

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 49 of 2021

BETWEEN:

**SIMON JOHN MCNALLY
SIMON NICHOLAS HOPE COOPER**

APPLICANTS

And

**CARL STUART JACKSON
ANDREW HOSKING
SIMON BONNEY
GREIG MITCHELL**

RESPONDENTS

Appearances:

Mr. John McCarroll SC of Harneys for the Applicants

Mr. Andrew Willins and Ms. Laure-Astrid Wigglesworth of Appelby for the
Respondents

2021 July 6 (Oral)
September 13 (Written)

JUDGMENT

- [1] **JACK, J [Ag.]:** This matter was last before me on 15th June when there was an extremely extensive hearing which covered some 103 pages of transcript. I dealt with a number of issues which arose. One of these was whether Treehouse Investments Limited, which I shall call “Treehouse” was a creditor of the three companies which are the subject of the liquidation. I directed that the order I made

at the conclusion of that hearing should not be sealed for seven days in order that Treehouse could remedy the evidential lacuna which I had identified. There is no doubt that the Court has the power to vary its orders at any time up to the point at which the order is sealed. That is made clear by the United Kingdom Supreme Court in the case of **Re L and Another (Children) (Preliminary Finding: Power to Reverse)**.¹

- [2] The Applicants before me today, represented by Mr. John McCarroll SC, are Treehouse and GAC Holdings Limited, which I shall call GACH. Mr. McCarroll effectively sought to reargue the matters which had been before me on the 13th of June.
- [3] I can deal the position of Treehouse very simply. In order to be able to make an application to be joined for the purpose of making submissions under Section 273 of the Insolvency Act, Treehouse had to show that it was a creditor.
- [4] The background of this is as long ago as 28th July 2018, my brother Justice Adderley made an order in the liquidation of the companies. And in the course of that order, he identified as relevant creditors, Treehouse. That, however, does not mean that they were accepted either by the liquidators or by the court as being, in truth, creditors of the companies. Instead (as is, of course, normal) a creditor has to make a proof of debt, submit that to the liquidator and then the liquidator, sooner or later, will adjudicate on the debt and decide whether he recognises the debt or not. If he does not, then the creditor can, of course, apply to the Court for determination of that issue.
- [5] Treehouse did not submit a proof of debt according to the receivers. At the hearing on 15th June, it was suggested they had indeed made a submission of a proof of debt, so I gave them the seven days in order to find the proof of debt and submit it. It suffices to say that Treehouse has not provided any evidence that they submitted

¹ [2013] UKSC 8, [2013] 1 WLR 634.

a proof of debt. In those circumstances, they are debarred from making a claim and accordingly, they are not creditors, so they have no *locus standi* to make an application under section 273. That is sufficient to deal with Treehouse.

- [6] The position of GAC is more complicated. There were two matters which were argued before me on 15th June by Mr. Willins who appeared, then as today, on behalf of the liquidators. The first is what has been described as the **Cherry v Boulton** point.² The second is a question of the prospect of success on any section 273 application which might be brought. Today Mr. McCarroll SC has said in addition that there are very serious questions over the liquidators and their *bona fides*. I can read what is said in Mr. Simon McNally's affidavit. It does not appear to be sworn in the bundle before me but it is from March of this year. At para 44, he says:

"The Joint Liquidators were appointed by the shareholders of the various companies as a litigation tactic to assist Dr. Cochrane and a group of companies. The companies did not require to be put into liquidation and there were no issues with regard to their solvency, but each was placed into voluntary liquidation by resolution of SMA as a direct consequence of the pre-agreed arrangements entered into between Dr. Cochrane, the FCO parties and with the liquidators and their team. These arrangements include the upfront payments of significant fees to the Joint Liquidators in the sum of half a million pounds sterling."

- [7] He continued in para 46:

"The Joint Liquidators were instructed by Dr. Cochrane and her team in relation to their activity. In the steps they took, it was clear that their appointment was made as part of a litigation strategy in the continuing fight of Mr. Ruhan and to protect the assets further from any claims that Mr. Ruhan or the RS Parties were making or indeed may make in relation to the same."

- [8] Mr. McCarroll took me to various other documents which he said showed the improper circumstances in which the liquidators were appointed to suggest that,

² (1839) 4 My & C 442, 41 ER 171.

really, they were pursuing an entirely improper approach to the liquidation. As I have said previously in this matter, this is not an appropriate way to raise those matters. If there were going to be allegations of that sort made against the liquidators, then the remedy is to ask the Court to remove those liquidators and to appoint fresh liquidators who are untainted.

[9] First of all, it is unfair to the liquidators to allow these matters to be raised in these types of applications and secondly, on case management grounds, it is improper to try and raise matters in this way. As I say, if a broad allegation that there is some conspiracy to act improperly to which the liquidators are a party, then that is a matter which needs to be brought to the Court's attention by way of an application for removal of the liquidators.

[10] The Court will not proceed in applications of this sort on the basis that the liquidators are people who are potentially liable to behave *mala fides*, and, in effect, completely dishonestly. That is simply not a basis on which the Court can proceed unless and until there is a properly made application for removal of liquidators on the grounds of misbehaviour; the Court will proceed on the basis that the liquidators are behaving in good faith. Now that is not to say that the liquidators will be presumed to be acting correctly. They may or may not be. The Court exercises its supervisory power under section 273 to ensure liquidators are acting correctly. The power under section 273 is something which the Court will use focusing on the particular matters which are raised.

[11] I can thus put aside that broad-brush attack on the liquidators and focus on the narrow issues which are raised by GACH. These amount to two points. The first, as I said, is the **Cherry v Boulton** point. What is said by Mr. McCarroll is that Unicorn, who were one of the companies in liquidation, only has a claim under the proceedings in the Isle of Man for £6 million, whereas the claim which GACH seeks to have proved in the insolvencies amount to £24 million. Therefore, he says, there is, even on the most generous basis of set-off, still money owing to GACH which

means that GACH can establish itself as a creditor and therefore has *locus standi* to apply under section 273.

[12] I have not heard Mr. Willins on that, because the other point which is put forward by Mr. McCarroll SC, is that the liquidators are behaving improperly in relation to the Isle of Man proceedings. The position here is that anybody applying under section 273 faces an uphill battle. That is because the liquidators are entitled to exercise their commercial assessment of the steps which they can best take in the liquidation to achieve the maximum return. And although there is some argument about precisely how one should formulate the perversity test, the Court will only interfere if a high degree of unreasonableness can be shown on the part of the liquidators. For the reasons which I gave in my judgment on 15th June, GACH, in my judgment, comes nowhere near that. There are very good reasons for the liquidators to be pursuing the Isle of Man proceedings, and thus far, they have actually recovered judgment by default. There is going to be a hearing in October as to whether that should be set aside. But in my judgment, for the reasons I gave in June, there is no proper basis for attacking the liquidators' decision to proceed with the Isle of Man action. The application by GACH, in my judgment, is redolent with bad faith on part of the movers. I do not accept that it is done for the proper purpose of achieving the maximum return in the liquidation.

[13] In my judgment, it is quite clear that it is done for an ulterior motive, namely that Mr. Anthony McNally, who is the guiding force behind GACH, wishes to assist his brother, Mr. Simon McNally, in the Isle of Man proceedings. In those circumstances, the application to join in a section 273 application is, in my judgment, hopeless. So, for these reasons I refuse to open the decision which I made on 15th June.

[14] Accordingly, I shall direct that the order which I made on 15th June be sealed.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar