Neutral Citation Number: [2020] EWHC 3441 (Ch)

Case No: CR-2018-009045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Rolls Building, Fetter Lane
London EC4A 1NL

Date: 17 December 2020

Before :

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

THE OFFICIAL RECEIVER	**Applicant**
- and -	
(1) JOHANNES CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS	
(2) TIMOTHY ULRICH	**Respondents**
-and-	
STEPHEN JOHN HUNT	
	Requesting Creditor

- -
- -

RAJ ARUMUGAM (instructed by **Government Legal Department**) for the **Applicant**
TOM SMITH QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Respondents**
CALEY WRIGHT (instructed by **Blake Morgan LLP**) for the **Requesting Creditor**

Hearing date: 02 December 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. The question to be decided by the Court is whether to order a public examination of Mr Deuss, an alleged de facto director of Transworld Payment Solutions UK Limited (the "Company"). The application is made by the Official Receiver (the "OR") at the request of the requesting creditor.

2. The Company was dissolved in May 2010 and was brought to life again for the purpose of being wound up on an application and petition made by TC Catering Limited ("Catering") in liquidation. Catering had no interaction with the Company during its trading life. It enters the story by reason of its liquidator having a connection with the Company. The liquidator of Catering is Mr Bramston, a partner of Mr Hunt in a firm known as Griffins. Mr Hunt discovered that at the date the Company was dissolved there was an outstanding county court judgment in favour of Chubb Electronic Security in the sum of £1,833.06. No other debts appeared due from the Company at that stage. Catering, by its liquidator, Mr Bramston, acquired the Chubb Electronic debt thereby giving it standing to seek a double-barrelled order to restore and wind up the Company. Mr Bramston paid the deposit for the winding-up petition. The Company was subsequently restored and wound up on September 2014 with Mr Bramston's partner, Mr Hunt, appointed liquidator in November 2014.

3. Mr Hunt is also the liquidator of Owl Limited ("Owl") which is said to be another creditor of the Company. It is in his capacity as liquidator of Owl that he made the request to the OR for the public examination of Mr Deuss.

4. Mr Deuss opposes the application for examination on several grounds. I shall deal with his grounds later but first I turn to the background. In this I am greatly assisted by a judgment handed down earlier this year of ICC Judge Jones who answered a question regarding jurisdiction: [2020] EWHC 115 (Ch). I draw upon his judgment as it sets out, I am told, uncontested matters of fact, and I add some factually salient background to the present application.

The background

5. On 10 October 2014, the winding-up proceedings in respect of the Company were transferred to the County Court at Brighton for administrative convenience. By letter dated 19 October 2017, in his capacity as liquidator of Owl Limited, Mr Hunt asked the OR to apply for a public examination of Mr Deuss. The application described Mr Deuss as a person who had been involved in the Company's day-to-day operations and who made high-level decisions for the Company. It was suggested he came within the ambit of section 133 of the Insolvency Act 1986 (the "Act") and should provide information about the Company's formation and management.

6. Mr Deuss is aged 78 and a resident of Bermuda. He was President, CEO and a director of First Curacao International Bank N.V. ("FCIB"). The evidence of his solicitors, given on his instructions, is that he was at all material times the ultimate beneficial owner of the Company but not a director, officer or employee.

7. The Second Respondent, Mr Ulrich, is described as having been known from time to time as the Vice-President, General Counsel and Supervisory Director of the Company. He was said to have been involved in FICB due diligence procedures. For those reasons it was suggested that he came within the public examination provisions and could provide information about the Company's formation and management. He is resident in the USA. After one false start during 2017, applications for examination were issued by the OR in Brighton County Court on 2 July 2018. By orders made on 23 and 25 July 2018, permission was granted to serve the applications out of the jurisdiction. Mr Ulrich has played no part in this hearing. The applications were subsequently transferred to the High Court by orders made on 4 October 2018.

8. Mr Hunt contends that the Company was involved in missing trader, intra-community VAT fraud (known as "MTIC fraud"). That fraud involved FCIB. Mr Deuss contends that FCIB was itself a victim of the fraud. The creditor claims in the Company's liquidation are said to have soared to in excess of £415 million.

9. The Company's letter before claim dated 5 February 2016 and Particulars of Claim have been sent to FCIB concerning FCIB's liability for the debts being proved in the Company's liquidation as a result of its involvement in the MTIC fraud. Draft particulars of claim were sent on 9 April 2018 and a second letter before claim dated 21 May 2019 was sent to Mr Deuss concerning his involvement in the Company. The

core of the allegations is that FCIB and Mr Deuss acted dishonestly by causing, allowing or otherwise assisting in the MTIC fraud.

10. On 21 September 2020 the Company and Mr Hunt in his capacity as its liquidator (as joint claimants) issued their claim in the High Court against Mr Deuss for:

> "damages or equitable compensation from the Second Defendant for breach of his fiduciary duty as a de facto and/or shadow director of the First Claimant in rendering the First Claimant liable to each of the companies listed in Schedule A hereto ("the MTIC Companies") (and/or their liquidators) for dishonest assistance and/or under s213 of the Insolvency Act 1986 ("the Liability") in causing or allowing the First Claimant to dishonestly assist the directors of the MTIC Companies to breach their fiduciary duty to act in the best interests of such companies by participating in MTIC fraud in 2004-2006 (inclusive), and in causing or allowing the First Claimant thereby to knowingly participate in the fraudulent trading of such companies and/or a contribution from the Second Defendant under the Civil Liability (Contribution) Act 1978 as being liable in respect of the same damage (being the Liability) as the First Claimant to the MTIC Companies."

11. The claim form (which has not been served) seeks: "damages or equitable compensation for dishonestly assisting the directors of the MTIC Companies to breach their fiduciary duty to act in the best interests of such companies by participating in MTIC fraud in 2004-2006". I am told that service is imminent.

12. It is worth mentioning at this point that the Company is one of a number within a group that Mr Hunt has been active against in the recent past.

13. Mr East is a solicitor acting for Mr Deuss. Mr East has produced witness statements on behalf of Mr Deuss, who has not yet submitted to the jurisdiction of England and Wales. Mr East explains:

> "As liquidator of many of these companies, Mr. Hunt participated in extensive negotiations during 2014 and 2015, which led to a settlement of claims (and counterclaims) between FCIB, a number of its customers and the liquidators who had been appointed in respect of these customers. Indeed, whilst Mr Hunt and Mr Bramston were seeking to restore [the Company] to the register, Mr Hunt took the

lead in the settlement discussions with FCIB and made clear that what was being put in place was a mechanism by which there would be no new claims made against FCIB and others by liquidators and/or HMRC (the "IP Settlement Agreements"). The intended effect of the IP Settlement Agreements was to release, inter alia, FCIB, its former officers, directors and employees from any new claims [or] demands, such as requests for examinations. The [IP] Settlement Agreements, which are subject to Curacao law and the jurisdiction of the Curacao courts, were entered into almost a year before Blake Morgan sent the Pre-Action Letter."

14. His evidence is that as part of the settlement, HMRC agreed not to pursue any claims against the officers of FCIB.

The application and evidence in support

15. Mr Hunt states in his witness statement that he has not recovered the books and records of the Company despite instructing his solicitors to write and insist they be produced. He says: "Despite a de jure director identifying [Mr Deuss] as being in charge of [the Company], in the last 3 years [Mr Deuss] has not answered one question about the Company nor delivered up a single document to assist me in reconstructing the Company records and Company knowledge." He has asked Mr Deuss to meet with him for an interview on several occasions without receiving a response. The request to attend an interview included an offer to meet at a location of Mr Deuss's choice.

16. As to the utility of the examination, Mr Hunt draws a timeline stating that the topics he wishes to question Mr Deuss about concern the period prior to 2004. That period of time may be significant, as the issued claim concerns the period 2004-2006.

17. He wishes to ask Mr Deuss about the "promotion, formation and management of the Company" even though the evidence supports the view that Mr Deuss was not involved in the Company's activities at that time, and how it "conducted its business and affairs". He accepts that the questioning will "entail discussing the conduct of Mr Deuss and his dealings" in respect of the Company, and that "the gathering of that information is relevant for the entire period of trading". As the claim form includes a

claim of fraudulent trading and breaches of certain duties "the gathering of information" is liable to be relevant for the period 2004-2006.

18. Mr Deuss's failure to respond to Mr Hunt may be explained on a number of grounds: (i) perceiving Mr Hunt as an aggressor by reason of having been a party to the IP Settlement Agreements and not revealing that another claim may be on its way as a result of the Company being restored; (ii) not wishing to unwittingly submit to the jurisdiction; (iii) because he has little to contribute or (iv) not wishing to incriminate himself. Whatever his position, Mr Hunt is clear that as "the ultimate beneficial owner, and apparently the controlling mind, of [the Company], either he will have the information available to him and/or he will be able to identify" who will hold the information.

19. The information sought by Mr Hunt is highly relevant to the outcome of this application.

Topics for examination- in brief

20. I have alluded to some of the matters which interest Mr Hunt. Specifically he states: "I would like access to the accounting papers created whilst [the Company] was trading…Consequential questions may need to be asked of Mr Deuss about those accounting entries and the treatment of transactions and inter-group balances."

21. Moving to the topic of dissolution he wishes to understand "the circumstances leading to the dissolution of the Company" and its "banking arrangements". He also wishes to examine Mr Deuss about the formation of the Company and "its general history prior to it promoting FCIB in the UK."

22. The Company occupied premises after September 2006 and Mr Hunt seeks to understand "how were they vacated", what if any assets were held in the premises and "what became of the assets of [the Company] after the premises were raided by HMRC in September 2006".

23. Lastly Mr Hunt gives evidence that "an issue has arisen as to the employment rights of individuals and in particular the position regarding their Company pension rights."

He does not give any further details in respect of the issue save that he wishes "any information" about the group scheme. I shall return to the topics in more detail.

Legal framework

24. Apart from one point, the parties are agreed as to the applicable legal principles. I shall refer to parts of Mr Smith QC's skeleton argument adding my own observations and then refer to Mr Wright's submission. The starting point in section 133 of the Act which provides (where relevant):

"(1) Where a company is being wound up by the court, the official receiver, … may at any time before the dissolution of the company apply to the court for the public examination of any person who –

(a) is or has been an officer of the company; or

…

(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company.

(2) Unless the court otherwise orders, the official receiver…shall make an application under subsection (1) if he is requested in accordance with the rules to do so by—

(a) one-half, in value, of the company's creditors;

...

(3) On an application under subsection (1), the court shall direct that a public examination of the person to whom the application relates shall be held on a day appointed by the court; and that person shall attend on that day and be publicly examined as to the promotion, formation or management of the company or as to the conduct of its business and affairs, or his conduct or dealings in relation to the company."

25. The court must be satisfied that the public examination would serve a "useful purpose": In *Re Casterbridge Properties Ltd* [2004] 1 WLR 602 at [53] per Chadwick LJ:

"the court is required to make an order for public examination if the conditions set out in section 133(1) are satisfied, unless it is satisfied that there is no useful purpose to be served by such an examination".

26. The term "useful purpose" is to be read in the context of the functions of the OR such as his function to provide a "D" report, obtain information regarding the administration of the estate and to give publicity as to the reasons for failure. Importantly for this case a public examination should not be oppressive. If the court finds that the contemplated examination is oppressive it should decline to make an order. The task for the court is to determine if oppression is likely: *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [49] per Lord Millett.

27. Referring to *Re Pantmaenog Timber Co Ltd* in the notes to section 236 of the Act, the authors of Insolvency Legislation Annotations and Commentary 2021 ("Annotations") explain [339]:

"the objective of examinations is to permit the liquidators to investigate the conduct of directors and others, where necessary…the power to examine may not, however, be used to conduct a fishing expedition"

28. Having stated that there is a discretion as to whether to make an order under section 236(2) the authors of Annotations state:

"there are some principles that must be considered by a court in arriving at its decision. Justice and fairness must demand that an order be made: *BCCI (No 7)* [1994] 4 All ER 876. The discretion is to be exercised judicially and following a careful balancing of the interests and factors involved, including taking into account the purpose of the examination power and whether the making of the order would be unreasonable unnecessary or oppressive: *Re British & Commonwealth Holdings Plc* [1993] AC 426."

29. Mr Wright submits, relying on *Shierson v Rastogi* [2003] 1 WLR 586 that (i) an examination may be ordered even after proceedings have been issued against the examinee and (ii) oppressive questioning in the form of questions relating to the litigation is permissible. Factually, *Shierson* stands out as a case where litigation had been launched but there was a concession that the liquidators had acted in good faith and there was no collateral purpose. It is right to say that the court will lend weight, even substantial weight, to the position of the office holder in usual circumstances.

30. Picking up on the note in Annotations and in particular the reference to *Re British & Commonwealth Holdings Plc*, it is useful, for the purpose of this application, to consider, in brief, the Court of Appeal [1992] Ch 342 decision in that case. The guidance is to be found in the judgment of Ralph Gibson LJ at pp. 184; 370–372. He said (inter alia) that the:

> "… exercise of the discretion involves the balancing of the requirements of the office-holders to obtain information against the possible oppression to the person from whom the information is sought."

that:

> "The purpose of the power … may be used to discover facts and documents relating to specific claims against specific persons which the office-holder has in contemplation and it is in itself no bar that the office-holder may have commenced or may be about to commence proceedings against the proposed witness or someone connected with him."

> "Normally … the court should seek to assist the liquidator … in determining what are the reasonable requirements of the office-holder and whether an order should be made, great weight is to be given to the views of the office-holder …"

> "… the case for making an order against an officer or former officer of the company will usually be stronger than it would against a third party because officers owe a fiduciary duty to the company and are under a statutory duty (s. 235 of the Insolvency Act 1986) to assist the office-holder …"

31. Ralph Gibson LJ emphasised, that:

"As has been stated so many times, each case must depend on its own facts.' (p. 189H; 378).

32. In the House of Lords, Lord Slynn of Hadley summed up the requisite approach as follows (at p. 984G):

"The protection for the person called upon to produce documents lies, thus, … in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements."

33. Oppression may take many forms. One such form was identified in *Re Atlantic Computers* [1998] BCC 200 at 208B-209A (again in the context of section 236 IA 86):

"The latter test was a rule of thumb under which relief under s. 236 would be withheld if office-holders had already commenced proceedings against, or definitely decided (mentally crossed the Rubicon) to proceed against, the proposed witness (typically for misfeasance, breach of fiduciary duty as a director, or so on). That rule of thumb has been disapproved for the reason mentioned by Sir Nicolas Browne-Wilkinson V-C in *Re Cloverbay Ltd (No. 2)* [1990] B.C.C. 414 at p. 419; [1991] Ch 90 at p. 101. But it still contains a germ of truth, as Hoffmann J said in *Re Bishopsgate Investment Management (No. 2)* [1994] B.C.C. 732 at p. 739. The germ of truth springs naturally from the purposes for which the statutory jurisdiction is intended, and from the need to avoid exercising it unreasonably or oppressively.

…

The decision of the Court of Appeal in *Re North Australian Territory Co* (1890) 45 ChD 87 is particularly illuminating. It supports Mr Clarke's submission that the statutory jurisdiction is not to be used for giving a litigant (just because he is an officeholder) special advantages in ordinary litigation. Brightman J in *Re Bletchley Boat Co Ltd* [1974] 1 WLR 630 at p. 637 said that it was not to be used 'to gain an

advantage in the action … over and above the ordinary advantages available in an ordinary defendant and an ordinary plaintiff in litigation.' Slade J said in *Re Castle New Homes Ltd* [1979] 1 WLR 1075 at p. 1091 that it was not to be used by an office-holder 'to bolster up his case'."

34. Accordingly, there is authoritative support for Mr Wright's proposition that an examination may proceed despite proceedings being issued against the target examinee. The court needs to be astute, however, to distinguish between those cases where the examination is for the purpose of enabling liquidators to carry out their duties and those where the discerned purpose is to obtain an unfair advantage in the litigation: *Daltel v Makki* [2005] 1 BCLC 594

35. There is no dispute that an oral examination is much more likely to be oppressive, than an order for the production of documents: *Re Cloverbay* [1991] Ch 90, 103C-E. An application for examination may be premature if documents have not been requested in advance.

36. Oppression is even more likely where the examinee was not an officer of the company in liquidation. In *Re Westmead Consultants Ltd* [2002] 1 BCLC 384 HHJ Weeks QC sitting as a Judge of the Chancery Division neatly explained: "It is oppressive to the outsider because he is hauled into court under threat of imprisonment or arrest if he is not compliant and there he has to answer questions about his conduct on oath and under compulsion. That, in my judgment, is plainly oppression."

37. A careful approach to making an order for examination as opposed to an order for the disclosure of documents is required. I now turn to the arguments advanced by the parties.

Arguments

38. Mr Smith argues that the liquidation requires context. Only when context is added will the court be able to balance the requirements of Mr Hunt as liquidator, who seeks to obtain information by cross-examination, against the possible oppression to Mr Deuss who, aged 78, would have to leave Bermuda in a pandemic, travel to the UK and face cross-examination.

39. He argues the context is best understood by looking at (i) how the restoration and winding up came about; (ii) the creditors of the Company then and now; (iii) the IP Settlement Agreements; (iv) the reports to creditors and lastly (v) the launch of proceedings against Mr Deuss.

40. Mr Smith submits that the only point of the liquidation is the litigation. This is denied by Mr Wright acting on behalf of Mr Hunt. Three matters stand out. First, Mr Hunt has represented to the Supreme Court of Bermuda that the Company has a liability for "dishonestly assisting in frauds" by reason of "on boarding" customers of the Company to FCIB without conducting effective due diligence and without properly carrying out compliance duties. The term "on boarding" appears to be synonymous with "introducing".

41. Secondly, Mr Hunt has sent letters before action, the first in February 2016 and second in 2019. In the first letter, addressed to FCIB and the Central Bank it was said:

> "[the Company] is faced with claims from English companies who were used as the defaulting companies ('the Defaulters") in Missing Trader intra Community ("MTlC") fraud. These companies would import goods from outside the UK and then sell them on but without accounting to HMRC for the VAT due on such sales. The purchase monies would not be received by these companies or would immediately be paid away so as to ensure they did not have assets available to discharge their liability for VAT…FCIB conducted its account opening business in an aggressive and pro-active way through Transworld. It was active in opening accounts in a sector that it knew or ought to have concluded was mainly fraudulent and was likely to lead to losses to victims".

42. The letter did not explain that Mr Hunt as liquidator of the vast majority of the English companies was instrumental in making the claims nor whether those claims had been subject to objective scrutiny.

43. The second letter before action is dated 21 May 2019. That letter claimed that Mr Deuss was the sole shareholder of FCIB and a "defacto and/or shadow director" of the Company "exercising direct strategic and tactical control in respect of the Company." The letter claimed that as a result of Mr Deuss's "level of involvement" in the day to

day operations including setting budgets, staff bonuses and attending quarterly meetings: "There can therefore be no doubt that your client was in a position of control in respect of the activities of both FCIB and TWPS, and moreover that he owed TWPS a fiduciary duty, in his position as director, to act in its best interests." It does not explain how he could have been a de facto and shadow director at the same time but perhaps that is a technical point and nothing much rides on it for the purpose of today.

44. Thirdly, as liquidator Mr Hunt has had to report to creditors on an annual basis. In his report to creditors of 2017 Mr Hunt informed the creditors that he had obtained a large amount of information and interviewed a director of the Company:

"the principle [sic] activity in the last year has been to continue to undertake investigations in support of the Company's claim against First Curacao International Bank ('FClB'). At the time of my first report to creditors I had recently recovered computer hard drive images taken from machines that were seized by HM Revenue and Customs ('HMRC') from the Company offices in September 2006. Following extraction, a further 150,000 documents (including about 5,000 excel spreadsheets) and emails have been recovered to add to the 20,000 documents already held at the time of my last report…I have received completed questionnaires from some of the former Company employees…In my last report I advised that I had met with Ms T Deuss, a director of the Company, however, the second director Mr Geerts remains too ill to meet with me".

45. It is noteworthy that he has received so many documents from HMRC which must have followed their "raid". It is therefore curious that of those many documents he has been unable to identify with more precision what he is searching for or what he says he is missing for the purpose of fulfilling his functions as a liquidator. Mr Hunt continued to obtain information for the purpose of his investigations, reporting to creditors in 2018:

"I previously reported that I had recovered approximately 170,000 documents, including password protected excel sheets containing data that have been successfully accessed. In the period following my last report those documents were reviewed and a detailed commentary supported by material from the records examined was submitted

to leading counsel…in the absence of Her Majesty's Revenue and Customs ('HMRC') being able to produce to me their copies of all material seized from the Company premises on behalf of the Dutch authorities in 2006, and the degradation of copy data from some of the Company computers imaged by HMRC, I have been engaged with HMRC for a considerable period in an attempt to secure data from a computer server that was used by the Company."

46. He informed creditors that a draft particulars of claim had been prepared and that "the material submitted to counsel included documents that identified knowledge of the connection between the customer base of FCIB and Missing Trader Intra Community Fraud at the most senior of levels of FCIB".

47. In the latest Annual Progress Report for the year ending 16 November 2019 Mr Hunt states:

"The principal activity in the last year has continued to be of the undertaking investigations in relation to the Company's claim against First Curacao International Bank ("FCIB") and defending the action brought by FCIB in Curacao. My investigations have also been extended in relation to an additional claim... Overall I am able to report that investigations have continued to make progress with enquiries now spanning other jurisdictions. There remain a number of obstacles to recovery of further information but I am confident that, with the assistance of the courts, additional evidence will become available in support of claims. The overarching strategy at the current time remains to investigate [and if] necessary issue claims against FCIB and Mr Deuss".

48. The report is heavily redacted making it difficult to know what Mr Hunt knows or does not know. One line in the midst of some heavy redaction reads: "It remains unclear the extent to which Mr Deuss and the Central Bank are working in conjunction."

49. It is likely that this is information he would want for the purpose of the litigation against Mr Deuss.

50. The submission that the sole purpose of the liquidation is litigation may not be accurate, but it is apparent that the strategy has been and remains to issue claims and make a recovery.

51. Mr Smith argues that the IP Settlement Agreements were intended to settle all claims and release the former officers, directors and employees of FCIB as well as companies or corporations under common control. Mr Smith argues that the reason why the Company was not included is that Mr Hunt did not inform FCIB that he had set about restoring and winding it up and taking the appointment as liquidator, notwithstanding that FCIB and Mr Deuss' position is that the Company is subject to the IP Settlement Agreements. The determination, says Mr Smith, in which Mr Hunt pursues the claims can only be explained by reason of his potential personal benefit if success comes knocking.

52. The clear suggestion is that Mr Hunt has acted underhandedly. It is couched in the terms of an abuse of process, but this is not a finding that should be made in the absence of cross examination.

53. Mr Smith characterises the liquidation of the Company as "most unusual". It is not a creditor-driven liquidation but an office-holder driven liquidation where that office-holder stands to gain financially and substantially. The court, he argues, should be mindful of the elapsed time of the events in question.. He argues with force that it is oppressive to ask questions about the litigation because it is impossible to know what are live issues and what are not from the vague way Mr Hunt has gone about the application. He emphasises that the claim form has not been served and not seen by Mr Deuss or his advisors. He says that an oral examination would be unfair when it is impossible to say whether the examination will trespass into the litigation. This is oppression.

54. He further argues, by reference to the matters Mr Hunt was ordered to set out, that the purpose of the examination is "make weight". This is the characterisation given by the Supreme Court of Bermuda to the issues said to be investigated when that Court was asked to recognise Mr Hunt. If they are "make weight" they have no utility.

55. It is striking that Mr Hunt has not asked Mr Deuss about the topics he wishes to examine him upon. It has been said that Mr Hunt has invited Mr Deuss to interview on at least two occasions. Mr Smith explains that the first time the topics or reason for the examination weres notified to Mr Deuss was in the statement ordered by ICC Judge Jones on 27 January 2020 and produced in February. The order provided that Mr Hunt shall file and serve evidence which identifies topics for questions which it is said may properly be put to Mr Deuss. The topics appear at paragraph 45 of his statement. They are (abbreviated by me):

    i) I would like access to the accounting papers created whilst the Company was trading. Consequential questions may need to be asked.

    ii) The banking arrangements of the Company and the circumstances leading to dissolution (10 years ago). He wants the "closing down ledgers".

    iii) Following the receipt of the Service Level Agreement between the Company and FCIB "I shall no doubt have questions about that document."

    iv) How the Company vacated the trading premises and what became of the assets of the Company held in the premises.

    v) Any information about the Company pension rights for employees.

    vi) The formation and promotion of the Company.

56. These topics do not altogether square with the OR report in support of a public examination where it was said that Mr Hunt would restrict his questions to "the promotion and management" of the Company. It is, however, consistent with item (vi) above. Given the time between the request made to the OR and liquidation of the Company it is surprising that Mr Hunt did not mention that he specifically wanted to ask questions about the Company's premises, the Service Level Agreement and the pension rights for employees.

57. Mr Wright argues that the ultimate beneficiary of claims made against Mr Deuss and FCIB will be HMRC. That is at odds with Mr Hunt receiving 50% of the proceeds of any claim made. He says Mr Deuss's role in "on boarding" is serious and that according to the evidence obtained by Mr Hunt, from the sister of Mr Deuss, he was a

de facto director. He says that the Company records are deficient. The deficiency I assume is that stated in paragraph 45 of Mr Hunt's statement: accounting ledgers, banking arrangements, the Service Level Agreement, evidence of a surrender or forfeiture of the Company's premises (it was held on a lease) and employee pension rights extending back to 2003 when the Company traded in oil.

58. It is argued that any perceived oppression will be negated as the court will act as an umpire in the examination, that the questions to be put to Mr Deuss are simple and can be provided easily. Mr Wright explains that Mr Hunt only recently provided information about the questions to which he wanted answers because that was the first time he had been asked to do so. In any event there is no oppression because the examination is justified as Ms Deuss cannot assist Mr Hunt in his investigations (because she says so) and Mr Geerts (also a director) is too ill.

59. Mr Geerts' evidence (contained in a letter) is that he ceased having any involvement after the Company stopped trading in oil. That was in or around the early part of decade 2000. In other words, the de jure directors have not assisted or cooperated with Mr Hunt, so he seeks to obtain information against Mr Deuss, as Ms Deuss has informed him that he was involved in the management. Further there is good reason to believe that Mr Deuss has more information and was involved in the management of the Company as he has been implicated in criminal wrong-doing in the Dutch Court.

60. Mr Wright argues that, on analysis, the questions that are to be posed have "nothing to do" with the claim against Mr Deuss, and that Mr Hunt will not be put into a better position than any ordinary litigant by reason of the examination.

61. Breaking down the argument to the issues said to be investigated in a public examination, Mr Wright argues that: (a) the accounts are important to understanding the Company and its failure; (b) knowledge of the banking arrangements is a standard request made and assists with understanding transactions; (c) although Mr Hunt does not have the Service Level Agreement to ask questions about, it is not oppressive to do so. The document should form part of the books and records and Mr Hunt is entitled to ask about its whereabouts; (d) Mr Deuss should be able to answer some basic questions about the premises; (e) as regards the pension, it is Mr Hunt's case that if Mr Deuss has relevant information he should provide it. He points to a letter

dated 22 March 2017 from Foot Anstey Solicitors acting for Ms Deuss. In that letter they state that Ms Deuss has a "vague recollection" that the pension scheme once existed for two or three oil traders. Mr Hunt was referred to the scheme trustees at Abbey Life; and (f) Mr Hunt has asked for the accounting information.

62. In respect of the last matter, Mr Hunt did ask for information having first sent (i) the initial letter before action dated 5 February 2016 claiming fraud and (ii) other threating letters in the same year stating that proceedings will be issued "in the near future". The letter of 21 July 2016, which I was taken to by Mr Wright, explains to solicitors acting for FCIB (not Mr Deuss at that time):

"[The Company] was a member of the "Transworld group" that is ultimately controlled and owned by Mr John Deuss. This is evidenced by, for example, the judgment of the Dutch Court at Arnhem dated 24 May 2012. Transworld reported directly to Mr Deuss. Tineke Deuss was a director of Transworld and an officer of FCIB and so there was clearly an overlap in the roles that they both performed for Transworld and for FCIB…the Liquidator believes that FCIB is capable of giving information concerning the promotion, formation, business, dealings, affairs or property of [Company]."

63. The letter in response explained that FCIB ceased trading in 2006 and was at that time being wound down with only limited staff in place. As a result of the previous legal proceedings in Holland FCIB "files were seized by the Dutch authorities amounting to several hundreds of thousands, perhaps millions of pages worth of documents. The documents previously contained in our client's files were unfortunately returned to our client in disorder. When considering alongside our client's limited staffing, this will present significant logistical issues in complying with requests set out in your letter". I emphasise that this was a response on behalf of FCIB and not Mr Deuss personally, but as Mr Hunt seeks to tie Mr Deuss and his activities in the Company to that of FCIB and the Central Bank, there is relevance in the response to this application.

Determination

i) Burden of proof

64. Although not foreshadowed in skeleton arguments an issue arose in submissions regarding the burden of proof. Mr Smith argued that the burden of proof lies with Mr Hunt to demonstrate a need whereas Mr Wright, relying on the mandatory language of section 133 of the Act, argued that the burden of proof lies with Mr Deuss to demonstrate why an examination should not be made. Mr Hunt has made the application for a public examination and asserted in his evidence that it is necessary for the purpose of fulfilling his functions as liquidator in this liquidation. As he has made the assertion, he should prove that there is such a requirement. This is usually not a difficult burden to discharge since a liquidator's functions are predominately enshrined in statute as are the obligations of a company's officers. It would be contrary to the principle of fairness for a liquidator to ask the OR to apply for a public examination without providing any reasons; and unfair on the respondent if he had no knowledge of the reasons for the public examination or understanding of why it was necessary for the functions of the liquidator. It would be contrary to the overriding objective which requires parties to be on an equal footing where possible. If there is such a requirement it is for Mr Deuss to demonstrate that notwithstanding the need for a public examination, it would, in all the circumstances, be oppressive to make an order. The requirement for an examination to have utility is the same side of the same coin, showing that the purpose for the examination is necessary for fulling an office-holder's functions.

(ii) **Six issues for the public examination**

65. I now turn to the 6 issues set out in the evidence of Mr Hunt in support of his request to the OR to publicly examine Mr Deuss.

66. In this determination I start by lending the appropriate weight to the request by Mr Hunt for a public examination.

67. In a contested case such as this, where a balance has to be struck between (i) the requirements of the office-holder to obtain information against (ii) the possible oppression of doing so by way of a public examination, and by reference to (iii) the litigation and (iv) the reasonable need for Mr Hunt to carry out his functions, I gravitate toward rejecting the application.

68. It is useful for the Court to know what information is in the possession of an officer-holder to prevent unnecessary orders. It appears from his reports to creditors that his investigations focus on the relationship with FCIB, the Central Bank and customers who deal in the technology and computer sector which is a "High Risk" sector for MTIC fraud. In that regard he has requested documents from FCIB. It is known that FCIB has perhaps "millions" of documents. Mr Hunt has not explained why he has not obtained sufficient documents from FCIB to fulfil his functions as liquidator and complete the investigations. It may be that FCIB have rejected delivery up of certain documents on the ground that it does not have the resource available to provide the documentation sought. The correspondence suggests this is the case. It is not clear to me what steps, if any, have been made to inspect these documents. Even if he has failed to obtain any of the documents held by FCIB, that alone has not prevented Mr Hunt from launching proceedings.

69. In respect of the first issue that is said to require a public examination, Mr Hunt has failed to explain in his evidence why the accounting papers for the period between 2006 to 2010 are important in the context of this liquidation. In any event he has copies of the statutory accounting entries. Given the opportunity to state in terms why the public examination is necessary to fulfil his functions as liquidator, Mr Hunt is only able to say: "consequential questions may need to be asked." This poses several difficulties. First, the production of documents does not justify a public examination. Secondly, as the claim form has been issued, there is a real risk that the "consequential questions" will cross the line and provide him with an unfair advantage in the litigation or otherwise improve his claim.

70. In my judgment Mr Hunt has failed to demonstrate a need for a public examination on this ground. A public examination would have no utility having in mind that Mr Deuss would be asked to travel from Bermuda to face questions that may arise from a document or documents that Mr Hunt does not have in his possession. That is at the very least disproportionate. Without more forcing Mr Deuss to answer questions on oath and under compulsion in these circumstances is plainly oppressive.

71. The second reason for requiring Mr Deuss to attend a public examination is said to be to ask questions about the banking arrangements of the Company and the circumstances leading to the dissolution. There is no evidence that Mr Deuss was

involved with the decision to dissolve the Company. I was informed during submissions that the dissolution was initiated by the Company's de jure directors. Mr Hunt has not explained why information regarding the "circumstances leading to the dissolution" is necessary for him to fulfil his obligations. Mr Wright said that it was usual to seek this information. That answer, in my judgment, is insufficient to answer the question of utility. The focus of the reports to creditors has been about the trading of the Company, its alleged involvement in high level fraud, and the Company's association with FCIB.

72. In the ordinary course of a liquidation, questions about a company's banking arrangements may well have utility. Information gleaned from the banking arrangements may illuminate unexplained transactions. Mr Hunt does not give evidence that he is seeking to understand the nature or extent of any particular transaction. The draft particulars of claim do not allege that Mr Deuss was in control of the Company's bank accounts. It is possible that the allegation that he acted as a shadow director implies that he had some dealings with the Company's banking arrangements. That is not obvious. It is not spelt out. A shadow director necessarily means that a de facto or de jure director is acting upon his instructions. The question about banking arrangements does not descend to detail and fails to specify which director was active in the banking arrangements or which director acted on the instructions of Mr Deuss. Seeking to understand the request better I turned to the draft particulars of claim to identify the possible involvement with the banking arrangements as a de facto director. The particulars of claim do not assist. These specify that Mr Deuss's involvement in the Company was as follows: setting management objective; marketing; reviewing performance data; setting and controlling a bonus plan and attending meetings. It is curious that Mr Deuss has never been asked in correspondence about either the dissolution or the banking arrangements.

73. In my judgment it is (to use the words of Robert Walker J (as he then was) in *Re Atlantic Computers* [1998] BCC 200) "unreasonable" to haul Mr Deuss before the Court for a public examination in these circumstances and particularly as Mr Deuss has offered to provide an affidavit confirming his knowledge and providing any responsive information.

