Neutral Citation Number: [2021] EWHC 81 (Ch)

Case No: BL-2018-001962

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/01/21

Before :

HIS HONOUR JUDGE HACON
(Sitting as a Deputy High Court Judge)

- -

Between :

HANGER HOLDINGS	**Claimant**
- and -	
(1) PERLAKE CORPORATION SA	
(2) SIMON CROFT	**Defendants**

- -
- -

Jonathan Hill (instructed by **Simons Muirhead & Burton LLP**) for the **Claimant**
Steven Thompson QC and **Erin Hitchens** (instructed by **Fladgate LLP**) for the **Defendants**

Hearing dates: 14-19 July 2020

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Approved Judgment

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

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. Blackjack is the most popular card game played in casinos worldwide. With the rapid recent growth in online gambling, the domain name www.blackjack.com ("the Domain Name") has acquired value.

2. The Claimant ("HH") seeks a declaration that it is entitled as against the Second Defendant ("Mr Croft") to ownership of the Domain Name. HH seeks a similar order in relation to what was referred to as "the Trade Mark". No registered trade marks were identified, so the term means only goodwill in a business associated with the Domain Name.

3. The First Defendant ("Perlake") is a dissolved Uruguayan company now in liquidation. Experts in Uruguayan law explained that notwithstanding the dissolution of Perlake, under Uruguayan law it remains in existence as a legal entity as it progresses through the process of liquidation. Perlake has not been served with the claim form and took no part in the present proceedings. Mr Croft is in effect the sole defendant. He has at all times been the owner of Perlake through bearer shares and prior to Perlake's dissolution he was the sole director of Perlake.

Background facts

4. The Domain Name was registered in December 1996. In 1999 or early 2000 it was purchased by Cary Pinkowski ("Mr Pinkowski") for US$465,000. HH was registered in the Cayman Islands on 21 March 2000 to serve as a vehicle for the business of online gambling under the Domain Name ("the Business"). Darren

Little ("Mr Little") and later Joe Whitney ("Mr Whitney") became investors in HH and with Mr Pinkowski they control HH.

5. The Business was conducted by HH on a website ("the Website") at the Domain Name address, initially operating from Antigua. The functionality of the Website was the responsibility of a software company called Cryptologic Corp.

6. In 2003 Messrs Pinkowski, Little and Whitney were introduced to Mr Croft. Mr Croft had expertise in online gambling, in particular from the UK.

7. On 29 April 2003 HH entered into a written agreement ("the 2003 Agreement") with Perlake. Upon the payment of sums specified in the 2003 Agreement, HH was to transfer the Business to Perlake together with the Website, the Domain Name, customer data and the Trade Mark. HH was to be paid consideration in the amount of US$250,000 and in addition to receive a percentage of revenue generated by the Business by way of commission. The 2003 Agreement is governed by English law.

8. Pending payment of the $250,000, the Domain Name and the Trade Mark were held by a firm of solicitors in Southampton acting as escrow agents. The completion of payment of that sum came in 2005 and in that year (there is an immaterial dispute about the exact date) the Domain Name and Trade Mark were assigned to Perlake.

9. Initially Perlake made four payments of $10,000 towards the consideration due, at least some of which went directly to Messrs. Pinkowski, Little and/or Whitney. In an email exchange between Mr Croft and Mr Pinkowski in

February 2005 it was agreed that HH should contribute $2,500 towards legal costs, leaving $207,500 outstanding. In April 2005 that sum was paid to HH.

10. It is HH's case that Perlake never paid HH any commission on income derived from the online Business as required under the 2003 Agreement. Complaints were made by HH from 2005 onwards about this and the lack of financial information required under the 2003 Agreement about the money being made by Perlake from the Business.

11. One of the terms of the 2003 Agreement provided that HH was entitled to terminate the 2003 Agreement if Perlake committed a material breach. There was a proviso that if the breach was capable of remedy, HH was obliged to give written notice specifying the breach and requiring it to be remedied; if Perlake failed to effect a remedy within 30 days of the notice the 2003 Agreement would terminate. Thereupon HH would be entitled to all rights in the Domain Name and the Trade Mark.

12. A letter dated 31 July 2015 was sent by Revision Legal, a firm of lawyers in Michigan acting on behalf of HH, to Perlake at an address in Luton, giving notice of termination of the 2003 Agreement. The letter specified Perlake's failure to keep records of the operation of the Business, to provide audited statements and to pay appropriate commission. On 5 August 2015 Revision Legal sent a similar letter to Perlake's registered office in Montevideo, Uruguay, which was the address required for notices to Perlake under the terms of the 2003 Agreement. There was again no response from Perlake.

13. On 31 July 2015 HH's directors filed a complaint ("the NAF Complaint") with the National Arbitration Forum ("NAF"), a provider of arbitration in relation to

domain name disputes. An amended complaint was filed on 9 August 2015. On 4 September 2015 solicitors acting for Perlake, DLA Piper in Leeds, filed a response. The principal point made by DLA Piper was that the complaint was too complex to be heard by NAF. On 22 September 2015 the NAF Complaint was dismissed by NAF on the ground that the legal and factual issues were such that arbitration was inappropriate.

14. Although HH was not aware of it, Perlake had by then been dissolved. Uruguayan Law No. 19.288 provides that a company owned by means of bearer shares was dissolved by the operation of law if the Uruguayan Central Bank had not been informed of the identity of the controlling shareholders within 90 days of the law becoming effective, which was on 1 November 2014. The 90 days expired on 29 January 2015. The Uruguayan Central Bank was not informed of Perlake's controlling shareholders. Consequently, on 29 January 2015 Perlake was dissolved by automatic operation of Uruguayan law and on 5 March 2015 the dissolution was registered in the Uruguayan National Register of Commerce.

15. Mr Croft said that he was not told about this until his Uruguayan lawyers informed him on about 10 September 2015. He did not then tell HH.

16. On 14 September 2015 Mr Croft was appointed liquidator of Perlake at an Extraordinary Shareholders' meeting (Mr Croft was the sole shareholder). This was recorded in the Uruguayan Register of Commerce on 4 December 2015.

