

EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 2021/0174

BETWEEN:

PT VENTURES, SGPS, S.A.

Applicant

-and-

VIDATEL LIMITED

Respondent

Appearances:

Mr. Christopher Harris, KC with him Ms. Georgina Peters and Mr. Stuart Rau and Ms. Akesha Adonis for PT Ventures, SGPS, S.A.

Mr. Hermann Boeddinghaus, KC with him Mr. Oliver Clifton and Ms. Colleen Farrington for Vidatel Limited

2023: December 6, 7;

2024: April 15, 17.

NOTE OF ORAL JUDGMENT

- [1] **WALLBANK, J.:** This is a Note of the Court's judgment in relation to an Originating Application filed by PT Ventures ('PTV') on 12th October 2021 ('Second Originating Application'). This application was heard over, in total, four days as indicated in the heading. At the conclusion of the hearing, I delivered an *ex tempore* oral judgment, with a view to this being memorialised in a written Note. The following is not a verbatim transcript of the oral judgment. Rather, it is very largely based upon the transcript, with a number of presentational, non-substantive, edits. To a considerable extent, this Note retains the 'speaking style' used in the oral judgment, which is

sometimes less exact than my expressions would normally be in a purely written judgment. Where there is any conflict between the transcript and this Note, this Note is to prevail.

1. Introduction

[2] By its Second Originating Application, PTV sought the following orders pursuant to section 162(1)(a) of the Insolvency Act 2003 (the 'Act'), and under section 159(1)(a) and/or (b) of the Act, that:

- (1) the Respondent, Vidatel Limited, (the 'Company'), or ('Vidatel'), be liquidated pursuant to the terms of the Act;
- (2) Mr. Matthew Richardson of Grant Thornton (British Virgin Islands) Limited, and Mr. Nicholas Stewart Wood, an overseas insolvency practitioner of Grant Thornton UK LLP, (the 'Liquidators'), be appointed as joint liquidators of the Company.
- (3) permission be granted to commence and proceed with the Second Originating Application herein;
- (4) the costs of this Second Originating Application be costs in the liquidation of the Company; and
- (5) such further order or other relief be granted as the Court may deem appropriate.

[3] The grounds for the Second Originating Application were stated to be as follows:

- (1) On 5th March 2021, the Applicant filed an originating application for the appointment of liquidators over the Company ('First Originating Application'). The First Originating Application went part-heard on 16th June and resumed on 7th July 2021. On 7th July 2021, I reserved judgment on that application.
- (3) On 30th September 2021, I handed down a reasoned written judgment explaining why the First Originating Application had succeeded and Vidatel's objections had failed (the 'Liquidation Judgment'). I ordered that the Company be wound up and the Liquidators be appointed with the standard powers conferred on them by the Act.
- (4) I further ordered that the parties were to seek to agree the remainder of the terms of the Liquidators' appointment by 7th October 2021, and if they were unable to do so, a consequentials hearing should be listed on the first available date convenient to Counsel and to the Court to determine the terms (the 'Liquidation Order').

- (5) On 7th October 2021, the Respondent, Vidatel, raised an argument that by reason of section 168 of the Act, in the absence of an application for an extension of time, the First Originating Application was deemed dismissed on 5th September 2021, and that any subsequent order made was a nullity.
- (6) Out of an abundance of caution, and without prejudice to its arguments that the Liquidation Order remained in full force and effect until such time, if any, as the Liquidation Order would be set aside, PTV filed the present application (i.e. the Second Originating Application).
- [4] PTV continues to contend, as it did in the First Originating Application, and in accordance with the Court's findings in its judgment on the First Originating Application that:
- (1) The Company, Vidatel, owes PTV a debt arising which is due and payable pursuant to, firstly, a New York Convention arbitral award rendered in favour of PTV on 20th February 2019; further or alternatively, an order of this Court dated 29th October 2020. That Order of 29th October 2020, provided, *inter alia* that:
- (i) the Applicant has leave to enforce the arbitration award as if it were a judgment of this Court in the sum of about US\$390 million (the 'Award'), that sum comprising the operative part of the Award, plus interest and legal costs; and
- (ii) in respect of legal costs, the Company should pay to the Applicant the sum of US\$800,000 within 28 days of the Order, i.e., by 26th November 2020
- (together, the 'Judgment Debts').
- [5] Moreover, PTV contends that the Company is insolvent within the meaning of section 8(1)(c)(2) of the Act as the ordered sums (i.e. the Award, plus interest and legal costs) have not been paid. In the circumstances, says the Applicant, the Company should be wound up under the provisions of the Act.
- [6] I should add here that Vidatel raised the point on 7th October 2021 that PTV's First Originating Application had been deemed to stand dismissed by reason of section 168 of the Act because PTV had not applied for, nor obtained, an order extending the statutory determination period for the First Originating Application.

- [7] The omission appears to have been missed both by PTV and Vidatel, as it had by the Court, until Vidatel raised it on the 7th October 2021. The Liquidation Order was stayed on 28th October 2021 ('First Stay Order').
- [8] On 9-10 February 2022, the Court heard extensive arguments both parties on what, if any, jurisdiction this Court had to do about the Liquidation Order. Patently, this Court no longer had jurisdiction to make the Liquidation Order when it did so on 30th September 2021.
- [9] For the reasons stated in a written judgment dated 27th June 2022, I ruled in an order dated 18th July 2022 that a set aside application brought by Vidatel and a slip-rule application brought by PTV were dismissed and the Liquidation Order was stayed pending any notice of appeal being filed by either party ('Second Stay Order').
- [10] In this Court's judgment, the Liquidation Order would need to be set aside by the Court of Appeal, this Court not having the power to do so.
- [11] The Second Originating Application was made the subject of a stay pending the final determination of any appeal against the Order of 18th July 2022, or the Liquidation Order.
- [12] The Court of Appeal, on 4th January 2023, set aside the Liquidation Order and the judgment of this Court dated 30th September 2021.
- [13] The Liquidation Order was set aside on the basis that PTV had elected to concede the so-called 'Section 168 Ground' such that Vidatel's appeal was allowed on that ground alone.
- [14] I will not here rehearse many of the other developments between then and now, save to observe that the insolvency practitioners who had been appointed by the Liquidation Order had also separately been appointed as receivers to preserve, but not sell, certain of Vidatel's assets by an order of this Court of Justice Jack dated 29th October 2020, further, that that receivership has been continuing and that this Court had given the parties permission to adduce evidence of Angolan law for the purposes of the determination of the present Second Originating Application.
- [15] In relation to the Second Originating Application, Vidatel gave notice of six objections which it filed on 27th April 202, as follows:
- (1) The Second Originating Application is a nullity due to the effect of section 175(3) of the Act.
 - (2) In any event, PTV was required by an express order of the Court to seek permission of the Court to commence and proceed with the applications but has failed to do so.

- (3) Even if PTV were now to seek the Court's permission to commence and proceed with the Second Originating Application, permission should not be granted because that application or any similar application is barred by *res judicata* principles.
- (4) Further and in any event, Vidatel wishes to pay and has sought to make arrangements for the satisfaction of all outstanding sums due to PTV and thereby confirm its solvency. But to date it has not been possible to do so, and this impossibility has nothing to do with Vidatel's means, but arises only by reason of various Court orders, and more recently by the purported nationalisation of its shareholding in Unitel S.A. ('Unitel') by the Angolan state, which is described by Vidatel as an associate of PTV, that had from time to time prevented Vidatel from using its very considerable assets to discharge the debt.
- (5) Even if the Court were to conclude that the external restrictions imposed upon the Respondent to deploy a portion of its assets to discharge its indebtedness to the Applicant are not what they appear to be, in other words, not real restrictions and/or if those restrictions were to be relaxed by PTV and/or its associates, then it follows that there is a reasonable prospect that the application debt will be paid within a reasonable period.
- (6) Even if the Court were to conclude that it has jurisdiction to make an order in the exceptional circumstances of this case, the Court should, in its discretion, decline to make an order.

[16] Turning to the grounds of objection, in relation to Grounds One and Two, section 175(1) of the Act materially provides:

"Subject to subsection (2), with effect from the commencement of the liquidation of a company...

- (c) unless the Court otherwise orders, no person may -
 - (i) commence or proceed with any action or proceeding against the company or in relation to its assets; or
 - (ii) to exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company."

Section 175(3) provides that:

"Anything or matter done or purported to be done in contravention of subsection (1) is void and of no effect."

- [17] The First Stay Order (that Vidatel says required PTV to obtain this Court's prior permission to commence the Second Originating Application) is dated 28th October 2021. Thereby this Court ordered at paragraph 7:

"The Second Originating Application be stayed pending the Court's final determination of the Set Aside Application and the Slip Rule Application, at which time PTV shall, if so advised, seek permission to commence and proceed with the Second Originating Application and directions for any such proceeding.

For the avoidance of any doubt, if and when the Court grants permission to PTV to commence and proceed with the Second Originating Application, PTV will have to advertise the Second Originating Application, and the Second Originating Application will fall to be determined by reference to the evidence before the Court at the time of such determination."

- [18] Vidatel contends that PTV did not seek such permission, but simply filed a listing request for its Second Originating Application to be brought on for hearing. PTV filed this listing request after the Court of Appeal's Order of 4th January 2023 overturning the Liquidation Order. PTV maintains that the effect of that Order of 4th January 2023 was that the stay of the Second Originating Application fell away. Vidatel, however, disagrees and says its position in relation to Ground One is straight-forward.

2. Grounds One and Two

2.1 Vidatel's position

- [19] The Second Originating Application was issued at a time when the Liquidation Order had been made, and was effective, notwithstanding the lack of jurisdiction since that Liquidation Order had not been stayed or set aside.
- [20] Vidatel says the issue of the Second Originating Application was a step within section 175(1)(c)(i) for which no permission had been granted. Indeed, permission was sought in the application itself. Thus, said Vidatel, the Second Originating Application was a nullity pursuant to section 175(3).
- [21] Vidatel observed that PTV's answer to this point appears to be that it was acceptable for it to issue and seek permission within the Second Originating Application. But, says Vidatel, no authority had been put forward for this proposition, and Vidatel submitted that this involves an unnatural and unnecessary reading of the section. Vidatel says the section does not preclude an application for permission which would stultify the section, but there is no reason why a person

who wishes to commence proceedings for which permission is required should not seek permission by way of an application, before issuing the proceedings for which the permission is sought. One would expect, says Vidatel, such an application to be made in the proceedings in which the Liquidation Order had been made, that is, the First Originating Application proceedings commenced on 5th March 2021, but PTV did not do so.

[22] If the legislator had intended to create a regime by which PTV could seek permission to continue proceedings, it would have been very easy for the legislator to have said so, but it did not.

[23] Vidatel points out that there is a 12-paragraph BVI judgment in which Justice Jack did give retrospective permission under section 175 for proceedings in England (see **Mostafa Sharifpoor v Framjee Properties Ltd (in liquidation)**¹). However, as Vidatel points out, Justice Jack had no assistance from Counsel for the Liquidators. The nullity point was not considered at all, and even leaving that aside, the decision is, according to Vidatel, plainly erroneous because proceedings in England would not be caught by section 175 in any event. Thus, says Vidatel, Justice Jack's decision in that case is of no persuasive value.

[24] Vidatel says, therefore, that Ground One provides a complete answer to the Second Originating Application.

2.2 PTV's position

[25] PTV disagreed. It argued that Vidatel's objection is wrong as a matter of law, and, in any event, it gives rise to a sterile point of the merest technicality about whether this Court should now grant permission to PTV. PTV's position is in summary as follows:

- (1) First, section 175(3) of the Act does not apply to the Second Originating Application, which is a collective proceeding, and brought by the same creditor who applied for the Liquidation Order in the first place, as a protective measure before the Court in which the extant liquidation proceedings are pending.
- (2) Secondly, PTV, in any event, complied with section 175(1)(c) of the Act, having applied for permission on 12th October 2021. There has been no breach of section 175(1), such that 175(3) is not engaged.

¹ BVIHC (COM) 43 of 2015 (unreported, delivered 9 June 2020).

(3i) Thirdly, and in any event, PTV has an extant application for permission, and if the Court has the slightest residual concern about the potential application of section 175(3), the Court can (and should) grant the requisite permission now.

[26] PTV says the present case is a collective proceeding and section 175(3) does not apply to collective proceedings. PTV observed that as a preliminary point it will be immediately obvious that having regard to the purpose of the stay in section 175(1), (i.e. the moratorium applicable to claims against a company in liquidation), Vidatel's objection under Ground One is not an attractive position for a debtor in Vidatel's position to adopt. The objection arises by reason of a liquidation order that was in force in relation to Vidatel only for a few days, before it was stayed under the First Stay Order. It is said that the Liquidation Order brought into force the statutory regime under the Act for the benefit of, for the realisation and distribution of Vidatel's assets for the benefit of creditors as a whole.

[27] PTV says at the time when section 175(1) ostensibly had effect in relation to Vidatel, its purpose was to protect the interest of Vidatel's creditors in the assets held on statutory trust for the creditors and 'not for the purpose of harassing or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company'. That quotation is with reference to the *dicta* of James LJ in the case of **Re David Lloyd & Co.**² PTV says that for Vidatel to pray in aid the statutory stay under section 175, this advances no part of the Act's purpose and policy. Furthermore, says PTV, the critical point is that the application is said to be caught by 175(1), and that itself was an insolvency proceeding, being a protective application to appoint liquidators expressly filed as a precaution in case the Liquidation Order was not valid.

[28] In those circumstances, said PTV, the Second Originating Application could not, on any view, be considered to fall within the type of action or proceeding with which the statutory moratorium is concerned. It was not an adverse proceeding by a creditor to commence an individual action to recover or enforce its debt which would subvert the collective scheme of distribution brought into effect by the extant Liquidation Order. Rather, it was itself an application to appoint liquidators, and so 'a form of collective enforcement of liabilities' (see **Re Lehman Brothers International (Europe) (in administration) (No. 4)**³ from the judgment of Lord Sumption).

² (1887) 6 Ch. D. 339.

³ [2018] AC 465.

- [29] As PTV explained, the purpose which section 175 is intended to promote is the same as that for which the Second Originating Application was filed, and on no view could the Second Originating Application subvert the collective process of the Liquidation Order.
- [30] PTV maintained that section 175(3) of the Act (which prescribes the consequence of individual creditor actions seeking to subvert the collective process of liquidation) must be read purposively so as to ensure that the purpose of section 175(1) is promoted. It is no part of the purpose of the statute to prevent a creditor from commencing a collective proceeding in circumstances where there may be doubt about the validity of the first application. It is, therefore, questionable whether the Second Originating Application fell within the statutory stay imposed by section 175(1). Even if it did, the consequence of nullity under section 175(3) should not have any application to this type of proceedings (being collective, not adverse). The legislator could not have intended this outcome which would (if the Court otherwise determines that the application is well-founded and Vidatel should be wound up) inhibit the proper distribution of the assets of an insolvent debtor, rather than safeguard their collective distribution. In other words, says PTV, it would result in the very mischief which section 175(1) is designed to prevent.
- [31] Accordingly, says PTV, the Second Originating Application should not be viewed as a nullity by reason of section 175(3) because the subsection does not apply to it.
- [32] Further, and in any event, says PTV, even if this Court were to consider that section 175(3) might have potential application to the Second Originating Application, the provision is not engaged because PTV complied with section 175(1). It applied for the Court's permission to commence and proceed with the Second Originating Application in compliance with section 175(1)(c). However, its Permission Application (within the Second Originating Application) was not determined and was stayed by this Court. The First Stay Order of 28th October 2021 stayed the Second Originating Application, and therefore the Permission Application, pending the final determination of the Set Aside/Slip Rule Applications, following which, it provided for PTV to 'seek permission to commence and proceed with the Second Originating Application and directions of any such proceedings' (see paragraph 7).
- [33] This permission requirement reflected the terms of the Permission Application, and in terms which precisely mirrored the language of section 175(1)(c)(i). Whereas, says PTV, there has been no breach of section 175(1)(c) of the Act, such that section 175(3) is not engaged.
- [34] In the present case, says PTV, permission can be granted and the application determined. In any event, even if, notwithstanding the points already made, the Court has any residual concern

that section 175(3) might potentially be engaged in the present case, Vidatel's objection in Ground One is a sterile technicality. PTV has an extant Permission Application, and the Court can grant the requisite permission now.

[35] PTV went on to say that there is a subsidiary question about whether, on the proper construction of the First Stay Order and the Second Stay Order, PTV remains subject to the permission requirement in the First Stay Order. Since the First Stay Order was directly responsive to the Permission Application which was made pursuant to section 175(1)(c), the Court might take the view that once the Liquidation Order was set aside on 4th January 2023, there was no longer any legal basis for it, and the permission requirement was obsolete.

[36] I pause here to note that it is in this particular submission that there was to be found the genesis of what became known as the '*ab initio* issue' which I will address further below.

[37] Returning to PTV's contentions, in any event, on either view, since Vidatel is not in liquidation, there can now be no objection to the grant of permission, and it will plainly be right and fair for the Court to do so. In particular:

- (1) Vidatel is no longer in liquidation.
- (2) PTV is a judgment creditor of undisputed debts exceeding US\$400 million which would be outstanding for well over four years and PTV should be permitted to apply to appoint liquidators to conduct the statutory investigations and realise and distribute Vidatel's assets for the benefit of its creditors.
- (3) PTV is Vidatel's significant majority creditor, with its only other known creditors being Ms. dos Santos and/or a company or companies associated with her, said to have funded Vidatel's legal costs.
- (4) PTV's views as a majority creditor should thus carry considerable weight with the Court. It continues to suffer considerable prejudice from Vidatel's refusal to pay Court costs orders and undisputed sums exceeding US\$400 million, of which Vidatel has made no effort whatsoever to pay any part.

[38] Moreover, as PTV explained, the considerations to which the English Courts have had regard in weighing competing interests of individual creditors who seek to pursue adverse proceedings with the collective interest for the body of creditors, when deciding whether to lift the statutory stay or grant permission, are totally inapposite to this case. The standard according to which the discretion should be exercised, being whether it is right and fair to grant permission, is aptly met.

2.3 The Court's judgment

- [39] In my respectful judgment, leaving aside the *ab initio* issue, Vidatel was correct that PTV needed to apply for and obtain the Court's permission to proceed with the Second Originating Application before it did so. Since upon its face a liquidation order had been made and appeared to be in effect at the time when the Second Originating Application had been filed, PTV's efforts to have the Second Originating Application listed for hearing were, again leaving aside the *ab initio* argument, void and of no effect pursuant to section 175(3).
- [40] On that analysis, the Second Originating Application had been and remained stayed. The stay could be lifted, but until now it has not been lifted.
- [41] All else being equal, and if the only question remaining before this Court were to be whether the stay of the Second Originating Application should now be lifted, and whether permission to pursue the Second Originating Application is to be granted, for all the reasons given by PTV, I would grant such permission. If that were to mean that this Court would have to hear a substantially similar winding-up petition for a third time, then so be it. That will be a consequence of PTV's choice not to apply for prior permission, but at the same time as the Second Originating Application, in the Second Originating Application itself.
- [42] I moreover do not read section 175 as not applying to the commencement of, or proceeding with, a collective remedy to appoint liquidators, in other words, to be restricted to claims for private remedies. If the Act intended such a restriction, it could have said so. Instead, the words 'any action or proceeding against the company' appear to be clear and to mean what they say. They appear to be unambiguous. They are wide enough to include other insolvency proceedings. Indeed, the whole purpose of section 175 appears to be to channel all claims and proceedings against a company in liquidation through a single set of liquidation proceedings, so that there can only ever be a single set of winding-up proceedings on foot against a company.

3. The '*ab initio* issue'.

3.1 PTV's position

- [43] This foregoing analysis, though, does not take into account the *ab initio* point. The *ab initio* point concerns an argument that by virtue of the Court of Appeal Order of 4th January 2023, setting aside the Liquidation Order of 30th September 2021, that Liquidation Order was rendered void *ab initio*. As void, the Liquidation Order could not have the effect under section 175(1)(c)(i) of prohibiting the commencement without the Court's permission of any proceeding against Vidatel.

Moreover, a void Liquidation Order could not have the consequence under section 175(3) that the Second Originating Application, made without permission, is 'void and of no effect'.

- [44] PTV argues that as a matter of general principle it has been stated in **Spencer Bower and Handley: Res Judicata** (5th edn., Lexis Nexis 2019) ('**Spencer Bower**') at 2.33 that:

"Whether an appellate court reverses the judgment below, the former decision, until then conclusive, is avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties. Even if the appeal fails, the decision of the appellate court becomes the source of any estoppels."

- [45] Further, PTV referred to this:

"Where the appellate court tribunal reverses a judgment for lack of jurisdiction, that judgment is a nullity, and the reversal does not decide any question on the merits."

- [46] Pausing here, the Court of Appeal in this case indeed reversed this Court's Liquidation Order of 30th September 2021 for lack of jurisdiction.

- [47] The principle, as articulated in a previous edition of that work, i.e., **Spencer Bower**, was cited and affirmed by the English Court of Appeal in **P&O Nedlloyd B.V. v Arab Metals Co., Stena Trading A.B., Ireland Alloys Limited**⁴ (a decision which this Court drew attention to the parties' attention). In that decision, Moore-Bick LJ accepted Counsel's submission (at paragraph 28) that:

"The effect of the order made on appeal is to avoid entirely the order made by the Court below".

- [48] The Lord Justice of Appeal in that case expressed the point as being one of general principle at [29]:

"As a matter of principle, when an appellate Court sets aside the order of a lower Court that order ceases to have any effect and the decision of the appellate court is determinative of the issue between the parties."

- [49] Likewise in **Re Atrium Training Services Limited**,⁵ the Chancery Division of the High Court of England and Wales applied the decision in **P&O Nedlloyd** and held that the effect of an order of the Court of Appeal was that the order of the first instance judge set aside by it was 'avoided *ab initio*' (at [47]), and 'ceased to have effect for all purposes once it was set aside' (at [45]).

⁴ [2007] WLR 2288 at [28] to [29].

⁵ [2015] EWHC 1755 (Ch).

- [50] The consequences that flow from an order of a lower Court being avoided *ab initio* will necessarily fall to be determined, says PTV, on a case-by-case basis. In the present case, the Liquidation Order was set aside on the basis of a lack of jurisdiction, as the result of the underlying application having been barred by effluxion of time by reason of section 168 of the Act. The Liquidation Order was, therefore, says PTV, a nullity.
- [51] Furthermore, the specific feature of the Liquidation Order is that it was an order made pursuant to statute. The Court's power to make the order derived from section 159 of the Act. Accordingly, the Liquidation Order, being set aside and (therefore) a nullity, there was no basis, says PTV, on which the statutory scheme could have had valid or operative effect.
- [52] In the present case, says PTV, Vidatel seeks to found retrospective reliance on the moratorium in section 175(1) of the Act, a provision which could only have been engaged by the making of a winding-up order. With the Liquidation Order being avoided and so a nullity, says PTV, section 175(1) was never validly brought into effect. Consequently, says PTV, PTV did not, in fact, require permission to bring the Second Originating Application and this, says PTV, is a further ground why Ground One and indeed Ground Two, necessarily fail.
- [53] PTV also prayed in aid the English Court of Appeal case of **Re AGPS Bondco plc**,⁶ which had somewhat different facts to the present case.

3.2 Vidatel's position

- [54] Vidatel disagreed with PTV's arguments. Vidatel submitted that, first, the authorities referred to by the judge and now relied on by PTV (aside from the **AGPS Bondco** case) both arose in the context of *res judicata* and clarify the *res judicata* position between the parties after the making of the second order. Vidatel referred to **P&O Nedlloyd** at [28] and **Re Atrium Training Services** at [45] in this regard.
- [55] **P&O Nedlloyd** at [28] says:

"Mr Rainey was quite right in saying that this court did not overturn the judge's decision on limitation, but despite that I am unable to accept that his judgment is any longer capable of giving rise to an estoppel in relation to that issue. The effect of the order made on appeal is to avoid entirely the order made by the court below."

⁶ [2024] EWCA Civ 24.

[56] In **Spencer Bower**, at [60], the matter is put as follows:

"When a tribunal with original jurisdiction has granted, or refused, the relief claimed and an appellate tribunal reverses the judgment or order at first instance, the former decision, until then conclusive, is avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties."

[57] **Atrium** at [45] says as follows.

"The effect of the reasoning in *Nedlloyd* on the facts of this case is only to preclude the Liquidators from denying that they have breached the default order in at least the manner identified by the Court of Appeal, and also from relying on the ground that Lewison LJ expressly stated he had not based his judgment on. Birss J's Order could only be relevant if it created some form of issue estoppel in relation to the issues considered by him and not considered by the Court of Appeal. It does not because Birss J's Order ceased to have effect for all purposes once it was set aside. Thus no estoppel could arise in relation to either the issue concerning the form of the list, which Birss J had resolved against the respondents, or the OCR Issue, which could not have been considered by Birss J and was not considered by the Court of Appeal."

[58] Vidatel argued that those cases are not directed at the effect of the first order in the period of time until the making of the second order. Vidatel argued that as a matter of authority and principle, and also as a matter of public policy, it would be wrong to conclude that the second order, in setting aside the first order, somehow renders, for all purposes, the first order as having been of no effect.

[59] Vidatel said such a conclusion would run contrary to high authority, namely the opinion of Lord Diplock in **Isaacs v Robertson**⁷ and the opinion of Lord Neuberger in **PricewaterhouseCoopers v Saad Investments**,⁸ cases which decided that a first order is valid unless and until set aside by the second. Those have been applied by this Court, in this jurisdiction, in the context of the First Originating Application, as was stated in this Court's judgment of 18th July 2022 in BVIHCM2021/0039.

[60] For completeness, **Isaacs v Robertson** at pages 101 F to 102 C stated:

"The main attack by the defendant on the Court of Appeal's judgment was based on the contention that as a consequence of the operation of Ord. 34, r.11(1)(a) of the Rules of the West Indies Associated States Supreme Court (rev. 1970) the order made by the High Court granting the interlocutory injunction on 31st May 1979 was a nullity. So

⁷ [1985] AC 97 at 101F to 102C.

⁸ [2014] 1 WLR 4482 at paragraph [25].

disobedience to it could not constitute a contempt of court. Glasgow J. accepted this contention; The Court of Appeal rejected it, in their Lordships' view correctly, upon the short and well-established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, must be obeyed unless and until it has been set aside by the court. For this proposition Robotham J.A.(Acting) cited the passage in the judgment of Romer L.J. in *Hadkinson v Hadkinson* [1952] p. 285, 288:

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void." 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed'. (Per Lord Cottenham L.J. in *Chuck v Cremer* (1861) *Cooper temp. Cottenham* 205, 338.) Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the Court... is in contempt and may be punished by committal or attachment or otherwise."

[61] **Saad Investments** at [25], stated as follows:

"So far as step (i) in the respondents' argument is concerned, it is well founded. The Board accepts that, even though the Supreme Court did not in fact have jurisdiction to wind up SICL, the order it made to wind SICL up and to appoint the respondents as joint official liquidators on 14th September 2012 must, at least until it is set aside by a subsequent order, be treated as effective in law. This is because of the short and well-established ground that an order made by a court of unlimited jurisdiction ... must be obeyed unless and until it has been set aside by the court, per Lord Diplock giving the advice of the Board in *Isaacs v Robertson* [1985] AC 97, 101F. Consistently with this, there is a number of cases in which judges have held that they cannot "go behind" a winding-up order, that it must be treated as valid and effective, albeit unless it is set aside or in some way stayed: see, In *Re Dover & Deal Railway Company*, [1854] 4 De GM & G 411, 420, per Knight Bruce and then In *Re London Marine Insurance Association* (1869) LR Eq 176, 193 per James V-C."

[62] Moreover, urged Vidatel, the effect of a rule that an order overturning an appeal is void *ab initio* would be to negate all of the consequences of the first order, undermining the confidence that

third parties (as well as the parties to the order) ought to be able to have in the integrity of any order that may for any reason be susceptible to being set aside.

[63] Additionally, contended Vidatel, even if it were right to say that the effect of a second order is not only to clarify the *res judicata* position between the parties after the making of the second order but also to render, for all purposes, the first order as having been of no effect, that would not meet Vidatel's case. That is for the simple reason that at the time the Second Originating Application was issued, the first order (i.e. the Liquidation Order) was effective. At that point in time, therefore, the Second Originating Application was rendered void and of no effect pursuant to section 175(3) of the Act. Vidatel contended that there can be no basis for saying that there nevertheless subsisted, in the Second Originating Application, some inchoate element that allowed it to be revived when the first order fell away.

[64] The language of the statute is clear, says Vidatel. The proceedings are rendered void, not voidable. In other words, the Second Originating Application was dead on arrival.

3.3 PTV's position in reply

[65] PTV disagreed with Vidatel's analysis. PTV argued that Vidatel was wrong to rely upon the decision of the Privy Council in **Isaacs v Robertson** for the proposition that an order, once made, is valid and effective unless and until it has been set aside. This is because there is no dispute that an order has presumptive validity unless and until it is set aside. Once set aside, it is clear that the order is avoided and a nullity.

3.4 The Court's judgment

[66] I agree with PTV on the *ab initio* point. Neither **Isaacs v Robertson**, nor **Saad Investments** deal with the effect of an order of an appellate court that overturns an order of a lower court. They concern the effect of an order before it is set aside, not the effect of the set aside. The effect of the set aside is completely different.

[67] Similarly, this Court's judgment of 27th June 2022, which led to this Court's Order of 18th July 2022 (i.e. the Second Stay Order), did not concern the effect of a set aside ordered by the Court of Appeal. I make that point because it was urged upon me by Counsel for Vidatel that my own judgment of June/July 2022 somehow does treat with that issue, and if I go against that now I would be reversing myself. That argument finds no favour with me. My judgment did not deal with that.

- [68] It is, in my respectful judgment, artificial and unwarranted on the authorities to treat the effect of the order made on appeal as avoiding entirely the order made by the Court below merely for res judicata purposes.
- [69] I derive support for this view from the fact that this Court's Liquidation Order of 30th September 2021 was set aside, and had to be set aside, for want of jurisdiction. Since the First Originating Application stood dismissed by the operation of statute, as at 5th September 2021, this Court was *functus officio* in relation to the application for appointment of liquidators from that date. This Court had no jurisdiction, no power and no juridical basis for making the Liquidation Order of 30th September 2021.
- [70] The lack of this Court's jurisdiction to have made the Liquidation Order of 30th September 2021, coupled with the clear principle expressed in **P&O Nedlloyd v Arab Metals** at paragraph 28 leaves me in no doubt that the Liquidation Order of 30th September 2021 is to be treated as if it had never been made.
- [71] The consequence of this is that Vidatel had, in law, never been put into liquidation. No liquidation of Vidatel had, in law, been commenced. As a result, the permission requirement in section 175 of the Act never arose. The consequence of that is that PTV was not required to seek permission to commence or proceed with the Second Originating Application pursuant to section 175.
- [72] It had been open, under the Act, to PTV to seek to have its Second Originating Application listed for hearing. As a matter of law, no permission to bring or proceed with the Second Originating Application had been needed.
- [73] Now, the First Stay Order of this Court which had imposed the permission requirement had been predicated on the application of section 175. It is to be recalled that PTV submitted that the wording of that order tracked the words of section 175. That was not a coincidence. In circumstances where it is now clear to this Court that section 175 did not, and could not, apply, it would not be right to hold PTV, nonetheless, to a requirement to obtain prior permission. Indeed, there is no basis for treating any such failure to obtain prior permission as nullifying the Second Originating Application. Vidatel's argument that rendering an order void *ab initio* is detrimental to certainty and would produce difficulties in relation to steps that liquidators might have taken following their putative appointment is irrelevant.
- [74] Section 186(6) of the Act has been inserted into the Act specifically to deal with such a situation and to remove any such uncertainty. By statute, it expressly validates steps taken by liquidators

where there has been a defect in their appointment. Indeed, in this case there appears to be no need even to have recourse to section 186(6). It appears to be common ground that the Liquidators did not do anything anyway. This reasoning, therefore, suffices to reject Vidatel's Ground One and Two objections.

4. Ground Three

4.1 Vidatel's position

[75] Ground Three is that even if the Applicant were now to seek the Court's permission to commence and proceed with the Second Originating Application, it should not be granted because the Application (or any similar application) is barred by *res judicata* principles.

[76] Vidatel's starting point here is the Court's decision in its judgment of 27th June 2022, as follows:

"The deemed dismissal, here on 5th of September 2021 of the application to appoint a liquidator over Vidatel is no different in effect than if a hearing of this Court had been convened on that date, with the Court delivering a ruling that the application be dismissed with immediate effect, and reserving all consequential matters, including as to costs, to a further hearing."

[77] Vidatel contends that this is the only relevant authority on the characterisation of the effect of section 168 and submitted that it is correct.

[78] Vidatel submitted that it is also consistent with the established principle that upon the expiry of the six-month time limit prescribed by section 168 (or any lawful extension thereof by prospective order of the Court) the Court ceases to have substantive jurisdiction to order a winding up of the respondent company.

[79] Vidatel argued that once the application has been dismissed by operation of section 168(3), that does not completely deprive the Court of jurisdiction. It may still make declaratory and consequential orders (such as the orders now sought by Vidatel). The authority they rely on is **KMG International NV v DP Holding SA** at [28].⁹

[80] But, says Vidatel, the Court can no longer make an order to wind up the company and appoint liquidators. See the two High Court decisions in **Safe Solutions Accounting Limited v French**

⁹ BVIHCMAP2017/0013 (unreported, delivered 16 April 2018) per Webster JA (Ag.).

Connection Ltd,¹⁰ and **Citco Global Custody NV v Y2K Finance Inc**,¹¹ both of which were approved by the Court of Appeal in **KMG International**.

- [81] It follows, says Vidatel, that the Second Originating Application, based as it is on precisely the same debt and precisely the same legal grounds, cannot be pursued.

4.2 PTV's position

- [82] PTV disagreed. PTV submitted that Ground Three should also be dismissed. It is plain, says PTV, that the deemed procedural dismissal of the First Originating Application does not create a *res judicata* precluding PTV from ever again seeking to wind up Vidatel when its undisputed and substantial Judgment Debts remain unpaid.

- [83] PTV says this defence is wrong as a matter of law because the principle of *res judicata* simply has no application on the present facts. They say it is a thoroughly bad point. Firstly, this is because Vidatel contends for a statutory consequence for which section 168 of the Act does not provide, and there is no basis for reading into the statute the permanent bar on subsequent liquidation applications which Vidatel asserts must be imposed. Secondly, the doctrine of *res judicata* has no application to the present case. The deemed dismissal of the First Originating Application by section 168(3), which occurred by operation of statute, did not give rise to a *res judicata* because it was not a judicial decision, still less a judicial decision on the merits of a relevant cause of action that would bar a Second Originating Application. In particular:

- (1) There was no judicial decision, which is a core element of a *res judicata*.
- (2) The First Originating Application was deemed dismissed by operation of statute on the basis of a procedural time bar, which did not lead to (but in fact, prevented) a judicial adjudication on the merits of the first application. At most, the deemed dismissal operated to determine the procedural question of whether the first application was barred by the effluxion of time under section 168 (but even on that narrow issue, the deemed dismissal could not have operated as *res judicata* since it was not a decision of a judicial tribunal in the relevant sense).
- (3) The point that the *res judicata* doctrine is inapposite and inapplicable is underscored by the public policy behind *res judicata*, which is not infringed in the present case. On the contrary, to interpret section 168 as imposing a permanent prohibition on any

¹⁰ BVIHCV2005/0242 (unreported, delivered 24 May 2006) at paragraph [18].

¹¹ BVIHCV2008/0146 (unreported, delivered 10 February 2009) at paragraph [16].

subsequent liquidation applications would work obvious injustice to the creditor and would be an affront to (and subvert) the long-established principle of insolvency law that insolvent debtors should pay their debts or be wound up.

- (4) In any event, as a matter of law and authority: it is long established by English authority that a second winding up or second bankruptcy petition can be presented by the same creditor whose first petition was dismissed on grounds which were procedural and/or did not undermine the standing of the creditor to petition.

[84] Moreover, indeed, in a number of cases, the Court of Appeal of this jurisdiction and three first instance judges of this Court have all accepted jurisdiction over and heard second originating applications where the first application has been deemed dismissed by section 168(3). Moreover, says PTV, the Judgment Debts in this case do constitute a *res judicata* between the parties, and remain a sound basis on which PTV, as the undisputed judgment creditor, can apply to appoint liquidators over Vidatel.

[85] PTV relied on a number of cases in support of these propositions. For example, PTV relied upon statements by Lord Hoffmann in **Wight v Eckhardt Marine GmbH**,¹² and statements made in the BVI case of **Bank of America N.A. v Pacific Andes Enterprises (BVI) Ltd**¹³ by Acting Justice Davis White, Q.C., at [39] and, says PTV, the BVI Courts have already permitted creditors to issue second originating applications once a first liquidation application has been dismissed or deemed dismissed by section 168(3). They identified a decision by Justice Bannister in **Citco Global**¹⁴ at [12] to [13] and of Justice Jack in **KMG International and Tall Trade Ltd and Capital WW Investment Ltd**.¹⁵

[86] PTV also relied on some other cases, including the UK Supreme Court case of **R (Coke-Wallis) and Institute of Chartered Accountants**,¹⁶ in which Lord Clarke at [34], with reference to the leading English textbook on the subject, **Spencer Bower** said:

"In para 1.02 *Spencer Bower and Handley on Res Judicata* 4th ed, makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are: (i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was - (a) final and (b) on the merits; (v)

¹² [2004] 1 AC.

¹³ BVIHC(Com)2016/0132 (unreported, delivered 1 December 2016).

¹⁴ BVIHC2009/0020A (unreported, delivered 18 September 2009).

¹⁵ BVIHC2020/0025 (unreported, delivered 3 December 2020).

¹⁶ [2011] 2 AC 146.

it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem."

- [87] PTV argued that it is obvious that the argument of *res judicata* (in the sense of cause of action estoppel) bars the Second Originating Application is not sustainable, because the core, essential components do not exist. PTV argued that the burden lies on Vidatel to establish the existence of and basis for *res judicata*, which it has failed to do and cannot demonstrate. Critically, says PTV, there has never been a judicial decision (requirements (i) to (ii)) (because the First Originating Application was deemed dismissed by operation of statute), still less was there any judicial decision which was final and on the merits (requirement iv).

4.3 The Court's judgment.

- [88] I agree with PTV's analysis.
- [89] I adopt the summary of PTV's case as set out in its skeleton for the December hearing at paragraphs 79 to 129 in its entirety. Ground Three of Vidatel's objections thus fails.

5 Grounds Four, Five and Six

- [90] Grounds Four to Six, can, for convenience, be taken together.

5.1 Vidatel's position

- [91] Vidatel urged in relation to Ground Four, that the Respondent wishes to and has sought to make arrangements for the satisfaction of all outstanding sums due to the Applicant, and thereby to confirm its solvency, but to date it has not been possible to do so - and this impossibility has nothing to do with the Respondent's means, but arises only by reason of various court orders (and more recently by the purported nationalisation of its shareholding in Unitel by the Angolan state, an alleged associate of the Applicant) that have from time to time prevented the Respondent from using its very considerable assets to discharge the debt.
- [92] On Ground Five, Vidatel urged: even if the Court were to conclude that the external restrictions imposed upon the Respondent to deploy a portion of its assets to discharge its indebtedness to the Applicant are not what they appear to be (i.e., are not in fact real restrictions), and/or if those restrictions were to be relaxed by the Applicant and/or its associates, then it follows that there is a reasonable prospect that the application debt will be paid within a reasonable time.

- [93] Lastly, Ground Six: even if the Court were to conclude that it has jurisdiction to make a winding up order, in the exceptional circumstances of this case the Court should, in its discretion, decline to make an order winding up the company.
- [94] More particularly Vidatel says, in relation to Ground Four, that it intends to oppose the Second Originating Application for the reasons set out in the Affidavit of Ms. Michelle Duncan sworn on 27th April 2023, together with the exhibit thereto referred to as MD-1 ('Duncan 1').
- [95] In essence, Ground Four says that Vidatel is not insolvent on a cash flow basis and that the only reason Vidatel has not been able to discharge the application debt is because the actions of PTV and its associates have prevented it from doing so.
- [96] Vidatel set out, first, what it said are the relevant legal principles; then the material facts; then the relevance of certain aspects of the evidence of Angolan law, and, lastly, a number of concluding submissions.
- [97] Vidatel summarises the relevant legal principles as follows:
- (1) Section 159(1)(a) of the Act provides that the Court may appoint the official receiver or an eligible practitioner as liquidator of a company on an application under section 162.
 - (2) Section 162(1)(a) provides that the Court may, on an application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if the company is insolvent.
 - (3) Section 162(2) provides that an application under subsection (1) may be made by, amongst others, a creditor.
- [98] Vidatel urges that it is trite law that the appointment of a liquidator under section 162(1)(a) is a discretionary remedy. Pursuant to section 8(1) of the Act, a company is insolvent, says Vidatel, if:
- (1) it fails to comply with the requirements of a statutory demand that has not been set aside, or
 - (2) execution or other process issued on a judgment, decree or order of a Virgin Islands Court in favour of a creditor of the company which has been returned wholly or partly unsatisfied, or either:
 - (i) the value of the company's liabilities exceeds its assets, or

(ii) the company is unable to pay its debts as they fall due.

[99] In the present case, says Vidatel, PTV relies only upon section 8(1)(c)(ii), the so-called cash flow test of insolvency (see para 7(c) of its grounds in support for the Second Originating Application). The expression 'debts' is nowhere defined in the Act, in contrast with the expression 'liabilities' used in section 8(1)(c)(i), the so-called balance sheet test of insolvency, which is defined in section 10 of the Act.

[100] Nevertheless, says Vidatel, it is settled law that an arbitration award gives rise to an enforceable debt for the purposes of section 8(1)(a) as soon as it is issued, even if not yet the subject of an order under sections 81(1) and 84(1) of the Arbitration Act 2013 for its enforcement in the same manner as a judgment. More recently, a decision of this Court has proceeded on the basis that such an award is also debt for the purposes of section 8(1)(c).

[101] Vidatel also reminds us that in the United Kingdom there are similar provisions which are also not deeming provisions. Vidatel says that insolvency, whether on the balance sheet test or cash flow test, must therefore be proven and the burden of proving a company's insolvency under section 8(1)(c) is, says Vidatel, on the applicant.

[102] Vidatel argues then that section 8(1)(c)(ii), the cash-flow insolvency basis, is most commonly relied upon where a debt presently payable is not paid by what Vidatel says is 'a lack of means'. Vidatel relies upon the case of **Byblos Bank SAL v Alkhudhairy**¹⁷ where Lord Justice Nicholls said this of section 223(d) of the United Kingdom Companies Act 1948, the forerunner of section 123(1)(e) of the United Kingdom Act 1986 and therefore the English equivalent to our section 8(1)(c)(ii):

"...it seems to me plain that, in a case where none of the deeming paragraphs (a), (b) or (c) is applicable, what is contemplated is evidence of (and if necessary, an investigation into) the present capacity of a company to pay all its debts. If a debt presently payable is not paid because of lack of means, that will normally suffice to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law".

¹⁷ [1987] BCLC 232.

[103] Vidatel says that this passage was cited with approval by the Supreme Court in **BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc**,¹⁸ a decision that has since been applied in the BVI.

[104] In **Eurosail**, remarks Vidatel, Lord Walker also had this to say at [25]:

"Section 123(1)(e) ... is not what would usually be described as a deeming provision. It does not treat proof of a single specific default by a company as conclusive of the general issue of its inability to pay its debts. Instead it goes to that very issue. It may open up for inquiry a much wider range of factual matters, on which there may be conflicting evidence."

[105] The reference by Nicholls LJ (as he then was) to the non-payment of a debt presently payable because of 'lack of means' is not to say that those words are to be read into the statute, says Vidatel, (although Vidatel submitted that such may readily be implied, given that the whole concern of section 8(1)(c) is with whether a company is insolvent, thus, without means).

[106] Rather, says Vidatel, it is to inform the Court's approach to the application of section 8(1)(c); a momentary inability to pay (to borrow the language of Briggs in **Cheyne Finance**, for example) may be explained (and generally is explained) by a lack of means on the part of the debtor (in which case the debtor, all other things being equal, may fairly be described as being insolvent on the basis of the cash-flow test), but conversely, in an unusual case, it may be explained, for example, by the fact that the debtor has been imprisoned without access to banking facilities of any kind by the creditor (in which case the debtor could not be fairly described as cash-flow insolvent, unless it so happened that an inspection of his balance sheet revealed that he would not be able to pay even if released).

