IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD 63 OF 2014 (AJJ)

Before The Honourable Mr Justice Andrew J. Jones QC

In Open Court on 3rd, 4th and 7th November and 5th December 2014

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION) (AS REVISED)

AND IN THE MATTER OF VC COMPUTER HOLDINGS LIMITED ("the Company")

APPEARANCES:

Mr Alan Turner and Mrs Charlotte Hoffman of Turners for the Petitioners, Zukiapa Management Limited and Sakaras Holding Limited (In Liquidation)

Mr Paul Murphy of Stuarts for the Company and its parent company, Mertal Overseas SA

JUDGMENT

Introduction

1. This is the trial of a creditor's winding up petition presented by Zukiapa Management Limited ("Zukiapa") and Sakaras Holding limited ("Sakaras") against VC Computer Holdings Limited ("VC"). Sakaras was incorporated in Malta in 2006 and is the top holding company of the Verysell Group which had its origins in a joint venture established in the early 1990's between a Russian citizen, Mr Mikhail Krasnov ("Mr Krasnov"), and Merisel

Inc which was a leading distributor of computer equipment. Zukiapa is incorporated in Cyprus. It is a wholly owned subsidiary of Sakaras and is an intermediate holding company within the Verysell Group. Merisel Inc sold its shareholding in 1996 and Mr Krasnov has been the controlling shareholder and CEO of the Verysell Group throughout the period relevant to this proceeding. In 2007 the Verysell Group raised new capital in the form of $30 million convertible loan notes issued by Sakaras to Brava Limited which is part of a private equity group called RP Capital which is based in London. Having made this investment, one of its directors, Mr Anatoli Kaminov ("Mr Kaminov") joined Sakaras' board of directors. He swore an affidavit upon which he was cross-examined at the trial.

2. The Verysell Group got into serious financial difficulty. Sakaras defaulted on its obligations and was put into compulsory liquidation on 4 July 2013 by order of the First Hall Civil Court of Malta. Dr Olga Finkel ("Dr Finkel") was appointed as official liquidator in which capacity she was able to secure her appointment as the sole director of Zukiapa. The directors and former management of Sakaras, Zukiapa and other Verysell Group companies have not co-operated with Dr Finkel and her attempt to obtain access to all the relevant books and records is the subject of on-going litigation in Cyprus.

3. VC was part of the Verysell Group until 2004 when it was acquired for nominal consideration by Mertal Overseas SA ("Mertal"), a company owned by Mr Luis Filipe Da Costa De Sousa Azevedo ("Mr Azevedo"). Why he acquired VC is unclear. His evidence is that his only economic interest was a commission of $20,000 per annum. In any event, his role in the affairs of the company has been very limited. VC had no employees of its own and, notwithstanding its sale to Mertal, continued as part of the Verysell Group for operational and managerial purposes. The managing director of the Verysell Group from 2004 to 2013 was Ms Natalia Terekhova ("Ms Terekhova"). She was not a director of VC but she acted on its behalf pursuant to a power of attorney issued on 15 January 2004. The evidence points to the conclusion that VC was under the managerial control of Mr Krasnov and Ms Terekhova at all material times, at least until July 2013 when Ms Terekhova ceased to be managing director of the Verysell Group. VC has not carried on any business since 2012.

4. Those books and records of Sakaras and Zukiapa disclosed to Dr Finkel in her capacity as official liquidator reflect that the proceeds of the loan notes issued to Brava Limited was lent by Sakaras to Zukiapa, which in turn lent the money on to VC pursuant to a series of seven back-to-back loan agreements made between March 2007 and December 2010. For the purposes of this proceeding the loan agreements between Sakaras and Zukiapa have been referred to as the "Back-to-Back Agreements" and those between Zukiapa and VC as the "Loan Agreements". The relevant bank records reflect that the loans were paid directly by Sakaras to VC's bank account. Dr Finkel attempted to obtain information about these loans from Mr Demedtrios A. Demetriades ("Mr Demetriades"), one of Zukiapa's former directors, but he declined to provide any substantive response on the ground that he and his law firm had acted as "nominee directors". He would not even identify the persons from whom they took instructions.

5. A statutory demand was served on behalf of Zukiapa at VC's registered office in Grand Cayman on 24 February 2014. It demanded payment of the principal sum of US$36,425,370 and interest of US$6,683,654. These are the amounts stated in a confirmation letter as being due and owing by VC to Zukiapa as at 31 December 2011 pursuant to (unspecified) "Long-term loans". This confirmation letter was found amongst the books and records disclosed to Dr Finkel. It is dated 4 May 2012, addressed to VC and signed by Zukiapa's directors, namely Mr Demetriades and Loukia Avgousti, another member of Mr Demetriades' law firm. A written response to the statutory demand was received from Mr Francisco De Castro Caldas ("Mr Caldas") who described himself as a director of VC. He made three substantive points in his letter. First, he said that "there were no Loan Agreements entered to by [VC] and [Zukiapa]". This is a lie. Second, he said that "VC has never received any bank wire transfers from Zukiapa, whether as loan proceeds or otherwise". This is true in that the loan proceeds were paid directly from Sakaras to VC. Third, he said "we can confirm that at no time has VC confirmed to Zukiapa that any amounts were due from VC to Zukiapa based on Loan Agreements". This is accurate in the sense that the confirmation letter is addressed from Zukiapa to VC, not the other way round. However, it is also disingenuous because Zukiapa's nominee directors must have signed the confirmation on the instructions or with

the approval of Mr Kransov and Ms Terekhova who were managing both companies. Mr Caldas subsequently resigned and has played no further role in this proceeding.

