

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) No 120 of 2017

**IN THE MATTER OF UNICORN WORLDWIDE HOLDINGS LTD (IN LIQUIDATION)
AND IN THE MATTER OF BALLAUGH HOLDINGS LTD (IN LIQUIDATION)
AND IN THE MATTER OF GLEN MOAR PROPERTIES LTD (IN LIQUIDATION)
AND IN THE MATTER OF SULBY INVESTMENT HOLDINGS LTD (IN LIQUIDATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

**CARL STUART JACKSON, GREIG MITCHELL,
SIMON BONNEY AND ANDREW HOSKING
(As Joint Liquidators of the Companies)**

Applicants

Appearances:

Mr. Martin Pascoe QC, Ms. Blair Leahy QC and Mr. Andrew Willins of Appleby for
the applicants

Mr. David Lord QC, Mr. Sebastian Kokelaar and Mr. Iain Tucker of Walkers for
Phoenix Group Foundation and Minardi Investments Ltd

Dr. Gerard Smith in person

2020: July 14
July 15

JUDGMENT

[1] **JACK, J [Ag.]:** On 22nd June 2020 I delivered an oral judgment in this matter whereby I sanctioned the entering by the joint liquidators into a settlement agreement with some, but not all, of the parties to a heavy action in the English Commercial Court due to be tried early next year. I gave directions for the exchange of skeleton arguments on costs and consequential matters.

- [2] Although the joint liquidators applied for sanction of the compromise agreement, they did not need to do so. It fell within their powers to enter the compromise agreement without sanction. However, because of the significant nature of the settlement they thought it appropriate to seek the Court's sanction. Two interested parties (one, a potential creditor), Phoenix Group Foundation ("Phoenix") and Minardi Investments Ltd ("Minardi"), opposed the granting of sanction. Another interested party, Dr. Gerard Smith, appeared but played little rôle in the hearing. There are no applications for costs either by or against him, so I shall not consider his position further.
- [3] Phoenix and Minardi were unsuccessful in opposing the sanction of the settlement, but they did achieve some clarification of the order sought, so that it was clear their alleged proprietary interest in what has been called the "Arena Surplus" was not prejudicially affected.
- [4] I start by considering what the correct approach in considering costs should be. The liquidators' position is that this was contentious litigation between them on the one hand and Phoenix and Minardi on the other. Phoenix and Minardi should therefore pay the liquidators' costs, at least insofar as they were increased by Phoenix' and Minardi's appearance. Phoenix and Minardi by contrast submitted that the application before me was very similar to an application by trustees for directions as to how they should exercise their powers. On such applications the starting point was that the costs of all parties should come from the fund. Thus Phoenix' and Minardi's costs should be paid as an expense of the liquidations of the companies provided Phoenix and Minardi establish their right to the Arena Surplus or Minardi's proof of debts admitted in the liquidation of the Unicorn. (Phoenix and Minardi also seek costs on the indemnity basis, but that basis of assessment does not exist in the Eastern Caribbean.)
- [5] The CPR 64.6 provides:

“(1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) This rule gives the court power in particular to order a person to pay –
(a) costs from or up to a certain date only;
(b) costs relating only to a certain distinct part of the proceedings;
or
(c) only a specified proportion of another person’s costs.

(4) The court may not make an order under paragraph 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances

(6) In particular it must have regard to –
(a) the conduct of the parties both before and during the proceedings;
(b) the manner in which a party has pursued –
(i) a particular allegation;
(ii) a particular issue; or
(iii) the case;
(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
(d) whether it was reasonable for a party to –
(i) pursue a particular allegation; and/or
(ii) raise a particular issue; and
(e) whether the claimant gave reasonable notice of intention to issue a claim.”

[6] Counsel for the liquidators put particular emphasis on **Re Lehman Brothers International (Europe)**¹ where Briggs J (as he then was) was dealing with an application in respect of which of various Lehman group companies were entitled to ownership of some securities. He summarised the parties' contentions on costs and the competing considerations as follows:

"3. For the Administrators, Mr Milligan QC described it as, in substance, commercial litigation between rival claimants to beneficial ownership of specific property (i.e. the Rascalised securities), in relation to which costs should follow the event, as in any other commercial litigation. Counsel for the affiliates all described it as being, in substance, a joint application by the various office-holders of insolvent companies within a common group to the appropriate forum for the resolution of difficult issues affecting them all, and standing in the way of the realisation and disposal of assets to creditors, or to other persons entitled to them. It was adversarial litigation only in the sense that, for the assistance of the court, the alternative solutions to the complex common problems were advanced by counsel, including counsel for the Administrators, on an adversarial basis. The result in terms of costs was, it was submitted, either that all the parties' costs should be borne by LBIE, or that each insolvent estate should bear its own costs.

4. There is considerable force in both those competing analyses, and it is neither necessary nor appropriate to make a stark choice between them. In favour of what I will call the commercial litigation analysis are the following factors. First, the *casus belli* for the application was, in a sense, the fact that LBIE invited each respondent affiliate to state whether it wished to assert a claim to beneficial ownership of the Rascalised securities, and each respondent replied that it did. Secondly, the dispute lies entirely between LBIE and a specific affiliate (or in the case of LBCCA and LBAH affiliates) in relation to each class of Rascalised securities, there being no wider class of potentially interested parties requiring representation. Thirdly, although each office-holder is, *quoad* the claim of his affiliate, acting in substance as a fiduciary for underlying stakeholders, there is no doubt that the office-holder is *dominus litis*, so as to be able to pursue or compromise claims on behalf of his insolvent estate, even though from time to time he may for that purpose have to obtain approval from creditors' committees, or from the relevant foreign court having jurisdiction in relation to the insolvency of that affiliate (here the courts of Switzerland, Hong Kong or New York).

¹ [2010] EWHC 3044 (Ch).

5. In favour of what I shall call the 'joint application for directions' analysis there are the following factors. First, the problems which led to this application arose from the carrying on by LBIE and its affiliates as associated companies of a business pursued on a Group basis, applying a common global settlement practice, Rascals processes decided on by the Group, using common form contractual documentation and a unified Group accounting system. Secondly, although the relevant insolvencies are primarily regulated by the courts of four different countries, all the foreign insolvency processes have been recognised here so that, pursuant to the Cross-Border Insolvency Regulations, all the relevant office-holders can seek the assistance of this court, as appropriate. Thirdly, as responsible office-holders, all the individuals responsible for the conduct of each affiliate's part in the litigation may fairly be thought of as fiduciaries, in analogous positions to trustees seeking a court's directions in relation to the administration of a trust.

Particularly relevant considerations he identified were:

"11. ...First, it is by no means uncommon that responsibility for issues arising in the administration of an insolvent estate may fairly be laid at the door of the insolvent entity (be it individual or corporate), for example where the insolvent has kept inadequate records, or sought to interfere by preference or worse with the proper distribution of its assets to its creditors. Secondly, there is an undoubted public interest in the due administration of the assets of an insolvent's estate in accordance with the statutory insolvency code, and parties who are joined in proceedings made necessary for that purpose should not be unduly discouraged by an unthinking recourse to the general rule where, in the end, the issue is decided against them."

He concluded:

"13. It follows in my judgment that although there are features of insolvency litigation which, by analogy with litigation about deceased's estates, may justify a departure from the general rule, the court should nonetheless approach any particular case for a departure with real caution, and litigants ought to expect to have to justify such a departure by reference to the facts about their alleged predicament, rather than merely by recourse to some supposed general principle."

[7] I agree entirely with this analysis, which pays appropriate respect to "all the circumstances" of these types of cases. In particular it is in my judgment wrong to

adopt a “stark choice” between the extreme contentions of each side here. Instead, a closer examination of each side’s behaviour is necessary, so that the Court can properly exercise its discretion, weighing all relevant factors.

[8] For Phoenix and Minardi speak the following points. They have in my judgment provided a useful service to the Court. Without their assistance, I would have been gravely handicapped in considering the merits and demerits of the liquidators’ position. The liquidators refused to involve Phoenix and Minardi in the settlement negotiations on the basis (a) that they were opposed parties and (b) that they would be able to make their concerns known in the way they have done, by appearing on the liquidators’ application for sanction. Phoenix and Minardi have done what the liquidators anticipated them doing. Further, the litigation in which the settlement agreement has been made was spawned by the chaotic administration of the insolvent companies against a background of fraud. The need for the liquidators’ application to Court, and the reason for Phoenix’ and Minardi’s appearance, can “fairly be laid at the door of the insolvent entity.”

[9] Against that is the point that Phoenix and Minardi were undoubtedly pursuing their own commercial interests in opposing the sanction application. They have had a very modest success in obtaining a declaration from me that their interest in the Arena Surplus is not prejudiced by the settlement, but have otherwise lost. On the other hand, I do not accept that they acted in bad faith in making their challenges.

[10] I do not consider that this is a case where Phoenix and Minardi should be ordered to pay the liquidators’ costs. The liquidators would have had to apply to the Court anyway. The hearing was undoubtedly lengthened by the appearance in opposition of Phoenix and Minardi, but, as I have said, they have assisted the Court. Interested persons, such as Phoenix and Minardi should not be “unduly discouraged” from appearing.

[11] Should Phoenix and Minardi be entitled to costs in the liquidation? I bear in mind that they were pursuing their own commercial interests and in substance have lost.

On that basis it would in my judgment be wrong to order that they recover all their costs. There should, however, be some recognition of the assistance they have given the Court. In my judgment, \$75,000 of their costs should be paid as part of the expenses of the liquidations, subject to the proviso in the Walkers draft order.

[12] Phoenix and Minardi have lodged an appeal against my sanction of the compromise agreement. There is an urgent need for the compromise agreement to be signed off. There is a trial listed in the early part of 2021. It is essential that the liquidators know whether the settlement is approved. Otherwise they will have to incur the extensive costs of preparing for trial. On the other hand, Phoenix and Minardi want to appeal. Whether they need leave or not is disputed between the parties, but is not a matter for me to determine. The Court of Appeal is sitting in the week of 20th July. I shall therefore order that, unless by 24th July 2020 the Court of Appeal allows the appeal or grants a stay or other equivalent relief, the liquidators may enter into and perform the settlement agreement.

[13] In the judgment distributed to the parties, I indicated that the Walkers draft was subject to an amendment in respect of costs and the appeal provisions in the previous paragraph an appropriate form of order. Both parties have submitted versions of the Walkers order. Of these I prefer the Appleby version which more accurately the direction in the previous paragraph.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar