Neutral Citation Number [2020] EWHC 1155 (Ch)

CR-2017-002863, 002864, 002866, 002867 and 002868

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTERS OF VICEROY JONES NEW TECH LIMITED, VICEROY JONES OVERSEAS PCC LIMITED (A COMPANY REGISTERED IN THE SEYCHELLES), WESTCOUNTRYTRUFFLES LIMITED, CREDIT FREE LIMITED AND TRUFFLE SALES LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London EC4A 1NL
Date: 12/05/2020

Before :
ICC JUDGE BARBER

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND INDUSTRIAL STRATEGY

Petitioner

- and –

(1) VICEROY JONES NEW TECH LIMITED
(2) VICEROY JONES OVERSEAS PCC LIMITED (A COMPANY REGISTERED IN THE SEYCHELLES)
(3) WESTCOUNTRYTRUFFLES LIMITED
(4) CREDIT FREE LIMITED
(5) TRUFFLE SALES LIMITED
(6) GEORGE FROST

Respondents

- -

Matthew Parfitt (instructed by Womble Bond Dickinson LLP) for the Petitioner
Tiran Nersessian (instructed by Francis Wilks & Jones LLP) for George Frost

Hearing date: 17 March 2020

- -

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.

ICC Judge Barber

1. This is the hearing of an application made by the Secretary of State for Business, Enterprise and Industrial Strategy (the 'SoS') for a non-party costs order against the Sixth Respondent, George Frost ("Mr Frost"), under Section 51 of the Senior Courts Act 1981. The SoS also seeks a Bathampton order.

2. Mr Frost was the architect of a truffle tree investment scheme involving five companies wound up by this court in the public interest on 12 October 2018 on the petitions of the SoS.

Background

3. The background to this matter and the conclusions and findings giving rise to this application are set out in my judgment dated 12 December 2018 ('the Judgment') [2018] EWHC 3404 (Ch).

4. In brief outline, the SoS presented public interest winding up petitions against five companies ('the Companies') involved in a truffle tree investment scheme. The SoS alleged that the Companies had all been involved in a scheme which lacked commercial probity, that the Companies had continued a similar objectionable method of trading to companies previously wound up in the public interest, with which Mr Frost and his family had been involved, and that there had been a lack of cooperation with company investigators appointed by the Secretary of State. In relation to TSL, a fourth ground, failure to file accounts, was also relied upon. Three of the Companies defended the petitions; two did not. Mr Frost was a director of the three defending companies (referred to in the Judgment as VJNT, PCC and WCT; hereafter collectively 'the defending companies'). He had also previously been a director of one of the non-defending companies (Credit Free) until just after the SoS began to investigate VJNT.

5. The truffle tree scheme devised by Mr Frost involved selling 'investments' in the form of fifteen-year leases of trees inoculated with truffle spores. Those targeted were members of the public with pension pots. 8925 trees were sold to over 100 investors for between £750 and £1000 per tree. The Court found that there was no reasonable prospect of these investors achieving a profit on their investment.

6. In total, VJNT raised at least £6.5 million from investors purchasing truffle tree leases, pursuant to contracts entered into by VJNT as vendor and the investor as purchaser. These purchase monies were paid, not to the vendor, VJNT, (which did not have its own bank account), but instead to a firm called Pinnacle Legal Services ('Pinnacle'), a business vehicle operated by Mr Frost. Pinnacle has had nothing to do with legal services since 2010, despite its name. Pinnacle was a convenient vehicle for these purposes as it was immune from s.447 investigation.

7. At least £855,000 of the £6.5 million went to Mr Frost. £1.7 million went to Mr Frost's business partner, Mr Hawes. £300,000 went to Mr Frost's brother, Brian.

8. Public interest winding up petitions against the five companies involved in the scheme were presented on 7 April 2017. The defending companies filed evidence in opposition on 17 August 2017. There were a number of interlocutory hearings. The costs of and occasioned by an application dated 29 March 2018, dealt with at one of the interlocutory hearings, have already been dealt with and form no part of the present application.

9. On 30 January 2018, the SoS's solicitors wrote to the defending companies' solicitors, setting out the SoS's concerns as to whether Mr Frost held a bona fide belief that the defending companies had an arguable defence to the petitions, and whether it was in the companies' interests to defend the petitions. The letter made a number of points about the defence evidence filed and warned that applications for personal costs orders might be made against Mr Frost and his brother Brian. The defending companies' solicitors responded by letter dated 22 February 2018 addressing (in a fashion, on instruction) the points raised in the letter of 30 January 2018 and objecting to what was described as "an inappropriate and unjustified attempt to heap further pressure on our clients (indirectly through their director and former director) in a bid to shore up a weak case".

10. The trial of the petitions took place from 8th to 12 October 2018 before me. By the conclusion of the trial, the case made out against the Companies was so strong that the SoS invited the Court to make winding up orders immediately, with reasons to follow. The Court acceded to that request and the Companies were wound up on 12 October 2018. The draft orders were amended in manuscript before being sealed, to add a provision stating that the question whether any person should be joined for the purpose of a non-party costs order would be reserved to the handing down of written reasons.

11. On 11 December 2018 the SoS issued an application to join Mr Frost as a party to seek a costs order against him and sought directions for the determination of that issue.

12. On 12 December 2018, the Court handed down its written reasons. The Judgment was highly critical of Mr Frost, stating that Mr Frost was "quite prepared to lie whenever he considered that it suited his purposes", that he supplied "ready untruths" which were "entirely unconvincing" and at times "manifestly false". The defence put forward by the defending companies was rejected by reference to contemporaneous documentation and cross examination. All grounds relied upon in the petitions were made out.

13. The order made on the handing down of judgment on 12 December 2018 gave directions on the SoS's non-party costs application against Mr Frost.

14. Initially, Mr Frost played 'fox and geese' with regard to the non-party costs application. He did not instruct solicitors to accept service on his behalf and was not available for service at the UK addresses given in his witness statements in the main proceedings. After various attempts to track him down, an application was eventually made for permission to serve Mr Frost in Lanzarote and by email. This application was granted and complied with.

15. After putting the SoS to that entirely avoidable expense, Mr Frost now has solicitors on the record. His solicitors first contacted the SoS on 2 September 2019 and everything was served on them on 9 September 2019.

16. On 22 November 2019, almost a year after the initial application to join Mr Frost as a party to seek a costs order against him, Mr Frost filed a witness statement in opposition to the application. On 24 February 2020, Mr Wolohan filed his fifth witness statement on behalf of the SoS.

Evidence

17. For the purpose of this hearing, I have read and considered:

(1) the Judgment;

(2) the third witness statement of Mr Mohamed dated 20 December 2018;

(3) the seventh witness statement of Mr Frost dated 22 November 2019; and

(4) The fifth witness statement of Mr Wolohan dated 24 February 2020.

I have also been provided with the trial bundles used at the trial of the petitions.

Jurisdiction under s.51 of the Senior Courts Act 1981

18. Section 51 of the Senior Courts Act 1981 gives the Court full discretion to determine by whom and to what extent costs are to be paid. This discretionary power is to be exercised "in accordance with reason and justice": Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No. 2) [1986] AC 965 at 981.

19. CPR 46.2 provides rules in relation to costs orders against non-parties. The person against whom an order is sought must be added as a party to the proceedings and must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.

The SoS's case

20. On behalf of the SoS, Mr Parfitt referred me to the Court of Appeal decision in Re Aurum Marketing Ltd [2000] 2 BCLC 645. In that case the respondent was the sole director of a company which placed advertisements inviting members of the public to participate in the marketing of certain health foods for which the company claimed to have the marketing rights. The Secretary of State presented a public interest petition under section 124A of the Insolvency Act 1986 for the winding up of the company in the public interest. The petition was supported by evidence, including a report from the Official Receiver which, inter alia, highlighted that a large amount of the money received by the company from the public had been transferred abroad and misappropriated and that the respondent had been evasive, contradictory and uncooperative when the company's affairs were investigated under section 447 of the Companies Act 1985. The petition was initially contested by the company but was unopposed at the hearing.

21. At first instance, the deputy judge held that the company was engaged in a "swindle" and made a winding up order, but refused the subsequent application by the Secretary of State that the respondent be ordered to pay the costs of the proceedings personally, on the grounds that the Secretary of State had failed to show that the respondent's claim that the company's business was a bona fide marketing operation was not a bona fide defence. The Secretary of State appealed against the deputy judge's refusal to make the costs order against the respondent.

22. Allowing the appeal, the Court of Appeal held that the correct test of whether to make a costs order against a non-party on a winding up petition was whether it was just to

make such an order, not whether there was evidence of mala fides, abuse of process, procedural manipulation or improper defence of the petition.

23. On the facts of Aurum, the factors relevant to determining whether a costs order should be made against the respondent were summarised by Mummery LJ (Schiemann and Simon Brown LJJ concurring) at p652-654 as follows:

> "(1) The scheme operated by the company was a swindle. That has been found as a fact on the petition. It was not appealed. The deputy judge came to this conclusion on the evidence of the Secretary of State. The fact that this was denied in the evidence filed by Mr Richards on behalf of the company, which then withdrew its defence, and that Mr Richards asserted and believed that it was not a swindle and that the business was conducted in good faith is irrelevant in view of that finding.
>
> (2) As Mr Richards was the sole director and shareholder of the company, it was he who was operating the swindle through the company. He was the controlling force behind the company's opposition to the winding up order. He cannot be heard to say that he was resisting the winding up order in the interests of the public, who were liable to be swindled; or in the interests of the creditors, who had been swindled; or in the interests of the company, which he was using to operate the swindle. The proceedings were contested by the company from June 1998 to mid May 1999 because Mr Richards, as controller and owner of the company, conceived it to be in his own interest to do so.
>
> (3) Mr Richards is not entitled in those circumstances to distance himself from the deputy judge's decision on the winding up petition and contend that the findings of fact were made against the company in proceedings to which he was not a party and that they are not binding on him. …
>
> (4) The effect of the order made by the deputy judge is that the burden of costs of proceedings successfully brought in the public interest to put an end to a swindle operated by Mr Richards through the company are borne not by Mr Richards but by the assets of the company, which has been found to be insolvent. In effect Mr Richards is able to throw the costs of the proceedings onto the general public and onto the creditors of the company who are the very people who have been or were liable to be swindled. That does not seem to me to be just.
>
> (5) I doubt whether the deputy judge in fact thought that this was a just result in the light of his findings on the winding up petition. The reason that we do not know for certain what the deputy judge thought on the justice of the outcome on costs is that the deputy judge did not ask himself the correct question, that is whether it was just to make the costs order against Mr

> Richards. That is the flaw in his approach to the costs application.
>
> (6) In his detailed judgment the deputy judge proceeded on the basis that the winding up order was made "in default of defence and no more" and that it was not appropriate to make "an extraordinary order" against Mr Richards "by a summary process" (a) without evidence from the Secretary of State against him of mala fides, abuse of process, procedural manipulation or improper defence of the petition by Mr Richards, known by him to be hopeless and "for the sole reason of avoiding a finding of dishonesty against himself" and (b) without reference to "the extensive evidence" put in by the company on the petition.
>
> That is not the correct approach. First, the winding up order was not made "in default of defence". … The order was made after a trial of the merits of the petition in which Mr Richards elected not to take part …
>
> Secondly, as already explained, the power to order a non-party to pay the costs of legal proceedings is not limited to cases of bad faith, abuse of process, impropriety or procedural manipulation. The power can be exercised if, in all the circumstances, it is just to do so.
>
> In this case it is just to order Mr Richards to pay all the costs personally, both of the Secretary of State, who has presented and successfully pursued this petition for the protection of the public, and of the company, whose assets should be preserved for the benefit of the creditors of the company and should not be available for the personal benefit of Mr Richards, who, for his own reasons, made the decision to oppose and then the decision not to oppose the petition. It would have been appropriate to make such an order at a 'summary hearing' of the kind which took place before the judge on 28 May 1999 following on his earlier decision to put the company into liquidation on public interest grounds. It was, in the words of Laddie J in Robertson Research International Ltd v ABG Exploration BV [1999] CPLR 756 'a plain and straightforward case', fit for summary treatment.'

