

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 2015/0065

BETWEEN:

CHU KONG

Applicant

and

**[1] ROY BAILEY
[2] JOHN GREENWOOD**

Respondents

Appearances:

Mr. John Carrington, QC, with him Mr. Richard Hacker, QC, and Ms. Reisa Singh for the Applicant
Mr. Peter Ferrer and Mr. Richard Parchment for the Respondents

2022: May 18.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** On 18th May 2022 the Court heard and determined an application to set aside an examination order (the 'Examination Order') in the liquidation of Ocean Sino Limited ('the Company' or 'Ocean Sino'). The Court delivered an oral *ex tempore* judgment. On 13th March 2023 one of the parties requested that the judgment be reduced to writing. This is that memorandum of judgment.
- [2] It is a summary, not a verbatim replication of the oral judgment. I have taken care that there should be no inconsistency between the two. For the information of the parties, where, nonetheless, there might be an inconsistency, the oral judgment is to prevail. Thus, in producing this memorandum of judgment, it is not the Court's intention that any further right of appeal should accrue.

1. Introduction

- [3] In this first part I briefly summarize the procedural background and parties' main submissions, in order to give a reader who is unfamiliar with the matter an overview. This outline of the background has been added after the event of delivery of the judgment. The judgment itself is to be found in the second part of this document.
- [4] On 15th February 2022 the Court acceded to an *ex parte* application made pursuant to section 285 of the Insolvency Act, 2003 (as amended)¹ ('the Act') for the private examination of the Applicant, Mr. Chu Kong ('Mr. Chu'), by the Liquidators of the Company ('the Liquidators', or 'Ocean Sino Liquidators'). There were two main aspects of that Order. The first was that Mr. Chu was ordered to be examined and secondly, that he was required to produce documents within a certain timeframe – by 4p.m. on 2nd March 2022 (i.e., some two weeks after the order was made).
- [5] Mr. Chu applied to have the Examination Order set aside in full. He did so by way of a Notice of Application dated 14th March 2022, which he amended on 29th March 2022. It is his Amended Notice of Application filed on 29th March 2022 that the Court is presently concerned with.
- [6] Mr. Chu is a 50% shareholder in Ocean Sino. The other 50% shareholder is Mr. Chu's protagonist in long running disputes concerning the Company, a Mr. Lau. Ocean Sino is the one hundred percent owner of PBM Asset Management Limited ('PBM'), a Hong Kong company. PBM itself is a 49 percent shareholder in Beibu Gulf Ocean Shipping (Group) Limited ('Beibu Gulf', another Hong Kong company now known as BGA Holdings Limited). Beibu Gulf is a one hundred percent shareholder in a number of companies, which themselves have subsidiary companies. Beibu Gulf has itself been placed into liquidation in Hong Kong, on 6th December 2021, with the Hong Kong Official Receiver appointed as the provisional liquidator.
- [7] The Examination Order, by clauses 2 and 4, summoned Mr. Chu for examination in respect of the 'business, dealings and affairs of the Company', which were then specified to 'include transactions entered into by subsidiaries within the Company's group'. Six 'subsidiaries' were

¹ No. 5 of 2003.

identified by their names. The documents required to be disclosed covered '[f]ull, unredacted copies of all books and records in [Mr. Chu's] possession, custody or control which concern the affairs of the Company'. The books and records sought were then particularized to include ten categories of documents and records.

- [8] Mr. Chu is not a resident of this jurisdiction ('the BVI'). He is resident in Hong Kong.
- [9] Mr. Chu's position was that he was prepared to be examined in relation to Ocean Sino, but he resisted having to answer questions and produce documents about the 'subsidiaries'. Mr. Chu contended that the proper court (if any) for the ordering of examination in respect of those companies is the Hong Kong court.
- [10] Mr. Chu contended that the BVI's statutory provision governing private examinations, section 285 of the Act, is in all material respects the same as that in England and Wales, where the statutory provision is understood not to have extraterritorial effect. Mr. Chu contended that, in consequence, section 285 of the Act should also be treated as having no extraterritorial effect.
- [11] Mr. Chu's learned Counsel, Mr. John Carrington, QC, explained his case thus.

1.1 Mr. Chu's case on the question of extraterritoriality.

- [12] By way of starting point, said Mr. Carrington, the English case of **Re Atlantic Computers plc**² is authority for a proposition that the English equivalent of section 285 jurisdiction is one that should be exercised with caution. Section 285 of the Act should similarly be strictly construed. There is nothing in its express terms which speaks to it having extraterritorial effect. So, the issue is whether it should be construed as having extraterritorial effect impliedly.
- [13] Mr. Carrington answered this question in the negative. He contended that with respect of private examinations, the English Court of Appeal case of **In re Tucker**³ ('**Tucker**') stands as authority that that section does not have extraterritorial effect. He explained that the effect of **Tucker** is that an order for a private examination cannot be served if the proposed examinee is outside the

² [1998] BCC 200.

³ [1990] 1 Ch 148.

jurisdiction. He also stressed that this interpretation has been upheld by the House of Lords in **Masri v Consolidated Contractors International (UK) Ltd (No. 4)**.⁴

[14] Mr. Carrington then submitted that the Court has no jurisdiction over Mr. Chu to compel him to be examined and to produce documents because he had not been served with the Examination Order outside of the jurisdiction. What the Respondents had purported to do was to serve the Examination Order on a firm of legal practitioners in the BVI that was acting for Mr. Chu in respect of these proceedings, but which indicated that it had no authority to accept service of the Examination Order.

[15] Mr. Carrington argued that such purported service did not satisfy the requirements of subsection (4) of section 285 of the Act, which provides:

"Where the Court makes an order under subsection (2), the applicant shall, forthwith serve a sealed copy of the order on the examinee..."

[16] Mr. Carrington contended that since the making of an examination order is the use of a coercive power, and since the section should be strictly construed, such service as was attempted is not sufficient to satisfy the requirement of service on the examinee.

[17] Mr. Carrington stressed that the Court's lack of jurisdiction (on each of the grounds of no extraterritorial effect and no service) is conclusive of the matter.

1.2 Mr. Chu's case on breach by the Liquidators of their duty of full and frank disclosure.

[18] Mr. Carrington argued that there was another serious problem with the Liquidators' application, as they had an obligation to draw the Court's attention at the *ex parte* hearing to significant factual legal and procedural aspects of the case, relying upon the English Court of Appeal case of **Memory Corporation Plc v Sidhu (No. 2)**.⁵ Mr. Carrington submitted that the Liquidators had been in breach of this obligation in several respects. He highlighted the following alleged breaches of this duty:

⁴ [2010] 1 AC 90.

⁵ [2000] 1 WLR 1443 at page 1459.

- (1) Mr. Chu had in fact provided documents and information since 2017; a factor going to the exercise of the Court's discretion if the Examination Order should not be set aside on jurisdictional grounds.
- (2) Mr. Chu had a meeting with the Joint Liquidators in October 2017.
- (3) Mr. Chu had previously explained why some documents that he was required to produce had already been produced, or in fact may not exist, or that he may not have had access to them.
- (4) The Liquidators did not inform the Court of Mr. Chu's concern about their disclosure to Mr. Lau of information that Mr. Chu was producing, in the context of the substantial disputes between himself and Mr. Lau in Hong Kong.
- (5) The Liquidators did not inform this Court about the winding up order against Beibu Gulf, at the behest of the Ocean Sino Liquidators through their control of PBM, or the fact that the Ocean Sino Liquidators had proposed themselves as liquidators for Beibu Gulf, a factor going to the exercise of this Court's discretion and to the issue whether it was necessary for the Court to make the Examination Order here in the BVI.
- (6) There was also no mention that the Hong Kong Official Receiver had supported the Ocean Sino Liquidators' to be appointed as the Liquidators of Beibu Gulf, which also has the support of creditors.
- (7) The Liquidators failed to explain that they have no duty to investigate the companies in which Ocean Sino had a minority interest, which include the alleged 'subsidiaries'.

[19] Mr. Carrington added that there had been non-disclosures in respect of the law:

- (1) The Court's attention was not drawn to the English High Court, Chancery Division, case of **In re Akkurat Limited**,⁶ ('**Akkurate**') which is the most recent decision that clarifies

⁶ [2020] EWHC 1433 (Ch).

the law, but the Court was incorrectly told that the principles were somewhat confused and remain unanswered.

- (2) The Court was misled as to the definition of a 'connected company'. In the Liquidators' skeleton it was there said that section 5(2) of the Act specifies that a company is connected to another company if it is (a) a subsidiary, a holding company, et cetera. But if one looks at section 5(2) of the Act, that is not a reference to a definition of a connected company but to a **'related'** company'. There is in fact no definition of a connected company.
- (3) The Court's attention was not drawn to the provisions of the Act with respect to production of documents. Section 285(c) provides for the production documents at an examination. This is to be contrasted with what the Examination Order ordered, namely production of documents separately from examination.
- (4) The Court was also not told that the deadline for production (22nd March 2022) was oppressive, falling only some two weeks after the date of the Examination Order and that it covered a very broad range of materials. This production deadline date in fact fell only a week after the Examination Order was sent to Mr. Chu's BVI legal practitioners (so that, on any view, Mr Chu only had one week's notice to produce the documents).

[20] Mr. Carrington next contended that examination and/or document production must be limited to the Company itself and the companies that are connected to it under sections 284(1) and 285(3) of the Act, since those sections in the Act are to be strictly construed (being examples of coercive powers).

[21] He also argued that the various companies in respect of which examination and disclosure was sought should not have been treated as 'subsidiaries' of the Company; the reason being that PBM is only a minority (49%) shareholder in Beibu Gulf. It is Beibu Gulf that is the parent of those companies, and they are instead Beibu Gulf's subsidiaries, because Beibu Gulf is their 100% owner.

[22] Mr. Carrington stressed the oppressive nature of the Examination Order, in circumstances where the Hong Kong courts would be the more appropriate forum and they were already, or imminently to be, seised of aspects of the same dispute. He explained that an element of oppression arises

from the fact that the Liquidators may very well be planning to examine Mr. Chu with a view to compel him providing statements which may be subsequently used against him in these existing or imminent proceedings, and there is also a risk of overlapping examinations.

- [23] Moreover, Mr. Carrington contended that the Examination Order does not have any carve out for matters for which Mr. Chu could claim legal privilege. Nor does the Examination Order recognise that Mr. Chu had agreed previously to provide information to the Ocean Sino Liquidators. Furthermore, no evidence appears to have been led by the Liquidators that Mr. Chu was capable of providing them with the information and documents in respect of all the subsidiaries, yet he is being ordered to do this.

1.3 The Liquidators' contentions.

- [24] Learned Counsel for the Liquidators, Mr. Peter Ferrer, disagreed fundamentally with Mr. Chu's points.

- [25] Mr. Ferrer presented his submissions under six heads:

- (1) Mr. Chu's alleged submission to the jurisdiction of the BVI Court;
- (2) Extraterritorial effect of sections 284 and 285 of the Act;
- (3) Service;
- (4) Oppression;
- (5) Alleged non-disclosure;
- (6) The form of the Examination Order.

