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IN THE HIGH COURT OF JUSTICE **Nos 556 and 557 of 2004**

CHANCERY DIVISION

COMPANIES COURT

LEEDS DISTRICT REGISTRY

In the Matter of Ci4NET.COM INC

and

In the Matter of DBP HOLDINGS LIMITED

and

In the Matter of the INSOLVENCY ACT 1986

JUDGMENT
[Published at 1600 on Thursday 20 May 2004: to be handed down at Leeds Combined Court Centre at 1400 on Wednesday 2 June 2004]

Introduction

[1] There are before the court applications by HSBC Bank plc ('HSBC') for administration orders in respect of two companies ('the companies') which are both incorporated outside England and Wales. The companies are Ci4net.com Inc ('USA'), which is incorporated in the State of Delaware, and DBP Holdings Limited ('Jersey'), which is incorporated in Jersey. The applications have been opposed by the companies. I am grateful to both counsel, Ms Stonefrost for HSBC and Mr Clarke for USA and Jersey, for their helpful written and oral submissions.

[2] The question which has been debated at most length is one of jurisdiction. This turns on the application to the facts of the case of article 3 of Council Regulation (EC) No 1346/2000 on insolvency proceedings ('the EC Regulation'). Paragraph 1 of article 3 is in these terms:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

The phrase "centre of a debtor's main interests" has been unattractively, but conveniently, reduced to the acronym CoMI. The registered office of USA is in Delaware, and the registered office of Jersey is in St Helier. HSBC contends that the CoMI of the companies is in London and that the presumption mentioned in article 3.1 has been rebutted by the evidence before the court. USA and Jersey contend that the presumption has not been rebutted and has been buttressed by the evidence.

[3] If in the case of either company the issue of jurisdiction is determined in favour of HSBC, then I must go on to consider the merits of the application. The conditions which must be satisfied before an administration order is made are to be found in Schedule B1 of the Insolvency Act 1986, which was inserted by the Enterprise Act 2000. By paragraph 11 of Schedule B1:

> "The court may make an administration order in relation to a company only if satisfied -
>
> (a) that the company is or is likely to become unable to pay its debts, and
>
> (b) that the administration order is reasonably likely to achieve the purpose of administration."

"The purpose of administration" is not a defined term, but it is agreed that it is identical with "the objective" which is referred to in paragraph 3(1) of Schedule B1:

> "The administrator of a company must perform his functions with the objective of -
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors."

Each company accepts that it is insolvent, so that the first of the paragraph 11 conditions has been satisfied. The dispute between HSBC and the companies relates to the second condition, namely, whether the evidence is sufficient to demonstrate that an administration order would be reasonably likely to achieve the objective set out in paragraph 3(1).

[4] Matters will not necessarily end at this point. It is possible that, in relation to either of the companies, the court will decide that it has jurisdiction but that the case for placing the company in administration has not been made out. The court has power on the hearing of an administration application to treat the application as a winding-up petition: Insolvency Act 1986, Schedule B1, paragraph 13(1)(e). HSBC contends that, if either application fails on the merits, then, as the company concerned is plainly insolvent, it should be wound-up by the court. The answer of the companies, and more particularly of USA, is that, even though a company is unable to

pay its debts, the court has a discretion to make or refuse a winding-up order. In this case, it is said, a winding-up order should be refused on the ground encapsulated in the Latin phrase, *forum non conveniens*. The submission is that, if USA is to go into liquidation, it should do so in the United States.

[5] I shall next set out the background against which the applications for administration orders have come before the court. I shall then deal in succeeding sections of the judgment with the issues which arise on jurisdiction and merits. In examining the facts of the case I shall be careful to differentiate between USA and Jersey. As I was rightly reminded by counsel, there is no basis for supposing that, on any issue, the outcome for Jersey must be the same as that for USA.

Background

[6] USA was incorporated (under a different name) in Delaware on 29 December 1995. It did not have any operating activities until 20 December 1999, when it acquired all of the issued shares of another Delaware corporation. In the annual report filed by USA with the Securities and Exchange Commission ('SEC') for the fiscal year ended 31 January 2000, one finds this overview of the business of the company:

> "[USA] is an economic network, or Econet, with equity interests in 39 Internet-related companies... We have a 50%-or-greater interest in 34 of these companies and hold minority interests in the remainder. Our partner companies include eight Internet infrastructure companies, 18 business-to-business... e-commerce companies, 12 business-to-consumer... e-commerce companies and one incubator company... Thirty two of our partner companies service the United Kingdom market. The geographic focuses of our remaining partner companies include Italy, the Netherlands, Europe as a whole, Australia and the United States."

On 1 March 2002 USA's corporate charter was made void under the law of Delaware for failure to pay franchise taxes. Delaware law provides for what in England would be called restoration of a company to the register upon payment of the arrears of franchise taxes and the filing by the company of a certificate of renewal. I was told by Mr Clarke during the hearing that news of payment of the arrears had just arrived, and accordingly I have not thought it necessary to review in this judgment the interaction between avoidance of the charter and an English administration order.

[7] Jersey is a wholly-owned subsidiary of USA. It was incorporated (under a different name) on 22 August 1997.

[8] A third company features in the history. This is a company which is now called Criterion Management Services Limited ('Criterion') and which is incorporated under the law of England and Wales. Criterion, like Jersey, is a wholly-owned subsidiary of USA. It has since 1 May 2002 been the subject of a company voluntary arrangement.

[9] The applications before the court arise in the context of the collapse of the dot.com market and of the insolvency of a Jersey resident called Kevin Leech. Mr Leech held, through a number of mainly Gibraltar-registered nominee companies, the majority of the issued shares in USA. In October 2002 the property of Mr Leech was declared "en desastre" by the Royal Court of Jersey. HSBC is the largest creditor in Mr Leech's bankruptcy, and has filed a claim for sums in excess of £88 million.

[10] USA and Jersey are also indebted to HSBC. On 19 March 2004 the amount of the debt stood at £4,805,462. The greater part of this debt, £4,094,974, arose from an overdraft facility granted to Jersey by HSBC on an account at HSBC's branch in Jersey. USA is liable for this debt under a joint and several guarantee of 10 January 2001 under which USA and Jersey provided cross-guarantees of each other's liabilities. The balance of the debt, £710,488, was owed on the overdraft of another company in the group, in respect of which USA and Jersey gave a guarantee on 11 January 2001. Demands for payment were made on 12 November 2002 and 23 March 2004, but nothing has been received to extinguish or reduce the debt.

[11] USA has, according to the evidence of the sole director of USA, three assets of value. These are:

(1) 5,060,956 shares in Auto Date Network Inc ('ADN'), which is a Delaware company with a number of subsidiaries. The business of the ADN group is in software for the automobile industry. USA's shares amount to what is about a 20 per cent (or 13 per cent "fully diluted") interest in ADN. ADN's shares are traded on stock exchanges in the United States. On 27 April 2004, USA's shareholding was worth US$16,245,669. That holding is, however, subject to a lock-up agreement between USA and ADN, which prevents USA from selling its shares before 6 October 2005. Further, there is some uncertainty about the ownership of the ADN shares, and I will have to deal with this towards the end of this judgment.

(2) 1,890,000 shares in Evolve Oncology Inc ('Evolve'), which is a Delaware company, the business of which has to do with operating and progressing trials of drugs for the treatment of cancer. Evolve's shares are listed in NASDAQ OTC, and on 27 April 2004 USA's holding was worth US$7,938,000. That value will, not, however, be realisable in full until March 2005 because of restrictions attaching to sales of the shares under rule 144 of the (United States) Securities Act 1933.

(3) Shares worth US$199,992 in a company registered in the Netherlands Antilles.

[12] The sole director of USA is Lee John Cole. He has been a director since December 1999. In his written evidence Mr Cole says:

> "I am an investment adviser to various trusts (of which I am not a beneficiary) and have been since 1998. I was born in the UK and lived in England until April 2000, when I moved to Spain. Since then I have lived in Spain full-time. I spend the overwhelming amount of my time either in Spain or travelling on business predominantly to the United States of America. I would estimate that

I have spent no more than 100 days in the United Kingdom since January 2001."

Other persons have in the past been directors of USA. These are Mr Leech, who was a director from December 1999 to September 2002; Dale Morrison, a United States citizen and resident, from April 2000 to April 2001; and for some time, it seems, Roger Holdom,who had an address in London.[1]

[13] Jersey appears to have only one asset of value, a shareholding worth US$135,000 in an English company called Enteraction TV Limited.

[14] The directors of Jersey are Mr Cole, Linden Boyne (who is also the company secretary) and Alan Bower. Mr Boyne and Mr Bowen are both resident in the United Kingdom.

First issue: CoMI

The law

[15] In *Re Brac Rent-A-Car International Inc*[2] Lloyd J decided that, on both a literal and a purposive interpretation of the EC Regulation, a company could have a CoMI in England even though it was incorporated outside the European Union. In reaching his conclusion on purposive interpretation, Lloyd J took account of certain of the recitals to the EC Regulation and of the Report on the Convention on Insolvency Proceedings by Professor Miguel Virgos and Etienne Schmit ('the Virgos-Schmit report').[3]

[16] Ms Stonefrost has drawn to my attention certain of the recitals to the EC Regulation, including these:

> "(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)...
>
> (13) The 'centre of main interests' should correspond to the place where the the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Ms Stonefrost also referred to paragraph 75 of the Virgos-Schmit report in which the authors, commenting on article 3.1 of the EC Regulation, said this:

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[1] A service agreement with Mr Holdom, in which he is described as "a Business Development Director" was included in USA's report to the SEC for the year ended 31 January 2000; but Mr Holdom is (by contrast with Messrs Leech and Morrison) not mentioned as a past director in Mr Cole's evidence.

[2] [2003] 1 WLR 1421, followed in *Re The Salvage Association* [2003] BCC 504.

[3] EU Council Document 6500/96 DRS 8 (CFC).

"The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction... be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (eg consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres...

Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

[17] In considering the application of article 3(1) to the facts of *Re Daisytek-ISA Ltd*[4] Judge McGonigal had regard both to recital 13 and to the passage which I have quoted from the Virgos-Schmit report. The judge said:

"In my view the identification of 'the debtor's main interests' requires the court to consider both the scale of the interests administered at a particular place and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its centre of main interests, whether as a result of the presumption in art. 3(1) or otherwise.

The requirement in recital (13) that, as a result of the administration of its interests at a particular place, the fact that such place is the centre of the debtor's main interests must therefore be 'ascertainable by third parties' is very important. In *Geveran Trading Co Ltd v Skjevesland* [2003] BCC 209 Registrar Jaques stated (at p. 223A) that:

> 'It is the need for third parties to ascertain the centre of a debtor's main interests that is paramount, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor.'

...

In my view the most important 'third parties' referred to in recital (13) are the potential creditors. In the case of a trading company the most important groups of potential creditors are likely to be its financiers and its trade suppliers."

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[4] [2003] BCC 562, paras. 14-16.

[18] There were differences between counsel as to the approach which the court should adopt to a company which, as will be seen in the case of USA, had its CoMI in England whilst it was active in the marketplace, but which has ceased to trade. Mr Clarke would agree with Ms Stonefrost to the extent that the EC Regulation should be applied in a manner which will discountenance attempts by a company to 'forum shop.' It is, both would accept, important that trade creditors should know in what jurisdiction they will be able to pursue the assets of the company if it leaves their debts unpaid. It would, Ms Stonefrost said in her oral submissions, "be contrary to the policy of the EC Regulation for a company to be able to remove itself from the jurisdiction by ceasing to trade." This, Mr Clarke said, goes too far. The question of timing is, he said, of importance. Mr Clarke accepts that a more or less cynical removal of the seat of a company's operations from the EU to a non-EU territory a few weeks or months before the business goes to the wall would not be regarded as working an alteration in the CoMI of the company. There is, however, a great difference between that and a restructuring of the business which is carried out for sound commercial reasons long before the question of insolvency proceedings becomes live.
In the latter situation the policy against forum shopping does not raise a bar to a change in the company's CoMI being effected upon the company's ceasing to trade in the EU.

[19] The differences between counsel is, I think, one of emphasis rather than of principle. I say this because, as was demonstrated by Ms Stonefrost's own detailed submissions on the facts, a close analysis of the recent history and present situation of the company is, even on her more rigorous view of the policy underlying article 3.1, the essential route to her desired conclusion. To the limited extent to which I think there is a material controversy here, I prefer Mr Clarke's approach. In my judgment, Ms Stonefrost comes too close to saying (although she did not in fact say it) that, once a company has a CoMI within the EU, it is stuck with that CoMI on ceasing to trade, notwithstanding the time at which, or the circumstances in which, that cessation occurs.

[20] On one matter I do agree with Ms Stonefrost. There seems to be to be no reason to suppose that the presumption that a company has its CoMI at the place of its registered office is a particularly strong one. It is, rather, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the CoMI.

USA

[21] Mr Clarke took as his starting-point the report for the year ended 31 January 2000 which was filed by USA with the SEC. Such reports deal with matters occurring after the relevant year-end and up to the date of signing, and this particular report was signed on 15 May 2001. In the report, 32 Haymarket, London SWI is stated to be the "address of principal executive offices" of USA. Mr Clarke accepts that, given this statement in a document filed in the public records of the United States, USA must be taken to have had its CoMI in London up to the spring of 2001. But, it is said, in April 2001 there began a process of converting USA from an active company into a passive holding company, and this process was completed in October 2001. By the end of the period, the CoMI of USA was no longer in London, but had

moved to the United States. The process began with the passing of a resolution by the directors on 25 April 2001. By this, the management was to be instructed "to discontinue operations in order to minimise expenditure as quickly as possible and encourage the management of portfolio businesses to seek external support." By October 2001 the process was substantially completed, and USA was left with just a few residual shareholdings.

[22] Mr Clarke then identified what he said were the only two connections with England and Wales which were retained by USA after 2001. The first was the transfer to London by HSBC of the management of the accounts in Jersey which had been guaranteed by USA. The second was the use by USA of the address at 32 Haymaket. As to the first matter, the transfer was by HSBC, not by USA, and the transfer was only of the management of the accounts, not of the accounts themselves.. As to the second matter, 32 Haymarket was no more than a "post-box." These links with this jurisdiction were, it was submitted, quite insufficient to support the notion that the CoMI of USA has remained in this country.

[23] On a consideration of the whole of the evidence, I am unable to accept either that USA is as "passive" as is suggested, or that the links which USA has with England and Wales have the vestigial character which Mr Clarke seeks to attach to them.

[24] I begin with the draft reports to the SEC for the years ended 31 January 2001 and 31 January 2002. Mr Cole has said in his evidence that these were no more than drafts and that they contain errors. I do not attach much weight to this. The documents bear signs of quite careful revision. More important, they were provided to HSBC by USA, and must, in my judgment, be treated as containing representations by USA to its principal creditor as to the nature and condition of its business. Both these draft reports repeat the statement that the principal executive offices of USA are at 32 Haymarket. Both state that USA has a 12 year lease of about 3,850 (2001 draft) or 3,000 (2002 draft) square feet at 32 Haymarket (in fact, the lessee is Criterion). The 2002 draft contains an internal heading, in capital letters, which states baldly: "WE ARE PREDOMINANTLY BASED OUTSIDE OF THE UNITED STATES."

[25] Mr Cole's evidence is that since 2001 the business of USA has been conducted from wherever he happens to be at the time, which will either be Spain or New York. So far as New York is concerned, the base for USA has been suite 1600 Rockefeller Plaza until March 2003, and 666 Third Avenue since August 2003. These are addresses connected with other companies in which Mr Cole has interests.

[26] I am not impressed by Mr Cole's evidence. The notion of the location of a business shifting as its director moves from one country to another does not sit easily with the policy which underlies the EC Regulation. A business must under the EC Regulation have a CoMI and, in my judgment, a CoMI must have some element of permanence. Whatever may have been done in New York or Spain, the business of USA has not been conducted exclusively in either country. Nor has it been conducted in both countries to the exclusion of any third country. There have been numerous meetings in London between Mr Cole and officials of HSBC in connection with the indebtedness of USA. As regards the New York addresses, the researches of Mr Paul Thompson, a witness for HSBC, have disclosed that (contrary to an assertion by Mr Cole in his evidence) there is no telephone number listed for USA in New York.

Indeed writing paper used by USA for correspondence, whilst it gave the address at Rockefeller Plaza, provided as the company's telephone and FAX numbers those at 32 Haymarket and no others. This paper was still in use in 2002. Further when Mr Cole wrote to PriceWaterhouseCooper on 30 September 2002 about arrangements for a meeting on 7 October, he referred to "my office [which] is at 2nd Floor, 32 Haymarket.

[27] Ms Stonefrost in her submissions pointed to many examples of letters being sent to USA at 32 Haymarket and of correspondence from USA which bore that address. Standing by themselves, these examples would not be inconsistent with 32 Haymarket's being merely a kind of poste restante or forwarding address. But, on the evidence of Ms Rachael Whitaker, a solicitor who served documents on USA and Jersey at 32 Haymarket, it seems clear to me that 32 Haymarket is more than this. Ms Whitaker was told by security guards in the lobby of 32 Haymarket that she would find the offices of USA and Jersey on the second floor. At the reception desk on the second floor Ms Whitaker left the documents with a person called Alison. Alison confirmed that the offices were those of USA and Jersey. She said that the correct person to open the documents would be "Lindon." It will be recalled that a Mr Linden Boyne is one of the directors of Jersey.

[28] Ms Stonefrost further demonstrated from the documents that USA has not been as inactive since 2001 as is suggested on the other side. The draft SEC report for the year ended 31 January 2001 shows restructuring activities continuing up to October 2002, a year or so after Mr Cole says that USA became "passive." In August 2003 USA was trying to make an escrow agreement under which it would deposit with an escrow agent certain assets to be used to pay creditors (it is not clear whether the agreement was ever signed). As late as October 2003 USA made the lock-up agreement relating to its shareholding in ADN.

[29] Finally, I refer to the position of Mr Cole himself. He is the only director of USA. Although he lives in Spain, he is a citizen of this country and his service agreement with USA provides that she shall not be required to live outside the United Kingdom. I accept that he has business interests in the United States, but it is remarkable that he does not suggest that, when he is away from his home in Spain, he spends the greater part of his time away in the United States.

[30] My conclusions are these. Although USA may have ceased to trade, there has not been a cessation of activities on its part. It is not dormant, nor is it close to being dormant. The connection between USA and London it still strong. USA has at premises leased by Criterion a base in London which is more than a mere postal address. The evidence that it has anything more solid in New York is unconvincing. In the draft SEC reports for 2001 and 2002 USA has presented itself to HSBC as having its principal executive offices in London. This is important because HSBC is the principal creditor of USA. HSBC is in London, and USA and HSBC negotiate with each other in London. If one compares the scale and importance of the activities carried on by USA in London with the scale and importance of its activities elsewhere, one is unable to identify any other specific place which, as it were, beats London into second place. The CoMI of USA was until at least April 2001 in London, and what has occurred since is not sufficient (even if supported by the presumption in favour of the place of the registered office) to justify a finding that the

CoMI is now elsewhere. Accordingly there is, in my judgment, jurisdiction to make an administration order in respect of USA.

Jersey

[31] The submissions made regarding Jersey have been relatively short.

[32] Jersey relies on Mr Cole's evidence which is that, until Mr Leech became bankrupt, the administration of Jersey was conducted "principally by Mr Leech (who at all times was and remained resident in Jersey) and, as the need arose, at 32 Haymarket." Since Mr Leech's bankruptcy Jersey has conducted no functions from 32 Haymarket "save for the correspondence [which HSBC] continued to send to that address and which was forwarded to me."

[33] On Mr Cole's evidence, the business of Jersey, which was the funding of other companies in the group, has ceased. The presumption arising from the location of the registered office is supported by the fact that the account on which Jersey is indebted to HSBC is located in at the Jersey branch of HSBC. Against this, none of the three directors of Jersey is resident in Jersey, and two of them are resident in England. Since about December 2000 all communications between HSBC and Jersey have been sent to and from 32 Haymarket. All statements of account have been sent to 32 Haymarket. The telephone number provided by Jersey to HSBC to enable HSBC to contact Jersey was that of the Haymarket office. Meetings between HSBC and Jersey about Jersey's indebtedness were held in London throughout 2001 and 2002. It is not suggested that in recent years any activities on the part of Jersey were carried on at the registered office or elsewhere on the island. If, as appears to be the case, the only ongoing activities of Jersey relate to its indebtedness to HSBC, everything being done by Jersey has for the past few years been done in London. In my judgment, Jersey has, at least since Mr Leech's bankruptcy in November 2002, and probably for two years or so before that, had its CoMI in London. Accordingly the court has jurisdiction to make an administration order.

Second issue: administration orders

General

[34] The applications for administration orders are unusual in one respect. Normally, such applications are supported by directors of the company, and the court has full information about the current state of the business and reasoned proposals for the future. Thus the court has before it ample material on which to decide whether the purpose of an order is reasonably likely to be achieved. Here, by contrast, the court is faced with an opposed application, the companies (understandably) are not co-operating with HSBC, and HSBC is in some difficulty in putting forward its case.

[35] As to the law, counsel are agreed that under Schedule B1 to the Insolvency Act 1986 the applicant for an administration order must show a real or realistic prospect that the statutory purpose would be achieved. The test, it was agreed, is the same as

that which obtained under the previous legislation.[5] The applicant does not have to show that the achievement of the statutory purpose is more probable than not, but what is demonstrated must go well beyond what is merely fanciful.

[36] Evidence has been given by Mr Edward Klempka, a licensed insolvency practitioner, who has investigated the affairs of USA and Jersey on behalf of HSBC. Mr Klempka is of the opinion that, in respect of each company, one of the objectives set out in paragraph 3(1) of Schedule B1 will be achieved but, because of the limited information which he has at this stage, he is unable to say which one.

USA

[37] *Rescue of the company as a going concern.* Mr Klempka is looking under this heading to a distribution of the assets of USA in specie to HSBC and the other creditors. Leaving aside the difficulties which might stand in the way of achieving this (to which Mr Klempka alludes in his evidence), this would not, in my judgment, constitute a rescue of USA as a going concern. Indeed, given that USA is a holding company which is not now trading in the few shareholdings which it retains, it is doubtful whether there is any going concern to be rescued.

[38] *Achieving a better result for the creditors than on a winding-up.* There is no evidence to support the view that administration would yield more than liquidation. USA is not a company with real property or chattels: as is well known, liquidation inevitably depresses the value of such assets. The only two substantial assets of USA are the shares in ADN and Evolve, which are traded on exchanges in the United States. There is no reason to suppose that a liquidator would be so irresponsible as to depress the value of the shares by flooding the market rather than by disposing of them in an orderly way. If that is so, the shares are worth their quoted price from time to time, and this will be so irrespective of whether USA is in administration or liquidation or in neither.

[39] *Realising property to make a distribution to secured or preferential creditors.* HSBC has no security over any of the assets of USA and there are no preferential creditors.

[40] In my judgment, the case for making an administration order in respect of USA has not been made out.

Jersey

[41] As with USA there is no going concern to rescue. As to the comparison between administration and liquidation, the position is also much the same as with USA. The only valuable asset of Jersey appears to be its shares in Enteraction TV Limited, and there is no evidence to support the proposition that more might be received for these shares in administration than on a liquidation. It is when one comes to the status of HSBC as a secured creditor that there may be a real difference between USA and Jersey.

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[5] Insolvency Act 1986, s.8(1); *Re Harris Simons Construction Ltd.* [1989] 1 WLR 368.

[42] On 19 January 2001 Jersey executed a debenture which, by clause 4(c)(vii), granted to HSBC a first fixed charge over all stocks and shares then or thereafter belonging to Jersey. HSBC is therefore a secured creditor as regards Jersey. The question is: what is subject to this charge? Mr Klempka has undertaken investigations which lead him to conclude that the shares in ADN which appear to be owned by USA may originally have been owned by Jersey, in which case they would in all probability be caught by the debenture. Mr Klempka accepts that, to make good the case for HSBC's being a secured creditor in respect of the ADN shares, further enquiries would have to be made. Mr Cole's evidence is that the ADN shares have always been assets of USA. Undoubtedly they are now registered in the name of USA.

[43] This matter has caused me some concern. I have considered Mr Klempka's evidence. The most impressive point which he makes is that the escrow agreement which is dated 21 August 2003, and which may or may not have been executed, shows HSBC as a secured creditor in a schedule which distinguishes between secured and unsecured creditors of USA. HSBC's only security was the debenture granted by Jersey, and the only asset or apparent asset of USA which might have been subject to that security was the holding in ADN. In my judgment, Mr Klempka's case under paragraph 3(1)(c) of Schedule B1 to the Insolvency Act 1986 goes beyond the fanciful. Accordingly I have concluded that an administration order should be made in respect of Jersey.

Third issue: winding-up

USA

[44] USA is plainly and admittedly insolvent, and there is no sound reason against the making of a winding-up order. The argument of *forum non conveniens* might have had merit if it came from a creditor other than HSBC. Coming from the company, it has none. It is appropriate that the liquidation take place where the USA has (as I have found) its CoMI and where the major creditor carries on business. As appears from expert evidence in the case, if the assistance of a United States court in the liquidation becomes necessary, this can be obtained by commencing a suit ancillary to the English winding-up proceedings.

Jersey

[45] If I had been unable to make an administration order in respect of Jersey, I would have had no grounds for refusing to order the winding-up of the company.

Conclusion

[46] There will accordingly be an order for the winding-up of USA and an administration order in respect of Jersey. I have directed that the judgment be listed for handing-down on Wednesday 2 June 2004, which is my next sitting day. If counsel lodge an agreed form of order, there will be no need for attendance by legal representatives.

[47] This judgment has been produced as a matter of urgency, as the parties are anxious to have my decision as soon as possible. It has not been made the subject of a final proof-reading, and a version corrected in order to eliminate grammatical and typographical errors will be circulated soon after 2 June.

Peter Langan
Judge

20 May 2004