6. The winding up petition was presented on 20 June 2014. It is based upon the total debt of US$31.8 million plus interest presently due and owing to Zukiapa under the first six of the Loan Agreements. A further sum of US$560,000 plus interest falls due on 8 December 2015 under the seventh and last of the Loan Agreements. The evidence in support of the petition is based entirely upon documents of Sakaras, Zukiapa and VC obtained by Dr Finkel in the course of performing her duties as official liquidator. Simultaneously with the presentation of the petition, a summons was issued for the appointment of provisional liquidators. I declined to make an order *ex parte* and this summons was adjourned for an *inter partes* hearing which was initially fixed for 30 June and was then adjourned by consent of the parties until 14 July 2014. VC defended the application in reliance upon affidavits sworn by Mr Krasnov and Ms Terekhova. They accepted that the proceeds of the loan notes had been used by Sakaras to fund VC's business, but contended that the Loan Agreements (and, by necessary inference, the Back-to-Back Agreements) were never intended to be performed and did not create any debt obligations owed by VC to Zukiapa. Ms Terekhova made no attempt in her affidavit to explain why she had executed sham documents. Mr Krasnov said (in paragraph 8 of his affidavit) that the purpose of the Loan Agreements was to create a "nominal debt". He said –

> "This was required to allow a reserve option to upstream cash flow of expected future profits (if and when these profits arise) generated by Russian subsidiaries of the Group via VC to Zukiapa and thereafter to its parent company Sakaras with minimum overhead. This was the reason for both VC and Zukiapa to enter into these Loan Agreements without intent to perform them and accordingly the reason why the Loan Agreements have never been actually performed and the loan amounts have never been provided by Zukiapa to VC. This practice is quite common for many groups and businesses operating in Russia and involving companies in different jurisdictions."

I found this explanation wholly unconvincing and it appears to constitute an admission of false accounting. It is also inconsistent with the contemporaneous bank records which reflect that payments were in fact made by reference to these Loan Agreements. I concluded that Zukiapa had made out a prima facie case for a winding up order and that the appointment of provisional liquidators was necessary to prevent continued mismanagement and misconduct in relation to VC. I subsequently gave leave for the petition to be amended. Sakaras was

added as a petitioner on the basis that, if it did not pay the loan amounts to VC as paying agent for Zupiaka (pursuant to clause 5 of the Back-to-Back Agreements), then it must have made payment as lender. The petition was also amended to plead a debt of US$12,851,340 payable by VC to Zukiapa (as assignee of Sakaras) on 1 January 2015.

7. In my reasons for making an order for the appointment of provisional liquidators, I attached some significance to the fact that neither Mr Krasnov nor Ms Terekhova had explained the basis upon which VC admittedly received US$32.4 million from Sakaras if it was not by way of loans made pursuant to the Loans Agreements. VC's case, as now revealed in the affidavits sworn by Mr Azevedo on 15 and 28 August 2014, is that the payments were made pursuant to a series of seven Supply Agent Agreements purportedly made between Sakaras and VC on the same dates as the Loan Agreements, between March 2007 and December 2010. Under these agreements, the amounts paid to VC are expressed to be conditional, whereby VC has no liability to repay unless it has first received payment of the purchase price for computer equipment sold to the Verysell Group's Russian subsidiaries. Under the Supply Agent Agreements, VC purportedly granted the purchasers up to two years to pay for the goods supplied. If they failed to pay within one year of the stated deadline, their debt is assigned automatically to Sakaras or its subsidiaries so that Sakaras has a receivable from the Russian subsidiaries for unpaid goods purchased from VC and VC is released from liability. Dr Finkel's response to Mr Azevedo's evidence is that the Supply Agent Agreements appear to have been dishonestly fabricated to bolster VC's defence in the light of my conclusion that the Petitioner had made out a prima facie case. Therefore, the first issue between the parties is whether the total sum of US$32.4 million was paid to VC pursuant to the Loan Agreements or the Supply Agent Agreements. The Petitioners' case is that the contemporaneous documentary evidence points to the conclusion that the Loan Agreements are genuine contracts pursuant to which VC is indebted to Zukiapa. VC's case is that the Loan Agreements are sham documents. With the exception of the last one which is dated 8 December 2008, it is now VC's case that they were all backdated, having been executed in June 2009, in response to advice from Deloitte & Touche, solely for the purpose of misleading the Maltese tax and regulatory authorities and that none of them were ever intended to be performed in accordance with their terms and were not in fact performed, with

the result that VC is not indebted to Zukiapa. Whether or not Mr Krasnov and Ms Terekhova did in fact execute these agreements solely for the purpose of misleading the Maltese authorities, Mr Krasnov and Mr Azevedo are now asking this Court to accept that they behaved in a way which can only be regarded as dishonest. This leads me to conclude that they are not reliable witnesses.

8. The second issue concerns the assigned debt of US$12,851,370. VC's case is that the Debt Restructuring Agreement dated 1 January 2011 does not mean what it says and that the underlying debts were always conditional and, in the events that happened, no repayment obligation arises. The conditional nature of these debts (and the amounts purportedly paid pursuant to the Supply Agent Agreements) is said to have been put beyond any doubt by a Framework Agreement on Netting purportedly made on 15 December 2010 between Sakaras and VC ("the Framework Agreement"). Dr Finkel's response is that this Framework Agreement also has all the hallmarks of a document created recently for the purpose of misleading this Court.

The First Issue: On what basis was US$32.4 million paid to VC?

The execution and performance of the Loan Agreements

9. Each of the Loan Agreements was signed on behalf of VC by Ms. Terekhova. Her affidavit was sworn on 16 July 2014. She says (in paragraph 7) that –

> "In the beginning of 2007 I was approached by Maria Faminskaya, head of management accounts department of Verysell SA, who requested me to execute the [Loan Agreements] on behalf of VC acting under the Power of Attorney. Maria Faminskaya stated that the Loan Agreements were required for accounting purposes only and were not expected to be actually performed."

This statement is consistent with Mr Krasnov's first affidavit sworn on 8 July 2014, but inconsistent with his subsequent oral evidence and inconsistent with his second affidavit sworn 6 November 2014. There is no suggestion in in either of these affidavits that the Loan Agreements were backdated. To the contrary, the only reasonable inference to draw from the introductory words "In the beginning of 2007…" is that she is saying that they were *not* backdated. Most importantly, there is no mention in either of these affidavits of any Supply

Agent Agreements having been executed at all, let alone contemporaneously from March 2007 onwards. Ms Terekhova failed to attend for cross-examination.

10. Each of the Loan Agreements was signed on behalf of Zukiapa by Mr Demetriades and Pantelitsa Athanassiou, who were later described as "nominee directors". They are both members of the Cypriot law firm called Demetrios A. Demetriades & Co. The two earliest Back-to-Back Agreements dated 3 March and 10 July 2007 are signed on behalf of Zukiapa by Eleni P. Kinani, presumably also a member of the same law firm. The rest are signed by Messrs Athanassiou and Demetriades. They did not swear any affidavits. The dates of the Back-to-Back Agreements match the dates and numbering of the Supply Agent Agreements, save for Supply Agent Agreement No. 4, which matches the date and loan amount of Back-to-Back Agreement No. 6.

11. Mr. Azevedo's second affidavit contradicts Ms. Terekhova's recollection. His affidavit evidence is that the Loan Agreements and Back-to-Back Agreements were in fact signed after advice was obtained from Deloitte & Touche sometime in 2008. During his oral evidence Mr. Azevedo said he recalled authorizing the signing of the Loan Agreements but said he did not understand why they were created and that he had no personal knowledge of the Deloitte & Touche advice.

12. Mr Krasnov's first affidavit does not state when the Loan Agreements or Back-to-Back Agreements were executed. The only explanation he gives in this affidavit is that they were entered into without any intention to perform them and for the purpose of creating a "nominal debt" to allow a reserve option to upstream cash flow profits generated by the ROS with minimum overhead. Mr Krasnov did not explain in his oral evidence what this meant. Instead, he repeated Mr. Azevedo's version of events. He was emphatic that the Loan Agreements and Back-to-Back Agreements were signed in late 2008 or early 2009 in response to advice from Deloitte & Touche and only for the purposes of deceiving the Maltese regulatory and tax authorities. This point was not made in his affidavit.

13. After his cross-examination had been completed, Mr Krasnov swore a second affidavit intended to establish that he had given instructions to the Demetrios A. Demetriades & Co Law Office on 11 June 2009 to execute and backdate the first six of the Loan Agreements. The instruction takes the form of a memorandum. There is no independent evidence from which to infer that this memorandum was created on that date or that it was ever sent to the law firm at all. Also exhibited to this affidavit is a letter dated 19 June 2009 from the law firm to Ms Terekhova. It simply states "Pleased find enclosed" … and it then lists the first six Loan Agreements. There is nothing in the content of this letter from which to infer that it was written in response to the memorandum dated 11 June 2009 or that the Loan Agreements were backdated in any way. I gave leave for this affidavit to be admitted in evidence, notwithstanding that Mr Krasnov had by then left Grand Cayman and so could not be recalled for further cross-examination.

14. There is no evidence from any independent source which can be said to corroborate the evidence of Mr Azevedo and Mr Krasnov that the Loan Agreements were created and backdated in response to advice received from Deloitte & Touche. No document from Deloitte & Touch has been put in evidence. No affidavit has been sworn by any member of Demettrios A, Demetriades & Co Law Firm. The only correspondence from this law firm is the letter dated 19 June 2009 which does not corroborate the assertion that its partners or employees backdated the Loan Agreements. Nor is there any evidence from any other independent source which corroborates the assertion that the Loan Agreements are a sham. To the contrary, there is documentary evidence from an independent source from which to infer that the Loan Agreements and Back-Back Agreements were executed on the dates stated and that they were in fact partially performed.

15. It is not disputed that each of the dollar amounts specified in the Loan Agreements was paid by Sakaras to VC on or about the date of each agreement. The same dollar amounts are specified in the Back-to-Back Agreements, the dates of which are either the same or shortly before the dates of the Loan Agreements. These are the same dollar amounts and the same dates as those stated in the Supply Agent Agreements. Bank statements and advice notes generated by Bank of Valletta Plc and UBS SA in respect of accounts maintained in the name

of Sakaras have been put in evidence. The authenticity of these documents is not in issue. There are a series of debit advices which reflect that the amounts specified in the Loan Agreements and Back-to-Back Agreements were paid by Sakaras to VC on or about the dates of the agreements. In each case the payment detail states "Loan Agreement" and the agreement number (with one exception), the date and loan amount corresponds with that of the related Back-to-Back Agreement. The payment detail on the bank advice must reproduce the payment detail on the instruction received from Sakaras. In my judgment, the only reasonable inference to draw from the documents generated by UBS is that they reproduce the instructions received from Sakaras and that Sakaras intended to make payment to VC pursuant to the Loan Agreements.

16. The debt advices relating to Sakaras' account with UBS SA reveal one inconsistency upon which counsel for the VC and Mertal placed great weight. The payment detail on the debit advice dated 11 July 2007 (in the amount of $5,990,000) refers to "Loan Agreement No. 4 DD 10.07.2007". The corresponding Back-to-Back Agreement dated 10 July 2007 is entitled Loan Agreement No. 6 and the corresponding Loan Agreement dated 11 July 2007 is entitled Loan Agreement No. 6A. However, the corresponding Supply Agent Agreement is numbered 4 in line with the debit advice. Having regard to the evidence as a whole, I infer that this debit advice must reflect a mistake. Whoever prepared the instructions to the bank must have referred to the wrong loan agreement number by mistake. This evidence also points to the conclusion that Supply Agent Agreement No.4 is not a genuine document and that it was created after the event in terms intended to correspond with the bank advice. Whoever drafted the Supply Agent Agreement reproduced the original mistake in order to match it up with the bank advice.

17. The credit and debit advices issued by UBS AG in respect of Zupiaka's account also constitute clear evidence that the Loan Agreements and Back-to-Back Agreements were in fact performed. For example, a credit advice dated 18 December 2009 that the Company paid $30,000 to Zupiaka in respect of "Partial Reimbursement of Loan Agreement No.3A". This is one of several advice notes reflecting partial repayment of capital due under the Loan Agreements. A credit advice dated 18 June 2009 reflects that the Company paid $2,052.39 to

Zukiapa in respect of "Interest payment on Loan Agreement No. 3A less invoices paid 2007". There is no interest payable under the Supply Agent Agreements. There is no bank advice which refers to a payment having been made or received pursuant to a Supply Agent Agreement. In my judgment these bank records constitute compelling evidence that the Loan Agreements reflect genuine transactions which were intended to be performed and were in fact partially performed.

The understanding of the Sakaras' board of directors

18. In his oral evidence, Mr. Krasnov said that the Sakaras' board of directors, including Mr. Kaminov, knew that the relationship between VC and Sakaras was governed by the Supply Agent Agreements and knew that its obligation to repay the sums received from Sakaras was conditional. Mr Kaminov denied having known about the Supply Agents Agreements and Framework Agreement until they were produced as exhibits to Mr Azevedo's affidavit. I prefer the evidence of Mr Kaminov on this point. Mr Krasnov's evidence is inconsistent with the very lengthy, detailed minutes of the board meetings. These minutes contain no reference to the Supply Agent Agreements or Framework Agreement. Furthermore, the minutes contain acknowledgements of the debt owed by Zukiapa under the Back-to-Back Agreements. On 16 May 2012, members of the board sought more detailed information about the necessity of writing off loan receivables due to Zukiapa which in turn necessitated writing off receivables due from Zukiapa to Sakaras. Mr. Kaminov is recorded as having said that "in light of VC's status as a major debtor of Zukiapa, the directors of Sakaras had the right to KYC information on VC…" Mr. Krasnov's response is significant. If the relationship between VC and Sakaras had been governed by the Supply Agent Agreements, as he now contends, one would expect him to have explained that it was not relevant to obtain KYC about VC because it was no longer a debtor. VC's case is that the last payment of $560,000 received from Sakaras on 15 December 2010 was pursuant to Supply Agent Agreement No. 17 dated 8 December 2010. If the Supply Agent Agreements had been the governing contracts, by the time of the board meeting in May 2012 unpaid debts due from the Russian operating subsidiaries would have been assigned automatically from the VC to Sakaras and VC would not have been referred to as a debtor at all. Instead, the minutes reflect that Mr Krasnov made no reference to the Supply Agent Agreements and responded

as if VC was still indebted to Zukiapa (which I conclude was in fact the case). The minutes of Sakaras' board meetings are very detailed and lengthy. They contain no reference to the Supply Agents Agreements but they do contain statements which are inconsistent with the existence of the Supply Agent Agreements.

