
[2013–14 Gib LR 389]

VISONE and CAB AIR SRL v. LUONGO, CALCAGNI, CATHEDRAL SQUARE HOLDINGS (GIBRALTAR) LIMITED and RE & PROPERTY RESOURCES LIMITED

SUPREME COURT (Prescott, J.): January 22nd, 2014

Civil Procedure—joinder of parties—third parties—liquidator not joined to action between company and creditor for sole purpose of being heard as party prospectively affected by order—selective and restrictive joinder not allowed under CPR, r.19.4(2), but only joinder as party to proceedings proper

The claimants sought a declaration that a contract entered into between the first claimant and the first defendant was void, and that all assets transferred under it should be returned.

In July 2009, the first claimant and the first defendant entered into a contract, in Italy, to set up an insurance company, Hill Insurance Ltd., which would be incorporated in Gibraltar. The first defendant was to capitalize Hill, which he did, by way of bonds which turned out to be false. The first defendant admitted that false bonds had been put in place, but denied that this had been done by him. As a result, Hill went into liquidation.

In October 2012, the claimants commenced the present proceedings in Gibraltar seeking a declaration that the contract be rescinded, set aside and declared null and void. As a result, orders for the preservation of trust property and worldwide freezing injunctions were made against all four defendants which included various disclosure requirements. In January 2013, Mr. Caruana was appointed as liquidator of Hill. The defendants having failed to comply with those disclosure requirements, the claimants' application for an unless order was therefore granted in May 2013; judgment would be entered against the first and second defendants unless they complied with the disclosure requirements within 28 days. That

28-day window expired, and judgment against the defendants was entered by the Registrar on July 12th, 2013.

The present proceedings concerned three separate applications: (a) an application by the liquidator to be joined to the proceedings in order to apply to vary or set aside the unless order; (b) an application by the claimants for summary judgment against the first, second and fourth defendants; and (c) an application by the first defendant to vary the terms of the freezing order.

Application by the liquidator to be joined to the proceedings for limited purposes

The liquidator requested (i) a stay of the unless order; (ii) joinder to the proceedings to be heard as a party prospectively affected by the unless order; and (iii) that the unless order be varied or revoked on the basis that it was granted in error and made on the basis of erroneous information, and/or without proper or full consideration of the relevant legal principles of equitable remedies and/or without consideration of the effect on proprietary interests of third parties. He submitted that he should be joined either (i) under the Civil Procedure Rules, r.19.2(2)(b), which allowed the court to order joinder of a new party to resolve an issue between that party and an existing party to the proceedings; or (ii) in the alternative, under CPR, r.40.9, which provided that a third party "directly affected" by an order could apply to have it varied or revoked; or, in the further alternative, that the court should intervene of its own initiative under CPR, r.3.1. He submitted that he was directly affected in that the first claimant, by order of the court, had acquired property in preference to Hill's creditors. The first and second defendants were bound as constructive trustees to transfer money to the claimants in preference to any claims from Hill, and seeking an account of profits from Hill demonstrated that the claimants had a competing claim with Hill.

The liquidator advanced two grounds on which the unless order should be varied or set aside, namely (i) the irregularity of the hearing and the unless order, as the court had not had the benefit of full argument, the disproportionate nature of the order, its contravention of the CPR, its procedural incorrectness and the inappropriate nature of the sanction proposed; and (ii) the illegality of the original contract to form and capitalize Hill, as it fraudulently misled the Financial Services Commission as to the size of the first claimant's interest in Hill.

The first claimant submitted that he was not trying to enforce judgments against moneys received from Hill but rather on assets transferred by him to the defendants, assets relating to the initial contract, not Hill. He also denied that the original contract was illegal or based on an illegal purpose.

Application by the claimants for summary judgment

The claimants had applied for summary judgment against the first, second and fourth defendants before the judgment against the first and second defendants had been entered. In the event that the liquidator's

applications failed and the unless order and judgment stood, the application would only be pursued against the fourth defendant.

Application to vary the terms of the freezing order

The first defendant requested that the hearing of his application be adjourned as he was neither present nor represented before the court due to an ongoing medical condition and difficulty in securing legal representation. He also requested additional time to consider his position in light of the liquidator's intervention, and sought to have the liquidator's application for joinder adjourned.

Held, making the following orders:

Application by the liquidator to be joined to the proceedings for limited purposes

(1) The liquidator would not be joined as a party to the action. He did not wish to become a party to the proceedings proper, but rather to be joined for the sole purpose of being heard as a party prospectively affected by the unless order. In the absence of any authority for the proposition that r.19.4(2) allowed for such selective and restrictive joinder, its natural meaning—that the rule related only to interveners wishing to be joined as parties to the proceedings proper—meant that that rule could not be used for the purpose the liquidator proposed (para. 16).

(2) Alternatively, (i) if the court's interpretation of CPR, r.19.4 were incorrect and it did allow for selective and restrictive joinder, or (ii) under CPR, r.40.9 which provided that parties not joined but "directly affected" by an order could apply to have it revoked or set aside, the liquidator was not sufficiently affected by the judgment to apply to have it set aside or varied. He was required to establish, on the balance of probabilities, that he would be "directly affected" by the order he sought to have varied or revoked. The unless order declared the first and second defendants to be constructive trustees for the claimants in respect of certain assets the claimants alleged they transferred to the first and second defendants. However, the order did not make declarations of beneficial ownership which were binding on third parties. Indeed, the liquidator had already been considering a separate action against the first and second defendants (paras. 17–21).

(3) In the further alternative, if the liquidator were sufficiently affected to apply to have it varied or set aside, then the grounds on which the liquidator applied to have the unless order varied or set aside would fail:

(i) The court had had the assistance of full argument at the hearing at which the unless order was granted. The liquidator, despite only finding out about the hearing the day before, had been well aware for some time of all the issues concerning potential conflicts between the directors and creditors of Hill and the application for an unless order. He did not raise at the original hearing, even in summary, the issues he now raised, and he took no issue at that time with the appropriateness of the order. The court

considered all relevant factors, principles, had before it detailed and substantial evidence, and it was not suggested that any injustice was suffered by the defendants (paras. 25–27).

(ii) While it was true that claims based on illegal contracts were barred, it had not been established that the original contract was in fact illegal (para. 30).

(4) Further, the court would not make an order of its own initiative. The powers in CPR, r.3.1 should be used sparingly and only in exceptional circumstances where the interests of justice demanded it and there was a compelling reason to do so. That was not the case in these proceedings (para. 31).

Application to vary the terms of the freezing order

(5) The first defendant's request to adjourn the hearing of his application to vary the terms of the freezing order would be granted, notwithstanding the history of requests for adjournments by the first and second defendants. The freezing order would prevent the dissipation of assets in the meantime. The application to adjourn the liquidator's application for joinder would not be allowed, however, as it was unclear why such an adjournment was requested, or even how long it ought to be, and without a clear time-frame and reason the court would be reluctant to grant one (paras. 10–11).

Application by the claimants for summary judgment

(6) The court would hear further submissions on the claimants' application for summary judgment. In the event that the liquidator's applications failed, the claimants' application for summary judgment would only be pursued against the fourth defendant and the court had not been addressed on that matter (para. 33).

Cases cited:

(1) *Forcelux Ltd.* v. *Binnie*, [2009] 5 Costs L.R. 825; [2010] H.L.R. 20; [2009] EWCA Civ 1077, referred to.
(2) *Hackney L.B.C.* v. *Findlay*, [2011] P.T.S.R. 1356; [2011] C.P. Rep. 18; [2011] H.L.R. 15; [2011] EWCA Civ 8, referred to.
(3) *Marcan Shipping (London) Ltd.* v. *Kefalas*, [2007] 1 W.L.R. 1864; [2007] 3 All E.R. 365; [2007] EWCA Civ 463, referred to.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.3: The relevant terms of this rule are set out at para. 22.
r.19: The relevant terms of this rule are set out at para. 14.
r.40.9: The relevant terms of this rule are set out at para. 17.

K. Azopardi, Q.C. and *A. Lugnani* for the claimants;
G. Davis, Q.C., *E. Phillips* and *J. Montado* for the applicant to be joined.

1 **PRESCOTT, J.:** There are three applications before the court. The first is an application by the first defendant, dated April 18th, 2013, to vary the terms of a freezing order granted by this court on October 17th, 2012. The second is an application by the claimants, dated June 10th, 2013, for summary judgment against the first, second and fourth defendants. The third is an amalgamation of two applications, dated June 19th, 2013 and September 13th, 2013, both made by Joseph Caruana as liquidator of Hill Insurance Co. Ltd. ("the liquidator") to be joined to the proceedings for the purpose of applying to vary or set aside orders of this court dated May 23rd, 2013, and July 12th, 2013.

Application of April 18th, 2013

2 The first defendant makes no appearance before this court, nor is he represented. By email dated September 12th, 2013, addressed to this court and copied to the solicitors for the claimants, the solicitors for the liquidator and his own solicitors, the first defendant indicated that he had discharged his solicitors from their retainer, that he had been unable to secure legal representation for this action and that he was unable to attend in person due to an undisclosed ongoing medical condition. Messrs. Bullock & Co., who to date had been representing the first defendant, confirmed that they had been discharged by him and were thereupon released by the court. The first defendant gave the address of his lawyer in Rome as his address for service.

3 The aforesaid email of September 12th, 2013 is headed "Application to adjourn the hearing of September 19th, 2013," and it is apparent that the first defendant sought that his application to vary the freezing order be adjourned on the following basis:

> "I am aware that September 19th, 2013 was set as a hearing date to last two days to consider my application, to vary the said order, and seek security for costs from the claimant who is not based in the jurisdiction and has failed to provide clarity as to his financial resources in maintaining this action. I am also aware that Joseph Caruana (the liquidator of Hill Insurance) applied to be joined as a party to the proceedings and the application was to be heard on July 25th, 2013. I do not know the outcome of such proceedings.
>
> In all the circumstances I require time to consider my position, particularly in the light of the intervention of the liquidator in the proceedings. I am seeking an adjournment of the hearing on September 19th in order to be in a position to get my arguments and my evidence together and present my applications."

It is not as clear whether the first defendant likewise sought to have the liquidator's application for joinder adjourned. He states:

> "I am not a lawyer at all but if the liquidator is right that the liquidation estate has precedence, I would want this honourable court to decide that issue. I note the liquidator, at that stage, was seeking a variation of the order or to appeal against it. That should be heard at the same time."

In determining the request for the adjournment, it is necessary to consider some of the background to this case, and for that, I draw liberally from the skeleton of Mr. Azopardi and from my own ruling of April 11th, 2013.

4 On October 11th, 2012, a claim form was issued, seeking *inter alia* a declaration from this court that a contract entered into between the first claimant and the first defendant, dated July 30th, 2009, be rescinded, set aside and declared null and void. Under the terms of that contract, a licensed insurance company, Hill Insurance Co. Ltd. was set up in Gibraltar in order to conduct insurance business. The directors of Hill were the first claimant, and the first and second defendants. The claim advanced by the claimants in the claim form is that the first defendant failed to capitalize Hill as required under the terms of the contract and, as a result, the claimants should, *inter alia*, have returned to them the assets which they transferred to the first and second defendants in consideration of such capitalization. It is alleged by the claimants that the failure to capitalize Hill was because false bonds were put in place by the first defendant. Whilst the first defendant accepts that false bonds may have been put in place, he alleges it was by a third party or parties. In any event, as a result of the lack of capitalization, Hill collapsed. On January 24th, 2013, Joseph Caruana was appointed liquidator of Hill.

5 The freezing order included various disclosure provisions, and since its inception there have been a number of applications and hearings before this court. The return date on the freezing order was set for November 23rd, 2012, and although Messrs. Bullock & Co. had previously indicated in correspondence to the claimant's solicitors that they would represent all four defendants, they entered an appearance only in respect of the first and second defendants, and represented only them on the return date. The third defendant was represented through its director, David Frier. At that hearing, it was ordered that the freezing order remain in place, and the first and second defendants were given additional time within which to comply with the provisions for disclosure.

6 On December 7th, 2012, the first and second defendants filed an application seeking a declaration that the court had no jurisdiction to entertain the claimant's claim or, in the alternative, that the court should decline to exercise any jurisdiction and set aside the claim form, discharge the freezing order, and generally stay the proceedings. Despite the court having determined that the application was out of time, and that there had been no application for an extension of time, it nevertheless proceeded to

hear the application. The matter was set down for hearing on January 22nd, 2013, but on that day an adjournment was requested by counsel for the first and second defendants on the grounds that because of a conflict of interest between the first and second defendants, counsel was in a position to represent only the first defendant. The adjournment was granted and the matter was heard on March 14th, 2013. At that hearing, the second defendant was unrepresented, and by letter to the court of January 31st, 2013, made no reference to a conflict of interest between herself and the first defendant, but instead, rather curiously perhaps, adopted all the evidence and submissions of the first defendant without exception or condition. On April 11th, 2013, the court dismissed that application.

7 Thereafter, it was incumbent upon the defendants to file defences within 28 days. They failed to do this, and the claimants filed applications, *inter alia*, for judgment in default, which applications were set down for May 23rd, 2013. At the eleventh hour, Messrs. Bullock & Co., on behalf of the first defendant, but also on behalf of the third and fourth defendants (which supposedly they did not represent), filed defences. The third defendant has since through its liquidator rejected that defence, and filed another in its place. On May 22nd, 2013, the second defendant in person filed a defence in materially the same terms as that of the first defendant. The defences denied fraud or liability but, *inter alia*, made admissions that moneys are held on constructive trust.

8 In light of the defences filed, the claimants abandoned their applications for judgment in default and instead pursued the application for an unless order on the grounds of non-compliance with the disclosure requirements in the freezing order. The second defendant has failed to file any affidavit in respect of disclosure. The first defendant has filed two statements but has failed to provide full disclosure of his assets outside Gibraltar, blaming his non-compliance on third parties.

9 The hearing of the application for the unless order came before the court on May 23rd, 2013. For the liquidator, it is said that his legal advisers became aware of that hearing the day before. In any event, counsel for the liquidator appeared, as did counsel for the third defendant, Sir Peter Caruana, Q.C. and Mr. O'Sullivan of Messrs. Bullock & Co. for the first defendant. The second defendant was not represented but was aware of the proceedings. The fourth defendant was not represented and made no appearance. On May 23rd, 2013, the court granted an unless order in terms that unless the first and second defendants complied with the relevant provisions of the freezing order within 28 days, judgment be entered against them. On June 19th, 2013, within the 28-day period identified in the unless order, the liquidator lodged an application requesting, *inter alia*, that he be joined to the proceedings and requesting that the unless order of May 23rd, 2013 be varied or revoked. The application was set down to be heard on July 25th, 2013. On July 10th, 2013, the claimants

applied for judgment to be entered on the grounds of non-compliance with the order of the May 23rd, 2013. On July 12th, 2013, judgment was entered by the Registrar. In the meantime, due to diary requirements the hearing of July 25th, 2013 was vacated and set down for September 19th, 2013 which was the same date as the return date on the applications set out at para. 1, above. On September 16th, 2013, the liquidator lodged a further application requesting, *inter alia*, that the order of the 12th July 2013 be varied or revoked.

10 Notwithstanding the history of requests for adjournments by the first and/or second defendants, I am minded to allow the adjournment of the application for variation of the freezing order to give the first defendant the opportunity once again to put his house in order in so far as legal representation goes. Such assets and funds as are caught by the freezing order are protected, and at this stage I can see no material prejudice which would be caused to the claimants by the adjournment of this application.

11 In relation to the application by the liquidator, he is eager to progress it, as are the claimants, and I am reluctant to adjourn this without an indication of the length of adjournment proposed by the first defendant, or indeed whether one is proposed at all. I therefore proceed to deal with the liquidator's applications.

Applications of June 19th and September 16th, 2013

12 In his application of June 19th, 2013, the liquidator seeks, *inter alia*:

(i) a stay of the order of May 23rd, 2013 pending final determination of the application;

(ii) joinder of the liquidator to be heard as a party prospectively affected by the judgment; and

(iii) that the order of May 23rd, 2013 be varied or revoked on the basis that it was granted in error and/or on the basis of erroneous information and/or without proper or full consideration of the legal principles on which equitable remedies ought to be granted and/or without the court considering the proprietary interests of third parties which might be affected.

13 The second application, that of September 16th, 2013, seeks that the relief sought in the application of June 19th, 2013 be extended in respect of the order of 12th July 2013. In addition, the second application notice seeks that the order of July 12th, 2013 be varied or set aside pursuant to CPR, r.40.9.

Joinder

14 The relevant provisions of CPR, r.19 provide:

"19.2

(2) The court may order a person to be added as a new party if—

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

. . .

19.4

(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

(2) An application for permission under paragraph (1) may be made by—

. . .

(b) a person who wishes to become a party."

15 It is evident from the application notice that the liquidator relies upon r.19.2(2)(b). Before I can deal with whether it is desirable to add a new party, I need to turn to the enabling provision—that is r.19.4(2)(b). That permits application for permission to be made by "a person who wishes to become a party." The somewhat curious situation the court is faced with in respect of this application is that, as I understand it, the liquidator does not wish to become a party to the proceedings proper. Substantive joinder is not sought. He wishes to be joined for the sole and narrow purpose of being "heard as a party prospectively affected by the judgment, any equitable relief and/or any tracing exercise." He does not claim there is an issue involving him and an existing party which is connected to the matters in dispute in the substantive proceedings. Had the liquidator so felt, he could have—and presumably would have—applied to be joined the moment Hill went into liquidation, but that is not so. In fact, there has been no application to be joined, either from Hill, prior to liquidation, or by the liquidator, post liquidation. The liquidator has expressed no interest in being joined for the purposes of the substantive claim or in respect of any of the satellite applications that have arisen under that umbrella. The purpose of this application for joinder is exclusively for the purpose of seeking to set aside or vary an order or orders.

16 No authority is relied upon in support of the proposition that CPR, r.19.4(2) allows for selective and restrictive joinder. In my view, upon its ordinary and natural meaning, the rule relates exclusively to the situation

where an intervener wishes to become a party to the action proper and not for a restricted collateral purpose. In the absence of any authority to the contrary, I find that rule 19.4 is not intended to be used as the liquidator proposes. Although it is therefore unnecessary to do so, should I be wrong in my interpretation of CPR, r.19.4, I shall consider whether the requirements of CPR, r.19.2 are met and joinder pursuant to CPR, r.19.2(2)(b) is appropriate, but shall do so in the context of the liquidator's application to have the order of July 12th, 2013 set aside or varied, pursuant to CPR, r.40.9.

17 CPR, r.40.9 provides that "a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." The prerequisite to the liquidator's application to have the order of July 12th, 2013 varied or set aside is that he establish, on a balance of probabilities, that he is directly affected by it. Mr. Davis rightly points out that there is little guidance in case law or the *White Book 2014* in relation to when a non-party will be "directly affected." It is not in dispute that the court has discretion which it should exercise according to the particular circumstances of each case. I have only been addressed briefly upon the relevance of CPR, r.40.9, but given that the reasons in support of joinder pursuant to CPR, r.19 are the same, I shall consider them together.

18 The liquidator's reasons for requesting joinder are, in essence, that by order of the court, the first claimant has acquired a proprietary interest in preference to the creditors of Hill, and that this might impact negatively on the creditors because the first and second defendants, as constructive trustees, are bound to transfer moneys to the first claimant in preference to any claims Hill might have. Mr. Azopardi reiterated several times that the first claimant is not seeking to enforce a judgment against moneys received from Hill; he seeks, *inter alia*, recovery of assets, property and moneys advanced by him directly to the first and second defendants, as well as damages to be assessed. Thus, Mr. Azopardi submits, any claim which Hill might have has nothing to do with the initial relationship between the first claimant and the first and second defendants upon which the action is founded. Further, it is said for the claimants that their claim and any claim Hill might have are entirely different and distinct. The liquidator points out that the fact that the claimants are seeking an account of the profits of Hill is indicative of the fact that in reality they have a competing claim with Hill. By way of reply, Mr. Azopardi asserts that any account of profits received by the claimants would be passed on to Hill.

19 It is true that the combined effect of the orders of May 23rd, 2013 and July 12th, 2013 is that the first and second defendants are declared to be constructive trustees for the claimants in respect of certain specific assets and moneys listed in the orders—assets and moneys which the first claimant claims were paid or transferred by him to the first and second

defendants. What the orders do not do, however, is make a declaration of beneficial ownership which is binding on a non-party to the action. It is, of course, open to the liquidator to institute any such proceedings as he may be advised are appropriate to seek such a declaration, and/or to bring such action against the directors of Hill as he may be advised is appropriate. Indeed, that this has been in the liquidator's contemplation is evident from a letter dated March 7th, 2013 from his solicitors to the claimant's solicitors:

> "While our client is still investigating the position of Hill and the possible claims which Hill or he as its liquidator may have, it is certainly in prospect that following full factual and legal analysis and advice, he will wish to pursue claims against Mr. Luongo and/or Ms. Calcagni in the interests of the unsecured creditors of Hill, particularly the policy holders, who are given statutory priority. In that event your client will prospectively be competing directly with the liquidator for what may be limited assets available to meet the shortfall in the estate of Hill in respect of the claims of legitimate creditors incurred during the period when your client was a director of the company . . . we are already considering evidence which indicates that the affairs of Hill were so conducted that the company's income was dissipated without proper regard for its liabilities and without the company's directors exercising appropriate control, matters in respect of which all the company's directors may be considered to bear a measure of responsibility the extent of which would fall to be determined by the court in due course."

20 I remind myself that this case is not one upon which the liquidator advances submissions of sufficient nexus to justify his being joined to the substantive claim. Indeed, this is a private *inter partes* dispute which centres on a claim—largely proprietary in nature—which the first claimant makes against, *inter alia*, the first and second defendants seeking the return of assets which the first claimant transferred to them as a result of an agreement which the first claimant alleges was premised upon fraudulent misrepresentations and/or fraud. The claimants do not claim assets belonging to Hill and maintain that they have never transferred assets to Hill. To the extent that Hill claims an interest in any assets it is for them to trace and lay claim to them. In the circumstances, I am not persuaded that there is any issue involving the liquidator and an existing party so connected to the matters in dispute as to make it desirable that the liquidator be joined in order to be able to resolve that issue. Nor am I persuaded that the liquidator is so directly affected by the judgment as to be able to apply to have it varied or set aside.

21 Given my determination that the liquidator should not be joined as a party to the action, and is not sufficiently affected by the judgment to apply to have it varied or set aside, there should be no need to consider the

matter further. However, if I am wrong, and the liquidator should be joined or is sufficiently affected by the judgment to seek to vary it or set it aside, I shall briefly deal with the grounds upon which the liquidator relies for variation and/or setting aside.

22 The liquidator's main submissions centre on the applicability of CPR, r.3. Mr. Davis relies upon various provisions of r.3, which I summarize as follows:

(i) The court has power under r.3.1(2)(m) to take any step or make any order for the purpose of managing the case and furthering the overriding objective to deal with cases justly, so that even if the court refuses joinder pursuant to r.19.4, or refuses to find that the liquidator is sufficiently "directly affected" pursuant to r.40.9, it can still intervene pursuant to r.3.1(2)(m).

(ii) Pursuant to r.3.1(1), the court has power to make an order of its own initiative and may do so pursuant to r.3.3(4) without directing a further hearing.

(iii) Pursuant to r.3.2(f), the court has the unfettered power to stay the judgment of July 12th, 2013, and should direct such a stay until the issues raised have been conclusively determined.

(iv) The court has power pursuant to r.3.1(7) to revoke or vary an order. Circumstances where an order can be revoked include where the judge who made the original order is shown to have been misled. Circumstances where an order can be varied include even a final order when the interests of justice favour giving proper consideration on materials already before the court to deal with something which ought to have been dealt with, for example, where there has been non-disclosure or a failure to draw the attention of the court to the relevant rules.

(v) Whilst r.3.1(7) does not give a court a power to hear an appeal against itself, it is said for the liquidator that there is no procedural ban to the court reviewing a procedural order made by the Registrar purporting to carry into effect an order which was made erroneously, even where the Registrar's order would in effect be a final order. Alternatively, the court has the power pursuant to r.3.1(2)(m) to set aside even a final order if the circumstances are exceptional and the interests of justice demand it.

23 There are two principal reasons why, in the submissions made on behalf of the liquidator, the provisions in r.3 as summarized above are engaged:

(i) Irregularity of the order of May 23rd, 2013; and

(ii) Illegality of the contract upon which the claim and the ensuring orders were based.

I shall deal with them in turn.

Irregularity of the order of May 23rd, 2013

24 It is said for the liquidator that—

(a) the order of May 23rd, 2013 was made "without the court having the assistance of full argument," and that although the liquidator was present in court on May 23rd, 2013, he only became aware of the hearing on the day before;

(b) the order of May 23rd was disproportionate, and was in a form not normally envisaged by the CPR;

(c) the CPR includes a mechanism which sets out procedural tracks as to the appropriate relief resultant from an unless order. CPR, r.3.5 makes provision for the consequences of a breach of an unless order;

(d) pursuant to r.3.5(2), only in specific circumstances—none of which are applicable here—can a party obtain judgment merely by filing a request for judgment. Where CPR, r.3.5(2) does not apply, an application is required in accordance with CPR, Part 23;

(e) there is a clear statement in the *White Book 2014*, in the commentary to CPR, r.3.4.1, to the effect that where a failure to comply with a court order has not rendered a fair trial impossible, "an order striking out a case even for contumacious breach is likely to be a breach of ECHR, art. 6 as being a breach of the respondent's right to a determination of their civil rights and obligations at a fair and public hearing within a reasonable time by an independent tribunal." It is submitted that if this applies to a striking out, it should more so to an unless order;

(f) when considering whether to make an unless order, the court should carefully consider whether the sanction with its ensuing consequences is appropriate in all the circumstances of the case (see *Marcan Shipping (London) Ltd*. v. *Kefalas* (3)), and there is an obligation on the part of the party seeking the order to draw to the attention of the court all relevant principles and all relevant facts. None of these principles was drawn to the attention of the court on May 23rd, 2013 and the order which issued thereafter should be reconsidered.

25 The implication behind the submission that counsel for the liquidator was only aware of the matter on the day before the hearing is that although he was present in court, he was not able to deal with the matter fully because of the short notice. I have little sympathy with this submission. Whilst counsel on the day, Mr. Phillips of Messrs. Isolas, might himself only recently have been briefed, notice of the hearing of the May 23rd, 2013 was not the starting gun for the liquidator's involvement in the *Visone* v. *Luongo* proceedings. I remind myself that Mr. Caruana was

appointed provisional liquidator of Hill on September 7th, 2012, and liquidator on January 24th, 2013. It is not in dispute that on November 14th, 2012 the first claimant was interviewed at some length by Mr. Davis for the liquidator and that on November 30th, 2012 the liquidator was supplied with copies of the freezing injunctions, particulars of claim and the contract. From the correspondence in the hearing bundle (referred to at para. 19) it is evident that before the hearing of May 23rd, 2013, the liquidator had a solid grasp of the issues concerning the liquidation and a clear understanding of any potential conflicts between directors and creditors of Hill.

26 Further, on February 25th, 2013 the liquidator was also appointed liquidator of the third defendants. Also on February 25th, 2013, Butler, J. ordered that the claimants be allowed to proceed with their action against the third defendants, notwithstanding that there was a winding-up order against them. The claimants' application to seek to continue proceedings against the third defendants had attached to it the application for the unless order which was heard on May 23rd, 2013, so that it appears that Mr. Caruana was, as far back as March 2013, aware of the unless order application. Indeed, at the hearing of May 23rd, 2013, Isolas were representing Mr. Caruana as liquidator of Hill, and Sir Peter Caruana, Q.C. was representing Mr. Caruana and Mr. Lavarello as joint liquidators of the third defendant.

27 I am persuaded that the issues arising in the hearing of May 23rd, 2013 were not new to the liquidator, and being represented at that hearing it was open to him to have raised, at the very least in summary, the issues he raises now, but he did not. The unless order of May 23rd, 2013 was granted at the conclusion of a hearing where none of the parties to the litigation took issue with the appropriateness of the proposed order. No submissions were advanced that the order was disproportionate, procedurally incorrect, in contravention of the CPR, or that it sought to impose a sanction which was inappropriate. Mr. Davis points out that Mr. Phillips for the liquidator sought a brief adjournment which was supported by Sir Peter. I was presiding that day and having reviewed my contemporaneous notes, I note that whilst Mr. Phillips did in fact seek an adjournment which was refused, it appears that Sir Peter did not. Sir Peter's reference to an adjournment was initially in relation to an extension of time to file a defence—however, on the basis that Mr. Azopardi had agreed to a further 28 days, he indicated he was not seeking an adjournment. The court considered all the relevant facts and principles including the particulars of claim, defences, the contract, the freezing injunction, the first affidavit of the first claimant, which is a 30-page document with 20 exhibits attached, the statements and letters of the first and second defendants, as well as previous rulings of the court. In addition, being fully aware of the history of this litigation, the court was of the view that there had been substantial

and ongoing non-compliance with a court order, and in the circumstances, made the unless order of May 23rd, 2013. I am satisfied that at the time the court was considering the unless order, it had before it a detailed and substantial evidential basis upon which the claim was being advanced. Pursuant to CPR, r.3, it was open to the court to make the order that it did. It may be said that an alternative route could have been adopted, as advocated by Mr. Davis, involving the sanction of striking out the defence, followed by consideration of what form any ensuing judgment should take. In my view, however, there is no material difference between that route and what has happened, other than the by-passing of a strike-out, which would have been of little consequence given that on the material before it the court would have been persuaded pre- or post-strike-out that judgment as entered was appropriate. Moreover, it is of some significance that it is not suggested that any injustice has been suffered by the defendants.

28 As an aside I feel compelled to express some concern in respect of the fact Mr. Caruana was and is liquidator for both Hill and the third defendant. Although Mr. Caruana has explained that he is the joint liquidator for the third defendant together with Mr. Lavarello, and that in order to avoid possible conflicts he "will not take any part in these proceedings on behalf of Cathedral and Cathedral's interests will be represented solely by Mr. Lavarello," the fact remains that despite his intention not to participate now for Cathedral until such time as his removal as liquidator is endorsed by this court, he continues to have the duties and responsibilities of liquidator for both Cathedral and Hill and the conflict of interest which arises from the dual appointments is in my view apparent.

Illegality of the contract of July 30th, 2009

29 Mr. Davis has advanced detailed and extensive submissions advancing the argument that the court should not allow these proceedings to continue because they are based on an illegal contract. Essentially he submits that the contract contemplates the commission of a criminal offence because the Financial Services Commission ("FSC") was intentionally misled as to the size of the first claimant's interest as shareholder controller. It is alleged that the first claimant told the FSC that he would be a 50% shareholder when in fact he was to be a 25% shareholder. Mr. Azopardi vigorously disputes that the contract was illegal and submits further that it was not based on an illegal purpose.

30 I have no difficulty accepting the general principle advanced by Mr. Davis that if a claim relies on illegality or immorality it is barred; applying that reasoning to the current facts, however, presents a stumbling block because the crucial ingredient upon which the principle is advanced, *i.e.* that the contract is illegal, has not been established. Whilst Mr. Davis

advances enthusiastic submissions before the court, they are nothing more than submissions which are challenged by the claimants and have not been tested by proper consideration of the evidence, more particularly examination and cross examination of the parties to the contract. It is of further note that the very defendants who dispute fraud and liability, do not plead illegality. It seems to me that before the court can even begin to be persuaded to set aside or vary a judgment on the grounds that the contract which forms the basis of the claim, which gives rise to that judgment, is illegal, it must be satisfied that the contract is in fact illegal, and I cannot be.

31 Further, whilst I accept the submission that the court of its own initiative has the power to intervene and set aside an order (CPR, r.3.1 and 3.3), my view is that such powers should be used sparingly. Case law suggests that these powers should be used only in exceptional cases where the interests of justice demand it and where there is a compelling reason so to do (see *Forcelux Ltd*. v. *Binnie* (1) and *Hackney L.B.C*. v. *Findlay* (2)). I am not persuaded that this is an exceptional case or that the interests of justice demand intervention. This litigation concerns private parties to a contract involving substantial sums of money. The court has found the first and second defendants to be in breach of court orders and upon the application of the claimants with notice to the defendants, judgment has been entered against them. The defendants as parties to the action have made no application to vary or set aside the judgment. I am not persuaded that the liquidator should be joined or that he should have leave to apply to vary or set aside the orders. I am of the view that the order of May 23rd, 2013 was not irregular, and for the reasons given I am not persuaded that the alleged illegality of the contract is relevant for present purposes. There is therefore no basis for the court to intervene of its own motion and less so upon the application of a non-party. Further, I do not stay the order(s) because the liquidator's application has been determined in full at this hearing.

32 By way of conclusion, one last observation. I note in the affidavit of the liquidator of June 18th, 2013 a reference to the fact that if this court does not consider it appropriate to vary or set aside the order(s) he would "consider it necessary to ask the Court of Appeal to reconsider the position." For my part I am perfectly aware that a party who is dissatisfied with my decision may, in certain circumstances, appeal to the Court of Appeal, and indeed it is a salutary aspect of the administration of justice that such should be the case. Judges, however, do not need to be reminded by litigants that there are rights of appeal and it is particularly unfortunate and regrettable that a liquidator—who is an officer of the court—should find it necessary to spell out the consequences of the court not deciding in his favour.

Application of June 10th, 2013

33 There is one last matter I must deal with and that is the claimant's application for summary judgment against the first, second and fourth defendants. The claimant's applications for summary judgment were filed before judgment had been entered against the first and second defendants as a result of non-compliance with the order of May 23rd, 2013. For the claimants, it is said that in the event that the liquidator's applications of June 19th, and September 16th, 2013 were to fail they would not pursue the application for summary judgment against the first and second defendants but only against the fourth.

34 I have not been addressed on the matter of summary judgment in respect of the fourth defendant, and there is only a brief reference made in counsel's skeleton. I shall therefore hear further submissions in this regard.

Orders accordingly.