In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No 466

IN THE MATTER OF THE COMPANIES ACT 1981

-and-

IN THE MATTER OF N-REN INTERNATIONAL LTD

-and-

IN THE MATTER OF ADRIA AKTIENGESCELLSCHAFT
(a.k.a. ADRIA AG)

RULING

(*Ex parte* in Chambers)

Whether Applicant was a person entitled to disclaimed property which had passed bona vacantia to the Crown upon dissolution of company indebted to Applicant – whether Applicant had to show a proprietary interest or merely a financial interest in disclaimed property – whether Applicant had a proprietary interest in disclaimed property – Companies Act 1981 sections 240(4) and 263

Date of hearing: 28th December 2017, 24th January 2018
Date of ruling: 25th January 2018

Mr Orlando Smith, Milligan-Whyte & Smith, for the Applicant, Adria AG

Introduction

1. This is an interesting and unusual application. The Applicant is a company known as Adria AG ("***Adria***"), which is incorporated under the laws of Liechtenstein. By an *ex parte* originating summons dated 18th December 2017, Adria seeks an order under section 240(4) of the Companies Act 1981 ("***the 1981 Act***"), read in conjunction with section 263 of the 1981 Act, for the vesting of certain property in the company ("the Property").

2. The Property formerly belonged to another company, N-ReN International Ltd ("***N-ReN***"), which was incorporated under the laws of Bermuda. But the Property reverted *bona vacantia* to the Crown when N-ReN was dissolved. The Acting Attorney General has issued a notice disclaiming any interest in the Property.

3. Following the initial hearing, I invited written submissions from the Applicant's counsel, Orlando Smith, and then further oral submissions. I am grateful for the care and skill with which Mr Smith presented his case. The issue which troubled me was whether Adria had an interest in the disclaimed property, as this was a precondition for the making of a vesting order.

Background

4. The facts relied upon by Adria are set out in affidavits sworn by Glenn Kielty, the duly authorised representative of Adria, and Thomas C Snyder ("***Mr Snyder***"), a former director of N-ReN. For the purposes of this application, I accept that, save where appears to the contrary in this judgment, the facts alleged by these deponents are true and correct.

5. Adria entered into a consultancy agreement dated 20th October 1978 with N-ReN ("***the Consultancy Agreement***"). The services which Adria provided

under the Consultancy Agreement concerned a contract dated 30th December 1975 for the construction and operation of certain fertilizer plants in Sudan ("***the Project Contract***") which N-ReN had entered into with a company incorporated under the laws of Sudan known as Sudan ReN Chemicals & Fertilizers Limited ("***Sudan ReN***").

6. The Property was as follows:

   (1) 12 promissory notes issued by Sudan ReN to N-ReN ("***The Promissory Notes***"), representing unpaid retention monies payable under the Project Contract. The Promissory Notes were guaranteed by the Government of Sudan. The last payment under the Promissory Notes fell due on 3rd October 1988. However, no payments have in fact been made under any of the Notes.

   (2) Certain debts owed by Sudan ReN to N-ReN under the Project Contract, and the right to demand repayment thereof.

   (3) 403,900 shares in Sudan ReN ("***the Shares***"), which comprised a 35 per cent ownership interest in the company. These were issued to N-ReN's parent company N-ReN Corporation, which was incorporated in Delaware in the United States ("***N-ReN Delaware***"), under an agreement between N-ReN Delaware and the Government of Sudan dated 30th November 1975 ("***the Founders Agreement***"). N-ReN Delaware held the shares as nominee for N-ReN.

   (4) The Property includes all rights, benefits and interests pertaining to the Promissory Notes and the Shares, including the right to arbitrate under the Project Contract and the Founders Agreement.

7. Pursuant to the Project Contract, Sudan ReN deposited the Promissory Notes in escrow with American Express International Bank ("***Amex***") in London. By an escrow agreement dated 8th March 1982 made between N-ReN, Adria and Amex ("***the Escrow Agreement***"):

(1) Amex agreed to hold in escrow any proceeds realised by discounting or payment of the Promissory Notes and to pay N-ReN's indebtedness to Adria out of such proceeds without further instruction from Adria (clause 4).

