[2019 Gib LR 73]

PREMIER REGISTRY LIMITED and TWELVE OTHERS v. FAMOUS FOUR MEDIA LIMITED (in liquidation)

SUPREME COURT (Dudley, C.J.): April 18th, 2019

Bankruptcy and Insolvency—application to court concerning office holder—ownership of funds—ruling that company (in liquidation) which obtained letter of credit for benefit of applicants (bid vehicles) but retained moneys after repayment of debt by applicants held moneys on resulting trust for applicants—liquidator had no real prospect of resisting relief sought by applicants

The applicants sought *inter alia* a declaration as to the ownership of certain funds.

The applicants were 13 bid vehicles which were the underlying asset of Cell A of Domain Venture Partners PCC Ltd. ("PCC"). Mr. Lavarello ("EL") was appointed cell administrator of Cell A. Cell A Domain Venture Partners PCC Ltd. ("DVP") was an experienced investor fund set up by Mr. Roache ("IR") to fund applications to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the rights to exploit for profit general top level domain names ("gTLD"). Each application for a gTLD was to be made through a special purpose vehicle for that gTLD, referred to as "bid vehicles." The bid vehicles were to be funded entirely by DVP and the income from sales. The commitment letter in respect of each applicant contained the following:

> "The Company [DVP] will make available US$1,500,000 in capital to the applicant conditional upon approval of the application by ICANN.
>
> Of the US$1,500,000 capital available to the Applicant US$300,000 will be used to fund an irrevocable standby letter of credit that the Applicant has secured and has in place in respect of the Continued Operations Instrument."

According to EL, it was a condition of the granting of a licence by ICANN that each operator of a gTLD had in place a continuing operation instruction in favour of ICANN so as to ensure the availability of funds to provide continuity of service to end users. There always had to be a letter of credit ("LoC") in place and, should there be a change in provider, there might have to be two in place for a short time.

In 2016, the aggregated LoC had to be moved from Credit Suisse (Gibraltar) Ltd. ("CS") to Barclays Bank, which was the new banker for DVP. It was subsequently ascertained that Barclays held LoC in the name of Famous Four Media Ltd. ("FFM"), a company (now in liquidation) of which IR was the majority shareholder. FFM had provided management services to the bid vehicles pursuant to service agreements. EL stated that the agreements did not provide for FFM holding assets of the bid vehicles or providing, holding or funding the LoC.

EL stated that it had been possible to trace the funds in respect of the migration of the LoC from CS to Barclays. The funds used to finance the LoC with Barclays were transmitted through the FFM 2 account, which FFM held with the Royal Bank of Scotland. The transactions were summarized by EL:

> "1. On 15th June 2016, the balance on the FFM2 Account was $997,924.20.
>
> 2. On 16th June 2016, the account was credited $680,000 from account number 39107271, with the account name 'Mr I S Roache'.
>
> 3. On 20th June 2016, a payment was made to Barclays in the amount of $1,505,000 with the narrative 'LOC cash Transfer'. This was the cost of the LoC.
>
> 4. On 19th July 2016, thirteen separate payments in the name of the Applicants amounting to [$1,638,852.66] were credited to the FFM2 Account bearing the narrative [Bid Vehicle GI]/Credit/ Suisse/ [number], for example, 'DOT ACCOUNTANT LTDGI/CREDIT SUISSE/217024'. I believe this to be the release of the cash that was backing each LoC that was held at CS.
>
> 5. On 20th July 2016 (the day after the CS credits) a payment of $680,000 was made to account number 39029548 (named in the Statement as belonging to 'Dominion Management Limited') under narrative 'IAT to IR'.
>
> 6. On 21st July 2013, $96,671.84 was transferred to Domain Venture Partners Gibraltar with the narrative 'Silver Reg, LOCs Ba'."

The bank records showed that the Barclays LoC was initially funded by FFM with IR bridging the funding gap by way of a payment to FFM of

US$680,000. The Barclays LoC was paid from the FFM 2 account. The FFM payment was refunded in the following month upon release of the CS LoC. Thereafter, IR was repaid US$680,000. US$96,671.84 was transferred to DVP. It was not in dispute that the LoC was for the sum of US$1,505,000. There was no mention in DVP's accounts that the money DVP loaned to the applicants which funded the CS LoC had been repaid to DVP. The court was asked to draw the inference that the moneys were not repaid and that they now funded the Barclays LoC. The applicants' accounts also referred to the LoC being funded by DVP.

There were a number of ongoing proceedings in relation to overarching disputes with IR and disputes between the investors themselves. The present claim, pursuant to s.232 of the Insolvency Act, related to the LoC. The applicants sought—

> "a declaration that the funds held at [Barclays] identified in the Barclays Letter of Credit in favour of [ICANN] dated 30 June 2016 ('LoC') in the name of [FFM] belong to the Applicants in the amount identified at Schedule A of the LoC as does any benefit of the LoC and that the court reverse the decision/omission of the Liquidator of FFM to refuse to transfer the LoC held at Barclays Bank in the name of FFM to the Bid Vehicles . . . and he be ordered to instruct Barclays to transfer the LoC to the Applicants (subject to its terms) accordingly."

The chief revenue officer of FFM stated that he believed there were very real questions about the ownership of the LoC funds but that in the absence of agreement they could only be resolved by a detailed accounting exercise.

The court understood IR to assert that all the moneys in the FFM 2 account used to obtain the Barclays LoC belonged beneficially to him, and that he made available a further US$680,000 to the FFM 2 account so that it could provide the US$1,505,000 required to support the new LoC. Whilst he previously believed all the moneys were still due to him, he accepted the partial repayment of US$680,000. He offered no explanation for the 13 separate payments made in the names of the applicants amounting to US$1,638,852.66 which were credited to the FFM 2 account.

Held, granting the relief sought:

The intention of the parties as to how each party held moneys was best understood by reference to the formal accounting records. Against that backdrop the various transactions could properly be understood as follows: (i) DVP loaned moneys to the applicants to obtain the CS LoC; (ii) FFM/IR loaned moneys to DVP to obtain the Barclays LoC for the benefit of the applicants; (iii) FFM/IR were repaid from the proceeds of the applicants' funds underpinning the CS LoC; (iv) the net effect was that DVP continued to finance the applicants' LoC with the applicants remaining indebted to DVP; and (v) the retention by FFM of the moneys (supporting the LoC) after repayment to it of the debt by the applicants/

DVP created a resulting trust in favour of the applicants. The analysis corresponded with contemporaneous emails and with the accounts and financial statements of the applicants, DVP and FFM. In contrast, Mr. Shaw's analysis, for FFM, although as a theoretical contractual construct undoubtedly arguable, was not supported by the evidence. In the absence of evidence supporting Mr. Shaw's legal analysis, the liquidator had no real prospects of resisting the relief sought by the applicants. The court would therefore grant the relief sought and would hear counsel as to the terms of the order and as to costs (paras. 42–44).

Cases cited:
(1) *Benady* v. *Visick*, 2019 Gib LR 36, considered.
(2) *Bramston* v. *Haut*, [2012] EWCA Civ 1637; [2013] 1 W.L.R. 1720; [2013] BPIR 25, considered.
(3) *Edennote Ltd.*, *Re*, *Tottenham Hotspur* v. *Ryman*, [1996] 2 BCLC 389; [1996] BCC 718; [1996] T.L.R. 348, referred to.
(4) *Mitchell* v. *Buckingham Intl. plc*, [1998] 2 BCLC 369; [1998] BCC 943, considered.

Legislation construed:
Insolvency Act 2011, s.175:

> "(1) In performing his functions and undertaking his duties under this Act, a liquidator, whether appointed by resolution of the members or by the Court, acts as an officer of the Court."

s.232: The relevant terms of this section are set out at para. 36.

N. Cruz and *C. Wright* for the applicants;
P. Shaw, *Q.C.* and *T. Hillman* for the respondent.

1 **DUDLEY, C.J.:** The applicants are 13 bid vehicles which are the underlying asset of Cell A of Domain Venture Partners PCC Ltd. By an order made by me on April 23rd, 2018, Mr. Edgar Lavarello ("EL") a partner of PwC was appointed cell administrator of Cell A, under the Protected Cell Companies Act.

2 This ruling is less extensive than it could have been, but the dispute touches upon a letter of credit ("LoC") that as I understand it expires at the end of April 2019 and a timely decision in relation to the funds underpinning the LoC is important if the applicants are to retain certain ICANN registries.

3 The background is undoubtedly complex and for ease I adopt the *dramatis personae* as set out in EL's affidavit (but only to the extent that they feature in this judgment). I also draw very liberally from the factual exposition he sets out by way of background.

Name	Description	Reference
Domain Venture Partners PCC Ltd.	An experienced investor fund set up by Iain Roache to fund applications to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the rights to exploit for profit generic top-level domain names ("gTLD"). Its directors at the time of the administrator's appointment were Iain Roache, Domain Management Ltd. (solely owned and controlled by Iain Roache), Benjamin Moss was in office as a local EIF director and Robert Maroney was a director and investor. It is a shareholder in the bid vehicles.	PCC
Cell A Domain Venture Partners PCC Ltd.	In administration, acting by [EL], the administrator.	DVP
Domain Management Ltd.	An entity solely owned and controlled by Iain Roache. DML is: 1. a director of the PCC; 2. investment manager to the PCC and controlling shareholder save in respect of matters which constitute "fundamental change" as defined in the articles; and 3. (former) sole director of the bid vehicles.	DML
Famous Four Media Ltd.	A company (now in liquidation) owned by Iain Roache and Geir Rasmussen. Iain Roache is the majority shareholder (80%), and they are both directors. The registered office was provided by Juno Fiduciary Services Ltd.	FFM

Iain Roache	Main promoter of DVP Former director and chairman of the PCC Sole owner and controller of DML which is: 1. a director of the PCC; 2. investment manager to the PCC and controlling shareholder save in respect of matters which constitute "fundamental change" as defined in the articles; 3. (former) sole director of the bid vehicles	IR
Geir Rasmussen	Director and shareholder of FF	GR
Judge Sykes Frixou	UK solicitors advising: 1. Iain Roache; 2. Geir Rasmussen; 3. FFM; 4. DML.	JSF
Grant Jones	Insolvency practitioner at Simmons Gainsford, 9 Cooperage Lane, Gibraltar, and liquidator of FFM.	GJ/the liquidator
Bid vehicles	Underlying assets of DVP	Bid vehicles
DP One Ltd.	A nominee entity that is one of two directors of the bid vehicles. Its directors are Edgar Lavarello (partner of PwC and administrator of DVP), Colin Vaughan (senior partner of PwC) and Joanne Wild (senior manager and in-house legal counsel of PwC).	DP1
DP Two Ltd.	A nominee entity that is the second director of the bid vehicles. Its directors are Edgar Lavarello (partner of PwC and administrator of DVP), Colin Vaughan (senior partner of PwC) and Joanne Wild (senior manager and in-house legal counsel of PwC).	DP2

4 The application to appoint EL as administrator of DVP was made on the application of Ms. Christina Mattin, a dissatisfied investor of DVP, with the support of most of her fellow investors.

5 As the *dramatis personae* identifies, DVP is an experienced investor fund set up by IR to fund applications to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the rights to exploit for profit generic top level domain names ("gTLD") for example ".accountant" or ".sport." A private placement memorandum was issued on October 14th, 2011 and subsequently amended and re-amended on November 15th, 2011 and February 29th, 2012. Each application for a gTLD was to be made through a special purpose vehicle for that gTLD, referred to in the PPM as "bid vehicles." The bid vehicles were to be funded entirely by DVP and the income from sales.

6 By virtue of EL's appointment as administrator of DVP EL took control of 20 active bid vehicles together with 11 other bid vehicles he believes have ceased trading. The bid vehicles are controlled by EL through two companies which he incorporated specifically for that purpose, namely DP1 and DP2. The applicants in this action are 13 of the trading bid vehicles.

7 There are a number of ongoing proceedings in relation to overarching disputes with IR and disputes between the investors themselves, but for present purposes those disputes do not have to be addressed.

Background to the summons

8 According to EL, it is a condition of the granting of a licence by ICANN that each operator of a gTLD has in place a continuing operation instruction in favour of ICANN, so as to ensure the availability of funds to provide continuity of service to end users. Essentially it provides ICANN with funding to take control of the gTLD in the event of operator failure, for example arising from insolvency. Of some significance for the purposes of understanding the specific factual background to the present application, the fact that according to EL there always has to be a LoC in place and should there be a change in provider there may have to be two in place for a short time.

9 Ms. Wild made certain inquiries from Barclays Bank who were known to be the new bankers to DVP in replacement of Credit Suisse (Gibraltar) Ltd. ("CS"). This led to Ms. Wild ascertaining that Barclays held LoCs which she believed belonged to DVP or to the bid vehicles. When she inquired about the LoC it was brought to her attention that GR had been endeavouring to liquidate them only that week. It subsequently transpired that the LoC was in fact in the name of FFM.

10 FFM is a company now in liquidation in which IR and GR respectively hold 80% and 20% of the shares, and both are directors. As I understand the position, FFM was put into liquidation by virtue of a resolution by its members, and GJ, a licensed insolvency practitioner, was appointed liquidator.

11 I think it is not in dispute that FFM provided management services to the bid vehicles with that relationship governed by service agreements that were in identical terms. The service agreements provide for the nature of the services to be provided and the fees to be charged. EL's evidence, to the effect that there is nothing in the service agreements that provides for FFM holding assets of the bid vehicles or to it providing, holding or funding the LoCs, has not been challenged.

12 The applicants advance two claims pursuant to s.232 of the Insolvency Act against FFM. The first is a proprietary claim for income received by the bid vehicles which is said to be held in what EL says was described to him by GR as an escrow account. It is said by EL that these moneys were transferred without his permission to JSF and (at least part) have been transferred to the liquidator who has refused to transfer them to EL. A substantive hearing on that summons is still to take place. The second claim relates to the LoCs and by that summons, the amendment of which I allowed at the hearing, the applicants seek:

> "a declaration that the funds held at [Barclays] identified in the Barclays Letter of Credit in favour of [ICANN] dated 30 June 2016 ('LoC') in the name of [FFM] belong to the Applicants in the amount identified at Schedule A of the LoC as does any benefit of the LoC and that the court reverse the decision/omission of the Liquidator of FFM to refuse to transfer the LoC held at Barclays Bank in the name of FFM to the Bid Vehicles . . . and he be ordered to instruct Barclays to transfer the LoC to the Applicants (subject to its terms) accordingly."

13 According to EL, certain disclosure orders made by me requiring disclosure of bank statements and records allowed his team to trace the funds in respect of the migration of the LoC from CS to Barclays. It is EL's unchallenged evidence that the funds used to finance the LoC held with Barclays were transmitted through what he denominates as the FFM 2 account which FFM held with the Royal Bank of Scotland. The transactions are summarized at para. 45 of EL's affidavit as follows:

> "45. I shall summarise the position in US Dollars, as this was operational currency of the funds:
>
> 1. On 15th June 2016, the balance on the FFM2 Account was $997,924.20.

2. On 16th June 2016, the account was credited $680,000 from account number 39107271, with the account name 'Mr I S Roache'.

3. On 20th June 2016, a payment was made to Barclays in the amount of $1,505,000 with the narrative 'LOC cash Transfer'. This was the cost of the LoC.

4. On 19th July 2016, thirteen separate payments in the name of the Applicants amounting to [$1,638,852.66] were credited to the FFM2 Account bearing the narrative [Bid Vehicle GI]/Credit/Suisse/[number], for example, 'DOT ACCOUNTANT LTDGI/CREDIT SUISSE/217024'. I believe this to be the release of the cash that was backing each LoC that was held at CS.

5. On 20th July 2016 (the day after the CS credits) a payment of $680,000 was made to account number 39029548 (named in the Statement as belonging to 'Dominion Management Limited') under narrative 'IAT to IR'.

6. On 21st July 2013, $96,671.84 was transferred to Domain Venture Partners Gibraltar with the narrative 'Silver Reg, LOCs Ba'."

14 Essentially, it is EL's evidence that these transactions reflect the need to have two LoCs during a changeover. The bank records show that the Barclays LoC was initially funded by FFM with IR bridging the funding gap by way of a payment to FFM of US$680,000 on June 16th, 2016. The Barclays LoC was paid from the FFM 2 account on June 20th. The FFM payment was then refunded on July 19th, 2016 upon the release of the LoC at CS. Thereafter, on July 20th, 2016, IR was repaid US$680,000. The significance that EL attributes to the transfer of US$96,671.84 to DVP following these various transactions is that it would seem unlikely that IR would provide the investors with a return on investment if he was personally owed funds that had been loaned.

15 It is not in dispute that the LoC is for the sum of US$1,505,000 and that this accords with the FFM2 account statement and that it has been issued on behalf of FFM in favour of ICANN. The LoC states that it is:

> ". . . with respect to a Registry Agreement between [FFM] and ICANN for Top Level Domain Registry Operations for the gTLD Registries as provided by Schedule A . . ."

Schedule A lists the names of the applicants albeit there appears to be a typographical error in respect of Spring Registry Ltd.

The documentary evidence

16 The evidence relied upon by the applicants (as opposed to the inferences to be drawn from it) is in the nature of corporate documentation, accounts and contemporaneous email exchanges, the authenticity of which is not in issue and therefore not capable of challenge.

17 A series of letters all dated March 31st, 2012 (which predates the first LoC with CS), one in respect of each applicant, from DVP to ICANN, with subject heading "Commitment Letter," signed by IR on behalf of the Board of DVP, contains the following:

> "The Company [DVP] will make available US$1,500,000 in capital to the applicant conditional upon approval of the application by ICANN.
>
> Of the US$1,500,000 capital available to the Applicant US$300,000 will be used to fund an irrevocable standby letter of credit that the Applicant has secured and has in place in respect of the Continued Operations Instrument."

It is implicit in those letters that at that stage DVP was to loan moneys to the applicants for them to fund the LoC required by ICANN.

18 That DVP would fund the LoCs is also apparent from the Call V Investor Communication issued by DVP which at sub-para. 4.1.1 entitled "Continued Operations Instruments" states that Call V moneys would be used to fund the LoCs.

19 The changeover from the CS LoC to the Barclays LoC is explained in the minutes of a meeting of the Board of Directors of DVP of May 25th, 2016 which at para. 5 states:

> "OS [Oliver Smith, in-house legal counsel] reported that the Registry Operators' Letters of Credit (LOC/s) open with Credit Suisse were an urgent operational concern. IR summarised that Credit Suisse were closing their operations in Gibraltar, and subsequently the LOCs had to be terminated by September 2016. OS informed the Board that new bank accounts for the Registry Operators were already opened with Barclays UK and that the intention was to establish a new aggregated LOC for all Registry Operators. IR requested that OS circulate a memorandum to the directors setting out, in detail, the plan for opening the new LOCs with Barclays."

20 In his affidavit, EL states that he has not had sight of any memorandum having been circulated. However, exhibited to IR's affidavit filed on behalf of the liquidator are a series of emails, the first and substantive being that of Oliver Smith of June 15th, 2016 at 1:05 p.m. in which under the heading "Letters of Credit" he states:

"Over the last few weeks we have been working on an LOC solution to mitigate the risk of the Registries breaching the terms of their ICANN agreements. The greatest risk is a lapse in LOC coverage caused by the requirement to transfer the LOC funds from CS to Barclays.

The solution that we are already working on, checked and confirmed by ICANN, is as follows:

1) Set up and establish an aggregated LOC under Famous Four Media's name with an allocation schedule for each Registry. The aggregated LOC will be issued at Barclays using an FFM account. The new LOC wording has already been approved by ICANN, Bank of America, and Barclays.

2) In order to ensure that there is no gap in coverage, there needs to temporarily be 2 LOCs in place and funded before the originals are cancelled by CS. As the funds sat in DVP are set aside for other matters, it was decided that Iain will temporarily fund the 2nd LOC at Barclays himself by way of a loan to DVP. We examined whether this would be a breach of DVP's PPM at section 10.12, and are of the opinion that the loan (likely to in place less than 2 weeks) is compliant. We are drafting a facility agreement to be approved at the DVP board level. The total amount to be funded is $1,505,000.00.

3) The final steps after the LOC at Barclays is funded is for CS to close the accounts and transfer the LOC money directly to Iain. The terms of the loan agreement will be such that as soon as the LOC money at CS is transferred to Iain, the amount held by Barclays will revert to being DVP's (as the initial lender of the LOC amounts). The loan will be interest free.

As we are under significant time constraints, we are already pushing ahead with this solution. However, the board will need to approve the agreement by way of board resolution which will circulate at the end of the week."

21 What IR omits from his exhibits (and consequently the liquidator failed to bring to the court's attention) is a further email by Oliver Smith in which he deals with a number of questions raised by recipients of the email. In the last email in the thread, also dated June 15th, 2016 and timed at 2:47 p.m., which was produced by EL (it having been provided to him by Robert Maroney during the overnight adjournment, who realized IR's exhibit was incomplete), Oliver Smith states:

> "The mechanics of the LOC solution with Barclays is as follows. Technically the LOC account is under the FFM account so it follows that the LOC is in FFM's name, albeit on behalf of the 13 registries listed in an allocation schedule provides (sic) to Barclays and ICANN. There is no question that the LOC amount is for the Registries, and the new loan agreement, and resolution will record this. Bear in mind that the terms of the facility agreement between DVP and the registries remain in place. We have also had confirmation from Barclays that we can instruct a transfer of the monies back to DVP in the event that the LOCs no longer need to be in place (on sale for example)."

The inference to be drawn is that the intention, at least at the time that Oliver Smith sent the email, was for FFM to be merely a conduit through which the applicants would hold the LoC.

22 In support of his application, EL also relies upon both the DVP accounts and the applicants' accounts. The DVP accounts are significant. The audited financial statements of DVP for the period December 1st, 2014 to May 31st, 2016 and which were signed off by IR, at note 4(b)(i) at p.20 states:

> "The loan receivables are loans made to the Bid Viehicles for the funding of the Letters of Credit ('LOCs') and any consideration required to be paid in either a private auction or other form of contention set resolution. The loan is interest free, unsecured with no fixed date of repayment."

In his affidavit, EL suggests that the DVP accounts also evidence that this remained the plan going forward in that note 12 on p.32 at paras. 2 and 3 reads:

> "The Company will make available USD 1,500,000 in capital to the Bid Vehicles conditional upon approval of the new gTLD application by ICANN.
>
> Of the USD 1,500,000 capital available to the Bid Vehicles, USD 300,000 will be used to fund an irrevocable standby letter of credit ('SLoC') that the Bid Vehicles have secured and has in place in respect of the Continued Operations Instrument . . ."

23 The Barclays LoC issued on June 30th, 2016. In his affidavit, EL cogently asserts that on the basis that the migration of the LoC from CS to Barclays took place in the summer of 2016 and the DVP statements were signed off on November 30th, 2016 he would have expected any material changes between the end of the reporting period and the sign-off to be reported upon and indeed he points out that there is an unrelated update at para. 13 of the notes on p.32 entitled "Events after the reporting period." EL highlights that there is no mention that the moneys loaned to the

applicants which funded the CS LoCs were repaid to DVP, the inference that the court is asked to draw is that they were not repaid and that the moneys loaned to the applicants now fund the Barclays LoC.

24 In support of the relief sought by the applicants, EL also relies upon the applicants' 2015 audited accounts. It is not in issue that the notes in each set of accounts for each applicant when dealing with the LoCs are identical save for the sums involved. By way of example, the audited accounts for dot Accountant Ltd. at note 10 of p.16 states:

> "During the year the Company executed a Registry Agreement with ICANN for the operation of the applied for gTLD. One of the requirements of this Registry Agreement was a Continued Operators Instrument in the form of an irrevocable SLoC. DVP has funded the Company's SLoC amounting to US$73,000 in favour of ICANN which is in line with the commitment letter . . ."

Note 16 at p.20 of those accounts shows a table identifying a loan to DVP with the description: "Funding of letter of credit in favour of ICANN."

25 These accounts are for the period before the LoC migrated from CS to Barclays but again they were signed off in November 2016 by IR on behalf of Domain Management Ltd., the sole director of the bid vehicles, and as with the DVP accounts, there is no update note to show that the loan had been repaid.

26 The applicants' 2016 unsigned accounts are also instructive. Turning again to the accounts prepared for dot Accountant Ltd., note 10 at p.17 under a sub heading "Deposits—restricted" states: "Deposits pertaining to amounts held by a financial institution to cover an irrevocable standby letter of credit ('SLoC') amounting to $73,000 granted in favour of ICANN." Thereafter, at note 15 at p.20: "All the restricted cash (note 10) is currently held at Barclays Bank Plc . . . In previous years, all the restricted cash was held at Credit Suisse (Gibraltar) Limited," with note 16 at p.22 reflecting the liability by the applicants to DVP arising from the funding provided by the latter.

27 Although the 2016 accounts are unsigned, the change of position, at least as regards where the deposit of the restricted cash was held, evidences that these accounts were not a mere *pro forma* reproduction of earlier accounts. The inference can properly be drawn that the officers of DVP and the applicants would have provided the auditors with the relevant financial information.

28 The accounting evidence also needs to be seen against the material generated by FFM before the LoC and the beneficial ownership of the moneys underpinning it became a disputed issue. On September 11th, 2018, GR swore an affidavit exhibiting a statement of affairs which to the best of his knowledge he said was an accurate reflection of the standing of

FFM. It is significant that the statement of affairs identifies the book value of its assets at £1,725,083 ascribing to it an estimated realisable value of £301,302 but fails to make any reference whatsoever to the some US$1.5m. underpinning the LoC.

FFM's position

29 It may be that it arises as a consequence of the liquidator having limited funds with which to engage in litigation. But whatever the reason, the position adopted by the liquidator of FFM in these proceedings has been unusual and certainly capable of being construed as running counter to the fundamental principle of objectivity required of a liquidator, now codified in the Insolvency Practitioner Regulations 2014. Rather than formulate his own view (or, as urged by me at a preliminary hearing, seek his own independent legal advice), by letter dated March 1st, 2019, GJ sought to abrogate his responsibility and authorized IR and JSF to act on behalf of FFM on the following basis:

> "I confirm that as Liquidator of FFM & agent of FFK, I authorise you to act on behalf of FFM in respect of the above two mentioned Summons and that I authorise you to instruct FBP Solicitors and JSF, together with such additional Counsel as may be necessary, in responding to the two Summons and appearing on behalf of FFM at the Hearing of both matters . . .
>
> Yours sincerely
>
> Grant Jones, Liquidator of FFM & FFM agent, acting without personal liability"

30 Whilst there may be circumstances in which it is proper for a liquidator to allow creditors or contributories to institute or defend an action, in the context of relief pursuant to s.232 of the Insolvency Act in which what is being challenged is an act or omission by the liquidator, in my judgment it is wholly inappropriate that an office holder (who by virtue of s.175 of that Act is an officer of the court) should seek to abrogate his statutory and professional responsibilities. For the sake of completeness I should point out that, after the hearing but before the handing down of this ruling, on April 11th, 2019, Mr. Hillman informed the Registrar that the liquidator had withdrawn the authority he had previously given IR and JSF.

31 Although the liquidator may have chosen to authorize others to conduct the litigation on his behalf, it is evident that he is the respondent to the summons and the evidence in the affidavits of IR and Christopher Cousins is that which is put forward by him in opposition to the relief sought by the applicants.

32 Christopher Cousins was the chief revenue officer of FFM and as I understand it is a creditor of FFM. His evidence touches upon the use to which the FFM 2 account was put and the suggestion that it was used by IR as a personal account; he agrees with the sequence of transfers as set out at para. 45 of EL's affidavit but suggests that a thorough examination of the accounts is required. The upshot of his evidence is to be found at para. 27 of his affidavit:

> "I verily believe that there are very real questions about [the] true ownership of the letter of credit funds in question that are capable of being answered definitively. In the absence of any agreement this question can only be properly resolved by carrying out a detailed accounting exercise (which in the time frame available has not been possible for me to do) or better still by granting the liquidator a direction for permission to instruct an independent accountant to provide a report on the issue which would be the only way to resolve this matter with certainty."

That suggestion is disingenuous given that the liquidator is a licensed insolvency practitioner and that, as is apparent from exhibit 13 to EL's first affidavit, the number of accounting entries involved is minimal. As EL explains in his second affidavit:

> "The entirety of the FFM2 account is made up of 446 lines of data and covers the period from April 2015 to September 2018. Of these 126 lines are bank charges, leaving only 320 lines of data to review . . . But even the remaining 320 lines of data are not all relevant as the transactions surrounding the LOC only amount to 20 . . ."

33 As regards IR, the position adopted by him in his affidavit is somewhat nebulous. As I understand it (although I am not certain) he asserts that all of the moneys in the FFM 2 account used for the purpose of obtaining the Barclays LoC belonged beneficially to him with him making a further US$680,000 available to the FFM 2 account in order that it could provide the US$1,505,000 to support the new LoC. As I understand it, whilst previously he believed all those moneys were still due to him, he now accepts the partial repayment to him of US$680,000. However, he offers no explanation for the 13 separate payments made on July 19th in the name of the applicants amounting to $1,638,852.66 which were credited to the FFM 2 account. His position is summarized in the last paragraph of his affidavit as follows:

> "It is my position that the funds supporting the LoC held by Barclays were paid to FFM by me and DVP, however whilst I accept that there is a corresponding debt due from FFM to both myself and DVP, I do not understand how this can amount to [a] trust in either my or anyone else's favour."

That assertion, in so far as I can follow his evidence, is not particularized by reference to banking transactions or corporate accounts.

34 Following the amendment of the summons, the cogent submission as to whether a LoC is an asset which can be beneficially owned fell by the wayside. Mr. Shaw very properly did not oppose the amendment, it being apparent at the hearing that the fundamental issue was whether the funds underpinning the LoC (subject to the security it affords in supporting the LoC) are beneficially owned by the applicants.

35 Credit also to Mr. Shaw, who provided a very credible analysis in relation to the transactions that underpin the substantive issue falling for determination. I can do no better than set out the relevant passage in his skeleton argument:

"16. The proper analysis is as follows

16.1 DVP provided original loans to the Applicants for acquiring LOCs from Credit Suisse. These were unsecured loans. The monies were not held on trust for DVP.

16.2 In obtaining the LOCs the Applicants each entered into loan obligations with Credit Suisse which were supported by security over cash deposits.

16.3 On the refinance of the LOCs with Barclays, the Applicants were each released from their liabilities with Credit Suisse.

16.4 Further, FFM entered into a facility letter in which it solely was liable to Barclays. No guarantee or other obligations were entered into by the Applicants. They were thus free of any liability to any bank.

16.5 The underlying funding for the new LOCs was still to be provided by DVP. However, that funding was now provided to FFM, rather than the Applicants. As it was FFM that was borrower from Barclays (and solely liable to it in respect of any funding shortfall) it is consistent that DVP were now lending to FFM to enable it to accept the terms of the Barclays facility letter.

16.6 This is supported by recital (4) to the DVP/Roache loan agreement dated 22 June 2016 which says that 'upon cancellation of the current LOCs, the cash held by Credit Suisse will be transferred back to [DVP]'. The effect of this was that repayment (if had been made) would have been to have extinguished the Applicants' liabilities to DVP. What happened in fact is that the monies repaid by Credit Suisse stayed with FFM, in effect, there was a re-lending to FFM in place of the Applicants.

16.7 It is nonsensical for the Applicants to claim to 'own' the Barclays LOC when it is not a party to it has not guaranteed it and is under no obligation in respect of it has had its own liability to Credit Suisse extinguished.

17. The true effect of the refinance is thus to replace the Applicants as debtor to DVP with FFM."

The law

36 Section 232 of the Insolvency Act provides:

"A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder."

37 This provision is in very similar terms to provisions found in the English Insolvency Act 1986 and it is clear that the general proposition is that as stated by Kitchin, L.J. (with Arden, L.J. and Rix, L.J. agreeing) in *Bramston* v. *Haut* (2) ([2012] EWCA Civ 1637, at para. 68):

"The court is properly reluctant to interfere with the day to day administration by a trustee of the bankruptcy estate because, as Harman J explained in *Re a debtor; ex parte the debtor v Dodwell (the trustee)* [1949] Ch 236 at 241, administration would be impossible if the trustee had to answer at every step to the bankrupt for the exercise of his powers and discretions in the management of and realisation of the property. So also in *Re Edennote Ltd* [1996] 2 BCLC 389 this court explained (at 394) that, fraud and bad faith apart, the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."

And later (at para. 69):

". . . I believe the test which must in general be satisfied was correctly described by Registrar Baister in these terms in *Osborne v Cole* [1999] BPIR 251 at 255:

'It follows that it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way.'"

38 However, the *Edennote* test (*Re Edennote Ltd.*, *Tottenham Hotspur* v. *Ryman* (3)) is subject to the caveat in *Mitchell* v. *Buckingham Intl. plc* (4). In a recent judgment handed down by me, *Benady* v. *Visick* (1), in which I

considered s.365(1) of the Insolvency Act which is materially the same as s.232, after referring to the judgment of Robert Walker, L.J. in *Mitchell*, I said (2019 Gib LR 36, at para. 23):

> "As I understand it, *Mitchell* is authority for the proposition that the *Edennote* test . . . is applicable for justifying interference with commercial decisions by a liquidator or a trustee in bankruptcy exercising administrative decision such as the realization of assets. But it is not the test to be applied when reviewing a decision involving competing claims between creditors. In my judgment, it follows that in the event that the court were to determine an application under s.365(1) in respect of a challenge to an admitted or a rejected proof, it would not apply the *Edennote* approach and defer to the trustee's business judgment provided it is rational. Instead, the court would resolve that issue on the evidence before it on the balance of probabilities."

In my judgment, the present case, albeit strictly not one of competing claims between creditors but rather a proprietary claim to certain moneys held by the company, is a dispute that is eminently one for the court and in which the *Mitchell* approach is applicable.

39 That said, this application has not come before me as a witness action but rather falls to be determined exclusively on the affidavits and exhibits placed before the court. I therefore accept Mr. Shaw's submission that in making a determination the court should apply the summary judgment test and to rule in the applicants' favour must be satisfied that the liquidator has no real prospect of successfully defending the claim. The commentary (in Civil Procedure, Vol. 1, at 678) to CPR 24.2 provides guidance on the test as follows:

> "In order to defeat the application for summary judgment it is sufficient for the respondent to show some 'prospect', i.e. some chance of success. That prospect must be 'real', i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word 'real' means that the respondent has to have a case which is better than merely arguable . . ."

Discussion

40 Undoubtedly there is merit in Mr. Shaw's analysis of the various transactions. The weakness in his submission is that it does not accord with DVP's and the applicants' accounts which evidence the continued existence of a loan by DVP in favour of the applicants. Nor can his analysis be reconciled with FFM statement of affairs. Neither do Christopher Cousins or IR rationalize the transactions in any manner approaching his analysis, which would have been expected had that been the basis upon which these financing arrangements were put in place.

41 Mr. Shaw relies upon recital 4 in the June 22nd, 2016 facility agreement between DVP and IR in support of the proposition that the payment by the applicants to FFM extinguished the debt between the applicants and DVP and resulted in DVP lending to FFM for it to obtain the LoC. Recital 4 states:

> "Upon the cancellation of the current LOCs, the cash held by Credit Suisse will be transferred back to the Borrower. The Borrower will therefore repay the Lender upon the cancellation of the Current LOCs."

To my mind the recital is far more prosaic, it simply states how repayment was to be effected. In the event the moneys went from the CS LoC cash held by the applicants to FFM and from those proceeds US$680,000 went to IR and the borrowing governed by that agreement was thereby repaid.

42 As Mr. Shaw properly points out in his skeleton, it is to be kept in mind that these were related parties substantially under the control of the same individuals. In my judgment the intention of the parties as to how each party held moneys is best understood by reference to the formal accounting records. Against that backdrop the various transactions can properly be understood as follows:

(i) DVP loaned moneys to the applicants to obtain the CS LoC;

(ii) FFM/IR loaned moneys to DVP to obtain the Barclays LoC for the benefit of the applicants;

(iii) FFM/IR were repaid from the proceeds of the applicants' funds underpinning the CS LoC;

(iv) the net effect is that DVP continued to finance the applicants' LoC with the applicants remaining indebted to DVP; and

(v) the retention by FFM of the moneys (supporting the LoC) after repayment to it of the debt by the applicants/DVP created a resulting trust in favour of the applicants.

43 The advantage of that analysis is that it corresponds with contemporaneous emails and with the accounts and financial statements of the applicants, DVP and FFM. In contrast, Mr. Shaw's analysis, although as a theoretical contractual construct undoubtedly arguable, it is not supported by the evidence. In my judgment, in the absence of evidence supporting Mr. Shaw's legal analysis, the liquidator has no real prospects of resisting the relief sought by the applicants.

44 For these reasons, I grant the relief sought and will hear counsel as to the terms of the order and as to costs.

Ruling accordingly.