

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2020/0138

**IN THE MATTER OF HATFIELD PROPERTY LTD
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

WEST BROMWICH COMMERCIAL LTD

Applicant

and

HATFIELD PROPERTY LTD

Respondent

and

FINANCIAL SERVICES COMMISSION

Interested Party

Appearances:

Mr. Shane Donovan and Mr. Greg O'Keefe-Davis of Mourant Ozannes for the Applicant.

No appearance for the Respondent

Mr. Stephen Grayson for the Interested Party

2021: January 18
January 21

JUDGMENT (No 2)

[1] **JACK, J [Ag.]:** In November I adjourned the hearing of an application made under sections 159(1)(a) and 162(1)(a) and (b) of the **Insolvency Act 2003**¹ for an order appointing liquidators to Hatfield Property Ltd ("the Company"). The basis of the

¹ No 5 of 2003, Laws of the Virgin Islands.

application was that the Company was insolvent and/or that it would be just and equitable to do so. The application sought the joint appointment as liquidator of Kevin Hellard, a United Kingdom qualified insolvency practitioner, together with Matthew Richardson, a BVI insolvency practitioner. The English Companies Court ordered on 15th April 2013 that the Company be wound up. Mr. Hellard became the English Court appointed liquidator on 20th May 2014.

- [2] In my first judgment² I pointed to the problem of appointing liquidators of companies incorporated in this Territory, where the BVI company owed monies to Her Majesty's Commissioners of Revenue and Customs ("HMRC") in the United Kingdom.
- [3] Subsequently the Financial Services Commission applied to be added as an interested party in view of the public interest in the relief sought. By order of 16th December 2020, I acceded to that application. Mr. Grayson appeared on behalf of the Commission. I am grateful to him for his submissions.
- [4] The detailed facts are set out in my first judgment. The essential problem is that the English winding-up order was made based on a sum of £134,227.00 in unpaid Value Added Tax owed to HMRC. Mr. Hellard, as an appointee of the English Court, is answerable to that Court. Thus, by recognising his appointment, this Court would, at least potentially, be indirectly enforcing the payment of a foreign revenue debt. It has long been established that, in the absence of legislation permitting enforcement of a foreign tax debt, recovery is barred by the "revenue rule": **QRS 1 ApS and others v Frandsen**³ and **Re Meribelle Investments Ltd.**⁴
- [5] Mr. Donovan, who appeared for the applicant, argued that the revenue rule only applied where all the debts of the debtor were owed to the Revenue. In **Wahr-Hansen and others v Compass Trust Co Ltd**,⁵ the plaintiff was the administrator

² [2020] ECSCJ No 370, (determined 12th November 2020).

³ [1999] 1 WLR 2169.

⁴ BVIHC (COM) 2020/0013 (the second judgment in the matter, determined 16th March 2020).

⁵ [2007] CILR 55.

of the estate of a Mr. Jahre. The action in Cayman was to trace various trust assets which had belonged to the deceased. Mr. Jahre had been a tax fraudster and owed large sums to the Norwegian Revenue, but there were others with an entitlement to the estate. Henderson J, sitting in the Grand Court, held that it was only where the sole creditor was the Revenue that the revenue rule barred recovery.

- [6] **Peter Buchanan Ltd v McVey**⁶ was a case decided by the Irish Supreme Court. McVey had defrauded the Scottish Excise of a large amount of duty owed by his one-man company on whisky traded by the company. He absconded to Ireland. The Revenue put the company into liquidation. The liquidator then brought proceedings in Ireland for the monies wrongfully abstracted from the company by McVey. The Irish High Court and the Supreme Court on appeal held that the proceedings were solely for the benefit of the Scottish Revenue and thus debarred by the revenue rule. Maguire CJ held that “if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets of the company under the control of the liquidator. But there is no question of that here.”
- [7] These (like **Frandsen**) were cases where the cause of action was an ordinary private law claim. Where this Court orders the liquidation of a company, the position is different. Only provable debts can be admitted in a company liquidation. A foreign revenue debt is not provable: **Government of India v Taylor**.⁷ Thus a VAT liability owed to HMRC is not in my judgment provable in a BVI liquidation.
- [8] Mr. Grayson confirms that there is no relevant legislation between this Territory and the United Kingdom allowing reciprocal enforcement of tax debts. The only legislation is in connection with the exchange of information: see, for example, the

⁶ [1955] AC 516 (Note) at 533.

⁷ [1955] AC 491.

International Tax Enforcement (British Virgin Islands) Order 2014.⁸ The common law position as stated in **Government of India** is therefore applicable to UK revenue debts in my judgment.

- [9] If matters ended there, then it would not be appropriate to appoint Mr. Hellard as joint liquidator in the BVI liquidation. He would be obliged to obey the English Court's directions to recognize the UK VAT debt, but obliged to refuse the proof of that debt under BVI law. There would be an insuperable conflict of duties.
- [10] Matters do not, however, stop there. The Company is massively insolvent. Its unsecured debts exceed £27 million. The only asset, valued at about £6 million, is the subject of security granted to a major creditor. As Mr. Grayson pithily puts it: "the amount likely to be paid to HMRC if a liquidator is appointed is Nil." In these circumstances, the revenue rule does not in my judgment prevent the appointment of Mr. Hellard as one of the joint liquidators.
- [11] The reason an appointment of liquidators by this Court is sought is that the Company was struck off the Register of Companies on 16th July 2018, following the resignation of its registered agent, Mossack Fonseca & Co (BVI) Ltd. An English liquidator has no power to apply to restore a struck off company to the register; only a liquidator appointed by this Court can do so.⁹ There is thus a real need for this Court to appoint liquidators, notwithstanding the absence of assets for distribution.

⁸ SI 2014 No 1359.

⁹ See sections 2 and 159 of the 2003 Act and section 215(4) of the Business Companies Act 2004 (No 16 of 2004).

[12] For these reasons I appoint Mr. Hellard and Mr. Richardson as joint liquidators of the Company.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar