[2021 Gib LR 348]

MATTIN v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration), JUNO FUND SERVICES LIMITED, DOMAIN MANAGEMENT LIMITED and ROACHE

SUPREME COURT (Dudley, C.J.): June 25th, 2021

2021/GSC/17

Injunctions—interlocutory injunction—balance of convenience—court ordered injunctive relief in action by investor—founder of investor fund (in administration) accepted that he held some of his shares on trust for investors but failed to account for distributions received from those shares or to cooperate with administrator

The claimant applied for orders against the fourth defendant.

The claimant was one of a number of investors who had brought claims against the fourth defendant in three separate claims: the Mattin action, the Braganza action and the Rennes action. The first defendant, DVP, was a Gibraltar experienced investor fund and protected cell company which was now in cell administration. DVP was formed to fund applications for 60 top level internet domain names, with each bid made by one of 60 special purpose vehicle companies.

It was not in issue in this application that the fourth defendant was the primary founder and promoter of DVP. Each of the 60 bid vehicles had an authorized nominal share capital of 100 ordinary shares carrying no economic rights but affording control of the company, and 100,000 redeemable preference shares carrying all the economic rights. A private placement memorandum (PPM) was issued for each bid vehicle, which set out that the offering of preference or investment shares was in two distinct forms: (a) 66.75% of the authorized investment share capital offered to the fourth defendant, as principal founder of the business; and (b) 32.25% of the authorized investment share capital offered to DVP, which would in turn be funded by the investors in DVP. DVP issued a private placement memorandum (the DVP PPM) to raise capital by selling redeemable shares to investors. The investment was stated to provide the venture capital funding to enable the bid vehicles to pay costs associated with the filings of applications for the domain names.

In addition to what was offered by the DVP PPM, investors were offered two additional incentives: strategic investor direct equity ("SIDE"); and the

performance guarantee trust ("PGT"). The PGT was relevant to the present application. It arose or was evidenced by a letter dated March 5th, 2012 from the fourth defendant to prospective investors. The fourth defendant pledged £42m. of his own equity holding as security against the investor funds. It was stated in the PGT that—

> "I hereby confirm that £42,000,000 worth of direct equity . . . in the Bid Vehicles of which is held in my name shall be held on trust in the name of T&T Nominees Limited . . . for the benefit of the investors in [DVP] until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has [been] repaid to them . . . Should the Repayment Event not take place within 54 calendar months from the Closing Date . . . the Direct Equity shall be transferred to the Participating Shareholders in [DVP] pari passu based on the size of their Capital Commitments . . ."

The claimant and the other investors in DVP received no distributions from their DVP preference shares. The claimant alleged that the trigger condition for a distribution to be made under the PGT to the investor beneficiaries was met in November 2016 but that the fourth defendant had failed to make payment.

Following an application for summary judgment in the Braganza action, the court declared that pursuant to the trust letter £42m. worth of shares owned by the fourth defendant in the 16 bid vehicles listed in a schedule were held on trust for Braganza II AB and other investors listed in that order. Claimants in various actions, including the present claimant, wished to vary the Braganza declaration so that it extended to shares in other bid vehicles.

The present proceedings concerned some US$32m. which the fourth defendant was said to have received from distributions made by bid vehicles. The claimant sought orders against the fourth defendant to secure that sum, for an account in respect thereof, and related disclosure orders.

The claimant's core contention was that the effect of the PGT instrument was that the fourth defendant declared himself a trustee of all the shares standing in his name in the bid vehicles so as to crystallize and secure the fixed value of £42m. If the event arose which required a determination and distribution in accordance with the PGT instrument, the PGT needed to deliver that fixed value to the entitled investors, subject only to any balance accruing to the fourth defendant. If that analysis was correct, the claimant and other claimants with the benefit of the PGT had a proprietary claim to the US$32m. The claimant submitted that the fourth defendant's conduct both before and after the cell administration order was made had shown him to be evasive, obstructive and uncooperative.

Held, granting injunctive relief:

(1) When determining whether to exercise its discretion to grant injunctive relief, the test to be applied by the court was that expounded in *American Cyanamid Co.* v. *Ethicon Ltd*. The court would ask itself, first, whether there was a serious issue to be tried; secondly, whether damages awarded

at trial or payable under the claimant's undertaking would provide an adequate remedy to the party injured by the grant or otherwise of the injunction; and thirdly, if there were doubt as to whether damages could afford an adequate remedy, the court must ask itself where the balance of convenience lay (para. 31).

(2) It was evident from the outline rehearsal of the competing positions adopted by the claimant and the fourth defendant that the low threshold of serious issue to be tried was easily met. No substantive argument had been advanced as to the weakness of the proprietary claim. The fundamental issue that would in due course have to be determined as against the fourth defendant was not whether the claimant and other claimants had the benefit of proprietary rights to shares in bid vehicles, but the scope of the PGT in the sense of which bid vehicle shares were caught by it and how "£42,000,000 worth of direct equity" was to be interpreted (para. 34).

(3) The fourth defendant's conduct undoubtedly called into question his probity. It might be that at trial the allegations of misconduct would not be made out, but in the context of the present application they were sufficient to lead the court to conclude that there was real doubt as to whether an award of damages would afford the claimant an adequate remedy. In contrast, there was nothing before the court to suggest that any injustice caused to the fourth defendant by the grant of the injunction could not be remedied by an award pursuant to the claimant's cross-undertaking in damages. The court's evaluation of the contrasting positions as regarded the adequacy of damages militated towards the exercise of discretion in favour of the grant of injunctive relief. So did the assessment of the overall balance of convenience. It was unnecessary to consider the relative strength of each party's case, save to highlight that the claimant's claim was proprietary; the fourth defendant accepted at least in part that some of the shares he held in the bid vehicles were held by him pursuant to the PGT and were therefore trust property; that notwithstanding that admission, he had failed to account to the investors for any distributions received from those shares; and that there was cogent evidence of lack of cooperation with the administrator. The only factor that could militate against granting an injunction was delay, but in large measure that was attributable to the fourth defendant's lack of cooperation with the administrator. The court was therefore satisfied that it was proper for it to exercise its discretion and grant injunctive relief. It would hear the parties as to the precise terms of the order (paras. 37–43).

Cases cited:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504; [1975] F.S.R. 101; [1975] R.P.C. 513, applied.

(2) *Cherney* v. *Neuman*, [2009] EWHC 1743 (Ch), referred to.

(3) *Mediterranea Raffineria Siciliana Petroli S.p.A.* v. *Mabanaft GmbH*, No. 816 of 1978, English C.A., December 1st, 1978; [1978] 12 WLUK 11, considered.
(4) *Melvin* v. *Roache*, 2016 Nos. 09–11, October 18th, 2017, unreported, considered.
(5) *Premier Registry Ltd.* v. *Famous Four Media Ltd.*, 2019 Gib LR 73, considered.
(6) *Sports Network Ltd.* v. *Calzaghe*, [2008] EWHC 2566 (QB), considered.

K. Azopardy, *Q.C.* with *K. Power* (instructed by TSN) for the claimant;
N. Cruz (instructed by CruzLaw) for the first defendant;
D. Eaton Turner (instructed by Phillips) for the second defendant;
E. Bennion-Pedley with *T. Hillman* (instructed by Hillmans Law) for the third and fourth defendants.

[*P. Caruana*, *Q.C.* with *C. Allan* (instructed by Peter Caruana & Co.) for the claimants in 2018 Ord 008;
D. Feetham, *Q.C.* with *D. Martinez* (instructed by Hassans) for claimant 1 in 2018 Ord 031;
S. ffrench Davis (instructed by Governor's Street Chambers) for claimants 2 and 3 in 2018 Ord 031.]

1 **DUDLEY, C.J.:** This is an application by the claimant ("CM") for orders against the fourth defendant ("IR") to secure sums in excess of approximately US$32m. paid out to IR and derived either directly or indirectly from certain bid vehicles which are (or were) underlying assets of "Cell A" of the first defendant ("DVP"), for an account in respect thereof, and related disclosure orders.

2 The factual matrix relied upon and which underpins the application is to be found in the rather extensive second witness statement of Robert Edward Maroney ("RM") dated October 30th, 2020. RM is an investment advisor and representative of CM and on September 16th, 2014 was appointed as CM's non-executive representative on the board of DVP. For his part, IR in his second witness statement, dated March 16th, 2021, states that much of what RM says is disputed but that so as to keep his statement concise only deals with what he considers to be "key issues that are or may be material to the application." Subject to the caveat that necessarily arises from the foregoing, in setting out the background briefly, and I hope reasonably non-controversially, I rely upon RM's witness statement and Mr. Azopardi's skeleton.

3 The claimant ("CM") is one of a number of investors who have brought claims against IR in three separate claims. These have been previously described as "the Mattin action," "the Braganza action" and "the Rennes action" and which by order of April 9th, 2019, and subject to its terms, I ordered that they be heard together, with any application in any of the three

actions having to be served on all parties to any of the actions. Other investors hold claims or rights they pursue in the administration of the first defendant.

4 DVP is a Gibraltar experienced investor fund and protected cell company which is now in cell administration in accordance with an order dated April 23rd, 2018, appointing Edgar Lavarello of PwC as administrator ("EL" or "the administrator"). Although DVP has other cells, no shares in them were ever issued, so DVP and Cell A are effectively the same. DVP was formed to fund applications for 60 top level internet domain names ("TLDs") with each bid for a TLD made by one of sixty special purpose vehicle companies ("the bid vehicles").

5 The second defendant ("Juno"), formerly known as Grant Thornton Fund Administration Ltd., was the fund administrator for DVP. It is not involved in this application.

6 The third defendant ("DML") is a Gibraltar company said to be wholly owned by IR and, although not a subject of this application, it is CM's case that until the making of the cell administration order, it was a conduit for IR's control of DVP and the underlying investments.

7 It is not in issue, at least in the context of the present application, that IR was the primary founder and promoter of DVP. IR also held 80% of shares in Famous Four Media Ltd. (in liquidation) ("FFM"). FFM provided management services to the bid vehicles and following the administration order, EL sought certain relief against it (see *Premier Registry Ltd.* v. *Famous Four Media Ltd.* (5)).

8 Each of the 60 bid vehicles had an authorized nominal share capital of 100 ordinary shares carrying no economic rights but affording control of the company, and 100,000 redeemable preference shares carrying all the economic rights. DML was appointed as director of the bid vehicles. Before DVP issued a private placement memorandum to raise capital, all ordinary shares were issued or transferred to DVP, giving DVP shareholder control.

9 A private placement memorandum ("PPM") was issued for each bid vehicle on around October 15th, 2011 and all are known to have been amended on or around March 28th, 2012. As set out in each bid vehicle PPM, the offering of preference or investment shares was in two distinct forms, as follows:

(a) The first category was the shares to be offered to IR himself, as the principal founder of the business:

> "During the Offer Period, the Fund shall offer for subscription 66,750 Investment Shares (representing 66.75% of the authorised Investment Share capital) to Iain Roache at a nominal value of £0.01 with a

premium consisting of certain intellectual property and contractual rights that he has brought to the Fund."

(b) The second category was the shares to be offered to DVP (which in turn would be funded by the investors in DVP) described as follows:

"During the Offer Period, the Fund shall offer for subscription 33,250 Investment Shares (representing 32.25% of the authorised Investment Share capital) at an aggregate price of £1,000,000 [£1 million] which represents a nominal value of £0.01 per share and the remaining amount being share premium."

10 In turn, DVP also issued a private placement memorandum ("the DVP PPM") to raise capital by selling redeemable preference A shares to investors. That PPM also went through various iterations with that dated February 29th, 2012 being the current version as at April 5th, 2012, which was the closing date for subscriptions for the DVP preference shares. Paragraph 10.4 of the DVP PPM would have made it clear to investors that all the financial capital for the bid vehicles was to be derived from the investors in the DVP preference shares:

"What the Investment Covers

The investment by Cell A into the Bid Vehicles shall provide all the venture capital funding to enable the Bid Vehicles to pay for costs associated with the filings of applications by each Bid Vehicle for the gTLD licenses [*sic*] . . .

It should be noted that those Bid Vehicle Investment Shares that are not held by Cell A may be issued at their nominal value of £0.01. These may be held by Iain Roache; investors of strategic importance to the Bid Vehicles (for example in providing potential exit routes or providing assistance in the commercialisation of the registry licences); such other parties as the Board of Directors of the Bid Vehicles determine in its absolute discretion. It is not intended that any Bid Vehicle Investment Shareholder other than Cell A shall contribute to the cost associated with the filing of the applications to ICANN for the gTLD registry licences."

Whether or not it follows, as RM contends, that therefore prior to the closing of the subscription to DVP on April 5th, 2012, the bid vehicles were essentially valueless or, alternatively, as IR contends, that by virtue of the fact that they were well placed to bid for ICANN registries they had intrinsic value and goodwill, is of no consequence to the issues which fall to be determined in the present application.

11 RM contends in his witness statement that beyond what was offered by the DVP PPM, investors were offered two additional incentives:

(i) strategic investor direct equity ("SIDE"); and

(ii) the performance guarantee trust ("PGT").

The SIDE is only of tangential relevance. As I understand it, IR afforded investors the opportunity to acquire direct equity in the bid vehicles from his own holdings of bid vehicle preference shares, to investors making a capital commitment of £5m. or more to DVP. According to RM there are, potentially, certain matters in issue between CM and IR in respect of CM's SIDE investments but again, according to RM, for the purposes of the present application, the SIDE scheme is relevant only to the extent that:

(i) it is said by RM that documentation provided to CM in relation to SIDE distributions provide some of the evidence in respect of sums received by IR from bid vehicle preference shares registered in his name and which CM claims were PGT property; and

(ii) it is accepted by CM that bid vehicle preference shares transferred in accordance with the SIDE investments, although originally registered in IR's name, are not subject to the PGT.

The performance guarantee trust and CM's claim under it

12 The PGT arises or is evidenced by a letter dated March 5th, 2012 from IR to prospective investors. In CM's case, she received it by email dated March 7th, 2012, in which IR also enclosed a redlined version of the DVP PPM with an enhanced allocation of SIDE investments. In relation to the PGT, IR stated: "I have also attached the letter confirming my pledge of GBP42 million of my own equity holding as security against the investor funds." The PGT itself reads:

> "To whom it may concern,
>
> I hereby confirm that £42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles of which is held in my name shall be held on trust in the name of T&T Nominees Limited (a fiduciary company regulated by the FSC and controlled by partners of Triay and Triay) for benefit of the investors in Domain Venture Partners PCC Limited until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has be [sic] repaid to them ('the Repayment Event'). Upon the Repayment Event the legal and beneficial title of such equity shall revert to Iain Roache. Should the Repayment Event not take place within 54 calendar months from the Closing Date of Domain Venture Partners PCC Limited the Direct Equity shall be transferred to the Participating Shareholders in Domain Venture Partners PCC Limited pari passu based on the size of their Capital Commitments in Domain Venture Partners PCC Limited.

> For the sake of clarity terms defined in or whose interpretation is provided for in any Private Placement memorandum of the Fund shall have the same meaning when used in this Agreement unless separately defined in this Agreement."

13 According to RM, the target return, which was the trigger for payment under the PGT, was directly correlated with provisions in para. 8.5 of the DVP PPM, which set out the "Investment Director Performance Fee." It is, as also said by him, that these together with the PGT were actively negotiated between investors and IR and precluded DML from receiving its fees of 20% of the profits until investors had received the return of the capital plus a hurdle rate. Returning to the PGT, again according to RM, it was a means of ensuring (at least to the extent that there was sufficient value in the bid preference shares held by IR) that a minimum guaranteed return would still be made to investors, even if DVP was unable to provide that through its minority interests in the bid vehicles.

14 It is further said by RM that, in the event, CM and the other investors in DVP received no distributions from their DVP preference shares either by the 54 months from the closing date, or to date. Although investors, including CM, have received moneys from the SIDE bid vehicle preference shares, which in CM's case is said to be just over US$700,000. It is therefore said for CM that the trigger condition for a distribution to be made under the PGT instrument to the investor beneficiaries was met on November 5th, 2016, but that IR has failed to effect payment.

15 Following an application for summary judgment in the Braganza action, which was not opposed by IR, by order dated January 8th, 2019, I made a declaration that:

> "Pursuant to the Trust Letter, £42 million worth of shares owned beneficially or legally by [IR] in the 16 Bid Vehicles listed in Schedule 1 to this Order are held on Trust for [Braganza II AB] and subject to paragraph 2 below, the Original and/or Step-In Investors in [DVP] listed in Schedule 2 to this Order, to be shared pari passu amongst them."

Paragraph 2 of the order deals with the competing claims between investors.

16 The 16 bid vehicles listed in Schedule 1 were bid vehicles which were successful in becoming the Registry for the gTLD for which they applied. There is a 17th bid vehicle, dot Gift Ltd., which does not operate a registry, but which withdrew its application for .gift in exchange for a 50% share in the profits of the successful applicant. The remaining bid vehicles were unsuccessful bidders but remain relevant in the various actions because they received financial compensation when their bids were withdrawn or failed and the compensation was paid out to shareholders including IR. In his skeleton, Mr. Bennion-Pedley accepts that payment were made to

shareholders of which IR, "was, by a considerable margin, the most significant."

17 As I understand it, claimants in various actions, including CM, want to vary the Braganza declaration so that it extends to shares in bid vehicles which either did not bid for gTLDs or whose bids were unsuccessful. An evident underlying reason for this is to be found in a report to the investors produced by the administrator, dated March 5th, 2020 ("the March 2020 investor report") in which he stated that "any real value currently in the business is minimal and will only be in the few millions of pounds." RM's assessment, as set out in his witness statement, is that optimistically a sale of the complete package of all the ordinary and preference shares in the active registries might achieve £2.4m. and that it therefore follows that all of IR's interests in the active registries and DVP must be worth less than that (although for the purposes of this application CM is willing to ascribe to IR interest, the value of the whole business).

18 The US$32m. which is the subject of the application, is based upon sums said to have been received by IR from distributions made by bid vehicles and ascertained from bank statements obtained by the administrator. In a letter from the administrator to the court, dated October 30th, 2020, he states:

> "I have read Robert Maroney's Second Witness Statement dated 20 October 2020 and hereby confirm as follows:
>
> (i) The extracts from bank statements referred to at paragraphs 139–140 of the witness statement and exhibited as REM2/669-674 and REM2/675-711 are accurate extracts from bank statements that have been provided to Mr Robert Maroney by myself or PwC in the form of PDF's and an Excel file respectively. In the case of the PDF's, the full set of those statements is as exhibited in REM3. The exhibited bank statements, and the statement from which the extracts were taken, were obtained by me or PwC in the course of my appointment as Cell Administrator.
>
> (ii) The bank statements show a number of transfers made to Iain Roache directly or to accounts held on his behalf. In the case of five of these transfers, I and my team have identified that they were paid into the account of a company controlled by Mr Roache called Famous Four Media Limited, which then made a single corresponding onwards transfer to an account in Mr Roache's name. The actual payments made to Mr Roache are numerous and these are summarised in the 'Bank statement payment amount to Mr Roache' column of the table below paragraph 142 of the witness statement, amounting to US$32,191,836.14.

(iii) Although I am certain that the above amounts were paid to Mr Roache, we are currently uncertain what the exact total figure received by Mr Roache was, and my and PwC's investigations into further transfers are ongoing. We have identified further entries in respect of which the transfer details do not correspond on their face with a distribution to Mr Roache because they suggest payments to investors, however the beneficiary of the recipient account appears to have been Mr Roache or companies which he controlled. The exercise to identify the exact amount received by Mr Roache in the transactions detailed in these bank statements is therefore ongoing but early investigations show that it exceeds US$32,191,836.14.

Accordingly, while I cannot say what the total amount of payments to Mr Roache or for his benefit disclosed in these bank statements is at present, I can verify that they show that at the least the transfers of US$32,191,836.14 set out in (ii) above were made to him."

19 Premised upon the distributions received by CM from the preference shares held by her through the SIDE incentive scheme, RM calculates that IR would have received around US$32,086,798 in distributions from bid vehicle preference shares registered in his name. This he says, correlates with the evidence in the bank statements which reflect payments to IR and for and on his behalf.

20 CM's core contention is that the effect of the PGT instrument was that IR declared himself a trustee of all the shares standing in his name in the bid vehicles so as to crystallize and secure the fixed value of £42m. If the event arose which required a determination and distribution in accordance with the PGT instrument, the PGT needed to deliver that fixed value to the entitled investors, subject only to any balance accruing to IR. If that analysis is correct, CM and other claimants with the benefit of the PGT (subject to competing claims between them on the distributions of the assets of the PGT or the PGT shares) have a proprietary claim to the US$32m.

Assertions in relation to IR's conduct

21 Reliance is placed by CM on IR's conduct, unusually not only arising in the context of the present dispute and the litigation arising therefrom, but also in relation to unrelated litigation. That earlier unrelated litigation did however touch upon certain bid vehicles and entities involved in the management of the DVP fund. My extempore ruling of October 18th, 2017 in *Melvin* v. *Roache* (4) broadly sets out the litigation conduct now being relied upon:

"3. The offending documentation essentially falls into two categories. The first is item 1 of the schedule, namely eight invoices purporting to be invoices from Famous Four Media Ltd. to AlpNames Ltd. dated 28 February 2015 through to 21 August 2016 and which were disclosed to the petitioner on 3 February 2017. To those must now be added a further two invoices with earlier dates which had not been previously disclosed. The second category are the remaining items, 2 to 8 in the schedule, which documents underpin or brought about the rights issue.

4. I need not deal with it in detail, but suffice it to say that, apart from the issues now arising, the respondents have historically been guilty of serious shortcomings in relation to their disclosure obligations. That eventually resulted in an order allowing for the taking of copies of metadata of various documents. It is not disputed that the metadata established that the documents in the schedule to the order were created after (in some instances long after) the date on the face of the documents. They are, at least in that sense, and for present purposes I adopt that narrow characterisation, forged documents.

5. It is accepted by the respondents that the material produced by them contained inaccurate and misleading information; and that the forged documents have been deployed in the litigation and relied upon in pleadings and witness statements. It also formed part of the material provided to the expert witnesses, whose opinions are consequently tainted."

22 More recently, and more closely related to the present litigation, reliance is also placed upon IR's conduct in *Premier Registry Ltd.* v. *Famous Four Media Ltd.* (5). In that action, EL sought to take control of a letter of credit in favour of ICANN to ensure the continued operation of bid vehicles. That letter of credit was held in the name of Famous Four Media Ltd. (in liquidation) a company in which IR had an 80% shareholding and which was placed into liquidation by its members. Unusually, the liquidator sought to abrogate his responsibility and authorized IR and his English solicitors to act on FFM's behalf. Leaving to one side my determination that the letter of credit was held on a resulting trust for the bid vehicles, I point out (2019 Gib LR 73, at para. 21) that IR had in his evidence omitted a relevant final email in a thread exhibited by him.

23 It is also right to say that in the interim report to investors dated March 5th, 2020, EL is critical of IR's conduct. The following passages are instructive:

"Sometime in late 2017 or early 2018 the FFM office in Gibraltar was shut down and a limited number of support functions were transferred to a different FFM company in London. Without informing the GFSC

> or the Investors, FFM London began to collect the monies due to the Bid vehicles. These monies were the subject of significant litigation instigated by me.
>
> Notwithstanding the control that FFM exercised throughout the period up to 28April 2018, over the management of DVP and the Bid Vehicles, it was unable to provide us with any accounting information for the 2017 financial year or any information for the period up to 28 April 2018, and have failed to account to me for the amounts they collected following my appointment.
>
> You will also be aware that lain Roache is the sole shareholder of DML (Domain Management Limited) a company that was engaged as 'investment director' of DVP and was paid $1,536,240 during 2017. DML has also failed to provide us with any accounting information or bank statements for either the 2017 financial year or any other prior year period."

And:

> "There is a history of Iain Roache making incredibly high profit projections resulting in fantastic valuations of the domain names, none of which were realised. The February 2017 'transaction and finance pack' ('2017 report') issued by Geir Rasmussen and Iain Roache showed that after three years of making losses (2014, 2015 and 2016) the Registries were projected to make a profit of US$1,046,745 a result we now know not to be true, as in fact the actual loss recorded in 2017 was 50% greater than that recorded 2016. Furthermore, the projected profits for the subsequent years were published in the 2017 Report as:
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> |---|---|
> | 2018 | $9,097,072 |
> | 2019 | $41,944,366 |
> | 2020 | $136,554,086 |
> | 2021 | $231,967,170 |
> | 2022 | $420,609,439 |
>
> It was such remarkable assertions that resulted in the implausible 2016 audited terminal value of $1.75 billion as stated in page 17 of the 2017 Report."

IR's evolving case

24 IR does not appear to dispute having received approximately US$32m.

25 In his original defence dated July 10th, 2019, at para. 23(d)(i)(A), IR appeared to deny that he was a trustee, and asserted that the PGT "nominates

a Trustee which is not [IR].” That is presumably a reference to T&T Nominees Ltd., to whom in the event no shares were transferred. And at (K) of the same paragraph, that it was for Juno to determine the original investors' respective beneficial interests in the PGT, whilst then going on to deny that any such beneficial interests had arisen. However, thereafter at para. 48 of the same pleading (and whilst not admitting the trust valuation), he admits para. 56 of the amended particulars of claim in which it is pleaded that he “[declared] a trust over SPV Participating Shares as were then or as were to be held by him personally.” As I then understand para. 49, it is said that the obligations under the PGT would have arisen in circumstances in which the “Original investors investment had not returned a compound 15% by the 54 month anniversary of the fund closing.” On that premise, it is said that nothing is due to CM and most investors. The pleading does not condescend upon that part of the PGT that specifically makes reference to the repayment of capital. Also IR's pleaded case at that stage was that if beneficial interests had arisen, and although the equity allocation among the bid vehicles was at his discretion, “[at] that juncture, it would have covered all of the SPVs [bid vehicles] and would not be subject to the DVP PPM.”

26 In a position statement dated March 3rd, 2020, which was filed for the purposes of a CMC, IR's position in respect of the PGT was put as follows:

> “For the avoidance of doubt, Mr Roache's position on this issue is as follows:
>
> 18.1. Although it would probably have been open to Mr Roache to determine which shares he placed into trust, as a matter of fact, he made no such election. Mr Roache simply gave instructions to Grant Thornton Fund Administration Limited (now Juno Fund Services Limited) for a trust to be established, albeit that that instruction was never carried through;
>
> 18.2. The result (subject to the second preliminary issue as to value) is that the trust declared or evidenced by the Trust Letter, bit upon shares across all Bid Vehicle companies.
>
> 19. Accordingly, if the Court is so minded (and subject to what follows in respect of the number of shares in each Bid Vehicle subject to the trust), Mr Roache does not oppose the variation of the order of 8 January 2019 so as to amend or replace the existing schedule 1 with a schedule that includes all 60 Bid Vehicle companies.”

The position statement goes on to deal with the meaning of the phrase “£42m worth” and at para. 21 sets out what is now IR's core contention:

> “In short, [IR] will contend that only such number of the shares across the Bid Vehicle companies as were necessary, pari passu, to add up

> to £42m by reference to the values set out in the 'Valuation Book', were subject to the trust."

In a witness statement dated October 30th, 2020 he adopted a similar position, and at para. 57 said:

> "Accordingly the effect of the Trust Letter (subject to issues in respect of participation, dilution and whether the Repayment Event took place which remain in issue between the parties and shall need to be determined in due course) was to impose a trust over a quantifiable number of shares in each of the 60 Bid Vehicles. I understand that my solicitors are to seek consensus between the parties as to the exact number of shares that became bound by the trust in order to try to move this matter forward and to allow for a more precise declaration."

27 At the hearing of this application IR provided a so called "Draft Substituted Defence and Counterclaim" dated March 3rd, 2021. Subsequently, by virtue of a consent order, DML and IR were given permission to rely, file and serve an amended defence and counterclaim which is materially the same. The position in that pleading is more nuanced, and rather than the broader position adopted in the position statement and October 30th, 2020 witness statement, it is now said that IR gave instructions for a number of shares in 20 bid vehicles to be held on trust. Which shares he says are held on trust by him for the investors and himself as co-investor. His primary case now is that the effect of the PGT was to impose upon him an obligation to place such number of shares across the bid vehicles as were necessary to add up to £42m. Crucially, that the interpretation of "value" for the purposes of determining the number of shares in each bid vehicle was by reference to the "Valuation Book" in the DVP PPM. And, that subject to his placing shares with such an aggregate value of £42m., that he had a discretion as to which shares were to be subject to the trust.

28 Paragraph 10.3 of the DVP PPM deals with the valuation of the bid vehicles and a valuation report, the valuation book, which is stated to be an independent valuation undertaken by Sochalls and which was "produced by estimating the potential revenue of each bid vehicle based on each being operational for a 5 year period . . ." If the valuation of the bid vehicles for the purposes of the PGT is to be derived from the DVP PPM, it is instructive that at para. 11.4 there is a different valuation approach. According to RM, whilst the Sochalls valuation adopts a discounted cash flow valuation based on wildly optimistic assumptions about future revenues, para. 11.4 adopts a fair market value approach.

29 For the purpose of opposing the application, IR also filed a witness statement dated March 16th, 2021. In it, as regards the instructions for shares to be held on trust across 20 bid vehicles, he states:

> "31. On 4 October 2012 I issued instructions to the fund administrator to place the requisite number of shares across the 20 most valuable bid vehicles into the Security Trust. Although the fund administrator appears not to have actioned that request, I take the view that the trust property consisted of those shares set out in the schedule in that request . . .
>
> 32. That made sense at the time as those top 20 registries had been valued most highly in the valuation book and so had the largest free float in my personal holdings which, from a purely practical point of view, allowed me to give the instructions . . ."

He also states that he has "never denied that [he] is bound, in some way, by the Trust Letter" and quite accurately, that his "position on the identity of the trust property has not been entirely consistent." As regards the allegations by RM in relation to his conduct, he does not deal with these in any material way much beyond his statement at para. 9: "Much of what [RM] says is disputed and I consider has been included in order to either discredit me or attempt to paint me in poor light."

Payment into court/securing the alleged trust property

The law

30 CM by her application notice seeks relief pursuant to various provisions in CPR Part 25 and/or the Trustee Act and/or the inherent jurisdiction, although in the event no reliance was placed upon the Trustee Act. The principal application, for an order to secure what is said to be trust property, evidently is one in which proprietary relief is sought and it follows that the court's equitable jurisdiction is engaged. Therefore, not least given that CPR 25.1(3) makes clear that the court's inherent jurisdiction is preserved, determining whether or not the property is income producing for the purposes of CPR 25.1(c)(vi) or whether the distributions to IR are a "fund" for the purposes of CPR 25.1(1) is in my judgment, a sterile exercise.

31 In determining whether or not to exercise my discretion in granting injunctive relief the test to be applied is that expounded in *American Cyanamid Co.* v. *Ethicon Ltd.* (1). First, is there a serious issue to be tried? Secondly, would damages awarded at trial or payable under the claimant's undertaking provide an adequate remedy to the party injured by the grant or otherwise of the injunction? If there is doubt as to whether damages can afford an adequate remedy, the court must consider where the balance of convenience lies.

32 Although Mr. Azopardi in his submissions dealt with adequacy of damages, he relies upon *Sports Network Ltd.* v. *Calzaghe* (6). *Calzaghe* is an English High Court decision of Coulson, J. involving an application under CPR 25.1(1) for the preservation of moneys allegedly held on trust

and in which, whilst applying *American Cyanamid* and considering whether there was a serious issue to be tried and the balance of convenience, the judge did not specifically consider the adequacy of damages. As I understand it, Mr. Azopardi submits that the inference that is to be drawn is that in cases for injunctive relief involving an application for a proprietary injunction, the court does not have to specifically consider the adequacy of damages.

33 Although there is no specific reference in *Calzaghe* to the question of the adequacy of damages, as I read the judgment, consideration of that issue was in effect subsumed in the analysis of the balance of convenience. That said, subject to the *serious issue to be tried* threshold being met, in applying the *American Cyanamid* guidelines I am mindful of the statement of Templeman, L.J. in *Mediterranea Raffineria Siciliana Petroli S.p.A* v. *Mabanaft GmbH* (3):

> "A court of equity has never hesitated to use its strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone."

Serious issue to be tried

34 It is evident from my outline rehearsal of the competing positions adopted by CM and IR that the low threshold test of *serious issue to be tried* is easily met. No substantive argument has been advanced as to the weakness of the proprietary claim; on January 8th, 2019 in the Braganza action I granted summary judgment which was not opposed by IR, and granted declaratory relief to the effect that £42m. worth of shares owned by IR in 16 bid vehicles were held pursuant to the PGT; subsequently, by his position statement dated March 3rd, 2020, IR indicated that he would not oppose the variation of the January 8th, 2019 declaration so as to substitute the 16 bid vehicles with all 60 bid vehicles and most recently by his March 3rd, 2021 witness statement and notwithstanding a change of position as to which bid vehicles are caught by the PGT, IR nonetheless accepts that he is bound "in some way" by the PGT. As matters stand at present, the fundamental issue that will in due course have to be determined as against IR is not whether CM and other claimants have the benefit of proprietary rights to shares in bid vehicles, but rather the scope of the PGT in the sense of which bid vehicle shares are caught by it and how "£42,000,000 worth of direct equity" is to be interpreted.

