



Neutral Citation Number: [2005] EWHC 2774(CH)

Case No: 7261 of 2005

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 1st December 2005

Before :

MR MICHAEL FURNESS QC
(Sitting as a Deputy Judge of the High Court)

IN THE MATTER OF TREASURE TRADERS CORPORATION LTD

-and-

IN THE MATTER OF THE INSOLVENCY ACT 1986

Jonathan Brettler (instructed by **The Treasury Solicitor**) for the Secretary of State for
Trade and Industry
The Company did not appear and was not represented

Hearing date : 25th November 2005

Approved Judgment

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

.....
Mr Michael Furness QC

JUDGMENT

Mr Michael Furness QC:

1 On this application the Secretary of State for Trade and Industry seeks the appointment of a provisional liquidator of Treasure Traders Corporation Ltd (“the Company”). The application is made in a petition for the winding up of the Company on the grounds of public interest pursuant to section 124A of the Insolvency Act 1986. In the petition the Secretary of State relies on four grounds, which can be summarised as follows:

- (1) The Company’s business involves the commission of criminal offences under the Fair Trading Act 1973
- (2) The Company’s business involves the running of an illegal lottery
- (3) The Company’s business is inherently objectionable and
- (4) The Company has made misleading statements to its customers in its presentations and marketing materials.

2 The Company was not represented at the hearing of the application, but its solicitors, Stripes, wrote a letter to the Court making submissions as to why the application should not be granted. I am grateful to Mr Brettler, who appeared for the Secretary of State, for assisting me to an understanding not only of the Secretary of State’s arguments, but also of the arguments advanced by the Company.

3 The Company was incorporated as a private limited company on 9th September 2004 as Tappitt Resources Ltd, and adopted its present name on 12th November 2004. It commenced trading in October 2004. The founder of the Company and, at present, its sole director, is Mr Peter Kippax. The evidence principally relied on by the Secretary of State is comprised in two affidavits made by Rosemary Janes, who is an Investigator in the Companies Investigations Branch of the Company Law and Governance Directive of the Department of Trade and Industry. Ms Janes was authorised under section 447 of the Companies Act 1985 to call for documents from the Company on 31st May 1990. She has also conducted interviews and attended presentations given by the Company to prospective customers. Ms Janes has been able

to give in her evidence a fairly detailed account of the Company's business operations, although she notes a paucity of accounting records. The Company actually traded for about four months without a bank account, all transactions being carried on in cash. According to Ms Janes, the Company still does not operate the cash control procedures appropriate for a business dealing substantially in cash transactions. Although Mr Kippax, in his evidence makes some criticisms of Ms Janes' description of the Company's business, these are either points of detail which, even if correct, do not in my view materially affect the accuracy of her evidence, or are disagreements with Ms Janes' comments on or analysis of the evidence.

The facts

4 Although, Mr Peter Kippax was the founder of the Company's business, the idea behind that business was provided by Mr Kippax's cousin Mr Alan Kippax. At the time of the Company's incorporation Mr Alan Kippax was the owner of a Canadian company called Treasure Traders International Corporation ("TTI") which was carrying on a business in Canada similar in nature to the business now carried on by the Company. TTI provided cash to start up the Company's business, a quantity of gemstones and a range of promotional material. Ms Janes has been informed that TTI is now under investigation by the authorities in Canada, and TTI does appear to have attracted some unfavourable publicity in that country. Mr Peter Kippax is at pains to stress that he has now severed all links with TTI and has taken steps to modify the Company's activities so as to comply with UK law. It is true that the details of the Company's operations have been modified over time. I propose to describe the Company's operations as they appeared to Ms Janes, and then deal, where appropriate with the changes which Mr Kippax says he has now introduced

5 By way of overview, the Company, on its own case, is ostensibly in the business of selling products. The original product was emeralds, which were sourced from TTI in Canada. These were made available for sale in the form of an article called a "Gem Cache". A Gem Cache, as I understand it, is a small brick covered in gold leaf. Inside the brick are loose emeralds, and there is a window in the brick through which the emeralds can be viewed. Attached to the brick is an appraisal

certificate stating the value of the enclosed emeralds. At some point in the scheme it became possible to acquire loose emeralds as an alternative to taking emeralds as in the form of Gen Cache (see paragraph 13 below). Recently Mr Kippax has introduced the further option of customers acquiring £5,000 worth of credit with an internet business called Trade Deals Ltd which he has established and which sells household goods. I will refer to all of these options as “products”.

6 The other aspect of the Company’s business is the Treasure Traders Scheme (“the Scheme”). A customer who puts down a deposit on a product is eligible to join the Scheme, under which he can earn money both from finding other people to pay deposits on products, and as a result of other participants in the scheme finding such people. The Company says this scheme is merely paying commission on the sales of the product for which Scheme participants are responsible. The Secretary of State says that it is a money circulation scheme under which existing participants share in money paid by new participants. That is the Secretary of State’s principal ground of objection on public interest grounds to the Company’s activities.

7 I turn now to the detail of the Scheme. A member of the public is invited to a presentation by an existing participant. There is an entrance fee of £5 for this presentation, at which the potential recruit is introduced to the Scheme. Following the presentation the potential recruit may become a “registered distributor” by paying the sum of £35 and receiving a “distributor pack”. All recruitment is by word of mouth. Existing participators in the Scheme are advised to say nothing of the details of the Scheme to potential new customers in advance of the Company’s presentation. According to Mr Kippax this is to ensure that potential customers are not put off before they receive a comprehensive presentation. This form of marketing hardly seems consistent with the Company’s stated objective of selling the product, for which no description of the Scheme would appear to be necessary.

8 To participate in the Scheme a registered distributor must then pay £1,200. This payment is characterised as a deposit towards the product. To receive the product the participant must pay an additional sum. For example, to obtain Gem Cache to a stated value of £5,000 the distributor must pay a further sum of £600 plus £315 for

VAT on the total purchase price of £1,800. Upon paying the , the participant is entitled to participate in the Scheme. In its original form there was no requirement under the Scheme ever to buy the product. The Company operates a seven day cooling off period following the payment of the .

9 The Scheme is described in the promotional literature as an opportunity to board a ship, and to acquire treasure. By paying a deposit a participant is able to board a ship as a Crewmember. The ship has a Captain, two First Mates, four Voyagers and contains spaces for eight Crewmembers. When a ship is filled, eight Crewmembers having been recruited, the ship will divide into two. The Crewmembers on the first ship will be promoted to the rank of Voyager on the two new ships. The Voyagers on the first ship will be promoted to the rank of First Mate on the new ships. Those who were previously First Mates will be promoted to the rank of Captain on the new ships, but only if they have obtained two “keys” during any of their three voyages (as Crewmember, Voyager or First Mate). A Crewmember aims to gain access to a reward consisting of cash sum of £7,000 (less deductions) plus a further £5,000 of Gem Cache by qualifying as a Captain of a ship which is then filled by the recruitment of eight Crewmembers. It should be noted that the £5,000 of Gem Cache is not receivable unless the Captain has completed his original purchase of Gem Cache, for which he paid the . This reward is called “Treasure”. A key (two of which are necessary to qualify as a Captain) is obtained when a participant recruits someone who pays the £1,200 .

10 In addition to this cash payment of £7,000 (before a deduction) and (in some cases) £5,000 of Gem Cache, the Scheme offers the prospect of a further reward described as a “Permanent Pension” or the “Lifelong Infinity Residual Retirement Bonus” (“the Permanent Pension”). Under this aspect of the Scheme, an individual qualifies for additional payments if he has become a Captain with a full ship twice and there are two Captains with a full ship in his “downline”. (An individual’s downline contains those he introduces, the persons introduced by his introducees, the persons introduced by their introducees, and so on.) Upon becoming Captain twice and there being two Captains with full ships in separate branches of an individual’s downline, he becomes a Team Developer entitled to £30 each time someone within his team

becomes Captain. Further rewards become available as the participant's downline expands.

11 If one looks at the Company's marketing and promotional material it becomes clear that the principal inducement offered to persuade potential customers to place a on the product is the opportunity to participate in the Scheme. Of course the product is mentioned and, indeed, extolled, but it is not possible to place a without attending a presentation (originally an hour long, nowadays a bit shorter) almost all of which is devoted to explaining the intricacies of the scheme and to emphasising the large sums of cash that can be earned by way of Treasure and Permanent Pension. The Scheme is marketed on the basis that it is an opportunity to make cash. For example, a form of invitation provided to participants to be given to new recruits summarises what is on offer using the words "Be First to Benefit – Massive Profitability – Earn £7,000". According to Mr Kippax the Company are in the process of changing these invitations, but no new version appears in evidence.

12 The conclusion that the real inducement to pay the is the chance to participate in the Scheme is, to my mind, amply demonstrated by figures produced by Ms Janes showing that as at May 2005 only 14 out of 232 participants who had paid s had actually gone on to acquire the product. Clearly, in the minds of most participants the £1,200 was paid to join the Scheme – they had no desire to acquire the product. Mr Kippax told Ms Janes on 26 July 2005 that the rules have now been changed so that a Captain must complete a purchase of Gem Cache upon the fourth Crewmember joining his ship. I do not, however, consider that this modification to the Scheme even if made and enforced, detracts from the conclusion that the inducement to pay the is the chance to participate in the Scheme. On the contrary the necessity for such a provision rather underlines that conclusion.

13 The Company asks that whatever criticisms might be made of its operations in the past, this application should be judged on the basis of the current operation. According to Mr Kippax customers are currently given a Purchase Order Deposit Receipt Certificate in return for their £1,200 deposit which gives them four options

- (1) to redeem the certificate by paying a further £500 plus VAT in return for Gem Cache with emeralds to the UK wholesale value of £5,000
- (2) to redeem the certificate by paying the cost of packaging in return for Gem Cache containing emeralds with a UK retail value of £1,200
- (3) to redeem the certificate by paying nothing except the VAT on £1,200 and receive loose emeralds with a UK retail value of £1,200
- (4) to redeem the certificate by paying £400 plus an administration fee of £100 plus VAT and then receive £5,000 credit on the Trade Deals website.

14 Mr Kippax claims that options (2) and (3) have been available alongside option (1) from the outset of the Company's business. The Secretary of State disputes this on the ground that they are not in fact mentioned in the earlier forms of the literature. The point does not seem to me to be material.

15 Looking first at option (1), Mr Kippax says in his evidence that the appraisals of the emeralds are carried out by a Mr Stephen Knight, who is the founder of an organisation known as "The Jewellery Judge" in Canada. The material exhibited to Mr Kippax's statement includes "The Jewellery Judge Guarantee" which makes it clear that all of Mr Knight's appraisals are carried out on the basis of retail prices in Canada. A copy of an appraisal certificate in evidence bears the words "New Replacement Value" and "Intended Use Insurance". So the statement in option 1 on the Purchase Order Deposit Receipt Certificate that the certified value is the wholesale value appears to be untrue. Wholesale value tends to suggest that the price at which the purchaser might be able to sell the emeralds to a dealer. In fact the emeralds are only appraised at the cost of replacing them (in Canada). Their realisable value in the hands of a private individual will clearly be much less. In his statement Mr Kippax says that when the Company was set up TTI provided gemstones "to the value of over £25,000 (£150,000 insurance replacement value)" which, even taking account of the Company's claim that it acquired emeralds from TTI at an advantageous price, gives some idea of the difference between wholesale and retail prices.

16 An important point about options (1) (2) and (3) is that in each case the customer has to pay an extra sum of money (even it is only the VAT on £1,200) for a product which will have a doubtful realisation value, especially in the hands of an individual with no connections to the jewelry trade. It is difficult to resist the conclusion that the use of emeralds, and in particular Gem Cache, as a product was hit upon as a means of creating a product with a value which ostensibly corresponded to or exceeded the supposed purchase price but which would cost nothing like the appraised value for the Company to provide, and which could be offered on terms which, as the evidence shows, most participants in the Scheme would not be interested in taking up.

17 So far as option (4) is concerned, this has been in operation, according to Mr Kippax, since 24th July 2005. He has, however, produced no evidence in his witness statement of 16th November 2005 (beyond the letters referred to below) to indicate whether this option has proved any more attractive than the option of acquiring Gem Cache has proved in the past. I should mention that exhibited to Mr Kippax's witness statement are nine letters, all apparently written in the second week of November 2005 (just after the first hearing of the petition) ostensibly from private individuals who have done business with the Company. I can form no judgment as to whether they are genuine. The writers of the letters express gratitude to the Company for giving them the opportunity to acquire the product – most of them refer to the Trade Deals option. Some writers also praise the way the Company runs its business and the concept which it promotes. Whatever the status of these letters, I do not doubt that the Company has satisfied customers, and that some of them may have purchased the product for its own sake, with no thought for participating in the Scheme. That does not, however, alter my conclusion that the evidence shows that the real inducement to pay the for the great majority of participants is, and is intended to be, the chance to participate in the Scheme, and not the opportunity to acquire the product.

The Fair Trading Act 1973

18 I now turn to the provisions of the Fair Trading Act 1973 section 118 of which, so far as material read as follows:

“118(1) This Part of this Act applies to any trading scheme if—

- (a) the prospect is held out to participants of receiving payments or other benefits in respect of any of the matters specified in subsection (2) of this section; and
- (b) (subject to subsection (7) of this section) either or both of the conditions in subsections (3) and (4) of this section are fulfilled in relation to the scheme.

(2) The matters referred to in paragraph (a) of subsection (1) of this section are—

- (a) the introduction by any person of other persons who become participants in a trading scheme;
- (b) the continued participation of participants in a trading scheme;
- (c) the promotion, transfer or other change of status of participants within a trading scheme;
- (d) the supply of goods or services by any person to or for other persons;
- (e) the acquisition of goods or services by any person.

(3) ...

(4) The condition in this subsection is that goods or services, or both, are to be supplied by the promoter or any of the promoters to or for persons introduced to him or any of the other promoters (or an employee or agent of his or theirs) by participants.

(5) For the purposes of this Part of this Act a prospect of a kind mentioned in paragraph (a) of subsection (1) of this section shall be treated as being held out to a participant whether it is held out so as to confer on him a legally enforceable right or not.”

Section 120 of the Act creates a number of offences. Subsection (3) is relevant to this case:

“120(3) If any person who is a participant in a trading scheme to which this Part of this Act applies, or has applied or been invited to become a participant in such a trading scheme,—

- (a) makes any payment to or for the benefit of the promoter or (if there is more than one) any of the promoters, or to or for the benefit of a participant in the trading scheme, and
- (b) is induced to make that payment by reason that the prospect is held out to him of receiving payments or other benefits in respect of the introduction of other persons who become participants in the trading scheme,

any person to whom or for whose benefit that payment is made shall be guilty of an offence.”

19 The Secretary of State argues that the entirety of the Company’s business is a trading scheme, as it comprises “arrangements made in connection with the carrying on of a business” with the definition of “trading scheme in section 118(8)”. He also argues that subsection (1)(a) is satisfied because the prospect is held out of receiving payments under (2)(a)(b) and (c). He also says that subsection 118(1)(b) is satisfied by virtue of subsection (4), the goods or services in question being the product, and also the service which the Company provides in running the Scheme. Subject to the Company’s argument referred to below (which if correct might mean that subsection (2)(a) was not satisfied) these arguments seem to me to be clearly correct. The Secretary of State then goes on to argue that the Company is therefore committing an offence under section 120(3) because the Scheme involves individuals making payments for the benefit of the promoter (ie the Company) which the Company receives, and because individuals make those payments by reason of the prospect of receiving payments or benefits from the Scheme.

20 The Company’s position is that section 120(3)(b) is not satisfied because the is paid for the product, and membership of the Scheme is free. But even if that were the correct analysis of the transaction, that does not deal with the fact that the Act creates an offence under section 120(3)(b) where the payment is induced by the

opportunity to receive payments from the trading scheme. If the inducement to buy the product is the opportunity to receive payments from the Scheme then it is perfectly possible to say that the purchase price of the product is a payment induced by the prospect of receiving payments from the scheme.

21 The Company also, I think, argues that subsection 120(3)(b) is not satisfied because what is held out to participants is the prospect of receiving payments or other benefits in respect of the introduction of other persons who pay a deposit for the product. The participants benefit so long as a new participant puts a deposit down on the product, regardless of whether that new participant actually joins the Scheme. I am assisted in my consideration of this argument by the judgment of Neuberger J (as he then was) in *Re Delphin International SA Ltd* [2000] 1 BCLC 71. The details of the scheme in that case were different to the present Scheme, but the learned judge's approach to the construction of the 1973 Act is of general application. At page 83e he points out that the Court is required to look at the reality of the business under consideration, and to consider the marketing material for the scheme as a whole.

22 Adopting that approach, the Company's second argument does not seem to me to afford an escape from the terms of section 120(3)(b). The fact that on the face of the Scheme documentation a participant who is induced to make the payment envisaged by section 120(3)(b) receives a benefit from the payment of s on the product does not prevent the section from applying if the persons who make those payments in fact go on to become participants in the Scheme. In my view, the Company is seeking to read the sub-section as if the words "in respect of ..." to the end were replaced by the words "as a result of the participation of other persons in the scheme". Even if the section contained that more restrictive wording I think it is doubtful the argument would succeed, having regard to reality of the way the Company's business is conducted and marketed. In fact, the actual wording of the sub-section is wider than this, because it applies where the prospect of benefiting from the schemes arises "in respect of" the introduction of a person who, in fact goes on to participate in the scheme. One has to assume that the width of the wording was intentional and I can see no justification for cutting the wording down in way which the Company's argument would require.

23 I therefore conclude that the business of the Company involves the commission of offences by the Company under section 120(3) of the Fair Trading Act 1973.

Lottery

24 The second ground on which the petition alleges that the Company should be wound up is that its business involves the carrying on of an illegal lottery. All lotteries which are not authorised by statute are made illegal by virtue of section 1 of the Lotteries and Amusements Act 1976. A lottery involves the payment of consideration in return for a chance of winning a reward. If any element of skill is required to win the reward the arrangement is not a lottery. The Secretary of State argues that certain elements of the Permanent Pension arrangements within the Scheme amount to a lottery because payments are generated on the basis of chance, and are not dependant on the skill of the recipient. The consideration for participating in the lottery is the payment of the initial and any other payments required under the Scheme. Permanent Pension is described in paragraph 10 above. Payments of permanent pension are made in respect of the recruitment of new members downstream of the recipient of the payments. The Company argues that the recipient of the payments has to use skill in recruiting participants and only if he chooses productive participants will he earn substantial amounts of permanent pension. The Secretary of State points out that the promotional literature envisages that in the longer term a participant may receive permanent pension from a hundred or more participants many of whom, in the nature of the Scheme, will have been recruited without any involvement of the recipient of the payment. These sorts of payments are, from the point of view of the recipient, dependant upon chance, because it is a matter of chance whether participators for whom the recipient has no responsibility are successful in recruiting new participants, and, if so, how many they recruit.

25 In support of this argument the Secretary of State relied on Court of Appeal decision in *In re Senator Hanseatische Verwaltungsgesellschaft m b H* [1997] 1 WLR 515, especially the judgments of Saville LJ at page 520 C to G and Millett LJ at

page524C to H. I consider that the Secretary of State is correct on this point too. I do not think the Company can plausibly characterise the activities of the recipients of permanent pension as sales managers who earn commission on the activities of their sales team. On the contrary it is suggested in the explanatory literature that after a while permanent pension can be earned with no effort at all on the part of the recipient. It is even suggested that eventually participants will be able to retire and live on their Permanent Pension (hence the name). At this point at least the income generated must be largely due to the recruiting efforts of individuals with whom the recipient has had no contact at all.

26 The question remains, however, whether the element of chance in the rewards paid from the Scheme is sufficient to warrant characterising the Scheme itself as a lottery. In the *Senator* case Saville LJ (as he then was) observed that a scheme which offers rewards to a participant which are attributable to his skill can nonetheless be a lottery if “to a substantial extent” it offers rewards which are dependent solely on chance (page 520E). So the question is whether the element of chance in this case is “substantial”. In addressing that question I bear in mind Saville LJ’s injunction to take “a common sense” approach.

27 It is fair to say that there is no evidence to suggest at present that substantial sums are being paid by way Permanent Pension, still less that a substantial part of the sums that are being so paid are attributable solely to chance. On the other hand, if the Scheme were to continue in the manner envisaged by the Company it is inevitable that in future there will be recipients of substantial sums which are attributable to chance. If I were to judge whether the Scheme is a lottery solely by the evidence of payments of Permanent Pension to date I would have to conclude that it is not a lottery, although it clearly has the potential to become one. However it is, I think, legitimate to consider whether payments based on chance play a substantial part in the Scheme as the Company intends it to operate in the future. Looked at in those terms, Permanent Pension is a substantial part of the Scheme. It is promoted by the Company as a means of participants earning substantial amounts of money to the point at which, as I have already pointed out, they can retire on the income generated by the recruitment of future participants. So in this sense payments generated by chance are an important,

and I would say substantial part of the Scheme. For this reason I am of the view that the Scheme is a lottery of the sort envisaged by the Court of Appeal in the *Senator* case.

Inherently Objectionable Business

28 It is inherently objectionable that the Scheme contravenes the law in the ways described above, but in that sense, as Mr Brettler accepts, this ground adds nothing to the two grounds already discussed. Whether the Scheme can be said to be inherently objectionable for reasons other than its illegality is not a matter I need address.

Misleading statements in the Company's literature

29 The Petition sets out several examples of misleading statements made in the Company's literature and presentations. In addition there is the misleading statement I have already described concerning the description of Gem Cache as having a wholesale value of £5,000 when in fact that is the retail or insurance value, which is arguably a more serious misrepresentation than the examples in the Petition. I consider that all statements referred to in the petition are also in some measure misleading. However, as Mr Brettler readily conceded, this ground would not of itself justify winding up in the absence of more serious grounds, so I say no more about this.

The appointment of a provisional liquidator

30 Section 135(1) of the Companies Act 1985 provides that the Court may appoint a provisional liquidator at any time after the presentation of a winding-up petition. The section confers a wide discretion. In this regard I bear in mind the observations of Sir Robert Megarry V-C in *Highfield Commodities Ltd* [1985] 1 WLR 149, at pages 158D-159H. Most importantly, the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding up order will be made (*ibid* page 158D-E).

31 Apart from arguing that its business is not unlawful, the Company advances a number of grounds for opposing the petition and the appointment of a provisional liquidator. One is that it has always sought to abide by the law, and has indeed in the past sought legal advice as to the legality of its operations. In view of the fact that the Company has in my view patently failed to run a legal operation I cannot see that an intention to do otherwise should be a ground for allowing the Company's business to continue. The Company also opposes the appointment of a provisional liquidator on the ground that it wishes to dispute the making of the winding up order on the hearing of the petition. But if that was the Company's intention it should have attended on this application (the reason given for non-attendance on this application is lack of funds). Finally, Mr Kippax expresses concern for the Company's customers if a provisional liquidator is appointed. I acknowledge that the appointment, and the eventual winding up of the Company, is likely to cause loss to some customers of the Company who may have paid a but as yet received nothing in return. But it is in the nature of money circulation schemes that people are likely to lose money when they come to an end. That is why they are illegal, and why it is necessary to stop them sooner rather than later.

32 In view of the fact that the business of the Company is, in my view, plainly unlawful under the Fair Trading Act 1973, as well as being an unlawful lottery, it is in my view a virtual certainty that a winding up order will be made on the petition. In the light of this I consider the best course, with a view to securing the assets of the company and eliminating the risk of any further unlawful activity is the appointment of a provisional liquidator. In coming to this decision I do of course bear in mind the guidance of the Court of Appeal in the *Senator* case (per Millett LJ at page 526G) to the effect that in cases of this sort the appointment of a provisional liquidator is likely to be preferable to injunctions or continued undertakings as to the Company's conduct.

33 For these reasons I am prepared to make an order for the appointment of a provisional liquidator in the form of the draft order prepared on behalf of the Secretary of State.

