

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2021/0047

BETWEEN:

**[1] RICHARD SCOTT TUCKER
AS JOINT AND SEVERAL ADMINISTRATOR OF
VECTOR RESOURCES LIMITED
(ADMINISTRATORS APPOINTED)**

**[2] BENJAMIN FORSTER CARRUTHERS
AS JOINT AND SEVERAL ADMINISTRATOR OF
VECTOR RESOURCES LIMITED
(ADMINISTRATORS APPOINTED)**

Applicants

and

**[1] MONGBWALU GOLDFIELDS INVESTMENT HOLDINGS 6 LIMITED
[2] HARNEYS CORPORATE SERVICES LIMITED
[3] MONGBWALU GOLDFIELDS INVESTMENT LTD**

Respondents

CLAIM NO. BVIHCM 2021/0048

BETWEEN:

**VECTOR RESOURCES LIMITED
(ADMINISTRATORS APPOINTED)**

Applicant

and

MONGBWALU GOLDFIELDS INVESTMENT LTD

Respondent

Appearances:

Mr. Alex Hall Taylor, QC, with him Ms. Amelia Tan for the Applicants
Mr. Richard Fisher, QC, with him Mr. Shane Donovan for the Respondent Mongbwalu
Goldfields Investment Ltd

2021: May 20;
November 11.

JUDGMENT

[1] **Wallbank J (Ag.):** This is the Court's judgment in respect of two applications filed on behalf of Vector Resources Limited ('**Vector**') by its joint administrators. These applications are

- (1) An application for this Court's assistance (the '**Assistance Application**') for an order under section 467(3)(b) and/or 3(h) of the Insolvency Act 2003¹ (the '**Act**') that, during the administration of Vector in Australia, Mongbwalu Goldfields Investment Holdings 6 Limited ('**MGIH6**') and Harneys Corporate Services Limited ('**HCSL**') be restrained from taking any steps to effect a transfer of 69.5% of the shares in MGIH6 held in the name of Vector ('**the Shares**') to Mongbwalu Goldfields Investment Ltd ('**MGI**'); and
- (2) An application for the appointment of 'soft touch' provisional liquidators over itself under section 170 of the Act, and an order under section 170(5) and/or 171(1) restraining MGIH6 and HCSL from taking any steps to effect the transfer of the Shares to MGI ('the **Provisional Liquidation Application**').

[2] For the reasons set out below, both applications fail. In reaching this judgment, I am conscious that this is likely to have very significant negative consequences for Vector, its creditors, and very possibly for the livelihoods of those behind Vector. I have not reached this decision lightly.

Background

[3] The underlying matrix of fact and procedural history can be quite briefly stated.

[4] In the Democratic Republic of Congo there is a tract of land believed to contain gold deposits. Steps have been afoot to convert this opportunity into money and with the eventual sinking of a commercial mine to extract the gold for profit. This can for convenience be referred to as '**the Project**'. MGIH6, through a majority-owned subsidiary, Adidi Kanga Resources SA, holds an interest in the Project. For present purposes the nature and extent of that interest is irrelevant.

¹ No. 5 of 2003.

It suffices to posit for present purposes that this interest was enough for MGIH6 to have sufficient control of the Project. MGIH6 itself is owned by MGI.

- [5] MGI itself has not been in a position to concretize the establishment of a mine. That is where Vector came in. Vector is a corporate entity incorporated and originally publicly listed in Australia. Its essence appears to have been to act as a channel through which investors interested in investing in potentially lucrative mining projects such as this one can invest their money, hopefully for a return on investment.
- [6] On 10th July 2018 MGI and Vector entered into a Share Sale and Purchase Agreement ('SSPA') pursuant to which MGI agreed to sell 69.5% of the issued share capital of MGIH6 ('the Shares') to Vector for \$90 million. MGIH6 is a company incorporated in this jurisdiction (the 'BVI'). The SSPA was expressly governed by English law.
- [7] As one would expect, the deal between MGI and Vector was more complicated than a normal commercial sale and purchase transaction where the shares in a land-owning company change hands for an agreed sum of money on a single date. Some of the factors which made this transaction more complicated included that the feasibility of establishing a commercial mine had yet to be ascertained and Vector itself would need to raise money from third party investors to consummate the purchase. As it goes without saying, Vector's ability to raise money in the market would inevitably depend upon being able to show investors that it was the legal owner of the majority of the shares in the company that controls the Project. Furthermore, Vector itself would need time to raise the necessary funds, so there was always uncertainty whether Vector would indeed be able to consummate the sale and purchase.
- [8] So, the part of the bargain which concerns us presently was structured like this. Vector was to pay a first tranche of US\$5 million towards the purchase price by a certain date, and then a second tranche of US\$5 million by a further date, and then, by a yet further date, Vector was to make a credit facility available for use of the Project in an amount of not less than US\$10 million (the '**Shareholder Loan Facility**'). In the meantime, the Shares would legally be transferred to Vector. But Vector would not by that time have paid the full purchase price of US\$90 million, so Vector and MGI agreed a mechanism whereby the Shares could be legally transferred back to MGI in case Vector should default upon its payment and other contractual obligations. Such other obligations included completing a definitive feasibility study (the

'Definitive Feasibility Study') by a certain date. The agreed mechanism was that the Shares would be held by an independent escrow agent in this jurisdiction, together with paperwork which would enable and indeed require the escrow agent immediately to transfer the Shares back to MGI if the escrow agent was instructed by MGI to do so in the event of a material default by Vector. All that might be needed to complete the paperwork to release the Shares back to MGI was for the retransfer date to be inserted, where or if that had been left blank. The escrow arrangement was covered by its own escrow agreement. It provided for the possibility of the escrow agent not immediately releasing the retransfer paperwork in the event of uncertainty whether or not the retransfer had properly been triggered. The escrow agent was HCSL, which is based in this jurisdiction. The escrow agreement was entered into on 3rd September 2018 between MGI, MGIH6, Vector and HCSL. It was governed by BVI law.

- [9] I have deliberately used general descriptive language in explaining the arrangements to relay the general thrust of the transaction. I will refer to aspects of this more specifically later where necessary.
- [10] Continuing in a general vein (and adopting parts of the chronological narrative helpfully provided by Vector), the SSPA underwent several renegotiations and amendments. The effective date of the SSPA became 10th January 2019. The 'Completion Date', as defined in the SSPA, became 24th January 2019. This was the date by which Vector was required to comply with its payment obligations to pay the first two tranches of US\$5 million each, under clauses **3.1(a)** and **(b)** respectively of the SSPA.
- [11] Vector did not do so. On 31st January 2019 MGI gave Vector 10 days' written notice to remedy its breaches of clauses 3.1(a) and (b) of the SSPA.
- [12] Vector was also required, under clause **3.1(c)** of the SSPA, to make available to MGIH6 the Shareholder Loan Facility of no less than US\$10 million by 7th February 2019. Again, Vector did not do so.
- [13] Further renegotiations ensued. On 9th February 2019 MGI undertook not to enforce its rights under the SSPA in respect of Vector's failure to remedy its breaches of clauses 3.1(a) and (b) until after 15th February 2019. This deadline was subsequently extended to 7th March 2019.

- [14] But before then, on or about 24th February 2019 Vector entered into a Convertible Note Agreement with certain investors ('the Convertible Note Investors') pursuant to which Vector borrowed a sum of US\$4,750,000.
- [15] The following day, 25th February 2019, MGI and Vector entered into a Standstill Deed, pursuant to which MGI agreed not exercise any rights under a particular clause of the SSPA, clause **7.3(b)(ii)**, for so long as any sum remained outstanding to the Convertible Note Investors. That clause had required Vector to complete the Definitive Feasibility Study by a certain date, failing which MGI had the right to call for a retransfer of the Shares.
- [16] Vector has since sought to argue, and indeed appears to have commenced ICC Arbitration against MGI to establish this, that the Standstill Deed did not concern a standstill only of Vector's obligations pertaining to completion of the Definitive Feasibility Study, but that it impliedly also entailed a standstill of Vector's obligations to provide the Shareholder Loan Facility.
- [17] By 7th March 2019 Vector had successfully discharged its obligations to pay the amounts required by clauses 3.1(a) and (b) of the SSPA, namely the first two tranches of US\$5 million each. But Vector was still in breach of its obligation to make available the Shareholder Loan Facility pursuant to clause 3.1(c) of the SSPA.
- [18] Between March 2019 and July 2020 Vector tried, unsuccessfully, to raise money from other investors. MGI accorded Vector this latitude.
- [19] But by mid-September 2020 it appears that MGI had had enough. On 17th September 2020 MGI gave Vector 10 days' written notice under clause 7.3(a) of the SSPA to remedy its breach of clause 3.1(c), being its obligation to provide the Shareholder Loan Facility to MGIH6.
- [20] Vector's response (on 21st and 24th September 2020) was to notify MGI that it disputed MGI's entitlement to exercise its right with regards to the release back to MGI of the Escrow Documents.

- [21] Undeterred and apparently unimpressed, on 29th September 2020 MGI issued an instruction letter ('**Instruction Letter**') to HCSL requiring it to release the Escrow Documents to effect the transfer of the Shares back to MGI.
- [22] On 1st October 2020 HCSL notified solicitors acting for Vector, Messrs. Blackwall Legal, that it had received a release instruction from MGI but that they would not release the documents until such time as an agreement had been reached between MGI and Vector with regards to the dispute.
- [23] On 9th October 2020 HCSL sent a letter to MGI stating that the Instruction Letter dated 29th September 2020 did not comply with the terms of the Escrow Deed because it did not confirm that a defined 'Release Event' had occurred and was continuing. HCSL also sent a letter to Vector stating that they would not release the Escrow Documents prior to close of business on 16th October 2020.
- [24] On 15th October 2020 MGI gave a further Instruction Letter to HCSL, dated 13th October 2020, confirming that a Release Condition had occurred and was continuing, and once again requiring HCSL to release the Escrow Documents.
- [25] This Instruction Letter satisfied HCSL. On 16th October 2020, HCSL wrote to Vector and MGI confirming that the Instruction Letter satisfied the requirements of the Escrow Deed and confirming that it would release the Escrow Documents to MGI on 20th October 2020, unless directed not to do so by the Court.
- [26] On 19th October 2020 Vector made an *ex parte* application to this Court for an injunction to restrain HCSL from releasing the Escrow Documents pending the determination of then proposed arbitral proceedings. MGI was not included as a respondent to that application.
- [27] On 20th October 2020 Vector issued a notice of a dispute to MGI pursuant to the SSPA (clause 13.1(b)).
- [28] On 28th October 2020 the *ex parte* injunction was granted on the papers without an oral hearing and the return date hearing was listed for 19th November 2020. On 16th November 2020 MGI

applied for leave to intervene in the proceedings and for the discharge of the *ex parte* injunction.

- [29] The return date hearing took place as scheduled on 19th November 2020. MGI was added as a party to the proceedings and the hearing was adjourned to a date to be fixed. The adjourned hearing was eventually fixed for 20th January 2021, with a round of evidence being directed to take place in the meantime.
- [30] On 10th December 2020, that is, before the return date hearing on 20th January 2021, Vector entered administration on a voluntary basis in Australia. Vector followed this on 18th December 2020 with a request for arbitration against MGI. On 21st December 2020 MGI submitted a proof of debt to the administrators of Vector for US\$5 million.
- [31] On 5th January 2021, as part of the evidence for the return date hearing on 20th January 2021, Vector filed a First Affidavit of Mr. Benjamin Carruthers, one of its Administrators, in which he stated that he believed that a statutory moratorium on enforcement of security interests under section 440B of the Australian Corporations Act 2001 (Cth) prohibited MGI from enforcing its rights under the Escrow Deed. This was a point Vector relied upon at the hearing on 20th January 2021.
- [32] The Court (by Justice Jack) delivered its judgment on the return date hearing on 22nd January 2021. The Court ordered the *ex parte* injunction to be discharged but stayed the effect of the order until 25th February 2021.
- [33] Before that order took effect, on 16th February 2021 Vector took out an application in the Federal Court of Australia seeking, amongst others:
- (1) an order that during the voluntary administration of Vector, MGI is prohibited from effecting a transfer of the Vector's shares in MGIH6 to MGI; and
 - (2) an order that MGI, MGIH6 and HCSL not take any steps to effect a transaction prohibited under (1) above.
- [34] On 17th February 2021 Messrs. Blackwall Legal, for Vector, sent email notification to MGI of the hearing of that application (the '**Substantive Australian Application**') before the Federal Court of Australia on 23rd February 2021 (i.e. giving some five clear calendar days', including a

Saturday and a Sunday, notice of that hearing), and attaching the application and evidence in support. This is relevant, because there is a dispute between MGI and Vector whether or not the Substantive Australian Application was heard on an *ex parte* or an *inter partes* basis. I need not go into the details of that dispute here, save to note that MGI appears to have been served with the Substantive Australian Application, MGI expressly did not submit to the Australian court's jurisdiction, and MGI withdrew its proof of debt on 22nd February 2021. Again, there is a dispute between Vector and MGI whether or not MGI had indeed submitted to the jurisdiction of the Federal Court of Australia, based upon arguments that by filing a proof of debt MGI had done so, and that this was not undone by MGI's withdrawal of the proof of debt. On the same date, MGI articulated a position to Vector in relation to the Substantive Australian Application, but when the hearing took place the following day on 23rd February 2021 MGI did not appear.

[35] On 24th February 2021, the Federal Court of Australia declared that:

- (1) The Escrow Deed created, as between Vector and MGI, an interest in favour of MGI over the property of Vector that is a 'security interest' as that term is defined in the Corporations Act 2001 (Cth) and the Personal Property Securities Act 2009 (Cth);
- (2) During the administration of Vector, section 440B of the Corporations Act 2001 (Cth) precludes MGI from enforcing its security interest against Vector, such that MGI cannot take any steps under the Escrow Deed to effect a transfer of Vector's shares in MGIH6 to MGI.

[36] Nevertheless, the Federal Court of Australia declined to make an injunction order.

[37] Also on 24th February 2021, Vector issued a Stop Notice in this jurisdiction in respect of shares in MGIH6.

[38] On 3rd March 2021, MGI demanded that HCSL immediately release the Escrow Documents and gave Vector 14 days' notice of its intention to register a transfer of the shares in MGIH6.

[39] Five days later, on 8th March 2021, HCSL confirmed that it would release the Escrow Documents upon satisfaction of its lien in respect of professional fees and disbursements and gave 14 days' notice of its intention to register a transfer of the shares in MGIH6.

- [40] On 17th March 2021 Vector and its Administrators issued their applications for recognition and assistance under Part XIX of the Insolvency Act, 2003, and for the appointment of provisional liquidators over Vector in this jurisdiction. These applications came on for hearing on 20th May 2021.

The Assistance Application – Order Sought and Grounds – Vector's position

- [41] The substantive order sought in the Assistance Application was that during the administration of Vector in Australia, MGIH6 and HCSL be restrained from taking any steps to effect the transfer of Vector's shares in MGIH6 to MGI or to any nominee of MGI.
- [42] The crux of the grounds for the Assistance Application was that Vector considered that it is entitled to seek the said restraining orders from this Court, on the back of the rulings by the Federal Court of Australia on 24th February 2021 that, amongst others:
- (1) The Escrow Deed entered into on 3rd September 2018 created, as between Vector and MGI, an interest in favour of MGI over the property of Vector, being a 69.5% shareholder in MGIH6, that is a security interest as defined in the Australian Corporations Act 2001 (Cth) and the Personal Property Securities Act 2009 (Cth);
 - (2) During the administration of Vector, section 440B of the Australian Corporations Act 2001 (Cth) precludes MGI from enforcing its security interest against Vector, such that MGI cannot take any steps under the Escrow Deed to effect a transfer of Vector's shares in MGIH6 to MGI.
- [43] Vector represented further that the relief sought in this Assistance Application constitutes:
- (1) an order under section 467(3)(b) of the Insolvency Act where the Court may 'restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property'; and/or
 - (2) in the alternative, an order pursuant to the broad powers available to the Court under section 467(3)(h) of the Insolvency Act.
- [44] Vector further contended that
- (1) In the absence of the assistance of this Court, the Administrators will not be in a position to take any practical steps to prevent the transfer of Vector's shares in MGIH6.

- (2) Vector's shares in MGIH6 are of significant value. As stated in Vector's Annual Report for the Year Ended 30th June 2019, the value of Vector's total assets was A\$135,843,811. Of this value, an amount of A\$135,524,333 has been attributed to the value of Vector's exploration and evaluation assets, of which an amount of A\$130,343,373 was attributed to the Project. These shares are therefore crucial to any efforts by the Administrators to rehabilitate or recapitalise Vector. Should Vector lose its shares in MGIH6, the Administrators would not be in a position to take any further steps to rehabilitate or recapitalise Vector in the administration.
- (3) Bearing in mind that MGI is merely one of the 50 creditors of Vector, securing a potential recapitalisation of Vector (which would not be possible without its shares in MGIH6) would result in a better outcome for all the creditors as a whole. This would be a just treatment of all creditors in Australia.
- (4) Any assistance given by this Court would not cause any further prejudice to MGI beyond what was already ordered by the Federal Court of Australia.
- (5) It is consistent with the interests of comity for appropriate steps to be taken to give effect to the decision of the Australian court.
- (6) The order sought does not offend against public policy.

[45] At the hearing on 20th May 2021 Vector argued that it has an overarching point that it was not in breach of the SSPA by failing to provide the Shareholder Loan Facility, by reason of the Standstill Deed, which Vector maintained excused it from performance of this obligation. As a result, says Vector, MGI has no equitable interest in the Shares as MGI contends.

[46] Vector further argued that HCSL is under no obligation under the Escrow Deed to effect the retransfer, because there is an extant dispute between Vector and MGI. Vector relies in this regard upon Clause 8.7 of the Escrow Deed, which states:

"In the event of any disagreement resulting in adverse claims or demands being made, or the receipt by the Escrow Agent of incomplete, unclear or conflicting claims, demands, instructions, notices, requests or other communications, in connection with this Deed or the Escrow Documents, and the Escrow Agent in good faith is in doubt as to what action it should take hereunder: (a) The Escrow Agent shall be entitled, in its sole discretion, to refuse to comply with any claims, demands, instructions, notices, requests or other communications with respect to this Deed or the Escrow Documents so long as such disagreement, dispute or conflict shall continue, and the Escrow Agent shall not be or become liable in any way to any Party for failure or refusal to comply with such conflicting claims, demands, instructions, notices, requests or other communications;..."

MGI's position in relation to the Assistance Application

[47] The following is a summary of the salient points of MGI's response to the Assistance Application.

[48] MGI's primary answer to Vector's purported overarching point (that the Standstill Deed impliedly also contained a standstill of Vector's obligation to provide the Shareholder Loan Facility) was that this Court had already rejected that argument when it rendered its judgment on 22nd January 2021 in respect of the *ex parte* injunction. Thus, argued MGI, Vector is prevented by the doctrine of estoppel from trying to run the argument again now: either the point had already been ruled upon, or it could, and properly should have been raised on that previous occasion. In this regard, MGI relied upon established authorities including **Net International Property Limited v Erez**,² **Henderson v Henderson**,³ **Greenhalgh v Mallard**,⁴ **Rawlinson & Hunter Trustees SA v ITG Limited**,⁵ **Koza Ltd v Koza Altin Isletmeleri AS**,⁶ **Konoshita v JTrust Asia Pte. Ltd.**⁷

[49] MGI put the nub of its argument thus:

"On 22 January 2020, the Court delivered oral reasons for discharging the *ex parte* injunction. It was held that there was no serious issue to be tried as regards MGI's entitlement to exercise its rights under the SSPA and the Escrow Deed. Vector's arguments based on implied terms, estoppel and waiver were all rejected as not giving rise to a serious issue. Furthermore, in giving its reasons, the Court said [8/275]:

"Benjamin Carruthers, one of the administrators, deposes that as a matter of Australian law Vector is protected (a) from enforcement of any security against it, and (b), from having contracts, such as the SSPA, terminated against it. In my judgment, these points are irrelevant. The SSPA is governed by English law. It was established in *Fibra Celulose SA and Pan Ocean Co. Ltd. and Another* [2014] EWHC 2124 Chancery 2014 Business Law Reports 1041, that provisions of a foreign insolvency law, in that case South Korean law, would not be applied to provisions purporting to prevent termination of contracts. Equally restrictions on the enforcement of security will not be recognised even supposing the agreement is a form of security, a point on which I did not hear full argument."

[50] MGI remarked that the *ex parte* injunction Vector had sought on 19th October 2020 had been intended to be in support of then intended foreign arbitral proceedings. MGI went on to

² BVIHMAP2020/0010 (unreported, delivered 22nd February 2021) at paragraphs [52]-[55] (Webster JA(Ag.)).

³ (1843) 3 Hare 100, 114-115.

⁴ [1947] 2 All ER 255 at 257.

⁵ [2015] EWHC 1664 (Ch).

⁶ [2021] 1 WLR 170.

⁷ BVIHMAP2020/0017, (unreported, delivered 24th March 2021) at paragraph [53] (Farara JA (Ag.))

observe that the principal dispute which was to form the basis of its intended arbitration was whether a term should be implied into the Standstill Deed to the effect that, notwithstanding that the Standstill Deed refers explicitly and exclusively to clause 7.3(b) of the SSPA, MGI ought not be able to exercise any rights under clause 7.3(a) for so long as any sum remains outstanding to the Convertible Note Investors under the Convertible Note Agreement. MGI submitted that this Court rejected Vector's argument that there was a serious issue to be tried to the effect that it was an implied term of the Standstill Agreement that MGI had agreed not to enforce its rights under clause 7.3(a) of the SSPA. Two matters immediately arise from this state of affairs: the application of an estoppel from raising again an argument the Court has already dismissed and secondly, quite apart from this, Vector's implied term point runs directly contrary to the explicit text of the Standstill Deed.

[51] MGI, for its part, makes its own primary argument a contention that when properly construed, the terms of the operative agreements, the facts, and the law should lead the Court to conclude that the escrow arrangement was not a security arrangement at all, but that immediately from the time MGI was entitled to issue a retransfer instruction to HCSL, MGI was, as a matter of law, to be treated as the beneficial owner of the Shares.

[52] MGI argued that it has an unconditional contractual entitlement to have the Shares transferred to it. The effect of those rights under the English and BVI governed law documents is that MGI is already regarded as having equitable title to the Shares, which do not form any part of the assets of Vector that would be available for its creditors. These rights are more than mere security rights: as a matter of BVI law, MGI is or is to be treated as the beneficial owner of the Shares. All that is now required to perfect the legal transfer of the Shares is the release of the executed Transfer Documents from escrow and registration of the transfer by MGIH6. There is no proper basis on which MGI can be prevented from exercising those rights by reason of any purported restriction on enforcement of a 'security interest' arising under Australian law. Thus, MGI contended that the declaration made by the Federal Court of Australia that they constituted a security interest, and any Australian law governed rights arising under the Corporations Act or the PPSA, are wholly irrelevant to the valid exercise of MGI's rights under the Escrow Deed.

[53] MGI also contended that at least from the point at which it was entitled to call for retransfer of the Shares, Vector held legal title to the shares as a constructive trustee for MGI pending

registration in the name of MGI (see Palmer's Company Law (Sweet & Maxwell 2021) at paragraph 6.412) because equity treats as done that which ought to have been done. That principle, stressed MGI, is of particular importance (and given effect) where the arrangements are intended to transfer ownership (see, for example, **Re Grant Forest Products Inc.**,⁸ **Bristol Alliance Nominee No. 1 Limited & Ors v Bennett & Ors**⁹ and Andrews, Clarke, Tettenborn and Virgo: Contractual Duties, Performance, Breach, Termination and Remedies (1st edn., Sweet & Maxwell 2012) at [27-042]-[27-044]). In these circumstances, as a matter of BVI law, any suggestion that MGI's rights are some form of 'security' in shares owned by Vector is misconceived. MGI's rights are superior to security rights: they are equitable ownership rights that should be enforced by this Court.

[54] MGI further remarked, in support to its contention that its rights were not some form of 'security', that (as Justice Jack had also observed in the Court's judgment of 22nd January 2021) MGI's only remedy for default by Vector was retransfer of the Shares: MGI's remedies in this regard had been limited by contractual agreement and did not include suing for the purchase price or any outstanding part thereof. As I understand MGI's argument, the holding of the Shares in escrow was not a means of securing or realising payment of any unpaid balance of the purchase price. It was not a form of collateral security: simply put, if Vector did not fulfil its obligations MGI could call the deal off, keeping any purchase price money it had already received.

[55] MGI argued that the mechanism agreed in the SSPA (at clause 7) amounted, in substance, to a conditional retransfer of the Shares back to MGI. MGI supported this conclusion with the following reasoning.

(1) By clause 7 of the SSPA, it was agreed that, until such time as the consideration was paid in full, a transfer form signed by Vector authorising the transfer of the Shares back to MGI would be held by an escrow agent. The requirements for the escrow arrangement included under Clause 7.2 that:

"(d) the Escrow Agent will release the Escrow Documents to the Seller ... in the event that the Seller issues the Escrow Agent with a notice to release the documents;

⁸ (2010) 1010 OR (3d) 383.

⁹ [2013] EWCA Civ 1626.

(e) the Seller may only issue the Escrow Agent a notice to release the Escrow Documents in the event that a release event arises as contemplated in clause 7.3;

(f) the Escrow Agent shall be permitted to rely on any notice received by it from the Seller and shall not be obliged to obtain confirmation from the Buyer that the Escrow Documents may be released ...”

- (2) One of the prescribed release events under clause 7.3(a) (and therefore conditions which would lead to retransfer to MGI) was the failure by Vector to make payment of the Purchase Price, which included each element of the consideration payment under clause 3.1. By subclause (i) of Clause 7, Vector was required to comply strictly with the obligations placed on it in terms of Clause 3.1 and was required to ensure that all amounts payable by it to MGI and/or MGIH6, as the case may be, were made on or before the dates stipulated in Clause 3.1. Clauses 7.3(a)(ii) and (iii) of the SSPA provide as follows:

“(ii) Should the Buyer fail, for any reason whatsoever, to effect payment of any of the amounts contemplated in clause 3.1 timeously, the Seller shall issue a written notice to the Buyer requiring it to effect the necessary payment within ten days of the date of the notice. In the event that the Buyer fails to effect the relevant payment within the aforementioned ten day period, the Seller shall be permitted to issue a notice to the Escrow Agent to release the Escrow Documents to the Seller.

(iii) The Seller’s right to issue a notice to release the Escrow Documents under the Escrow Agreement is the Seller’s sole and exclusive remedy against the Buyer for a failure by the Buyer to effect payment of the Purchase Price.”

- (3) The release of the Escrow Documents is governed by clause 6 of the Escrow Deed. Clauses 6.1 and 6.2 impose two different regimes. By the first (which concerns us here), under Clause 6.1, the parties unconditionally and irrevocably undertake and agree that:

“(a) each Escrow Document will, immediately following receipt by each Party of notification from the Escrow Agent that a Release Condition has been satisfied in accordance with clause 5, be released from escrow to the relevant Recipient and/or the Relevant Escrow Delivery Party, as the case may be; and

(b) the Escrow Agent shall be authorised to date any Escrow Document which has been executed but not yet dated when it is released from escrow with the date when that documents was released from escrow.”

Thereafter **immediately** following the receipt by the parties of that notice, HCSL came under an obligation to deliver the Escrow Documents to the relevant recipient. MGI picked up upon and stressed the use of the word ‘immediately’. This word is an

important indicator as to the nature of the underlying rights, as I shall discuss further below.

- (4) By clause 1.1 of the Escrow Deed, the Release Conditions are defined in Schedule 2 to the Escrow Deed as including: 'Receipt by the Escrow Agent of an Instruction Letter from Party A instructing the Escrow Agent to release the Escrow Documents to Party A (a Release Direction).' Party A is defined by the Escrow Deed as being MGI, and Party B is defined as being MGIH6. An Instruction Letter is defined by Clause 1.1. as meaning:

"... a letter from Party A addressed to the Escrow Agent containing a confirmation that a Release Event has occurred and is continuing and an Instruction to the Escrow Agent to release the Escrow Documents to Party A. The Parties agree that any Instruction Letter as contemplated by this clause needs only be signed by Party A."

The point MGI was highlighting here is that the retransfer mechanism envisages and provides for unilateral action on the part of MGI as Party A, commensurate with already accrued beneficial ownership rights.

- (5) MGI continued, that a 'Release Event' was in turn defined as meaning: 'the events listed in clause 7.3 of the Share Sale Agreement.' Clause 5 of the Escrow Deed provides that: 'The Escrow Agent shall promptly notify each other Party (in accordance with Clause 12) upon either of the Release Conditions being satisfied.'
- (6) Clause 8.7 of the Escrow Deed confers on the Escrow Agent a **permissive power, in certain circumstances**, to refuse to comply with an Instruction Letter (the point being that the Escrow Agent does not have to, and if it does not, it must immediately comply with the Instruction Letter):

"In the event of any disagreement resulting in adverse claims or demands being made, or the receipt by the Escrow Agent of incomplete, unclear or conflicting claims, demands, instructions, notices, requests or other communications, in connection with this Deed or the Escrow Documents, and the Escrow Agent in good faith is in doubt as to what action it should take hereunder: (a) The Escrow Agent shall be entitled, in its sole discretion, to refuse to comply with any claims, demands, instructions, notices, requests or other communications with respect to this Deed or the Escrow Documents so long as such disagreement, dispute or conflict shall continue, and the Escrow Agent shall not be or become liable in any way to any Party for failure or refusal to comply with such conflicting claims, demands, instructions, notices requests or other communications; ..."

- (7) By clause 16, the Escrow Deed and any non-contractual obligations arising out of or in connection with it are governed by, and to be construed in accordance with, BVI law (MGI's point being that it is BVI law that governs the rights and obligations pertaining to

the operation of the Escrow Deed, not Australian law, and Australian law is irrelevant to this).

[56] MGI argued that it, as a matter of contract under the terms of the SSPA and Escrow Deed, has an accrued and unconditional right to delivery of the Transfer Documents for the purpose of enabling it to have the Shares registered in its name. Its right to receipt of the Transfer Documents in accordance with the Escrow Deed is complete and it is entitled to require HCSL to perform its obligations (as HCSL is entirely willing to do). In this regard:

- (1) On 17th September 2020, MGI delivered a notice to Vector to remedy its breach of clause 7.3(a)(ii) of the SSPA to make available the Shareholder Loan;
- (2) Vector accepts and admits that it has failed to remedy this breach: *per* the Affidavit of one Mr. Michael Hendriks at paragraph 36 and paragraph 9 of its written submissions;
- (3) On Friday 16th October 2020, HCSL wrote to the Parties confirming receipt of a valid direction from MGI which satisfied the Release Conditions and notifying them of its intention to release the Escrow Documents albeit not until Tuesday, 20th October 2020;
- (4) On Monday 19th October 2020, Messrs. Carey Olsen confirmed that they had been instructed by Vector to apply for injunctive relief and HCSL confirmed that it would, in those circumstances, delay releasing the Escrow Documents until that application had been determined;
- (5) Vector's previous application for injunctive relief was dismissed by this Court on 22nd January 2021. This Court on that date rejected Vector's argument that there was a serious issue to be tried to the effect that it was an implied term of the Standstill Agreement that MGI had agreed not to enforce its rights under clause 7.3(a) of the SSPA, and also that any right arising under Australian law purporting to restrict MGI from exercising its rights was of relevance. The *ex parte* injunction granted was discharged, albeit the order to that effect was stayed until 25th February 2021;
- (6) On 24th February 2021, Vector served a stop notice on MGI and HCSL under rule 49, Civil Procedure Rules 2000 ('CPR') (which notice was premised on Vector being 'beneficially entitled to 695 shares' in MGIH6);
- (7) On 3rd March 2021, MGI demanded that HCSL release the Transfer Documents as provided for under the Escrow Deed;
- (8) On 8th March 2021, HCSL confirmed that it would release the Escrow Documents to MGI subject to satisfaction of its lien for professional fees and disbursements;

- (9) The assistance and 'soft-touch' provision liquidation applications were issued on 17th March 2021, and no further steps to release the Transfer Documents have been taken pending resolution of those applications.
- (10) The position of HCSL has been confirmed in advance of the hearing on 20th May 2021 by a letter dated 17th May 2021. HCSL has made clear that it will abide by any order or direction given by the Court. However, the substance of its position remains clear: unless enjoined by the Court, it will comply with the Instruction Letter and sees no reason to have recourse to the permissive power under Clause 8.7 of the Escrow Deed.

As Messrs. Appleby, acting for HCSL, commented (in the letter of 17th May 2021):

"Clause 8.7 of the Escrow Deed is a permissive power which entitles (but did not require) our client to refuse to release the Escrow Documents if, in good faith, it is uncertain of its obligations. In its letter dated 16 October 2021 our client (HCSL) confirmed that, having by then taken independent advice, it was satisfied that a Release Condition had occurred and that it had come under an obligation to release the Escrow Documents. It was suggested at the time that our client 'could not be criticised' if it declined to release the Escrow Documents in relation upon its rights under clause 8.7 of the Escrow Deed. However, HCSL's view was that the proper course was for it to comply with its obligations under the Escrow Deed, and not to seek to hide behind an exculpation clause to justify a failure to do so. This also meant that your client received the benefit of a judicial determination by the Court on the question of whether the Escrow Documents should be released, rather than the arbitrary detention of those documents by an Escrow Agent. The Court has since made two orders entitling HCSL to act in accordance with any direction which it gives, most recently (and explicitly) on 22 March 2021. Whatever the outcome of the applications before the Court on 20 May 2021, HCSL's strong preference would be that the Court gives a clear and unequivocal direction, specifically directed to HCSL, as to the steps that it should take, subject to its lien. On the assumption that it does so, we cannot see that any further resort to Clause 8.7 of the Escrow Deed would be necessary."

- (11) Against this background, it can be seen that there is no relevant dispute that the contractual conditions for the release of the Escrow Documents are satisfied. The BVI Court has already held that there is no serious issue to be tried in this regard. As a matter of BVI law, MGI has a current and enforceable right to the delivery up of the Escrow Documents and to have the Shares registered in its name. The sole basis upon which Vector has brought the Applications is based on the existence of rights allegedly arising as a matter of Australian law.
- (12) As a result of the contractual arrangements entered into between the parties, and the unconditional right to transfer and receipt of the Transfer Documents that has now accrued under the Escrow Deed, MGI has acquired equitable title to the Shares. The relevant rights of MGI under the Escrow Deed are rights that would be enforced by way

of specific performance in equity (see, for example, Snell's Equity (34th edn, Sweet & Maxwell 2019) at paragraph 17-10). As a matter of contract and in equity, the transfer was complete (or treated as complete) once the conditions for transfer and release of the Transfer Documents from escrow were met: see, for example, **Kingston v Ambrian Investment Co Ltd**¹⁰ and Clause 6.1 of the Escrow Deed. At least from this point, Vector held legal title to the shares as a constructive trustee for MGI pending registration in the name of MGI (see Palmer's Company Law (Sweet & Maxwell 2021) at paragraph 6.412) because equity treats as done that which ought to have been done. In these circumstances, as a matter of BVI law, any suggestion that MGI's rights are some form of 'security' in shares owned by Vector is misconceived. MGI's rights are superior to security rights: they are equitable ownership rights that should be enforced by this Court.

- (13) The fact that Vector has now entered administration in Australia, and that steps are being taken to seek to place it into provisional liquidation in the BVI, does not alter the analysis or mean that MGI's right to the Shares should not be given effect. The English Court of Appeal case of **Bristol Alliance Nominee No. 1 Limited & Ors v Bennett & Ors**¹¹ confirms (as has always been the case) that accrued rights in equity to a particular asset are respected and enforced against a company in an insolvency process because such an asset is not regarded as part of the company's estate.
- (14) All that MGI requires to obtain legal as well as equitable title to the Shares is performance of the obligations of HCSL under the Escrow Deed, and subsequent perfection of the transfer through registration.

[57] MGI submitted that if, as MGI contends, MGI is as a matter of BVI law to be treated as the equitable owner of the Shares by reason of the now unconditional transfer provided for by the SSPA and the Escrow Deed, it is difficult to see on what basis any application for assistance can proceed. The Shares are not property of the debtor in any relevant sense, and it is inconceivable that Part XIX of our Insolvency Act could override such rights (particularly when the Court is required to take into account the just treatment of MGI, and the need to protect persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience: see Section 468 of the Act).

¹⁰ [1975] 1 WLR 161 at 166.

¹¹ [2013] EWCA Civ 1626.

[58] However, says MGI, even if MGI's rights are treated as a form of security such that it is a 'secured creditor' for the purpose of Part XIX, Vector's claim for assistance is self-evidently flawed. Relief is sought under Section 467(3)(b) and (h), which provisions enable the Court as a matter of discretion to grant relief which (under (b)) restrains the creation, exercise of enforcement of any right or remedy over or against the debtor's property, or (under (h)) amounts to any other relief as it considers appropriate. Yet Section 467(3)(b) of the Act is expressly subject to the effect of sub-section (4). This provides:

“An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest.”

Sub-section (4) therefore acts as a bar on the relief sought by Vector because, on this analysis, it would affect the rights of MGI as a secured creditor. There is no jurisdiction to grant the relief sought, and subsection 467(3)(h) of the Act cannot conceivably be read as being sufficiently wide to grant relief that is expressly prohibited by Section 467(4). The only answer given by Vector on this point has been to assert that that Australian law renders MGI's security right unenforceable for the purpose of Section 9 (and therefore 467(4)) of the Act). That is self-evidently a wholly circular argument: the argument assumes that Australian law has been (or will be) given effect here, such as to render the security right unenforceable, and then seeks to maintain that it is already unenforceable when considering whether or not Australian law will be given effect by an order under Section 467(3) of the Act. This argument should be rejected says MGI. In particular:

- (1) Australian law does not have effect to render any security right unenforceable unless and until recognised and given effect through an assistance order in the BVI. That, says MGI, is the whole point of the Assistance Application: the Australian declaration alone does not suffice. The starting point is therefore necessarily that there is an enforceable security interest as a matter of BVI law unless recognition and assistance is given in order to give effect to Australian law;
- (2) Any question of recognition and assistance (whether arising at common law or under Part XIX) will always be subject to questions of local law and local public policy (see, by analogy, the comments of Lord Sumption in **Singularis Holdings Limited v PricewaterhouseCoopers**¹²). In this instance, local law could not be clearer: existing valid security rights cannot be affected by any relief granted under Part XIX;

¹² [2014] UKPC 36 at paragraph [19].

- (3) An express bar on affecting security rights under BVI law, which rights are otherwise enforceable as a matter of BVI law, must therefore be respected, and should not be undermined, by reason of provisions of foreign law which are inapplicable unless given effect under Part XIX. It would make no sense to suggest (and would entirely undermine) the obvious purpose of Section 467(4) of the Act if a valid security right was treated as unenforceable by reason of the making of an order in a foreign jurisdiction, which order had not been recognised under Part XIX.

[59] Further and in any event, to the extent that there is jurisdiction to grant relief as sought by Vector (which MGI denied), MGI says this is not a case in which any relief should as a matter of discretion be granted. In particular:

- (1) In granting any relief under Section 467 of the Act, the Court is required to take account of (and only grant relief that is consistent with) matters including (see Section 468(1)((b) and (d)): the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the process of claims in the foreign proceedings; and the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency. Any relief which prevents the exercise of MGI's BVI governed law rights under the Escrow Deed would not be consistent with such principles;
- (2) To order otherwise would amount to the direct enforcement of substantive Australian law in a way that alters MGI's existing BVI law governed rights (the moratorium also being a precursor to Vector's attempt to argue that the security interest is unperfected and vests in Vector by reason of the provisions of the PPSA). This is inappropriate under Section 467 of the Act.

The Provisional Liquidation Application

Grounds and Vector's position

[60] In its Originating Application for the appointment of provisional liquidators, Vector summarised its grounds as follows:

- (1) Vector itself is the applicant and consents to the appointment of provisional liquidators as required by section 170(4)(a) of the Companies Act.
- (2) The appointment of provisional liquidators is urgent and necessary for the purpose of maintaining the value of the MGIH6 Shares, which are Vector's primary asset, and facilitating the Administration of Vector in Australia:

- (a) Vector's only material asset is its interest in the Project. Consequently, the success of any rehabilitation of Vector is contingent on the ability to recapitalise its interest in the Project. To this end, the Administrators are in the process of liaising with potential investors so that Vector may continue to operate as a going concern.
 - (b) It was on that basis that the Administrators took out the Substantive Australian Proceedings on 16th February 2021 to restrain MGI from taking any steps under the Escrow Deed to effect a transfer of Vector's shares in MGIH6 to MGI. Notwithstanding that the Australian Court has declared that MGI is precluded from enforcing its security interest against Vector, such that MGI cannot take any steps under the Escrow Deed to effect a transfer of Vector's shares in MGIH6 to MGI, MGI has acted in a manner inconsistent with the Australian order by demanding that HCSL release the Escrow Documents and give Vector notice of its intention to register the transfer of Vector's shares in MGIH6 to MGI.
 - (c) Following that, HCSL has given notice of its intention to release the Escrow Documents and to update Vector's Register of Members in 14 days, pursuant to the Stop Notice dated 24th February 2021.
 - (d) There is therefore a real and imminent risk that HCSL will release the Escrow Documents and register the share transfer by 22nd March 2021, which will be contrary to the Australian order and result in Vector losing its only material asset. The urgent appointment of provisional liquidators over Vector is therefore imperative to maintaining the company's asset.
- (3) Additionally, the purpose of a provisional liquidation is to support and facilitate the voluntary Administration of Vector in Australia. The Administrators are in the process of recapitalising Vector. As part of the recapitalisation, the Administrators have managed to secure funding from a certain (named) investor entity which has been provided in the interests of protecting Vector's interest in the Project which is also its primary asset. The Administrators are also in discussions with other parties interested in the recapitalisation of Vector.
- (4) For the foregoing reasons, the appointment of 'soft touch' provisional liquidators is imperative to allowing the going concern value of Vector to be maintained for the benefit of its creditors as a whole.

- [61] Vector explained further that the present Provisional Liquidation Application was brought further to the Australian order made by the Australian Federal Court in the Australian proceedings which were commenced on 17th February 2021. The effect of the declaration made in the Australian order was to preclude MGI from acting in respect of its security interest in the MGIH6 Shares during Vector's Australian administration.
- [62] Vector contends that its evidence in support of the Provisional Liquidation Application is unchallenged and should thus be accepted. That evidence includes that:
- (1) Vector is balance sheet insolvent as the value of its liabilities exceeds its assets and/or cash flow insolvent given that the company is unable to pay its outstanding debts absent a recapitalisation;
 - (2) Vector has a connection with the Virgin Islands through its 69.5% shareholding in MGIH6, a BVI incorporated company;
 - (3) The proposed joint liquidators, Mr. Pretlove and Mr. Carruthers, are eligible insolvency practitioners. There has been no objection to the nomination of these individuals as the joint liquidators.
 - (4) Vector as the applicant has consented to the appointment of provisional liquidators.
 - (5) The restraining order sought by Vector as part of the Provisional Liquidation Application to prevent MGIH6 and HCSL from effectuating the transfer of the MGIH6 Shares to MGI or to any nominee of MGI, is necessary to give effect to the declaratory orders made by the Australian Court and is crucial to maintaining the MGIH6 Shares as part of the Administrators' efforts to recapitalise Vector. This is the purpose of appointing joint provisional liquidators over Vector.
- [63] Vector, in anticipation that MGI would argue (as it has) that it has already acquired accrued beneficial ownership rights in the Shares by dint of Vector's breach of the terms and conditions of the SSPA, argued that MGI's arguments as to the nature of their rights and whether or not they are 'security' rights could and should have been raised in the Australian proceedings and prior to the declaration made by the Australian Federal Court under the Australian order. Vector argues that MGI is therefore estopped from now raising this argument in the present BVI proceedings based on the principles in **Johnson v Gore Wood & Co.**¹³

¹³ [2002] 2 AC 1.

- [64] Vector contends further that this Court's judgment of 22nd January 2021 does not operate as a *res judicata*. Vector says that decision is not determinative of the matters the Court ruled upon. Vector observes that whilst that decision has not been appealed, it should be borne in mind that it was not appealable as a matter of statute law.
- [65] Vector asserts that if the orders for appointing provisional liquidators and restricting the transfer of Vector's assets are made, the Administrators would then have time to seek final relief in the Australian proceedings, and if necessary, any additional assistance orders required in the BVI. Either as a result of the grant of that additional time or the grant of any additional orders, Vector will have the best chance of coming to agreement with various stakeholders to ensure the continued operation of MGIH6 and therefore a material return to creditors (including MGI).
- [66] Vector relies upon section 170(4) of the Insolvency Act. This materially provides as follows:
- "(4) The Court may appoint a provisional liquidator under subsection (1) if-
 - (a) the company, in respect of which the application to appoint a liquidator has been made, consents; or
 - (b) the Court is satisfied that the appointment of a provisional liquidator-
 - (i) is necessary for the purpose of maintaining the value of assets owned or managed by the company; or
 - (ii) is in the public interest."

Provisional Liquidation Application – MGI's position

- [67] The following is a summary of the salient points of MGI's position in relation to the Provisional Liquidation Application.
- [68] MGI homed in on Vector's argument that MGI is estopped from raising the equitable ownership point before this Court, by dint of MGI's ability to have raised it in the Australian proceedings. MGI says that argument is 'plainly misconceived', for the following reasons:
- (1) MGI has not accepted that the Australian Federal Court had jurisdiction over it (*per* the Australian Federal Court judgment itself at paragraph [3]);
 - (2) Some reliance appears to be placed by Vector on a point raised but not determined by the Australian Court to the effect that it had jurisdiction over MGI by reason of a proof of debt submitted by MGI in the Vector administration (*per* the judgment at paragraphs [21]-[25]). That, says MGI, is an interesting point in circumstances where MGI's proof (and its status as a creditor) was rejected by Vector before the application in Australia

was made, and the proof was then formally withdrawn by MGI. In the factual context of this case, MGI does not accept that its attempt to get information from the Vector administrators through submitting a proof amounted to the taking of a procedural step that was consistent only with acceptance of the Australian court's jurisdiction over it: see **Stichting Shell Pensioenfonds v Krys and another**;¹⁴

- (3) This is, however, irrelevant on the facts of this case because the only determination made by the Australian court was as to whether the interest held by MGI as a result of the SSPA and the Escrow Deed was a security interest for the purpose of the PPSA and Corporation Act 2001 (i.e. as a matter of Australian law). MGI is not seeking to relitigate or challenge that finding in these Applications, because it is irrelevant. What matters is the classification of the interest held by MGI as a matter of BVI law, and how that interplays with the Assistance Application and the Provisional Liquidation Application;
- (4) In this regard, the English Court of Appeal decision in **Lightning v Lightning Electrical Contractors Ltd**¹⁵ is instructive. The defendant company bought property in Scotland with funds allegedly provided by Mr. Lightning. In Scottish proceedings, the Sheriff Court held that Mr. Lightning's licensee was not entitled to resist the company's claim to possession. In English proceedings, Mr. Lightning claimed a declaration that the property was held by the company on resulting trust for him. The Court of Appeal held that there was no issue estoppel nor any jurisdictional impediment to hearing the claim. That was because there was an existing equity between the parties, both of whom were amenable to the jurisdiction. Any suggestion of issue estoppel was in the circumstances described as 'unreal and unjust' by Peter Gibson LJ.
- (5) Further and in any event, in circumstances where MGI itself maintains that Vector is estopped from relying on any Australian law right to seek to prevent it from exercising its rights under the Escrow Deed, no issue estoppel can now run to prevent MGI from arguing that Vector's Applications are barred by issue estoppel or abuse of process. The prior equity arising from the conduct of the injunction proceedings favours MGI. This Court has already decided in previous proceedings between these very same parties, when Vector unsuccessfully sought to maintain an injunction preventing MGI from exercising its rights to the Shares, that

¹⁴ [2015] A.C. 616 at [31].

¹⁵ [1998] WL 1044.

- (i) there is no serious issue to be tried as to whether MGI is entitled as a matter of contract to exercise its rights under the Escrow Deed and related SSPA; and
- (ii) any restrictions on the enforcement of security arising under Australian law do not prevent MGI from exercising its rights under the Escrow Deed in accordance with the parties' chosen governing laws.

[69] MGI further observes that there is a lack of clarity as to whether the Australian proceedings were conducted on an *ex parte* basis, or, alternatively, on short notice. The Australian court made this comment at paragraph [2] of its judgment, suggesting that the Australian court considered that Vector had been appearing, or might have been appearing, on an *ex parte* basis:

“Several affidavits were read and correspondence was tendered into evidence. It is unnecessary to go into the detail of that evidence, save to observe that the Administrators have put before the Court all communications which have been raised on behalf of the defendants and it appears to me that they intended to do that at all times in discharge of their obligations, appearing *ex parte*.”

[70] MGI contended furthermore, that there is no proper basis for the appointment of ‘soft touch’ provisional liquidators over Vector in this jurisdiction:

- (1) First, Vector cannot establish a sufficient connection with the BVI under section 163 of the Act. Its only assets in the BVI are said to be the Shares. However, as set out above, MGI is entitled to the Shares which are treated as beneficially owned by it. Assets held on a bare trust cannot suffice to satisfy the jurisdictional requirements of Section 163 because there is no reasonable possibility of benefit accruing to the creditors from the making of a winding-up order. That has always been the underlying rationale for relying on the availability of assets in the jurisdiction in order to found jurisdiction for a winding-up petition, and it is not met in this case: see the comments of Megarry J (as he then was) in **Re Cia Merabello San Nicholas SA**,¹⁶ cited along with other relevant authority in **Re OJSC Ank Yugraneft**.¹⁷
- (2) Secondly, the Shares are at the very least subject to a security interest in favour of MGI. Section 175(2) expressly provides that the appointment of liquidators from the commencement of the liquidation ‘does not affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest’. Section 171 provides that, subject to any limitation

¹⁶ [1972] Ch 75 at 91-92.

¹⁷ [2009] 1 BCLC 298 at [9]-[20].

imposed by the Court, 'a provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he or she was appointed.' Just as a liquidator cannot prevent a secured creditor from exercising rights to take possession of and realise or deal with the secured assets, it is not possible to confer on the provisional liquidators any such power. Similarly, the scope of the power under Section 170 of the Act to appoint a provisional liquidator on such terms as the Court considers fit cannot of itself suffice to provide for an order restraining MGI from exercising rights as a secured creditor. Alternatively, Section 175(2) indicates that the Court should not exercise any jurisdiction it may have in a manner that restricts a secured creditor's rights. In these circumstances, the Court cannot be satisfied that an appointment of a provisional liquidator is necessary for the purpose of maintaining the value of assets owned or managed by the company (see Section 170(4)(b) of the Act).

- (3) Thirdly, and in any event, as a matter of discretion, it would be inappropriate to appoint provisional liquidators on the terms sought:
- (a) No purpose can be achieved by the appointment of provisional liquidators where MGI is beneficially entitled to the Shares or, alternatively, has a security interest in the Shares. As Mr. Carruthers says at paragraph 59 of his Affidavit, the Shares are Vector's sole asset, without which any efforts to recapitalise Vector would be futile. There is therefore no real prospect that a restructuring will occur without the agreement of MGI, and MGI has no interest in doing so.
 - (b) If, as MGI argues, it is not possible to restrain MGI from exercising its rights, the provisional liquidation would seem to lack any proper purpose;
 - (c) Any order as anticipated would seem to be inconsistent with the existing English and BVI law governed rights of MGI.
 - (d) The appropriate route for relief (if any) would be an injunction in aid of arbitral proceedings, or assistance under Part XIX of the Act, not the appointment of soft touch provisional liquidators under Part VI. The former has been rejected by this Court. The latter should be rejected for the reasons set out above. As the Court of Appeal held in **Net International Property Limited v Erez** at paragraphs [40], [41] and [50], Part XIX of the Act provides a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. The appointment of soft touch provisional liquidators cannot be used

to seek wider or inconsistent relief to that. The application for relief under sections 170(5) or 171 is therefore an attempt to obtain injunctive relief by the back door.

DISCUSSION

[71] Upon consideration, in my respectful judgment, this is not a case in which Vector's application for assistance and the appointment of provisional liquidators, and a restraining order, should be acceded to. I shall now explain why.

[72] I shall first address the nature and effect of the transaction.

[73] This is revealed, in particular, by Clause 6.1 of the Escrow Deed. This concerned release of the Escrow Documents by the Escrow Agent in order for the Shares to be retransferred to MGI. Clause 6.1 provided as follows:

“(a) each Escrow Document will, **immediately** following receipt by each Party of notification from the Escrow Agent that a Release Condition has been satisfied in accordance with clause 5, be released from escrow to the relevant Recipient and/or the Relevant Escrow Delivery Party, as the case may be; and

(b) the Escrow Agent shall be authorised to date any Escrow Document which has been executed but not yet dated when it is released from escrow with the date when that document was released from escrow.” [Emphasis added.]

[74] This clause needs to be read together with Clause 7.3(a)(ii) of the SSPA, which provides:

“(ii) Should the Buyer fail, for any reason whatsoever, to effect payment of any of the amounts contemplated in clause 3.1 timeously, the Seller shall issue a written notice to the Buyer requiring it to effect the necessary payment within ten days of the date of the notice. In the event that the Buyer fails to effect the relevant payment within the aforementioned ten day period, the Seller shall be permitted to issue a notice to the Escrow Agent to release the Escrow Documents to the Seller.

[75] The notice to release the Escrow Documents was to take the form of an 'Instruction Letter', defined by clause 1.1 as meaning:

“... a letter from Party A addressed to the Escrow Agent containing a confirmation that a Release Event has occurred and is continuing and an Instruction to the Escrow Agent to release the Escrow Documents to Party A. The Parties agree that any Instruction Letter as contemplated by this clause needs only be signed by Party A.”

[76] We can sensibly ask ourselves here why the Escrow Agent was required 'immediately' to release the Escrow Documents upon receipt of a compliant Instruction Letter, and why an Instruction Letter needed only to be signed by Party A (here MGI). The answer is that (a)

something must already by then have happened which (b) operated to vest the beneficial interest in the Shares unconditionally in MGI. From that point on, MGI became entitled to require that the Shares be retransferred to MGI. The event in question was a defined 'Release Event'.

[77] I accept MGI's submission that it is the doctrine that equity treats as done what ought to be done which is at work behind this unconditional vesting. The 'thing' that ought to be done here is the transfer back of the full (i.e. legal and equitable) ownership in the Shares if Vector perpetrates a 'Release Event'. Thus, irrespective of whether Vector concurs with such a transfer – and, by extension, irrespective whether Vector agrees with MGI issuing an Instruction Letter, or, moreover, whether Vector seeks to play for time in one way or another in good faith or not – equity treats the transfer back to have occurred, such that MGI can register its legal ownership of the Shares once more in its own name. Thus, even though upon the occurrence of a Release Event the share register and other legal documents might still say that Vector is the legal owner of the Shares, the owner in equity, that is, the unconditional beneficial owner, becomes MGI.

[78] The maxim that equity treats as done what ought to be done has become known as the doctrine of anticipation. It derives from the English Court of Appeal case of **Walsh v Lonsdale**.¹⁸ That was a landlord and tenant case. Lord Jessel MR explained the position thus:

“There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year.”

[79] The key aspect of this doctrine is that the relief is in principle capable of being given by specific performance. This has been reiterated by the English Court of Appeal in **Bristol Alliance Nominee No. 1 Limited & Ors v Bennett & Ors**.¹⁹ The English Court of Appeal went further and considered that a company in administration remains as liable to an order for specific

¹⁸ (1882) 21 Ch D 9.

¹⁹ [2013] EWCA Civ 1626.

performance as if it were not in administration, with entry into administration after accrual of the equitable entitlement not affecting that prior equity.²⁰

[80] If it is here right, as I think it is, that equity treats the transfer back of the Shares to have occurred, such that MGI can register its legal ownership of the Shares once more in its own name, the applicability of this equitable doctrine raises a further question. The Court, which, after all, is also a court of equity, should ask itself why it should assist a party whose clear intent is to thwart 'what ought to be done'. The inappropriateness of a suggestion that a court of equity should itself frustrate equity is startling. This is an important consideration where the Court might have a discretion to assist an applicant, such as Vector, or not, as the case may be.

[81] An obvious answer to the question I have just raised is that there may, in certain cases, be considerations which override the equitable doctrine. An example in point would be Vector's purportedly overarching contention that as a matter of contract, Vector is not yet in breach of its obligations and a Release Event has not yet occurred, because the Standstill Deed operates to extend Vector's time for meeting its obligations, not just with regard to completing a Definitive Feasibility Study, but also, by an implied term, with regard to producing the Shareholder Loan Facility.

[82] There are two fundamental difficulties with this line of argument, which I thus reject.

(1) I accept MGI's submission that this Court (by Justice Jack) has already ruled on 22nd January 2021 that Vector's arguments concerning an alleged implied term discloses no serious issue to be tried. I accept MGI's submission that Vector is estopped from arguing this point (and the other points Justice Jack ruled upon) afresh, under the doctrine of *res judicata*. Vector submitted that Justice Jack's ruling was not determinative, but I do not understand why it was not. Indeed, Vector cited no authority to support that bold (and bald) submission. Vector adverted to the fact that no appeal could, by statute, lie from Justice Jack's decision. But that surely serves to underline the fact that Justice Jack's decision was indeed determinative, because the intention of the statute in question must have been to render a decision of the court of first instance determinative.

²⁰ At paragraphs 30 and 34.

(2) The second major difficulty with Vector's reliance upon the Standstill Deed is that there is not a scintilla of evidence that I could see to support Vector's argument that it contains the implied term they argue for. Justice Jack was not obviously wrong in his finding that this argument does not disclose a serious issue to be tried. Indeed, so far as I could tell (and I recognise that I might not have had all the evidence before me), he was absolutely right. On its face, and in the clearest terms, the Standstill Deed concerned only the obligation to produce the Definitive Feasibility Study and nothing else. I am not swayed to give credence to Vector's argument by the fact that Vector has started arbitration proceedings, and indeed under the auspices of the International Chamber of Commerce ('ICC'). Commencing arbitration, even using the relatively expensive facilities of a prestigious body such as the ICC, does not strengthen a case and does not mean that there is in fact a serious issue to be tried. From the documentary evidence I have seen, and with the greatest of respect, Vector's reliance upon the Standstill Deed as an overarching saving point is beyond farfetched.

[83] Having thus discounted Vector's purportedly overarching Standstill Deed argument, the Court must ask what effect, if any, Vectors' legal steps in Australia have had.

[84] A starting point has to be that, as I have accepted, this Court, by Justice Jack, has already decided that they are irrelevant. I could end the analysis there, but there is more that can be said.

[85] The Court must ask itself at what point in time equity treated MGI as the unconditional beneficial owner of the Shares. The answer appears to be: by the latest on 15th October 2020. That was the date MGI issued an Instruction Letter to HCSL, dated 13th October 2020, which HCSL accepted on 16th October 2020 as satisfying the requirements of the Escrow Deed for release of the escrow documents to MGI. HCSL has expressly stated that it does not intend to invoke its right pursuant to Clause 8.7 of the Escrow Deed to withhold the Escrow Documents in case of a doubt whether it should do so.

[86] What this ultimately means is that MGI became the unconditional beneficial owner of the Shares **by 15th October 2020**, as a matter of English law and BVI law. When that happened, the Shares were no longer Vector's assets in anything other than name.

- [87] Thus, MGI became the unconditional beneficial owner of the Shares **before** Vector entered administration in Australia on **10th December 2020**. Whatever effect, as a matter of Australian law, entering administration might have had upon 'security interests', that must be irrelevant so far as MGI's prior accrued beneficial ownership rights to the Shares are concerned, because the Shares were then to be treated in equity as already outside Vector's estate of assets.
- [88] It also warrants remarking that MGI did not receive the Escrow Documents on 15th October 2020. HCSL acknowledged the Instruction Letter on 16th October 2020 but was required to give Vector notice that a Release Condition had been satisfied. This notice was given, the same day as HCSL's acknowledgment of the Instruction Letter, on Friday, 16th October 2020, but was not deemed to have been given pursuant to clause 12.1(c) of the Escrow Deed until Monday 19th October 2020. In respect of the period prior to 16th October 2020, Clause 8.7 gave HCSL a permissive power not to comply with an Instruction Letter in case of doubt. HCSL might conceivably have had a doubt, since on 21st and 24th September 2020 Vector notified MGI that it disputed MGI's entitlement to exercise its right with regards to the release back to MGI of the Escrow Documents. But, as HCSL's legal representatives explained subsequently:
- "In its letter dated 16 October 2021 our client (HCSL) confirmed that, having by then taken independent advice, it was satisfied that a Release Condition had occurred and that it had come under an obligation to release the Escrow Documents."
- [89] That being the case, MGI was entitled to the Release of the Escrow Documents by 16th October 2020.
- [90] It merits recalling further that Vector issued a notice of a dispute to MGI, purportedly pursuant to clause 13.1(b) of the SSPA, on **20th October 2020** and it was on 28th October 2020 that Vector obtained its *ex parte* injunction. It can clearly be seen that but for the delay in releasing the Escrow Documents, Vector would not have been able to block the retransfer, nor, purportedly, to cause a retransfer of the Shares to be stayed by entering into administration. Had the Escrow Documents been released to MGI, they would have been re-registered in MGI's name well before Vector took any of its steps in Australia. Administration of Vector would have been utterly irrelevant to MGI and the Shares and Vector would not even had the beginnings of an argument that the Shares amounted to a 'security interest' in MGI's favour, because the Shares would by then manifestly have been MGI's.

[91] It is not equitable that MGI should be treated as deprived of its rights to have re-registered the Shares by reason of the fact that Vector obtained injunctive relief to which (as the Court has found) it was not entitled. MGI was in principle entitled to an order of specific performance in respect of its retransfer rights. The position can, however, easily be remedied because (and here the doctrine mentioned earlier again appears) equity treats as done what ought to be done. The delay can simply be ignored, and HCSL can be assumed to have released the Escrow Documents immediately on 15th October 2020, or at latest by 16th October 2020. In this regard, HCSL has itself confirmed that it does not wish to rely upon its right under the Escrow Deed to withhold release of the Escrow Documents pending the resolution of a dispute between MGI and Vector. The effect is that MGI should be treated as having become the unconditional beneficial owner of the Shares and to have had the unqualified right to register them in its name no later than 16th October 2020. The fact that HCSL stated that it would delay releasing the Escrow Documents until Vector's intended application for an injunction had been determined is irrelevant, because HCSL took this position in response to Vector's intimation of 19th October 2020 that Vector would be applying for injunctive relief. It is irrelevant because MGI was by then entitled to the release of the Escrow Documents. In any event, on 8th March 2021 HCSL confirmed that it would release the Escrow Documents to MGI subject to satisfaction of its lien for professional fees and disbursements, without relying upon its right to withhold the Escrow Documents pursuant to Clause 8.7 of the Escrow Deed.

[92] I thus agree with MGI that Vector's administration in Australia, and the declaration it obtained that the Shares constitute a 'security interest', the enforceability of which is stayed, are irrelevant and should be ignored. The consequence is determinative: there is no reason why this Court should assist Vector in its efforts to use its administration and the Federal Court of Australia's declaration to prevent retransfer of the Shares. What is more, this Court should positively refuse to do so (without, of course, intending any disrespect to the Australian courts in doing so), because MGI has a prior and superior equity over whatever interests Vector may retain in the Shares, and this Court should give effect to that equity.

[93] This also means that there is no reason for this Court to give recognition to the orders of the Federal Court of Australia and operation of Australian legal provisions – doing so would serve no purpose. This Court will thus decline to do so (again without, of course, intending any disrespect to the Australian courts). The upshot also is, that, as MGI has argued, if MGI's

rights to the Shares are indeed to be construed as a security interest, our law would regard them as enforceable, and not affected by the entry of Vector into administration in Australia.

[94] Yet, Vector contends that MGI is estopped from arguing that the declaration of the Federal Court of Australia dated 24th February 2021 does not apply to MGI and its interests in the Shares. That argument however is, in my respectful judgment, flawed:

- (1) Vector is itself estopped from making this argument, because this Court has, by Justice Jack, already ruled on 22nd January 2021 that the position under Australian law, such as it may be, is irrelevant to the rights and obligations under the SSPA and Escrow Deed under English and BVI law respectively;
- (2) Whether or not MGI is indeed estopped as Vector argues is unclear to me. There appears to be uncertainty whether or not MGI had submitted to the jurisdiction of the Federal Court of Australia and whether or not the hearing which led to that court's declaration was conducted on an *ex parte* or *inter partes* basis. These are matters of Australia law and procedure, on which this Court is, in my respectful judgment, unable to rule with sufficient certainty, so I will decline to do so. I would remark that the Federal Court of Australia itself seemed to think that Vector was, or might be, appearing *ex parte*.
- (3) Even if MGI is in principle estopped, I apprehend that this Court has a discretion to allow a party nonetheless to run an argument 'under special circumstances'. This appears from the statement of principle by Sir James Wigram V-C in **Henderson v Henderson**, as quoted in **Net International Property Limited v Erez** at paragraph [54]:²¹

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (**except under special circumstances**) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case." [Emphasis added.]

This would appear to me to be a case where such latitude should be allowed. I note that Vector had given MGI only five clear days' (and two of those were a Saturday and a Sunday, so this means only three clear working days') notice of the substantive hearing before the Federal Court of Australia. I do not know what sort of notice periods

²¹ BVIHCMA2020/0010 (unreported, delivered 22nd February 2021) at paragraph [54] (Webster JA(Ag.)).

Australian procedural law considers to be fair, but by Eastern Caribbean Supreme Court standards this would generally be treated as too short notice. CPR 11.11(1)(b) stipulates that at least 7 days' notice must, as a general rule, be given before the Court is to deal with an application. It would be unfair to hold a respondent to its obligation to raise all the arguments it might wish to do, including complicated and/or technical legal points, and subject him to the effects of the doctrine of *res judicata* if he does not, in such a short time. Thus, to the extent that this Court has a discretion to allow MGI to argue that the declaration of the Federal Court of Australia dated 24th February 2021 does not apply to MGI and its interests in the Shares I allow MGI to do so.

The Provisional Liquidation Application

[95] The starting point for consideration of the Provisional Liquidation Application is that Vector relies upon section 170(4) of the Insolvency Act. This materially provides as follows:

- "(4) The Court may appoint a provisional liquidator under subsection (1) if-
 - (a) the company, in respect of which the application to appoint a liquidator has been made, consents; or
 - (b) the Court is satisfied that the appointment of a provisional liquidator-
 - (i) is necessary for the purpose of maintaining the value of assets owned or managed by the company; or
 - (ii) is in the public interest."

[96] It is apparent from use of the word 'may' in the opening line of section 170(4) that the Court has a discretion. The Court is not bound to appoint a provisional liquidator, even if the company concerned wants one and consents (see section 170(4)(a)). Subsection 170(4)(a) is clearly to be read disjunctively from subsection 170(4)(b): it is introduced by the word 'or'.

[97] In this case, consideration of section 170(4)(b) is relatively straight-forward. Where, as here, MGI is the unconditional beneficial owner of the Shares, and is entitled to have them registered in its own name, with orders to that effect being both possible and appropriate, there is no current necessity to appoint provisional liquidators to maintain the value of the Shares. That might change if Vector or its administrators take steps to stymie a retransfer of the legal ownership of the Shares to MGI. Moreover, it would not be in the public interest for the Court to appoint provisional liquidators, where the Applicants' intent is to frustrate MGI's prior accrued and superior equity in the Shares.

[98] Exercise of the discretion under section 170(4)(a) requires closer scrutiny.

[99] I accept MGI's argument that Vector cannot establish a sufficient connection with the BVI under section 163 of the Act. Section 163 materially provides:

(1) The Court may, on application by a person specified in section 162(2), appoint a liquidator of a foreign company under section 159(1) if the Court is satisfied that the company has a connection with the Virgin Islands and

(a) the company is insolvent;

(b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed;

(c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed;

(d) the company is dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered;

(e) the company has ceased to carry on business; or

(f) the company is carrying on business only for the purpose of winding up its affairs.

(2) For the purposes of subsection (1), a foreign company has a connection with the Virgin Islands only if

(a) it has or appears to have assets in the Virgin Islands;

(b) it is carrying on, or has carried on, business in the Virgin Islands; or

(c) there is a reasonable prospect that the appointment of a liquidator of the company under this Part will benefit the creditors of the company.

[100] Vector's only assets in the BVI are said to be the Shares, but MGI is entitled to the Shares which are treated as beneficially owned by it. Vector, through its agent HCSSL, holds the Shares on bare trust for MGI. I accept MGI's argument that assets held on a bare trust cannot suffice to satisfy the jurisdictional requirements of Section 163 because there is no reasonable possibility of benefit accruing to the creditors from the making of a winding-up order, per Megarry J (as he then was) in **Re Cia Merabello San Nicholas SA**,²² cited along with other relevant authority in **Re OJSC Ank Yugraneft**.²³

²² [1972] Ch 75 at 91-92.

²³ [2009] 1 BCLC 298 at [9]-[20].

[101] If that is right, this Court should not exercise any discretion it might still have to appoint provisional liquidators.

[102] I also accept MGI's argument that without prejudice to its contentions that it is the unconditional beneficial owner of the Shares (which I accept), the Shares are at the very least a form of security interest in MGI's favour, and such a security interest remains enforceable according to our law. It remains enforceable according to our law because (a) this Court deems it inappropriate to assist Vector by recognising legal steps and orders Vector has obtained under Australian law; and (b) I accept MGI's position that it should not be treated as estopped from arguing that MGI is not bound by Australian law and Australian court orders. I accept also MGI's legal argument that the Shares should not be treated as being part of Vector's estate. In such circumstances, the appointment of provisional liquidators would not achieve Vector's stated purpose.

[103] I also accept MGI's contention that since Vector maintains that the Shares are its only significant asset, MGI's cooperation would be needed to achieve a reorganisation of Vector. I note that MGI says it has no interest in cooperating in this regard.

[104] Ultimately, Vector's resort to this Court with its Assistance and Provisional Liquidation Applications was too late: MGI's unconditional beneficial ownership of the Shares had by then already accrued. A provisional liquidation cannot touch them. Thus, the appointment of provisional liquidators would be pointless. This Court should not, in principle, make pointless orders.

DISPOSITION

[105] For these reasons, the Court will respectfully decline to grant both the Assistance Application and the Provisional Liquidation Application.

[106] Since HCSL has requested a clear direction: HCSL shall release the Escrow Documents forthwith to MGI, subject to satisfaction of its lien in respect of HCSL's costs and expenses.

- [107] It would not be right, in my respectful opinion for Vector further to invoke the administration and such changes and effects it might have had under Australian law to prevent retransfer of the Shares taking place. Thus, Vector shall, by itself or by its administrators, forthwith do all such further things as may be required to enable MGI forthwith to register the Shares in its own name or that of a nominee.
- [108] Costs should follow the event in the usual way. Vector shall pay MGI's costs of and incidental to the Assistance Application and the Provisional Liquidation Application, to be assessed if not agreed within 21 days.
- [109] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court
Registrar