17. On 12 October 2015 Mr Croft wrote to BB Online, the registrar of the Domain Name, instructing them to transfer the registration of the Domain Name to himself. The letter purported to give Mr Croft authority to direct the transfer by

reason of his status as director and liquidator of Perlake. On 12 October 2015 Mr Croft was recorded as registrant of the Domain Name. This change in registrant did not come to the attention of HH until late in 2017 because the registration was held through a privacy protection service so that Mr Croft was not identified as registrant on the publicly available WHOIS database.

18. Meanwhile, in a letter dated 14 December 2015, Revision Legal on behalf of HH for the third time gave Perlake notice of termination of the 2003 Agreement. On this occasion (unlike the previous two letters) the letter required that the specified breaches be remedied within 30 days. There was again no response from Perlake.

19. A claim form was issued in this Court on 21 December 2017 (not in the present action) by HH against Perlake. A copy was sent to BB Online, which reached Perlake. On 8 January 2018, solicitors identifying themselves as acting for the liquidator of Perlake, without identifying him as Mr Croft, stated that Perlake could not respond because it had been dissolved. This was the first occasion on which HH learned of the dissolution of Perlake. Further information was sought and in a letter dated 28 January 2018 the same solicitors told HH that that Perlake “no longer exists”. The claim against Perlake was not pursued. As I have indicated above, Perlake did still exist under Uruguayan law.

20. HH investigated the Domain Name and was informed by the registrar that Mr Croft was the registrant of the Domain Name and had been so since 12 October 2015.

21. On 31 August 2018 the claim form in the present proceedings was issued by HH.

The arguments in summary

HH's case

22. The claim advanced by HH is broadly as follows. Perlake was in material and irremediable breach of the 2003 Agreement and HH was entitled to terminate. It did so by the letter of 5 August 2015 and the 2003 Agreement came to an end on the letter's deemed dated of service, 11 August 2015. Failing that, the 2003 Agreement was terminated upon service of the letter of 14 December 2015. Upon termination Perlake came under a duty to transfer the Domain Name and the Trade Mark to HH pursuant to the terms of the 2003 Agreement. In consequence of that, HH became the owner in equity of the Domain Name and the Trade Mark. HH is therefore entitled to call for the transfer to it of those rights. No transaction in respect of the Domain Name or Trade Mark since then, even if valid, has disturbed HH's equitable ownership.

Mr Croft's defence

23. Mr Croft denies that Perlake committed any breach of the 2003 Agreement, or that if it did, such breach was either material or irremediable. Mr Croft also says that a domain name is not property in which equitable ownership can arise.

24. A further strand to Mr Croft's defence is that Perlake entered into a loan agreement with Mr Croft dated 1 March 2005 ("the Loan Agreement"). Under the terms of the Loan Agreement Mr Croft loaned money to Perlake. In the event that the loan remained outstanding upon the dissolution of Perlake, any assets owned by Perlake would pass to Mr Croft. When Perlake was dissolved on 5 March 2015, the Domain Name automatically passed to Mr Croft under

the terms of the Loan Agreement. (Mr Croft's evidence focussed on the Domain Name although it seems that if he is correct, the Trade Mark also passed to him at the same time.) By the time the 2003 Agreement was terminated Perlake owned no interest in the Domain Name or Trade Mark which could be transferred to HH. Alternatively, Perlake, by its liquidator – Mr Croft – was entitled to transfer its assets to Mr Croft under Uruguayan insolvency law.

HH's case on the Loan Agreement

25. HH's case in respect of the Loan Agreement is first, that there was no such agreement made on 1 March 2005. It is a recent fiction created by Mr Croft. Alternatively, the Loan Agreement is (a) inconsistent with the 2003 Agreement and (b) contravenes the anti-deprivation principle as explained in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38.

26. Thirdly, even if the Domain Name and Trade Mark were transferred to Mr Croft under the terms of the Loan Agreement or by any other means, Mr Croft took ownership subject to HH's equitable interest.

The principal issues

27. In closing Mr Thompson put his case on the basis that there were four key issues to be resolved, beginning with HH's claim to an equitable interest. The other principal issues he identified were (2) whether there was a material breach of the 2003 Agreement, (3) if so, whether the breach was irremediable and (4) whether the consequence was the termination of the 2003 Agreement.

The 2003 Agreement

28. The 2003 Agreement contained the following terms:

"Definitions and Interpretation

1.1 In this Agreement and the Schedules attached hereto, the following expressions shall have the meanings set out below:

'Assets':	the Blackjack Site, Customer Data, Domain Name and Trade Mark.
'Blackjack Site':	the website currently located at the Domain Name, including all software and designs incorporated in such website to make the website function for the HH Business (other than the rights to the Domain Name and the Trade Mark, and software owned by OddsOn Inc or third party suppliers to be licensed direct to Company under section 3.5 (either by assignment or novation agreements) in place and stead of existing licences with HH).
'Business':	the online business conducted on the Blackjack Site after the Completion Date.
'Commission':	the Commission payable in accordance with Schedule 2.
'Completion Date':	23:59 UK time 29 April 2003

‘Consideration Date’:	the date which the total Commission paid by Company under this Agreement to HH together with the total Fees paid under the Service Agreement (as defined in that Agreement) is equal to the Transfer Consideration.
‘Domain Name’:	the domain name blackjack.com
‘Encumbrance’:	any right or interest of any third party, including any mortgage, charge, lien, option, encumbrance, right of pre-emption or first refusal, or any assignment to create any such right or interest.
‘Existing Players’:	customers who registered on the Blackjack Site prior to the Completion Date.
‘New Players’:	customers who register and/or play on the Blackjack Site after the Completion date (excluding Existing Players)
‘Players’:	collectively, the Existing Players and the New Players
‘Service Agreement’:	the agreement between HH and 6047343 Canada Inc. effective from

the Completion Date for services related to the Blackjack Website

'Trade Mark': the brand name and trade mark Blackjack.com (including any registration or application of such trade mark, any goodwill that HH may have in such trade mark, all statutory and common law rights attaching to such trade mark and the right to take action in respect of past infringements of the trade mark and to retain any damages obtained as a result of such action).

'Transfer Consideration: US $250,000.

…

2 Transfer of Assets

2.1 In consideration for Company agreeing the payments to be made under section 4, HH agrees to sell to Company, free from any Encumbrances.

2.1.1 with effect from the Completion Date, the Blackjack Site and the Customer Data, including by way of assignment all related intellectual property rights; and

2.1.2 with effect from the Consideration Date, the Domain Name and the Trade Mark, including by way of assignment all related intellectual property rights.

…

3.5 The parties acknowledge that this Agreement Is completed in anticipation of Company putting in place its own licence in respect of the Software and any other arrangements with third parties reasonably required to operate the Blackjack Site, In place and stead of any existing licences or other arrangements between HH end such third parties, which licences and arrangements will be cancelled concurrently. If Company fails to notify HH within 28 days of signing this Agreement that such arrangements are in place, this Agreement may be terminated on notice by HH or Company and neither party will be liable to the other in respect of such termination.

…

4 Financial Arrangements

4.1 In consideration of the rights granted to Company under this Agreement, Company shall pay HH the Commission. Such Commission shall be payable by Company in accordance with Schedule 2. Payment of the Transfer Consideration may be accelerated at Company's discretion at any time by the payment of non-refundable Commission in advance (any such accelerated payment to be set off against future Commission).

…

9.2 HH may terminate this Agreement immediately by notice in writing if Company commits a material breach of any of the terms of this Agreement and, if such breach is capable of remedy, fails to remedy the breach within 30 days of receiving notice from HH specifying the breach and requiring the breach to be remedied. In the event of such termination, notwithstanding any other remedies HH may have, HH shall be entitled to all Company rights in the Trade Mark and Domain Name which shall cease, and Company shall promptly notify the relevant naming authority to ensure that Company is no longer nominated as the administration contact in relation to the Domain Name. Furthermore, the Company at its expense shall cause the Domain Name to be transferred back to HH or its nominee within 7 working days of such termination.

…

15. Assignment

15.1 The Company shall not transfer, convey, assign, mortgage or grant an option in respect of or grant a right to purchase or in any manner transfer or alienate (a "Transfer") all or any portion of its interest or rights in the Business or in this Agreement (an "Interest") otherwise than in accordance with sections 15.2 and 15.3 or section 15.5.

15.2 Except in the case of a proposed Transfer of all of its Interest to a subsidiary or holding company of the Company or to a subsidiary of a holding company of the Company, provided that such subsidiary or holding company first complies with section 15.3 herein, the Company shall not transfer an Interest without the prior written consent of HH.

15.3 In the event that the company wishes to transfer an Interest to a third party (the Purchaser"), the Company and the Purchaser shall deliver to HH, prior to the completion of such disposition, an acknowledgement:

15.3.1 by the Purchaser that it agrees to be bound by all of the provisions of this Agreement as if it were an original signatory to this Agreement and

15.3.2 by the Company that it shall not be released from any duties or obligations under this Agreement accrued to the time of such transfer.

15.4 The Company agrees that its failure to comply with the restrictions set out in sections 15.1 to 15.3 would constitute an injury and result in damage to HH impossible to measure monetarily and, in the event of any such failure, HH shall, in addition and without prejudice to any other rights and remedies at law or in equity, be entitled to injunctive relief restraining or enjoining any sale of any Interest save in accordance with the provisions of sections 15.1 to 15.3, and if the Company intends to make a sale or is making a sale contrary to the provisions of sections 15.1 to 15.3, it hereby waives any defence it might have in law to such injunctive relief.

15.5 The Company may at any time sell an Interest to any third party without the prior consent of HH if, and only if, on the closing of such sale the Company pays HH a sum equivalent to:

15.5.1 the greater of (i) 6.25% of the gross proceeds of such sale and (ii) US$600,000; minus

15.5.2 total Commission received by HH under this Agreement together with total Fees paid under the Service Agreement (as defined in that Agreement);

including for the avoidance of doubt payment of the Transfer Consideration to HH on or before the closing of such sale. Upon the payments referenced above being made to HH, this Agreement shall be deemed to have terminated.

15.6 After the Consideration Date, HH has the right to assign its interest in this Agreement, provided HH notifies the Company to that effect.

…

Schedule 2

1 In this Schedule, the following expressions shall have the following meanings:

‘Applicable Percentage’: 20% of Net Revenue received from Existing Players and 6.25% of Net Revenue received from New Players calculated calendar monthly in US dollars;

‘Net Revenue’: means the total wagers placed on the Blackjack Site, less: [provisions for deductions].

…

2. Commission Share

2.1 Company shall keep true and accurate books and records of all its operations and activities in respect of the Business, including in respect of the Service Agreement. Such books and records shall be kept in accordance with generally accepted accounting principles consistently applied.

2.2 The Company shall not less than three months after the fiscal year end of the Business deliver to HH financial statements for the Business audited in accordance with generally accepted accounting principles consistently applied.

2.3 Company will pay to HH as a commission in respect of the Business the Applicable Percentage of Net Revenue monthly in arrears within 30 days of the end of the relevant month, and with such payment it shall provide HH with a full set of financial statements for such month in respect of the Business. On receipt of payment, HH will issue and provide to Company a receipted invoice.

…

2.5 Company will in good faith with appropriate due care and attention provide HH with a financial summary monthly of Players' activity (reflecting on each Players activity throughout the relevant month) at the same time as it makes payment of the Applicable Percentage of Net Revenue showing details of all transactions on the Blackjack Site so that HH may verify the amounts received."

The witnesses

HH's witnesses of fact

29. I heard evidence on behalf of HH from Messrs Pinkowski, Little and Whitney. Mr Thompson did not criticise any of them as witnesses and I think he was right not to. They gave direct answers to the questions put to him although for their various reasons, each did not always remember events clearly.

30. There was also a witness statement from Razi Mireskandari, who is the Managing Partner of Simons Muirhead and Burton LLP, the solicitors acting for HH. He was not cross-examined and I was told at the start of the trial that his evidence of primary facts was not challenged, but that there may be criticisms of inferences he sought to draw. In the event neither side made any significant reference to Mr Mireskandari's evidence.

Mr Croft's evidence of fact

31. Mr Croft relied only on his own evidence of fact. Mr Hill described Mr Croft as an intelligent man who gave his evidence in a calm and collected way. I agree. However, Mr Hill submitted that I should reject Mr Croft's evidence in relation to two matters about which there was significant argument. One concerned the Loan Agreement and the other concerned the existence or otherwise of documents relating to income from the business and whether Perlake had been in breach of the 2003 Agreement. I will return to those two matters below.

32. Mr Hill submitted that less central matters also showed that Mr Croft was not a reliable witness. I will give two of the clearer examples. First, Mr Croft used

the name “Simon Black” when providing administrative details in relation to the Domain Name. Mr Croft’s explanation for this in cross-examination was that he wished to identify emails intended for the registrant of the Domain Name as opposed to being directed to him personally so that he could deal with them quickly or not at all. I accept that this was Mr Croft’s strategy and that there is nothing inherently wrong in that. However, in his first witness statement Mr Croft said:

> “80. HH alleges that I have used the name ‘Simon Black’ when providing administrative details in relation to the Domain Name. That is not correct. I have never been known by that name and I have never referred to myself as Simon Black. I have no idea where this rather bizarre notion has come from.”

33. In cross-examination Mr Croft sought to distinguish using “Simon Black” for purposes of privacy and using the name to hide his own identity. That is a fine distinction. Mr Croft’s paragraph 80 does not suggest to me that his first instinct is to give full and honest evidence in relation to matters raised in this case.

34. Similarly, there was a letter dated 5 October 2018 written by solicitors acting on Mr Croft’s behalf in response to the issuing of the present proceedings. The letter states that Mr Croft has not lived in the UK since 2010. The same solicitor filed a witness statement on behalf of Mr Croft on 8 October 2018 seeking to set aside service of the claim form, stating Mr Croft “has lived in Portugal since May 2010, making only intermittent visits to the UK since that date.” Yet in cross-examination Mr Croft said that by October 2018 he had returned to the

UK for lengthy periods on a regular basis for two years because he had medical issues. During this time he set up a company in the Isle of Man and for that purpose he had stated that he had a UK address.

35. I gained the impression that Mr Croft was not a reliable witness. He was someone willing to be flexible in his evidence, depending on the perceived need at the time. Aside from the two examples on peripheral matters I have given, there were more central reasons for reaching that conclusion, as I will explain below.

The expert evidence on Uruguayan law

36. Guillermo Duarte Zanoni provided expert evidence on Uruguayan law on behalf of HH. Dr Duarte heads the corporate practice of Bergstein Abogados, a law firm based in Montevideo which specialises in corporate and tax law.

37. Expert evidence on Uruguayan law on behalf of Mr Croft came from Alejandro Miller, who is a partner in the Montevideo firm Guyer & Regules. Professor Miller specialises in banking and corporate work and is a professor at the law school of the University of Montevideo and as the School of Law of the State University of the Republic.

38. I found both to be clear and very helpful. The experts provided a joint report dated 22 June 2020.

Experts in forensic investigation

39. Part of HH's case was that the Loan Agreement had been created much later than the date on which Mr Croft says it was created, namely 26 February 2005

and the few days following. Experts in forensic investigation of were called. Rish Auckburally gave evidence for HH. He is a Senior Digital Forensic and Incident Response Consultant employed by 3B Data Security Ltd. Benjamin Hanson, who gave evidence on behalf of Mr Croft, is a Director of Digital Forensic Investigations within the Data & Technology practice of Ankura Consulting (Europe) Limited. Both were good witnesses. They provided a useful joint statement dated 14 July 2020.

Whether Perlake was in material breach of the 2003 Agreement

The law on material breach

40. HH's right to terminate the 2003 Agreement arose under clause 9.2 only if there was a material breach of any of the terms of the 2003 Agreement.

41. Mr Thompson referred to *National Power plc v United Gas Company Ltd*, an unreported judgment dated 3 July 1998 in which Colman J addressed the meaning of "material" in a clause permitting a party to a contract to give notice of termination in the event of a material breach. Counsel for the plaintiff ("NP") argued that material meant repudiatory. Counsel for the defendants argued that it meant significant, or of some seriousness, but not repudiatory. The judge considered the decision of the House of Lords in *The Antaios* [1985] 1 WLR 191 and the judgment of Neuberger J in *Glolite Ltd v Jasper Conran Ltd*, Times, 21 January 1998, and summarised his conclusions in this way (at p.63):

> "For these reasons I am unable to accept NP's submissions on construction and I conclude that a material breach under clause 17.1.1 is one which in all the circumstances is wholly or partly remediable and is

or, if not remedied, is likely to become, serious in the wide sense of having a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms.”

42. Mr Hill did not challenge that paragraph as representing an accurate summary of the effect of the word “material” in clause 9.2 of the 2003 Agreement.

Whether there was a material breach

43. The following are the pleaded alleged breaches of the 2003 Agreement by Perlake (using the definitions set out in the 2003 Agreement):

(1) Perlake did not at any time deliver to HH financial statements for the Business in accordance with generally accepted accounting principles, in breach of clause 2.2 of Schedule 2.

(2) Perlake did not at any time pay to HH commission in accordance with clause 4.1, in breach of clause 2.3 of Schedule 2.

(3) Perlake did not provide at any time a full or any set of financial statements, in breach of clause 2.3 of Schedule 2.

(4) Perlake did not at any time provide HH with a monthly or any financial summary of Players’ activity, showing details of all transactions on the Blackjack Site so that HH could verify the amounts received, in breach of clause 2.5 of Schedule 2.

44. Mr Croft’s pleaded defence to these alleged breaches is as follows:

(1) Instead of financial statements HH was provided with access to an online "back office" support service. This provided real time data and financial statistics regarding the Website on demand. HH never raised any issue with this alternative. To the extent that it constituted a breach of clause 2.2 of Schedule 2, the breach was waived by HH by reason of the fact that HH was content to use the superior information provided by the back office.

(2) Commission was paid to HH in respect of the first two years of operation of the Website. Thereafter the Website generated no revenue. Very shortly after the Website was acquired, the United States implemented legislation design to forbid or limit online gambling. This had a major impact on income because the United States had been the primary market.

(3) Access to the Back Office fulfilled the obligation to provide financial statements.

(4) Mr Croft pleaded that he was unable to comment about the alleged breach of clause 2.5 of Schedule 2 to the 2003 Agreement.

45. In an email from Mr Little to Mr Croft dated 12 June 2006, Mr Little asked for a summary of their conversation regarding, among other things, back office access and a payment schedule. It is apparent from an email sent by Mr Little to Mr Whitney the next day that they did not have back office access and that Mr Little did not trust Mr Croft. Subsequent emails to Mr Croft in October, November and December 2007 indicate that back office access had still not been

provided to HH. I give an example: an email dated 1 December 2007 from Mr Whitney to Mr Croft:

> "Simon, I have run out to excuses for my lack of info re BJ.com. My investors can not believe that we do not have the info we are supposed to have for our royalty payment. They think I am being negligent in my duty as there representative. Therefore I am coming to London to get ANSWERS. I am arriving on Dec 8th and am available the 9th, 10th & 11th to meet with you to straiten this out. We are not going away so you might as well deal with this now. Please confirm the earliest time we can meet. Please have all records and the monies owed for my review. Thanks. Joseph."

46. An email dated 28 December 2007 from Mr Whitney to Mr Croft indicated that they met and that Mr Croft provided a log in for the back office. Mr Whitney said that it did not work which is consistent with an email dated 2 July 2008 in which he said that his technician could not get into the blackjack site. Emails indicate that HH was still not satisfied in 2009. In one dated 29 September 2009 from Mr Little to Mr Croft, Mr Little said:

> "We ask you that you please provide us with the appropriate accounting of these customers that you are being diverting to other gaming sites – as well as the accounting for the site overall.
>
> Your back-end reporting system, as far as we can see, has never worked. Under the terms of our agreement you are to provide us with ongoing accounting of the revenues, which we still have not received.

..

> Five months ago you told me that we would be getting paid in three months. That never happened.
>
> It seems a little odd that we receive virtually no contact from you, no payments, yet according to Gambling Online, Blackjack.com is the 2008 gaming site of the year?
>
> It's been over 5 years now and you have not been able to make a success out of this project. I continue to leave messages for you and get no response. As well, no response to emails.
>
> We would appreciate a formal update from you with appropriate accounting and a concise plan moving forward."

47. I was shown no response to this email, Mr Croft's silence having apparently been in line with a lack of response to some earlier emails sent to Mr Croft.

48. There is a record of Mr Croft contacting Mr Pinkowski on 4 August 2010. Mr Croft's email began "It is indeed a long time since we last spoke". He then provided a UK mobile phone number and said "You can also still access the reports on the back office", providing a link and security credentials for accessing the web page.

49. There is no recorded response from Mr Pinkowski in this chain of emails until 4 August 2014, 19 August 2014 and again on 4 September 2014, on each occasion asking Mr Croft to call him. The next email in this chain was not until 3 June 2015, again from Mr Pinkowski to Mr Croft:

> "Can I get an audited financial statement from you in regards to Blackjack.com. It has been years since we got one. Many more years since we received a payment."

50. It was put to Mr Pinkowski in cross-examination that the four year gap between Mr Croft's email of 4 August 2010 and Mr Pinkowski's email of 4 August 2014 indicated no desperate desire on the part of HH to get financial reports. Mr Pinkowski said:

> "I was very frustrated with Simon, and unfortunately a lot of my emails prior to 2009 disappeared when Hotmail changed the rules, but no, there was phone calls, 100 per cent, I probably talked to him on Skype chat, so we had – I would communicate with Simon, but there was a great deal of frustration. I do want to say, that was an error, that 3 June 2015, 'Can I get an audited financial statement? It has been years since we got one.' We never got an audited financial statement not once – not once, from him. So, there was frustration absolutely there was frustration."

51. Mr Whitney's evidence was that HH gained brief access to the Website at some point before July 2008. Mr Pinkowski said that he only accessed the back office once and found not audited statements but a mishmash of information which made no sense. He confirmed this in cross-examination.

52. Mr Croft insisted in cross-examination said that back office access was working for HH from 2005 onwards, although there were software changes and successive changes to access codes

53. I find HH's evidence regarding the back office a good deal more persuasive than that of Mr Croft. I accept Mr Pinkowski's evidence that HH had only brief access to the back office and that it revealed nothing of which he could make sense. It is consistent with the email exchanges between April 2005 and August 2010 which also show that Mr Croft must have been aware that in this period HH had for the most part not been able to access the back office and were in any event not satisfied that it was receiving the accounting information it required under the 2003 Agreement. It is true that there was an email silence of 4 years after August 2010 but a reasonable person in the shoes of Mr Croft should have been making some effort to ensure that HH was receiving the information it plainly wanted. He did not. I accept, in any event, Mr Pinkowski's evidence that there were other communications during this period when Mr Croft was made aware of Mr Pinkowski's frustration at the lack of information.

54. HH had access to information from the back office for a brief period only and even then it was not intelligible. At no point would a reasonable person in the place of Mr Croft have understood that this was an arrangement satisfactory to HH and which HH had accepted in lieu of financial records. Mr Croft did not point to any communication from HH which suggested otherwise.

55. In my view Perlake was in persistent breach of clauses 2.2, 2.3 and 2.5 of Schedule 2 by failing to provide financial statements and details of transactions on the Website as required by those clauses.

56. As to the materiality of that breach, it seems to me that Perlake's failure to provide the appropriately audited financial statements regarding the Business

and details of Player's transactions on the Website undoubtedly had a serious effect on the benefit which HH was entitled to derive from the performance of the 2003 Agreement. An important aspect of that benefit was the provision of information by which HH could assess whether it was receiving the correct sums by way of commission, or, after the first two years, whether the Business truly earned no money so that no commission was due to HH. The breach was material.

Whether the breaches were irremediable

57. HH relies on its letter of 5 August 2015 or, failing that, its letter of 14 December 2015. The difference is that the former letter did not state that HH required the breaches to be remedied. It was common ground that the August letter was effective to terminate the 2003 Agreement only if at least one of the breaches specified was incapable of remedy. Those alleged breaches were Perlake's failure to keep records of the operation of the Business, to provide audited statements and to pay appropriate commission.

58. HH submitted that they were incapable of remedy for two reasons. The first was that Perlake had not only failed to supply HH with the financial records required under the 2003 Agreement, it had not even created any. Therefore in August 2015 there was no information available from which Perlake could retrospectively provide the audited statements.

59. Mr Croft's pleaded case does not appear to dispute that he failed to keep financial records of the Business for a substantial part of the time during which it was conducted. There was no evidence of any alternative source of the relevant financial information. Mr Croft's evidence in chief was that the entry

into force of the Unlawful Internet Gambling Act in the United States in October 2006 stopped the US business. Thereafter Mr Croft used the Website as an affiliate site, i.e. directing visitors to the Website to other gambling websites in return for 30% of the net gambling revenue. Mr Croft estimated that gross monthly income for the period in which the site operated as an affiliate site never exceeded US$7,000 and fell as low as $1,500 per month. He said that there was no point in sending the records to HH after activity on the website fell following the change to the US legislation and that in any event HH had access to back office information.

60. In cross-examination Mr Croft said that some books and records were kept in respect of the Business. He said that about three years of audited figures were produced by BOO Stoy Hayward, but after that nobody seemed interested. Mr Croft took the view that if HH had really wanted audited accounts it would have asked for them. Yet the evidence shows that HH did repeatedly ask.

61. It was put to Mr Croft was that no financial records were kept, or at least not for the whole of the period during which the Business was conducted and that in August 2015 it would not have been possible to remedy Perlake's breaches of the 2003 Agreement by producing records which did not exist. Mr Croft had no satisfactory answer.

62. The only evidence in support of Mr Croft's claim that he kept any financial records at all was Mr Croft's own assertion. There was no evidence from anyone who may have seen them or who drew them up or assisted in doing so. If Mr Croft by himself had gone to the trouble of creating them, I see no reason why he would not have sent them to HH. On balance I do not believe that

financial records were kept for at least part of the time that the Business was in operation. Perlake's failure to supply the records could not have been remedied in August 2015.

63. HH ran an alternative argument on irremediability: the breaches were not remediable because Perlake was in liquidation in August 2015. However, Dr Duarte confirmed that Perlake's status would not, as a matter of Uruguayan law, have prevented the liquidator, in the person of Mr Croft once he had been appointed, from obtaining the records and providing them to HH. On the other hand, it was not made clear that the overdue commission revealed by such records, whatever it was, could have been paid as required by clause 2.3 of Schedule 2.

64. I take the view that the breaches of the 2003 Agreement identified in the letter of 5 August 2015 were both material and irremediable. Pursuant to clause 9.2, the 2003 Agreement was terminated on the deemed dated of service of the letter, 11 August 2015.

The effect of termination

65. HH's pleaded case and Mr Hill's argument in opening was that upon termination the equitable interest in the Domain Name and Trade Mark became vested in HH, such that they became entitled to call for the assignment of those rights.

66. In closing Mr Hill advanced a new primary case which was that upon termination, the effect of clause 9.2 was to transfer all interests, legal and

equitable, in the Domain Name and Trade Mark to HH. I do not think it makes any practical difference and I will address only HH's pleaded case.

The arguments

67. Mr Hill submitted that the position in relation to a domain name is analogous to that in relation to a registered trade mark: a valid agreement by which a party is entitled to require the assignment of a trade mark upon the occurrence of a specified event will create an equitable interest in the trade mark on the part of the intended assignee when that event occurs.

68. Mr Thompson's response was that clause 9.2 created a contractual right on the part of HH in the event of termination, nothing more. He drew an analogy alternative to Mr Hill's: a domain name is like a telephone number, consisting of alphanumeric characters which, when applied, directs internet communications to a particular website. A domain name, like a phone number, is not an item of property. In consequence, unlike a trade mark, no equitable interest in it can be created. Mr Thompson conceded that there can be property in goodwill and that this part of his argument was directed only to the Domain Name.

69. I do not accept Mr Thompson's analogy. Phone numbers are not generally bought and sold. There may be possible exceptions to this depending on the contractual arrangement with the phone company, but there is no doubt that a domain name can be freely traded. The present case is a prime example.

70. However, Mr Hill's case on the creation of an equitable interest does, it seems to me, rest on establishing that a domain name is personal property. He relied

on the decision of the House of Lords in *OBG Ltd v Allan* [2007] UKHL 21. One of the many issues in the appeal arose from an allegation of conversion. In his opinion Lord Hoffmann, obiter but for the majority, expressed the view that a domain name may be intangible property. I will quote the whole of the relevant paragraph to put his observation into context:

> "[101] Mr Randall relied upon authorities in Canada and the United States. I can find no discussion in the Canadian cases of whether a claim for conversion can be made in respect of a chose in action. These cases are analysed by Peter Gibson LJ in his judgment in the Court of Appeal [2005] QB 762, 777-778 and I do not think that I should lengthen this judgment by adding to his comments. For the reasons which he gives, I derive no assistance from them. There are certainly cases in the United States which support Mr Randall's submission and which form part of the profligate extension of tort law which has occurred in that country. Perhaps the most remarkable is the decision of the Federal Court of Appeals (9th Circuit) in *Kremen v Online Classifieds Inc* (2003) 337 F 3d 1024, in which it was held that a publicly-funded company which provided gratuitous registration of internet domain names could be liable in conversion, on a footing of strict liability, for transferring a registered name to a third party, having acted in good faith on the authority of a forged letter. The court held that the domain name was intangible property which could be converted in the same way as a chattel and that the registration company could be liable for its value. I have no difficulty with the proposition that a domain name may be intangible property, like a copyright or trade mark, but the notion that a registrar of such property

can be strictly liable for the common law tort of conversion is, I think, foreign to English law."

71. In *Tucows.com Co v Lojas Renner SA* 106 O.R. (3d) 561, [2011] ONCA 548, the Court of Appeal of Ontario ruled on an action brought by the plaintiff for a declaration that it had not registered or used a domain name in bad faith and that the Brazilian defendant was not entitled to the transfer of the domain name. Weiler JA set out a detailed review of judicial and academic consideration in several jurisdictions (including England, mentioning *OBG*) as to whether a domain name constitutes property, at [41]-[66]). She reached the firm conclusion that it does.

72. Mr Thompson directed my attention to the judgment of the Court of Appeal in *British Telecommunications plc v One in a Million Ltd* [1999] 1 WLR 903. This was a passing off case in which the Court of Appeal ruled that the use of a domain name incorporating the well-known name of a corporation could be restrained at the instigation of the corporation where use of the domain name threatened to represent falsely that it was owned by or associated with the corporation. The injunction granted at first instance, restraining the defendants from using, offering for sale, selling or otherwise transferring the domain names in issue to another party, was upheld. Mr Thompson submitted that this does not square with a domain name being property since the effect of the order of the Court of Appeal would then have been to divest the defendants of property, raising issues of sequestration of assets or a violation of rights in private property contrary to the Human Rights Act 1998.

73. I fail to see why an injunction restraining the use or transfer of a domain name would engage the Human Rights Act 1998 or raise issues of sequestration of assets if one assumes that a domain name is intangible property. It would make equally little sense in the context of an injunction to restrain the use or transfer of a registered trade mark. Section 22 of the Trade Marks Act 1994 provides that a registered trade mark is personal property.

74. I find the analysis of Weiler JA in *Tucows.com* entirely persuasive and agree that a domain name is intangible personal property.

75. So far as goodwill is concerned, it is well established that goodwill is intangible personal property which may be assigned from one entity to another, see for example *Reuter v Mulhens* [1954] Ch 50.

76. That being so, subject to one important matter, I find that upon termination of the 2003 Agreement, the effect of clause 9.2 was to create an equitable interest owned by HH in the Domain Name and Trade Mark. (No issue of the conflict of laws was raised; I need only apply English law.)

77. The one matter is whether Perlake owned any interest which could be transferred to HH at the date of termination, to which I turn under the next heading.

The effect of the Loan Agreement

78. Mr Croft contends that HH cannot have acquired an equitable interest in the Domain Name from Perlake upon the termination of the 2003 Agreement on 11 August 2015 because by that time all interests in the Domain Name had passed to Mr Croft on the date of dissolution of Perlake, 29 January 2015, by the effect

of the Loan Agreement as concluded on 1 March 2005. The transfer of the Domain Name to Mr Croft as owner was formalised on or about 12 October 2015 following Mr Croft's instruction on that date, as liquidator of Perlake, to transfer the registration of the Domain Name to himself.

79. In the Loan Agreement "The Lender" is Mr Croft and "the Borrower" is Perlake. It begins with an "introduction":

> "A) The Borrower intends to borrow $250,000 (United States Dollars) ("loan") from the Lender in order to accelerate payments of the "Transfer Consideration" relating to the acquisition of the Assets defined by the Website Transfer Agreement between the Borrower and Hanger Holdings Ltd dated 25th April 2003.
>
> B) The Lender intends to loan $250,000 (United States Dollars) ("loan") to the Borrower on the terms set out herein, and the Borrower intends to repay the Loan to the Lender.
>
> C) Both parties agree to keep, perform and fulfil the undertakings and conditions set out in this Agreement."

80. Following an immaterial clause on definitions and interpretation, the Loan Agreement continues:

> "2) Loan Amount
>
> 3) The Lender undertakes to loan $250,000 (United States dollars) to the Borrower and the Borrower undertakes to repay this

principle amount to the Lender, without interest payable on the unpaid principal.

4) Payment

5) This Loan is repayable within 30 days of the Lender providing the Borrower with written notice of demand.

6) Default

a) Notwithstanding anything to the contrary in this Agreement, if the Borrower defaults in the performance of any obligation under this Agreement, then the Lender may declare the principal amount owing at that time to be immediately due and payable.

b) If the principal amount has not been repaid, the principal amount owing will be automatically converted without notice into consideration for the sale of any of the Assets still owned by the Borrower to the Lender and ownership of those Assets will pass to the Lender if any of the following events occur: -

i) the Borrower defaults in payment as required under this Agreement or after demand for 10 days

ii) Upon the institution by or against the Borrower of insolvency, receivership, liquidation or bankruptcy proceedings or any other proceedings for the settlement of the Borrower's debts

iii) Upon the Borrower making an assignment for the benefit of creditors

iv) Upon the Borrower's dissolution

7) Governing Law

a) The Agreement shall be governed by and construed in accordance with the laws of England and the parties submit to the exclusive jurisdiction of the English Courts."

HH's case on the Loan Agreement

81. Mr Hill's first submission was that HH had acquired its equitable interest by reason of the 2003 Agreement on the date of that Agreement, 29 April 2003. As I understood him, Mr Hill argued that the contingent contractual right which HH had as against Perlake to ownership of the Domain Name and Trade Mark was a contingent equitable interest in the Domain Name and the Trade Mark. This contingent equitable interest was retained by HH even if there was an assignment of all interests in the Domain Name and the Trade Mark by Perlake to another party. Mr Hill offered no authority in support of this proposition, in the absence of which I take it no further.

82. Mr Hill’s alternative and principal argument was that the Loan Agreement was a sham and could not have validly transferred the Domain Name and Trade Mark to Mr Croft.

Mr Croft’s evidence

83. In his first witness statement Mr Croft said that Perlake did not have the cash necessary to pay the consideration due to HH under the 2003 Agreement and needed a loan. Nerex, Mr Croft’s other gambling business, had the money. Mr Croft drafted the Loan Agreement himself, using a template, without any legal advice. He did not feel the need to share the document with anyone. The amount loaned was $250,000, even though the consideration remaining due to HH was only $207,500, so that Perlake could use the remainder for any on-going operating costs.

84. The presentation of the NAF Complaint led Mr Croft to discover that Perlake had been dissolved. It was incumbent upon Mr Croft as liquidator to pass Perlake’s assets to its shareholder, i.e. to himself. In addition, as the Lender under the Loan Agreement he was entitled to take ownership of the Domain Name.

The expert evidence

85. There was detailed expert evidence addressing the question whether the Loan Agreement was truly created in the days leading up to 1 March 2005, as Mr Croft contended. Messrs Auckburally and Hanson each applied their expertise in order to try to reach a firm opinion, particularly in respect of the metadata of a key document, as to the date on which a key draft of the Loan Agreement had

been created. It is sufficient for me to record the conclusion agreed by them in their Joint Statement of 14 July 2020:

> "19. There is no evidence in the metadata of the documents examined to refute that the file 'LOAN AGREEMENT.dom' was created on 26th February 2005 at 0905."

Anomalies in Mr Croft's evidence

86. Mr Hill submitted that there were several anomalies in Mr Croft's evidence and that there were other objections to his case regarding the Loan Agreement.

87. First, the Loan Agreement purported to loan the sum of $250,000 when the sum due to HH from Perlake was only $207,500. This, Mr Hill submitted, was consistent with Mr Croft many years later having forgotten that he had agreed with Mr Pinkowski that only $207,500 remained due. Mr Croft's answer in his first witness statement was that the remaining $42,500 was for Perlake's operating costs. But in cross-examination Mr Croft said that Perlake did not have a bank account, implying that it did not conduct any day-to-day business.

88. Secondly, Mr Croft produced no bank statements to evidence his payment to Perlake. Nor was there evidence to show payment from Nerex, the real source of the money, to Mr Croft.

89. Thirdly, in cross-examination Mr Croft accepted that the payment of the $207,500 to HH came from Nerex, not Perlake. It follows that there was no need for Mr Croft to have advanced a loan to Perlake.

90. Fourthly, Mr Hill referred to the description by Mr Croft in his second witness statement of the Loan Agreement having been a loan facility made available to Perlake. That would explain why there was no transfer of funds from Nerex to Mr Croft and from Mr Croft to Perlake. But the Loan Agreement is not drafted to be a loan facility. It is clearly an undertaking by Croft to lend Perlake $250,000, to be repaid in due course without interest.

91. Fifthly, Mr Hill submitted that the Loan Agreement was not consistent with clause 15 of the 2003 Agreement. Under clause 15, in the event that Perlake wished to transfer an interest (which would include Perlake's interest in the Domain Name and/or the Trade Mark) to a third party, prior to such disposition Perlake was required to deliver to HH an acknowledgment by the prospective acquirer of the interest that it was bound by the provisions of the 2003 Agreement. In addition, Perlake waived the right to defend injunctive relief to restrain a sale of an interest in breach this restriction. Alternatively, Perlake could sell an interest without HH's consent provided it paid HH a considerable sum of money as calculated according to clause 15.5. In argument this was estimated at $350,000 if the Domain Name were sold.

92. When challenged with clause 15 in cross-examination, Mr Croft said that when he drafted the Loan Agreement in late February 2005 he was extremely careful to deal with that clause. His idea had been that when Perlake managed to gather $350,000, he would recall his loan to Perlake, Perlake would pay HH $350,000 and he would receive the Domain Name.

93. Sixthly, according to Mr Croft, he learned of the dissolution of Perlake on 10 September 2015 from his Uruguayan lawyers, Hughes & Hughes. There was

correspondence between Mr Croft and Hughes & Hughes in which Mr Croft was informed of a potential liability to the Uruguayan tax authorities of 50% of the assets owned by Perlake. In cross-examination, for the first time Mr Croft said that he discussed the Loan Agreement with Hughes & Hughes but did not send them a copy. Mr Hill submitted that had the Loan Agreement been genuine, it is not to be believed that Mr Croft, acting honestly, would not send the Loan Agreement to his lawyers in order to obtain their advice about the tax implications.

94. Mr Croft did not provide convincing answers to any of these points.

95. Mr Thompson's submission on the Loan Agreement was confined to saying that the experts were unable to say whether or not it had been drafted in the days before 1 October 2005 and that HH had therefore failed to prove this aspect of its case.

96. As mentioned above, Mr Hill also advanced an argument that the Loan Agreement could not have given rise to the transfer of the Domain Name to Mr Croft, based on the English rule of anti-deprivation, i.e. the rule to restrain measures having the effect of depriving a bankrupt of property which would otherwise be available for creditors, see *Belmont Park Investments*. But here the party in question had not been declared bankrupt; it was a dissolved Uruguayan company in liquidation, albeit an entity still in being. Even assuming that the rule would have applied to the present facts had they consisted of a purely English context, there is the difficulty that on the present facts issues regarding the conflict of laws arise. These were touched on only briefly by counsel and I need not take them forward.

Discussion

97. This was another instance in which Mr Croft's case depended wholly on his own evidence. He said that he drafted the Loan Agreement himself and told no one about it until after September 2015 so there was no other individual who could confirm his account. There was no evidence from Hughes & Hughes regarding any discussion of the Loan Agreement with Mr Croft. There were no documents to support his account.

98. Individually the anomalies listed by Mr Hill do not prove that Mr Croft was not telling the truth about the Loan Agreement. But taken collectively, they suggest to me that Mr Croft was not telling the truth. I do not believe that he was.

99. I find that the Loan Agreement was created by Mr Croft in or around September 2015 as a means of avoiding the position he then found himself to be in: the possible loss of the Domain Name and the Trade Mark as a result of the breach of the 2003 Agreement and the dissolution of Perlake.

Conclusion

100. By reason of the termination of the 2003 Agreement on 11 August 2015, HH acquired an equitable interest in the Domain Name and the Trade Mark. No transaction or purported transaction since then has deprived HH of that equitable interest. HH remains entitled to call for the assignment to it of the legal interest in each of those rights and related relief.