Adequacy of damages and the balance of convenience

35 Mr. Azopardi submits that IR's conduct both before and after the cell administration order was made has shown him to be evasive, obstructive and uncooperative. That he has been unwilling to provide information and assistance to a court appointed administrator. That throughout, he has acted in a self-serving manner using the structure as his own personal financial fiefdom to the detriment of investors. That the opaqueness of his transactions and dealings is remarkable despite his admissions that a large measure of bid vehicles fall within the scope of the PGT. And that even now he seems unwilling to enter into voluntary orders providing information which in part would do no more than confirm to the court what he should already have told the administrator. In essence that there can be no confidence in IR abiding by future orders of the court as to damages and that his evasiveness suggests a desire to conceal what went on and what is going on now. And that therefore assets in respect of which there is a real dispute should be secured.

36 For his part, Mr. Bennion-Pedley submits that IR has complied with all orders made to date and that there is no evidence to suggest that he will not comply with any orders the court makes at the appropriate time. That the evidence upon which CM relies, which is intended, presumably, to discredit or raise suspicion, is highly partisan and disputed. And that the fact that this investment turned out badly for the investors or that IR personally benefited from it to a very significant extent does not provide sufficient grounds to proceed other than in a properly principled way.

37 IR's alleged conduct undoubtedly calls into question his probity. RM's witness statement may turn out to be partial but, at this juncture, IR has chosen not to provide a counter-narrative and has limited himself to a broad denial without condescending upon the detail of the allegations. Moreover, and whilst cognizant that in this, as in any other litigation, evidence can be advanced in a partial manner, I do not ignore that the basis for much of the criticism being levied against IR is underpinned by the difficulties which EL has encountered in the administration of DVP and the way that IR has conducted himself in earlier litigation. It may be that at trial, with the benefit of a detailed consideration of the evidence and the cross-examination of witnesses, the allegations of misconduct which are relied upon are not made out, but in the context of the present application they are undoubtedly sufficient to lead me to conclude that there is real doubt as to whether an award of damages would afford CM an adequate remedy.

38 For her part, CM through counsel offers a cross-undertaking to pay any damages which IR sustains as a consequence of the injunction which the court considers she should pay. In relation to her ability to meet any obligations which may arise as a consequence of that obligation, all that is

said is that CM is a wealthy investor who invested £5m. into DVP and that there is no suggestion that she is not in a position to meet the undertaking. The adequacy of the cross-undertaking has not been challenged.

39 In my judgment, there is doubt as to whether an award of damages would afford CM an adequate remedy. In contrast there is nothing before me to suggest that any injustice caused to IR by the grant of the injunction cannot be remedied by an award pursuant to the cross-undertaking as to damages. The value of that cross-undertaking may be affected by the assets that CM may have in the jurisdiction, and by the level of risk of loss to which IR may be exposed by the grant of injunctive relief and it may require fortification, but any such application can be made in the usual way.

40 My evaluation of the contrasting positions as regards the adequacy of damages militates towards my exercising my discretion in favour of the grant of injunctive relief. So does my assessment of the overall balance of convenience. It is unnecessary for me to consider the relative strength of each party's case, save to highlight that CM's claim is proprietary; that IR accepts at least in part that some of the shares he holds in the bid vehicles are held by him pursuant to the PGT and are therefore trust property; that notwithstanding that admission (the scope of which has varied over time) he has failed to account to the investors for any distributions received from those shares; and that there is cogent evidence of lack of co-operation with EL, which together with historic litigation conduct, could be viewed as indicative of IR's willingness to engage in sharp practice. The only factor which could militate against granting an injunction is delay; however, I accept Mr. Azopardi's submission that given that this is a proprietary claim, delay is irrelevant as it is not necessary to show a risk of dissipation (*Cherney* v. *Neuman* (2)). But in any event, in large measure the delay can be attributed to IR's lack of cooperation with the administrator who had to obtain bank statements and reconstruct records, which in turn have provided the evidential basis for the application.

41 For the reasons I have given, I am satisfied that it is proper for me to exercise my discretion and grant injunctive relief. However, the relief must be circumscribed to this action. The various actions are being managed together and although some issues touching upon all of them will fall to be determined at the same time, they have not been consolidated. As regards the securing of assets, the injunctive relief is to be limited to CM's claim in so far as it relates to the protection afforded to her investment by the PGT. If the parties are unable to agree the amount that is to be secured, I shall hear submissions. Evidently, consequent upon this ruling, claimants in other actions may of course make such applications as they may consider appropriate.

42 In addition, as is usual in the context of orders to protect and preserve what is said to be a trust fund, I shall order ancillary relief. IR is to provide

an account of all distributions and other financial benefits he may have received, either directly or indirectly from the bid vehicles together with disclosure of the location of those assets and of any substituted property into which it can be traced. For that accounting and disclosure process to be effective, it is unrealistic for it to be limited to CM's investment, her proprietary claim is to moneys which are part of a larger fund and the accounting and disclosure will not be capable of being understood unless it is by reference to the whole.

43 I shall hear the parties as to the precise terms of the order and as to costs.

Ruling accordingly.