[107] Vidatel urged that, when applying the cash-flow test, the Court should not merely look at events as they stand at a moment in time. Vidatel says it is inherent in the language of 8(1)(c)(ii) that the debtor's prospects are very relevant when the Court is exercising its discretion, since 'as they fall due' is a phrase that looks to the future. See **Byblos Bank** at p.247f and **Eurosail** at [25], [33], [34], and [37]. In particular, says Vidatel, Lord Walker said this in **Eurosail** at [37]:

"...the 'cash-flow' test is concerned, not simply with the petitioner's own presently-due debt, nor only with the other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future".

¹⁸ [2013] UKSC 28.

[108] The application of the cash-flow test should thus not depend 'on a slavish focus on debts due as at the relevant date'. See **Re Cheyne Finance plc**¹⁹ at [51] by Lord Briggs, where he said:

"Such a blinkered review will, in some cases, fail to see that a momentary inability to pay is only the result of a temporary lack of liquidity soon to be remedied..."

[109] Rather, says Vidatel, the two tests, balance sheet and cash-flow insolvency, are properly to be seen as standing side-by-side as part of a single exercise to determine whether, looking at the commercial reality, a company is unable to pay its debt. See, for example, **Bucci v Carman**²⁰ at paragraph 29 where Lord Justice Lewison said this:

"Thus I agree with Warren J. at [34] that the two tests feature as part of a single exercise, namely to determine whether a company is unable to pay its debts. In addition, even when applying the cash-flow test it is not enough merely to ask (as H.H. Judge Purle QC did) whether the company is for the time being paying its debts as they fall due. As Briggs J. said in *Cheyne Finance*, a realistic examination may reveal that a company is on any commercial view insolvent, even though it may continue to pay its debts for the time being."

[110] Vidatel thus says, the potential relevance of a company's balance sheet to its cash-flow position can cut both ways. Thus, apparent cash-flow solvency may be shown to be illusory when the balance sheet position is inspected, as in **Bucci v Carman**, where funds supplied by new investors were being used to settle debts owed to existing investors, and the example given in the citation from **Eurosail**, while, conversely, apparent cash-flow insolvency may be shown, on further investigation of the balance sheet position, to be the result of a temporary lack of liquidity soon to be remedied, as in the example given by Briggs J in the citation from **Cheyne Finance**.

[111] Vidatel say that that is, of course, not to say that the two tests are not disjunctive. Vidatel says they most certainly are disjunctive, and it is trite law that either will suffice, if relied upon. However, said Vidatel, this applies especially to cash-flow insolvency which Vidatel says is the more nebulous of the two concepts. A close and realistic examination of the company's cash-flow position (i.e. the Court's assessment whether the company is in fact insolvent, being the ultimate issue) will in appropriate circumstances not be complete without scratching beneath the surface and looking at its full financial position in greater detail. These will include an examination of its future prospects. Thus, if the company's balance sheet shows notable weaknesses, then its appeals to future prospects (even if, by themselves, they might enable the company to discharge

¹⁹ [2008] BCC 182.

²⁰ [2014] BCC 269.

the application debt) are likely to carry little weight with the Court, and, conversely, in the case of a strong balance sheet.

[112] Having highlighted what it says are those principles, Vidatel alluded to what it says are the following material facts:

- (1) Vidatel is a BVI company owned by Ms. dos Santos, who is a daughter of a former president of Angola. PTV is a company incorporated in Portugal and is now ultimately owned by the Angolan state, the Republic of Angola. Vidatel and PTV each owned valuable shareholdings in a major Angolan telecoms company, the largest telecoms company, and also the largest privately-owned company in Angola: Unitel.
- (2) Vidatel's Unitel shareholding was purportedly nationalised by the Angolan state in October 2022.
- (3) PTV commenced Paris-seated ICC arbitration proceedings against Vidatel, and the other two 25 percent shareholders in 2015, and obtained an award in 2019 ordering Vidatel and others, to pay various sums to PTV. Also in 2015, PTV obtained a worldwide freezing order in the BVI in support of the arbitration.
- (4) Vidatel sought to annul the arbitration award in the French Courts. Its final appeal to the Cour de Cassation (France's highest Court) failed on 9th November 2022. Vidatel says that earlier, the French Attorney General, acting in the public interest, had provided an opinion to the Cour de Cassation supporting annulment, but that ultimately the Cour de Cassation disagreed. (I fail to see what the significance of any opinion is by an Attorney General when ultimately the Court which has charge of making decisions decides to make a contrary decision. But, Vidatel included this detail, so I am reciting it. If doing so was intended to suggest that somehow the claim should have been annulled, then that is squarely scotched by the decision of the ultimate French Court.)
- (5) Very shortly before the Cour de Cassation's decision was handed down, on 26th October 2022, the President of Angola issued a decree purporting to nationalise the shares held by Vidatel in Unitel. The decree was officially published on 28th October and became effective the following day, on 29th October 2022.
- (6) Meanwhile, while proceedings to annul the arbitration in France were ongoing, PTV sought relief in the BVI in connection with the award, initially pursuant to recognition proceedings that culminated in a four-day trial before Justice Jack. By the Order of

Justice Jack dated 29th October 2020, PTV was given leave to enforce the award pursuant to sections 81(1) and 84(1) of the Arbitration Act 2013. Justice Jack also, unopposed by Vidatel, appointed receivers over Vidatel's principal assets, including its shares in Unitel and its rights to accrued but unpaid dividends, and also future dividends, in respect of those shares. The purpose of the receivers' appointment was to realise those assets to the extent necessary to enable Vidatel to pay the debts owed to PTV.

- (7) Vidatel points out that the shares in Unitel had always been Vidatel's principal asset, although the value of its accrued but unpaid dividends in respect of those shares is also substantial. Vidatel says the joint receivers have sought to recover those assets from Unitel but have so far not been successful. They have also commenced litigation in Angola seeking to annul the nationalisation, which the receivers have been advised by their Angolan lawyer was unlawful, and in the alternative, the receivers have been pursuing claims for compensation on behalf of Vidatel but have also to date not been successful, as shown both by a receivers' report of 8th March 2024 as well as by what Vidatel refers to as a recently produced report of the receivers' Angolan lawyer dated 28th November 2023.
- (8) Vidatel says that the joint receivers have been advised that the loss to Vidatel by reason of the nationalisation is between US\$330 million and US\$405 million. That is the amount they seek by way of compensation. As for dividends, the joint receivers have estimated that the value of unpaid dividends owed to Vidatel amounts to some US\$254 million, an amount which increases with every quarter.
- (9) So, placing these values at their most conservative, says Vidatel, and ignoring a number of other assets and contingent assets, the joint receivers' value for the shares and the unpaid dividends amounts to a total US\$584 million (i.e. US\$330 million plus US\$254 million), which is a surplus of some US\$181 million in excess of the application debt of currently about US\$402 million. The receivers have in their quarterly report summarised the steps taken by them to recover unpaid dividends from Vidatel and the expropriated shares from the Angolan state. But they have not been successful so far.
- (10) Vidatel points out that, subject to Vidatel's contested 25 percent shareholding in Unitel, Unitel is wholly owned by the Angolan state, including a further 25 percent *via* PTV, and Unitel must accordingly be taken to be controlled by the Angolan state.

- (11) Vidatel contends that PTV is itself a wholly owned subsidiary of the Angolan state *via* an intermediate entity named Sonangol, an Angolan parastatal corporation. Vidatel contends that PTV must accordingly also be taken to be controlled by the Angolan state. Vidatel points out that PTV is a mere investment holding company with its business understood to be comprised solely of its 25 percent holding in Unitel, and its claim against Vidatel.
- (12) Vidatel says that it follows that both the Angolan state, which expropriated Vidatel's shares in Unitel without paying any compensation for them, and now refuses to return them, and Unitel which owes US\$254 million in historic dividends to Vidatel, are associates of PTV.
- (13) Therefore, says Vidatel, it is PTV's own associates that are standing in the way of Vidatel's ability to discharge its debts of PTV. Put simply, if the Angolan state wished Vidatel to discharge its debts to PTV, then it could arrange for that to be done.
- (14) Vidatel considers that various evidence it has obtained in relation to Angolan law is relevant.
- (15) Vidatel says that in the context of its objection in Ground Four, Angolan law is relevant principally to what value remains in Vidatel. Prior to nationalisation, Vidatel's main assets, ignoring for present purposes its valuable contingent assets, were the shares and accrued rights to dividends.
- (16) Vidatel points out that PTV's position is apparently that the nationalisation has *de facto* destroyed Vidatel's balance sheet as shown by correspondence, for example, in a letter from Maples to Walkers of 2nd March 2023 in which is asserted that the nationalisation 'significantly deteriorates Vidatel's balance sheet and cash flow position'.
- (17) Further, there is another Maples letter to Walkers of 24th March 2023 in which it was asserted that 'the nationalisation of Vidatel's shareholding, which has *de facto* deprived Vidatel of its principal asset, can only have worsened Vidatel's ability to pay its debts'.
- (18) Vidatel points out the same theme has been taken up in evidence filed by Vidatel in the shape of evidence from Mr. Rogerson on behalf of PTV in June 2023 ('Rogerson 4'), because in that evidence he seeks to undermine the evidence Vidatel had served in relation to the purported nationalisation and Vidatel's rights that flowed from it. For example, Mr. Rogerson stated at paragraph [38] of Rogerson 4 (and, in effect, thereby

making submissions on Angolan law, although Mr. Rogerson is not known to be an Angolan lawyer), that Vidatel's right to compensation under Angolan law was suspended or precluded.

- (19) Vidatel's position on this is that the submission that the nationalisation has somehow destroyed its balance sheet, and therefore precludes the argument that it could pay its debt to PTV if not prevented by PTV's associates, is fanciful.
- (20) Vidatel says its starting point in relation to this is that there are two assets, or contingent assets, to which the purported nationalisation gives rise. The first asset ('Asset One'), comprises the shares or compensation if the nationalisation was invalid, which is the relief the receivers are seeking. The second asset ('Asset Two'), comprises compensation if the nationalisation was valid. Vidatel says each can only be understood by reference to evidence of Angolan law.
- (21) As to Asset One, Vidatel points out that the joint receivers have provided an opinion from their Angolan lawyer dated 28th November 2022 describing the claim by the receivers against the Angolan state and setting out the basis of that opinion.
- (22) There are also before the Court two expert reports, one of Mr. Alves on behalf of Vidatel, and one of Mr. Lopes on behalf of PTV, which discussed the legal principles applicable to nationalisation, including the measure of compensation on which, importantly, they disagree.
- (23) Moreover, Vidatel points out that although the Court does not in fact have the claim documents themselves (the joint receivers having maintained they were bound not to disclose them), the Court is now in a much better position, thanks to Vidatel's recent applications against the joint receivers and the expert evidence, to understand what the litigation in Angola is about. Therefore, Vidatel invites the Court to refer in particular to the joint receivers' lawyer's report which discusses, *inter alia*,
 - (a) the legal and factual basis for their claims in Angola;
 - (b) the basis of their argument that Vidatel's property rights were violated by the Angolan state;
 - (c) the basis of their argument that the nationalisation decree was not properly justified, was invalid; and

- (d) by reference to Article 200(1) of the Angolan constitution (described as being a cornerstone principle), the basis of the receivers' argument that the nationalisation was null and produces no legal effects;
- (e) and the nature of the relief claimed on behalf of Vidatel for compensation as well as an annulment giving rise to a range of asset said to be worth between US\$330 million and US\$405 million.

(24) In relation to Vidatel's report of Mr. Alves, Vidatel says this explains the legal principles relative to nationalisation. Vidatel points out that PTV's expert takes a different view to some of these points. Vidatel says Mr. Lopes is entitled to that, and Vidatel says, he differs from what Vidatel called the independent receivers' lawyer. Vidatel invites the Court to prefer Vidatel's expert, and the independent receivers' lawyer, to the views taken by PTV's expert. Vidatel reminds the Court that PTV fought hard to oppose the admission of expert evidence on Angolan law at all (I mention it, even though I am not sure what Vidatel wishes this Court to infer from that particular point.)

[113] At a minimum, says Vidatel, the material now before the Court makes clear beyond any doubt that the joint receivers' claim is a serious claim for up to US\$405 million. To be clear, Vidatel is not asking, and has never asked, this Court to decide that the steps taken by the Angolan state under Angolan law are illegal under Angolan law with the consequence that the nationalisation is invalid. It merely says that the claim being brought is a real claim which should be regarded as an asset, and accordingly the suggestion that its balance sheet has been destroyed is fanciful on the grounds of Asset One alone.

[114] In relation to Asset Two, Vidatel said that this comprises an entitlement to compensation on the alternative footing that the nationalisation was valid and Vidatel says it will have a serious claim to substantial compensation in respect of its Unitel shares. Again, says Vidatel, that is enough to conclude that Vidatel's balance sheet has not in fact been destroyed and any arguments to that effect are fanciful. Vidatel also refers this Court to various other aspects of Angolan law included in Vidatel's skeleton, which I need not refer specifically to them here.

[115] Vidatel makes a number of further submissions. It reminds the Court that in the present case no statutory demand has been served, nor has PTV issued execution on other persons in respect of that application debt, and therefore there is no basis for any claim that Vidatel is deemed to be insolvent. PTV relies only, says Vidatel, on section 8(1)(c)(ii) and must therefore prove insolvency. Then, stresses Vidatel, in order to prove insolvency PTV must demonstrate that

Vidatel's inability to pay the application debt is not 'the result of a temporary lack of liquidity soon to be remedied' (a quotation from **Cheyne Finance** at paragraph [51]) nor the result of externally-imposed restrictions, but that it has not been paid because of lack of means, i.e., because it is insolvent, with reference to **Byblos Bank** at page 247d.

[116] In that regard, says Vidatel, it is patently obvious that Vidatel is subject to a number of restrictions, which have nothing to do with its solvency, that prevent it from paying the application debt.

[117] To summarise these restrictions, Vidatel points out the following:

- (1) Unitel, controlled by PTV and its associates, is refusing to pay substantial dividends owing to Vidatel.
- (2) The receivers appointed by PTV over Vidatel have thus far failed to make any tangible progress in securing the payments of the dividends due to Vidatel.
- (3) The Angolan state, an associate of PTV, has purported to nationalise Vidatel's shares in Unitel and has subsequently refused to pay compensation for those shares.
- (4) The receivers have thus far failed to make any tangible progress in securing the return of Vidatel's shares or the payment of compensation due to Vidatel as a consequence of the purported nationalisation.

[118] Furthermore, and in any event when considering whether insolvency has been proved, Vidatel urged that the Court should not mechanically apply the cash-flow insolvency test but should, in addition, have regard to the commercial reality (that proposition derives from **Evans v Jones**²¹ at paragraph [24]) to determine precisely why Vidatel has not paid the application debt. In other words, Vidatel says the Court should carry out a realistic examination into what happened.

[119] Vidatel, it says, has provided ample evidence as to why it has not paid the debt. Its assets have been tied up by PTV and its associates, and even the receivers, who were appointed for the specific purpose of realising those assets in order to pay PTV, and who have spent over US\$2 million to that end, have been prevented by PTV and its associates from doing so.

[120] Furthermore, having regard to Vidatel's balance sheet position, which the Court should not ignore, says Vidatel, in determining precisely why Vidatel has not paid the application debt, there

²¹ [2017] Ch 1.

is every reason to think that Vidatel has the means to pay the application debt, were it not for the hindrance the joint receivers have experienced in realising the assets.

- [121] In other words, says Vidatel, having regard to the very unusual circumstances in this case, the Court should look at Vidatel's position in the round when coming to a determination whether it is unable to pay its debts within the proper meaning of section 8(1)(c)(ii) as suggested in **Bucci v Carman** at paragraph [29].
- [122] Vidatel says, in that regard, it is equally obvious that Vidatel has significant balance sheet strength, and thus has the means to pay its debts when they fall due were it not for externally-imposed restrictions. Vidatel says this no doubt explains why PTV has sought generally to shy away from this issue in its evidence and places no reliance on section 8(1)(c)(i), the balance sheet insolvency test. Vidatel urges that this Court should not ignore this aspect of Vidatel's financial position.
- [123] Vidatel says, on the basis of the best available evidence, that of the receivers, that Vidatel has assets worth at least \$584 million, even disregarding valuable contingent assets such as its contingent claims for contributions against claimed liabilities worth US\$402.6 million, hence it has a balance sheet value, disregarding the contingent assets, of more than US\$181 million.
- [124] Vidatel points out that PTV could improve the evidence available to the Court if it chose to do so, including by causing Unitel to give detailed evidence of the value of the unpaid dividends and such evidence as it undoubtedly has as to the value of its own 25 percent shareholding in Unitel, but it has not.
- [125] Vidatel submits that in the circumstances PTV has failed to prove, on a balance of probabilities, that Vidatel is insolvent by reason of an inability to pay its debts when they fall due. Accordingly, says Vidatel, the Second Originating Application should be dismissed with costs.
- [126] In relation to Ground Five, we might remind ourselves that Vidatel says that it follows from the circumstances that there is a reasonable prospect that the application debt could be paid in a reasonable period and for that reason Vidatel invites the Court to dismiss the Second Originating Application or alternatively to adjourn it, to allow the Applicant and its associates, including the Angolan state, an opportunity to agree arrangements which will enable Vidatel to deploy a portion of its assets to discharge the debt.
- [127] At the December hearing, Vidatel reminded us that PTV's entire argument on Ground Five was predicated on the assertion that Vidatel was not seeking an adjournment of the Second

Originating Application to allow time for payment, rather it was seeking the dismissal of the Second Originating Application and so the question had been whether or not there should be an adjournment.

- [128] Vidatel says that the relevant legal principles that govern the Court's discretion to allow a debtor time to pay are set out in **Aabar Block SARL v Maud**²² at paragraphs [99] to [102]. Vidatel suggests there is a simple answer to the question 'How long does Vidatel need?' and Vidatel says the answer is that it depends on when PTV's associates, namely its shareholder, Sonangol, and/or the Republic of Angola, and/or Unitel, allow payment to be made.
- [129] Vidatel urges that it bears emphasis that the timing and mode of payment rest entirely in the hands of PTV and its associates, and Vidatel points out there is nothing Vidatel can do to impede payment from being made because of the function of the receivers. Vidatel says it is very simple: if the receivers get paid, PTV gets paid.
- [130] Vidatel moves on to Ground Six, which is that, even if the Court were to conclude that it has jurisdiction to make an order, in the exceptional circumstances of this case, the Court should, in its discretion, decline to make an order.
- [131] Vidatel says, it is now clear that PTV has a collateral purpose in pursuing the present application, namely, to seize Vidatel's Unitel shareholding for the benefit of its ultimate parent, the Angolan state, and/or to reduce the risk to the Angolan state that nationalisation of the Unitel shareholding will be successfully challenged. This is a point which, although articulated, had not been pressed during the hearing in June and July 2021, but Vidatel does now press the point. Vidatel claims to rely upon 'new evidence' that the Unitel shareholding had been nationalised. Vidatel also relied upon the express terms of the preamble to the decree of nationalisation, indicating that an agreement had been reached between PTV and the Angolan state, or PTV and Sonangol, which at the time held the other shares in Unitel not yet held by PTV and not yet nationalised, that the Unitel shareholding should be nationalised, and that this agreement was reached in light of the 'pending lawsuits' that were 'obstructing' the realisation of the Angolan state's objective of gaining complete control of Unitel.
- [132] Vidatel says that to allow PTV to pursue the Second Originating Application for a collateral purpose would be contrary to the interests of Vidatel's general body of creditors, and since there is a substantial balance sheet surplus, of its shareholders, as well as the misuse of the Court's

²² [2016] Bus LR per Snowden J.

winding up jurisdiction, such that this present application should be refused in the Court's discretion.

- [133] Vidatel submits that on the very unusual facts of this case there is ample evidence that PTV is pursuing this Second Originating Application for a collateral purpose, within the second category identified by Snowden J in **Maud**. Vidatel says the Second Originating Application should be dismissed on this ground, for the reason that PTV is pursuing a private interest, on behalf of the Angolan state, that is objectively adverse to the class interest of Vidatel's creditors as a whole, which is that creditors get paid in full, or as much as can be expected in the circumstances. Plainly, says Vidatel, the nationalisation of Unitel shareholding and its protection from effective challenge is objectively adverse to the class interest of Vidatel's creditors, and this Court should not allow its power to be used to that end.
- [134] Vidatel points out that Vidatel is not beset by other creditors rushing to get in first, the usual reason why a form of collective procedure is desirable. Vidatel and PTV are both investment holding companies. Neither is a commercial trading entity. Furthermore, PTV has enforceable judgment debts against Vidatel, and persists in saying that it would need to be enforced against assets abroad as none are present in the Virgin Islands. Precisely the same may be said of steps that may need to be taken by liquidators. They, too, would need to enforce against assets abroad.
- [135] Vidatel goes on to suggest that one might think that making liquidators of the receivers would hamper and delay their efforts. They have had a problem in Angola getting recognition, and one might well think that if they suddenly metamorphosed into liquidators that would set the process back yet further. Accordingly, says Vidatel, there is every reason to think that PTV is seeking an order for collateral purposes, and none for thinking that the usual grounds for seeking an appointment order apply in this case. Vidatel invites this Court to take a step back and take a commercial view and take cognizance of the fact that PTV is a subsidiary of the Angolan state. If Vidatel has claims against the Angolan state, and PTV in theory stands to benefit from them, it does not need this Court to help it in realising them through liquidation. It can apply directly to its parent.
- [136] Lastly, Vidatel refers to evidence from Ms. Michelle Duncan that Vidatel's shareholding in Unitel has long been a specific target of the Angolan state and that the key actors considered it a foregone conclusion that they would be able to confiscate it through a liquidation of Vidatel in the Virgin Islands.

- [137] Vidatel submits that the Court should make an order dismissing the Second Originating Application with costs, alternatively an order adjourning the Second Originating Application. Vidatel reminds the Court that Vidatel remains in the hands of receivers, and subject to a worldwide freezing order, and there is no need for a winding-up order to secure PTV's position.

