[2013–14 Gib LR 488]

IN THE MATTER OF RECLAIM LIMITED

SUPREME COURT (Dudley, C.J.): March 31st, 2014

Companies—compulsory winding up—"just and equitable"—"just and equitable" to wind up company on public interest grounds where continued operation of company endangers Gibraltar's reputation as financial centre—although no illegality alleged, company involved in time-share scam and holding substantial assets owed to clients—in creditors' interest that company be wound up and affairs managed by liquidator—weight given to government department bringing application as has expertise and sense of responsibility in seeking winding-up order

The Minister for Finance applied to the Supreme Court for a winding-up order in respect of Reclaim Ltd.

Following a formal request from the UK Office of Fair Trading ("OFT") in April 2011, the Minister had appointed an inspector to investigate and produce a report on three companies: Reclaim, Incentive Leisure Group Ltd. ("ILG") and Personal Travel Group Ltd. ("PTG"). The report found that the three companies were involved in a timeshare scam. Reclaim's role in the scam was issuing certificates which were used as a marketing tool by ILG and PTG. These certificates purported to allow buyers to get back part of the purchase price; the vendor would transfer a small portion of the purchase price to Reclaim, and if the buyer complied with certain conditions, they could redeem a much larger amount—the difference made up by buyers who failed to comply with those conditions. Those funds were not held by Reclaim, but were transferred to a Spanish fiduciary, Law-Abogados Patrimonial ("LAP"). The report also found that the OFT proceedings and UK press coverage of the matter had adversely affected Gibraltar's reputation as a financial centre. Reclaim was the only company still in operation at the time of the report, IGL and PTG having been put into creditors' voluntary liquidation.

The Minister submitted that the conditions with which buyers were required to comply in order to obtain a refund under the Reclaim certificates were convoluted, confusing and prejudicial, effectively denying many consumers a refund. There was a clear connection between ILG, PTG and Reclaim, and the affairs of the three companies had been (and in the case of Reclaim, continued to be) conducted in such a way as would damage the reputation of Gibraltar as a financial centre, or were otherwise contrary to public interest.

Reclaim submitted that the funds associated with the certificates did not belong to it, were not held or controlled by it, and would not be available to a liquidator appointed to Reclaim; the certificates were used by a number of companies, not just ILG and PTG; winding up was a serious outcome, and should be used only as a last resort; Reclaim was solvent and it was not alleged that it had breached Spanish or Gibraltar law; there was no fraud by Reclaim, but rather unfair commercial practice by third parties using its product; the allegations made in England to the OFT were based on a minority of exaggerated complaints; only 30 or so complaints had been received by the Ministry of Consumer Affairs in Gibraltar; and dealing with consumer complaints inefficiently could not be a basis upon which to wind up the company; thousands of customers had been paid and thousands were still to be paid, so the winding up of the company would result in the collapse of the orderly winding up that Reclaim was undertaking itself, leading to more reputational risk to Gibraltar.

Held, granting the application:

(1) Reclaim would be wound up as it was not in the public interest of Gibraltar or its reputation as a finance centre to allow it to continue in operation. While it was true that no illegality could be attributed to Reclaim, there was only a limited number of complaints to the Ministry of Consumer Affairs, and the failure to deal with those complaints adequately could have been dealt with under consumer protection legislation rather than by winding up the company, Reclaim was part of a web of companies perpetrating a large timeshare scam as its certificates were overwhelmingly used by ILG and PTG and the three companies had overlapping owners and directors; it deliberately made the conditions of its certificates complicated in order to avoid or defeat claims by the unwary; was holding substantial sums of money which were contingently owed to clients; and the director of Reclaim did not know who the other corporate directors were, nor could he explain why inaccurate accounts had been filed with Companies House; it was unclear how any trustee/beneficiary relationship could have arisen between LAP and the certificate holders, and, in any event, Reclaim had a contractual obligation to repay certificate holders, and it was in the interests of those creditors that Reclaim be wound up and its affairs managed by a court-appointed liquidator rather than by those who had allowed the company to be used in the scam in the first place. Weight should be given to the fact that the application was brought by a government department with expertise and responsibility in seeking a winding-up order (para. 9; para. 22; paras. 26–29).

(2) The court would not decline jurisdiction. The petition was based primarily on the submission that Gibraltar's reputation might be adversely affected by allowing a company involved in a time-share scam to continue in operation, and the Gibraltar courts were in the best place to determine, on the evidence before it, whether the application had been made out (para. 23).

Case cited:
(1) *Walter L. Jacob & Co. Ltd.*, *Re* (1989), 5 BCC 244, *dicta* of Nicholls, L.J. applied.

Legislation construed:
Companies Act 1930, Schedule 10, para. 10: The relevant terms of this paragraph are set out at para. 1.

L. Baglietto and *D. Martinez* for the petitioner;
K. Azopardi, *Q.C.* and *N. Bottino* for Reclaim Ltd.

1 **DUDLEY**, **C.J.:** This is a petition by the Minister for Finance of Gibraltar ("the Minister") for a winding-up order in respect of Reclaim Ltd., pursuant to para. 10 of Schedule 10 and s.220(f) of the Companies Act. Paragraph 10 of Schedule 10 provides:

> "If in the case of a body corporate liable to be wound up under this Act it appears to the Minister responsible for finance from a report made by inspectors under paragraph 7, or from information or documents obtained under paragraphs 15 or 16 below, that it is expedient in the public interest that the body should be wound up, he may (unless the body is already being wound up by the court) present a petition for it to be so wound up if the court thinks it just and equitable for it to be so."

Section 220(f) is in the following terms:

> "A company may be wound up by the court if . . .
>
> (f) the court is of opinion that it is just and equitable that the company should be wound up."

The parties are agreed that for the petition to be granted it must be in the public interest and it must be just and equitable to do so.

The law

2 It is not in issue that the approach to be taken by the court when considering whether to make a winding-up order on a public interest petition is to be found in the judgment of Nicholls, L.J. in *Re Walter L. Jacob & Co. Ltd.* (1) who said (5 BCC at 250):

> ". . . [T]he court has regard to all the circumstances of the case as established by the material before the court at the hearing. Normally that will involve the court, faced with a petition presented by a creditor or a contributory, considering primarily the conflicting interests and wishes of the opposing parties to the petition, whether creditors or contributories or the company itself. The court will consider those matters which constitute reasons why the company

> should be wound up compulsorily, and those which constitute reasons why it should not. The court will carry out a balancing exercise, giving such weight to the various factors as is appropriate in the particular case."

And later, he continued (*ibid*., at 251):

> "In the case of 'public interest' petitioners, the court will, of course, carry out that evaluation with the assistance of evidence and submissions from the Secretary of State and from other parties. When doing so the court will take note that the source of the submissions that the company should be wound up is a government department charged by Parliament with wide-ranging responsibilities in relation to the affairs of companies. The department has considerable expertise in these matters and can be expected to act with a proper sense of responsibility when seeking a winding-up order. But the cogency of the submissions made on behalf of the Secretary of State will fall to be considered and tested in the same way as any other submissions. His submissions are not *ipso facto* endowed with such weight that those resisting a winding-up petition presented by him will find the scales loaded against them. At the end of the day the court must be able to identify for itself the aspect or aspects of public interest which, in the view of the court, would be promoted by making a winding-up order in the particular case."

Background

3 By three separate notices of appointment issued pursuant to para. 2(2)(e) of Schedule 10, the Minister being satisfied that there were circumstances suggesting that the affairs of Reclaim, Incentive Leisure Group Ltd. ("ILG") and Personal Travel Group Ltd. ("PTG") were being conducted in a manner detrimental to the reputation of Gibraltar as a financial centre or otherwise contrary to the public interest, appointed Mr. Edgar Lavarello ("the inspector") to carry out an investigation in accordance with the provisions of Schedule 10 and to produce a report. In the event, the report was made available to the Minister on January 31st, 2012.

4 It is apparent from the face of the report that the reason for the appointment of the inspector came about as a result of a formal request from the UK Office of Fair Trading ("the OFT") dated April 11th, 2011 seeking that the Ministry of Finance and/or the Ministry of Consumer Affairs consider undertaking investigations under Schedule 10 of the Companies Act into ILG, PTG and Reclaim. In the report, the inspector made the following findings and conclusions in respect of the three companies:

"**2 Summary of findings, conclusions and recommendations**

2.1 Findings

2.1.1 Incentive Leisure Group Ltd. ('ILG')

ILG marketed and sold holiday club memberships to consumers. The adverts (placed by third party intermediaries) gave the misleading impressions that consumers would be able to dispose of their timeshares and, consequently, no longer be liable to pay the maintenance charges. In reality, the club membership offered very little or no financial reward for consumers, and when they requested to rescind the contract within the 'cooling-off' period, they were not allowed to do so and were threatened with legal action.

Whilst the OFT considered that the company's activities breached consumer protection laws, it did not pursue an Enforcement Order against the same because at the time they issued proceedings, ILG was no longer trading; it had been placed in creditors' voluntary liquidation ('CVL'), thus the OFT believed that no further action was necessary.

2.1.2 Reclaim Ltd. ('RCL')

RCL operates the most complex structure in the scheme, thus special emphasis must be placed as to how creditors are to be treated in the event that the company is liquidated compulsorily. RCL would only provide a refund to the creditors who abide by the strict terms of its 'certificate.' Whilst not illegal, the OFT and the UK courts believed that RCL's scheme was prejudicial to consumers because of the highly complicated stages involved in pursuing a refund.

There is a clear contradiction between the available redemption fund (or 'consumers' fund,' for want of a better word) displayed by RGL on its website (£16m.) and the capital and reserves reflected in the company's last balance sheet (£1,000). There is strong evidence to suggest that RCL operates several bank accounts, both in Spain and Tangiers, Morocco. We are unaware of the accounts' liquidity. It is, therefore, paramount for a liquidator to investigate the company's available assets on a world-wide basis.

2.1.3 Personal Travel Group Ltd. ('PTG')

PTG offers consumers two different 'agency products,' a marketing agency agreement and a management agency agreement. Essentially, both products purportedly offer consumers the opportunity to act as PTG's agents, allowing them to charge a commission for every new customer introduced into the scheme. As with ILG, consumers were led to believe that they would be able to dispose of their timeshares. In reality, however, they joined what appeared to be a pyramid

scheme on payment of a substantial fee with little or no financial reward.

It is clear that consumers in the UK were aggrieved by PTG's scheme. It is equally evident that Gibraltar's reputation as a finance centre has been adversely affected due to the negative press releases after the OFT issued proceedings against the company and its directors/employees.

2.2 Conclusions

These companies have been used to entice consumers to invest in various products, with little or no financial reward for the consumer and, in the case of Reclaim Ltd., they continue to do so as the company is still active. It is clear that the companies' marketing strategies and conduct are prejudicial and unfair because of the highly complicated stages involved in pursuing a refund or making a profit. It is equally evident that the UK proceedings adversely affect Gibraltar's reputation as a finance centre; the UK press have portrayed a picture that Gibraltar, as a jurisdiction, aids and contributes to the companies' scheme, as corrupt individuals make the most of fiscal advantageous countries . . . The companies, however, have had very little presence in Gibraltar with their activities being conducted mainly from the UK, and the companies being effectively managed from Spain."

5 In January 2011 the inspector expressed the view—albeit somewhat nuanced—premised on the fact that the OFT did not pursue enforcement orders against ILG and that it had been placed into creditors' voluntary liquidation, that there was no need for the Minister to take positive action in respect of that company. In respect of PTG, although also placed into creditors' voluntary liquidation, he expressed the view that it would be desirable to make the winding up subject to the supervision of the court. In the event, that course of action was not pursued by the Minister.

6 In respect of Reclaim, the inspector expressed the view that as the company remained active, Gibraltar's image would continue to be adversely affected and he recommended that a petition should be presented to wind up the company on the basis of the statutory provisions now relied upon. The inspector went on to point out that in the event of Reclaim being wound up there would be three types of creditors: (i) those that had fully complied with Reclaim's terms and conditions, (ii) those that partly complied with the terms and conditions, and (iii) those that did not comply at all, and went on to express the view that all creditors should be treated the same. That is not a matter which requires determination at this stage.

7 The proceedings brought by the OFT in the English High Court bear some consideration. Those proceedings (to which Reclaim was not a party) were brought against 10 defendants, ILG and PTG being the first and second, and a Mr. Keith Barker being among the other defendants. According to the witness statement of Mr. Jason Freeman, the Legal Director in the Consumer Markets Group at the OFT, which was relied upon in the English proceedings and which is part of an appendix to the inspector's report, a Mr. Garry Leigh would have, but for his death in a traffic incident, also have been a defendant. In those proceedings, the OFT sought enforcement orders to prevent the defendants from continuing certain unlawful practices which were summarized in paras. 2 and 3 of the OFT's particulars of claim:

> "2 In summary, the defendants use unfair commercial practices, prohibited by the Consumer Protection from Unfair Trading Regulations ('CPRs') to induce consumers who wish to sell their timeshares to attend meetings with staff acting on behalf of the first and second defendants [ILG and PTG]. At those meetings the relevant staff use unfair commercial practices, including practices banned in all circumstances by the CPRs, to persuade consumers that the only way to dispose of their time share is for them to purchase the first or second defendant's 'product' (a 'holiday club' or a 'home-based holiday agency'), at a cost of between £7,000 and £16,000. As an incentive to purchase one of these 'products,' the first and second defendants, through their staff, falsely and/or misleadingly claim that the consumer will be able to get the value of their time share back after 51 months by making a claim against a 'reclaim certificate' that they will be given. The contracts do not include a seven day 'cooling-off' period, and subsequent attempts by consumers to cancel the contracts are refused, although a price reduction is frequently given. Consumers subsequently discover that the first and second defendants have not taken over ownership of their timeshares, that they remain liable for maintenance fees, and that the reclaim certificate does not have the value claimed for it.
>
> 3 As a consequence individual consumers have paid and continue to pay the first and second defendants large sums of money on the basis of false or misleading statements, for which they get no or minimal benefit."

8 In consent orders entered in the English High Court on April 2nd, 2012, PTG and Keith Barker amongst others were ordered, *inter alia*, not to publish or disseminate any statement likely to give the impression that the reclaim certificate was free or provided part payment of the consumer's time share or that the consumer would be able to recover a significant amount of the sum stated on the certificate.

The Reclaim product

9 The Reclaim product is capable of being viewed as a marketing tool in which a consumer acquiring a product from a vendor is as part of that transaction given a voucher issued by Reclaim which, provided certain conditions are met, allows for a redemption of part of the moneys paid. The vendor transfers 12.5% of the purchase price to Reclaim, of which Reclaim retains 2.5% for itself, and, in accordance with cl. 5 of the terms and conditions of the certificate, is required to place the remaining 10% at an international bank "under the supervision of an independent board of trustees," for the purposes of paying out to qualifying certificate holders.

10 On the face of the certificate, the amount entered as being the maximum payable is the full purchase price paid to the third party. However, cl. 6 of the terms and conditions of the certificate provides:

> "The amount available for redemption by qualifying certificate holders will be calculated by applying the original amount placed at the bank . . . to the number of qualifying redemption claims made at the relevant redemption date. Qualifying certificate holders will receive the benefit from the amount in the fund relating to non-qualifying certificate holders. Although Reclaim Ltd. makes no promise nor gives any undertaking to redeem the maximum amount as shown on the certificate overleaf Reclaim Ltd. guarantees that the minimum amount each successful claimant will receive will be 10% of the maximum amount shown on the Reclaim certificate."

For the Minister it is submitted that, in order to provide a refund, Reclaim required consumers to abide by strict and convoluted terms which were confusing and prejudicial to the consumer because of the highly complicated stages involved in pursuing the claim for a refund, in effect denying most consumers a refund. However, all that a Reclaim certificate holder must do is send to Reclaim the registration section of the certificate, by certified post, within 14 days of the date of issue. Thereafter, a certificate holder does not have to do anything else until 28 days before the expiry of the 51-month period from the date of issue of the certificate. At that stage, to qualify for payment, the certificate holder is required to send the original certificate, together with a copy of the original purchase invoice or proof of purchase, and banking details. At least in theory, within 30 days Reclaim has to acknowledge receipt and thereafter payment is effected within a further period of no more than 150 days. In my view, it is not a complex process but one which, because it involves strict time limits spread over some four years, is aimed at avoiding or defeating possible claims by the unwary.

11 At para. 4.4 of his report, the inspector asserts that Reclaim's scheme "has been adjudged to be unfair and prejudicial for consumers by the UK courts." That appears be an inaccurate statement. The consent orders

entered in the English High Court on April 2nd, 2012 appear to determine that representations made in respect of the scheme were unfair, but not that the scheme itself was illegal or unfair. The OFT wrote to Reclaim on July 14th, 2011, making certain allegations of unfair practices and requiring that certain undertakings be given, failing which it would consider making an application to the English High Court. By letter dated July 9th, 2011, Reclaim provided a substantive reply in which it essentially refuted the allegations made against it and indicated that it was unable to give the undertakings proposed. It is apparent that thereafter the OFT did not institute proceedings in the English High Court. The only adjudication made against Reclaim is one by the English Advertising Standards Authority dated January 19th, 2011, which related to a claim in a brochure that a Reclaim certificate would pay back up to 95% of its face value, and, given that the scheme had never resulted in such an outcome, the Authority determined that the advertisement was misleading.

12 It is not in issue that the last Reclaim certificates were issued in 2011, and that it is only clients with certificates issued between 2008–2011 that remain entitled to seek payment. According to Mr. Malcolm Willis, a director of Reclaim whose evidence in this regard was not materially challenged (although for reasons I shall turn to later the weight I can properly ascribe to his evidence is somewhat limited), Reclaim has paid 10,842 certificate holders sums which total in excess of €17m., and there are a further 5,032 certificate holders who are potentially entitled to payment.

13 It is Reclaim's position that the funds are neither held by nor belong to it, that Reclaim has no control and is not a signatory to the bank accounts or any of the administrative or investment arrangements in respect of those funds, rather, that the funds are held by its Spanish fiduciary, Law-Abogados Patrimonial SL ("LAP"). That is also the position advanced by Mr. Luis Fernandez, a Spanish lawyer and director of LAP, according to whom the funds are held upon trust "solely for the benefit of claimant Reclaim clients, and belong to these clients," and he does not accept that these funds would be available to a liquidator appointed over Reclaim. In support of that proposition, Mr. Fernandez relies upon an agreement dated January 18th, 2000 between Reclaim and himself. LAP appears to have only come into the equation in 2002, when that the Spanish tax authorities required that a specific vehicle hold the funds instead of their being held in Mr. Fernandez's client account. There is no documentary evidence of a novation agreement whereby LAP acquired the obligations under the January 18th, 2000 agreement. The matter does not fall to be determined, but I am of the view that the relationship which exists between Reclaim and qualifying certificate holders is a contractual one in which Reclaim has a contingent liability

which arises upon strict compliance with the refund process, and consequently I am unclear as to the basis upon which Mr. Fernandez makes the assertion that there is a trustee/beneficiary relationship between LAP and the certificate holders, or how that entitles LAP to withhold transferring the moneys to a liquidator appointed over Reclaim.

The corporate history of Reclaim

14 Given that in large measure the possible nexus between ILG, PTG and Reclaim is central to the petition, the corporate history of Reclaim bears some detailed consideration. Reclaim was incorporated in March 1999. According to Reclaim's company profile—available from Companies House—it has an authorized and issued share capital of £1,000, divided into 900 voting shares of £1 each, and 100 non-voting shares of £1 each. It is instructive that under "observations" in the company profile, the following is to be found: "The accounts of the company which show a figure of £1,000 do not reflect the financial statements quoted on the company's website."

15 Reclaim's records at Companies House show that 60 non-voting shares are held by the Isabella Corporation, a Belize limited company which, according to Malcolm Willis, is beneficially owned by him, with the remaining 940 shares recorded as held by a Seychelles company, Meadowbank Nominees Ltd. ("Meadowbank").

16 The Isabella Corporation acquired 50 shares in March 2004 and a further 10 in September 2004. For its part, Meadowbank, whose name suggests it provides nominee services, acquired the shares in May 2007. Although not registered with Companies House, according to Reclaim's corporate register of transfers and register of members and share ledger on February 24th, 2009, Meadowbank transferred 900 voting and 40 non-voting shares to Keith Barker and on that same day Keith Barker transferred 504 voting shares and 22 non-voting shares to Garry Leigh. Thereafter, on March 16th, 2010, the Isabella Corporation transferred its 60 non-voting shares to Malcolm Willis. The upshot is that, according to Reclaim's corporate records, the interests held in the company by Stuart Barker, the late Garry Leigh and Malcolm Willis are a 42%, 52% and 6% stake respectively.

17 As regards Reclaim's directors, the current position appears to be that Malcolm Willis, who was appointed on April 20th, 1999, remains a director. The other directors are ABK Nominees Ltd., ABM Nominees Ltd. and KNJ Nominees Ltd., all three British Virgin Islands companies with the same address and appointed on June 17th, 2008. However, a review of past directors bears some consideration. At the time that Malcolm Willis was appointed there were two other appointments, Mr. Stephen James Granville, who resigned on May 8th, 2002, and, of more

significance for present purposes, Keith Barker, who resigned on February 25th, 2011. It is noteworthy that by a resolution dated February 13th, 2007, Malcolm Willis, purportedly as sole director of Reclaim, resolved that a power of attorney be issued by the company in favour of Keith Barker to operate Reclaim's bank accounts in Morocco.

18 It is also useful to compare Reclaim's corporate history with that of ILG and PTG. ILG's company profile shows that, prior to its liquidation, Keith Barker held 30% of the issued share capital with the late Garry Leigh holding the balance, both of them having been appointed directors on March 27th, 2001. It is also of some significance that ABK Nominees Ltd., ABM Nominees Ltd. and KNJ Nominees Ltd. were subsequently also appointed directors of ILG. Similarly, PTG's company profile shows that of the 2,000 issued shares 1,400 were held by the late Garry Leigh with the remaining 600 being held by Keith Barker. The company profile shows that Keith Barker was a director of PTG from March 24th, 2009 to May 9th, 2011 and that KNJ Nominees Ltd. was a director from November 30th, 2010 to May 9th, 2011.

Malcolm Willis's evidence in relation to ownership and control of Reclaim

19 At the original hearing of the petition, I adjourned the matter to allow Reclaim to supplement its evidence, *inter alia*, in relation to its shareholding, the beneficial interest in the shareholding, and the management and control of the company. I also invited Reclaim to supplement its evidence in respect of its contractual arrangements with companies other than ILG and PTG. I further indicated that a director of Reclaim could, if he so wished, give oral evidence. Supplemental evidence was filed and Mr. Willis gave evidence under oath.

20 When cross-examined, Mr. Willis denied that he had a previous conviction for theft. However, on being shown a certificate of conviction issued by the Crown Court at Bodmin, he accepted that in 1987 he was tried and convicted upon indictment of one count of theft and sentenced to 15 months' imprisonment. He went on to say that on another occasion he had been sentenced to 2 years' imprisonment also for theft. It further emerged that Mr. Willis had been declared bankrupt in the United Kingdom but, somewhat surprisingly, could not recall with any degree of accuracy when he had been discharged. His failure to give an honest answer until confronted with the certificate of conviction clearly calls into question his credibility as a witness and consequently I view his evidence with circumspection.

21 Mr. Willis's evidence, as contained in his witness statements, was that before joining Reclaim he worked as an accountant for a holiday company; he became a director of Reclaim in 1999; on joining the

company he was given 50 non-voting shares; he received a further 10 shares when one of the original directors—Mr. Stephen Granville—left Reclaim in early 2000; and for tax reasons he held his interest through the Isabella Corp. In relation to Keith Barker and Garry Leigh, it was his understanding that they purchased the Reclaim shares in 2009, for sums unknown to him, "to safeguard their own customers who were in possession of Reclaim certificates due to the difficulties they were experiencing with the authorities in the United Kingdom." The explanation given in respect of Keith Barker's appointment as a director as early as 1999 was that he was a "technical specialist and was involved for IT purposes, this is the extent of my knowledge." In his oral evidence, Mr. Willis failed to provide any cogent explanation as to why control of Reclaim by Keith Barker and Garry Leigh would have protected their customers in relation to the difficulties being experienced by them with their other corporate vehicles. Similarly, he failed to develop the explanation cogently in relation to Keith Barker's appointment as a director from 1999 to 2011. To compound matters, Mr. Willis was unable to provide any information as to who the alter egos of the present corporate directors are, with whom it appears he has had no dealings in the management of Reclaim. Similarly, despite having been a director since the inception of the company, he was unable to say for whose benefit Meadowbank had held the shares. The *lacunae* in Mr. Willis's knowledge of Reclaim is simply not credible and the inference I draw is that it is feigned ignorance aimed exclusively at distancing the company from Keith Barker and Garry Leigh.

22 The unchallenged evidence advanced by Reclaim is that since its incorporation, some 184 companies have contracted with it to use the Reclaim product. However, a review of the statistics shows that not all used the Reclaim product, and others used it sparingly. Following the adjourned hearing, Mr. Willis's second witness statement provided further information from which the volume of certificates issued by ILG and PTG as a percentage of all certificates issued can be gleaned. Although the material dates back to 1999, for present purposes it is only necessary to consider the figures from 2007:

Year	**2007**	**2008**	**2009**	**2010**	**2011**
Total number of certificates	1,723	3,688	2,489	1,566	116
Certificates issued by ILG	987	2,865	2,323	1,068	0
Certificates issued by PTG	0	0	0	412	97
ILG/PTG % of total	57%	77%	93%	94%	83%

It is apparent that as from 2008 the Reclaim product was overwhelmingly used by ILG and PTG.

Grounds of opposition

23 On behalf of Reclaim, a jurisdictional point is raised, albeit not pressed. Essentially, it is said that because Reclaim is solvent, Insolvency Regulation 1346/2000 has no applicability. That jurisdiction depends upon E.C. Regulation 44/2001, which would give the Gibraltar courts exclusive jurisdiction as the company has its seat in Gibraltar but that given the petition is made on public interest grounds the court could decline jurisdiction on the basis of *forum non conveniens*. That proposition of law is certainly supported by the learned authors of Dicey, Morris & Collins, 2 *The Conflict of Laws*, 15th ed., para. 30–039 (2012). It is suggested that the most convenient forum would be Spain in that the company has operated from there and that the moneys and investments held to repay certificate holders are also managed from Spain. I am of the view that this court should not decline jurisdiction. At the heart of the petition is the submission that the reputation of Gibraltar could be adversely affected by the continued operation of this company and this court is best placed to make a determination as to whether or not on the evidence before it the application is made out.