74. The third identified factor said to require a public examination faces several difficulties. First Mr Hunt wishes Mr Deuss to come to the jurisdiction on the basis that he may have questions regarding a document that [he] does not possess – namely the Service Level Agreement. That by itself is an inadequate reason for ordering a public examination. Secondly, Mr Hunt has failed to explain when he may obtain the Service Level Agreement. It is uncertain whether Mr Deuss has a copy. Lastly, I am told that the Service Level Agreement directly relates to an allegation made in the draft particulars of claim and the issued claim form, namely "on boarding". If that is the case (and paragraph 9 of the draft particulars indicates that it is) there is a prospect that the public examination may give Mr Hunt a "special advantage" in the litigation over and above that usually obtained in ordinary litigation. I say "prospect" as the court has no way of knowing why Mr Hunt wishes to ask questions about the agreement or the nature and extent of the questioning if the questions do not touch upon or concern the litigation. I do not rest my decision on this alone. In his statement Mr Hunt says that he believes Mr East holds the Service Level Agreement, or at least knows of its existence. If it is a Company document, Mr Hunt is entitled to it. It should form part of a formal request for delivery up. Only when he has seen the document will he, on his own admission, be able to decide whether any legitimate questions arise. The request for a public examination on this ground is premature at the very least.

75. Mr Deuss has said that he is content to provide an affidavit confirming his knowledge and providing any responsive information in respect of the fourth and fifth matters raised. There is no utility in a public examination on these grounds. Although it is possible to order a public examination on a single ground the last request concerns the formation of the Company. It has never been Mr Hunt's position that Mr Deuss was involved with the formation of the Company. Mr Geerts has said in his correspondence that he was in control of the Company in the early days of the Company. In any event Mr Deuss has agreed to provide an affidavit confirming his knowledge and understanding of the information that has already been provided by Mr Geerts. In those circumstances, a public examination will serve no useful purpose.

General issue relating to the request for a public examination

76. A more general point arises in respect of the application for a public examination. Although Mr Hunt has set out six specific areas for questioning that he says will serve a useful purpose for the liquidation, it is also clear that he intends to go further if he is able to cross-examine. I have already mentioned that in his written evidence he has said that gathering of information is relevant for the entire period of trading.

77. The claim of dishonest assistance and fraudulent trading are serious matters. Nothing less than dishonesty will suffice for liability for dishonest assistance. The connection to MTIC fraud will involve evidence of a scheme to defraud HMRC of VAT. Typically the function is to divert payment of the VAT element on an importer's sale into the UK market to a prior European supplier. The supplies in this matter were in the technology and computer sector. The claim form identifies Mr Deuss as a de facto or shadow director owing fiduciary duties to the Company which allegedly 'onboarded' companies that were either an importer company or in a chain of companies involved in importing whereby the company engaged in arrangements under which it incurred a VAT liability for monies which were not collected from its customer. The claim is yet to be fully pleaded, but I infer that the inquiries of Mr Hunt relating to the "entire period of trading" are designed to provide factual material to make good a claim that may extend to the existence of the whole line of companies involved in the MTIC fraud and his participation.

78. The draft particulars of claim plead that Mr Deuss was aware or knew that the Company was trading in a "High Risk" sector, "as carrying an increased risk of reputation damage to FCIB by reason of the likelihood of their being involved in VAT carousel fraud", and that "the custom of the companies within the T & C sector was viewed as being "price insensitive", i.e. the companies were not concerned about the cost of the banking services provided by FCIB". By reason of this knowledge, he knew of the illegitimate trading. It is said that he targeted companies that traded in the "High Risk" sector and failed to carry out proper inquiries to ensure the trade was legitimate. This is a summary only. It provides a flavour of the allegations against Mr Deuss which may fairly and properly be put in the litigation but raise substantial issues for the conduct of a public examination.

79. In this context Mr Wright's argument that the court can control the questioning if it strays into areas that touch upon or concern the claim made against Mr Deuss is not,

in my judgment, an answer to permitting a public examination that may span the "entire period of trading" where the allegations are of the sort pleaded in the draft particulars of claim. The court has a power to ensure that such an examination is conducted properly but if the answer to resisting a public examination is simply that the court has control, there would never be an improper examination. In my judgment it is too great a burden on a busy court to ensure that any question does not relate to the claim and by accident or design give a liquidator an advantage in the litigation.

Conclusion

80. Mr Hunt has reason to state that he has made every effort to obtain documents belonging to Company and is justified in seeking to understand the history of the Company. However, this is an unusual liquidation where Mr Hunt has issued proceedings against the target examinee claiming a contribution to losses in excess of £415m on the basis of dishonesty and fraudulent trading. He has sought to justify a public examination on 6 specific grounds. It is accepted that in relation to each of those grounds Mr Hunt has not asked Mr Deuss directly about the issue or asked for delivery up of a specific document. Unless it is proven that Mr Deuss was a de facto director or shadow director he was not an officer of the Company. As matters stand, he was an outsider during the Company's life. In my judgment, in these circumstances, for Mr Deuss to be hauled into court under threat of imprisonment or arrest if he is not compliant, to answer questions about his conduct on oath and under compulsion, is plainly oppressive.

81. If I am wrong about oppression then in my judgment there is no useful purpose for a public examination based on the evidence provided and there is a real risk that the "consequential questions" said to be necessary will improve Mr Hunt's position in the litigation.

82. I would be grateful if the parties seek to agree an order.