5.2 PTV's position

- [138] PTV takes a very different view in relation to Grounds Four to Six. PTV says that Vidatel's challenge on these grounds must fail. It points out that on 30th September 2021 Vidatel was found by this Court to be insolvent, when the Court made the Liquidation Order. There has been no material alteration in Vidatel's financial position since that time. Vidatel remains unable to pay the Judgment Debts, since it has not paid them, nor made any proposal to pay them forthwith.
- [139] Vidatel's suggestion in the Notice of Opposition, paragraph 4, that it 'has sought to make arrangements for the satisfaction of all outstanding sums due to PTV' is patently false and it is not supported by the evidence. PTV points out in Grounds Four to Six of the Notice of Opposition, Vidatel once again seeks to contest its insolvency, and alternatively asks the Court in the exercise of its discretion not to wind it up on the basis of 'the exceptional circumstances of this case'.
- [140] Whilst the evidence of Ms. Duncan advances an array of diverse factual assertions, the core of Vidatel's case is still that advanced in the First Originating Application, namely that PTV is seeking to wind it up while at the same time preventing it from paying the Judgment Debts, and is motivated by an, in reality, unspecified 'collateral purpose' being advanced by the Angolan state.
- [141] PTV says this is manifestly wrong. PTV has actively sought and been awarded compensation for the loss suffered by it for the better part of a decade, since 2015, and has actively sought to enforce, and indeed obtained an enforcement order for, the Judgment Debts since 2019. Since Vidatel has not paid those debts, and Vidatel has no assets in the jurisdiction in which it is incorporated against which to enforce those debts, certainly to PTV's knowledge, liquidation is PTV's last means of recourse as a judgment creditor. It is obvious, says PTV, that PTV wants to wind Vidatel up.
- [142] Very recently, points out PTV, Vidatel has sought to expand the scope of its case on Grounds Four to Six by adducing expert evidence of Angolan law. However, it remains PTV's case that

the matters of Angolan law are irrelevant, and the Court can proceed to determine Grounds Four to Six without the assistance of this evidence.

[143] In summary, PTV's says its case in relation to Grounds Four to Six is straight-forward:

- (1) Vidatel is plainly insolvent within the meaning of section 8(1)(c) of the Act, and has been insolvent since 2021, or most likely 2019 when it was denuded of its liquid assets by Ms. dos Santos and subsequently, in December 2019, made subject to a freezing order in Angola.
- (2) Secondly, Vidatel's assertion that its inability to pay its debts 'has nothing to do with Vidatel's means' is wholly irrelevant. Vidatel's reliance on its purported 'means' has no legal meaning. It is not a legal term of art and forms no part of the test for cash-flow insolvency.
- (3) Vidatel's evidence does not show that 'there is a reasonable prospect that the application debt will be paid within a reasonable period.'
- (4) This Court should make a liquidation order *ex debito justitiae*, and in accordance with established legal principle, and there is no sound basis, whether legally or factually, to exercise its discretion against making a liquidation order. The existence of 'exceptional circumstances' forms no part of the established legal principles on the exercise of discretion.

[144] Further, Vidatel's evidence fails to demonstrate, on the facts, the alleged 'collateral purpose', and applying well-established authority, would not in any event constitute a sound basis upon which to refuse to exercise the Court's discretion to wind up Vidatel.

[145] In relation to the Court's approach of discretion, PTV points out the importance to each ground of the Court's established approach to jurisdiction and discretion. First of all, says PTV, it is important to bear in mind that Vidatel is insolvent for the purposes of the Act and the Court thus has jurisdiction to wind it up. As to the matter of the Court's discretion, where the statutory preconditions for a winding-up order are met, a creditor is entitled to a winding-up order *ex debito justitiae*.

[146] PTV relies upon the classic statement in the law to that effect of Buckley J in **Re Crigglestone Coal Company Co.**²³ Thus, says PTV, in the absence of any opposition from any other creditors,

²³ [1906] 2 Ch 327, 330-332.

a creditor is entitled as of right to a winding-up order. This is clear and well established, says PTV.

- [147] It also refers to the case of **In Re Southard & Co. Ltd**²⁴ where Lord Justice Buckley described the principle as follows:

"[...] where the debt is established and not satisfied and there are no exceptional circumstances, the creditor is entitled to expect the court to exercise its jurisdiction in the way of making a winding up order."

- [148] PTV points out that the views of shareholders or the company itself, or its directors 'will normally carry little weight when considering the petition of an undisputed creditor whose debt is due and unpaid', with reference to **French: Applications to Wind Up Companies** (4th edn., Oxford University Press 2021) at 7.666, and other cases like **Re Leigh Estates (UK) Ltd**²⁵ where the judge Richard Sykes, Q.C., said at page 295D to E:

"The one voice to which weight is not normally attached in the case of a winding-up petition by a creditor is that of the company itself."

- [149] PTV points out that where an application is not opposed by other creditors, refusal of a winding-up order would be 'wholly exceptional': **Bank of America v Pacific Andes**²⁶ *per* Davis-White J at [39]. PTV points out that discretion must nonetheless be exercised judicially in accordance with well-established and well-defined principles as *per* **Re Palmer Marine Surveys Ltd**.²⁷ PTV says the bases upon which the Court might refuse to wind up a company are tightly delineated. It says this is no wider principle of exceptional circumstances.

- [150] Furthermore, says PTV, if the Court considers that there should be an independent investigation of the affairs of the debtor, a winding-up order can be made. This is consistent with the fact that one of the purposes of liquidation is to ensure there is an investigation of the affairs of an insolvent company. It says that there is no sound reason why the Court should not exercise its discretion to grant the application, and every reason why it should do so. It points out that Vidatel is insolvent.

- [151] PTV takes issue with the argument that 'PT Ventures must demonstrate on a balance of probabilities that Vidatel is unable for want of means to pay its debts as they fall due'.

²⁴ [1979] 1 WLR 1198 at page 1203 E to F.

²⁵ [1994] BCC 292.

²⁶ BVIHC (COM) 133 of 2016 (unreported, delivered 1st December 2016).

²⁷ [1986] 1 WLR 573, *per* Hoffmann J at page 578 B to C.

- [152] PTV says there is a blatant attempt by Vidatel to contradict this Court's conclusion in the Liquidation Judgment, and it should not be open to Vidatel to reopen this argument now. Whilst the Liquidation Judgment has been set aside, it contained a full and reasoned analysis of this issue, the Court having heard full argument by the parties. The reasons for the Court's analysis there were set out in [44] and [45] following the analysis of the authorities referred to.
- [153] PTV says that this Court was correct in its conclusion that there is 'nothing to warrant reading words such as 'want of means' into section 8(1)(c)(ii) of the Act'. This, says PTV, was a pure and conclusive finding of law, and there is no basis to depart from it, nor consider it anew. It refers to the overriding objective in CPR Rule 1.1 to that effect, to ensure that liquidation applications are determined expeditiously.
- [154] PTV asked the Court to bear in mind that the basis for the Second Originating Application is the Judgment Debts. This is important, says PTV:
- "...where a debt is due and not disputed (which will invariably be the case in relation to a judgment debt as in the present case), it is long-established that "the failure of the debtor company to pay the debt is itself evidence of inability to pay"."
- [155] PTV cites **Re Taylor's Industrial Flooring**,²⁸ as well as the BVI authority which applies in this jurisdiction of **Sparkasse Bregenz AG v Associated Capital Corporation**.²⁹
- [156] That is why, says PTV, as the Court of Appeal explained in that case, such a creditor does not need to serve a statutory demand, which would be pointless in the case, and can simply rely on the test for cash-flow insolvency.
- [157] PTV says that the assertion in the First Affidavit of Ms. Michelle Duncan ('Duncan 1') at [16(b)] that PTV cannot establish insolvency 'merely by showing that Vidatel has failed to discharge a judgment debt of this Court' is wrong in law and contrary to long-established authority.
- [158] PTV says that any factual developments that have occurred, such as nationalisation, are irrelevant because of the conclusion in the Liquidation Judgment at [44] to [45], which was a pure finding of law. In relation to the objection in Ground Six, that there is no reasonable prospect that Judgment Debts will be paid within a reasonable time, PTV pointed out that Vidatel was essentially pointing to the test for an adjournment in relation to an application to dismiss, thus applying one test to different circumstances. However, at yesterday's hearing [on 16th April 2024]

²⁸ [1990] BCC 44 (CA).

²⁹ BVI Civil Appeal No. 10 of 2002, unreported, delivered 18 June 2003.

learned Counsel for Vidatel submitted that Vidatel is indeed seeking an adjournment of the petition on Ground Five if the Second Originating Application should not otherwise be dismissed. In support of Ground Five, Duncan 1 at paragraph [17] stated that Ground Five ‘follows on closely from the preceding ground of opposition (and is engaged if and to the extent that the Court concludes that Vidatel will in fact be able to surmount the external restrictions)’.

- [159] PTV says that, with respect, this is a legal nonsense. The evidence does not demonstrate that Vidatel will be able to discharge the Judgment Debts within a reasonable period, or at all, but, in any event, this does not constitute a legal basis upon which to dismiss the application.
- [160] At most, says PTV, credible evidence that debts will be paid soon may afford the debtor a short period of time in which to make payment, whilst the Court grants a short adjournment, and that the test established for adjournments is well established, with reference to the English Court case of **Sekhon v Edginton**,³⁰ which is a Practice Note. It provides that an adjournment may be ordered where there is a reasonable prospect of the petitioned debt being paid within a reasonable time.
- [161] There have of course been some cases on the authorities where such an adjournment has been granted, and PTV says the Court has the power to adjourn the petition, but the practice is to do so only if there is credible evidence that there is a reasonable prospect that the petitioned debt will be paid within a reasonable time. The need for credible evidence is also reflected in various authorities that PTV refers to in its skeleton.
- [162] Moreover, PTV points out that if a debtor does not produce any evidence of its ability to pay, it takes the risk that the Court will not accept his bare assertion as to his means and ability to pay, following **Dickins v Inland Revenue Commissioners**.³¹ In the case of **Maud** itself, Justice Snowden at [99] to [101] also alluded to these principles.
- [163] PTV says it is revealing that Vidatel has not sought an adjournment, yet its Ground Five is predicated upon using identical language on the test applied by the Court for such a purpose. PTV asked the Court to infer that Vidatel well knows that it cannot meet the test, and that an adjournment ‘for a short period’ would be pointless, and so PTV argues that Ground Five does not, as a matter of both law and fact, constitute a basis upon which to refuse to wind up Vidatel.

³⁰ [2015] 1 WLR 4435.

³¹ [2004] BPIR 718.

[164] In relation to Ground Six, PTV says the principles are well-established as to the Court's discretion to refuse a winding-up order. PTV points out that the sole basis upon which Vidatel seeks to persuade the Court not to wind it up in the exercise of its discretion is by asserting that PTV has a collateral purpose of seizing Vidatel's Unitel shareholding.

[165] PTV pointed out that although it has been said that this ground was not pressed during the hearing in June and July 2021, it was raised but was abandoned by Vidatel days before the hearing, with no explanation.

[166] PTV then sets out what PTV says are the applicable principles. It says the Court has power to dismiss a petition on the ground that it constitutes an abuse of the process of the Court, and that is at parallel with the inherent jurisdiction to strike out a claim on such grounds, as, for example, was explained in **Lonrho plc & Ors v Fayed & Ors (No. 5)**:³²

"If an action is not brought *bona fide* for the purposes of obtaining relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. ... But for the court to strike it out on this basis ... it must be clear that this is the case".

[167] Also in the context of winding-up, English Courts have developed clear principles, at the highest appellate level, according to which an otherwise well-founded petition may be at risk of dismissal on the ground that the petitioning creditor is pursuing the petition for a collateral purpose.

[168] PTV points out that the question is about what constitutes a class interest. Whether the creditor's interest is adverse to the class interest is a crucial factor. PTV refers, for example, to the case of **Ebbvale v Hosking**.³³ The line of argument is that a petition is not abusive simply because its purpose would be for the petitioner's benefit as a creditor.

[169] However, where the petitioner's stated purpose is adverse to the interest of the general body of creditors, that is a different circumstance. For example, PTV points to **Re a Company (No. 001573 of 1983)**³⁴ *per* Lord Justice Harman. In that case it was beyond doubt that the petitioning creditor's purpose was objectively adverse to the interests of creditors generally, because it would result in the automatic forfeiture of the company's main asset for no consideration.

[170] There are more recent cases, for example, the **Maud** case, in which case:

"In the light of these authorities I conclude that the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed will

³² 1993 1 WLR 1489.

³³ [2013] 2 BCLC 204.

³⁴ [1983] BCLC 492.

amount to an abuse in two situations. The first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. It is also clear from those authorities, and as a matter of common sense, that the jurisdiction of the court to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly. Bankruptcy proceedings cannot be allowed to become the forum for a detailed investigation into past and present relationships or an exploration of what the petitioner hopes to gain from the insolvency of the company or individual, in financial or personal terms and a consideration of whether those hopes are legitimate or not".

[171] The second category, points out PTV, was expressly clarified by Snowden J at [80] to [83], not as having been intended to refer to two different situations in which a petition will amount to an abuse of process, but rather as a singular situation.

[172] PTV says it is clear and well-established that when one looks at these cases, the jurisdiction for refusing a petition on the ground of collateral purpose is one which is to be exercised sparingly, and for a petition to constitute an abuse of process on the ground of collateral purpose, one of two things must be established clearly by the debtor, or other creditors:

- (1) the petitioner must 'not really want' to obtain the liquidation of the company; or
- (2) the petitioner must be using the winding up petition for a purpose that is adverse to the class interest of the creditors.

[173] PTV says it wishes Vidatel to be wound up. It is not using the present application for a purpose 'adverse' to the class interest of Vidatel's creditors. PTV points out the first category identified in **Maud** is clearly not made out and is merely here as an assertion on the part of Vidatel. PTV contends that it 'of course' wishes to place Vidatel into liquidation because this is its only recourse to make sure that the Judgment Debts are paid.

[174] Secondly, PTV says the second category in **Maud** is also not made out because Vidatel has not identified any purpose which could be considered to be adverse to the class interest of Vidatel's creditors. Vidatel's liquidation is a process, says PTV, by which independent officeholders would investigate its affairs and realise and distribute its assets. On no view would, or could, this amount to a 'seizure' of Vidatel's asset, including its shares in Unitel. Furthermore, in the present case,

PTV is Vidatel's overwhelming, majority creditor, and the class interest is necessarily, to that extent, that of PTV.

[175] Lord Sumption, observed PTV, put the point well in **Vendort Traders Inc v Evrostroy Group LLC**³⁵ at [12] in which a similar assertion was made that insolvency proceedings in the BVI would be 'part of a plot to divest Vendort of its shares in ISKOG.' He said 'that may well be the effect of the distribution of its assets in the winding up, but if so it is simply the legal consequence of a lawful winding up order occasioned by Vendort's failure to meet its legal liabilities'.

[176] Accordingly, says PTV, even if, on its evidence, Vidatel has established that PTV has the alleged 'collateral purpose', there would be no basis for concluding that PTV is acting abusively of the liquidation jurisdiction, and no basis for declining to exercise the jurisdiction to wind up Vidatel. However, says PTV, in any event, Vidatel's evidence comes nowhere near to establishing that Vidatel has the alleged 'collateral purpose' of seizing Vidatel's shares in Unitel.

[177] PTV points out that Vidatel has provided no evidence at all that PTV has been motivated in seeking the appointment of liquidators by a desire to seize Vidatel's stake in Unitel. PTV rejects this assertion and asks the Court to note that it has no wish to intervene, and no wish or intention to seize that stake.

[178] The assertions made by Vidatel, says PTV, are threadbare in relation to Vidatel's assertion as to PTV's state of mind, or its motivations, and no more than a matter of inference, based upon what Vidatel derives from the preamble to the presidential decree. PTV says this interpretation of the decree is entirely speculative, and not accepted by PTV. PTV says that for the reasons explained in Rogerson 4 at paragraph [50], it does not support the far-reaching inference which Vidatel seeks to draw from it, and says nothing at all about PTV's purpose in seeking to wind up Vidatel.

[179] In short, says PTV:

- (1) PTV manifestly has a legitimate purpose in applying to appoint liquidators, namely to allow independent officers appointed by the Court to investigate Vidatel's affairs, to allow PTV to prove in the liquidation, and finally obtain satisfaction of its debts.
- (2) At the same time, if the Court wishes to appoint liquidators over Vidatel, that would not or could not result in the Angolan state seizing Vidatel's shares in Unitel for its own benefit.

³⁵ [2016] UKPC 15.

- (3) Nor is there any evidence that the appointment of liquidators would be adverse to the interests of Vidatel's creditors as a class. Moreover, PTV is Vidatel's overwhelming majority creditor, and considers that Vidatel should be wound up.

5.3 The Court's judgment

- [180] I accept PTV's submission that Vidatel clearly cannot pay its debts as they fall due at any point in the immediate future,³⁶ thus it is insolvent on a cash flow basis. I also accept PTV's previous submissions that it is unable to arrange for the Angolan Freezing Order to be varied or relaxed or any other relaxations to be made to enable Vidatel to pay the debt.
- [181] PTV, certainly in relation to the Angolan Freezing Order proceedings, is not a named party to those proceedings, and even if PTV is indirectly state-owned, this does not mean that PTV is able to influence whether or not the Angolan state might consent to vary either that freezing order or any other restriction, apart from that order, whatever the status of that order might currently be. I accept further that the debt in issue is due and owing.
- [182] Moreover, I can only repeat what I said in [44], [45] and [46] of my previous Liquidation Judgment in relation to the Liquidation Order, namely that:

"[44] In relation to the laws of this jurisdiction it would appear to me to be nothing to warrant reading words such as 'unable for want of means' into section 8(1)(c)(ii) of the Act. If the legislature had intended such a restriction to apply, it would have provided for it. Such a restriction would unduly circumscribe the situations in which a creditor could apply to wind up a company.

[45] I also accept PTV's submissions that the 'balance sheet' and 'cash flow' tests are disjunctive. It suffices for a creditor to show insolvency on one or the other.

³⁶ Lest objection be taken that by referring to 'the immediate future' I am deviating from the test stated in **Sekhon v Edginton** [2015] 1 WLR 4435 that an adjournment may be ordered where there is a reasonable prospect of the petitioned debt being paid within a reasonable time, I do not intend any such deviation. At the hearing, Vidatel sought to argue that 'a reasonable time' is an open-ended, fact-sensitive concept, which in this case would encompass a presently indeterminate point in the future when restrictions on Vidatel's ability to pay the Judgment Debts might be lifted or varied – which could be years hence. For the avoidance of doubt, I reject that submission. The concept of 'within a reasonable time' is to be understood within the context of avoidance of delay in a final resolution of a winding up petition, as made clear in paragraph 22 in **Sekhon v Edginton**. It would be diametrically contrary to such avoidance of delay to adjourn a winding up petition *sine die*, possibly for years. Winding up proceedings are intrinsically summary in nature, intended to be concluded within weeks or months, not years. Faced with a call for such an open-ended adjournment, the normal correct course is for the Court either to grant or to dismiss the winding up petition. Thus, a short adjournment can be contemplated, with a stop in the reasonably near future, but not an open-ended adjournment potentially extending into the distant future.

[46] Since a winding up order is a discretionary remedy, the Court can take into account, as a discretionary factor, whether a company's inability to discharge debts as they fall due is caused by temporary or other difficulties unrelated to its balance sheet, which might be healthy. But I do not apprehend that there is any statutory restriction in this regard, as learned Queen's Counsel for Vidatel has submitted there to be."

[183] I am persuaded by, and adopt as my own, PTV's arguments. Furthermore, I should categorically state that I do not accept that PTV, or any of its directors, are able to obtain a release of what have been described as restrictions upon Unitel paying dividends to Vidatel, nor in relation to the nationalisation whether by compensation or otherwise.

[184] Learned Counsel Mr. Boeddinghaus for Vidatel sought to make much of the fact, which he says is shown in public documents, albeit not put in evidence, that PTV has four directors who are also directors of PTV's parent, Sonangol, and that these in turn were nominated by the Government of Angola.

[185] Even if that is correct, and even if it is correct that the Government of Angola might thereby be in a position to influence board decisions within Sonangol and PTV, respectively, there is no evidence showing that these individuals could influence the Government of Angola.

[186] Put simply, whilst it might be correct that influence could be coming down from the Government, there is no evidence to show that influence could go the other way from those appointees by the Government of Angola up to the decision-makers in the Government of Angola.

[187] It is a key element of Vidatel's case to elide, or lump together, by terming all these other persons and entities with powers outside PTV, as PTV's associates. Those are, for example, Sonangol, the Government of Angola, and the Angolan Public Prosecutor. By eliding them altogether, Vidatel has created, or sought to create, an argument that influence can go both ways. There is simply no evidence that they can be elided together, that they can be treated as associates, and indeed if for any reason they might be treated as affiliated or associated, it still does not get Vidatel home on how it can be said, and on what evidence it can be said, that individual directors, although they might have been appointed by ultimately the Angolan Government, could in fact influence the Angolan Government.

[188] I also note that in the consideration of the Angolan law evidence (which goes in part to the value within Vidatel), Vidatel's own case that it is entitled to compensation for nationalisation of some of its assets is far less certain, or far less strong, than Vidatel seeks to present it as. In fact, the

uncontested Angolan law evidence that PTV has put forward suggests that compensation for nationalisation might not come at all for a good reason.

[189] The evidence of Angolan law is only relevant if this Court were to imply the words ‘for want of means’ into our statute in relation to the cash-flow insolvency ground for winding up a company. There are, as I have explained here, as well as in my previous judgment, a number of reasons why such an implication is not appropriate.

[190] I do not find any collateral purpose in the bringing of this Second Originating Application, and no circumstances which would incline this Court to exercise such discretion as it has to refuse to wind up Vidatel.

[191] I also do not see any grounds for an adjournment under Ground Five.

[192] There is no evidence that Vidatel will be able to discharge the petition debt within a reasonable time, nor that this is reasonably likely. The evidence is quite the opposite, in fact. I have not forgotten the fact that it was not only the legal restrictions and other restrictions placed upon Vidatel's assets in Angola which prevent it from doing so, i.e., paying down the debt. A prior, very significant event is that Ms. dos Santos, who controlled Vidatel, caused it to pay away millions of dollars which could have been used ultimately to pay down these debts, had she not done so.

6. Disposition

[193] In all of the circumstances, I am satisfied that PTV is entitled to the liquidation order that it now seeks, and the Court so finds.

[194] I take this opportunity to thank the parties' Learned Counsel for their assistance to the Court, and in particular for their work in converting the oral judgment transcript into the first draft of this Note, which has saved the Court much time.

Gerhard Wallbank

High Court Judge

By the Court

Registrar