

**THE EASTERN CARIBBEAN SUPREME COURT
VIRGIN ISLANDS**

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

Claim Number BVI HC (COM) 2007/0188

**RODERICK JOHN SUTTON and WILLIAM RICHARD TACON
(as Joint Liquidators of Performance Investment Products Corporation)**

Appearances: Mr Andrew Willins for the Joint Liquidators, the Applicants

JUDGMENT ON ADJOURNMENT

[2011: 25, 30 May]

- [1] **Bannister J [ag]:** This is an application pursuant to section 433(3) of the Insolvency Act, 2003 ('the Act') for the setting of an interim payment on account of the remuneration of Mr William Tacon and Mr Roderick Sutton as, first, Joint Provisional Liquidators and, subsequently, Joint Liquidators of Performance Investment Products Corporation, a BVI registered company ('the Joint Liquidators', 'the Company'). The Joint Liquidators, together with another gentleman, Mr James Cleaver, were appointed Joint Provisional Liquidators on 13 August 2007 and were appointed Joint Liquidators on 3 October 2007. Mr Cleaver takes no part in the application.
- [2] When the application came before me on the morning of 25 May 2011 I raised with Mr Andrew Willins, who appears for the Joint Liquidators, certain concerns which I had and adjourned it for a short time. When it came back to me later in the day I found that those concerns were not allayed and I adjourned the application generally. These are my reasons for that adjournment.
- [3] The Company was incorporated on 14 January 1999. According to an affidavit sworn by Mr Sutton in support of the application it formed part of a web of associated companies which together managed a series of investment schemes. In addition to the Company, there was a related company incorporated in Hong Kong, called Performance Investment Products Corporation Limited

('PIPC/HK'); another, called PIPC Corporation, Philippines and another, called Performance Asset Management Pte Ltd ('PIPC/Pte') in Singapore. It appears that the principal seat of the management of the business of the group of companies was in the Philippines. As I understand it investors contracted with the Company (although regrettably I have not been shown an example of an investment contract), paid their investment money into PIPC/HK, which appears to have operated as banker for the group, and were paid out by PIPC/Pte. None of the companies was a subsidiary of any of the others, but it is convenient to refer to them as a group. My impression, and it is only an impression, is that *de facto* the liquidations have been conducted almost exclusively from Mr Sutton's offices in Hong Kong, with the interface between the insolvency practitioners and the investors taking place in the Philippines.

- [4] The Joint Liquidators say that the group ran a Ponzi scheme and that funds amounting to some US\$138 million have gone missing. The present position is that the Company is holding some US\$685,000, the balance of some US\$740,000 remitted to it by PIPC/HK (although why and upon what basis was not made clear to me), while PIPC/HK retains some US\$866,000 after disbursements including the (rough) equivalent of some US\$261,000 in legal fees and some US\$131,000 in unspecified agents fees.
- [5] PIPC/HK went into provisional liquidation in Hong Kong on 6 August 2007, with Mr Sutton being appointed, together with Mr Chiong, a fellow partner in what was then Ferrier Hodgson Limited ('Ferrier Hodgson'), as one of the Joint Provisional Liquidators. On 15 August 2008 Mr Sutton and Mr Chiong were appointed Joint Liquidators and they remain as such. This is the first application by Mr Tacon and Mr Sutton for approval of remuneration in this Court since the appointments of August and October 2007 and I understand that a similar first application is to be made to the High Court in Hong Kong by Mr Sutton and Mr Chiong in some few days time.
- [6] In the provisional liquidation and subsequent liquidation of the Company the Joint Liquidators seek approval for remuneration in the sums, respectively, of HK\$1,032,990 and HK\$2,390,540¹.
- [7] The liquidations appear, so far as I can tell from the evidence before me, to have been run from Hong Kong rather as if the Company and PIPC/HK were a single entity. In fact, so far as I can tell from the material with which I have been supplied, it would appear that the investors, if they are

¹ roughly US\$138,285 and US\$320,018

properly to be treated as creditors (as to which see further below) were creditors of the Company, not of PIPC/HK, and the money held by PIPC/HK (if not held on trust for investors) would appear (again I speak very tentatively) to have been held by PIPC/HK as agent for the Company. If PIPC/HK did hold as agent for the Company, it would seem that what ought to have happened was for the funds held by PIPC/HK to have been remitted to the Company and for investors claims to have been dealt with in the liquidation of the Company. Instead, a Committee of Inspection has been formed in the liquidation of PIPC/HK (although none of its members would appear to have direct contractual claims against PIPC/HK) and five members of that Committee have been treated, rightly or wrongly, as a creditors committee for the purposes of the liquidation of the Company. Whether these arrangements were legally effective may be a matter for some question, but either way it is said (and there seems good reason for this), that for the purposes of fixing the Joint Liquidators' remuneration in respect of the Company, there is no prospect that the creditors' committee of the Company will approve any of the Joint Liquidators' claimed remuneration.

[8] A complication arises out of the fact that certain investors are alleging that funds paid to PIPC/HK were held by that company on trust for the investors and there is in the papers before me a decision of a Regional Trial Court of the Republic of the Philippines in proceedings brought by an investor against, among others, Mr Sutton (and his firm) and PIPC/HK, for a declaration that money in the Joint Liquidators' hands is held by them in trust for the investors. The reasoning appears to have been based upon declarations of trust issued by the Company to incoming investors, but I have not seen a copy of such a document. There is some uncertainty as to who may be bound by the decision, but if, as appears to be the case, there are in existence declarations of trust issued to investors it seems to me that the question whether the funds in the hands of the Joint Liquidators are affected as a result needs to be resolved as a matter of urgency, irrespective of the question who may be strictly bound by the decision of the Regional Trial Court.

[9] Although, as I have said, the liquidations of the Company and PIPC/HK appear to have been conducted on a unified basis, their respective liquidators have nevertheless felt able to apportion their claims for remuneration between the Company and PIPC/HK, on the basis that 'operational control' matters, investigations and collection, preservation and realization of assets is attributed to PIPC/HK. The remuneration attributable to the Company is summarized at paragraphs 139 to 147 of Mr Sutton's first affidavit. Those paragraphs show that the elements included were bank-related

matters; collection of books and records; investigations – directors and officers; investigations – other; legal matters; meetings; reporting and dealings with creditors; and statutory compliance.

[10] It has been explained to me that that the Joint Liquidators' time spreadsheets across both liquidations, going back to the first entries on 19 July 2007 and ending on 30 June 2010 have been scrutinized by Ms Michelle Menrath, a director of FTI Consulting (the successor entity through which Ferrier Hodgson now practices), and that she has somehow been able to extract entries covering some twenty one pages of densely typed script and attribute them to work done on behalf of the Company (as opposed to PIPC/HK). Even if I could read the document, there is no material before me upon which I could begin to make a judgment whether this work is properly claimable as remuneration payable to the Joint Liquidators of the Company in and about their winding up of the Company – rather than of PIPC/HK.

[11] It is true that if all the funds presently to hand in each of the liquidations (US\$685K with the Company and US\$866K with PIPC/HK) are treated as one single fund and the work done by the Joint Liquidators of the Company and by the Joint Liquidators of PIPC/HK is treated as work done for a single company, then the result (once the remuneration as a whole has been judged to be fair and reasonable) is unobjectionable. As a matter of law, however, there has been no decision that the funds presently the two companies are to be treated as one fund, nor is there a ruling that work done in one liquidation is to be treated as done equally in the other. A further complication is that whereas the Joint Liquidators of PIPC/HK are both from the same firm, the appointment in the BVI is shared between Mr Sutton and Mr William Tacon, so that even if the liquidations were treated globally, there would still be a need to separate out the sums to which Mr Sutton and Mr Tacon were entitled from those due to Mr Sutton and Mr Chiong.

[12] I feel unable on the material with which I have been presented to determine the claim by Mr Tacon and Mr Sutton for interim remuneration in respect of the Provisional Liquidation and subsequent Liquidation of the Company. As I have said, the liquidations appear to have been treated as a *de facto* group liquidation with (I mean no disrespect to Mr Tacon) the bulk of the work being carried out from a base in Hong Kong and on the ground in the Philippines and to some extent, perhaps, in Singapore. I cannot evaluate, even if I were comfortably able to read, the itemized entries forming the 'Excel spreadsheet identifying BVI only time' which is to be found at Tab 5 of Volume 1 of the

hearing bundles for this application as representing time properly spent in and about the liquidation of the Company specifically.

- [13] One solution to the problem, subject always to the views of the High Court of the Hong Kong Special Administrative Region might be for this Court and the Hong Kong Court to make reciprocal orders in aid of each proceeding. In this jurisdiction, for example, section 467(3)(d) of the Insolvency Act, 2003, empowers the Court to

‘make such other order or grant such other relief as it considers appropriate to facilitate, approve, or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceedings with a foreign proceeding.’

It might be possible (subject to the question whether the money presently held by each of the companies is held by them in trust and, if so, for whom), to make use of this and any similar provision in the Hong Kong legislation to provide, for example, that for the purposes of calculating the remuneration of the relevant insolvency practitioners, the funds of the Company and of PIPC/HK be remitted to Hong Kong and treated for that purpose as one fund (‘the fund’); and that the remuneration of the Joint Liquidators of both the Company and of PIPC/HK be assessed in accordance with Hong Kong law and paid out of the fund, once so assessed.

- [15] An obvious objection to such a course is that at one level and on a strict legal view of the position it assumes (a) that neither the Company nor PIPC/HK has (or can assert that it has) an entitlement to a separate portion of the remaining available funds and (b) that neither the Company nor PIPC/HK has separate creditors or (if different) investors able to assert an interest in such an identifiable separate fund. If in fact there exist separate classes able to assert an interest in an aliquot part of the remaining available funds, then it might be thought contrary to principle to throw upon that fund more than the amount of Liquidators’ remuneration properly attributable to their work on that fund, unless pursuant to some overarching scheme of arrangement – which, although the obvious solution in theory, does not sound like a very realistic prospect given some of the views that have been expressed by some of those involved thus far.

- [16] On the other hand, the reality may well be that the work which has been carried out has been carried out for the benefit of the group as a whole and that each person with an interest in recoveries will have benefitted proportionately from the totality of the efforts made by the

insolvency practitioners on their behalf. If, as I suspect, that is correct, then it seems to me that a strong case can be made out for saying that the need for precise attention to be paid to separate corporate personality falls away and that it is just and equitable that each person ultimately interested in recoveries should bear a proportionate share of the overall cost of securing them. The proposal made in paragraph [14] above would appear to achieve that result, although it would still leave the separate entitlement of Mr Tacon undecided.

- [17] If such a pooling for the purposes of establishing entitlement to remuneration cannot lawfully be achieved, either by the route which I have suggested or through some other mechanism, then it seems to me that there is no alternative to a renewed application by the Joint Liquidators of the Company with a detailed (and legible) schedule of time spent upon the provisional liquidation and subsequent liquidation of the Company, supported by an affidavit explaining why it is said that the time referred to was spent on the liquidation of the Company (rather than upon the liquidation of any other entity).
- [18] I would be happy for the Court in Hong Kong to be referred to this Judgment and would be interested to learn if it considers that movement along the lines which I have suggested might bear fruit – in which case the two sets of Joint Liquidators may care to consider making reciprocal applications for orders in aid. They would need to be supported by affidavit evidence going to the manner in which the liquidations were conducted and the factors influencing the way in which that was done.



Commercial Court Judge
30 May 2011