JERSEY / JUDGMENT

Rep of Harbour -v- Orb [2016] JRC 171 (28 September 2016)

[2016] JRC 171

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judgment

the commissioner: 1. The representor ("Harbour") applies to the Court for a letter of request to be issued to the English High Court seeking the making of an administration order with respect to ORB a.r.l. ("ORB"). 2. Harbour is an exempted limited partnership registered in the Cayman Islands and which is in the business of providing litigation funding to third parties. ORB is a Jersey registered company, the sole director and shareholder of which is Dr Gail Cochrane, who resides at Steephill, St Saviour's Hill, Jersey where ORB has its registered office. 3. The history is set out in some detail in the interlocutory judgment of Popplewell J dated 15 th April, 2016, ORB a.r.l. & Ors-v-Ruhan & Ors

[2016] EWHC 850 (Comm) and our summary of the background is derived in large part from that judgment as well as from the affidavit evidence before us. 4. Following a corporate reorganisation in August 2002, ORB became the holding company of a group with interests in hotels, commercial and warehouse properties, transport and logistics businesses and venture and private capital. 5. Between August and November 2002, Dr Gerald Martin Smith, the former husband of Dr Cochrane and then the chief executive of ORB, stole approximately £35M from Izodia plc, a company in which ORB held a 29.9% shareholding and misapplied the bulk of those monies for ORB's benefit. As a result of investigations by the Serious Fraud Office, Dr Smith personally faced criminal sanctions, and by early 2003, Izodia had also brought proceedings against ORB and Dr Smith for recovery of the sums transferred from Izodia's bank account. Once the theft had been discovered ORB sold a substantial proportion of its assets to Mr Andrew Joseph Ruhan, and companies associated with and/or controlled by him ("the ORB assets"). 6. In 2004/5, the ORB assets were transferred by Mr Ruhan into a complex structure involving numerous (over 100) companies ultimately owned by the trustee of an Isle of Man settlement ("the Arena Settlement"). 7. In April 2006, Dr Smith pleaded guilty to a number of charges relating to the theft of Izodia's monies and was subsequently sentenced to 8 years in prison. This was not his first conviction; in 1993 he was convicted of fraud in relation to a sum of £2M, and sentenced to 2 years' imprisonment. 8. In 2007, a confiscation order was made in England against Dr Smith in the sum of approximately £41M and two partners of KPMG were

appointed enforcement receivers to recover the debt. 9. On 27 th October, 2012, shortly after Dr Smith's release from prison, proceedings were commenced by ORB and two others, whose role appears to have been minor, (together "the Claimants") in the High Court against Mr Ruhan ("the English proceedings"), alleging that in the sale of the ORB assets to Mr Ruhan, there was an oral agreement, not reflected in the sale documentation, that ORB would share in the assets sold and the profits made from their development by Mr Ruhan. It was asserted that in breach of that oral agreement, Mr Ruhan had sought to conceal the ORB assets in the complex structure of the Arena Settlement, sold them for his own benefit and failed to account for the share of the profits due under the oral agreement. 10. The Claimants agreed with Dr Smith that in return for his cooperation and assistance in the English proceedings, they would transfer to him 50% of the sums recovered up to the amount owing by Dr Smith under the confiscation order. Popplewell J. said there was good reason to believe that he was the driving force behind the prosecution of the English proceedings (paragraph 15 of his judgment). 11. Initial funding for the prosecution of the English proceedings came from the second respondent ("Litigation Capital"), a New York based entity owned, it would seem, by Dr Smith's brother, Mr Anthony Smith. 12. On 10 th July, 2013, Harbour entered into an agreement with the Claimants ("the Funding Agreement") to provide litigation funding. Under the Funding Agreement, any proceeds from the English proceedings were to be utilised (after payment of certain disbursements):- (i) firstly, in the payment to Harbour of the legal costs it had funded; and (ii) secondly, in paying to Harbour a share of those proceeds calculated by reference to a formula set out in schedule 2. 13. The monies due to Harbour under the Funding Agreement are secured by:- (i) A debenture giving Harbour fixed and floating charges over the whole, or substantially the whole, of ORB's property. (ii) A guarantee by Dr Cochrane which is in turn secured by a security interest agreement over the shares in ORB. 14. Ancillary proceedings were then commenced in the Isle of Man by Dr Cochrane against Mr Simon Cooper and Mr Simon McNally, who had been cited as parties to the English proceedings. They are described by Popplewell J as Mr Ruhan's former solicitors and trusted business advisers who were the discretionary objects under the Arena Settlement. 15. The Isle of Man proceedings were settled by deed dated 17 th December, 2013, entered into between Dr Cochrane, Mr Cooper and Mr McNally ("the Isle of Man Agreement"). The effect of the Isle of Man Agreement was for Mr Cooper and Mr McNally to procure the transfer by the trustee of the Arena Settlement to Dr Cochrane of control of assets held both within the Arena Settlement and outside it. It is noteworthy that under the provisions of the Isle of Man Agreement Dr Cochrane acknowledged having received £10M on 15 th November, 2013, from Mr Cooper and Mr McNally, which she agreed was to be applied towards the settlement consideration payable to her. 16. ORB is expressly written out of any benefit from these arrangements which were undertaken, apparently, without the knowledge of Mr Ruhan. On learning of these arrangements, he counter-claimed in the English proceedings for what he contended was a misappropriation of the assets transferred to Dr Cochrane. In his original defence, when he was seeking to avoid interference in his business affairs, he had said that he had no beneficial interest in the

Arena Settlement assets. Once it had emerged that Dr Cochrane had acquired the assets as a result of the Isle of Man Agreement, he asserted that the assets were in reality his. 17. Popplewell J made this comment at paragraph 16 of his judgment:- "That is to say, rather than awaiting the outcome of the action, the Claimants have taken matters into their own hands and have taken control of such of the Orb Assets and/or their allegedly traceable proceeds as were in the Arena Settlement without waiting for the trial." 18. Quite how Dr Cochrane was able to achieve this result is not clear to us from the documents we have seen. 19. Popplewell J put the value of the assets transferred to Dr Cochrane under the Isle of Man Agreement as being in excess of £150M; more, he said, than the maximum amount of ORB'S claim in the English proceedings. 20. None of the parties to the English proceedings come out of Popplewell J's judgment with any credit, but he was particularly scathing about the conduct of the Claimants, described by him as the ORB parties. Quoting from paragraph 181:- "181 This high handed behaviour, and refusal to recognise the authority of the Court's orders, is of a piece with their abusive behaviour in other respects. There is a long history of behaviour by the Orb Parties in these and other proceedings which shows that they are prepared to mislead the Court and abuse the Court's processes for the improper collateral purpose of putting pressure on Mr Ruhan." 21. On 23 rd October, 2014, Harbour entered into a deed with ORB, Dr Cochrane, Mr Cooper, Mr McNally and others ("the 2014 Agreement") by which it was agreed that the assets received by Dr Cochrane under the Isle of Man Agreement would be treated as proceeds of the English proceedings, pursuant to the Funding Agreement. 22. By consent order dated 6 th May, 2016, the claims and counter claims in the English proceedings were dismissed. 23. On 24 th June, 2016, Phoenix Group Foundation obtained a freezing injunction up to the value of £145M against Dr Cochrane and on 11 th July, 2016, the liquidators of a number of companies within the Arena Settlement Group obtained a proprietary injunction and world-wide freezing injunction up to £45M against Dr Cochrane (and another). The Court was only referred to the orders granted and not the statement of claim in each case and is unable therefore to give a reliable summary of the basis upon which these claims are being pursued against Dr Cochrane in the High Court. 24. On 3 rd August, 2016, a production order, issued by the Central Criminal Court in London, was served on Andiamo Office Services Limited, ("Andiamo"), formerly Pro Vinci Limited, at its offices in London. Andiamo provides family office services to Dr Cochrane's family and would appear to have played an important role in advising on the English proceedings. Production is sought of the final settlement agreement to discontinue the English proceedings and documents and accounting records relating to the sale of assets by ORB to Mr Ruhan in 2003; indicating, it would seem, a criminal investigation into those matters. 25. Harbour claimed to have provided litigation funding for the English proceedings of £5,189,010.48p, a figure which, as we say below, does not appear to be contested and applying the formula under schedule 2 of the Funding Agreement, it calculates that it is due a further £28,756,041.92 as its share of the proceeds. Formal demands were made against ORB by letters dated 17 th and 26 th August, 2016, and ORB was informed that failing settlement, an application would be made for the appointment

of an administrator.

Procedural History

26. Harbour's representation was first brought before the Court on 19th August 2016 and adjourned until 1 st September, 2016, when it was ordered that ORB be convened and notice given to Litigation Capital. The matter was adjourned until 8th September when Litigation Capital was granted leave to intervene with the Court adjourning the matter until 14 th September, 2016, giving the parties until 13 th September, 2016, to file any additional documentation; no additional documentation was filed by ORB or Litigation Capital. 27. ORB and Litigation Capital elected not to attend the hearing before us on 14 th September, 2016, having seen letters from KPMG LLP and from the Serious Fraud Office to the Court to the effect that the appointment of an administrator was in their view both premature and inappropriate. It would seem that it was assumed by them that in the face of such objections, the Court would not issue the letter of request; a somewhat high risk strategy, because the application was maintained by Harbour. 28. As it was Harbour alone was represented before us by Advocate Drummond and in terms of evidence, we had affidavits sworn by Ms Susan Jean Dunn and Mr Daniel Sejas on behalf of Harbour and an affidavit sworn by Dr Cochrane in opposition. We also had a short affidavit from the proposed administrator, Ms Louise Mary Brittain, a partner in Wilkins Kennedy, a firm of licensed insolvency practitioners and accountants. The Court also had the benefit of an opinion with addendums from Ms Marcia Shekerdemian QC of Wilberforce Chambers and the advice of the Viscount. Jurisdiction 29. The Court has an inherent jurisdiction to request assistance from the High Court by way of letter of request for the purposes of placing a Jersey registered company into administration in England. The Court's authority is well established and has been applied on a number of previous occasions - see Dessain & Wilkins, Insolvency & Asset Tracking, 5th Ed (2016), pages 328 to 331. 30. The first such case in Jersey was OT Computers Limited

[2002] JLR N10, 2002/29. This was an application by the company itself. The Court considered in some detail the Court's jurisdiction to issue such a letter of request in REO (Powerstation) Limited

[2011] JRC 232A. It noted that whilst in OT Computers the applicant had been the company, there was no doubt that the Court had jurisdiction to issue a letter of request on the application of a creditor of the company, and had in fact done so in several cases (paragraph 11). Indeed, in the Court's experience, the application is more commonly made by a creditor. 31. As a matter of English law, if a foreign company has its centre of main interests ("COMI") in England, the English High Court has jurisdiction to place that company into administration without the need for a letter of request from the Royal Court. As the Court stated in Representation of Bank of Scotland plc

[2012] JRC 080 :- "if the Company has its centre of main interests in England and Wales, the representor would have the right to appoint administrators to the Company using the 'out of Court route' provided for in paragraph 14 Schedule B1 of the English Insolvency Act 1986. However, where a petitioner is unable to show that a company's centre of main interests in England and Wales, the English High Court has no power, in the absence of a Letter of Request, to make an administration order against that company. The representor was unable to show that the Company has its centre of main interests in England and Wales; hence the application for a Letter of Request to be issued to the English Court." 32. However a creditor of the company may not know, or be able to show, where the company's COMI is. It simply may not have access to the information about the internal affairs of the company. In those circumstances, the letter of request from this Court is necessary to clothe the English High Court with the jurisdiction to make an administration order. As the Court stated in Alard Investments Limited

[2015] JRC 137 at paragraph 11:- "The relevant provisions of the administration regime in England and Wales are set out in the Insolvency Act 1986, schedule B1. A company incorporated in Jersey is not a 'company' for the purpose of schedule B1 unless its centre of main interests is in the United Kingdom. The Company was managed and controlled from Jersey and the Bank was unable to demonstrate that its centre of main interests was England and Wales. The only option therefore was for an application to be made to the High Court on the basis of a letter of request issued by the Royal Court." 33. In this case, we were told that if the ORB's COMI had been in England, Harbour would have been able to appoint an administrator out of court under the terms of the Debenture. 34. Harbour suspects that ORB's COMI is at the offices of Andiamo, but it cannot prove that is the case and Dr Cochrane denies that is the case. Accordingly, Harbour requires a letter of request from this Court. Discretion 35. In Reo (Powerstation) Limited , the Court said this at paragraph 18 in relation to the exercise of its discretion:- "It seems to us that the Court should be prepared to contemplate issuing a letter of request if it is in the interests of the creditors, or if it is in the interests of the debtor or if it is in the public interest. In relation to the latter of these three considerations, the public interest obviously includes, indeed we think as a matter of priority, a satisfactory methodology for dealing with the interests of the creditors and the debtor. Subordinate to these considerations in relation to the public interest is also the interests of the Island in terms of its reputation outside these shores. Public policy considerations do not overtake the requirement to do justice as between those who are directly affected, and in our view is therefore subordinate to those interests when it comes to exercising a discretion in a matter of this kind, but we can have regard, at the edges of our discretion, to the fact that a major insolvency of a Jersey company, causing extensive damage to creditors and debtor alike is not in the best interests of the Island, and this can operate as an additional reason to exercise the discretion to issue a letter of request." 36. Under s 426(4) of the Insolvency Act 1986 , an English court having jurisdiction in relation to insolvency law in any part of the United Kingdom is able to assist courts also having corresponding jurisdiction in any relevant

territory, which includes Jersey. Accordingly, in considering whether to issue the letter of request, this Court must be exercising its jurisdiction in relation to insolvency law. As Davis LJ put it in the case of In re Tambrook (Jersey) Limited

[2013] EWHC 866 (Ch) at paragraph 41, the Jersey court must be engaged in furthering the interests of an insolvent company and its creditors and facilitating the most efficient collection and administration of the company's assets. 37. By analogy with an application for a declaration en désastre , a creditor need only show that the company which is the subject of the application is cash-flow insolvent - see Siena SARL v Glengall Bridge Holdings Limited

[2015] JRC 260 at para 39. 38. We are not aware of any Jersey application for a letter of request made by a creditor where the applicant's status as a creditor has been in doubt. Again an analogy should be made to the position with an application for a declaration en désastre . The creditor must show that it has a liquidated claim, in other words a certain debt to which there is no reasonably arguable defence (so that if proceedings were issued it could form the basis for an immediate application for summary judgment) - see Dessain & Wilkins, Insolvency & Asset Tracking, 5th Ed (2016), pages 149 to 150. 39. We need to be satisfied therefore that Harbour is a creditor of ORB with a liquidated claim and that ORB is cash flow insolvent. Is Harbour a creditor with a liquidated claim? 40. In her written responses to the formal demands made by Harbour, Dr Cochrane denies any debt being due by ORB to Harbour, although that denial is not repeated in her affidavit of 7 th September, 2016, filed in response to Harbour's application. Indeed, and perhaps significantly, she says nothing in that affidavit about Harbour's claim or whether or not it is accepted by ORB. Furthermore, in his skeleton argument, Advocate Nicholls, representing ORB, makes no reference at all to Harbour's claim and whether or not it is accepted by ORB. His submissions are limited entirely to the lack of any evidence of ORB having assets within England and Wales, a requisite, he says, for any letter of request to be issued. Advocate Nicholls did not appear at the hearing on the 14 th September, 2016, and therefore the Court was unable to press him on the point, but if ORB had a genuine defence to Harbour's claim, it would be surprising in the extreme for that defence not to be mentioned, and indeed, given some prominence. 41. In her letter of 5 th September, 2016, Dr Cochrane does accept that there has been what she describes as "a contingent recovery" under the English proceedings, contingent she says upon her taking on liabilities which are now the subject of claims against her (referred to above). She puts it this way:- "At its simplest, it cannot be the position that your clients are entitled to a sum payable from a gross receipt before "settlement costs", rather than the actual net sum recovered." 42. There is no reference in either the Funding Agreement, the Isle of Man Agreement or the 2014 Agreement to any such contingency. It would seem indisputable that:- (i) In schedule 5 to the Isle of Man Agreement, Dr Cochrane acknowledged receiving £10M from Mr Cooper and Mr McNally; and (ii) In the 2014 Agreement, she and ORB agreed that the monies paid to her by Mr Cooper and Mr McNally under the Isle of Man Agreement would be treated as proceeds received as a result of success in the English

proceedings. 43. On the evidence presented to us and the arguments put forward, we do not think it can be disputed that there has been a recovery under the English proceedings and that Harbour is entitled to the payment of the legal costs it funded to the extent of £5.18M. We conclude, therefore, that Harbour is a creditor for that liquidated sum, at least. Is ORB cash-flow insolvent? 44. Applying the cash-flow test, formal demand has been made against ORB and the liquidated claim of £5.18M has not been paid. Advocate Drummond submitted that on the face of it, the test for insolvency had been met. 45. In her affidavit, Dr Cochrane states that ORB has no assets legally or equitably in England and Wales. She says that in recent years, ORB has only existed "to further litigation claims". To the extent that ORB had any assets, she says they comprised a claim arising out of the original ORB to Ruhan transaction as set out in ORB's letter of 25 th April, 2006, to the joint liquidators of a number of companies within the Arena Settlement group. The claim is to an equitable proprietary interest in the assets of those companies to the extent of some £35M. 46. Dr Cochrane explains that ORB was unable to fund this claim and so it has been assigned to Litigation Capital. Notice of that assignment was given by Litigation Capital to the joint liquidators by letter dated 8 th June, 2016. No disclosure is made by Dr Cochrane as to the terms of that assignment and whether ORB stands to share in the proceeds, if any, of that claim. The implication to be drawn from her affidavit is that ORB has no assets at all and has no ability, therefore, to meet Harbour's liquidated claim out of its own resources. 47. In her letter of 31 st August, 2016, to Harbour (but not in her affidavit), Dr Cochrane states that ORB is solvent, "its expenses being met by way of shareholder loans". As she is the sole shareholder that must mean a loan from her, but she makes no commitment to providing funds to meet the claims of Harbour or of the other creditors referred to below. 48. In February 2016, Harbour commissioned Mazars to provide a headline valuation of the assets of ORB. Whilst the report provides a summary of assets, valued at some £50M, it does not make it clear whether those assets are held legally by or beneficially for ORB. Ms Dunn, Head of Litigation Funding at Harbour, in her affidavit of 10 th August, 2016, says at paragraph 30 that at a meeting she attended at the offices of Andiamo on 26 th July, 2016, Dr Smith and Ms Dawna Stickler of Andiamo confirmed that there were significant assets held in the name of ORB. Although Dr Cochrane was not at the meeting, she says this is simply not correct. 49. Even if ORB has an interest in the assets listed by Mazars, they comprise substantial property investments in Jersey, Poland, Majorca, Italy and London. One of the London properties, Hamilton House, comprises some 15 apartments, one of which appears to be the home address of Dr Smith. Mazars state, without elaboration, that Hamilton House is under Dr Cochrane's ultimate ownership. 50. In her letter of 26th August, 2016, to Harbour, Dr Cochrane states that apart from Harbour's "asserted claim", there are no other claims against ORB. That is not correct:- (i) By letter dated 31 st August, 2016, Simons Muirhead & Burton LLP wrote to the Court giving notice of a claim by Dr Smith against ORB. They assert that under a letter of engagement referred to above, he is entitled to receive a payment of up to 50% of the sums recovered in the English proceedings. That sum is limited to the amount payable by Dr Smith in the confiscation proceedings. They state that as a result of the consent order

made on 6 th May, 2016, Dr Smith has satisfied his obligations under the letter of engagement, thereby triggering his entitlement to a fee of approximately £35M. That fee constitutes his realisable property, and is therefore subject to the receivership order, a view, they state, that is shared by the Serious Fraud Office and the Enforcement Receivers. It is unhelpful to ORB's denial of Harbour's claim that Dr Smith's claim is premised upon a substantial recovery in the English proceedings. (ii) Litigation Capital, represented by Carey Olsen, also claims to be owed in excess of £3M by ORB. 51. There appears to have been a strategy (evidenced by the Isle of Man Agreement) to divert assets from ORB and there is no reliable evidence to indicate that it retains any assets, let alone assets to meet the substantial claims of its creditors, with no commitment from its shareholder that those claims will be met as they fall due by way of shareholder loan. It has failed to discharge the liquidated claim of Harbour which is now due and on the basis of the evidence before us, we conclude that ORB is cash-flow insolvent. Serious Fraud Office and Enforcement Receivers 52. Both the Serious Fraud Office and KPMG, for the Enforcement Receivers, wrote to the Court by letters dated 12 th September, 2016, resisting the issuing of a letter of request on the grounds that it was inappropriate and premature. Both letters are premised upon what appears to be a misunderstanding as to the submissions made by Harbour at the hearing of 8 th September, 2016, (presumably communicated to them by ORB or its legal representatives), namely that Harbour's claim against ORB was entitled to priority over the claim of Dr Smith. Harbour made clear by its letter of 13 th September, 2016, that its submission to the Court was simply to the effect that ORB was indebted to Harbour. That debt remained unpaid and ORB is therefore cash-flow insolvent. It did not submit that Dr Smith's claim was subordinate; Harbour's position in this respect is reserved. 53. Both the Serious Fraud Office and KPMG said that the issue of priority, if it arose, was to be determined in due course by the High Court. The Serious Fraud Office made reference to an existing statutory mechanism envisaged by the receivership order for the High Court to determine competing rights and interests; we do not have a copy of the receivership order and it is therefore not clear what that mechanism is. It is also not clear why competing claims against an insolvent Jersey company would necessarily be determined by the High Court. 54. In its letter, KPMG gave notice of a deed of trust dated 24 th August, 2016, executed by Dr Cochrane in relation to ORB. In it she declares and undertakes as beneficial and legal owner of the shares in ORB, that she will hold the same on trust and as nominee for Dr Smith absolutely, subject to the security interest in favour of Harbour. This deed was signed two days after the service of Harbour's application upon her but she makes no reference to it in her letters to Harbour or in her affidavit. Indeed in her affidavit she deposes that she is the sole director and shareholder in ORB, without clarifying that she is in fact acting as a bare nominee. 55. This deed appears to be in direct breach of Dr Cochrane's obligations under the security interest agreement in favour of Harbour not to declare any trust or nominee arrangement in respect of shares in ORB (clause 5(8)) and not to sell, transfer, exchange or otherwise dispose of the benefit of her interest in ORB (clause 5(7)). By making that declaration, Dr Cochrane has made her interest in ORB the realisable property of Dr Smith and therefore subject to the receivership order. It would also, and

subject to that order, place that interest in the hands of a convicted fraudster. Exercise of discretion 56. In these circumstances should the Court issue a letter of request to the High Court for the appointment of an administrator? 57. It is the case that in all the previous occasions in which the Court has issued a letter of request, there has been no issue as to the insolvency of the company, the liquidated claim of the creditor (where the application was brought by a creditor), the assets of the company and their situs in the jurisdiction of the High Court or substantially so. 58. In this case, there is on the face of it an issue as to the insolvency of ORB and as to the liquidated claim of Harbour, although on the evidence before us and for the reasons set out above, we are satisfied in respect of both. 59. We do not think that the location of assets in England is the only factor to be taken into account when considering the issue of a letter of request. The Court has a wide jurisdiction to be exercised for the purpose of the most efficient collection and administration of the company's assets in the interests of the creditors, but there clearly has to be a substantial connection with England. 60. The opinion of Ms Marcia Shekerdemian QC that the High Court will be likely to accede to the request is premised upon ORB having a very substantial connection with England and Wales. The draft letter of request provided to us by Advocate Drummond has the Court stating in the preamble that ORB has substantial connections with England and that it is in the interests of the creditors that an administration order be made. 61. What is that substantial connection? The evidence we have seen indicates that ORB may have no assets at all, but to the extent that it has an interest in the assets listed by Mazars, the majority of those are situated outside England. As it stands, we cannot point with any certainty to any asset in England over which the appointment of an administrator would immediately bite. 62. It seems to us that whoever is appointed to administer the affairs of this insolvent company in the interests of its creditors would be involved in undertaking the following actions:- (i) To gather information about ORB in order to ascertain what assets it may have or may have a claim to. (ii) To recover and sell those assets. (iii) To intervene, if necessary, in the proceedings brought against Dr Cochrane in England, to protect any assets caught by the injunctions in those proceedings over which ORB may have a claim. (iv) To the extent that assets may have been wrongfully removed or diverted from ORB by its directors, to bring proceedings against those involved. As Dr Cochrane is the sole director of ORB, and as far as we can understand it, has been in control of ORB for some years, she must be a potential defendant to any such proceedings. 63. We accept that whilst there will be information to be obtained in Jersey from ORB's registered office and from Dr Cochrane, there is likely to be relevant information in England held by Andiamo and by ORB's English solicitors, who acted in the English proceedings. Intervening in the English proceedings brought against Dr Cochrane is obviously something to be undertaken in England, just as proceedings against Dr Cochrane would be undertaken in Jersey. Recovery of assets may involve proceedings in a number of jurisdictions. 64. The question arises as to why an administrator is any better placed to undertake these actions than the Viscount. The power of an administrator, not available to the Viscount, is to rescue ORB as a going concern, thus avoiding the "sudden death" nature of a désastre (see In re Alard

Investments Limited at paragraph 9). We are not concerned here with rescuing ORB as a going concern. 65. Harbour recognises that on the appointment of an administrator by the High Court, there will be an immediate need for a letter of request to be issued by the High Court to this Court in order to recognise that appointment, and for a number of orders to be made here. That need arises out of ORB being a Jersey company controlled by a Jersey resident, with a propensity according to Popplewell J to mislead and abuse the process, which can continue to deal with the assets of the company outside England unless and until the Court in Jersey orders otherwise. 66. A draft representation for this purpose had been the subject of some discussion between Bedell Cristin, acting for Harbour, and the Viscount, who was concerned at the extent of the orders that would be sought from this Court by the administrator and how the actions of the administrator in Jersey will be supervised. Those proposed orders include not only a moratorium over proceedings in Jersey but anything necessary to enable the administrator to manage the business affairs of ORB as a going concern and orders for the provision of information to and attendance upon the administrator. Those discussions have not been finalised and whilst Harbour may be able to address the points raised by the Viscount to her satisfaction (and to the satisfaction of the Court), it leaves the Court with a sense of unease as to a process by which, potentially, an administrator appointed by the High Court (assuming it can be persuaded to make that appointment), with whose jurisdiction no substantial connection can be established, is able to exercise powers in Jersey not available under Jersey law; or as the Viscount put it administration by the back door. 67. On a declaration of désastre all of the property of ORB will vest in the Viscount, who has extensive powers to obtain information here and who is able to seek the recognition of her status in England and the assistance of the High Court to the extent necessary in that jurisdiction. Whilst neither Advocate Drummond nor the Viscount had researched the point, it was felt in discussion that the Viscount may find it easier to seek her recognition in other jurisdictions such as Poland, Majorca and Italy than would an administrator appointed by the High Court over a Jersey company. 68. Ultimately, before asking the High Court to consider appointing an administrator, we need to be satisfied that administration is the most effective method of collecting and administering ORB's assets in the interests of all the creditors, as opposed to a declaration en désastre . On the evidence before us, we can see no particular advantage to the use of the English regime of administration over that of a désastre and, in any event, there is insufficient evidence to demonstrate a substantial connection to England which would justify requesting the assistance of the High Court. 69. We also bear in mind that the issuing of a letter of request is not supported by ORB's other creditors, although we do so with an element of circumspection because of the apparent connection between Litigation Capital and Dr Smith and the apparent misunderstanding by the Serious Fraud Squad and KPMG as to the submissions made by Harbour, and because of a concern, following in particular the disclosure of the deed of trust dated 24 th August, 2016, as to whether Dr Cochrane and Dr Smith are manipulating the process. 70. We therefore decline to issue a letter of request. 71. Harbour has its remedies against ORB and Dr Cochrane which it can pursue and an application can be made to declare ORB en désastre . On the evidence

before us, we would have been minded to make such a declaration, but we acknowledge that we have not heard from the other creditors, or from the Viscount, on whether a declaration should be granted. Authorities ORB a.r.l. & Ors-v-Ruhan & Ors

[2016] EWHC 850 (Comm) . Dessain & Wilkins, Insolvency & Asset Tracking, 5th Ed (2016),. OT Computers Limited

[2002] JLR Note 10 , 2002/29. REO (Powerstation) Limited

[2011] JRC 232A. Representation of Bank of Scotland plc

[2012] JRC 080 . Alard Investments Limited

[2015] JRC 137 . Insolvency Act 1986. In re Tambrook (Jersey) Limited

[2013] EWHC 866 (Ch Siena SARL v Glengall Bridge Holdings Limited

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