Bermuda.

54. Likewise I have not ignored the fact that Mr Hunt states in his Third Affidavit that he has sought information from the Land Title Registry in Bermuda concerning the land the Company might possess. It would be surprising if a company incorporated in the United Kingdom, without a permit to carry on business in Bermuda under section 134 of the Companies Act 1981, would be granted permission to own land in Bermuda under the provisions of the Bermuda Immigration and Protection Act 1956. Again Mr Preston confirmed that the Company owns no land in Bermuda.

55. In setting aside the ex parte Order dated 19 July 2019 the Court makes it clear that it will of course entertain an application for such an order if it can be shown that it will serve a useful purpose in aid of a legitimate object.

56. Mr Smith QC also argues that the use of the recognition Order to obtain evidence for the contemplated English proceedings also falls foul of the restriction in *Singularis,* that the common law power of assistance *"is not therefore available to enable them to do something which they could not do even under the law by which they were appointed."* In the present case, Mr Hunt is appointed under English law and Mr Smith contends that as a matter of English law, Mr Hunt would not be entitled to relief from the English court to compel the production of information which he now seeks. This is because, he says, such requests would be considered oppressive, as they are evidently in large part for the purpose of gathering information to support litigation which Mr Hunt has already decided to commence.

57. The relevant English statutory provision is section 236 of the Insolvency Act 1986, which is the equivalent to section 195 of the Bermudian Companies Act 1981. Mr Smith relies upon the leading authority in *British & Commonwealth Holdings plc v Spicer and Oppenheim* [1993] AC 426, in relation to the exercise of the Court's discretion for these purposes. In this case the House of Lords decided:

> (1) Although there is no requirement that the documents sought by the officeholder must be for the purposes of reconstituting the company's knowledge, this is one of the purposes which may most clearly justify the making of an order.
> (2) The power under section 236 it is an extraordinary power and the discretion must be exercised only after a careful balancing of the factors involved.
> (3) This involves balancing the reasonable requirements of the officeholder to carry out his task against the need to avoid making any order which is unreasonable, unnecessary or oppressive to the person concerned.
> (4) The applicant must satisfy the court that, after balancing all relevant factors, there is a proper case for such an order be made. The proper case is one where the

administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the officeholder's requirement.

58. Mr Smith QC argues that in the present case, the information requests which Mr Hunt apparently intends to make would be considered oppressive. First, Mr Hunt has clearly decided that he will sue Mr Deuss and FCIB. He has prepared the draft Points of Claim settled by Leading Counsel pleading claims against Mr Deuss and FCIB. Thus the effect of any information requests which go to the subject matter of the claim will be to allow Mr Hunt to gain advantages in the intended litigation which are not available to ordinary litigants.

59. Mr Preston, for Mr Hunt, submits that the Court is required to undertake a fact sensitive detailed analysis to weigh the various factors and consider all the circumstances in relation to each particular application for disclosure. In the circumstances he submits that the Court should not assume what type of disclosure, if any, the liquidators might ask the Court to grant in these proceedings and determine, pre-emptively, that all of those remedies would be oppressive in the circumstances of this case.

60. I have already ruled that the ex parte Order should be discharged on the ground that its use to obtain evidence for contemplated proceedings in England was an illegitimate purpose and that the Court will not exercise its common law power of assistance to aid the obtaining of evidence for use in contemplated foreign proceedings. In light of that ruling it is unnecessary to express a concluded view as to whether Mr Hunt would be entitled to relief from the English Court to compel the production of the information which he now seeks in the Kennedys letters. The Court can state that Mr Smith QC's submission that such an application would be considered oppressive by the English Court, is strongly arguable.

The scope of the ex parte stay

61. Mr Smith QC argues that there was no proper basis for Mr Hunt obtaining assistance from the Court by way of the stay order contained in paragraph 2 of the ex parte Order.

62. First, he submits that the evidence provided by Mr Hunt does not disclose any basis for granting such relief as there was no evidence of apprehended hostile creditor action or potential jeopardy to assets.

63. Second, he argues that at common law there is no basis for granting an order in terms of paragraph 2 of the ex parte Order which seeks to apply generally against unidentified persons. In this regard Mr Smith QC relies upon the decision of Barrett J in the New South Wales Supreme Court in *Independent Insurance Company Ltd* [2005] NSWSC 587, where Barrett J explained that such an order is "*express to be binding on the whole world in the manner of legislation*" and is therefore inappropriate for the court to make.

64. Third, he submits that at the ex parte hearing, the Court was misinformed by counsel into believing that the grant of such relief is a standard part of the recognition Order in England. Most recognition applications in England take place under the provisions of the Cross-Border Insolvency Regulations 2006, which implement the UNCITRAL Model Law on Cross-Border Insolvency into English law. When a foreign insolvency proceeding is recognised under the Regulations as a foreign main proceeding, then an automatic moratorium on creditor action arises. However, Mr Smith QC submits, this was nothing to do with recognition at common law, and therefore has nothing to do with the position in Bermuda.

65. In light of the fact that I have already discharged the entire ex parte Order, I can deal with these points shortly.

66. If necessary, I would have set aside paragraph 2 of the ex parte Order on the ground that it serves no legitimate purpose as there are no assets of the Company in the jurisdiction.

67. In light of my earlier ruling it is unnecessary to decide whether it is always inappropriate to order a stay of proceedings in respect of creditor claims by the general body of creditors of the insolvent company, as appears to be suggested by Barrett J in *Independent Insurance*. Such orders can serve a useful purpose when there are assets within the jurisdiction and there is justifiable apprehension that actions are likely to be commenced by some, as yet unidentified, creditors of the insolvent company. This would appear to be the reasoning of Kawaley CJ in *Funding Partners Global Fund Ltd* [2009] Bda LR 35, although the point was not in contention and not fully argued by counsel.

Settlement Agreements

68. TWPS argues that the Settlement Agreements were intended to draw a final line under the issues relating to alleged MTIC fraud. The intended effect of the Settlement Agreement, in particular, was to release FCIB, its former officers, directors and employees and any corporation or entity under common control with any of them from any new claims or demands, such as requests for information from insolvency practitioners, such as Mr Hunt.

69. Mr Smith QC contends that the Company is not itself referenced in the Settlement Agreements because Mr Hunt failed to tell FCIB that he had been appointed as liquidator of this Company and, as far as the Transworld Group was concerned, it had been dissolved in 2010.

70. The application of the Settlement Agreements gives rise to two issues of Curaçao law: whether TWPS is a releasee under Article 2(1) of the Settlement Agreements; and whether the Company is bound by the release. These issues of Curaçao law are presently pending before the Curaçao courts.

71. Mr Smith QC submits that if TWPS and FCIB are correct in their interpretation of the Settlement Agreements, then this would be a further reason why it would not be open to Mr Hunt to pursue information requests in Bermuda, and a further reason why any recognition of his appointment in Bermuda would be unnecessary and inappropriate. Mr

Smith submits that in the circumstances, the recognition Order should be discharged, or alternatively stayed pending the outcome of the Curaçao proceedings.

72. In light of my earlier ruling I can deal with this point briefly. The Court is not in a position to express any view in relation to the merits of the position taken by the parties under Curaçao law. The Court assumes that the respective positions of the parties are arguable. In the circumstances, assuming the application for the recognition Order would otherwise be justified for a legitimate purpose, the Court would not have refused recognition merely by reference to the existence of the Curaçao proceedings in relation to the Settlement Agreements.

Material Non-Disclosure

73. TWPS contends that there was very material non-disclosure by Mr Hunt at the ex parte hearing and that this is therefore a freestanding reason why the ex parte Order should be set aside. Reliance is placed upon the principles governing the requirement on an applicant to give full and frank at an ex parte hearing as summarised by Popplewell J in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 at [50]-[52].

74. First, TWPS contends that there was a complete failure in both Mr Hunt's affidavit and counsel's skeleton argument to explain any of the very unusual background to the liquidation of the Company including (i) the very questionable circumstances in which it was placed into liquidation; (ii) the failure to disclose Mr Hunt's appointment as liquidator of the Company to FCIB at the time of entry into the Settlement Agreements; (iii) the extraordinarily generous remuneration payable to Mr Hunt and the fact that this appears to have been approved by a creditor under the control of an associate; (iv) the fact that the creditors of the Company whose claims are being relied on to support the claims against FCIB and Mr Deuss are controlled by Mr Hunt and/or his associates.

75. Second, Mr Hunt did not adequately explain the existence and relevance of the release clauses in the Settlement Agreements and the existence of the proceedings pending in Curaçao.

76. Third, there was a failure to give proper disclosure of the information requests which had been made by Mr Hunt in England and the repeated and detailed explanations given by FCIB's lawyers, Jones Day, that such a requests were oppressive given that Mr Hunt had already decided to commence proceedings against FCIB and Mr Deuss.

77. Again I can deal with this issue briefly. At the ex parte hearing the Court was aware, *inter alia*, from the Quinn Emanuel letter dated 9 July 2019 that (i) Gowlings had written a letter before action asserting claims against FCIB and Mr Deuss; (ii) there were proceedings pending in the Curaçao courts the outcome of which was materially likely to affect Mr Hunt's ability to prosecute claims against Mr Deuss; (iii) Mr Hunt had made an application to the English Court seeking public examination of Mr Deuss; and (iv) it was contended on behalf of Mr Deuss that the requested public examination was incompatible with the proceedings threatened in the letter before action.

78. I accept that the Court was not made fully aware of the circumstances of Mr Hunt's appointment as liquidator of the Company or the details of his compensation. In all the circumstances, I have come to the view that I would not have discharged the ex parte Order on the grounds of non-disclosure if I had otherwise taken the view that it was properly granted for a legitimate purpose.

Conclusion

79. Having regard to my conclusion expressed in paragraphs 43 to 45, I discharge the ex parte Order dated 19 July 2019 recognising the appointment of Mr Hunt as the liquidator of the Company and granting stay of proceedings.

80. I will hear the parties in relation to the issue of costs, if required.

Dated this 6 March 2020

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NARINDER K HARGUN

CHIEF JUSTICE