



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 5

P1222/18

OPINION OF LORD CLARK

In the petition

MCR OIL TOOLS LLC

Petitioner

against

(FIRST) SPEX OFFSHORE (UK) LIMITED; (SECOND) SPEX ENGINEERING (UK) LIMITED; (THIRD) SPEX CORPORATE HOLDINGS LIMITED; (FOURTH) SPEX GROUP HOLDINGS LIMITED; (FIFTH) SPEX GROUP US LLC

Respondents

Petitioner: Higgins QC, Ower; Ledingham Chalmers LLP
Respondents: McBrearty QC, Roxburgh; Pinsent Masons LLP

10 January 2020

Introduction

[1] The petitioner seeks orders to restore General Services 1 Limited (“GS1”) and General Services 2 Limited (“GS2”) to the Register of Companies. Until 19 August 2016, GS1 was named SPEX Offshore Limited and GS2 was named SPEX Services Limited. Under those former names, GS1 and GS2 are named as defendants, along with others, in proceedings raised by the petitioner in Texas (“the Texas proceedings”). The principal purpose behind the application for restoration is to allow the petitioner to seek to retain GS1 and GS2 as defendants in the Texas proceedings (subject to the Texas court allowing

amendment to recognise the change of names). Those proceedings were raised in ignorance of the fact that the companies had been dissolved. The respondents to the present petition are also defendants in the Texas proceedings. The respondents argue that the court should refuse the prayer of the petition on the grounds that, in the circumstances, it would not be appropriate for the court to exercise its discretion to restore either GS1 or GS2 to the register.

Background

[2] Prior to their dissolution, GS1 and GS2 formed part of a corporate group which included the respondents. In the course of their trading, GS1 and GS2 each entered into licence agreements with the petitioner, in respect of what can broadly be described as intellectual property. The licence agreement between GS1 and the petitioner terminated in May 2016. GS1 entered into a creditors' voluntary liquidation ("CVL") on 27 October 2016. Following conclusion of the liquidation, GS1 was dissolved on 30 September 2017. The licence agreement between GS2 and the petitioner terminated in May 2014. GS2 entered into a CVL on 30 November 2016. Following the conclusion of the liquidation, GS2 was dissolved on 5 January 2018.

The Texas proceedings

[3] The petitioner is the plaintiff in the Texas proceedings but I shall simply refer to it as the petitioner. The Texas proceedings involve claims by the petitioner against GS1, GS2, the respondents, and Mr Jamie Oag (who was a director of GS1 and GS2). The pleadings in the Texas proceedings are lengthy and reasonably complex, with a number of different grounds for action and a variety of remedies sought. The claims are set out in what is described as "the third amended complaint". The affidavits lodged by the parties in the present case differed in some respects in their explanations of what the claims in the Texas proceedings

comprised. The position of the petitioner is as follows. It operates in the oilfield tools industry. It researches, invents, designs, develops, and manufactures proprietary oilfield tools, products, equipment and accessories. To do so, it uses patented technology, trade secrets and confidential and proprietary information (“the intellectual property”). Details of the intellectual property of the petitioner are set out in the third amended complaint. The license agreements between the petitioner and GS1 and GS2 provided that improvements or modifications to the intellectual property, or items derived from its application or use, would belong to the petitioner. In particular, there was a contractual obligation on these companies as licensees to assign any improvements to the petitioner. There was an obligation on the licensees to advise the petitioner of any infringement of the petitioner’s intellectual property rights and to return all confidential information to the petitioner. The license agreements had terminated. However, without the knowledge of the petitioner, GS1, GS2 and SPEX group companies had filed patent applications derived from the petitioner’s confidential information, licensed patents, products or technology. Improvements were also assigned to others in the SPEX group. As well as the return of this intellectual property, among the remedies being sought were awards of damages, on a joint liability basis.

[4] In summary, the legal basis for the claims made by the petitioner in the Texas proceedings appears to be as follows: breach of contract (directed at GS1 and GS2); misappropriation of trade secrets under the Texas Uniform Trade Secrets Act and the United States Defend Trade Secrets Act (directed against all defendants); unfair competition (directed against all defendants); common law fraud and fraudulent inducement (directed at GS1, GS2 and Mr Oag); tortious interference with existing contracts (directed at the other defendants); *alter ego*/piercing the corporate veil (the parties disagreed about against whom these claims were directed); denuding the corporations (directed at other defendants, but

the corporations being GS1 and GS2); and conspiracy (directed against all defendants). The remedies sought for breach of contract include specific performance by GS1 and GS2 of their contractual obligations. Declaratory judgments are sought against all of the defendants to the effect that the petitioner is the rightful owner of the intellectual property identified in the claim. Preliminary and permanent injunctions are sought, again in respect of all the defendants. The petitioner also claims damages and expenses against all of the defendants.

[5] As indicated, one of the grounds upon which the claims in the Texas proceedings are based involves piercing of the corporate veil. The pleadings in the third amended complaint also rely upon the concept of *alter ego* which exists under the law of Texas, but that point (to the extent that it is different from the concept of piercing the corporate veil) appears not to be a live issue, at least for present purposes. The issues which arise in the Texas proceedings will be determined by a jury. In deciding those aspects of the claims which are based upon piercing of the corporate veil, the jury will require to apply the law of Scotland. Expert evidence on that matter, provided by two senior counsel from Scotland, has been lodged in the Texas proceedings.

[6] The respondents have sought to have the claims in the Texas proceedings dismissed. They seek dismissal on a number of grounds. In relation to the claims based upon breach of the licences, the respondents contend that these claims cannot be brought whilst GS1 and GS2 are dissolved, as these entities do not exist and cannot therefore be parties to the action. In respect of the other claims, the respondents raise a number of arguments contesting jurisdiction, and challenging the basis of the claims and the remedies sought.

The present proceedings

[7] The petitioner raised the present petition in order to enable it to seek to retain GS1 and GS2 as defendants in the Texas proceedings (subject to amending how they are named

in the claim). The petitioner seeks an order in terms of Section 1031(1) (c) of the Companies Act 2006, which provides that on an application under section 1029 the court may order the restoration of the company to the register if "...the court considers it just to do so".

Section 1029(1) provides *inter alia* that an application may be made to the court to restore to the register a company that has been dissolved. Section 1029(2) provides that an application for restoration may be made *inter alia* by "...any person with a potential legal claim against the company...any person who was a creditor of the company at the time of its striking off or dissolution... or any other person appearing to the court to have an interest in the matter". In terms of section 1032(1), the general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. Section 1032(3) provides that the court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

[8] The primary issue I have to determine in this application for restoration of these two companies to the register is, in terms of section 1031(1)(c) of the 2006 Act, whether it is just to do so.

Submissions

Submissions for the petitioner

[9] The submissions for the petitioner can be summarised as follows. SPEX Group Holdings Limited had been the only creditor of GS1 and as the only creditor it was reasonable to assume that it had initiated the CVL of GS1. Jamie Oag had been a director of GS1 and resigned a few months before the special resolution to wind-up the company. In

relation to GS2, SPEX Group Holdings Limited was the sole shareholder. The evidence appeared to show that SPEX Group Holdings Limited, and/or SPEX Engineering (UK) Limited, paid for the services of the liquidators. SPEX Group Holdings Limited was the sole shareholder of GS2 when it was dissolved, and GS2 was the sole shareholder of GS1 when it was dissolved. It was therefore quite clear that there was a connection between the dissolved companies and the other companies in the SPEX group.

[10] The nature and grounds for the Texas proceedings were discussed in the affidavit of Jose Portela. He was an appropriately qualified lawyer, responsible for dealing with the Texas proceedings on behalf of the present petitioner. He had explained in his affidavit that he was satisfied that the Texas proceedings have factual and legal merit. That being so, there was little to the extent that the court here, dealing with this petition, could or should seek to interrogate regarding the Texas proceedings. He had explained that in around December 2017 his firm was instructed by the present petitioner. Proceedings were raised, by complaint, in Texas on or about 27 December 2017. Amendments were made to the petitioner's complaint. A third amended complaint was filed on or about August 2018. Service of the complaints upon GS1 and GS2 was not successful.

[11] Mr Portela had also explained that the petitioner operates in the oilfield tool industry, and described the nature of its work and the nature and content of its intellectual property, insofar as relevant to the Texas proceedings. The petitioner required to enforce the contractual obligations of GS1 and GS2. This was necessary for seeking the remedy of specific performance and could only be done if GS1 and GS2 were restored to the register. Establishing breach of contract against these two companies was a necessary element of the Texas litigation. The details of the alleged breaches of contract were explained. Accordingly, the petitioner was a party with a claim against GS1 and GS2 and with a clear interest in their

restoration to the register. It would be sufficient for the court to find that the petitioner would appear to be a creditor.

[12] The central issue in the Texas proceedings was the return of the disputed property, sought by specific performance. Everything in the proceedings really stemmed from the relations the petitioner had with GS1 and GS2. It was central to the furtherance of this dispute that the petitioner should be able to investigate GS1 and GS2, which it cannot do unless they are active participants. It was also highly relevant that Mr Portela had stated in his affidavit that including them in the proceedings is necessary and appropriate.

[13] In relation to the claim based upon the concept of piercing the corporate veil, the parties behind the veils were GS1 and GS2. The use of this concept was a route to try to recover intellectual property, including patents, held by the other entities. Piercing the veil was tied to breaches of contract by GS1 and GS2 and the actions of Mr Oag. However, even if the claims based upon piercing the veil were not to succeed, restoration of GS1 and GS2 was required for the other reasons given.

[14] The Texas proceedings were plainly a complex piece of litigation. The claims had been advanced and vouched by a qualified US attorney. The court was entitled to assume that he has advanced the claims responsibly. Mr Portela had since moved to another firm and there was an affidavit from the new attorney. She endorsed everything in his affidavit. Accordingly, there were two attorneys who stood behind the claims advanced.

[15] It was therefore clear that the dissolved companies are key players in the dispute in Texas. Some of the claims and remedies are addressed directly against them and they are also involved in one way or another in every one of the claims. The dissolved companies had to become players in the litigation in order for the petitioner to make and enforce its claim.

[16] Certain of the respondents to the present action, as defendants in the Texas proceedings, had in those proceedings put forward a motion to dismiss the claims. That was what had given rise to the present petition. Mr Portela described it in his affidavit as a motion to dismiss all claims against all of the defendants. That appeared to be supported by the terms of the motion, but it might be said to be unclear from the terms of the motion precisely which claims are sought to be dismissed. However, it was clear that dismissal is sought of numerous heads of claim on the basis that GS1 and GS2 have been dissolved. The affidavit from Mr Kendall, lodged by the respondents, states that if GS1 and GS2 are not restored, the petitioner will lose its potential remedies of specific performance and declaratory judgment against them.

[17] The petitioner had made a motion to amend its complaint in the Texas proceedings. In those proceedings, the previous names of GS1 and GS2 had been used and the petitioner had moved to amend to correct the names. That motion was refused by the judge in Texas on 24 April 2019, but without prejudice to the arguments made and the relief sought in the amended complaint being asserted after the proceedings in Scotland for restoration are resolved.

[18] Turning to the case law, reference was made to: *Peaktone v Joddrell* [2013] BCC 112; *City of Westminster Assurance Co v Registrar of Companies* [1997] BCC 960; *Re Blenheim Leisure (Restaurants) Ltd (No 2)* [2000] BCC 821; *Advocate General for Scotland, Petitioner* [2010] CSOH 117; *Stanhope Pension Trust Limited v Registrar of Companies* [1994] 1 BCLC 628; *Re Oakleague Ltd* [1995] BCC 921; *Re Priceland Ltd* [1997] BCC 207; and *Whitbread (Hotels) Ltd, Petitioners* [2002] SLT 178.

[19] The petitioner had satisfied the “gateways” into restoration in respect of both companies; that was apparently not disputed. Thus, in the absence of special circumstances

restoration should follow. The court should grant the application for restoration as it was plainly just to do so. The petitioner's primary position was that, properly viewed, the respondents did not have any locus to oppose the application. But even if technically they had a right to oppose restoration, they did not have a legitimate reason to oppose it. As defendants in the Texas proceedings, the respondents have sought to rely upon the argument that the litigation (or at least parts of it) cannot proceed because GS1 and GS2 are dissolved. That is what gave rise to the present petition. If the application is granted, it would prevent the respondents from continuing to rely on that argument in the Texas proceedings and would permit the petitioner fully to pursue those proceedings, allowing a determination of all claims by the court in Texas.

[20] The reality was that the respondents were seeking to stifle the petitioner's claims against them, by saying in the Texas proceedings that claims cannot be made because the companies are dissolved and by saying in the present proceedings that the companies should not be restored. The respondents' only interest was to frustrate the petitioner's claims in the Texas proceedings.

[21] One of the central points made by the respondents was the argument that the claims in the Texas proceedings against GS1 and GS2 will not succeed because the issue of piercing the veil of incorporation is governed by Scots law and is bound to fail. That argument appeared to proceed on basis that the sole purpose of restoration is to pursue the claims based on piercing the veil. That was, however, plainly incorrect; many other claims directed against GS1 and GS2 and other defendants hinge on the involvement of GS1 and GS2. These include the claims for declaratory judgments and for fraudulent inducement. Even if the respondents were correct that claims based upon piercing the veil were bound to fail, that would just mean that part of the claims against GS1 and GS2 would

fall away, leaving all the other claims, including the primary claim for specific performance and the claim for declaratory judgements, and everything that flows from those claims.

[22] This court should not engage in a full hearing on the respondents' point that claims based on piercing the veil were bound to fail. The case law made it clear that the party seeking restoration does not need to show that the claim to be brought will be successful. It will be for the court in Texas to decide that matter, albeit by applying Scots law. Expert evidence will be put before the jury in Texas. It would be inappropriate for this court to usurp the function of the court in Texas and start forming a view on which party may be right and which party may be wrong. The whole issue was a matter for the court in Texas but if some form of analysis was necessary, it was sufficient to look broadly at the third amended complaint. Viewed at the appropriate level of analysis, there was more than a shadowy claim to pierce the corporate veil.

[23] The respondents also say that it would be unjust to permit restoration, as their interests would be materially affected by having to incur significant costs in the Texas proceedings. The fact that the respondents wish to improve their own position by preventing restoration was not a legitimate basis for opposing the application. None of the matters relied upon by the respondents carried sufficient weight to cause this court to refuse the application. The motion for the petitioner was therefore that parts (v), (vi), (vii), (viii) and (ix) of the prayer of the petition should be granted. In essence, these dealt with restoring GS1 and GS2 to the register, appointing liquidators and an award of expenses.

Motion to lodge a further affidavit

[24] Towards the close of her submissions, senior counsel for the petitioner moved to lodge an affidavit dealing with the difficulties that would arise, should GS1 and GS2 not

remain as defendants, in relation to recovery of documents under the discovery process in Texas and the obtaining of depositions. The respondents opposed receipt of this affidavit, for the following reasons. There had been no notice of this line of argument. Had notice been given, expert evidence would have been obtained by the respondents. It was unfair to have this affidavit lodged half-way through the hearing. Senior counsel for the respondent had been able to ascertain that the points made in the affidavit were highly controversial. In response, senior counsel for the petitioner argued that it was clear that the respondents had been able to address the issues. There was no real prejudice. It was of assistance to have this evidence before the court.

[25] In considering the issue, I had regard to the fact that this matter was not referred to in the pleadings, or in the notes of argument or affidavits lodged. There had been a clear timetable fixed for the lodgement of these documents. No fair notice had been given to the respondents that this point would be raised. Further, it appeared not to be a simple or straightforward issue, senior counsel for the respondents having stated that he had been advised that there were substantial grounds for challenging the accuracy of the affidavit. Such challenge would have involved obtaining a further affidavit for the respondents and hence the interruption and postponement of part of the hearing. I therefore refused the petitioner's motion for the late lodgement of that affidavit.

Submissions for the respondents

[26] The respondents' submissions can be summarised as follows. It was accepted that restoration to the register is normally an administrative process. Where the purpose of restoration is to allow a claim to be brought, the court would not normally inquire into detail as to the prospects of success of the claim. However, the court did require to be satisfied

that the claim is not “merely shadowy”: *Stanhope Pension Trust Limited v Registrar of Companies*. There were many aspects of the present case which showed it not to be a run-of-the-mill restoration case. On the question of purpose, if the petitioner was to establish, in the Texas proceedings, breach of contract on the part of GS1 and GS2, that alone would be worthless. The petitioner could not enforce any claim for damages against these insolvent companies. It could obtain no intellectual property rights from GS1 or GS2 because they do not own any of them. A number of patents had been applied for in the names of the respondents. The suggestion that the remedy of specific performance against GS1 and GS2 would be of any assistance in seeking return of these to the petitioner was wrong. The petitioner would need to establish breach of contract, obtain an order for specific performance and would then need to succeed in its claim of piercing the corporate veil in order to obtain recovery.

[27] In the Texas proceedings the petitioner was not seeking some equitable route of enforcing rights to patents; rather, the route was to make other defendants liable for the contractual obligations of GS1 and GS2. That was the only basis for the order for specific performance. The legal route of piercing the corporate veil was absolutely at the core of the application for restoration. This issue is to be governed by Scots law. If this court was persuaded that the claim based on piercing the corporate veil is irrelevant then the correct course would be for the court to refuse restoration. If this part of the claim is irrelevant as a matter of Scots law, there would be no purpose to restoration. That was the key point: whether or not there is a purpose to restoration. If the claim regarding piercing the veil is bound to fail, or is “merely shadowy”, or has no real prospect of success, then there was no purpose to restoration.

[28] It was accepted that if a set of facts, taken at face value, showed a reasonable claim against the company which is sought to be restored (for example, based upon a guarantee, or indemnity or a right against an insurer) it would be difficult for the court to say that there were no prospects of success at all. But the unusual feature of this case was the attempt to apply the concept of piercing the veil of incorporation. There was normally no purpose to pursuing the dissolved company itself in the other cases where restoration has been sought; the normal purpose is either to recover assets or get at a third party.

[29] If the companies were not restored, the remainder of the litigation would continue or at least be unaffected by the dissolution. The case would continue on free-standing grounds. The claims based upon misappropriation and conspiracy would continue to trial and damages would be the remedy. Any transfer or return of intellectual property would however require the claims based upon piercing the veil to succeed. There were other lines of argument open to the petitioner in relation to return of intellectual property. Patent infringement could have been alleged and an assignation of rights could be obtained as a remedy. But the petitioner had chosen a different route, which requires success in the piercing of the veil argument and that was bound to fail.

[30] Reference was made to *Blenheim Leisure (Restaurants) Ltd (No 1)* [2000] BCC 554 (CA), and *Re Blenheim Leisure (Restaurants) Ltd (No. 2)*. The key point was whether the statutory test is met: is restoration of the companies to the register just? It was correct that restoration is normally an administrative procedure and that the usual outcome would normally be that restoration is allowed, absent special circumstances, and that the court would not normally inquire into prospects of success of the claim to be brought, as long as the claim is not “merely shadowy”. However, the test of whether restoration is just was as open-textured as possible and permitted the court to take into account all of the circumstances.

[31] The requirement that the claim is not “merely shadowy” was an important one, in considering the proposed claim for the purposes of the application for restoration. In *Grupo Mexico* [2018] Bus LR 1863, reference was made to whether or not there was a real prospect of success. There may be different kinds of cases where there is no real prospect of success. One example would be where it was highly doubtful that a proper basis in fact could be established (that being the position in *Grupo Mexico*). Equally, if there was no proper basis in law or if the basis in law was not adequately explained, the test would be met.

[32] Reference was made to *Whitbread (Hotels) Ltd Petitioners*, in which Lord Eassie said that he would not gainsay the outcome of the proceedings to be raised and took into account that responsible counsel in England had supported the claim. Thus, the claim would have to be sorted out in England. The key difference in the present case was that this court was considering a point of Scots law. *Grupo Mexico* was an example where there was clearly no purpose to restoration. The intention was to pursue claims in Mexico. The court was satisfied on the evidence that there was no basis for the claim. If this court was persuaded that it wouldn't let the claim based on piercing the veil go further in a Scottish court then there was no purpose in letting it go further in the Texas proceedings.

[33] Turning to the Texas proceedings, the court should prefer the analysis of them given in the affidavit of Mr Kendall, who is a former United States District Judge. The claims made by the petitioner could be described as primary and derivative. The derivative claim was intended to bring home the liability of GS1 and GS2 to the respondents. The claim refers to them being held liable for the existing legal and contractual obligations of GS1 and GS2. Based on Mr Kendall's affidavit, it was clear that the primary claims of damages and injunctive relief were against the present respondents.

[34] Contrary to the petitioner's submission, Mr Portela's affidavit made clear that the corporate veil to be pierced was that of GS1 and GS2. The issue of *alter ego* simply did not exist as a matter of Scots law, but Mr Portela is saying it should be dealt with in the same way as piercing the veil. However, trying to pin liability on the respondents for GS1 and GS2's contractual obligations was not the same as piercing the veil.

[35] In relation to the motion for dismissal in the Texas proceedings, that is based upon dissolution of GS1 and GS2 and does not apply to the primary claims. Mr Portela was wrong in asserting that dismissal of all claims is being sought. Given that error, his affidavit should be treated with caution. So, in simple terms if there was no restoration the damages claims against all of the respondents would still proceed.

[36] In relation to improvements, the route for recovery was already there, without GS1 and GS2 being restored: there are claims based upon conspiracy and the wrongful taking of trade secrets. Piercing the veil was a last-resort remedy, when no other remedy is available. Other remedies existed, by way of damages and for transfer of intellectual property rights, and so the remedy premised on piercing the veil was not a claim of last resort.

[37] Senior counsel then went on to address in some detail the legal test for piercing the veil of incorporation under Scots law. Reference was made to a number of authorities. Senior counsel then went through parts of the third amended complaint and sought to apply to them the various tests and *dicta* in the authorities he had cited on piercing the veil. For the reasons I give later, it is not appropriate for me to rehearse these submission in full. In outline, the contention was that the case based upon piercing the veil was utterly misconceived. It had no prospect of success and would inevitably fail, so there was no purpose to restoring the companies to the register. Given that the case was bound to fail, there was no prejudice to the petitioner in refusing restoration.

[38] In response to the point made by the petitioner that it was unattractive that the respondents were seeking to stymie the Texas litigation, the correct way to view the matter was that if there are good grounds to oppose restoration then dismissal of the claims in the Texas proceedings against GS1 and GS2 is the logical follow-on. It just so happens that in this case events had occurred the other way round: the petitioner raised the Texas proceedings without having sought restoration. All that the respondents were doing was what they would have done if the petitioner had sought restoration in the first place. That was something the petitioner could and indeed should have done, given that the fact of dissolution having occurred was available for the petitioner to know.

[39] The broad point was the fact that the petitioner could have selected a different route to get the remedy of transfer or return of the intellectual property, but it had chosen to take a route which is bound to fail. Therefore, there was no purpose to the restoration. The question of prejudice to the respondents in having to incur further expense in the Texas proceedings was not a major point, but wrapped up with it was the issue of purpose. If there was no purpose because the claim is inevitably going to fail, then it was inappropriate to grant restoration and make everyone spend further money, especially in a jurisdiction where the normal rule is that the successful party does not get an award of expenses. Accordingly, the court should refuse the prayer of petition.

[40] On the separate matter that the companies, if restored, would still be in liquidation and with liquidators having to be appointed, several issues arose. If the court was otherwise minded to grant restoration then the case should be put out by order for further discussion on those issues.

Reply for the petitioner

[41] In relation to what Mr Portela had said about piercing the veil, the general point was clear: that part of the case is about piercing the corporate veil of other entities to get to GS1 and GS2 and Mr Oag. There was a minor error in Mr Portela's account, but read in full under reference also to the third amended complaint the position was as stated above. It was accepted that any claim to pierce the corporate veil is not the most straightforward of matters, but this did not mean the claim was shadowy. This matter was something for the court in Texas to decide. It was clearly of significant relevance that proceedings are happening in another jurisdiction.

[42] What senior counsel for the respondents had attempted to do was to have a debate on the third amended complaint. It would be quite wrong to approach matters on that basis. In any event, the analysis on behalf of the respondents of the case law on piercing the veil was not correct. There were sound reasons for concluding that piercing the veil was an appropriate remedy in the circumstances of the present case. The pleadings which were criticised were made when it was thought that the piercing the veil claim would be dealt with under Texan law.

[43] It was not accepted that if there was scope for patent infringement proceedings that would be a complete alternative and would mean there was no need to pierce the corporate veil. Also, making any such alternative claim would give rise to time, expense and inconvenience. It was difficult to imagine that restoring GS1 and GS2 was going to be significantly more expensive than the respondents being faced with patent infringement proceedings. Turning to the case law, the correct test was not whether the claim to be brought against the restored company had a reasonable prospect of success. The specific performance and declaratory judgments claims were key aspects of the petitioner's case in

Texas. Mr Kendall accepted that one could not get these remedies if GS1 and GS2 were not in the proceedings. These go hand in hand with the other remedies. There was a clear link between the declaratory remedy and the injunctions sought. The case of common law fraud and inducement would be difficult to pursue in the absence of GS1 and GS2. Many of the damages claims are addressed against the defendants jointly and if the petitioner succeeds against GS1 and GS2 there would be scope for seeking damages from the other parties. So, even for financial relief there was a clear purpose in restoration. There was no objection to the issues raised about the liquidators being dealt with at a by-order hearing.

Reply for the respondents

[44] Senior counsel for the respondents observed that further purposes for restoration just referred to (injunctive relief and the difficulty of otherwise establishing any fraudulent inducement claim) had not been raised before and were not vouched in the affidavits lodged for the petitioner. The same was true about the point made regarding the relevance of piercing the veil for propriety rights. The key to analysing whether there was a claim with any prospect of success was to realise that the remedy sought in the Texas proceedings is to enforce the contractual obligations of GS1 and GS2 against the respondents. That is what assisted in bringing home that there is no proper claim to be made against GS1 and GS2.

Decision and reasons

The relevant legal principles

[45] The Companies Act 2006 Act brought together two previous procedures relating to restoration, under sections 651 and 653 of the Companies Act 1985. Aspects of the wording which had previously appeared in the 1985 Act were repeated in the 2006 Act. As was said

in *Peaktone v Joddrell*, previous jurisprudence applies equally to the 2006 Act. In considering what has been said in previous cases, I keep in mind that the test for granting restoration is that stated in section 1031(1)(c): whether it is just to do so. It should not be taken that the case law provides a gloss on that test. However, in the key cases, the observations of the judges assist in understanding the broad parameters of the test of whether restoration is just, having regard to the nature and purpose of restoration.

[46] In *Stanhope Pension Trust Ltd & Another v Registrar of Companies* (at 635f-g)

Hoffman LJ, as he then was, noted what had been said by Megarry J in *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 WLR 293, at 297)) that where it is proposed that a company be restored to the register to facilitate the making of a claim against it, the interest of an applicant in having the company revived does not have to be firmly established or highly likely to prevail; it is sufficient if it is not “merely shadowy”. Hoffman LJ added:

“The making of the order does not determine whether the applicant has a claim against the company or the company has a claim against a third party. As I have already said, all that is required is that the claim should not be “merely shadowy”. It therefore seems to me that a third party who merely wants to say that the applicant has no claim against the company or that the proceedings which the revived company proposes to bring against him have no prospect of success should not be entitled to intervene in the application.”

[47] In *Re Oakleague Ltd*, Robert Walker J held (at 924H) that provided that the application for restoration falls within the general legislative purpose, the company ought to be restored. He added that whether the restoration does anyone any good is a matter to be decided by another tribunal in the future.

[48] In *City of Westminster Assurance Co v Registrar of Companies* it was observed (at 963) that the policy of the legislation is to limit those who can apply to restore a company to the register to those who were legally prejudiced by the dissolution of that company. Those who wished to enforce a liability of the company needed to have some way of having the

company restored. The ability to restore the company does not depend upon there being a cause of action at the time when the company was dissolved.

[49] In *Re Blenheim Leisure (Restaurants) Ltd (No 1)* it was held that whether it is "just" to order restoration will depend on all of the circumstances of the case, including the nature of the application to remove the company's name from the register, the reasons for the application to restore, the subsequent events that had happened since dissolution.

[50] In *Re Blenheim (Restaurants) Ltd (No 2)*, Neuberger J, as he then was, set out (at 831) the key principles from the previous case law and stated that applications for restoration are quasi-administrative proceedings which should be dealt with simply and quickly. He held (under reference to the former restoration provisions contained in the Companies Act 1985) that the principles applicable in that case included: (a) if one of the three conditions (or "gateways") set out in the statute (here, section 1031(1)) is satisfied, then the court has a discretion as to whether or not to restore the company to the Register; and (b) if one or more of the gateways is established then, absent special circumstances, restoration should follow. Exercising the discretion against restoration should, he stated, be the exception and not the rule. However, he also observed (at 830F) that "...the court does have to look into the matter where there is a real issue as to the prospects of restoration doing any good". In the case he was dealing with, part of the purpose of restoration of the company was for it to seek recovery of sums owed. Neuberger J observed that the prospects of the company, once restored, establishing anything of value "are more than shadowy, but they are pretty speculative".

[51] Finally, there are two Scottish cases which assist. In the first, a case in which a claim had been drafted by responsible English counsel and was to be raised in England, Lord Eassie held that it was inappropriate for the court in Scotland to enter into a detailed

examination of the validity of that claim: *Whitbread (Hotels) Ltd, Petitioners* (para 12). In the second, Lord Glennie, in *Advocate General for Scotland, Petitioner* observed (para 7) that:

“It would make no sense for the applicant to be required to prove his case that he was a creditor for the purpose of making the application to restore the company’s name to the register, and then have to prove it all over again in an action against the restored company.”

[52] Lord Glennie also observed (para 7) that for the purposes of Scots law, the reference to “creditor” in section 1029 includes contingent or prospective creditors.

Application of these principles

[53] I did not understand it to be disputed by the respondents that the petitioner satisfied at least one of the “gateways” for the bringing of this application for restoration. In particular, in terms of section 1029 (2) of the 2006 Act, the petitioner has a potential legal claim against the companies sought to be restored. The petitioner was also, on the basis of the information and allegations made, a creditor of GS1 at the time of its dissolution and a contingent creditor of GS1 and GS2 (in the sense in which that term is explained by Lord Drummond Young in *Liquidator of the Ben Line Steamers Ltd* 2011 SLT 535).

[54] Turning to the question of whether it is just to grant restoration, a full and clear explanation of the key principles capable of being derived from previous cases is set out by Neuberger J in *Re Blenheim (Restaurants) Ltd (No 2)* and I need not rehearse them here. For the purposes of the present case, it seems to me that the main strands of the approach taken in previous cases can be summarised in very brief terms. Assuming that the applicant is a person who falls within one of the “gateways” set out in section 1029(2), if the purpose of the application is to bring a claim against the company or companies sought to be restored then unless there is no real benefit or purpose of restoration, or the circumstances are

exceptional or the claim is “merely shadowy”, it would normally be just to grant restoration. As noted above, the expression “merely shadowy” was used in the present context by Megarry J in *Re Wood and Martin (Bricklaying Contractors) Ltd*. The court held that it was not necessary that the interest of the applicant is one which is firmly established or highly likely to prevail, provided it is not merely shadowy. As also noted earlier, the use of that expression has been endorsed by Hoffman LJ and Neuberger J. For my part, it is a sensible and reasonable threshold to be met as part of seeking to establish, when restoration is sought, that it would be just to do so.

[55] In *Grupo Mexico* the claim for restoration to the register was made by persons alleged to have been acting dishonestly and having used forged documents. The court identified a number of aspects of the conduct of the principal claimant underlying his claim which involved falsehoods, dishonesty and forgery. In setting out the principles to be applied the judge stated that if an applicant seeks restoration in order to pursue a claim, he must prove that the claim has a real prospect of success (para 172 (iii)) and referred in that regard to *Re Blenheim (Restaurants) Ltd (No 1)*, at 572. The respondents in the present case relied upon that observation. I have been unable to find *dicta* to that effect in the decision cited. However, the judge in *Grupo Mexico* also referred to the question of whether the claim should not be “merely shadowy” and that is indeed the test which he went on to apply. He found the case to be an exceptional one and that the claim fell within that category.

[56] In understanding what is meant by the expression “merely shadowy”, it is helpful to note, as mentioned above, that Neuberger J found that an interest in restoration which was “pretty speculative” was not shadowy. Synonyms for “shadowy” could include being imaginary, vague, nebulous, faintly perceptible or of an uncertain nature. Thus, in a case based on fraud or falsehood, the claim could be “shadowy” because of being, in effect,

imaginary. The application of the test of whether the claim is “merely shadowy” is not something which should result in a full debate on the legal relevancy of the potential claim. Adapting what Lord Glennie said in *Advocate General for Scotland, Petitioner* to the circumstances of a debate rather than a proof, what our law would describe as the legal relevancy of the claim which is to be made before another court is something for that other court to deal with (whatever its rules may be) and it is not something that the petitioner needs to demonstrate at this stage for the purposes of restoration. That applies even where the court dealing with the matter is located in another jurisdiction and has to apply Scots law. The degree of detailed examination of the factual and legal basis for the claim which occurs in a debate on relevancy is therefore simply not appropriate. If the claim is “merely shadowy” in the sense discussed, that is something which normally should be fairly obvious. No doubt, if, as in *Grupo Mexico*, where there are exceptional circumstances such as a wholly spurious (and hence imaginary) claim being advanced and that can readily be demonstrated to be the position, restoration will not be granted as it would simply not be just to do so.

[57] I am not satisfied that the claims in the present case can properly be described as being “merely shadowy” or that restoration has no proper purpose or will do no good. I reach that view for the following four reasons. Firstly, the claims in the Texas proceedings have been spoken to in separate affidavits from two experienced US attorneys responsible for advancing the claims. I consider that I am entitled to proceed upon the basis that the claims have been advanced responsibly and that these attorneys are of the view that the petitioner has a proper basis for the claims. Against that background, it is not for me to delve fully into the intricacies of the pleaded case or to form a concluded view on which of the affidavits relied upon by the parties should be accepted and which should be rejected.

[58] Secondly, the foundation of the respondents' position that the allegations based on the ground of piercing the veil are bound to fail was that this ground is being used to hold the respondents liable for breaches of contract by GS1 and GS2. I am not persuaded that this is a correct interpretation of the full position. I appreciate that there is some support for that view in what is said in the principal affidavit relied upon by the petitioner as to the use of the concept of piercing the veil in the Texas proceedings. However, there are also clear references in that affidavit to seeking the veil to be pierced so as to demonstrate that GS1 and GS2 are liable in law for certain conduct of other corporate entities, based upon piercing the veil of those entities. Mr Portela makes references to "claims that the corporate veil of the Other Defendants [ie not GS1 and GS2] should be pierced" and identifies where these are set out in the third amended complaint. He summarises the claim as being that by forming the respondents as companies and using them to infringe the petitioner's intellectual property rights, GS1, GS2 and Mr Oag "used the corporate form as an unfair device to achieve an inequitable result" in essence theft of trade and ownership of intellectual property. The corporate form was used by GS1, GS2 and Mr Oag "to evade or avoid their legal obligations" he contends. Accordingly, the US attorney responsible for the petitioner's claims in the Texas proceedings asserts that, at least in part, the argument for piercing of the corporate veil is to get at GS1 and GS2 (and Mr Oag). When one turns to the terms of the third amended complaint (in count nine), there appears to be support for this understanding of the claim. Thus, at least in part, the claim based on piercing the corporate veil is that the corporate form of the other corporate defendants should be disregarded. There is also, and as I understand it, separately, mention of the other defendants using the corporate form for illegitimate purposes and that those other defendants should be held liable for the existing contractual obligations of GS1 and GS2. But that is not the sole

contention on piercing the veil. Mindful of the fact that the pleadings appear to have been prepared on the basis of the law of Texas, it would be inappropriate for me to go into any deeper analysis of them or indeed to seek to speculate on how the court in Texas will view them.

[59] Thirdly, I am not persuaded that the respondents are correct that if piercing the veil is a wholly untenable argument then claims against GS1 and GS2 for breach of contract and specific performance and other claims against them have no purpose. The respondents argued that the concept of piercing the corporate veil is what underpins the claims in the Texas proceedings that involve recovery of intellectual property. However, as I understand those claims, they are at least in part based upon a direct remedy of transfer by GS1 and GS2 of intellectual property. The respondents say that can't occur, because the intellectual property is not owned by those companies. However, each of the licence agreements entered into by GS1 and GS2 contains provisions to the effect that the licensee "*hereby* [emphasis added] irrevocably assigns and conveys" to the petitioner right, title and interest in and to all improvements, including all applicable intellectual property rights. These provisions are referred to in the third amended complaint. In his affidavit, Mr Portela refers to the petitioner being entitled to specific performance of GS1 and GS2's "obligation to assign, convey and transfer the SPEX Patents and Improvements". It therefore seems that the petitioner may be contending that any such right transferred by GS1 or GS2 (if they acted as the petitioner asserts) could never become the property of a transferee if the provisions mentioned resulted in immediate transfer of these future rights, on their creation, to the petitioner. Putting it at a more general level, there may be an argument based on an inability to transfer property rights to the respondents (in this jurisdiction, perhaps captured by the maxim *nemo dat quod non habet*) which underlies at least some of the remedies sought.

Specific performance thus appears to be sought as a means of effecting the formal transfer of property rights based upon the licence agreements. I am of course not in a position to say how the law of Texas would approach the petitioner's claims based on the licence agreements, but the simple point is that I have been given no basis for concluding that, without piercing the veil, any other ground of claim for return of improvements or other intellectual property is imaginary, vague, nebulous, faintly perceptible or of an uncertain nature and hence is "merely shadowy". Where the claim for return of such intellectual property rights is based upon breach of contract and specific performance by GS1 or GS2 then restoration of these companies is necessary. I also understand that the presence of GS1 and GS2 as defendants is relevant to the claims for declaratory judgments, including in relation to ownership of intellectual property rights. It may also be relevant to other aspects of the claims, for the reasons submitted by the petitioner. Therefore, I am satisfied that there are claims against GS1 and GS2 which are not, on the face of it, dependant on the concept of piercing the corporate veil and which cannot themselves be described as "merely shadowy".

[60] Fourthly, in any event, on the aspects of the claim which do indeed depend upon the concept of piercing the corporate veil, I am also satisfied that these do not fall into the category of being "merely shadowy". Whether these claims have a sound foundation in law is a matter for the court in Texas, albeit applying Scots law, but it cannot be said that, as articulated, they are "merely shadowy" in the sense that I have described. On the contrary, the claims are tolerably clear. I would add that no basis was presented in the affidavits or submissions to support the view that an action for patent infringement under the law of Texas could result in, for example, an improvement or new patent having to be transferred to the petitioner. Accordingly, if other remedies fail, piercing the veil could potentially still be a remedy of last resort.

[61] There is a proper purpose behind restoration. It cannot be said that restoration will do no good. The claims are not “merely shadowy”. In light of these conclusions, it would be inappropriate for me to set out in any detail the submissions of the respondents on the position in Scots law on piercing the corporate veil, or to offer any views on them. I do not regard the fact that restoration might result in further expense for the respondents in relation to the Texas proceedings to be of any real significance. The petitioner submitted that the respondents had no locus to challenge the application for restoration, but that is not an issue upon which I was addressed and I reach no conclusions upon it.

Conclusion

[62] For these reasons, I am satisfied that restoration of GS1 and GS2 to the Register of Companies should be granted, as it is just to do so. However, as there are some consequential issues arising from the fact that the companies will return to liquidation once restored, I shall put the case out by-order for those matters to be addressed before making a final order.