

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0044

IN THE MATTER OF BEC LIMITED

AND IN THE MATTER OF THE
INSOLVENCY ACT, 2003

BETWEEN:

BECLIMITED

Appellant

and

[1] A2

[2] A1

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

On the papers:

Mr. Philip Riches, QC with him Ms. Olga Osadchaya for the Appellant
Mr. Merrick Ricardo Watson and Mr. Timothy deSwardt for the Respondents

2022: July 29;
September 9.

Commercial appeal – Refusal of application to set aside statutory demand – Section 156 of the Insolvency Act, 2003 – Refusal of adjournment application – Whether or not leave to appeal was required – Application test – Rule 62.1 (3) of the Civil Procedure Rules 2000 – Application to strike out notice of appeal – Application for stay of execution – Application to adduce fresh evidence – Test for admitting fresh evidence – Whether appellant satisfied three limbed test for admitting fresh evidence – Principles governing a stay – Whether there is a reasonable prospect of success on appeal – Whether threshold for a grant of a stay has been met – Whether appeal would be rendered nugatory if stay is not granted

In February 2014, BEC Limited, a company incorporated in the Territory of the Virgin Islands (“BVI”) (“the Company”), the Respondents, A2 and A1 (“the Respondents”), companies incorporated under the laws of the Cayman Islands and the State of Delaware respectively, and related parties entered into a stock purchase agreement by which, inter alia, the Company acquired the shares of a Bahamian company, BECB Limited (“BECB”). The agreement resulted in BECB having tax obligations to the tax authorities in the People’s Republic of China (“PRC”). This led to arbitration before the London Court of International Arbitration (“LCIA”) regarding the payment of BECB’s tax liability. The Respondents eventually settled BECB’s tax liabilities to the authorities in the PRC and sought recoupment from the Company and BECB. This led to further arbitration before the LCIA tribunal which found the Company and BECB jointly and severally liable to pay to the Respondents certain sums for fees and disbursements, costs, and interest (together “the Debt”). The Company denied responsibility for the Debt.

In March 2022, the Respondents served a statutory demand on the Company seeking payment of the Debt. The Company applied to set aside the statutory demand (“the Set Aside Application”). Prior to the hearing of the Set Aside Application, the Company changed its solicitors and, one day before the hearing, applied for permission to amend the Application (“the Amendment Application”) and for an adjournment of the hearing (“the Adjournment Application”). The learned judge granted the Amendment Application, refused the Adjournment Application, and proceeded to hear the Set Aside Application. The judge dismissed the Set Aside Application and ordered that the Respondents are entitled to file an application in the Commercial Court for the appointment of liquidators over the Company. The Company was also ordered to pay the Respondents’ reasonable costs of the Set Aside, Amendment and Adjournment Applications.

The Company, without leave, appealed against the learned judge’s decision to refuse the Adjournment Application and dismiss the Set Aside Application. Having appealed, the Company applied for a stay of the order refusing the Adjournment Application and the Set Aside Application (“the Stay Application”), and an application for permission to adduce fresh evidence in the consideration of the appeal (“the Fresh Evidence Application”). The Respondents applied to strike out the notice of appeal (“the Strike Out Application”).

The broad issues that arise for determination by this Court are: (i) whether the order dismissing the Set Aside Application is interlocutory or final; (ii) whether to admit the fresh evidence; and (iii) whether the threshold for the grant of a stay has been met.

Held: dismissing the Strike Out Application, the Stay Application and the Fresh Evidence Application; and making the orders set out at paragraph 53 of this judgment, that:

1. An order or judgment is final if it would determine the issues that arise on a claim, whichever way the application could have been decided. An application to set aside a statutory demand is not a claim in the true sense in that it does not determine the rights or obligations of any of the parties to the claim and it does not contain an order that can be enforced. It is a mechanism by which a creditor can obtain an order from

the court that the debtor company is insolvent which is a ground under section 163 of the **Insolvency Act** or appointing liquidators over the company.

Rule 62.1 (3) of the **Civil Procedure Rules 2000** applied; Sections 8(a) and 163 of the **Insolvency Act, 2003** Act No. 5 of 2003, Revised Laws of the Virgin Islands considered; **Oliver McDonna v Benjamin Wilson Richardson** Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported) considered.

2. The issuing of a statutory demand and/or a subsequent order not setting aside the statutory demand is not a procedural first step for a creditor seeking to wind up a company. An application to set aside a statutory demand is *sui generis* and is not governed by the principles relating to orders that are a prerequisite to filing substantive proceedings. An application to set aside a statutory demand has the effect of resolving the company's deemed insolvency based on the unpaid debt in question, and nothing more. It is a final order and leave to appeal is not required.
3. It cannot be said that the new evidence sought to be adduced satisfies the three limbs of the test for admitting fresh evidence on appeal in **Ladd v Marshall**. In this case, the two letters comprising the new evidence are addressed to the Company and it is reasonable to infer that they were in the Company's possession since they were issued in 2018 and 2020 respectively. It follows that the letters were available with reasonable diligence and the failure of the Company to identify them and appreciate their alleged significance is not a good excuse for admitting them in the appeal. The letters also fail to satisfy the second limb of the test that, if admitted, they would have an important influence on the result of the appeal, even if they would not be decisive. The application to admit the letters as fresh evidence is refused.

Ladd v Marshall [1954] 3 All ER 745 applied.

4. Generally, the courts do not grant a stay of a declaratory order. In this case, the judge's order refusing to set aside the statutory demand is in the nature of a declaratory judgment. The order did not create any enforceable rights – it simply authorised the creditor to apply for the appointment of liquidators.
5. A party who applies for a stay pending appeal must satisfy the five principles in **C-Mobile Services Ltd v Huawei Technologies Co. Limited**. The Court will consider the fifth principle, the prospects of the appeal succeeding, even if the grounds of appeal are not strong and are only arguable. However, when the grounds of appeal are only arguable the court will not likely grant a stay unless there are other compelling circumstances such as the appeal being rendered nugatory if a stay is not granted. The grounds of appeal in this case are only just arguable and there are no compelling circumstances. Accordingly, the application for a stay is refused.

C-Mobile Services Ltd v Huawei Technologies Co. Limited BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) considered; **Nam**

DECISION

[1] **WEBSTER JA [AG.]:** There are three applications before the Court:

- (a) An application by the appellant, BEC Limited (“the Company” or “the Appellant”) for a stay of execution of the order of Jack J [Ag.] dated 2nd June 2022 by which the learned judge, *inter alia*:
 - (i) refused the Company’s application to set aside a statutory demand served by the Respondents, A2 and A1 (“the Respondents”) on 2nd March 2022; and
 - (ii) refused the Appellant’s adjournment application pending the determination of the Company’s appeal against the judge’s order (“the Stay Application”).
- (b) the Company’s application for permission to adduce fresh evidence in the consideration of the appeal (“the Fresh Evidence Application”);
- (c) the Respondents’ application dated 5th July 2022 for:
 - (i) a declaration that the Company’s notice of appeal filed on 23rd June 2022 is null and void and incapable of founding the Court’s jurisdiction to hear the appeal; and
 - (ii) an order that the notice of appeal be struck out on the basis that it is a nullity since leave to file a notice of appeal was required and was not obtained from the Commercial Court or the Court of Appeal (“the Strike Out Application”).

- [2] By a consent order made on 14th July 2022, the applications were ordered to be heard on the papers on 29th July 2022 (“the Consent Order”). The Company later asked in its skeleton argument in support of the applications that the Strike Out Application be heard in person, given the serious consequences for the Company if the application succeeds. The Court reviewed this request and took note that the Strike Out Application is largely a question of law on undisputed facts, and the Court has full submissions from both sides. The Court proceeded to deal with the application on the papers as contemplated by the Consent Order.

Background to the applications

- [3] The Company is incorporated in the Territory of the Virgin Islands (“BVI”). The 1st and 2nd Respondents are companies incorporated under the laws of the Cayman Islands and the State of Delaware respectively. The 1st Respondent is a wholly owned subsidiary of the 2nd Respondent.
- [4] The essential background to the dispute between the parties is that in February 2014 the Company, the Respondents, and related parties entered into a stock purchase agreement by which, *inter alia*, the Company acquired the shares of a Bahamian company, BECB Limited (“BECB”). The completion of the agreement resulted in BECB having tax obligations to the tax authorities in the People’s Republic of China (“PRC”). This led to arbitration before the London Court of International Arbitration (“LCIA”) regarding the payment of BECB’s tax liability. The Respondents eventually settled BECB’s tax liabilities to the authorities in the PRC and sought recoupment from the Company and BECB. This led to further arbitration before the LCIA tribunal which found the Company and BECB jointly and severally liable to pay to the Respondents US\$6,185,886.85 in fees and disbursements, £618,249.91 in costs, and US\$45,529.49 in interest (together “the Debt”). The Company denied responsibility for the Debt. On 2nd March 2022, the Respondents, through their BVI solicitors, served a statutory demand on the Company seeking payment of the Debt.

- [5] On 17th March 2022, the Company applied under section 156 of the **Insolvency Act, 2003**¹ (“the Act”) to set aside the statutory demand (“the Set Aside Application”). On 26th May 2022, the Company changed its solicitors and on 30th May 2022, the day before the scheduled hearing on 31st May 2022, applied for permission to amend the Set Aside Application by adding a new ground, and to adjourn the hearing of the Set Aside Application. The learned judge (“Jack J” or “the Judge”) granted the application to amend but refused the application for an adjournment and proceeded to hear the Set Aside Application.
- [6] By an order dated 2nd June 2022, Jack J dismissed the Set Aside Application and ordered that the Respondents are entitled to file an application in the Commercial Court for the appointment of liquidators over the Company. The Company was also ordered to pay the Respondents’ reasonable costs of the three applications (Set Aside, Amendment and Adjournment).
- [7] The Company, without leave, appealed against the learned judge’s decision to refuse the Adjournment Application and dismiss the Set Aside Application. The Company filed the Stay Application and the Fresh Evidence Application. The Respondents opposed both applications and filed the Strike Out Application and asked that it be dealt with as a preliminary issue.
- [8] I will deal with the three applications in the order suggested by counsel, that is, the Respondents’ Strike Out Application first, followed by the Fresh Evidence Application and the Stay Application.

The Strike Out Application

- [9] A good place to start the Strike Out Application is with general comments about statutory demands. A statutory demand, as the name suggests, is a statutory

¹ Act No. 5 of 2003, Revised Laws of the Virgin Islands.

procedure by which a creditor can demand payment of an outstanding debt. It was introduced in the BVI by sections 155–157 of the Act. It is a formal demand, in writing, for payment of a debt within 21 days of service of the demand. It does not replace a creditor’s right to demand payment of a debt in any form that he sees fit, or make no demand because the debt is due and payable in accordance with its terms. If a demand is made under the provisions of the Act, and is not set aside, the debtor company will be deemed to be insolvent and the creditor can use the deemed insolvency as a ground for appointing liquidators over the company.

[10] The relevant provisions of the Act are sections 155–157 which are set out below. Section 155 sets out general provisions about a statutory demand and what should be included in the demand. The general provisions include paragraph (e) which states that if the debtor does not comply with the demand the creditor may apply to the court (under Part VI of the Act) for the appointment of a liquidator.

[11] Section 156 deals with the procedure for the alleged debtor to apply to set aside the statutory demand if he disputes the debt or has a reasonable prospect of establishing a set-off, cross-claim or counterclaim for an amount equal to or greater than the amount in the demand. The parts of section 156 that are relevant to this decision are:

- “(1) Where a person has been served with a statutory demand he may apply to the Court to set it aside.
- (2) An application under subsection (1) shall be made within fourteen days of the date of service of the demand on him.
- (3) The Court may not extend the time for making or serving an application to set aside a statutory demand.
- (4) Subject to an order of the Court under section 157, the time for compliance with the demand ceases to run as from the date upon which an application under subsection (1) is filed with the Court.”

[12] Section 157 sets out the procedure for the hearing of an application to set aside a statutory demand. The relevant parts of the section are:

- “(1) The Court shall set aside a statutory demand if it is satisfied that
 - (a) there is a substantial dispute as to whether
 - (i) the debt, or

- (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due;
 - (b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum;
 - (c)...
- (2) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused
 - (a) because of a defect in the demand, including a failure to comply with section 155(3); or
 - (b) for some other reason.
- (3) ...
- (4) If, on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the statutory demand, it may extend the time for compliance with the statutory demand.
- (5) If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.
- (6) Having considered the evidence before it on a hearing under this section, the Court may either summarily determine the application or adjourn it giving such directions as it considers fit."

[13] Sections 163 and 8 are also relevant to this decision. Section 163 is in part VI of the Act which is headed "Liquidation". The material part of section 163 is: "[T]he Court may, on application by a person specified subsection 162(2), appoint a liquidator... under section 159 (1) if ... (a) the company is insolvent"

[14] The meaning of the "insolvent" is in section 8 of the Act. The section provides that:

- "A company is insolvent if
 - (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
 - (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
 - (c) 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.”

[15] As stated above, Jack J dismissed the application to set aside the statutory demand and the Company appealed against his decision. The main issue in the Strike Out Application is whether the Company needed leave to appeal against the decision of the Judge not to set aside the statutory demand because the decision was interlocutory, or the Company did not need leave because the decision was final. It is not disputed that if leave was needed the appeal is liable to be set aside as a nullity.

[16] The test in the Eastern Caribbean whether an order is final or interlocutory is the application test. This was settled by part 62.1 (3) of the **Civil Procedure Rules 2000** (“CPR”) and several decisions of this Court. Rule 62.1(3)(b) defines the application test as: “an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided.”

[17] The rule, though self-explanatory, has been explained in various decisions of this Court and the courts of the wider Caribbean and elsewhere. In **Oliver McDonna v Benjamin Wilson Richardson**² Barrow JA explained the rule in paragraph 19:

“The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order.”

[18] An application to set aside a statutory demand is not a claim in the true sense – it does not determine the rights or obligations of any of the parties to the claim and it does not contain an order that can be enforced. It is a mechanism by which a creditor can obtain an order from the court that the debtor company is insolvent which is a ground under section 163 (read with section 8(a)) for appointing liquidators over the

² Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported).

company. If the application fails and the statutory demand is not set aside, the court's order will authorise the creditor to apply under section 163 of the Act to appoint liquidators over the company. However, this is not an enforceable order and the creditor does not have to apply for the appointment of liquidators. If the application succeeds and the statutory demand is set aside the creditor can still proceed, if it so desires, to apply to appoint liquidators of the debtor company on any of the other grounds for insolvency in section 8 of the Act, provided it has evidence to support the alternative grounds.

- [19] The orders that can be made on an application to set aside a statutory demand should not be bifurcated into a result where the claim will continue if the application fails, but will come to an end if the application succeeds. In both situations the issue of the insolvency of the company based on the alleged debt is resolved – the company is either deemed to be insolvent (if the Set Aside Application fails) or not (if the application succeeds). The separate issues of the appointment of liquidators and the winding up of the Company remain to be initiated and resolved. The Respondents can do this regardless of the result of the Set Aside Application. In fact, the Respondents did not need to issue a statutory demand. They could have applied directly under section 163 of the Act and proved the Company's insolvency on any of the grounds of insolvency in section 8, namely, insolvency based the Company's failure to satisfy an execution or other process issued on a judgment in favour of a creditor, proof that the Company's liabilities exceed its assets (balance sheet insolvency), or proof that the Company is unable to pay its debts as they fall due. The Respondents could have applied for the appointment of liquidators over the Company on any of these grounds with or without the aid of an unsatisfied statutory demand. Support for this interpretation of sections 8 and 163 of the Act can be found in **Re a Company (No 006798 of 1995)**³ where Chadwick J reviewed section 123(1) of the UK Insolvency Act 1986, which is substantially the same as sections 8 and 163 of the Act, and found that:

³ [1996] 1 WLR 491.

“There is no doubt that the terms of section 123(1)(e) of the Act of 1986 enable the court to reach the conclusion that a company is unable to pay its debts as they fall due on any evidence which satisfies it of that fact. It is not necessary for there to be a statutory demand; nor, in exceptional circumstances, is it necessary for there to be a demand at all. But, as it appears to me, the statutory provision which deems inability to pay debts on failure to meet a statutory demand suggests, at the least, that the court should be slow to reach the conclusion that a company is unable to pay its debts from the mere fact of non-payment of a debt which has never been demanded of it at all.”⁴

[20] The preceding paragraph illustrates the position of an unpaid creditor. The position of the debtor company is also worth mentioning. A company can defend an application to appoint liquidators on any of the grounds alleged in the application, except a ground or grounds that have been resolved by the statutory demand in the set aside application. In this case, the issues of disputed debt and the form of the statutory demand were canvassed by the Company in the Set Aside Application and resolved by the Judge in favour of the Respondents. Any attempt by the Company to resurrect them in the winding up proceedings would be met by a plea of issue estoppel. However this has nothing to do with the finality of the order.

[21] The Respondents relied on the case of **Harvest Network Limited v CHC Investment Holdings Limited**⁵ as a part of their wider submission that the order on the Set Aside Application is an “intermediary question”⁶ in the procedure to wind up the Company (and not a final step or order). In **Harvest Network** a member of a company applied under section 184C of the **BVI Business Companies Act, 2004** for permission to bring a derivative action in the name and on behalf of a company. The trial judge granted permission to bring the action. The company appealed against the order without first obtaining leave. The member applied to strike out the appeal on the ground that it was an appeal against an interlocutory order and leave to appeal was required. The Court of Appeal applied the application test and found that the order granting permission to file the derivative claim was an interlocutory

⁴ Ibid at page 502.

⁵ BVIHCP2018/0007 (delivered 23rd November 2020, unreported).

⁶ Paragraph 17 of the Respondents’ skeleton argument in support of the Strike Out Application.

order. The company not having obtained leave, the Court struck out the appeal. The unanimous judgment of the Court was delivered by Smith JA [Ag.] who found that the substantive derivative claim could not be commenced without the leave of the court. He compared the leave requirement to the requirement in judicial review claims that the claimant must first obtain permission from the court before filing the substantive claim. He noted in paragraph 21 that:

“[21] By parity of reasoning, derivative leave, by its very nature, should not be viewed as an independent, freestanding claim but rather as a procedural first step; a *sine qua non* for the institution of substantive derivative proceedings. On this view, it cannot be viewed as determinative of the issue between the parties whichever way the application is decided.”

[22] Smith JA [Ag.] also referred to the dictum of Carrington JA [Ag.] in **Marvin Roy Dey v The Attorney General**.⁷

“An application for leave to seek judicial review is made under Part 56.3 of the **Civil Procedure Rules 2000 (CPR 2000)** as the first step in an application for judicial review. By its very nature, it is a procedural first step that must be taken and overcome before the merits of a substantive claim can be determined by the High Court. An appeal against the decision of the High Court with respect to such an application therefore must be classified as a procedural appeal, which is defined in Part 62.1 of the **CPR 2000** as an appeal from the decision of a judge, master or registrar which does not directly decide the substantive issues in a claim.”

[23] The difference between these two cases and the instant appeal is that the issuing of a statutory demand and/or a subsequent order not setting aside the statutory demand is not “a procedural first step; a *sine qua non*” for a creditor seeking to wind up a company. The creditor can either issue the statutory demand and proceed to winding up proceedings regardless of the outcome of an application to set aside the demand, or it can proceed directly under section 162 of the Act and prove its case that the company is insolvent based on any of the reasons set out in section 8 of the Act.⁸ An application to set aside a statutory demand is *sui generis* and is not governed by the principles relating to orders that are a pre-requisite to filing

⁷ HCVAP 2008/023 (delivered 3rd November 2008, unreported).

⁸ Section 8 is set out in paragraph 14 and discussed at paragraph 18.

substantive proceedings as in cases like **Harvest Network**, or cases dealing with interlocutory orders in ongoing proceedings. The application to set aside a statutory demand has the effect of resolving the company's deemed insolvency based on the unpaid debt in question, and nothing more. It is, in my opinion, a final order and leave to appeal was not required.

Other points raised by the Respondents

[24] I have also taken note of Smith JA's comment, which was adopted by the Respondents in their written submissions,⁹ regarding the use of the leave procedure to filter out cases that have no merit or can be dealt with by alternative means. The consideration does not apply in this case based on my finding that leave to appeal was not required.

[25] The Respondents also relied on the decision of this Court in **Trade and Commerce Bank v Island Point Properties S.A. and Another**.¹⁰ However, this case has limited application to the instant appeal. In **Island Point** there was no application to set aside the statutory demand. The challenge to the demand was made in the course of the winding up proceedings and there was no issue regarding the nature of an order made on an application to set aside a statutory demand. The ratio of the case is that a company that does not apply to set aside a statutory demand can dispute the debt at the hearing of the application to appoint liquidators of the company. The estoppel does not apply in this situation. This was confirmed by Jack J in paragraph 22 of his judgment in **Everbright Sun Hung Kai Company Limited v Walton Enterprises Limited**.¹¹

[26] I note that the Respondents referred to the obiter dictum of George-Creque JA (as she then was) in paragraph 21 of the judgment in **Island Point** where she noted:

“Lest I be misunderstood, I hasten to make clear that I am in total agreement with the proposition that where a company has been unsuccessful in setting

⁹ Paragraph 56.

¹⁰ Territory of the Virgin Islands High Court Civil Appeal No. 12 of 2009 (delivered 13th August 2010, unreported).

¹¹ BVIHC(COM) 2020/0022 (delivered 9th April 2020, unreported).

aside a statutory demand having made a timely application to do so, the company may not seek to resist the application for appointment of a liquidator on the same grounds relied on for setting aside the demand, **absent good and substantial reasons**. This simply accords with the well settled principles of estoppel.”

The learned Justice of Appeal did not elaborate on “good and substantial reasons”, probably because this was not relevant to her decision. What is clear is that she endorsed the principle that a company will be estopped from raising in the application to appoint liquidators any ground, such as disputing the debt, that was disposed of in the set aside application.

[27] The Respondents also relied on two cases coming out of the courts of Hong Kong. **Andrew Wyles Waters v Malahon Credit Company Limited**¹² is a 2003 decision of the First Instance Court, where the judge stated that an application to set aside a statutory demand is not a final order. I do not regard this case as persuasive because it is a first instance decision and the application was considered under the provisions of the Bankruptcy Ordinance, Cap. 6, and the Bankruptcy Rules which deal with the bankruptcy of individuals, not companies. **NG Yat Chi v Max Share Limited and others**¹³ makes a similar finding on an application to set aside a statutory demand. The judgment does not mention the legislation under which the order setting aside the statutory demand was made. It deals with the debtor’s application for leave to appeal to the Hong Kong Court of Final Appeal under the Hong Kong Court of Final Appeal Ordinance. I am not persuaded that this Court should follow the decisions in these cases on a matter of the interpretation of the provisions of the Act.

[28] None of these points change the basic finding above that the order made on the Set Aside Application is a final order and leave to appeal against it was not required. The application to strike out the notice of appeal is therefore dismissed.

¹² HCSD 24 of 2001.

¹³ HCA 414/2002.

Permission to adduce fresh evidence on the appeal

[29] The Company complains that as a result of the Judge's dismissal of the Adjournment Application it did not have a proper opportunity to put before the lower court evidence in support of the new ground for setting aside the statutory demand. It now seeks permission from this Court to adduce and rely on the following new evidence:

(1) Letter dated 28th June 2018 from the State Administration of Taxation Tianjin Tax Bureau.

(2) Letter/statement of the Tianjin Municipal Tax Service, State Taxation Administration, dated 20th January 2020.

Both letters are addressed to the Company and are referred to hereafter as "the new evidence".

[30] The test for admitting fresh evidence on appeal is well-known and has been applied by this Court on numerous occasions. The test is taken from the case of **Ladd v Marshall**¹⁴ which stipulates that three conditions must be satisfied before an application to adduce fresh evidence can be granted. The three conditions are: (i) the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court; (ii) the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible though it need not be incontrovertible. All three conditions must be satisfied for the new evidence to be admitted.

[31] It is difficult to see how the Company could satisfy the first condition. The two letters comprising the new evidence are addressed to the Company and it is reasonable to

¹⁴ [1954] 3 All ER 745.

infer that they were in the possession of the Company since they were issued in 2018 and 2020 respectively. Therefore, they would have been available with reasonable diligence at the time that the Set Aside Application was filed in May 2022. The Company's position is that it was not advised to proceed on the new ground of disputed debt until the day before the scheduled start of the hearing on 31st May 2022. The Judge refused the Company's application for an adjournment of the hearing. As a result, the Company could not identify and deploy the new evidence at the hearing. Put another way, the new evidence was available with reasonable diligence but the Company did not have sufficient time to identify, assess and deploy it because of the late change of its case and the Judge's refusal of its application to adjourn the hearing.

[32] The Court was not directed to any authority where the failure of a party's legal advisers to advise on the available remedies is a good reason for saying that the new evidence could not have been obtained with reasonable diligence and was not deployed at the first instance trial. The evidence was available with reasonable diligence and the failure of the Company to identify it and the legal advisers' failure to appreciate its alleged significance is not a good excuse for admitting it in the appeal. The new evidence does not satisfy the first condition that it could not have been obtained with reasonable diligence for use at the set aside hearing in the lower court.

[33] The new evidence also fails to satisfy the second condition that, if it is admitted, it would probably have an important influence on the result of the appeal, even if it would not be decisive. The Company relied on the general principle of BVI law and public policy that the BVI courts will not enforce a foreign judgment if it amounts to an indirect enforcement of a foreign tax liability.¹⁵ The essence of the Company's position, in the notice of appeal, is that the learned judge erred by finding that the Debt does not amount to an indirect enforcement of a foreign tax liability. They assert that the new evidence will support this position.

¹⁵ Section 3(2)(b) of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 27.

- [34] The two letters provide details about the liability of BECB for tax following the completion of the stock purchase agreement. They do not assert a claim by the PRC Tax Authorities for outstanding taxes and, in any case, the taxes due on the completion of the stock purchase agreement have been paid. The PRC Tax Authorities no longer have an interest in the matter. I do not think that the new evidence, if admitted, would have an important influence on the result of the appeal.
- [35] Finally, the new evidence is apparently credible coming from public authorities in the PRC and there is no evidence or suggestion of tampering with the contents of the letters. However, this finding is immaterial having regard to the findings on the first two conditions of the rule in **Ladd v Marshall**.
- [36] I would dismiss the application for permission to adduce and rely on the new evidence.

The Stay Application

- [37] The Company applied for a stay of the Judge's order refusing the application to set aside the statutory demand and the application for an adjournment of the set aside hearing, pending the determination of the appeal. The application to stay the adjournment order was not pursued.
- [38] The factual basis of the Stay Application is set out in the first affidavit of the general counsel of the Company's parent company. He deponed that BECB is a wholly owned subsidiary of the Company and BECB holds substantial participation interests in certain oil contracts with a third party relating to oil fields off the coast of mainland China. The contracts are said to be worth more than US\$1 billion. BECB also entered into a financial leasing contract with that third party by which the third party provided funding of US\$400 million to BECB. The Company asserts that the appointment of liquidators would have disastrous consequences because it would be regarded by the third party as a change of control of the Company thereby giving

the third party rights under the financial leasing contract to take over the interests of BECB in the oil contracts. This would cause massive and irretrievable losses to the Company. Further, operational losses would be caused by the appointment of liquidators who would likely take over the running of the Company and its subsidiary. To prevent these massive losses, which would far exceed the amount of the Debt, the Company needs a stay of Jack J's order pending the determination of its appeal.”

[39] The Respondents have raised two objections to the stay, one as a matter of law and the other based on the facts.

[40] The legal objection is that the Judge’s order is declaratory and the courts generally do not grant a stay of a declaratory order. The Respondents relied on several authorities for this basic proposition including the decision of this Court in **John Paul Dejoria and another v Gigi Osco-Bingeman and others**¹⁶ where Gordon JA cited with approval the following passage from the text “The Declaratory Judgment” by Zamir & Woolf¹⁷ at page 1:

“A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive judgment which can be enforced by the courts.”¹⁸

[41] I am satisfied that the Judge’s order refusing to set aside a statutory demand is in the nature of a declaratory judgment. It did not create any enforceable rights. It confirmed the validity of the statutory demand. I said as much in paragraph [18] above. However, there is one additional factor in this case. The Judge’s order authorised the Respondents to apply for the appointment of liquidators over the Company. This is a right that the Respondents may exercise, though they are not obliged to do so. It would have been better if the Company had applied for an injunction to restrain the Respondents from exercising their right to apply for the

¹⁶ Anguilla Civil Appeal No. 4 of 2005 (delivered 24th April 2006, unreported).

¹⁷ 3rd Edition, Sweet & Maxwell (2002).

¹⁸ Ibid fn.17, at paragraph 49.

appointment of liquidators. However, the Court, in the exercise of its wide discretion and considering the overriding objective and the need to do justice between the parties, will consider the application for a stay of that part of the Judge's order authorising the Respondents' right to apply for appointment of liquidators, and grant the stay if it is justified on the facts and all the circumstances of the case.

[42] The principles or conditions that the court considers in applications for a stay pending appeal are well-known. In **C-Mobile Services Ltd v Huawei Technologies Co. Limited**¹⁹ they are set out as:

“

- (i) The Court must take into account all the circumstances of the case.
- (ii) A stay is the exception rather than the general rule.
- (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (iv) In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
- (v) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).”

[43] While these conditions are cumulative and the applicant for a stay must satisfy all five, the weight that the Court attaches to each condition will vary from case to case. The Court carries out a balancing exercise and no one condition is decisive.²⁰

[44] The first two factors are uncontroversial and apply in this case. The Company's position on the other factors is that if a stay pending appeal is not granted, it will suffer catastrophic losses and will be ruined and the appeal would be nugatory by the time it is heard. Further, it has good prospects of succeeding on the appeal. As such, a stay is vital and the balance of harm favours the grant of a stay.

¹⁹ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

²⁰ Novel Blaze Ltd (in liquidation) v Chance Talent management Ltd BVIHCVAP2020/0006 (delivered 16th April 2021, unreported).

- [45] The Respondents countered by submitting that the evidence of the potential losses consists of bald assertions by the Company and is not supported by expert evidence of PRC law which is the governing law of the oil contracts, the LCIA arbitration agreement, and the financial leasing contract.
- [46] I do not agree that the Company's evidence of potential losses consists of bald assertions. There is enough evidence to alert the Court to the extent of the potential losses. What is missing is expert evidence of the laws of the PRC governing the contractual documents and the potential right of the third party to take over the oil contracts. This omission is not fatal to the Stay Application.
- [47] I turn finally to the grounds of appeal. The Company has not asserted that it has strong grounds of appeal, only a good prospect of succeeding on the appeal. This is not fatal because strong grounds of appeal are not essential. The Court's approach to the grounds of appeal on the stay application was considered in **Nam Tai Property Inc v ISZO Capital LP**²¹ where, after considering the five conditions in the **C-Mobile** case,²² the Court stated that the grounds of appeal should be considered in all applications for a stay, and:
- “If there are strong grounds of appeal or a strong likelihood of success the court should seriously consider whether the stay should be granted and will usually grant a stay. Conversely, if the grounds of appeal or likelihood of success are only arguable the court should not grant a stay unless there are other circumstances that are compelling such as the appeal being rendered nugatory if the stay is not granted.”²³
- [48] The grounds of appeal in this case barely meet the threshold of being “arguable”. The Judge rejected the Company's argument that the statutory demand purports to enforce indirectly a foreign tax liability and found that the Debt is a private matter between the parties. The first and second grounds of appeal challenge this finding. It is a finding of mixed fact and law based on the evidence that was before the Judge,

²¹ BVIHCP2021/0010 (delivered November 8th 2021, unreported).

²² Supra paragraph [42].

²³ Ibid at paragraph 16 per Webster JA.

and the Company faces the difficult task of persuading an appellate court to interfere with this finding. The Court was not provided with any authority which suggests that a claim for reimbursement of the monies paid to discharge a foreign person's tax liability is an indirect enforcement of a foreign tax liability.

- [49] The third ground of appeal is that the award of costs and interest should not have been made because they are parasitic on the substantial claim that the Debt amounts to the indirect enforcement of a foreign tax liability and can only succeed if the first and second grounds are successful.
- [50] The fourth ground of appeal questions the jurisdiction of the LCIA tribunal. It is difficult to see how this issue can be resolved in favour of the Company on the appeal in the absence of expert evidence of English law on the matter. I also note that there is nothing in evidence that suggests that the Company has applied to the LCIA to set aside the final award of the tribunal which underpins the Debt.
- [51] All is not lost for the Company on the issue of the stay. It can raise issues relating to the effects of the appointment of liquidators at the hearing of the winding up application and urge the court not to appoint liquidators, or to stay the appointment on terms, because section 167 of the Act gives the court the power to "dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved." The wide discretion conferred on the courts by this section has been recognised by the Commercial Court – see for example **L Capital KDT Limited v Retribution Limited**,²⁴ per Farara J [Ag.] (as he was then) at paragraphs 65 and 66 and Wallbank J [Ag.] in **Tungshu Venus Holdings Limited v Zhang Rui Kang and Another**²⁵ at paragraph 67.

²⁴ BVIHC(COM) 2015/0078 (delivered 25th January 2016, unreported).

²⁵ BVIHCM 2020/0093 and BVIHCM 2020/0115 (delivered 5th November 2020, unreported).

[52] In all the circumstances, I would refuse the application for a stay of the Judge's order dated 2nd June 2022 pending the determination of the Company's appeal against the said order.

Disposal

[53] I would make the following orders:

- (i) The Respondents' application dated 5th July 2022 for a declaration that the Company's notice of appeal filed 23rd June 2020 is null and void and incapable of founding the Court's jurisdiction to hear the appeal and for an order striking out the said notice of appeal is dismissed.
- (ii) The Company's application for a stay of execution of the order of Jack J dated 2nd June 2022 pending the determination of the Company's appeal against the said order is dismissed.
- (iii) The Company's application for permission to adduce fresh evidence in the appeal is dismissed.
- (iv) The Respondents shall pay the Company's assessed costs of the Strike Out Application and the Company shall pay the Respondents' assessed costs of the application for the stay of execution and the application for permission to adduce fresh evidence in the appeal.

- (v) All such costs shall be assessed by a judge of the Commercial Court unless the parties agree otherwise within 21 days from the date of this decision.

I concur.

Mario Michel

Justice of Appeal

I concur.

Gerard St. C. Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar