EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 81 OF 2020

IN THE MATTER OF EXENTIAL INVESTMENTS INC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

RUSSELL CRUMPLER AND DAVID STANDISH
AS JOINT LIQUIDATORS OF EXENTIAL INVESTMENTS INC (IN LIQUIDATION)
Applicants

and

EXENTIAL INVESTMENTS INC (IN LIQUIDATION)
Respondent

Appearances:
Determined on paper with written submissions from Alex Hall Taylor QC, Richard Brown and Paul Griffiths of Carey Olsen

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2020: September 29

JUDGMENT

[1] **JACK, J [Ag.]**: This is an application by liquidators made under section 186(3) and (5) of the **Insolvency Act 2003**[1] (a) for sanction to bring information disclosure proceedings and (b) for a direction, sanction and/or permission to draw-down on a funding agreement between the Liquidators, the Company and a litigation funder dated 20 August 2020 on the basis that it is in the best interests of

[1] No 5 of 2003, Laws of the Virgin Islands.

the creditors as a whole, does not offend the principles of maintenance and champerty and is a lawful and enforceable agreement as a matter of BVI law.

[2] As to (b) this Court has granted such sanction of funding agreements in other cases, but counsel for the liquidators tell me that there is no written judgment in this jurisdiction confirming the power of the Court to grant such relief. I shall state my reasons briefly, but I observe that I have heard no adversarial argument. The authority of this judgment is thus likely to be weaker than if the matter had been heard contentiously.

[3] The facts, which are set out in the witness statement of David Standish, the second applicant, are set out in the skeleton argument submitted on behalf of the applicant liquidators as follows:

> "15. The Company is a BVI company, incorporated on 26 April 2012. It was struck off the Register of Companies on 23 February 2017 until it was restored to the Register on 30 July 2020.
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> 16. The Ponzi scheme operated from around 2011, until it was finally shut down by the authorities in Dubai in July 2016. Investors were induced to invest by promises of low/no risks and high rewards. The premise of the investment was summarised in one of the Exential Group's standard form contracts which provides:
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> > 'The risk of loss in trading currencies in FOREX can be substantial However, Tadawul ME Forex Managed Accounts Program uses a very low degree of leverage, which works well for investors. We assure you complete protection of your initial capital investment of $20,000 in our Managed Account Program at all times. There is no reckless or unsustainable leverage taken to achieve these performances. Even better, our managed accounts also use sophisticated proprietary methodologies to follow short-term trends. We continuously research and develop our trading models to always perform better.'
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> 17. The scheme at first paid some returns out to investors as 'profits'. Money flowed in and out of the scheme between 2011 and 2015 and this incentivised some investors to invest further and greater amounts into the scheme. The face of the Exential Group, Mr. Sydney Marshal Agnelo Lemos ('Mr Lemos'), was keen to promote the image of success and he was often seen in expensive cars, threw lavish parties and rubbed shoulders with some of the world's elite sportsman, which all garnered

attention (and therefore investors) into the scheme operated by the Exential Group. The scheme appears to have peaked in late 2015.

18. In early 2016, the Exential Group ceased paying out investors' withdrawal requests, with an array of excuses being offered over the course of that year as to why money could not flow out. [The Dubai authorities] ordered the Exential Group to stop trading in July 2016 and in December of the same year, two of the ringleaders of the fraud, Mr. Lemos and Ryan Fernandez were arrested and subsequently sentenced to 513 years in prison. Mr. Lemos' wife, Valany Cardoza, was also sentenced to 513 years although as she had fled to Goa, India, her sentence was pronounced in her absence.

19. The Exential Group's own marketing material placed the Company at the centre of the Exential Group and it was represented to investors that the Exential Group: 'was based in the BVI and the Seychelles, with a representative office in Dubai' and 'consists of three companies; Tadawul ME UAE (responsible for all automated trading), Exential Mideast UAE (marketing arm of the Exential Group) and "Exential Investments" (our offshore unit based in BVI and Seychelles).'

20. This alone establishes a *prima facie* case that the Company was integral to the Exential Group and, as with many frauds of this nature, it is likely the Company will have been used interchangeably with other entities in the Exential Group to perpetrate the fraud and the evidence obtained to date bears this out.

21.. During the relatively short time the Liquidators have been in office, they have undertaken investigations which evidence that:

a. Mr. Lemos was a director of the Company between 28 June 2013 to date and its sole shareholder from 27 June 2013.

b. Mr. Raymond Anthony Thomas ('Mr. Thomas') served as director of the Company between 31 May 2012 and 1 July 2014 and was its sole shareholder between 31 May 2012 and 27 June 2013, when he transferred his shares to Mr. Lemos.

c. Mr. Lemos was granted a wide-ranging Power of Attorney on 25 September 2012 authorising him to 'act as the true and lawful Attorney of the Company for and in the name of and on behalf of the Company' in relation to a very wide range of matters including, amongst other things:

(i) to represent the Company in connection with the registration and establishment of branch offices anywhere under the name 'Exential Investments Inc' (or such other similar name as may be approved);

(ii) to manage in the sole discretion of Mr. Lemos the financial affairs of the Company; and

(iii) to open, maintain and operate bank accounts in the name of the Company or in the joint names of the Company and any other person, firm or companies at any bank. These arrangements are suspicious on their face for obvious reasons.

d. The Company operated a bank account with Investec Bank (Mauritius) Limited between October 2012 and August 2013 through which it received US$11,588,155.36 from individual investors in the Ponzi scheme and made payments to Exential Mideast Commercial Brokers LLC ('Exential Mideast UAE') (US$6,690,634.43), BT Prime Ltd (US$ 2.02 million), FX Primus Limited (US$ 1.6 million), Bancodebinary Limited (US$310,000), Capital Control (US$ 2,524) and Mr. Lemos (US$ 13,747.25).

e. The Company operated a bank account with Emirates Islamic Bank in the UAE.

f. A financial institution in the UAE is understood to be holding a significant sum of money relating to the Exential Group.

g. Capital Control ME Limited ('Capital Control'), a BVI company incorporated on 24 April 2013 also appears to have formed part of the Exential Group and actively targeted investors in Hungary (and, possibly, other countries in Eastern Europe) which, according to the front sheet of a contract was the 'official representative of' the Company, although the investors were directed to pay their investments to other entities in the Exential Group. The Company transferred Capital Control the sum of US$2,524 shortly after it was incorporated.

22. The Liquidators have identified the following steps that they believe it may be necessary for them to take, in order to further their investigations into the Ponzi scheme and recover assets for the benefit of creditors:

a. Seek recognition of the liquidation order in Dubai/UAE and Mauritius.

b. Obtain further bank account records for the Company and other entities in the Exential Group. This will likely require **Bankers Trust**[2] relief for which sanction is sought to bring proceedings…

c. Continue investigations into sums potentially held at a financial institution in the UAE.

d. Continue to collect in the Company's books and records and investigate its affairs.

e. Obtain corporate records of other companies in the Exential Group. This will require **Norwich Pharmacal**[3] relief for which sanction is sought to bring proceedings…

[2] See Bankers Trust Co v Shapira [1980] 1 WLR 1274.

[3] See Norwich Pharmacal v Customs and Excise Commissioners [1974] AC 133.

> f. Obtain information from those connected to the Company, including Mr. Lemos and, if she can be located, Mrs. Lemos.
> g. Identify and bring recovery actions against persons involved in the fraudulent scheme.
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> 23. In order to take the above steps, the Liquidator[s] and the Company will require professional advice from legal practitioners and others."

[4] The creditors of the company have typically lost five figure sums in the Ponzi scheme. Proofs totalling $87 million have already been presented. It is thought that about $250-$500 million went through the scheme, although some of that may have been repaid to early investors. The difficulty facing the liquidators is that, with such a large number of (comparatively) small creditors, it is very difficult to raise funds from the creditors to pursue potential avenues of recovery. Accordingly, the liquidators have sought to obtain litigation and liquidation funding.

[5] Mr. Standish's witness statement explains the steps taken to test the litigation funding market. I am satisfied that the liquidators have obtained the best deal available.

[6] This leads to the question whether it is lawful for the liquidators to enter a funding arrangement whereby the funder receives a share of the recovery in the litigation. At common law maintenance and champerty were criminal offences. The **Criminal Law Act 1967** (UK)[4] abolished the offences in England and Wales, but section 14(2) provided:

> "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

[7] This Territory's **Criminal Code 1997**[5] provides in section 328:

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[4] 1967 c 58.
[5] No 1 of 1997, Laws of the Virgin Islands.

"(1) The following offences under common law are abolished:

(a) any distinct offence, under the common law, of maintenance (including champerty and embracery)…

(2) For the avoidance of doubt, it is hereby declared that to the extent (if any) that the following Acts of the Parliament of England apply in the Territory, namely

(a) the **Champerty Act** (28 Edw. I.c.11),

(b) the **Maintenance and Embracery Act 1540** (32 Hen. VIII c.9), they are hereby repealed in relation to the Territory."

[8] It is noticeable that the provision in the English legislation for the retention of the rule of public policy against maintenance and champerty is not reproduced in our legislation, which suggests that the legislature was not concerned with any breach of public policy from the making of litigation funding arrangements.

[9] In **London & Regional (St George's Court) Ltd v Ministry of Defence & Anor**[6] Coulson J, as he then was, held:

"102. A person is guilty of maintenance if he supports litigation in which he has no legitimate interest without just cause or excuse: see **Hill v Archbold**[7] and **Trendtex Trading Corp v Credit Suisse**.[8] Champerty has been described as 'an aggravated form of maintenance' and occurs when the person maintaining another stipulates for a share of the proceeds of the action: see **Giles v Thompson**.[9] What these principles seek to avoid is 'the wanton and officious intermeddling' with the disputes of others in which the inter-meddler has no interest whatsoever and where the assistance that he renders to the other party is without justification or excuse. In commercial cases, the courts have recognised that a sufficient interest does not have to be proprietary in character; in **Trendtex**, Oliver LJ concluded that maintenance would be justified 'wherever the maintainer has a genuine pre-existing financial interest in maintaining the solvency of the person whose action he maintains'.

[6] [2008] EWHC 526 (TCC). An appeal on another point was dismissed by the English Court of Appeal: [2008] EWCA Civ 1212, 121 Con LR 26, [2008] 45 EG 100.
[7] [1968] 1 QB 686.
[8] [1980] 1 QB 629.
[9] [1994] 1 AC 142.

> 103. Many of the relevant authorities in this area of the law have been helpfully summarised by Underhill J in **Mansell v Robinson**.[10] He concluded that:
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> > a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable: see **R (Factortame) Ltd v Secretary of State for Transport (No.8)**;[11]
> >
> > b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement: see **Giles v Thompson**;
> >
> > c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable: see, for example, **Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No.2)**;[12]
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> > d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction: see **Papera**."

[10] A similar approach has been adopted in Bermuda,[13] Jersey,[14] Australia[15] and Cayman.[16] Jackson LJ in the **Final Report** of his **Review of Civil Litigation Costs**[17] said that he "remain[ed] of the view that, in principle, third party funding is beneficial and should be supported." He set out a number of reasons why such funding was in the public interest and contributed to access to justice.

[11] In my judgment, the funding arrangement proposed is not contrary to BVI public policy. Indeed, the contrary is the case. Without the funding, the liquidators would

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[10] [2007] EWHC 101 (QB).
[11] [2002] EWCA Civ 932, [2003] QB 381.
[12] [2002] EWHC 2130 (Comm), [2002] 2 Lloyd's Rep 692; also cited as The Eurasian Dream (No 2) (Cresswell J).
[13] Stiftung Salle Modulable and another v Butterfield Trust (Bermuda) Limited [2014] SC (Bda) 14 Com at paras [327] to [333] (Kawaley CJ).
[14] In re Valetta Trust [2011] JRC 227, 2012 (1) JLR 1 (Royal Court).
[15] Campbells Cash and Carry Pty Limited-v-Fostif Pty Limited [2006] HCA 41, 229 CLR 386 (High Court of Australia): see the discussion at paras [66]ff and the conclusion at para [96].
[16] A Company v A Funder FSD 68 of 2017 (Segal J).
[17] (December 2009) at para 1.2.

be unable to obtain recoveries for the benefit of the creditors of the company. Approving the funding arrangement is in the current case essential to ensure access to justice. Accordingly, I sanction the entering of the funding agreement.

[12] The other relief sought under (a) is straightforward. I have no hesitation in granting the remainder of the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar