

**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

Appearances:

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

No appearance for the Respondent

2020: November 9,
November 12

JUDGMENT

[1] **JACK, J [Ag.]**: In **Re Meribelle Investments Ltd**¹ 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.

¹ BVIHC (COM) 2020/0013 (the second judgment in the matter, determined 16th March 2020).

[2] This case raises similar difficulties. The respondent (“the Company”) is a single purpose vehicle. I can take the facts from Mr. Donovan’s skeleton argument served on behalf of the applicant (“West Brom”).

“3. The Company was incorporated pursuant to the provisions of the **International Business Companies Act**² on 28 October 2005 with Mossack Fonseca & Co. (BVI) Ltd... as its registered agent. The Company was automatically re-registered pursuant to the provisions of the **[BVI Business Companies Act 2004]**³ with effect from 1 January 2007.

4. By a Loan Agreement dated 9 December 2005, entered into between the Company (as borrower) and West Brom (as lender), West Brom made available to the Company a loan facility of up to £28.55 million (the Loan) for the purpose of the purchase of the freehold and leasehold land and buildings being Cannock Shopping Centre, Market Hall Street, Cannock and 25, 27 and 29 Market Hall Street, Cannock and Cannock Shopping Centre, Market Hall Street, Cannock, Staffordshire, United Kingdom (the Property).

5. As part of the security for the Loan, the Company entered into a Legal Charge dated 19 January 2006 (the Charge), pursuant to which it granted West Brom a mortgage over the Property. The Charge was entered in the Company’s register of mortgages, charges and other encumbrances on 1 February 2006.

6. On 17 March 2009, LPA Receivers were appointed by West Brom over the whole of the Property under the [UK] **Law of Property Act 1925**.⁴

7. The Company was unable to meet its [Value Added Tax] liabilities to [HMRC]. On 4 December 2012, HMRC presented a petition to wind up the Company to the High Court of England and Wales. There was no appearance by or on behalf of the Company at the hearing of the petition. By Order of the English High Court dated 15 April 2013, it was ordered that the Company be wound up pursuant to the provisions of the **Insolvency Act 1986** (UK).⁵ The Official Receiver was appointed as liquidator of the Company.

8. Kevin Hellard of Grant Thornton UK LLP was subsequently appointed as liquidator of the Company by the Secretary of State with effect from 20 May 2014.

² Cap. 291, Revised Laws of the Virgin Islands.

³ No 16 of 2004, Laws of the Virgin Islands.

⁴ 15 & 16 Geo V c. 20.

⁵ 1986 c. 45.

9. Mossack Fonseca ceased operations in the BVI in or about March 2018, as a result of the reputational fallout from a major leak of sensitive Mossack Fonseca group client data that occurred in 2016, commonly known as the 'Panama Papers'.

10. On 7 May 2018, Matthew Richardson of Grant Thornton (British Virgin Islands) Ltd asked the Financial Services Commission (the Commission) if it would permit Mr. Hellard, in his capacity as the liquidator of the Company as appointed by the English Court, to change the Company's registered agent. The Commission's response was to the effect that Mr. Hellard would not have authority to cause the Company to change its registered agent unless and until the Order of the English Court was recognised in the BVI. Alternatively, if an order appointing liquidators were to be made by the BVI Court, the effect of section 91(5) of the **BVI Business Companies Act, 2004** would be that the Company would not then require a registered agent.

11. On 1 June 2018, the Registrar published a notice in the Virgin Islands *Official Gazette* by which she required various companies, including the Company, to appoint a new registered agent within 45 days, failing which they would be struck off. The Company was subsequently struck off the Register on 16 July 2018 because it did not have a registered agent."

[3] The English winding-up order was made by Registrar Derrett (as she then was) based on a sum of £134,227.00 in unpaid Value Added Tax owed to HMRC. The Company's only asset is the property in Staffordshire, which is worth about £6,115,000. The Company owes West Brom about £33.7 million. In addition to the Revenue, there is a debt to Investec Bank (Channel Islands) Ltd for over £2 million. West Brom propose that Mr. Hellard, the current English liquidator, and Mr. Richardson be appointed by this Court as joint liquidators.

[4] The problem with making such a joint appointment is that Mr. Hellard is answerable to the English Court which appointed him. In **Meribelle** the liquidator appointed by the English Court was a Mr. Gregson. Substantially the only debts proved before this Court in that case was the debt owed by the company to HMRC. I said:

"[7] Mr. Gregson's application was listed to be heard today. Whilst reading the papers over the weekend, I noticed a potential problem. By recognizing Mr. Gregson's appointment, this Court would be indirectly

enforcing UK revenue law. In **QRS 1 ApS and others v Frandsen**⁶, the defendant had been the owner of five Danish companies, who were the plaintiffs in the action brought in England. He stripped the companies of their assets and then changed his own domicile to England. The Danish tax authorities put the five companies into liquidation. The liquidator brought proceedings in the name of the five companies for restitution and breach of Danish company law against the defendant. The English Court of Appeal held:

'It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue, or other public laws of another country — see rule 3 of **Dicey & Morris**⁷ and the comment upon it in that work. On the English authorities it is clear that the present action falls foul of that rule: in substance it involves the indirect enforcement of Denmark's revenue law.'

The Court rejected an argument based on European Union law, which [was] not relevant to the current case, and proceeded to dismiss the action.

[8] The current case may potentially fall foul of that principle as well. The only reason for the Court to recognize Mr. Gregson's appointment would be so that he can restore the company to the register. He would then use his recognition to appoint himself (or his nominee) as a director of Meribelle and proceed to sell Wheatley Oast [real estate in England and Meribelle's only asset], thus being able to reimburse the UK Revenue.

[9] I originally wondered whether the Court's refusal to enforce foreign revenue law also applied as between the United Kingdom and the British Overseas Territories. What limited research I have done suggests that it does. In **Municipal Council of Sydney v Bull**⁸, New South Wales legislation⁹ provided for the owners of property on Moore St in Sydney to contribute to improvement works. The Council sought to recover £3,919.4s.3d. from the defendant in the English High Court. The monies were owed over the period 1898 to 1904. Grantham J held:

"The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."

⁶ [1999] 1 WLR 2169.

⁷ Then 12th Ed, 1993, Vol 1 p 97; now rule 3 of Dicey, Morris and Collins on the Conflict of Laws (15th Ed, 2018) at para 5R-019.

⁸ [1909] 1 KB 7.

⁹ The Moore Street Improvement Act 1890 (54 Vict No 30 of the Statutes of New South Wales) and the Moore Street Improvement Act Amendment Act 1892 (55 Vict No 13).

[10] It should be noted that Grantham J does not distinguish between the debt owed prior to 1st January 1901 to that owed after. That date was when New South Wales ceased to be a colony of the United Kingdom and, on the founding of the Commonwealth of Australia, became an Australian state.

[11] In **Attorney-General for Canada v William Schulze & Co**¹⁰, there had been proceedings in Canada for the forfeiture of goods imported in breach of Canadian customs law. The Attorney-General was successful in the Canadian proceedings and forfeiture was ordered. The Canadian court awarded him his costs. He then sought to recover the costs in the Court of Session. He lost, for similar reasons to the **Sydney Municipality** case. Lord Stormonth Darling pointed out:

‘It is no doubt rather anomalous that the King, through his Courts in Scotland, should refuse to recognise a debt due to himself in Canada, merely because it arises out of the execution of a Revenue Statute. But it was not maintained, and I think is not maintainable that in the sense of international law, the mother country and her self-governing colonies stand in different relationship from that which exists between two foreign states. If that relationship is ever to be modified it must be done by reciprocal legislation.’”

[12] These views do not seem to depend on the question whether the sovereign when claiming taxes was acting in right of New South Wales, or Australia, or Canada. It may thus not matter whether the Queen acts in right of the Virgin Islands or in right of the United Kingdom when the question of enforcement of UK tax obligations in this jurisdiction is in question.”

[5] If that is right, then a liquidator appointed by this Court would not be entitled to distribute to the UK Revenue such assets as found their way to him. He could only distribute the assets to non-sovereign creditors. In those circumstances, it would not be appropriate to appoint Mr. Hellard as liquidator, because he would be put in an impossible position, owing duties to the English court to distribute to HMRC *pari passu* and duties to this Court, not to distribute to HMRC at all.

[6] It might be possible to appoint Mr. Richardson as sole liquidator. The main problem is that putting the Company into liquidation in the BVI has the effect of

¹⁰ (1901) 9 SLT 4.

reviving the Company without the need for a new registered agent to be appointed. Once the Company was revived, then Mr. Hellard, when he acts in England, would be clothed with full power to collect and realise assets and then (insofar as there are any recoveries for distribution) to distribute them, *inter alia*, to the Commissions of Revenue and Customs. It is not clear to me whether it would be proper to put the Company into liquidation in this Territory if the practical result was that a foreign liquidator could distribute to a creditor, who under the laws of this Territory would not be entitled to payment.

[7] As I pointed out in **Meribelle** there are a number of uncertainties. I was not sure in that case and am still not sure, whether there is any relevant tax legislation between the United Kingdom and the BVI. I referred in that case to the **International Tax Enforcement (British Virgin Islands) Order 2014**¹¹, which relates to the exchange of information between the relevant tax authorities, but I was referred to nothing on the reciprocal enforcement of tax debts in the respective jurisdictions. Further I considered the question as to whether the public policy expressed in the **Sydney Municipality** and **Schulze** cases is still good law may be a difficult issue.

[8] In the light of these uncertainties, I have adjourned this matter for a short time. I have directed that the papers be served on the Attorney-General and the Registrar of Corporate Affairs, so they can consider whether they want to make representations, either in their own right or as *amicus curiae*.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹¹ SI 2014 No 1359.