(2) Should any of the Promissory Notes not be paid or discounted and the proceeds thereof paid into the Escrow Account on or before 3 months after the due date of such Note, Adria would be entitled to issue proceedings against N-ReN for an amount equal to or in excess of the face value of the dishonoured Note (clause 5).

(3) In such event, ie if Adria did issue proceedings against N-ReN, the Bank would release to N-ReN from the Escrow Account, without further instruction from Adria, the dishonoured Promissory Note and further Notes to the approximate value of the proceedings issued against N-ReN by Adria (clause 5).

8. By a deed of power of attorney dated 1st August 1994 ("***the Power of Attorney***"), N-ReN appointed Mr Snyder and John J Kelley Jr ("Mr Kelley") as its attorneys in fact. The Power of Attorney authorised the attorneys in fact to dispose of any assets of N-ReN and to assign the benefit or burden of any contract to which N-ReN was a party. Mr Snyder explained in his affidavit that he was instructed to wind down N-ReN's affairs and to complete contracts with creditors, chiefly Adria.

9. By a deed of transfer dated 24th February 1995 between N-ReN (ostensibly) and Adria ("***the Deed of Transfer***"), Mr Snyder, purportedly acting pursuant to the Power of Attorney, agreed: (i) following the procedure laid down in the Founders Agreement, to offer to sell the Shares to the Government of Sudan, and if the Government of Sudan did not exercise its right to purchase the Shares, to transfer them to Adria; and (ii) to instruct Amex to release the Promissory Notes to Adria. The purpose of these transactions was to discharge the debt which N-ReN owed to Adria for outstanding consultancy

fees. The Deed of Transfer noted that as at 31st December 1994, the amount of the debt, including interest, was $3,050,914.00.

10. I was referred to a letter dated 8th April 1994 from Mr Kelley to Mr Snyder proposing various insertions to the draft agreement that became the Deed of Transfer ("***the April 1994 letter***"). As appears later in this judgment, Adria invites the Court to attach considerable importance to this letter.

11. By a letter to Amex, also dated 24th February 1995, Mr Snyder, purportedly on behalf of N-ReN, informed Amex that N-ReN had modified its agreement with Adria (ie by the Deed of Transfer) and that this impacted on the Escrow Agreement. Mr Snyder instructed Amex that: (i) all proceeds received by Amex from Sudan ReN and/or the Government of Sudan in payment of the Promissory Notes should be paid directly on receipt to Adria; (ii) in accordance with the Deed of Transfer, Adria was now the exclusive owner of the Promissory Notes; and (iii) all the Promissory Notes should be released to Adria.

12. By a letter to N-ReN dated 7th July 1995, Adria stated that, in accordance with "*the Contract between [Adria] and [N-ReN]*", Adria confirmed the transfer to it of the Shares. On 11th July 1995, Mr Snyder endorsed the letter as signed and accepted by N-ReN.

13. Confusingly, the said contract for the transfer of the Shares ("***the Share Transfer Contract***"), which Mr Snyder signed purportedly on behalf of N-ReN, bears the subsequent date of 19th August 1995. Under this contract: (i) N-ReN agreed to transfer the Shares to Adria; (ii) Adria purportedly accepted the transfer; and (iii) N-ReN authorised the registration of the Shares in the name of Adria. I am not told whether registration in fact took place. The Government of Sudan had been invited by N-ReN in accordance with the Founders Agreement to purchase the Shares but had not done so.

14. Custody of the Promissory Notes passed from Amex to Standard Chartered: it appears that Standard Chartered acquired all or part of Amex's business. Although the Promissory Notes were held by Standard Chartered Private

Bank in London, they were governed by the Bank's US entity: Standard Chartered International (USA) Ltd. They were therefore subject to a United States sanctions regime prohibiting transactions with Sudan which prevented their release to Adria. The sanctions, which commenced in 1997, were not lifted until January 2017. The Promissory Notes were released to Adria on 16th March 2017.

The problem

15. Adria commenced arbitration proceedings before the International Chamber of Commerce against Sudan ReN and the Government of Sudan ("***the ICC Respondents***") to enforce its purported rights in relation to the Property. A Revised and Amended Request for Arbitration was filed on 30th June 2017.

16. Adria was in for a nasty shock. The ICC Respondents took the point that N-ReN was struck off the Register of Companies ("***the Register***") on 30th September 1994. Notice thereof was duly published in a local newspaper, "*The Bermuda Sun*". Upon such publication, N-ReN was dissolved by operation of statute. See section 261 of the 1981 Act, which is headed "*Registrar may strike defunct company off register*" and sets out the procedure whereby the Registrar may do just that.

17. Upon the dissolution of N-ReN, all property and rights whatsoever vested in or held on trust for it immediately before its dissolution, not including any property held by it on trust for any other person, were deemed to be *bona vacantia* and accordingly to belong to the Crown. See section 262 of the 1981 Act, which is headed "*Property of dissolved company to be bona vacantia*". The UK Government website helpfully explains that "*bona vacantia*" means "*vacant goods*" and is the name given to ownerless property, which by law passes to the Crown.

18. In the premises, the Deed of Transfer and the Share Transfer Contract were ineffective to transfer the Property to Adria: (i) because N-ReN, once dissolved, was incapable of dealing with property, or indeed doing anything

else; and (ii) upon N-ReN's dissolution, the Property, none of which was held on trust for Adria, passed *bona vacantia* to the Crown. Therefore, the ICC Respondents submitted, Adria has no standing before the ICC to seek relief against them in relation to the Property. Hence the present application.

19. That N-ReN's dissolution did not come to light earlier is, to say the least, unfortunate.

The problem confronted

20. A company, once dissolved, can in certain circumstances be restored to the Register.

21. Section 260 of the 1981 Act is headed "*Power of court to declare dissolution of company void*". Section 260(1) provides in material part that where a company has been dissolved the Court may, at any time not later than five years from such date, on an application by the liquidator or any other any person who appears to the Court to be interested, make an order declaring the dissolution to have been void. It may be that this section is intended to apply only to companies which have been dissolved at the conclusion of a liquidation, but I need not consider that question here.

22. Section 261(6) provides in material part that if a creditor feels aggrieved by the company having being struck off the Register, the Court on an application made by the creditor before the expiration of twenty years from the publication of the notice in an appointed newspaper, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that that company be restored to the Register, order the name of the company to be restored to the Register.

23. Neither of these sections will avail Adria because, by the date of the originating summons, more than five years had passed since the dissolution of N-ReN and more than twenty years had passed since the publication of the notice in an appointed newspaper.

24. Instead, Adria seeks an order pursuant to section 240 of the 1981 Act that the Property be vested in it as "*disclaimed*" property. Section 240 is headed "*Disclaimer of onerous property*" and provides in material part:

> "*(1) The liquidator of a company may with the leave of the Court disclaim any property belonging to the company whether real or personal including any right of action or right under a contract which in his opinion is onerous for the company to hold or is unprofitable or unsaleable.*
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> *(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company, and the property of the company in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.*
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> . . . . .
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> *(4) The Court may, on an application by any person who … claims any interest in any disclaimed property … and on hearing any such persons as it thinks fit, make an order for the vesting of the property in … any persons entitled thereto … and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.*"

25. There is no time limit for an application under section 240.

26. To succeed on an application under section 240(4), the applicant must be both a person who claims an interest in the disclaimed property and a person who is entitled to that property. Thus the applicant must be entitled to the interest claimed.

27. The leading case on the nature of the interest to which the applicant must be entitled is Re Ballast Plc [2007] BCC 620 Ch D. This concerned an application by an insurer under section 178 of the Insolvency Act 1986, which is analogous to section 240 of the 1981 Act, for a vesting order in relation to a claim by the insured company, which was in liquidation, against another company. The insurer had a right to be subrogated to the claim of the insured company: the question was whether this was sufficient to qualify

as an interest within the meaning of section 240. Lawrence Collins J (as he then was) held that it was not:

"*86. Under s.181 of the 1986 Act St Paul must be a person who 'claims an interest in the disclaimed property' (i.e. the claim), and must also be 'a person entitled to' the disclaimed property.*

87. The next question which arises is the nature of the interest which the applicant must show. In Lloyds Bank SF Nominees v Aladdin Ltd [1996] 1 B.C.L.C. 720 the applicant for a vesting order was the occupant of leasehold premises who had agreed with the lessee to take an assignment of the lease subject to the consent of the landlord. The applicant had paid the lessee £54,000 for what is described in Leggatt L.J.'s judgment as the prospect of an assignment. Before consent was granted the lessee went into liquidation, and the liquidator then disclaimed the lease. The occupant sought a vesting order, relying on a decision by Mr Gavin Lightman Q.C. (as he then was) in Re Vedmay Ltd [1994] 1 E.G.L.R. 74 , in which a statutory tenant had been held to have standing to make an application for a vesting order on the basis that the disclaimed property was the lease, and in which Mr Lightman Q.C. had said (at 75):

> *'The term 'interest' is not ... confined to a proprietary interest. It extends to any financial interest in the subsistence or otherwise of the lease and includes, in particular, any interest that would be adversely affected by the disclaimer.'*

88. Rattee J. dismissed the application by the occupant in Lloyds Bank SF Nominees v Aladdin Ltd on the basis that he had no interest under s.181(2)(a) , and distinguished Re Vedmay on the basis that in that case the applicant had the status of irremovability, whereas in the instant case the applicant did not have any interest in the nature of a proprietary interest. An application for permission to appeal was refused. Leggatt L.J. said in a judgment with which Peter Gibson L.J. agreed ([1996] 1 B.C.L.C. 720 at p.722):

> *'It seems to me that nothing that was said by Mr Lightman in Re Vedmay Ltd can be read as requiring this or any other court, to take notice of any such interest as does not constitute an interest in the property. To read the section more widely would lead to absurd results which cannot have been intended by the legislature ... [T]his court cannot have any prospect of according to [the applicant] any such interest or recognising any such interest as it would be necessary for him to claim, if he was to bring himself within the provisions of s. 181.'*

89. The decision of Rattee J. is not reported and the decision of the Court of Appeal is on an application for permission to appeal and is not binding on me, although it is of persuasive authority.

. . . . .

109. The question is whether St Paul has an interest or entitlement to the claim for the purposes of s.181 of the 1986 Act. ***I am satisfied on the authorities and on principle that an applicant must have some form of proprietary interest in the property in respect of which a vesting order is sought*** *and that St Paul's right of subrogation is not a sufficient interest.*" [Emphasis added.]

28. I am satisfied that this decision represents the law in England and Wales, and that there is no principled reason why, in respect of a statutory provision that is in all material respects the same, the law of Bermuda should diverge from it.

29. Considered in isolation, section 240 appears to apply only to property disclaimed by a liquidator. However it must be read in conjunction with section 263, which is headed "*Power of Crown to disclaim title to property vesting under section 262*", ie to disclaim property vested in the Crown because it is deemed to be *bona vacantia*. Section 263 provides:

"*(1) Where any property vests in the Crown under section 262, the Crown's title thereto under that section may be disclaimed by a notice signed by the Attorney-General.*

(2) When a notice of disclaimer is executed under this section as respects any property, that property shall be deemed not to have been vested in the Crown under section 262 and section 240 shall apply to the property as if it had been disclaimed under 240(1)."

30. The Acting Attorney General signed a notice of disclaimer dated 28th November 2017. Thus the Court has jurisdiction to make a vesting order in favour of Adria provided that Adria can establish that it has a proprietary interest in the Property.

31. The problem for Adria is that none of the actions purportedly carried out by the company since its dissolution has any legal force or effect. However, Mr

Smith relied upon two documents which predated the dissolution to try and establish that Adria had an equitable interest in the Property.

32. First, Mr Smith submitted that the April 1994 letter was evidence that a contract between Adria and N-ReN was concluded in April 1994. He relied upon the affidavit of Mr Snyder, who stated at para 5:

"*... the directors of the Company [ie N-ReN] ... as early as April 1994, and well before the Company was dissolved on 30th September, 1994, agreed to transfer the Company's shares in Sudan-ReN to ADRIA (both the Promissory Notes and the Shares) in exchange for the discharge of the consultancy debt owed to Adria, as reflected in [the April 1994 letter] ... The inclusions suggested to be added in that communication is mirrored in the final Deed of Transfer of 24th February 1995.*"

33. The April 1994 letter, before setting out the suggested inclusions, stated in material part:

"*Today I am faxing you a copy of the Kielty Agreement which I have marked up and since you will not be able to read my writing where I have made insertions, this letter sets forth the major insertions so they will be legible for your review. Bare in mind that my efforts were to leave as much of the Agreement in the form submitted to you to keep negotiations focused on the principle issues involved. The Agreement itself is very much of a skeleton and obviously could be very much more extensive with respect to representations and warranties from Adria A.G. On the other hand, I presume that the simple form will serve your purposes.*"

34. As Mance LJ (as he then was) stated in Baird Textile Holdings Ltd v Marks & Spencer plc [2002] 1 All ER (Comm) 737 at para 59:

"*59. For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.*

60. Both requirements are normally judged objectively."

35. The draft agreement to which the April 1994 letter refers led to a final agreement which was executed on 24th February 1995 as the Deed of Transfer. However, Mr Smith submitted that the letter is evidence that by

April 1994 there was an agreement on essentials with sufficient certainty to be enforceable. I am not satisfied that this was the case.

36. The fact that the insertions in the Kielty Agreement were included in the Deed of Transfer does not mean that they had been agreed by April 1994. In the April 1994 letter they were specifically stated to be for review. Moreover, I am satisfied that, judged objectively, the parties intended that the agreement which they were negotiating should not give rise to legal relations between them until it was finalised and executed.

37. Second, Mr Smith submitted that the Escrow Agreement gave Adria an equitable charge over not only the proceeds of the Promissory Notes but over the Promissory Notes themselves, the rights under the Notes, and the underlying debt. I disagree.

38. The Escrow Agreement provided that the proceeds of the Promissory Notes should be paid into escrow and then paid out to Adria up to the value of the indebtedness owed to Adria by N-ReN. Adria could have enforced payment of any monies received in escrow by an action for specific performance. It is arguable that the effect of specific performance being available was to give Adria an equitable interest in any proceeds of the Promissory Notes. See, in relation to specific performance in the analogous case of an uncompleted contract of sale, Michaels v Harley House Ltd [2000] Ch 104 EWCA at 113 H *per* Robert Walker LJ.

39. But the Escrow Agreement did not purport to give Adria any right or interest in relation to the Promissory Notes or the underlying debt, whether by assignment or otherwise. In short, it gave Adria none of the other rights for which Mr Smith contended.

40. Mr Smith submitted in the alternative that, so as to do justice on the particular and highly unusual facts of this case, the Court should adopt the approach of Gavin Lightman QC (as he then was) in Re Vedmay Ltd and adopt a "*financial interest*" test. Adria had a financial interest in the

Property, Mr Smith submitted, in the sense that it was a creditor, indeed the only creditor, of N-ReN.

41. However, hard cases make bad law. Whatever the justice of the case, I can see no principled reason for requiring Adria to demonstrate a financial interest rather than a proprietary interest, and I am not prepared: "*to do a great right, do a little wrong*".[1] Had the Legislature intended that the Court should apply an "*interests of justice*" test, as the Court would under section 261(6) of the 1981 Act, then section 240(4) would have so provided.

42. On reflection, the case is not that hard. The 1981 Act provides a generous period of 20 years after a company has been struck off for a creditor to investigate its status. If the creditor goes to sleep on its rights during that period it cannot reasonably expect the Court to bend the law to come to its aid. I appreciate that from 1997 to January 2017 there were United States sanctions in place. But even without the benefit of hindsight a prudent creditor, knowing that N-ReN was in financial difficulties, would from time to time have made enquiries of the Registrar of Companies to ascertain whether the company was still in existence.

43. As Adria does not have a proprietary interest in any part of the Property the application is dismissed. Had Adria had such an interest then I should have made the vesting order sought. As the Applicant was the only party I make no order as to costs.

DATED this 25th day of January, 2018

Hellman J

[1] The Merchant of Venice: Act 4, scene 1.