24. Mr Parfitt argued that the present case is analogous to that of Aurum Marketing. He submitted that, taking the following factors into account, justice requires an order that Mr Frost pay the SoS's and the defending companies' costs of these proceedings personally, and that there be a Bathampton order:

> (1) The defending companies were all components in a scheme promoting an investment which was found to be "a one-way bet".

(2) Mr Frost was a director of the three defending companies: he was the sole director of VJNT; he and his wife were the directors of PCC; and he was the sole director of WCT during these proceedings (previous directors having been his brother, Brian, and his nephew, Jordan). Mr Frost was also a former director of Credit Free, although he resigned and sold that company after the SoS's investigations began.

(3) Mr Frost did not prepare any costings or take any other appropriate steps to assess the viability of the scheme from the end investor's perspective before he began marketing it: Judgment, para 93. Its lack of viability was a matter of simple, but indomitable, arithmetic: Judgment, paras 78 and 89. The court found that no investor could reasonably expect to make money from the investment: Judgment, paras 76 and 79.

(4) Mr Frost admitted during cross examination that VJNT's sales literature was misleading (Judgment, para 96), and that he did not even know what the brochures meant in referring to the ability of investors to exit via retail programmes which were "in place" , when at the time such programmes did not exist: Judgment, para 95. Mr Frost showed "no remorse" for the inaccuracy of communications with investors; Judgment, para 99.

(5) The monies raised from the scheme were rapidly dissipated, with as little regard to company law as to any other propriety; see references to unlawful dividends and fictional accounts at paras 106 and 124-127 of the Judgment respectively. Mr Frost was entirely untroubled by such niceties: Judgment, paras 127-8.

(6) The scheme itself was designed to prevent investors from having any recourse in relation to their investments (Judgment, para 114) and to "confuse and obfuscate": Judgment, para 122.

(7) Mr Frost was both the architect of the scheme (Judgment, para 23) and deeply involved in all aspects of it once it was in place, despite his denials, which were rejected: (Judgment, paragraphs 49-50).

(8) Mr Frost is a recidivist. This was the third scheme in which he has been involved which the SoS has had to shut down on public interest grounds; Judgment, paras 11-13 and 139-145.

(9) Even if Mr Frost did not know all of these things at the outset of the scheme (incredible as that would be), he should have realised that there was no good defence when he received the public interest winding up petitions and the accompanying evidence.

(10) The SoS's case as to the lack of commercial probity of the scheme was "well and truly made out"; Judgment, para 138. Mr Frost was not 'unlucky' at trial; the case did not turn on a subtlety of law or an unexpected factual twist. There could be only one answer as to whether it was in the public interest to let the scheme live on.

(11) At an early stage, the SoS warned Mr Frost that the personal costs order might be sought against him. Mr Frost ignored this warning and caused the defending companies to fight on.

(12) The Companies have already been ordered to pay the SoS's costs. These costs will be payable as an expense of the respective liquidations. That will reduce the funds available to repay members of the public who may have claims in the liquidation of the Companies. It will further the impropriety for which the Companies were wound up.

(13) The same logic applies to the defending companies' own costs of resisting the petitions. Although the SoS has attempted to find out who paid the defending companies' legal costs, and how much they were, no answer has been received. If company money was used, it was a breach of section 127 of the Insolvency Act 1986 as no validation order was sought. If the defending companies can reverse any payments they have made by a Bathampton order, and also recover their costs from Mr Frost, that will increase the funds available in the liquidation.

Mr Frost's case

25. On behalf of Mr Frost, Mr Nersessian submitted that a non-party costs order was always 'exceptional' and that the court should treat any application for such an order 'with considerable caution': Symphony Group Plc v Hodgson (1994) QB 179 at p192-3; Metalloy Supplies v MA (UK) Ltd (1997) 1 WLR 1613 at 1620B-D.

26. As noted by Hart J, however, in Re North West Holdings plc (24 September 1999, unreported),

> 'there appears …. to be a danger of treating the requirement that the circumstances are "exceptional" as being part of the statute to be applied. It is not … In none of the cases to which I have referred have "exceptional circumstances" been elevated into a precondition to the exercise of the power; nor should they be."

27. Subsequent case law has confirmed that "although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against": see Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs) [2004] 1 WLR 2807 (a decision of the Privy Council) at 2815D-E.

28. Moreover, as made clear by Mummery LJ in Re Aurum Marketing Ltd [2000] 2 BCLC 645, (agreeing with Hart J in Re North West Holdings in this respect), public interest petitions are themselves an unusual form of proceedings which are more likely to attract orders for costs against non-parties. As noted by Hart J in Re North West:

> "In particular they have the characteristics that, while the burden of proof is on the Secretary of State, in practice a

> respondent company will usually be starting on the back foot; that (unlike most forms of litigation) they do not lend themselves readily to compromise; and that the effect of a successful petition is likely to be adverse to the general commercial reputation of those involved in the promotion and management of the respondent company. Moreover, and particularly where a provisional liquidator has been appointed, it is likely that in the typical case the costs of the company's defence the petition will be underwritten by its owners and managers. It will therefore more often than not be a normal feature of this type of litigation that, if the petition is successful, the Secretary of State will be able to make out a case for saying that some individual connected with the company has for his own purposes resisted the making of an order which it was all along in the public interest should be made, and that it is just that that individual should make good to the public purse the cost incurred in the petition, or at least that part of those costs directly attributable to the fact that the petition was opposed."

29. The unusual features of a public interest winding up petition were further explored by the Court of Appeal in Re North West Holdings plc [2002] BCC 441. At paras 51-54, Charles J reasoned as follows:

> '[51] The question for the court in respect of a public interest petition is whether it is just and equitable for the company to be wound up having regard to the evidence as a whole and the grounds put forward by the petitioner founded on the public interest (see Walter L Jacob & Co Ltd (1989) 5 BCC 244 at pp250A-252B). Features of such a petition that distinguish it from other petitions to wind up (and many other proceedings) and make it an unusual form of proceedings are:
>
> (a) the petition is based on a conclusion of the Secretary of State that it appears to him to be expedient in the public interest that the company should be wound up.
>
> (b) that conclusion, and thus the proceedings, are often based on information obtained by the Secretary of State as a result of an investigation instigated by him (or another regulator) pursuant to a statutory power (e.g. section 447 of the Companies Act 1985), and
>
> (c) the allegations which found such conclusion of the Secretary of State and the application to wind up will often include allegations that amount to an assertion that the directors (or others who have been in control of the company and caused it to trade) have abused the privilege of trading with limited liability.

> Such an abuse can be, but does not have to be, based on allegations of dishonesty. Certainly it is often not necessary to allege dishonesty to explain why the Secretary of State concluded that it is expedient in the public interest for a company to be wound up … or to prove dishonesty to show that it is just and equitable that the company be wound up.
>
> [52] There are a wide range of business activities that can found a public interest petition to wind up a company but the conclusion of the Secretary of State upon which the petition is based means that it will often assert that the activities of the company are such that the members of the public who deal with it are exposed to unacceptable risks which are different in kind to the risks flowing simply from the advantages of limited liability.
>
> [53] Therefore (as pointed out by Hart J) the petition will often make allegations which are severely critical of the person or persons who controlled the company. Such criticisms can be, or can potentially be, very damaging to the individuals concerned but the fact that they therefore have strong personal motives for causing the company to defend does not mean that the company does not have an arguable defence that it is in its interests to advance.
>
> [54] It is established by Secretary of State for Trade and Industry v Aurum Marketing Ltd that the power to order a non-party to pay costs is not limited to cases of bad faith and in my judgment when the court is invited to exercise that power in a public interest petition it may take into account (a) the nature and extent of the risks to which the public have been exposed by the activities of the company and any abuse of the privilege of trading with limited liability, and (b) the participation therein of the non-parties.'

30. Mr Nersessian also referred me to Taylor v Pace Developments Ltd [1991] BCC 406 at 409F. This case however concerned a commercial dispute, and so must be read subject to the considerations explored in Re North West and Aurum.

31. Moreover, as noted by Rix LJ in the later case of Goodwood Recoveries Ltd v Breen [2006] 1 WLR 2723 at [59], having conducted a review of the authorities (including the decision of the Court of Appeal in Re North West and the decision of the Privy Council in Dymocks):

> 'the law has moved a considerable distance in refining the early approach of Lloyd LJ in Taylor v Pace Developments Ltd [1991] BCC 406. Where a non-party director can be described as the "real party", seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that

> he be liable in costs on a fact sensitive and objective assessment of the circumstances."

32. In the present case, Mr Nersessian submitted that the SoS had a very small canvass to work with. By paragraph 23 of his skeleton argument, he contended that: 'The evidential burden is entirely on the SoS to prove … that Mr Frost did not hold a bona fide belief that (1) the companies had an arguable defence to the petitions and (2) it was in the interests of the companies to advance that defence.'

33. He submitted that the SoS was restricted to those specific grounds, because those were the grounds raised by the SoS by its letter of 30 January 2018 warning Mr Frost of the SoS's intention to seek personal costs order against him and touched on in the third witness statement of Mr Mohammed in support of the third-party costs order application.

34. I reject that submission. The main purpose of the letter of 30 January 2018 was to put Mr Frost and his brother Brian on notice that the SoS might seek third party costs orders against them. The main purpose of Mr Mohammed's third witness statement was to summarise the course of events leading up to the third-party costs application. Whilst it flagged the fact that a personal costs warning had been given by letter of 30 January 2018, and quoted some passages from the judgement of the court handed down on 12 December 2018, it was made clear by paragraph 9 of the statement that "all necessary submissions will be made by Counsel for the Secretary of State at the hearing of the application" .

35. Neither the letter of 30 January 2018 nor Mr Mohammed's statement had the status of a pleading. In making this application for third-party costs, the SoS is not restricted to matters specifically raised in a letter written nine months before trial or highlighted in a statement filed very shortly after the handing down of judgment on 12 December 2018. Mr Mohammed's statement made clear that the factors which the Court would be invited to take into account in determining the application for a non-party costs order were to be addressed in submission in the usual way.

36. Mr Nersessian further argued that, on the caselaw as it stands, the Court was required to focus on whether Mr Frost held a bona fide belief that the Companies had an arguable defence and that it was in the interests of the Companies to advance that defence. He maintained that Aurum is 'not as wide as it looks', referring me to the judgment of Aldous LJ in Re North West, in which he had stated (at para [34]):

> 'A crucial question is whether the relevant directors (or director) hold a bona fide belief that (i) the company has an arguable defence, and (ii) it is in the interests of the company for it to advance that defence. If they do then (in the absence of special circumstances) to make them pay costs of proceedings in which they are not a party would constitute an unlawful inroad into the principle of limited liability. It follows that directors of a company which is served with a petition would be well advised to consider with the company's, or their, legal advisers what defences the company has and, having regard thereto, whether it is in the interests of the company to defend the petition. If the bona fide decision of the directors (or

> director) is that it is, (in the absence of special circumstances) the directors (or director) should be able to cause the company to defend without fear of being made liable to pay any costs, unless the position should change materially during the lead up to the hearing, or at the hearing. If so, the decision would need to be reconsidered.'

37. Mr Nersessian argued that in the light of that reasoning, it was 'plainly relevant' to consider whether Mr Frost had acted in good faith in causing the defending companies to defend the petitions.

38. I accept that, on appeal, much of the debate in Re North West focused on whether the director held a bona fide belief that (i) the companies had an arguable defence to the petitions and that (ii) it was in the interests of the companies for them to advance that defence. This focus, however, in part stemmed from the nature of the defence raised by the director to the application for a non-party costs order against him. I do not view North West as limiting the breadth of Aurum in any way.

39. Indeed, Charles J in North West was at pains to stress (at [48]) that 'Aurum Marketing Ltd shows that having regard to the guidance given by the earlier authorities the question for the court … is whether in all the relevant circumstances it is just to order a non-party to pay costs' ; adding (at [54]) that 'It is established by Secretary of State for Trade and Industry v Aurum Marketing Ltd that the power to order a non-party to pay costs is not limited to cases of bad faith'.

40. Overall, as noted by Mummery LJ in Aurum (at p650h):

> "there is guidance in the cases highlighting various factors relevant to the exercise of the discretion (see, in particular, Symphony Group plc v Hodgson 1993 4 All ER 143), but none of the authorities attempt to legislate for the exercise of the discretion. That must always depend on consideration of the actual circumstances of each case. There is, for example, no general rule that it is right in every case of a one-man company to make the controlling shareholder and director personally liable for the costs on the ground that he has caused the company to defend the proceedings: see Taylor v Pace Developments Ltd 1991 BCC 406 at 409. It is wrong to treat the reported cases is providing a comprehensive checklist of factors which must be present in every case before the discretion can be exercised in a particular case. What may be sufficient to justify the exercise of the discretion in one case should not be treated as a necessary factor for the exercise of the discretion in a different case."

41. With this guidance in mind, I turn to consider the present application.

42. The key factors raised on behalf of the SoS in in favour of the making of a personal costs order against Mr Frost and a Bathampton order are set out at paragraph 24 of this judgment.

43. The factors relied upon by Mr Frost in answer to the application are set out in his seventh witness statement. In broad summary, they are as follows:

(1) that he believed 'that the objects for which the [defending companies] were originally set up were credible and genuine' (Frost (7) para 9);

(2) that the defending companies' business 'was still live' and that he believed that defending the petitions to be in the best interests of the defending companies and their investors; if the defending companies continued trading, the trees could be grown to the point that truffles could be harvested, 'and returns could be made to investors' (Frost (7) paras 9, 15-17);

(3) that he had restored TSL to the register in order to ensure that VJNT could pursue a guarantee against that company on behalf of the investors;

(4) that during the time that the petitions were in court, the defending companies spent in the region of £100,000 in respect of 'Complete Compliance', a company tasked with attending and assessing the plantations, 'in order to ensure that the investor's position was protected' as he 'believed that this was important due to their investment in the proposition that we had presented to them' (Frost (7) para 20);

(5) that he believed that the defending companies 'had an arguable defence to the allegations' (Frost (7), para 5) and that, 'without waiver of privilege' his belief was 'affirmed by the advice of the [defending companies'] legal team that there were arguable defences to the petitions that were proper to advance' (Frost (7) para 9);

(6) that he acted in good faith in causing the defending companies to defend the petitions and that he would not have defended the case if he had thought that there was no benefit in doing so for the investors (Frost (7) para 21);

(7) that he rejected the accusation that he had caused the defending companies to oppose the petitions solely for his own benefit and/or to avoid investigation by the Official Receiver and/or any appointed liquidator; the Companies had already been investigated in the run up to presentation of the petitions and Mr Frost was already the subject of a formal investigation by the Official Receiver for director disqualification in connection with Viceroy Jones Limited, another company wound up in the public interest with which Mr Frost had been involved (Frost (7) paras 12-14);

(8) that he was retired from business life and had 'no wish, desire or need to begin working again' (Frost (7) para 11);

(9) that his actions, in placing himself 'in the lion's den' by giving evidence and attending trial, were not 'the actions of a person who seeks to avoid scrutiny'; (Frost (7) para 11 and 13);

44. With regard to (1), Mr Frost cannot be heard to say that he 'believed the objects for which the [defending companies] were originally set up were credible and genuine' (Frost (7) para 9). The truffle tree scheme was found to be entirely lacking in commercial probity. Mr Frost was found to be its architect. The defending companies were vehicles used by Mr Frost for the purposes of the scheme. This was the third scheme in which Mr Frost has been involved which the SoS has had to shut down on

public interest grounds. The Court found that, as the architect of the scheme, Mr Frost took no appropriate steps to satisfy himself of the viability of the investment model from an end investor's perspective before marketing the scheme to pensioners: Judgment, paras 79, 80, 81 and 93. The arithmetic was unanswerable. As put at paragraph 76 of the Judgment:

'On Dr Thomas's truffle yield predictions (which I am satisfied are accurate) of 20kg to 90kg per hectare, at VJNT's prices, no investor could reasonably expect to make money from the truffles produced by their trees, because they paid too much for their trees in the first place. It was, as Mr Parfitt put it, a "one-way bet".

45. To put this in money terms:

'given their contractual entitlement to only half of the value of truffles produced, over the course of the 15 year lease, on predicted truffle yields, investors could expect to receive, in respect of truffles produced per tree, at best £600 and at worst £136, having purchased the trees from VJNT for between £750 and £1000 per tree ': Judgment, paragraph 78.

46. Whilst Mr Frost claimed to have worked from different figures in 2012 when assessing the viability of the scheme, the Court rejected his testimony on this issue and found that no alternative figures were prepared or considered: Judgment, paragraph 79.

47. From purchase monies raised by the scheme, Mr Frost benefited to the tune of £855,000 and his brother benefited to the tune of £314,000 – whilst the investors, members of the general public, were bound to make a loss.

48. With regard to (2) to (4), I reject Mr Frost's claims to have believed that resisting the winding up petitions was in the 'best interests' of the defending companies. The defending companies were simply vehicles set up by Mr Frost and his family for the purposes of Mr Frost's latest scheme; a scheme found to be wholly lacking in commercial probity, which it was inevitable that the Court would shut down. Mr Frost cared so little for VJNT that it did not even have its own bank account; and none of the purchase monies due to it from the truffle purchase contracts which it had entered into with investing members of the public had ever been properly accounted for in its books and records: Judgment para 124-127. It was simply a vehicle. WCT had long since spent all sales proceeds received by it, notwithstanding that such sums were supposed to cover the cost of looking after truffle trees for the 15 year period of the tree leases: Judgment, para 107. PCC's role in the scheme was completely opaque and there was no evidence that it had any meaningful assets either: Judgment, para 118-121. It was plainly not in the interests of the defending companies themselves to incur large sums in opposing the petitions. Even if, as Mr Frost claims, he had further members of the public waiting in the wings to invest in his scheme, that of itself would not affect the outcome on the petitions. The scheme lacked commercial probity and had to be brought to an end.

49. I further reject Mr Frost's claims to have believed that resisting the winding up petitions was in the best interests of the investors because they still had truffle trees which might produce returns. The Spanish plantation was in crisis (Judgment, para 99), WCT had no obvious means of paying for the upkeep of its own plantation

(Judgment, para 107) and VJNT's 'guarantee' that any trees which perished during the 15 year term would be replaced was ultimately toothless, given the exculpatory terms of the contractual documentation in place: Judgment para 109-114. Any possibility of prospective benefit was rejected by the Court and any continued involvement of Mr Frost and his brother in the management of the 'investments' was ruled out in any event, given the Court's findings as to the veracity of their testimony, the extent of their knowing involvement in the scheme, and the extent of their involvement in similar schemes in the past: Judgment, paras 161-2.

50. Mr Frost's attempts to pay lip service to acting bona fide in the interests of the defending companies, their investors and creditors in defending the petitions were entirely untenable. His prior conduct, as found proven, speaks for itself. The truffle tree scheme was wholly lacking in commercial probity. The pricing structure made it a one-way bet. VJNL didn't even have its own bank account; all of the purchase monies paid by investors pursuant to their truffle tree purchase contracts with VJNL were instead paid to Pinnacle, a partnership run by Mr Frost which was immune from s447 investigation. Large sums were paid out of the purchase monies to Mr Frost and his brother. There were no onward sales options for customers when the scheme was set up, despite advertising material stating that there were; potential investors were simply lied to about onward sales options - and lied to about projected yields: Judgment at paragraph 91, 95-7. Such lies continued post-purchase; investors were lied to about the value of their investments (Judgment, paragraph 98), and about the state of the truffle tree plantations in which their investments were based (Judgment, paragraph 99).

51. Mr Frost's total lack of regard for the creditors and investors of the defending companies is further demonstrated by the findings in the Judgment relating to the lack of any meaningful recourse for investors. The structure and terms of the scheme documentation were all the work of Mr Frost: Judgment, paras 108 to 112. Much of the contractual documentation put in place post-dated the start of trading and the terms of it were exculpatory. Investors had no meaningful contractual rights.

52. The restoration of TSL to the register, purportedly to enable 'enforcement' of the contracts with the Plantation managers (WCT, Parkview and SATG), was in my judgment a purely cosmetic exercise; the contracts between TSL and the Plantation managers being toothless. The monies expended by the defending companies post-petition on 'Complete Compliance' visiting truffle tree plantations (which absent s127 relief would in any case be void) were again little more than a cosmetic, tactical gesture: the pricing structure put in place by Mr Frost at the outset meant that the investments were all a one-way bet in any event.

53. Mr Frost's lack of regard for the creditors and investors is further demonstrated by the rapid dissipation of monies raised by the scheme (Judgment, paras 102-106), coupled with the failure properly to account for such monies in the books and records of any of the Companies: for example Judgment paras 106, 128 (Credit Free), paras 107,129,130 (WCT), paras 124-128 (VJNT). The opaque role of PCC, a Seychelles registered company, simply added to the confusion: see Judgment at paras 117-121.

54. The scheme was set up by Mr Frost in a way deliberately designed to confuse and obfuscate. It was clearly not the work of a man with investors' interests at heart. As concluded at paragraph 122 of the Judgment, this was a scheme in which those

investors parting with funds had no rights of enforcement and no ready means of establishing what had become of their pension funds.

55. Moreover, as previously noted, this was not Mr Frost's 'first rodeo'. The Companies continued very similar objectionable method of trading to previous companies wound up on public interest grounds with which Mr Frost was involved, including Green Planet and VJL. He is a knowing, serial offender: Judgment, paragraphs 139-145.

56. Against that backdrop, I have no hesitation in rejecting Mr Frost's claims to have acted in the interests of the defending companies, their investors and creditors in causing the defending companies to defend the public interest petitions.

57. As put by Mummery LJ in Aurum at p653a: 'He cannot be heard to say that he was resisting the winding up order in the interests of the public, who were liable to be swindled; or in the interests of the creditors, who had been swindled; or in the interests of the company, which he was using to operate the swindle.' In my judgment these comments apply equally to Mr Frost and his decision to cause the defending companies to defend the petitions.

58. With regard to (5), I do not accept that Mr Frost bona fide believed that the defending companies 'had an arguable defence to the allegations' (Frost (7), para 5). Mr Frost was in the unique position of knowing what the truth was from the outset. He was the architect of the scheme and involved in every material aspect of it. The fact that it took a five-day trial to establish that he had lied in numerous material respects does not detract from the fact that Mr Frost (unlike his legal team, who could only act on instruction) knew what the true position was all along.

59. Against that backdrop, Mr Frost's claim, made, I note, 'without waiver of privilege' that his belief was 'affirmed by the advice of the [defending companies'] legal team that there were arguable defences to the petitions that were proper to advance' (Frost (7) para 9) is of little assistance to him.

60. Mr Nersessian submitted that 'this was a factually complex case involving a considerable amount of evidence on both sides and submissions presented by experienced legal teams' and that the mere fact that the defending companies were unsuccessful does not mean that their case was unarguable. The case was not that complex, however. Unopposed, it would have required an afternoon appointment at most, for the SoS to prove the case. It only required a five-day trial because Mr Frost and his brother chose to file evidence which was false in material respects and which they must have known to be false in material respects: see by way of example paragraphs Judgment, paras 48-53 and 54-67.

61. I would add that, had Mr Frost genuinely believed that the defending companies had an arguable defence to the petitions, he would have engaged properly with the investigations undertaken prior to presentation of the same. Instead, at every step of the way, he sought to thwart any investigations into the defending companies: Judgment, paras 148-154.

(1) In relation to VJNT, for example, Mr Frost accepted in cross examination that, after meeting with Mr Mohammed on 1 August 2016, he had ceased to cooperate with the investigation and had not provided them with a number of categories of

documents demanded, including (a) correspondence with introducers and their representatives and (b) sales databases, including a master sales database which he accepted in cross examination that he still had in his possession but had deliberately not provided.

(2) In relation to PCC, there had been almost total non-compliance with the investigators appointed by the Secretary of State. A similar pattern of non-cooperation was adopted during the course of investigations to that adopted in the case of VJNT, including stalling interviews by a variety of excuses, refusing to provide contact information for relevant parties and refusing to deliver up documentation demanded. Whilst having access to documents that would explain PCC's activities, Mr Frost declined to disclose the same prior to trial. Even once he had decided, during the course of trial, to disclose certain documents relating to PCC, he merely disclosed one or two selected documents, rather than any of the other documents previously requested by the investigators. As rightly noted by Mr Parfitt, it was "hard to escape the conclusion that Mr Frost and PCC [had] something to hide."

(3) In relation to WCT, neither Brian Frost when a director, not Mr Frost after taking over as a director, produced the documents requested.

(4) Whilst Credit Free was not one of the defending companies, a similar pattern of non-cooperation was adopted in relation to that company, which was the main conduit for investors' money once it had passed through Pinnacle. On 20 July 2016, investigators served a copy of their authority in respect of VJNT on Mr Frost, who was, at that stage, a director of Credit Free as well. Very shortly after being served with that authority, Mr Frost and his co-director, Mr Hawes, resigned as directors of Credit Free, stalling investigation into Credit Free by selling it to an individual who lived abroad. As described in paragraph 153 of the Judgment, this was an elaborate game of cat and mouse.

62. With regard to (6) and (7), for already reasons given, I reject Mr Frost's claims to have acted in 'good faith' in causing the defending companies to defend the petitions. In my judgment it is clear from the evidence overall that he did not have their interests at heart when defending the petitions.

63. Mr Frost had stalled and obstructed investigations in the run up to presentation of the petitions. He then stalled the compulsory winding up of these companies (from which fuller investigations would follow) by eighteen months by defending the petitions. As put by Mr Parfitt in his skeleton argument: 'defending the petitions bought him 18 months more with his £855,000, from the date of presentation in April 2017 to the denouement in October 2018, and cost the taxpayer thousands of pounds in legal costs'.

64. It is no answer to say that the defending companies had already been investigated in the run-up to presentation of the petitions; Mr Frost and his brother did not cooperate with those investigations. Having been involved with companies wound up in the public interest in the past, I have no doubt that Mr Frost at all material times appreciated that fuller investigations would follow the compulsory winding up of the defending companies; investigations which, from his past conduct, he appears very keen to avoid.

65. It is no answer to say that Mr Frost had no incentive to avoid or defer formal investigation into his own conduct as a director, as he was already the subject of a formal investigation by the Official Receiver for director disqualification. The formal investigation referred to related to a different company, Viceroy Jones Limited, which had run a 'carbon credits' scam; whilst there may be some common features between the investigations already underway in relation to Viceroy Jones Limited and those which would follow the compulsory winding up of the defending companies, it is inevitable that there will be fresh lines of enquiry triggered by the winding up of the defending companies.

66. Mr Nersessian was at pains to stress that Mr Frost cannot have been motivated simply by a desire to stall the winding up of the defending companies. He pointed out that Mr Frost could have stalled the date of winding up by simply filing evidence on their behalf and withdrawing their defence at the last minute before trial, whereas he saw the trial through, giving evidence at it.

67. Whatever Mr Frost's motivations for seeing the matter through to trial, however, for the reasons already given, I am satisfied that they did not relate to the interests of the defending companies themselves, or their investors and creditors for that matter.

68. I also reject any suggestion that Mr Frost should be commended for walking into the 'lion's den', as he put it, and subjecting himself to cross-examination. He certainly did not attend court to make a clean breast of it; as a witness, he remained obstructive, he shrugged off points without answering them properly, and in numerous material respects, he lied. Whilst his brother ended up crying in the witness box, Mr Frost remained entirely unrepentant throughout.

Conclusions

69. Having considered the arguments of both parties I remind myself of the guidance given in Aurum Marketing:

> 'the power to order a non-party to pay the costs of legal proceedings is not limited to cases of bad faith, abuse of process, impropriety or procedural manipulation. The power can be exercised if, in all the circumstances, it is just to do so.'

70. In my judgment, in all the circumstances of this case, it is just to visit the costs of the winding up proceedings on Mr Frost.

71. In reaching this conclusion I take into account the findings in the Judgment regarding Mr Frost and the scheme that he created, promoted and ran. I take particular account of the following factors, which incorporate a number of those expressly relied upon by the SoS:

> (1) The defending companies were all components in a scheme promoting an investment to the public which was found to be "a one-way bet". The Court found that no investor could reasonably expect to make money from the investment: Judgment, paras 76 and 79. The nature and extent of the risks to which the public were exposed by the activities of the defending companies is clearly a relevant factor.

(2) Mr Frost was both the architect of the scheme (Judgment, para 23) and deeply involved in all aspects of it once it was in place, despite his denials, which were rejected: Judgment, paragraphs 49-50.

(3) Mr Frost was a director of the three defending companies: he was the sole director of VJNT; he and his wife were the directors of PCC; and he was the sole director of WCT during these proceedings (previous directors having been his brother, Brian, and his nephew, Jordan).

(4) Mr Frost did not prepare any costings or take any other appropriate steps to assess the viability of the scheme from the end investor's perspective before he began marketing it: Judgment, para 93. Its lack of viability was a matter of simple, but indomitable, arithmetic: Judgment, paras 78 and 89.

(5) Mr Frost admitted during cross examination that VJNT's sales literature was misleading (Judgment, para 96), and that he did not know what the brochures meant in referring to the ability of investors to exit via retail programmes which were "in place" , when at the time such programmes did not exist: Judgment, para 95. Lies to investors continued post-purchase; including lies about the value of their investments (Judgment, paragraph 98), and about the state of the truffle tree plantations in which their investments were based (paragraph 99). Mr Frost showed "no remorse" for the inaccuracy of communications with investors; Judgment, para 99.

(6) The monies raised from the scheme were rapidly dissipated and were not properly accounted for in the books and records of the Companies: see references to unlawful dividends and fictional accounts at paras 106 and 124-127 of the Judgment respectively. Mr Frost was entirely untroubled by such matters: Judgment, paras 127-8.

(7) The scheme itself was designed to prevent investors from having any recourse in relation to their investments (Judgment, para 114) and to "confuse and obfuscate": Judgment, para 122.

(8) Mr Frost is a repeat offender. This was the third scheme in which he has been involved which the SoS has had to shut down on public interest grounds; Judgment, paras 11-13 and 139-145.

(9) For reasons explored in this judgment, Mr Frost cannot have held a bona fide belief that the defending companies had an arguable defence to the petitions. He was in the unique position of knowing what the truth was from the outset, unlike his legal team. The SoS's case as to the lack of commercial probity of the scheme was "well and truly made out"; Judgment, para 138. Mr Frost was not 'unlucky' at trial; the case did not turn on a subtlety of law or an unexpected factual twist. There could be only one answer as to whether it was in the public interest to let the scheme live on.

(10) For the reasons explored in this judgment, Mr Frost cannot have held a bona fide belief that it was in the interests of the defending companies or their creditors and investors to advance that defence. In this regard I can put it no better than Mummery LJ in Aurum at p653a: 'He cannot be heard to say that he was resisting the winding up order in the interests of the public, who were liable to be swindled; or in the interests of the creditors, who had been swindled; or in the interests of the company,

which he was using to operate the swindle.' In my judgment these comments apply equally to Mr Frost and his decision to cause the defending companies to defend the petitions.

(11) At an early stage, Mr Frost was warned that the SoS might seek a personal costs order against him. Mr Frost ignored this warning and caused the defending companies to fight on.

(12) The defending companies have already been ordered to pay the SoS's costs. These costs will be payable as an expense of the respective liquidations. That will reduce the funds available to repay members of the public who may have claims in the liquidation of the defending companies. It will further the impropriety for which the defending companies were wound up.

(13) The burden of costs of proceedings successfully brought in the public interest to put to an end a scheme entirely lacking in commercial probity designed by Mr Frost and then operated by him through the defending companies should not be borne by the companies themselves. The effect of that would be to throw the costs of the proceedings onto the general public and onto the investors and creditors of the defending companies who, to adopt the words of Mummery LJ in Re Aurum at p653(4), include the very people who have been or were liable to be made victims of the scheme.

(14) The same logic applies to the defending companies' own costs of resisting the petitions. If the defending companies can reverse any payments they have made by a Bathampton order, and also recover their costs from Mr Frost, that will increase the funds available in the liquidation.

72. In my judgment, the only just order in this case is to visit the costs of the winding up proceedings on Mr Frost rather than on the investors and creditors of the defending companies. He has cynically abused the privileges of limited liability trading and must now stand the cost.

73. For all of these reasons, I propose to make an order that

(1) Mr Frost do pay the SoS's costs of the petitions in relation to the defending companies from 17 August 2017 until the handing down of judgment save for the costs of the application made on 29 March 2018;

(2) If and to the extent that the defending companies' costs of the petitions have been borne by those companies, Mr Frost do pay the defending companies' costs of the petitions from 17 August 2017 until the handing down of judgment;

(3) The defending companies costs of the petitions from 17 August 2017 until the handing down of judgment shall not be paid from the assets of the defending companies unless all the unsecured creditors of the defending companies have been paid;

(4) Mr Frost do pay the SoS's costs of this application; and

(5) Mr Frost do make a payment on account of his costs liabilities to the SoS.

74. I shall invite Counsel to submit a draft order. Unless the figure can be agreed, I shall hear submissions on the appropriate figure for interim costs on the handing down of judgment.

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ICC Judge Barber

12 May 2020