1.3.1 Submission to the jurisdiction

- [26] Mr. Ferrer contended that Mr. Chu was amenable to the jurisdiction of this Court because he had previously taken steps in these proceedings and had obtained an immediate benefit consistent with the right to have his claim or the issue considered by the Court. He had therefore submitted

to the jurisdiction of this Court. Mr. Ferrer urged that this is the test for submission to the jurisdiction which this Court ought to apply, following the Privy Council decision in **Stichting Shell Pensioenfonds v Krys**.⁷

[27] Mr. Ferrer observed that from an early stage, Mr. Chu has sought to come to this Court to seek to regulate the liquidation and to have directions given to the Liquidators. There has been total engagement by Mr. Chu with these proceedings, with no reservation of rights. He has also used BVI law firms as his address for service within the jurisdiction in relation to these proceedings. All of the steps taken by Mr. Chu in these proceedings since 2015 must count as submission to this jurisdiction, including the BVI's statutory regime pertaining to liquidations, which includes sections 284 and 285 of the Act.

1.3.2 Extraterritorial effect of sections 284 and 285

[28] Mr. Ferrer observed that this Court has never had the opportunity to consider whether sections 284 and 285 of the Act have extraterritorial effect. Thus, the Court will need to determine that issue from first principles. All of the English cases which Mr. Chu is relying upon are not binding and have been decided on a different issue and are entirely distinguishable.

[29] Section 284 provides:

“Examination Before Court’:

Where a company is in liquidation, an application may be made to the Court, ex parte, by the liquidator or by the Official Receiver, for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected company.”

[30] Mr. Ferrer observed that the addition of 'a connected company' is in excess of what the English legislation provides and is a purely BVI addition.

[31] Subsection 284(2) materially provides that:

“An application under subsection (1) may be made in respect of—

⁷ [2014] UKPC 41 at paragraph 31 (Sumption LJ).

(a) a person specified in section 282(2); or

(b) any other person who the applicant considers is capable of giving information concerning the company or a connected company; or

(c) any other person who the applicant knows or suspects has in his or her possession or control any asset of the company or is indebted to the company.”

[32] Subsection 284(3) provides that:

“(3) An application under subsection (1) shall state whether the applicant seeks a public or a private examination.”

[33] Persons specified in section 282(2) include:

“(a) an officer or former officer of the company;

(b) a member or former member of the company;

(c) a person who was involved in the promotion or formation of the company;”

[34] Mr. Ferrer observed that Mr. Chu is included here, because he was a former director of the Company.

[35] Mr. Ferrer submitted that the BVI statutory regime amalgamates private and public examinations.

[36] Mr. Ferrer then submitted that **Tucker** is distinguishable and not binding upon this Court and turned on its own facts. Mr. Ferrer submitted that that case concerned a specific provision which is not present in the BVI legislation.

[37] In particular, the decision in **Tucker** concerned section 25 of the English Bankruptcy Act 1914, which included the following provision:

“The court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.”

[38] Mr. Ferrer explained that this provision is not to be found in the BVI legislation.

[39] He referred to **Akkurate**, where the English High Court, Chancery Division,⁸ gave the following interpretation of this provision, quoting from the English Court of Appeal decision in **Tucker**:⁹

"Finally, and to my mind conclusively, by section 25(6) the court is given a power (the scope of which will have to be considered on the respondent's notice) to order the examination out of England of "any person who if in England would be liable to be brought before it under this section." This wording carries inevitably, in my judgment, the connotation that if the person is not in England he is not liable to be brought before the English court under the section. ... Liable to be brought before it must mean "liable to be brought by summons". Section (6) thus confirms that a person who is not at any relevant time in England, and so cannot be served with a summons of the English court in England, cannot be examined by that court under subsection 1."

[40] Mr. Ferrer then went on to explain that in England, there are cases which show that had it not been because the courts were bound to follow this interpretation under the doctrine of *stare decisis*, those courts would be inclined to think that even private examination orders should be treated as having extraterritorial effect.

[41] Mr. Ferrer's position, in sum, was that there is nothing in the BVI regime which makes that restriction on its face (i.e., that sections 284 and 285 of the Act do not have extraterritorial effect); and secondly, the specific statutory restriction found in England is not to be found in the BVI provisions. Consequently, **Tucker** and **Akkurate** can be distinguished.

[42] Mr. Ferrer then took the Court to a decision of the Privy Council in **AWH Fund Ltd v ZCM Asset Holding Company (Bermuda) Ltd**,¹⁰ concluding from this that where there is broad language in a legislative provision, including in insolvency law, the Privy Council has interpreted that as having extraterritorial effect. Mr. Ferrer submitted that this was a firm decision by the Privy Council that a particular section under the Bahamas insolvency legislation, which is similar to the BVI Insolvency Act, and which has no indication of territorial restraint, was intended to have extraterritorial effect. Mr. Ferrer's contention was that this Court should follow this view.

1.3.3 Service

⁸ [2020] EWHC 1433 (Ch) at paragraph 26 (Sir Geoffrey Vos, Chancellor).

⁹ [1990] Ch. 148 at pages 158-9 (Dillon LJ).

¹⁰ [2019] UKPC 37.

[43] Mr. Ferrer explained that the Liquidators' position is that Mr. Chu has been represented by BVI legal practitioners of record now for a long time in these liquidation proceedings which have been on foot since 2015. In each of the applications made therein by Mr. Chu, he has given as an address for service, that of his lawyers in the Territory, and he has been continually engaging in these legal proceedings. He submitted that in consequence, Mr. Chu's 'service point is a non-issue'.

1.3.4 Oppression

[44] Mr. Ferrer referred to the English High Court, Chancery Division, case of **Daltel Europe Ltd (in liquidation) & Ors v Makki**,¹¹ ('Daltel') as illustrating that the Court is required to carry out a balancing act when permitting liquidators to examine someone who is also a defendant to proceedings brought by the liquidators. On the one hand, the Court must be astute to the danger, in practice, of reversing the burden of proof and of requiring a defendant to prove his innocence. On the other hand, liquidators need to obtain information to enable them to carry out their primary function of identifying and getting in the assets of the company.

[45] Mr. Ferrer submitted that **Daltel**¹² recognises that this balancing act can be performed by the Court exercising its supervisory powers to disallow a line of questions, or to allow an examinee to have more time to prepare answers.

[46] Mr. Ferrer argued that in the present case, an examination order is necessary. In Hong Kong, there are no liquidators appointed yet, and shareholders have objected to the identity of the proposed liquidators. There is a real need for the present liquidation to be progressed.

[47] Mr. Ferrer relied upon a proposition that the affairs of a company cover the affairs of its subsidiaries.

[48] Mr. Ferrer urged that the Court should also be cognisant of the fact that Mr. Chu was embedded at every level of the structure: he was a director of the Company, of PBM, of Beibu Gulf and also

¹¹ [2004] EWHC 726 (Ch).

¹² [2004] EWHC 726 (Ch) at paragraph 31 (David Richards J).

of some of the 'subsidiaries', thus a compartmentalised approach keeping different liquidations separate is not appropriate.

[49] Concerning oppression in the manner that the Examination Order required disclosure to be given by a deadline separate and before the examination itself, Mr. Ferrer suggested that it would be 'nonsensical' if the statutory provision were required to be strictly construed, because then Mr. Chu could not be required to produce materials before the examination, but he could 'turn up' at the examination with 'a wall full of books', which would inevitably provoke an adjournment.

[50] Mr. Ferrer further submitted that the deadlines for production of materials had not been oppressive as the Liquidators had given Mr. Chu 'plenty of warning' that production was going to be sought, a considerable number of weeks before the application was made.

1.3.5 Non-disclosure

[51] Mr. Ferrer sought to rebut the allegations of non-disclosure with essentially two arguments:

- (1) Whilst the winding up of Beibu Gulf had not been mentioned at the *ex parte* hearing, this Court had been informed of the winding up proceedings on a recent prior occasion; thus, the Court was already aware of it;
- (2) In relation to alleged non-disclosure of authorities, and in particular of **Akkurate**, such authorities are irrelevant anyway, because they deal with English statutory provisions that have no equivalent in the BVI.

1.3.6 Form of order

[52] Mr. Ferrer argued that there is nothing in the form of the Examination Order that was objectionable. In particular, there is nothing in the order which requires Mr. Chu to disclose privileged information given to him in his personal capacity.

1.4 Mr. Chu's Reply submissions

[53] Mr. Carrington opened his Reply submissions by arguing that there is a basic principle that legislation is territorial, and that it is exceptional for legislation to have extraterritorial effect. Mr.

Carrington argued that the question then becomes, what is here that should cause the Court to interpret the material provisions of the Insolvency Act as having extraterritorial effect? He observed that Mr. Ferrer has not taken the Court to any such material. Moreover, contended Mr. Carrington, the BVI legislature could have made legislative provision for extraterritorial effect, but it did not.

- [54] Mr. Carrington argued that this Court should follow **Tucker**, as a matter of principle and of precedent, such that section 285 of the Act should not be construed as having extraterritorial effect. Mr Carrington referred the Court to the 'complete ratio' for the decision on extraterritoriality in **Tucker**:¹³

"...These passages in *Ex parte Blain* were referred to by Lord Scarman and Lord Wilberforce in *Clark*. Lord Scarman stated that the principle there referred to (which put into modern language he restated as being that "unless the contrary is expressly enacted or so plainly implied that the Courts must give effect to it, UK legislation is applicable only to British subjects or to foreigners who, by coming to the UK, whether for a short or a long time, have made themselves subject to British jurisdiction") was a rule of construction only. Lord Wilberforce said at page 152, that the principle, which was really a rule of construction of statutes expressed in general terms, required an inquiry to be made as to the person with respect to whom Parliament was presumed, in the particular case, to be legislating. I look, therefore, to see what section 25(1) was about, and I see that it is about summoning people to appear before an English Court to be examined on oath and to produce documents. I note that the general practice in International Law is that the courts of a country only have the power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English Court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English Court. Against this background, I would not expect section 25(1) to have empowered the English Court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English Court. I then find that the alternative procedure is provided by orders in aid under section 122 which could be used to secure the examination of persons resident in Scotland or Ireland or within the jurisdiction of other British Courts before the bankruptcy courts of those countries. This procedure, while taking advantage of the jurisdiction of those other type courts, also respects those jurisdictions."

¹³ [1990] 1 Ch 148 at page 158 (Dillon LJ).

- [55] Mr. Carrington explained that section 25(6) of the English Bankruptcy Act was thus an independent ground of reasoning for the English Court's interpretation that private examination orders should be treated as not having extraterritorial effect.
- [56] Mr. Carrington then argued that the fact that Mr. Chu had filed a proof of debt in the present proceedings does not render him liable to being examined, since creditors are not mentioned in section 282(2) of the Act as a category of persons to whom notice of examination may be given.
- [57] He added that the principle in relation to submission to the jurisdiction of an insolvency court appears to be that one has to look at the facts to see whether submission, whether by proof of debt or by bringing actions in the liquidation, is consistent with submission to this particular part of the Court's jurisdiction concerning examinations, and Mr. Chu submits here that his actions are not consistent with this. Mr. Carrington made this submission without prejudice to his contention that the Court's jurisdiction to make an examination order is based purely on service, and in this case such service could not have been effective.
- [58] Mr. Carrington argued that since the Act says an examination order has to be served on the examinee, the legislature intended that it be served on the examinee. If the legislature wanted service to be effected in another way, it would have said so. The words of the Act cannot simply be ignored or disdained.
- [59] Mr. Carrington then addressed the Court in reply on other points, including oppression and the scope of meaning of 'connected persons.' It is not necessary to summarise those arguments here in greater depth.

2. Judgment

- [60] I then gave an *ex tempore* judgment, which in summary form was as follows. This is not a verbatim record of what I said. It is a summary that has undergone some editorial improvement for ease of reading. Nothing of substance has been omitted, nor added, nor changed.
- [61] The following will be the Court's ruling in relation to the amended notice of application to set aside the *ex parte* order made on 15th February, 2022, which has been filed on 29th March, 2022, by Mr. Chu.

- [62] For the reasons that I will give, the application succeeds.
- [63] First of all, I would say that I am fully cognizant of Mr. Ferrer's point of departure in this case, that Mr. Chu is a target for potential claims from the Liquidators for what can be bluntly called misappropriation, in favour of Mr. Chu and his family, of value in relation to this estate.
- [64] It is also abundantly clear that Mr. Chu appears to have taken every single opportunity to oppose the making of this winding up order of the Company and to oppose the more probing type of administration of the Company's estate which the liquidators have proposed. Mr. Chu has launched a number of applications in this Court designed, it would appear, to derail the liquidation.
- [65] At the same time, in this application, Mr. Chu raises two types of challenges. One challenge comprises highly technical legal arguments in relation to the Court's jurisdiction. The second challenge comprises factual arguments as to oppression, failure to give full and frank disclosure and an array of objections to the *ex parte* order made.
- [66] I will also say as a preamble that to make an *ex parte* application is difficult, particularly in a complex commercial matter when it can always be said that some piece of information has not been properly put before the Court or given due weight or that there was some unfair aspect in the way the case was presented.

2.1 Breaches of duty of full and frank disclosure

- [67] Whilst under the statutory regime a party may apply on an *ex parte* basis for an examination order and an order to produce documents, an *ex parte* application carries with it a burdensome duty of full and frank disclosure.
- [68] First, in relation to full and frank disclosure, I think it is clear on the law (and the parties do not disagree), that there is an obligation to put pertinent case law authorities before the Court.
- [69] The English High Court, Chancery Division, case of **Akkurate**¹⁴ was not placed before the Court at the *ex parte* hearing. That is an important decision, because it is an up-to-date statement of

¹⁴ [2020] EWHC 1433 (Ch).

English law in relation to the question of extraterritoriality, expressed by one of the top jurists in the English Court system who is also known for his work in relation to some offshore jurisdictions, namely the United Kingdom's (then) Chancellor of the High Court (currently Master of the Rolls), Sir Geoffrey Vos.

- [70] In **Akkurate**, Sir Geoffrey Vos candidly explained¹⁵ that his own personal views as to extraterritoriality of the English Insolvency Act provisions in question are quite possibly different from those which were expressed by the English Court of Appeal in the seminal case of **Tucker**. But Sir Geoffrey Vos considered¹⁶ that he was bound by the doctrine of *stare decisis* to follow **Tucker**.
- [71] **Akkurate** was not brought to this Court's attention by the Liquidators at the *ex parte* hearing. That was a significant omission, for reasons I will explain when dealing with extraterritoriality.
- [72] Then, importantly, the fact and the status of the Hong Kong winding up proceedings in respect of Beibu Gulf were not brought to the Court's attention. This was a particularly important omission because the fact and status of the Beibu Gulf winding up proceedings goes to the need or the convenience for this Court to make an examination order (if it has the power to do so), in respect of that company and its subsidiaries. Simply put, if another court is seised of the winding up of that company, then that other court might, on its face, appear to be a more appropriate court to exercise discretion as to whether or not, and if so, how, individuals should be examined in relation to the affairs of that company.
- [73] Pertinently, Mr. Chu has been the main individual concerned with the Examination Order which pertains to the affairs of the group as a whole. Mr. Chu is resident in Hong Kong and is amenable to the jurisdiction of the Hong Kong Court. The affairs of Beibu Gulf, and other companies, also appear to be subject to the purview of the Hong Kong Court.
- [74] So, it would beg the question why this Court should nonetheless make an examination and document production order when there would appear to be a more appropriate forum for such an application or an order.
- [75] That is a matter which should have been raised at the *ex parte* hearing stage and it was not.
- [76] In relation to the question of whether or not Hong Kong would be the more appropriate court to deal with an application for examination and production of documents, this would have caused this Court some difficulty. On the one hand, this Court would have had to balance its ability (such as it might be) to make an immediate examination and production order against the fact, as it

¹⁵ [2020] EWHC 1433 (Ch) at paragraphs 47 and 53.

¹⁶ [2020] EWHC 1433 (Ch) at paragraphs 51 and 54.

now transpires, that in Hong Kong proceedings the Official Receiver was then essentially 'warehousing' the proceedings, pending either their setting aside, their confirmation or the appointment of a liquidator.

[77] In respect of Mr. Ferrer's submission that this Court already knew from proceedings prior to the current application for an examination and document production order that there were winding up proceedings on foot against Beibu Gulf in Hong Kong, it should not be forgotten that judgment on those earlier proceedings was given on 10th November 2021, a month or so **before** the winding up order in Hong Kong was made, and at a point where that winding up proceeding was still undetermined. The Court thus did not have full information, and (for Mr. Ferrer's submission to work) the Court would have had to remember all the information in relation to what it was told about the prospects of those winding up proceedings, as well as to differentiate such information from the information it has received in the hundreds of other cases that it has had to deal with in the meantime. One could also ask oneself, how can it be that this Court might automatically (without being told) know what the status of matters is, not only before a different Court, but before a foreign Court. It simply cannot.

[78] The Applicants for the Examination Order should have informed the Court that they had obtained a winding up order against Beibu Gulf in Hong Kong, that the liquidation was still at the early stage; the company had been put into the hands of an Official Receiver; there was still a dispute as to who the liquidators might be; the Ocean Sino Liquidators have proposed that they should be the liquidators; it was not clear yet whether they would be appointed; the Ocean Sino Liquidators knew there were some objections taken both as to the winding up and probably also to their appointment as liquidators. Moreover, if the Court has power to make an order now, the Ocean Sino Liquidators would suggest that it would be convenient for the Court to make the order now, and if it subsequently proves to be unnecessary the Ocean Sino Liquidators would, of course, let the Court know. That is possibly how the application for the Examination Order might have better been approached in retrospect, but it was not and that was a very important consideration.

[79] Then, the Court was also told in the evidence in support of the *ex parte* application that there were limitation periods, but without any specificity. It was suggested by Mr Carrington QC that the Liquidators were being coy about what the limitation provisions were. With respect, on another view, what happened was that the Court was prompted into making an order for examination and production of documents on the basis of the imminent expiry of an unspecified

limitation period which has been referred to in Mr. Greenwood's 10th Affidavit. In that Affidavit he was urging the Court to make an immediate order because of these (unspecified) limitation periods arising. That there had to be an immediate order made on the basis that there are some unspecified limitation periods about to expire is unsatisfactory.

[80] It had been pointed out, again rather obliquely, that some protective writs had been filed. Again, the evidence of this before the Court on the *ex parte* basis was scant and depended upon the Court remembering the facts of a previous application (which I cannot now recall).

[81] Whilst the Court can take into account that the underlying facts had happened in around or before 2015 and therefore that in 2021 six years was on the point of elapsing for limitation purposes, for the Court to be goaded by a generalization into acting quickly is tantamount to asking the Court to act on an irrational basis. More detail should have been forthcoming at that point on the issue of limitation, but it was not.

[82] There were thus breaches of the Liquidators' duty to have given full and frank disclosure.

[83] In the Court's judgment, those breaches infect the entire order made at the *ex parte* hearing. The reason why they do so is because of the decision of **Tucker** in relation to extraterritoriality, which entails that this Court simply did not have power to order Mr. Chu to come and give evidence in the circumstances of this case.

2.2 Oppression

[84] Mr. Chu complained that it was oppressive for him to produce documents prior to an examination and that the Court has no jurisdiction to make such an order.

[85] In section 285(3)(b) of the Act, the provision speaks in terms of an order which may require the examinee to produce at the examination any books, records or other documents in his possession or control that relate to the company or connected company in relation to various topics. Where the subsection refers to 'at the examination', I construe that to mean that there is no requirement upon an examinee to produce documents before the examination, or that no such requirement can be imposed upon an examinee. The examinee can be ordered to bring along, either virtually or in hard copy form, books and records to the examination. In a properly commercial setting, some leeway would then be feasible, such that if at the examination the person concerned needs more time to come up with documents, or it appears from what he has

said at the examination that there should be more documents available, then orders can be made, if required, to require him or her to produce those documents. But there is simply no statutory basis for an order that the examinee should produce documents **before** the examination.

[86] I also agree that it was oppressive, given the long list and variety of documents which were being sought, for Mr. Chu to have effectively been given only two weeks from the time the order was made until he was required to produce those documents. I understand that a similar, although not necessarily identical, list of documents was requested about a month beforehand, but, nonetheless, although Mr. Chu might have expected that his opponent would resort to the Court and apply for a production order, at that point there was as yet no obligation on him to produce anything, because correspondence does not in general impose obligations.

[87] In this case it is a wide set of documents that was sought, and I am persuaded that if the Court had the power to make such an order, there should have been a longer time period than just two weeks in which to produce them.

[88] That said, I am not treating that particular ground of oppression as sufficient on its own for the overturning of this order. Both sides could have taken a more balanced approach to the timescale for production. In particular, a witness such as Mr. Chu, in his capacity as a witness, could have adopted a more reasonable stance and responded to the Examination Order by saying that he was unable to produce the materials within the time period given but could do it within a somewhat longer time for such and such reason(s), instead of whipping out an objection that the Examination Order is oppressive and the whole order should thus be set aside. The latter is the attitude of an obstructive litigant, not of a witness.

2.3 Extraterritoriality

[89] I now turn to the question of extraterritoriality.

[90] What we are concerned with in our Act are two main material sections - sections 284 and 285. In section 284, we have an enabling provision. It provides:

“Where a company is in liquidation, an application may be made to the Court, ex parte, by the liquidator or by the Official Receiver, for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected

company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company.”

[91] Then, in subsection 284(2), the persons who may be brought before the Court are identified. This is a very wide range of persons. It is a person specified in section 282(2), and that is basically anybody holding information about the company. By section 284(2)(b) such person can be any other person who the Applicant considers capable of giving information concerning the company or a connected company or, by section 284(2)(c), any other person whom the Applicant knows or suspects has in his possession or control any assets of the company or is indebted to the company. The application must state whether the Applicant seeks a public or a private examination, by section 284(3).

[92] In this case it was a private examination that was being sought.

[93] Section 285 provides that:

“The Court may order the examinee to appear before the Court to be examined.”

[94] It is important to note that the examination is to take place before the Court, and not before the liquidator or officeholder. So, although a liquidator is an officer of the Court, what has been provided for here is that this Court should entertain the examination.

[95] Subsection 3 provides that the Court will direct the examination to take place at a venue specified in the order, whether it is in public or private, and the Court may direct the production at the examination of documents and records.

[96] By section 285(3)(d), the order may provide for an alternative method of service of the order on the examinee and, by section 285, shall state the action which may be taken against the person if he does not appear before the Court as required by the order.

[97] This latter provision is notable. It suggests that this Court must have jurisdiction over the examinee so that it can make orders to compel that person. We have to ask ourselves who can be compelled. The answer, obviously, is only those people over which this Court has jurisdiction.

[98] Section 285(3)(f) deals with public examination and advertisement.

[99] In section 285(4) there is a requirement for a sealed copy of the order to be served on the examinee. Some other consequential matters are set forth in subsections (5) and (6).

[100] There is no specific statutory provision which delineates this Court's jurisdiction in the same way that pertains in England.

[101] We now turn to **Tucker**. This was followed in **Akkurate**.

[102] In **Tucker**, the English Court of Appeal, in the judgment of Lord Justice Dillon, first gave a historical recap of the position in England going back to Section 25 of the Bankruptcy Act 1914.

[103] There, at subsection (1), the court was given power to make an examination and document production order. Then in subsection 25(6) there are the following provisions:

"The Court may, if it thinks fits, order that any person who, if in England, would be liable to be brought before it under this section, shall be examined in Scotland or Ireland or in any other place out of England."

[104] It is fair to say that this particular provision does not lend itself to easy comprehension by those brought up in the law today. The style of legal drafting has changed over time. That provision is not easy to understand on its own terms. But what it essentially has been understood to mean in **Tucker** (by Lord Justice Dillon¹⁷) is as follows:

"Finally, and to my mind conclusively, by section 25(6) the court is given a power ... to order the examination out of England of "any person who if in England would be liable to be brought before it under this section." This wording carries inevitably, in my judgment, the connotation that if the person is not in England he is not liable to be brought before the English court under the section."

[105] We see, of course, there utilization and wielding of the double negative.

[106] It is correct that we do not have a similar provision in our statute. Mr. Ferrer would say that is the end of it, but as Mr. Carrington has submitted, it is not.

[107] On the same page in **Tucker**, page 158, Lord Justice Dillon explains the underlying principle. He referred to a rule of construction of statute. The same rules of construction that apply in England

¹⁷ [1990] 1 Ch 148 at page 158 (Dillon LJ).

apply in this jurisdiction as well. We must bear in mind that our legislature is quite capable of expressing itself clearly if it so wishes, and if it does not, we have to apply rules of construction. The rule of construction was stated by Lord Justice Dillon as follows:

"These passages in *Ex parte Blain* were referred to by Lord Scarman and Lord Wilberforce in *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130. Lord Scarman, at p. 145, stated that the principle there referred to (which put into modern language he restated as being that "unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction") was a rule of construction only. Lord Wilberforce said, at p. 152, that the principle, which was really a rule of construction of statutes expressed in general terms, required an inquiry to be made as to the person with respect to whom Parliament was presumed, in the particular case, to be legislating."

[108] I pause here to note that the BVI statute is also expressed in general terms. Consequently, we too have to apply this rule of construction.

[109] Lord Justice Dillon then went on to say:

"I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents."

[110] Pausing here, it is evident that Lord Justice Dillon was here speaking of witnesses, not about defendants.

[111] Dillon LJ continued:

"I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court."

[112] Analysing this, there are four principles or points that Lord Justice Dillon was here referring to. The first goes to what the section in question is fundamentally about. He said it is about summoning people to appear before an English court to be examined on oath and to produce documents. That is precisely what our own statutory provisions do, nothing more and nothing less.

[113] Then he goes on to state the second point or principle. He said:

"I note that the general practice in International law is that the courts in a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process."

[114] In the present case, Mr. Chu has not accepted service of the Examination Order and he was not present within the Territory when he was purportedly served with it.

[115] I note Mr. Carrington's submission that our Act speaks of service on the examinee. That wording is significant. It prompts us to consider whether Mr. Chu's submission to the jurisdiction in relation to other aspects of the liquidation proceedings was sufficient either to make him accept service, or to subject him to the jurisdiction of the courts of this Territory. As I will endeavour to explain, I do not think they do.

[116] Thirdly, Lord Justice Dillon proceeded to state:

"Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court."

[117] 'BVI Court' can be substituted for 'English court'. 'BVI subject' can be substituted for 'British subject'.

[118] Mr. Chu is not a BVI subject who is resident overseas. Mr. Chu is a Hong Kong resident. So, there is even one step further removing Mr. Chu from the jurisdiction of this Court. The point, however, is still the same. This Court has never had power to serve a subpoena ad testificandum or a subpoena duces tecum on somebody not resident in the BVI.

- [119] A further point to be noted is that although the Act in question provides in broad terms that essentially any person can be ordered to attend the Court for examination and to produce documents, the legislature did not go on to provide that this should apply to anyone, whether within or without the jurisdiction.
- [120] In an offshore context, that omission could be said to be glaringly obvious. One way of interpreting this is to hold that the examination and document production provisions apply without territorial limits, particularly where, as here, BVI companies are used for international commerce. Another way of looking at it is to remind ourselves that the BVI applies English law rules of construction for statutory interpretation. In my respectful judgment, the latter approach is the legally correct, better, approach.
- [121] Lord Justice Dillon lastly went on to say that against this legal background, he would not expect section 25(1) (read our own sections 284 and 285) to have empowered the court (read 'BVI Court') 'to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English Court.'
- [122] This reduces to either a person accepting service or being present within the Territory.
- [123] It is of course said, here, that Mr. Chu is present in the BVI through legal practitioners - Messrs Sabals previously and now through Mr. Carrington's firm. It is also said that he has been served here in the jurisdiction through those legal practitioners.
- [124] I accept Mr. Carrington's submission that just because Mr. Chu has been taking part in these liquidation proceedings in certain capacities, this does not mean that he should be treated as having submitted to the jurisdiction in a different capacity. A capacity Mr. Chu has is as one of the 50 percent shareholders in the Company, although he has other capacities which he has referred to during some of the other many applications that have been before the Court.
- [125] If Mr. Chu had no connection with the matter so far, and supposing he was simply a litigant in unrelated legal proceedings, and he had lawyers here in the jurisdiction, even Messrs Sabals or Mr. Carrington's firm, dealing with those unrelated matters, it could clearly not be said that he should be presumed to be present in the jurisdiction for the purposes of service in such unrelated legal proceedings.

[126] This begs the question whether it make any difference that Mr. Chu has different capacities in relation to the current insolvency proceedings. Mr. Ferrer contends that it does not make any difference. Mr. Carrington has submitted that it does.

[127] Mr. Carrington referred to textbook authority, **Sheldon: Cross-Border Insolvency** (4th edn., Bloomsbury Publishing 2015) at paragraph 1324, which materially stated the following:

"It does not follow from Rubin¹⁸ (or the earlier authorities) that any participation in the foreign insolvency process amounts to a general submission, elevating all aspects of the foreign process to universal effect as against the creditor who has participated. The principle is not mechanistic. Rather, its relevance and applicability may depend upon, for example, the issue with which the English Court is concerned, as well as the particular facts, including the nature of the participation and the foreign insolvency process. It may be necessary to determine whether the participation in the foreign insolvency process is inconsistent with, say, the relief sought by the creditor in England. If there is no such inconsistency, the principle may not be engaged. So, a claimant who had submitted claims in a Russian liquidation did not generally submit to the jurisdiction of the Russian Court for all purposes so as to be barred from pursuing claims in England. Nor was a creditor, who had submitted a proof in a primary liquidation in the Cayman Islands, prohibited in New South Wales from opposing a remission of assets to the Cayman Islands for a distribution under which that creditor would receive no dividend."

[128] Mr. Carrington maintained that doing something in one capacity in relation to insolvency proceedings does not necessarily mean he is accepting or should be treated as being involved in the proceedings for other reasons. In my respectful judgment that is a crucial distinction in the present case. The textbook cited by Mr. Carrington acknowledges that it can sometimes be extremely difficult to tell whether or not a person should be treated as having submitted to the jurisdiction in relation to the matter as a whole, or whether he maintains different capacities.

[129] I understand in this case that the Liquidators want to interview Mr. Chu based upon the knowledge they suppose he has in relation to both the Company (Ocean Sino) and the subsidiary and connected companies (as described in a loose sense as 49% ownership is not strictly speaking a subsidiary). In respect of those companies, they can only be described as nothing more than assets of Ocean Sino at the moment. They are companies which are subject to the jurisdiction of a different Court and Mr. Chu had a different capacity, as a director, I understand, in relation to those companies or some of those companies. That is a different capacity from what he has in the current proceedings concerning Ocean Sino.

¹⁸ See, generally, Rubin v. Eurofinance S.A. [2012] UKSC 46.

- [130] On balance, I think Mr. Carrington is right that, as a potential examinee, Mr. Chu is involved in a different capacity from those he has had so far in relation to these proceedings.
- [131] Taking a step back, the section which permits examination (section 285) makes a point of requiring service on the examinee (by section 285(4)). There are a number of reasons for that. One of them is that an examinee needs to be given proper notice, so that he has an opportunity to respond during an examination. That is obvious natural justice. Then secondly, there is a question of service and jurisdiction. It is normally service which triggers the Court's jurisdiction over a person. If Mr. Chu were voluntarily to come to this Court and accept service, I have no doubt that this Court could order him to be examined. In relation to examination, it would be as a witness, not as somebody interested in the liquidation, such as a creditor potentially, nor as a contributory. If he were voluntarily to come to this Court and accept service, I have no doubt the Court can take jurisdiction over him.
- [132] Equally, if Mr. Chu was to be found in the BVI, I have no doubt the Court could take jurisdiction over him.
- [133] Absent those two situations, it is not clear to me that the Court can 'haul' (to use Lord Justice Dillon's word) him in as a witness. Witnesses are in a slightly different category from defendants, from contributories, and from creditors.

2.4 Disposition

- [134] For those reasons I am persuaded by Mr. Carrington, and I adopt his submissions in these respects, that the Court simply does not have power to order Mr. Chu to be examined in relation to the Company (Ocean Sino) and all of the companies beneath Ocean Sino shown in the structure chart before the Court.
- [135] That said, the conclusion I have reached rather surprises me. It would seem to me eminently sensible, particularly for an offshore jurisdiction such as the BVI, to allow for extraterritorial examinations, especially since BVI business companies are usually merely links in a chain, and it is necessary in the interests of cross-border cooperation in insolvency matters, as well as for comity, to be able to work together with other courts and other regimes, to enable a full picture to be established and to prevent the dishonest and greedy from getting away with occult practices of hiding information, on the basis of technicalities. There is a great public interest in allowing an

officeholder of this Court to get straight to the point, but that is not, as I understand it, how sections 282 to 285 of the Act are to be construed. So, I am constrained, I think, with no great enthusiasm, I would add, to say that the Court simply did not have power to make the Examination Order. It must thus be set aside.

[136] In relation to costs, Mr. Chu sought his costs, as following the event. The Liquidators resisted the making of a costs order. Mr. Ferrer, for the Liquidators, argued that it is a novel point that had been raised, and with this being the first time the Court has to consider such a matter, the Court's decision is in the interests of both stakeholders. Thus, argued Mr. Ferrer, the appropriate order is no order as to costs.

[137] Mr. Carrington, for Mr. Chu, argued that in circumstances where the Court found very heavily in Mr. Chu's favour that there had been material non-disclosure, Mr. Chu should be awarded costs, in line with the general rule that costs follow the event.

[138] I accepted Mr. Carrington's submission and ruled that since the Examination Order should never have been made, and Mr. Chu had been within his rights to make an application to have the Examination Order discharged, and as he had succeeded with that application, costs should follow the event with an award of costs in favour of Mr. Chu.

[139] The Liquidators asked for leave to appeal, on the basis that this was the first time that the Court has addressed sections 284 and 285 of the Act, and the issue of extraterritoriality is an issue of great public importance to this jurisdiction. There is also an important issue in relation to submission to the jurisdiction and what constitutes submission. I granted leave to appeal without hesitation.

[140] Mr. Carrington, for Mr. Chu, sought permission to make an eventual application for consequential orders, which I also granted.

[141] I take this opportunity to thank Counsel for both sides for their assistance to the Court.

Gerhard Wallbank
High Court Judge

By the Court

Registrar