24 Reclaim opposes the petition on the merits on various grounds, and although advanced in some detail, they can be summarized as follows: the relief sought is very serious and final and therefore weighty considerations should apply before the court grants this remedy of last resort; Reclaim is not insolvent and there are no allegations of breaches of Gibraltar law and, given that it operates from Spain, it is also relevant that there are no allegations of breaches of Spanish law; to the extent that breaches of English law are alleged it is said that they are based on a minority of exaggerated complaints or relate to acts of third parties; it is not a case of fraud by Reclaim, but rather a case of unfair commercial practice by third parties with the standard set by a regulator in another jurisdiction and there is no evidence of local complaints or allegations of unfair commercial practices in Gibraltar; and the approximately 30 complaints received by the Ministry of Consumer Affairs in Gibraltar during the period 2003–2013 are *de minimis*; and that inefficiency in dealing with consumer complaints cannot be a basis upon which to wind up the company. It is also said that given that thousands of customers have been paid and that thousands are still to be paid, the winding up of the company would result in the collapse of the orderly winding up of the business which is being undertaken by Reclaim itself and that it is the grant of the petition which would bring deep dissatisfaction to clients and consequently the reputational risk to Gibraltar.

25 I also cannot ignore that the majority of the Reclaim certificates issued by ILG and PTG date back to 2007–2010; that the inspector was appointed in October 2011 and reported to the Minister on January 31st, 2012, but the petition was thereafter presented on December 18th, 2012.

In the context of a public interest petition and absent an explanation, the delay in its presentation suggests that the "public interest" concerns were somewhat limited.

Conclusion

26 There are undoubtedly features in this case which militate towards the dismissal of the petition, in particular the absence of illegality which can be attributed to Reclaim and, adopting a somewhat insular perspective, the limited number of complaints received by the Ministry of Consumer Affairs. There is also merit in the submission that failures to deal with consumer complaints adequately could have been capable of being tackled with the instruments available in consumer protection legislation rather than by winding up the company.

27 Whilst on balance I am of the view that Keith Barker held a beneficial interest through Meadowbank, in any event, at the very latest, Keith Barker and Garry Leigh acquired an interest in Reclaim in 2009, at a time when Reclaim was almost exclusively providing its certificates through ILG and later PTG. The explanation that they did so to protect the clients from the problems they were encountering in the United Kingdom (presumably with ILG and PTG) is disingenuous given that they acquired the shares in February 2009, and the particulars of claim in the English proceedings were settled in December 2010, and that no explanation whatsoever is given as to how their acquisition of the shares served to protect clients. Therefore, although no illegality can be attributed to Reclaim itself, what cannot be ignored is that Reclaim was part of a web of companies which were used to sell a product with no inherent value whatsoever and which, adopting Mr. Baglietto's language, was a "massive timeshare scam."

28 I also cannot ignore that Reclaim is a company holding substantial sums of money which are contingently owed to clients and, crucially, that Mr. Willis neither knows who his fellow directors are, nor has a proper explanation been given as to why palpably inaccurate accounts have been filed with Companies House. Whether the moneys are sufficiently protected because they are held by LAP is a matter capable of debate, but one which I find unnecessary to determine. Irrespective of any protection which LAP may afford, the contractual obligation to repay certificate holders is Reclaim's, and it must be in the interest of those potential creditors that the affairs of Reclaim be wound up and managed by a court-appointed liquidator rather than by those who have allowed the company to be used in a timeshare scam.

29 For these reasons and irrespective of any delay in presenting the petition, it is not in the public interest of Gibraltar and in particular its reputation as a finance centre that Reclaim be allowed to continue to

operate and it is just and equitable that it be wound up by the court under the provisions of the Companies Act.

Application granted.