The books and records and financial statements of Zukiapa and VC

19. The audited financial statements of Zukiapa for the period from 18 August 2006 to 31 December 2007 and for the years ended 31 December 2008 to 2011 inclusive are in evidence. These financial statements have been audited by Rotsas & Co Ltd, a firm of English qualified chartered accountants with offices in London and Cyprus. The 2006/7 balance sheet reflects 'Trade and other receivables' of $21,639,188 which is not the same thing as long term loan receivables. The liability side of the balance sheet does reflect 'Long-term loans' of $21,584,279 which is consistent with the existence of the Back-to-Back Agreements although the amounts are not the same. VC's financial statements have not been disclosed (in breach of the directors' obligations under the provisional winding up order). Mr Krasnov produced a document entitled 'Report on the Balance Sheet of VC as an Agent of Verysell Group' but he did not explain how it has been compiled. It is dated 14 January 2013 and appears to reflect the consolidated position of VC and Zupiaka. It recognizes the existence of the loan liability from Zupiaka to Sakaras and in this respect appears to be consistent with the existence of the Back-to-Back Agreements and inconsistent with the existence of the Supply Agent Agreements. The loan liabilities are characterized as 'Nominal Loan Zukiapa (Sakaras)' and are consistent with the 'Long-term loan' liabilities reflected in Zupiaka's audited financial statements. Mr Krasnov's oral evidence was that this was false accounting and the audited financial statements do not reflect the true position. On VC's case, its only liability was to Sakaras under the Supply Agent Agreements, but this is inconsistent with Zukiapa's financial statements which reflect that it was liable to Sakaras in respect of long-term loan obligations. When asked to address this inconsistency, Mr. Krasnov relied instead on the proposition that VC did not confirm that any debt was payable to Zukiapa, regardless of what is shown in the accounts.

20. The confirmation letter dated 4th May 2012 upon which the statutory demand was based states as follows –

> "In reply to the request of VC Computer Holdings Ltd in connection with the finalization of its accounts for the year 2011, herewith we confirm that as of December 31, 2011 the balance between VC Computer Holdings Ltd and Zukiapa Management Limited was as follows:
>
> Accounts due to Zukiapa Management Limited from VC Computer Holdings Ltd
> Long-term loans USD36'425'369.83
> Interest USD3'927'800.22 "

Mr Krasnov accepts (in paragraph 15 of his affidavit) that this confirmation letter was signed by Zukiapa's directors, but he appears to dismiss it as mere false accounting. He says –

> "Although the petitioner refers to letter signed by Zukiapa directors, this is a unilateral statement issued by the creditor and not the debtor. The business reason for Zukiapa directors to issue such letter was confirmation of said "nominal debt" for books and records of the Group and not as an acknowledgement of actual VC indebtedness before Zukiapa".

In effect, Mr Krasnov is asserting that the content of this confirmation letter is false and that the directors of Zukiapa were instructed to sign it only for the purpose of supporting false accounting in the Verysell Group.

21. Counsel for VC also relies upon a decision made at a meeting of Sakaras' board of directors on 20 June 2012. The board discussed Sakaras' single entity (non-consolidated) financial statements for the year ended 31 December 2010. It was decided to "impair" receivables of $39.3 million. It is perfectly clear from the minutes that the directors were talking about making a provision for debts which were thought to be irrecoverable or doubtfully recoverable. It is equally clear that making a provision in Sakaras' accounts did not have the effect, and was not intended to have the effect, of discharging the legal liabilities. This point was expressly made by certain directors in the context of an injunction restraining Sakaras from alienating its assets. The minutes record that making a provision in respect of a receivable in its balance sheet did not constitute the alienation of the asset in question. This discussion does not lead to the conclusion that Zukiapa's obligations to Sakaras or VC's obligations to Zukiapa under the Back-to-Back Agreements and Loan Agreements had been

released and discharged. However, it is of course further evidence that the board of directors knew nothing about the Supply Agent Agreements or the Framework Agreement. If the Back-to-Back Agreements and the Loan Agreements were a sham and Sakaras was party to the Supply Agent Agreements and the Framework Agreement, the discussion at this board meeting would have been entirely different.

The form and content of the Loan Agreements

22. Counsel for VC made the submission that the Loan Agreements should be regarded as "unreliable and nonsensical documents" because their form and content is such that they do not have the appearance of legitimate commercial loan agreements. I disagree with this submission. They contain all the information necessary to create a binding loan agreement. They each state the principal amount of the loan, the rate of interest, the repayment terms, a provision relating to collateral, the governing law and the fact that they are executed in two counterparts. They are expressed to be governed the law of Switzerland which is where the Verysell Group's administrative office was located. Bearing in mind that the lender and borrower are related parties under common management, I do not find it surprising that these are simple, straightforward documents without any detailed recitals. Nor do I find it surprising that VC's capital requirements should be met by loans from a Verysell Group company. To my mind there is nothing "nonsensical" about these documents.

The execution of Supply Agent Agreements

23. There is no evidence which positively corroborates that the Supply Agent Agreements existed on the dates on which they purport to have been executed but there is evidence which tends to suggest that they did not come into existence until August 2014. The statutory demand is based upon the confirmation of loan term loans, which can only mean the long term loans made pursuant to the Loan Agreements. Given the way in which VC's case is now put, one would have expected Mr Caldas' reply to have said that the Loan Agreements were not intended to be acted upon and that the actual business relationship between the company and the Verysell Group is governed by the Supply Agent Agreements and the Framework Agreement. Instead, he lied about the existence of the Loan Agreements and made no reference to the Supply Agent Agreements or the Framework Agreement at all. He stated –

"We object and claim that there were no Loan Agreements entered into by VC Computer Holdings ("VC") and Zukiapa Management Limited (hereafter "Zukiapa") to which you refer as the basis for your claim, neither at any VC confirmed in writing to Zukiapa that such amounts were due from VC to Zukiapa."

This statement was untrue. It is now admitted that the Loan Agreements did in fact exist when this letter was written. If the Supply Agent Agreements had in fact existed, it would not have been necessary to lie about the existence of the Loan Agreements. Mr Caldas could have explained that the Supply Agent Agreements were the governing documents and that the Loan Agreements were not intended to create any actual liabilities.

24. VC opposed the application for the appointment of provisional liquidators on the basis of the evidence of Mr. Krasnov and Ms. Terekhova. As I have already observed, their affidavits make no mention of the Supply Agent Agreements or the Framework Agreement. These documents are mentioned for the first time in the list of documents exhibited to Mr Azevedo's first affidavit sworn on 13 August 2014. No contemporaneous documentary evidence reflecting the existence of these agreements was produced to Dr Finkel at any time prior to the date on which Mr Azevedo swore this affidavit. The bank advices refer to the Loan Agreements, but there is no reference to any Supply Agent Agreements. The minutes of the board meetings make no reference to these agreements. Mr. Krasnov said in his oral evidence that the Supply Agent Agreements were in fact shown to Mr. Kaminov in a meeting some time in 2012. However, the minutes of the board meetings contain no reference to them and Mr. Kaminov denies that these agreements were ever produced to him.

25. Counsel for VC attaches considerable significance to a document called *Report on Reconcilliation as of 21.03.2013.* This is an internally generated document produced for the first time in August 2014 as an exhibit to Mr Azevedo's second affidavit. Appendix 5 of this document is entitled *Reconcilliation between VC and Sakaras, 1.01.2007 – 31.12.2012.* The first two line items are as follows –

"03.27.2007 Funds from Sakaras, SAAgr No.3 10001 Rosbank USD -10,000.000.00
07.10.2007 Funds from Sakaras, SAAgr No.4 10001 Rosbank USD - 5,990,000.00"

This document records the funds paid from Sakaras' account with UBS SA, Lausanne to VC's account with Rosbank (Switzerland) SA. Mr Azevedo has produced copies of debit advices relating to VC's account with Rosbank, but he has not produced any of the credit advices reflecting the receipt of the seven principal payments of which these are the first two. However, six out of the seven the debit advices generated by UBS in respect of these transactions are in evidence, including that relating to the payment of $5,990,000 made on 10 July 2007. The debit advice states – "Details of payment LOAN AGREEMENT NO 4 DD 10.07.2007". This must reflect what was stated in the payment instruction which must have been prepared and signed by or with the authority of Ms Terekhova and/or Mr Krasnov who were respectively the managing director and chief executive officer of the Verysell Group at the time. Counsel would have me believe that this must be a mistake because Mr Krasnov's evidence is that the Loan Agreements were not executed (and backdated) until two years later in June 2009. He relies upon the fact that the reconciliation document refers to "SAAgr No.4" as evidence that the payment must have been made by reference to a Supply Agent Agreement, not a Loan Agreement. However, counsel also accepts that there is no documentary evidence before the Court generated from an *independent* source which corroborates the assertion that the Supply Agent Agreements existed prior to August 2014 or that any payments were made pursuant to a Supply Agent Agreement. This evidence leads me to the conclusion that it is the UBS debit advices, not the Report on Reconciliation, which reflects the way in which the transactions were actually characterized by Mr Krasnov and Ms Terekhova at the time they took place. Bearing in mind that Mr Krasnov admits having engaged in false accounting, it is reasonable to infer that the Report on Reconciliation has been recently amended to include references to "SAAgr".

The Framework Agreement on Netting

26. The Framework Agreement is dated 15 December 2010 and it is signed by Mr Krasnov on behalf of Sakaras and by Ms Terekhova on behalf of VC. If it is an authentic document which constitutes a genuine contract between the parties, it would constitute a complete defence to this petition. It is so important to VC's case that it seems to me inherently unlikely that it would have been completely overlooked in both Mr Caldas' response to the statutory

demand and in the affidavits sworn by Messrs Kasnov and Terekhova in response to the application for the appointment of provisional liquidators.

27. There is no documentary evidence before the Court from any independent source which corroborates that the Framework Agreement came into existence on or about 15 December 2010. Indeed there is no internally generated documentation pointing to its existence prior to August 2014. It is first mentioned in the index of documents exhibited to Mr Azevedo's first affidavit sworn on 13 August 2014. He stated (at paragraph 95) that "This document explains why the Loan Agreements were in place and definitively establishes that the Loan Agreements were not intended to be binding contracts." Mr. Azevedo's affidavit evidence (paragraphs 102 and 103) is that he participated personally in the preparation of the Framework Agreement and specifically asked for the inclusion of clause 1.9 which required that the Loan Agreements be amended to reflect that the payment obligations were intended to be conditional. He says that no one followed up on this point. However, when asked about the Framework Agreement during re-examination, Mr. Azevedo appeared to be unfamiliar with the document.

28. I agree with counsel for the Petitioners that the content of the Framework Agreement has all the hallmarks of a document produced after the event for the purpose of bolstering VC's case and overcoming the adverse findings contained in my Reasons published on 2 August 2014. The recitals read like an affidavit drafted to meet the Petitioners' case. To put it into context, it is important to remember that the parties to the Framework Agreement had common management. If this document had in fact been executed by Mr Krasnov and Ms Terekhova on or about 15 December 2010, there would have been no need for them to recite in detail a factual history which would, if true, have been perfectly well known to both of them at the time. If it had been known to them at the time, they would have set it out in their respective affidavits sworn in July 2014.

29. The contrast between the form and content of the Loan Agreements and the Framework Agreement is instructive. As I have already observed, the Loan Agreements are simple, straightforward documents which do no more than is necessary to document loan transactions made between related parties under common management. In contrast, the Framework

Agreement contains an elaborate narrative which seems out of place in this context. It appears contrived.

30. Taken as a whole, the evidence leads me to the conclusion that both the Supply Agent Agreements and the Framework Agreement are not contemporaneous documents and were probably created in August 2014 for the purposes of bolstering VC's case and attempting to overcome the adverse findings contained in my Reasons published on 2 August 2014.

The Second Issue: Is the US$12.8 million debt conditional?

31. By an Assignment and Set-Off Agreement made on 15 December 2010 between each of Verysell SA and CAT SA (indirect subsidiaries of Sakaras) as assignors and Sakaras as assignee, trade debts owed by VC in the total amount of US$12,851,339.79 were assigned from Verysell and CAT to Sakaras. By an Assignment Agreement made on 27 December 2010 between Sakaras as assignor and Zukiapa as assignee, these trade debts were further assigned to Zukiapa. VC, as debtor, is made a party to the agreement and by Section 1.03 expressly acknowledges that after the effective date thereof it will owe this debt to Zukiapa. It was signed on behalf of the Company by Ms Terekhova. Also, on 27 December 2010, the parties to the Assignment Agreement entered into a deed of amendment. VC accepts that this Assignment Agreement is valid and enforceable in accordance with its terms – it is not said to be a sham document. It is expressed to be governed by Swiss law and by Section 5.02 it was expressly agreed that "This Agreement may not be altered other than by agreement of the Parties expressed in a written document signed by all the Parties". It follows that, even if the Framework Agreement is an authentic document it could not affect Zukiapa's rights as assignee of these debts because Zukiapa is not party to the Framework Agreement.

32. By a Debt Restructuring Agreement made on 1 January 2011 between Zukiapa as creditor and VC as debtor, the trade debts of US$12, 851,339.79 were converted into a loan repayable on 1 January 2015 together with interest at 3.75% per annum. This transaction was formally approved by a resolution of Zukiapa's board of directors passed on the same day and there is no suggestion that this agreement was a sham.

33. The terms of this Debt Restructuring Agreement are important. Recital B states that 'the Claim' (meaning the trade debts of US$12,851,339.79) is then due and outstanding. Recital C says that the Debtor (meaning VC) does not have sufficient funds to discharge the Claim and that seizure of its assets would entail the termination of VC's activity making repayment unfeasible. VC expressly acknowledges the Claim at Recital D.

34. VC's case, set out on paragraphs 102 and 103 of Mr Azavedo's second affidavit, is that the Restructured Debt is conditional. His argument is that the underlying trade debts originally owed to CAT SA and Verysell SA were conditional pursuant to the terms of (a) a supply agreement dated 11 May 2004 and made between CAT and VC and (b) a supply agreement dated 24 August 2007 and made between Verysell and VC, as subsequently amended in both cases. As originally executed, neither of these supply agreements was stated to be conditional. VC's case is that they were both amended subsequently to the effect that its obligation to pay for the goods supplied became conditional. The CAT agreement was purportedly amended by an agreement dated 30 July 2004 and signed by Ms. Terekhova for VC and by Mr. Krasnov for CAT. The reason for the amendment is said to be that VC had been sold out of the Verysell Group between May (when it was executed) and July (when it was amended). If this is true, one might have expected that the Verysell agreement (which was first executed on 24 August 2007) would have been expressed to be conditional from the outset but it was not. It was purportedly amended on 1 December 2008 by letter signed by Mr. Maroun of Verysell.

35. Whether or not these supply agreements were in fact amended to the effect that VC's obligation to pay for the goods supplied became conditional, the recitals of the Debt Restructuring Agreement (dated 1 January 2011) state categorically that the debts totaling US$12,851,339.79 were then due and owing. If VC's obligation to pay had become conditional upon receiving payment from its own purchasers, there would be no need to enter into any debt restructuring agreement at all. I agree with counsel for the Petitioners that the Restructuring Agreement constitutes an unequivocal acknowledgement by VC that these trade debts were due and payable.

36. When asked about the recitals to the Debt Restructuring Agreement in cross-examination, Mr. Krasnov merely pointed to the Framework Agreement which he indicated explained the true conditional nature of the debt. Even if I had believed that Framework Agreement is a genuine contract executed on or about 15 December 2010, it was not executed on behalf of Zukiapa and so cannot have the effect of forgiving a debt owed by VC to Zukiapa as assignee. If the Verysell Group management had ever genuinely believed that VC's obligation to pay US$12,851,339.79 for goods supplied had become conditional or that the obligation had been released by the Framework Agreement, Ms Terekhova, would never have executed any debt restructuring agreement which states in unequivocal terms that VC does owe US$12,851,339.79 to Zukiapa.

37. Neither Mr Krasnov nor Ms Terekhova have suggested that the Debt Restructuring Agreement is a sham document intended to give the false impression that the trade debts had been converted into a loan repayable on 1 January 2015. I conclude that VC owes the principal sum of US$12,851,339.79 to Zukiapa and that it will fall due for payment on 1 January 2015 together with interest at 3.75% per annum for four years from 1 January 2011.

Conclusions

38. Mr Krasnov and Mr Azevedo would have the Court believe that the Loans Agreements are backdated and were executed in June 2009 solely for the purpose of misleading the Maltese tax and regulatory authorities and that they were never intended to be performed and enforced in accordance with their terms. This assertion is not corroborated by contemporary documentary evidence. To the extent that there is any contemporary evidence from an independent source, namely the UBS bank advice notes, it points unequivocally to the opposite conclusion. I do not doubt that Mr Krasnov and Ms Terekhova are ready to backdate documents and engage in false accounting when the need arises, but the evidence leads me to the conclusion that it is the Supply Agent Agreements and the Framework Agreement which have been backdated and executed for the purpose of misleading the Court.

39. I am satisfied on the balance of probabilities that VC is indebted to Zukiapa in the sums of US$32.4 million plus interest due under the Loan Agreements and US$12,851,370 plus interest due under the Debt Restructuring Agreement. Of these amounts, the sum of US$31,840,000 plus interest is presently due and owing.

40. I am also satisfied that VC is insolvent. It ceased to carry on business about two years ago. There is no evidence that VC has any other liabilities apart from the sums payable under the costs orders made in this proceeding and a sum of $43,700 owing to its former lawyers who now support the making of a winding up order. Counsel for VC asserted at an earlier stage of the proceedings that VC's only realizable asset is a sum of approximately $5,000 credited to its bank account. The provisional liquidators have not identified any other realizable assets. Mr Azevedo's evidence is that he incorporated Mertal for the purpose of buying VC. The price paid was $1,287.50 being the amount of its issued share capital. His evidence is that he attributed some potential value to a judgment debt in the sum of $462,000 which is still outstanding, but when asked about it in cross-examination he said that he now assumed that the debtor has no assets. On the basis of this evidence there can be no doubt that the VC is in fact insolvent.

41. I should mention that Mr Azevedo produced a "Letter of Intent" dated 29 April 2014 and a "Memorandum of Intent" dated 1 June 2014 which are intended to establish that VC was in the process of negotiating valuable contracts at the time when the order for the appointment of provisional liquidators was made. Even if this was true, which seems inherently unlikely, it does not detract from the conclusion that VC is insolvent.

42. It follows that Zukiapa is entitled to a winding up order.

43. I will appoint Messrs Kris Beighton and Alexander Lawson of KPMG as official liquidators.

44. I will make the usual order pursuant to CWR Order 24, rule 8(1) that the Petitioners' costs of the proceedings be paid out of VC's assets, such costs to be taxed on the indemnity basis if not agreed with the official liquidators.

45. Mr Azevedo is on notice of the Petitioners' intention to seek an order for the costs against Mertal and against him personally. I shall direct that any such application must be made by summons which must be issued and served no later than Monday 5 January 2015, together with a written submission and an affidavit setting out any evidence upon which the Petitioners intend to rely. In the event that Stuarts Walker Hersant are not instructed to accept service on behalf of Mr Azevedo, I shall make an order for substituted service.

46. Orders accordingly.

DATED this 5th day of December 2014

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The Honourable Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT