Application seeking the issuance of a letter of request to the High Court of Justice in England and Wales, by which the Liquidator's appointment would be recognised and relying upon the terms of section 426 confer on them powers available under the Insolvency Act 1986.

[2021]GRC062

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:	**HIGHBRIDGE INVESTMENTS LP, INC** **(acting through its sole liquidator David Rubin)**	**Applicant**
	-and-	
	ANDREW KING	
	LESLEY CHAPMAN	
	WILLIAM HUNTER	**Respondents**

Hearing date: 15th September 2021

***Ex tempore* judgment delivered: 7th October 2021**

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Applicant: **Advocate A M Davidson**
Counsel for the Respondents: **Advocate G K Bell**

Cases, texts & legislation referred to:

Re OT Computers Limited [2002] JRC 29
Re REO (Powerstation) Limited [2011] JRC 232A
The Insolvency Act 1986
The Insolvency Act 1986 (Guernsey) Order 1989
Re HIH [2008] UKHL 21
In Re Tambrook (Jersey) Limited [2014] 1 Ch 252
The Limited Partnerships (Guernsey) Law, 1995
The Companies (Guernsey) Law, 2008
Re BCCI [1993] BCC 787
The Royal Court Civil Rules, 2007
The Civil Procedure Rules
Bilta (UK) v Nazir (No 2) [2016] AC 1
Re Dallhold Estates (UK) Pty Ltd [1992] BCC 394
Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch)
The Insolvent Partnerships Order 1994

1. By an application dated 3 August 2021, David Rubin, who has been appointed as the liquidator of Highbridge Investments LP, Inc, seeks the issuance of a letter of request to the High Court of Justice in England and Wales by which the appointment would be recognised and also relying upon the terms of section 426 conferring on him powers available under the Insolvency Act 1986. That application is supported by the Applicant's third affidavit which he swore on 30 July 2021, from which he explains that he was appointed by this Court as the liquidator, at that time a joint liquidator with David Sheil, on 16 May 2018, of the entity that I will call "HILP". Mr Sheil was replaced by Robert Cowie last November but Mr Cowie resigned from office in July this year, meaning that Mr Rubin as the Applicant is the sole liquidator today. His evidence covers the steps that he has taken along with the progress of the voluntary liquidation of Highbridge Consultancy Limited ("HCL"), a voluntary winding-up or liquidation occurring in England and Wales where Mr Rubin was appointed on 18 December 2015 by way of a special resolution. He explains that he considers that he should use the powers available under the 1986 Act in his capacity as liquidator of HCL which he considers has claims against Oliver Mishcon relating to his involvement with HCL where the claims against another director, Ortho Barnes, have already been settled and he sets out that, in his opinion, the business of HCL and HILP was so interconnected that the proper course is for him to seek to pursue the Bailiwick based directors of HILP's general partner, an entity that was known as Highbridge GP Limited, now dissolved, who are Andrew King, William Hunter and Lesley Chapman, all of whom were directors of Provident Trustees (Guernsey) Limited and so for convenience will be described by me as "the Provident Directors." The three of them, as well as Mr Mishcon, were given notice of the application but the three of them have chosen to be joined as Respondents and they are represented by Advocate Bell.

2. Mr Rubin's evidence also deals with what he says is a connection with England and Wales arising from the agreement that was reached between HILP and HCL and the fact that HILP's contracts were made subject to English law and he also deposes to the fact that, apparently, all customers of HILP were based in England. He sets out that he believes that the actions of those he seeks to pursue both as liquidator of HCL and as liquidator of HILP amount to fraudulent trading and that there is a *prima facie* case of knowledge and the other requirements in the Provident Directors.

3. In response, each of the three respondents has sworn an affidavit in broadly similar terms, those of the two gentlemen on 31 August this year and Ms Chapman's was sworn up in Alderney on 2 September. Each affidavit states that he or she, as the case might be, has no beneficial interest in any assets in the United Kingdom nor holds bank accounts there and none of them has agreed to submit to the jurisdiction in England and Wales. In the light of seeing that evidence and also the skeleton argument that had been prepared by Advocate Bell, Mr Rubin has produced his fourth affidavit, which he swore on 15 September, which was the day this matter was heard, addressing issues raised therein. In particular, in that evidence he states that the investigations that he was undertaking into HILP were still ongoing in December 2017, a date to which I will return, and he suggests that it was therefore premature to suggest that he should have sought to wind up HILP in the High Court, again through a process to which I will turn in a moment.

4. In addition to having skeleton arguments from Advocate Davidson on behalf of the Applicant and Advocate Bell, I have various opinions on English law, first of all provided on behalf of the Applicant by Clara Johnson, her first opinion being dated 30 July this year, and for the Respondents by Josh Lewison dated 13 August 2021 and, as a result of that, Miss Johnson prepared a supplemental opinion dated 6 September.

5. Following the oral hearing on 15 September, both sides were given the opportunity to address what appeared to me during that hearing to be the main basis of opposition to the application, namely, abuse of process, by filing any further material. That resulted in a further opinion from Mr Lewison dated 22 September, along with an affidavit of Quentin Bregg sworn the same day

exhibiting some materials relating to the HCL liquidation that had been filed by Mr Rubin early on after his appointment to which reference was made in Mr Lewison's opinion. The Applicant responded with a second supplemental opinion of Miss Johnson dated 29 September, along with an affidavit of Rebecca Hale sworn the same day, that affidavit also exhibiting the management services agreement between HILP and HCL to which reference had been made in that opinion.

6. Against that background, I turn next to the principles that are applicable. Issuing a letter of request for recognition of an appointment made by this Court to a foreign court usually proceeds *ex parte*. As a result, it seems that there is a paucity of authority as to what happens. Advocate Davidson has referred to some Jersey cases dealing with outgoing requests. For example, in *Re OT Computers Limited* [2002] JRC 29, on the *ex parte* application the court appears to have been influenced by an opinion from English counsel confirming that a request in the form envisaged would be received by the High Court and enable it to decide whether to make the administration order being sought there, at that time a concept not known to Jersey law. As a result of that case, the opinion of Miss Johnson was obtained with a view to it being placed before the Court indicating that, in her opinion, the High Court would be amenable to receiving a request from this Court. More recently in Jersey, in *Re REO (Powerstation) Limited* [2011] JRC 232A, it was accepted by the Royal Court of Jersey that it should be prepared to contemplate issuing a letter of request if it is in the interests of creditors or if it is in the interests of debtors or if it is in the public interest.

7. Turning to statute, there are effectively mirror arrangements by which cross border assistance can be sought in respect of insolvent entities or bodies. Just as applications made under section 426 of the Insolvency Act 1986 under the terms of the extending statutory instrument, which is the Insolvency Act 1986 (Guernsey) Order 1989, are welcomed by this Court through comity, requests in the opposite direction are usually met in a similar fashion. One of the consequences under the section is that the powers of the requesting and requested court generally become available in the requested jurisdiction. That is apparent by virtue of section 426(5), which provides:

> *"For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.*
>
> *In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."*

By virtue of subsection (11)(a), a "relevant country or territory" means any of the Channel Islands as well as the Isle of Man.

8. It is apparent from a number of cases to which Miss Johnson refers that this subsection is generally given a broad interpretation by the High Court, so, for example, in *Re HIH* [2008] UKHL 21, the House of Lords granted a letter of request from the Australian court to remit English assets to four insolvent Australian insurance companies for distribution in accordance with the Australian statutory scheme for distribution which was materially different from that which existed at the time in England. In other words, it was satisfied that it was appropriate to have regard to the Australian provisions even if they differed from the English provisions.

9. In relation to a Jersey entity in *In Re Tambrook (Jersey) Limited* [2014] 1 Ch 252, the Court of Appeal confirmed the High Court's jurisdiction to make an administration order in England, even though there were no formal insolvency proceedings in Jersey or none were contemplated. In so doing, it rejected the judge's finding that the requesting court must be exercising its

insolvency jurisdiction in order for the English court to provide assistance to it. Davis LJ held at para.38:

> *"The second, and linked, point is this. The authorities show that s.426(4) and (5) are to be given a broad interpretation. In my view, the words of s.426(4) are amply sufficient, broadly read, to enable the English court to 'assist' the Jersey court in the way here requested. There is neither linguistic necessity nor purposive compulsion to adopt a narrow and restrictive approach. To the contrary."*

10. I take these principles to mean that, if recognition were to be sought and granted, the gaps in the powers in either jurisdiction's domestic law can be filled, or perhaps better expanded, by reference to the powers available in the other jurisdiction and that is very much the basis on which Mr Rubin pursues this application. He acknowledges that under the terms of the Limited Partnerships (Guernsey) Law, 1995 the ability to pursue fraudulent trading does not exist so, as liquidator in this jurisdiction, he would be unable to pursue the Provident Directors under the terms of the powers conferred upon him as liquidator by the 1995 Law. He notes that, under the terms of the Companies (Guernsey) Law, 2008 as amended, powers similar to those on the face of the Insolvency Act 1986 exist in relation to companies and the general partner of which the Provident Directors were the directors is a route that could have been followed to confer upon him those domestic powers so, rather than filling gaps, if the letter of request were to be issued and the application for it to be given effect were granted, that would not be necessary. Without going into detail, in *Re BCCI* [1993] BCC 787 there is a good example of that approach relating to a request from the Grand Court of Cayman and, in particular, relating to the sections of the Insolvency Act that Mr Rubin seeks to engage.

11. The starting premise, therefore, is that issuing the letter of request is appropriate if there is a reason to do so and I am prepared to accept the indication given in *REO (Powerstation) Limited* as to the types of purposes for which a letter of request can properly be granted. There ought to be some connection to the jurisdiction to which the request will be addressed to assist so that there will be a proper purpose being served but even if those conditions are satisfied, on behalf of Mr Rubin, Advocate Davidson acknowledges that the Court still has a discretion, where that discretion must be exercised judicially, and it is common ground between the parties' English law experts, Miss Johnson and Mr Lewison, that usually requests are entertained and all assistance that can be available is rendered by the requested court.

12. On behalf of the three Respondents, Advocate Bell contends that this application should be dismissed because to issue a letter of request would be either an abuse of process or it will serve no purpose where there are no assets on which to execute any judgment obtained and it is unlikely to be enforceable in Guernsey or that the Applicant has failed to give the required full and frank disclosure. There is then a subsidiary point about whether the High Court would be able to exercise jurisdiction over the Provident Directors. I am satisfied that the first of these grounds of opposition is by far the most significant and that is what led to the ability to present further information to the Court.

13. In respect of the other arguments, I can deal with them comparatively quickly. The issue about full and frank disclosure fell away because this has been dealt with *inter partes* rather than *ex parte*. In respect of the argument that I will term "the Utility Argument", although the Respondents have deposed to the fact that they have no assets in the United Kingdom and will not volunteer to submit to the High Court's jurisdiction, I am satisfied that under both the Royal Court Civil Rules, 2007 and by reference to the Civil Procedure Rules as they operate in England and Wales, there is sense in there being one set of proceedings. I am not persuaded that obtaining leave to serve out on the three Provident Directors if the letter of request were issued and found favour where Mr Mishcon appears to be an anchor defendant for the purposes of proceedings in the High Court would be a problem and, further, I have noted that there are arrangements for reciprocal enforcement that are such that, should that be necessary,

appropriate steps could be taken post-judgment. It will prejudge what might or might not happen if proceedings are issued out of the High Court to say that there is no utility and, therefore, in my view, there can be some utility. In that regard, I note what Mr Lewison has suggested by reference to *Bilta (UK) v Nazir (No 2)* [2016] AC 1 but I still consider it more likely than not that service out would be permitted and, indeed, Mr Lewison recognises as much in para.39 of his first opinion.

14. On the issue of enforcement, if enforcement of a judgment obtained in England became relevant, they are questions of Guernsey law and, therefore, are not for Mr Lewison to opine upon. As I have just said, although there may be some questions depending on what happens about enforcement, there remains the potential for any such judgment to be capable of being enforced, whether that be in Guernsey or Alderney, and, therefore, I am not persuaded that the Utility Argument is a reason to refuse to issue the letter of request on this application.

15. The main opposition has always been and continues to be the argument that it is an abuse of process. That involves determining the question of whether the Applicant, Mr Rubin, is now seeking to circumvent a limitation barrier that would have operated if the winding-up of HILP had been sought in England and Wales. In that regard, because these are questions of English law, I have been heavily reliant upon the opinions of the two English counsel and I will admit that some of it is highly technical. In that regard, I accept that both of the parties' experts are qualified to give expert opinion and, therefore, I have to decide which of the opinions I prefer and I have reminded myself that I can decide that one of them expresses a better opinion on one point and another on a distinct point. Both counsel should remember that their role is to assist this Court on questions of English law and not to engage in argument as they might if they were appearing in the High Court and, in that regard, I have discounted anything contained in either opinion which does not go to the question of the abuse of process and, in particular, I have not had any regard to para.19 of Miss Johnson's second supplemental opinion.

16. However, first of all, as a matter of Guernsey law, I need to decide the approach that this Court should take. Advocate Davidson suggests that the test to refuse to issue a letter of request should be a very high one. He submitted that it was as high as considering whether the request would be futile, in the sense of asking for something that it is impossible for the High Court to grant. He further submits that if that high threshold for refusing the application is not met, the better course is to leave it to the High Court to determine whether or not to accede to a request from this Court for assistance. In response, Advocate Bell suggests that there is a lower test which involves considering whether there is good reason not to grant the application. He goes further and suggests that there is no gloss on the question of good reason by including very good reason or, indeed, very strong reason, both terms being used in the opinion of Miss Johnson, and he refers to the decision of Rattee J in the *BCCI* case which referred to the requested court granting assistance unless there is some good reason for not doing so.

17. On that question, I prefer the approach gleaned from what the High Court is likely to do on receipt of a request rather than considering that the issuing of a letter of request is subject only to the extremely high test being suggested by Advocate Davidson. I reach that conclusion because comity between courts is about courts in different jurisdictions affording to each other proper respect so that the usual language of it being a pleasure to render the assistance being sought is not treated as being requests being made where the prospects of success are so remote or so slim that it is a waste of everyone's time and their money. In other words, when considering whether to issue a letter of request, the requesting court, this Court, should have regard to the fact that no court in another jurisdiction will thank this Court for issuing a request where the prospects of success are that remote or slim. I take that view as well by reference in this case to the overriding objective, because the overriding objective under the 2007 Rules, reflecting the overriding objective in the Civil Procedure Rules, is that court time should not be taken up in either court system where the matter really does not deserve court time.

18. I take the view that futility or impossibility is raising the bar higher than it needs to be. It strikes me that that is equivalent to a test of bound to fail with the analogy on a strike-out application. I prefer taking a realistic view as to the prospects of success and, in doing so, have regard to what might be argued against the letter of request in the receiving court or the requested court and also having regard to which side appears to have the better of the argument before deciding whether to grant the application or refuse it. In doing so, I recognise that a realistic prospect of the request finding favour does not mean to say that it is bound to find favour and that there may be arguments that can be advanced before the receiving or requested court that might be attractive to that court.

19. It is common ground between the parties that the legislative regime relating to insolvency in England and Wales would have permitted an application to be made by Mr Rubin as liquidator of HCL to wind up HILP in England and Wales. The difference between the two English counsel who are experts before this Court is that Mr Lewison opines to the fact that the application would have been likely to succeed, whereas Miss Johnson disagrees. The abuse of process argument by the Respondents is predicated on the view that the proper approach for Mr Rubin was to apply to the High Court. Mr Lewison points out that the position is different from some previous cases because here the application could have been made but Mr Rubin chose not to make it. In doing so, he draws attention to *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394, the *BCCI* case and also *Re Television Trade Rentals* [2002] EWHC 211 (Ch), which was concerning two Isle of Man companies where the English court was asked to put them into company voluntary arrangements which was not a feature of Manx insolvency law.

20. He also draws attention to the abandonment in 2018 of Mr Rubin's application to restore and then wind up the general partner. However, in doing so, I think he has overlooked the fact that para.3 of the Act of Court from 2018 shows that the application was not pursued rather than it being abandoned, in that it was adjourned *sine die* with liberty to restore.

21. The facts show that HILP was dissolved under the 1995 Law on 17 December 2014. It arose from the retirement of the general partner. Section 8(1)(e) of that Law makes provision for the limited partnership to continue in those circumstances, the most relevant situation being that there are up to ninety days permitted for a new general partner to be appointed but, again, none was in this case. Further, the absence of any general partner meant that there was no one to wind up the affairs of the limited partnership until a liquidator was appointed, making use of section 30, which is what happened in 2018. There may have been nothing to worry about if the liabilities of HILP had been validly assigned to HCL but Mr Rubin's investigations once he was appointed to liquidate HCL around one year after that in December 2015 shows his views on that process and, therefore, the renewed interest in HILP and seeing what could be done for its creditors.

22. The winding-up of an insolvent partnership is available in England and Wales as a winding-up of an unregistered company. Modifications are made to the provisions in the 1986 Act by virtue of the Insolvent Partnerships Order 1994 and, in particular, the provisions found in schedule 3 to that Order. Section 221 provides that:

> *"Any insolvent partnership may be wound up if it has or at any time had in England and Wales either a principal place of business or a place of business at which business is or has been carried on in the course of which the debt or part of it arose which forms the basis of the winding-up of the partnership."*

23. Further, by section 221(2) as modified, an insolvent partnership is not to be wound up under the Act if the business of the partnership had not been carried on in England and Wales at any time in the three years preceding presentation of the petition, and that is why the Respondents are arguing that time ran out for the application in respect of HILP under the terms of the 1994 Order in December 2017. They say that, as the liquidator of HCL, Mr Rubin had the ability to

wind up HILP under that Order during those three years, effectively, those two years after his appointment. The material he filed in respect of HCL in 2015 showing the relationship between HCL and HILP shows that he was aware of the interrelationship between those two bodies. HCL was said to provide back office services to what was described inaccurately in that material as a Guernsey based company, HILP, where HCL had been set up to provide UK-based administrative assistance to HILP. Mr Rubin and Mr Mishcon set out that the reason for HCL being placed into liquidation was that its sole client, being HILP, had ceased trading.

24. Although Mr Rubin deposes to the fact that he has formed the view that the business of HCL and HILP constituted a scheme and that those contracting with Highbridge did not distinguish between them, the rest of the material shows that each customer was actually contracting with HILP and not with HCL. That was no doubt why the liabilities were purportedly assigned to HCL at the time the general partner retired and HILP was dissolved.

25. Stepping back from the material and the relationship between the two parties, whatever Mr Rubin thinks, I am not persuaded that the Respondents are correct to contend that section 221 as modified is clearly met. I am not persuaded that Mr Rubin as the liquidator of HCL was necessarily obliged to pursue that route by December 2017. The relationship between HILP on the one hand, HCL on the other hand and those who were contracting with HILP does not satisfy me at this stage that there is the better of the argument that HILP had a place of business in England and Wales. HCL clearly had a place of business in England and Wales but even if Mr Rubin regards it as a scheme where people were not distinguishing between the two entities, I do not think that the locus available under the 1994 Order modifying the terms of the Insolvency Act is necessarily indicative that the application would have found favour. Looking at the service agreement between HCL and HILP, I take the view that this was an arm's length, although closely connected, arrangement and that HCL was providing services to HILP and that HILP was therefore not necessarily using any place of business other than its Guernsey address.

26. If I needed to do so, I would also remind myself that what Mr Rubin initially sought was to restore the general partner and then to wind it, and also the limited partnership, up. Indeed, with the benefit of hindsight, it may have been preferrable to have taken that route because if the general partner had been restored, although there would have been a delay, if it were then also wound up, the directors of the general partner, being the Provident Directors, would have been entitled to have their say, had they wished to, on the winding-up and these types of issues would have been addressed much earlier. If there had been a winding-up of the general partner, then the powers available under the 2008 Law would not result in filling gaps that otherwise exist because of the limited partnership being wound up under the 1995 Law. In those circumstances, Mr Rubin may have had a clearer choice as to which forum in which to proceed but that would not have precluded him, as he now chooses, to propose to litigate in England and Wales.

27. In summary, therefore, having regard to the arguments advanced by Advocate Bell, relying upon the expert evidence of Mr Lewison, as to whether or not there would be a finding of an abuse of process, I am not persuaded on the material before me that the Respondents have the better of that argument. I prefer the opinion that is given by Miss Johnson that it is less likely that the court in England and Wales will refuse the letter of request if it is issued because of those abuse arguments.

28. If I am wrong, however, to reach the conclusion I have on whether or not on the facts HILP had a place of business where the debt being relied upon arose, recognising that the debt to which the Respondents are referring is the money owed to HCL by HILP for the services being performed and, as a result, the Respondents have a credible argument that what Mr Rubin is now doing is circumventing the three-year period mentioned in section 221(2) as modified, I take the view that those arguments would be better to be rehearsed fully in terms of matters of

English law to be resolved by the High Court rather than before this Court. In other words, going back to my realistic prospect of success test, this is not an issue which is unarguable by either side. It is an issue where there may be something further that can be said. There may be some nuance as to the approach that the High Court would take on Mr Rubin's application for recognition pursuant to the letter of request because that court will be better positioned to resolve that than this Court on the basis of the expert evidence before it. Put another way, I still prefer Miss Johnson's opinion rather than Mr Lewison's, but I cannot say that that will necessarily be the outcome if the same arguments were deployed before a court familiar with that type of issue.

29. I appreciate that that puts the Respondents to the additional expense, if they so wish, of opposing the letter of request but I am satisfied before this Court that the balance lies in favour of not rejecting the application for the reasons I have given. In other words, I am not satisfied that there is a sufficiently strong argument on abuse of process that means that I should accept that today.

30. Having determined that the preconditions to grant the application have been satisfied, I am left to consider whether this Court should exercise its discretion to grant the application and issue the letter of request. Although I remain of the view that there are other routes by which Mr Rubin could choose to proceed to bring those he considers to be liable for fraudulent trading before a court, as raised during the course of the hearing, I have decided that it would be wrong for me to require him to take the alternative route of restoring his application to deal with the general partner by way, first, of restoration and then of winding-up which would inevitably engage the Provident Directors in some shape or form if they wanted to be heard and I recognise that there are different ways of approaching the same question and that Mr Rubin has chosen the route that he has determined he wishes to follow.

31. I have also considered whether or not the amount of time he has taken to reach this stage is something that should result in me refusing his application. I believe he could have moved quicker than he has but that in itself is not, in my view, a good reason to refuse to issue the letter of request. Further, because he is an appointee of this Court, I am prepared to give him a degree of deference to pursue the route that he has chosen. It does require him to seek first to have his appointment by this Court recognised in England and Wales and, indeed, I am satisfied that that step would not normally be contentious. The issue will be about whether that means that the powers that are available through section 426(5) of the 1986 Act should be permitted to him. In general, again, I think that that is likely to follow but there could be arguments to be deployed against it. Accordingly, whilst it remains open to Mr Rubin to rethink his position if he wanted to pursue the alternative route of tackling the general partner, I remain satisfied that this is an appropriate application to grant and, subject to a few small comments, the application is granted on that basis.

32. A draft letter of request attached to the application, however, contains some small errors. On the second page of the draft letter of request, the final recital, (i), I am not satisfied that it is appropriate to say that it is overwhelmingly connected with England and Wales and, therefore, I require the word "overwhelmingly" to be removed. I am satisfied there is a connection and that connection comes through the relationship between HCL and HILP as evidenced by the service agreement and the roles that the Provident Directors were playing in giving effect to that limited partnership's business through using the services of HCL in England.

33. Turning over the page to the actual requests, I am not persuaded, now that there is a sole liquidator of HILP, that (c) can properly be included so it must be removed and, in relation to (b), because he is a sole liquidator, for "them" substitute "him". But what the request sets out to do is to seek recognition of Mr Rubin's appointment by this Court as the sole liquidator of the limited partnership and then, perhaps the more contentious area, to confer upon him the

powers available to him under the Insolvency Act 1986 as if he had been appointed liquidator in a compulsory liquidation pursuant to Part 5 of that Act as applied through the 1994 Order.

34. So, subject to making those changes, para. 1 of Mr Rubin's application is granted.