

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

Claim No BVIHC (COMC) [REDACTED]

**IN THE MATTER OF ANONYMOUS COMPANY LTD
AND THE INSOLVENCY ACT 2003**

BETWEEN

A CREDITOR

Applicant

And

ANONYMOUS COMPANY LTD

Respondent

Appearances:

Mr. Andrew Willins of Appleby (BVI) Ltd for the applicant

Mr. Gerard Clarke and Ms. Gurprit Mattu instructed by O'Neal Webster for the
Respondent

2021 January 18; 21
January 28 (anonymised hand down)

ANONYMISED JUDGMENT

**(This judgment is published in anonymised form. There will be argument after
Easter 2021 as to whether the judgment handed down in its original form should be
made public.)**

- [1] **JACK, J [Ag.]:** By an originating application dated 30th June 2020 the applicant (“A Creditor”) seeks the appointment of a liquidator over the respondent (“the BVI company”). The applicant relies on section 8(1)(c)(ii) of the **Insolvency Act 2003**¹ (failure to pay its debts as and when due) to show the respondent’s insolvency.

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

[2] There is very little dispute about the facts, which I can take from Mr. Willins' skeleton argument:

"3. The [BVI company] is a company incorporated in the Virgin Islands on 20 August 2013, as a vehicle to engage in the exploration and development of petroleum. Amongst the jurisdictions in which it does so is Ruritania. For that purpose, the [BVI company] entered into five Petroleum Production Sharing Agreements... with the Ruritanian Government. [A Creditor] was engaged to facilitate those works through a series of agreements and purchase orders, specifically:

- (i) The 'Contract 1' Agreement dated 6 June 2015 which related to the provision of drilling rig HL22 and services associated with the maintenance and operation of that rig;
- (ii) The 'Contract 2' Agreement of the same date which related to the provision of drilling rig HL29, and services associated with the maintenance and operation of that rig;
- (iii) The 'Contract 3' Agreements dated 14 February 2016 relating to well testing equipment and associated services.

These agreements were then supplemented by Supplementary Agreements.

4. These Agreements were entered into between [a company related to A Creditor]... and the benefits and rights under those agreements assigned to [A Creditor]. There is no dispute as to the validity of those assignments. Neither is it in dispute that the services contemplated by the various agreements were supplied. It is not in dispute that these services were provided. A total of 117 invoices have been raised under those agreements, in the total amount of US\$38,340,546.21.

5. The fact that this debt is owed has been the subject of a series of admissions. For example on 15 January 2020 a confirmation of balance admitted a total debt payable of US\$35,427,896.06. At its highest there may be a minor discrepancy in the contemporaneous correspondence as to the amount which is admitted: in a balance confirmation effective 30 April 2019, Applicant put the balance due as being US\$33,412,743.24, as against an admitted US\$29,927,448.28.

6. On any view, these discrepancies provide no basis for defending the application: see **Re Tweeds Garages Ltd.**²

7. By May 2019, a single payment had been made of US\$300,000 against this debt. On 15 May 2019 the Respondent made payment proposals offering to pay a total of US\$32,680,000 within a 9 month period. Only

² [1962] Ch 406.

US\$354,383.27 was ultimately paid; the payment proposals in relation to the rest were simply dishonoured.

8. A series of demands were also made, each of which went without a reply. A letter before action, threatening to make an application for the appointment of Liquidators was sent to the Registered Office address of the [BVI company] on 12 June 2020. Again, there was no reply. Instead, the commencement of these proceedings produced another offer to pay the debt by instalments, if the hearing on 9 November 2020 was adjourned. The hearing was adjourned but, again, the promise was dishonoured.”

- [3] The agreements are all in similar terms. The first party is described as “Anonymous Company Ltd Ruritania Branch, a company registered under the laws of Ruritania and having its principal place of business at [an address in Ruritania’s capital city] (hereinafter referred to as the ‘Company’)”. The agreement provides: “This Contract shall be construed in accordance with and governed by the laws of Hong Kong.” There is also provision for the application of “Applicable Laws”, which are effectively the laws of the place of performance (in other words Ruritania).
- [4] After a 30 day period for settlement negotiations, all disputes stood to be resolved by arbitration before the Hong Kong International Arbitration Centre (“HKIAC”). On 18th September 2020 the BVI company did refer a dispute to the HKIAC.
- [5] The BVI company does not dispute that (as set out in Mr. Willins’ skeleton) substantial sums of monies are owed to A Creditor. The issue raised by the BVI company is as to who owes the money. Originally, the BVI company’s case was that the monies were owed by the Ruritanian branch of the BVI company (“the Ruritanian branch”), which it submitted had legal personality. Before me, Mr. Clarke, who appeared for the BVI company, said that this was a misunderstanding. The BVI company’s case is that the monies were owed by Anonymous Company Ltd Ruritanian Branch (“the Ruritanian company”), which had legal personality in Ruritanian law.

- [6] Without disrespect to Mr. Clarke's argument, I have to say that there is no evidence that the Ruritanian company has been incorporated at all or that it has any legal personality. It is true that the agreements refer, as I have set out, to the contractual party as being a "company registered under the laws of Ruritania and having its principal place of business" at an address in [the capital of Ruritania]. Being *registered* is, however, quite different to being *incorporated* under the laws of Ruritania. Mr. Willins was able to show, wholly convincingly, by taking me through the relevant legislative proclamation that companies which wished to do business in Ruritania (just like businesses in this Territory) had to be registered for tax with the Ruritanian authorities and required business licences.
- [7] The VAT registration was in evidence. So too was the evidence in support of the application to the Ruritanian authorities for registration by the BVI company. The documentation for registration comprised the instruments of incorporation in the BVI and the power of attorney given to operate the BVI company in Ruritania. All were notarised in this Territory and legalised with apostille. By contrast there is not a scrap of evidence that the Ruritanian company exists or ever existed. In my judgment, the evidence is overwhelming that the company registered in Ruritania is the BVI company, not the Ruritanian company.
- [8] Although Mr. Clarke abandoned the BVI company's argument that the Ruritanian branch had legal personality, I should say that there is no evidence for that either. Article 212 of the Ruritanian Commercial Code has a *numerus clausus* of types of business organisation. Branches do not appear there. The existence of branches is recognised in article 313(3), but they do not have separate legal personality.
- [9] A Creditor sought to introduce the expert evidence of [a jurist]. He is an eminently well-qualified Ruritanian jurist, having been for some years the deputy Chief Justice of Ruritania. He supported the conclusions above. Mr. Clarke objected to my receiving that evidence on the basis of non-compliance with CPR 31.2 (at least 42 days' notice of the intention to adduce the evidence) and CPR 32.6(1) (permission of the Court). If his evidence had been of central relevance, then I

would have given the BVI company an opportunity to answer it, but since the evidence I have set out above is unequivocal, there was no need to rely on his report.

[10] Mr. Clarke submitted that, notwithstanding any findings of fact I might make as to the (non)existence of the Ruritanian company, nonetheless I should still dismiss the current application (or at least stay it), pending the outcome of the Hong Kong arbitration. He founded this submission on my decision in **Re Lenox International Ltd; Rangecroft Ltd v Lenox International Ltd**.³ In that case, like here, the applicant for the appointment of a liquidator had not served a statutory demand. The underlying debt was subject to an arbitration agreement. I stayed the application pending a speedy arbitration.

[11] In the subsequent case of **Re Fair Cheerful Ltd; IS Investment Fund Segregated Portfolio Co v Fair Cheerful Ltd**,⁴ I held:

“The **Insolvency Act** permits a creditor to present an application for the appointment of a liquidator without first serving a statutory demand, but it is not generally desirable. In particular, it potentially interferes with the putative debtor’s right to have disputes referred to arbitration. Under section 18 of the **Arbitration Act 2013**⁵ the Court is obliged to refer disputes to arbitration. If the applicant had served a statutory demand and the respondent had applied to set the statutory demand aside, then the automatic referral to arbitration under section 18 would apply to that application.”

[12] Mr. Willins submitted that my reference to “automatic referral” under section 18 overstated the position and the Court retains some discretion. He relied on **C-Mobile Services Ltd v Huawei Technologies Co Ltd (Statutory Demand)**.⁶ This judgment was not cited to me in the two earlier cases (only the other judgment of the same day was), so he submitted that I decided those cases *per incuriam*. However, **C-Mobile (Statutory Demand)** was a case concerning the

³ [2020] ECSCJ No 231, BVIHC (COM) No 37 of 2020 (determined 6th July 2020).

⁴ [2020] ECSCJ No 242, BVIHC (COM) 2020/0034 (determined 16th July 2020) at para [3].

⁵ No 13 of 2013, Laws of the Virgin Islands.

⁶ [2015] ECSCJ No 194, BVIHCMAP 2014/0006 (determined 15th September 2015).

Arbitration Ordinance 1976,⁷ which had no provision corresponding to section 18 of the 2013 Act. The point must thus await a case which directly raises the issue.

[13] That, however, is not the end of the matter. It is now well-established in this jurisdiction that the Court's decision to appoint a liquidator is an exercise of discretion: see **C-Mobile Services Ltd v Huawei Technologies Co Ltd (Appointment of Liquidator)**⁸ and most recently **Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd**.⁹ In **Lenox and Fair Cheerful**, I held that an important consideration in deciding whether to exercise the discretion to appoint a liquidator was whether the parties had agreed that disputes should be referred to arbitration. In particular, it would in general be wrong to allow an applicant to avoid a referral to arbitration under section 18 by failing to serve a statutory demand.

[14] That remains my view. However, as **C-Mobile (Liquidator)** shows, this jurisdiction does not adopt the uncompromising approach favoured by the English Court of Appeal in **Salford Estates (No 2) Ltd v Altomart Ltd**.¹⁰ In the English case, the Court recognised that there was a discretion, but held that the discretion was very narrowly circumscribed. Sir Terence Etherton C, giving the judgment of the Court, held at para [39] that, where there was an arbitration provision applying to the underlying debt, a winding up order should never be made “save in wholly exceptional circumstances which I presently find difficult to envisage.” That is not the law of this Territory.

[15] In my judgment in cases where there are no other creditors, it would as a general matter undermine the policy of the **Arbitration Act** if, in deciding whether to stay or dismiss the application for the appointment of a liquidator in favour of an arbitration, the Court were to apply the **Sparkasse Bregenz** test¹¹ (“the reason for

⁷ Laws of the Virgin Islands.

⁸ [2015] ECSCJ No 195, BVIHCMAP 2014/0017 (determined 15th September 2015).

⁹ [2020] ECSCJ No 233, BVIHCVP 2020/0006 (determined 9th July 2020).

¹⁰ [2014] EWCA Civ 1575, [2015] 1 Ch 589.

¹¹ **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp**, [2003] ECSCJ No 47, Civil Appeal No 10 of 2002 (determined 18th June 2003, unreported) at para [3].

not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds”). However, this Court should still examine whether a proposed defence is advanced with any real belief in its substance. The Court should look at the reality of the matter before blindly staying or dismissing an application for the appointment of a liquidator in favour of arbitration.

- [16] In the current case, there is in my judgment no substance to the defence advanced by the BVI company whatsoever. It is simply a put-up job. I do not accept that those behind the BVI company have any belief in its veracity. There is no Ruritanian company. The Ruritanian branch is a mere emanation of the BVI company. Having regard to these matters, in the exercise of my discretion, I decline to order a stay or the dismissal of the application, notwithstanding that an arbitration is already afoot. Instead, I order that liquidators be appointed.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar