

**THE EASTERN CARIBBEAN COURT OF APPEAL
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0004

BETWEEN:

STEVEN GORAN STEVANOVICH

Appellant

and

**MARCUS WIDE and MARK MCDONALD
(as Joint Liquidators of Barrington Capital Group Limited) (In Liquidation)**

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster
The Hon. Mde. Vicki-Ann Ellis

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

Appearances:

Mr. Stephen Moverley Smith, QC with him, Mr. Fraser Mitchell for the Appellant
Mr. Tom Smith, QC with him, Ms. Eleanor Morgan for the Respondents

2019: July 16;
2022: March 7

Commercial appeal — Interlocutory appeal — Insolvency — Application to set aside the order of the joint liquidators — Sections 210 and 273 of the Insolvency Act, 2003 — Locus standi — Meaning of ‘person aggrieved’ in section 273 — Legitimate interest — Perversity test — Whether the judge erred in not granting the application to set aside the joint liquidators’ decision or direct that a section 210 application be made

The appellant, Mr. Steven Goran Stevanovich (“Stevanovich”), was the sole director of Barrington Capital Group Limited (“the Company”). The Company operated as an investment fund that lent money to various businesses; between 2001 and 2006 it loaned monies to a group of companies in the United States of America referred to as the Petters Group Inc. (“Petters Group”), which was controlled by Mr. Tom Petters. The loans were documented in what has been called ‘the Master Loan Agreement’.

In 2009, Stevanovich placed the Company into solvent liquidation. He then resigned as the Company's sole director and was replaced by a company who would act as an independent director to handle the formalities of the dissolution. Between August 2010 and January 2011, the Company's certificate of recognition was cancelled; the Company's liquidation plan was approved; the Company's assumed sole asset was distributed to its shareholders; a liquidator was appointed; a certificate of completion filed; and the Company was dissolved.

In June 2009, Mr. Tom Petters was charged in the US with mail fraud, money laundering and conspiracy following a discovery that he had been carrying on a massive Ponzi scheme through the Petters Group. A trustee in bankruptcy ("the Trustee") was subsequently appointed to the Petters Group under Chapter 11 of the United States Bankruptcy Code and, by October 2010, the Trustee issued a complaint in a United States Bankruptcy Court seeking to avoid payments which had been made by the Petters Group, including those made to the Company. Stevanovich and the Company were named as defendants to those proceedings. The Company did not defend the US complaint and, in April 2015, default judgment was entered against the Company.

On 16th April 2013, the Trustee applied to the High Court in the Territory of the Virgin Islands ("BVI") to restore the Company into liquidation under the provisions of the BVI Business Companies Act, 2004. The application was approved, and the Company was reinstated on the register. The respondents, Marcus Wide and Mark McDonald, were named joint liquidators. The Trustee submitted a claim in the liquidation of the Company seeking payment of the sum claimed against it in the US proceedings. The respondents admitted the Trustee's claim in liquidation and in October 2016 commenced proceedings against Stevanovich in the BVI under sections 254 and 255 of the **Insolvency Act, 2003** (the "Insolvency Act") for misfeasance and fraudulent trading. Stevanovich subsequently applied to the court pursuant to section 273 of the Insolvency Act and/or the inherent jurisdiction of the court to set aside the joint liquidators' decision to admit the claim, or alternatively that the joint liquidators be directed to apply to the court under section 210(2) of the Insolvency Act to expunge the claim. The learned judge, dismissed Stevanovich's application, finding that Stevanovich had no *locus standi* to seek to set aside the joint liquidator's decision under section 273.

Stevanovich appealed the decision, challenging the learned judge's findings on *locus standi*. He also challenges the judge's conclusion that, even if he had standing, the decision could only be overturned if it was completely absurd or unreasonable. He also contended that the judge erred by not considering whether to set aside or reverse the liquidators' decision, or to direct a section 210 application.

Held: dismissing the appeal and awarding costs to the respondents to be assessed if not agreed within 21 days, that:

1. A person aggrieved by an act, omission or decision of an office holder within the meaning of section 273 of the Insolvency Act may apply to the court to confirm, reverse or modify the act, omission or decision of the office holder. The applicant must show that they have sufficient interest to make the application in that they are:
(i) a person qualified to make the application; and (ii) a proper person to make the

application in the sense that they have a legitimate interest in the relief sought. In this case, Stevanovich did not seek relief in his capacity of a former sole director but as a defendant to proceedings brought against him for contribution to the claims which were admitted in the US Court. There was therefore no connection established between his previous directorship of the Company and the section 273 relief sought before the judge. In the premises, he is neither a creditor, contributory nor a debtor to the company in liquidation. Accordingly, in the circumstances, the learned judge did not err in finding that Stevanovich lacked sufficient standing to seek section 273 relief.

Section 273 of the **Insolvency Act**, No. 5 of 2003, Laws of the Virgin Islands applied; **Deloitte & Touche AG v Christopher D Johnson and another** [2000] 1 BCLC 485 applied; **ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v The Kenneth Krys et al** BVIHCMAP2016/0011 –BVIHCMAP2016/0015, BVIHCMAP2016/0023 –BVIHCMAP2016/0028 (delivered 20th November 2017, unreported) applied; **Kevin Gerald Stanford v Stephen John Akers et al** BVIHCMAP2017/0019 (delivered 12th July 2018, unreported) applied.

2. The test for setting aside an act, omission or decision of an office holder under section 273 is one of perversity. Absent cases involving fraud and bad faith, the court will not interfere with the decision of a liquidator/office holder unless the decision is so perverse that no reasonable liquidator, properly advised, could have taken it. In this case, the question raised by the section 273 application was whether the liquidators were correct to admit the Trustee's claim on the basis that the Trustee's claim, made on the footing of the US default judgment, was enforceable against the Company. Such an evaluation did not involve an exercise of a discretion as to the realisation of assets in satisfaction of the debts of the company's creditors or any similar commercial or administrative function as generally within the unique province of the liquidator. Accordingly, and as the learned judge concluded, the perversity test would not apply to a review of the liquidators' decision to admit the Trustee's claims.

Re Edenote Ltd [1996] 2 BCLC 389 applied; **Mitchell and another v Buckingham International plc (In Liq.) and others** [1998] 2 BCLC 369 applied; **Mahomed and another v Morris and others** [2000] 2 BCLC 536 applied; **Adams and others v Cape Industries plc and another** [1990] 1 Ch 433 applied.

3. Section 210(2) of the Insolvency Act gives the court specific powers upon the application of a liquidator or where the liquidator declines to make an application, a creditor, to expunge or amend an admitted claim in liquidation if it is satisfied that the claim should not have been admitted or should be reduced. Section 210 is a tool which a liquidator or, exceptionally, a creditor may seek judicial intervention in the context of a liquidation. The making of an application under section 210(2) is within the province of the liquidator or a creditor where the liquidator is not minded to make the application. It is not for the court to direct that such an application be

made, but for those so empowered by the statute to make that application to address their own concerns and protect their own interests. As Stevanovich is neither a liquidator nor creditor and the respondents' consistent defence of their decision to admit the Trustee's claims is that they do not, at this stage, desire to make a section 210 application, therefore section 210 is not engaged.

Section 210 of the **Insolvency Act**, No. 5 of 2003, Laws of the Virgin Islands applied.

JUDGMENT

[1] **BAPTISTE JA:** This is an interlocutory appeal from a decision of Wallbank J [Ag.] dated 5th December 2018, by which the learned judge refused to grant an application by the appellant, Steven Goran Stevanovich, for alternative relief under sections 273 and 210 of the **Insolvency Act, 2003**¹ ("**Insolvency Act**"), in relation to the decision of the joint liquidators of Barrington Capital Group Limited to admit claims in the company's liquidation.

[2] The background to the appeal is comprised largely of uncontested facts which were very well detailed in the learned judge's judgment. I have summarised the most relevant aspects of that background below.

Background

[3] Steven Goran Stevanovich ("Stevanovich") is the former sole director of Barrington Capital Group Limited ("the Company") which was incorporated in the Territory of the Virgin Islands, originally under the name Capital Strategies Fund Limited, and carried on business as an investment fund. A part of the Company's business was to make various types of investments and to offer interest accruing loans to various companies. From 2001 to 2006, the Company loaned monies to a group of companies in the United States of America ('US') referred to as the Petters Group Inc., which was controlled by Mr. Tom Petters. The loans were documented in what has been called 'the Master Loan Agreement'.

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

- [4] At some point in 2009, Stevanovich decided to place the Company into solvent liquidation. Following this decision, he resigned as the Company's sole director and was replaced by a company who would act as an independent director to handle the formalities of the dissolution. Between August 2010 and January 2011, the Company's certificate of recognition was cancelled; the Company's liquidation plan was approved; the Company's assumed sole asset was distributed to its shareholders; a liquidator was appointed; a certificate of completion filed; and the Company was dissolved.
- [5] During that period (in June 2009), Mr. Petters was charged in the US with mail fraud, money laundering and conspiracy, following a discovery that he had been carrying on a massive Ponzi scheme through the Petters Group Inc. (Petters Group"). A trustee in bankruptcy ("the Trustee") was subsequently appointed to Petters Group under Chapter 11 of the US Bankruptcy Code and, by October 2010, the Trustee issued a complaint in a US Bankruptcy Court seeking to avoid payments which had been made by the Petters Group, including those made to the Company. Stevanovich and the Company were named as defendants to those proceedings. The Company did not defend the US complaint and, in April 2015, default judgment was entered against the Company in the sum of USD \$578,366,822.24 on the basis, inter alia, of a finding by the US Bankruptcy Court that it had personal jurisdiction over the Company pursuant to the forum selection provision in the Master Loan Agreement which is governed by Minnesotan law.
- [6] While the US proceedings against Stevanovich were ongoing, in April 2013, the Trustee applied to the High Court in the Territory of the Virgin Islands ("BVI") to restore the Company into liquidation under the provisions of the **BVI Business Companies Act, 2004**.² That application was granted; the Company was restored to the register; and Marcus Wide and Mark McDonald were appointed as the Company's joint liquidators ("the Joint Liquidators"). The Trustee further submitted a claim in the liquidation of the Company seeking payment of the sum claimed

² Act No. 16 of 2004, Laws of the Virgin Islands.

against it in the US proceedings. The joint liquidators admitted the Trustee's claim in liquidation on the basis of their conclusion that the Company was present in the US at the time the complaint was issued and therefore that under BVI law, the default judgment was recognisable and enforceable in the BVI.

[7] In October 2016, following the admission by the Joint Liquidators of the Trustee's claim, the Joint Liquidators commenced proceedings against Stevanovich in the BVI under sections 254 and 255 of the **Insolvency Act** for misfeasance and fraudulent trading. In those proceedings, the Joint Liquidators seek what is essentially a contribution from Stevanovich personally as former director of the Company, to satisfy the Company's debt following the admission of the Trustee's claim. The Joint Liquidators allege that Stevanovich engaged in fraudulent trading and misfeasance as a director and/or de facto director of the Company in respect of the distributions made by the Company, including its winding up. They claim further that Stevanovich should have known that, once Mr. Petters' Ponzi scheme was uncovered, the Trustee would seek to recover the monies paid to the Company by Mr. Petters' companies.

[7] Stevanovich strenuously resists the proceedings and has filed a defence. Importantly, Stevanovich frontally challenges the enforceability of the US default judgment in the BVI, and the decision of the Joint Liquidators to admit the Trustee's claim. At paragraph 37 of the defence, he avers as follows:

"To avoid any doubt, it will be the Defendant's case that:

(a) the Claimants could not, acting properly, taking any steps which would amount to a submission to the jurisdiction of the US Bankruptcy Court. In a letter to Appleby dated 27 August 2013 the Claimants confirmed that they had not taken any steps which would constitute a submission to the jurisdiction of the US Bankruptcy Court;

(b) the US Bankruptcy Court lacked jurisdiction over the Company (under BVI conflicts of laws rules);

(c) Mr Kelley's claim is not admissible in the Liquidation of the Company, with the result that the Company is not and never was insolvent within the meaning of the Act, and that the judgment of the US Bankruptcy Court is not enforceable against the Company in the British Virgin Islands;

(d) the Claimants could not, acting properly and consistently with their duties, admit Mr Kelley's claim in the liquidation of the Company; to the extent that they did:

(i) the Claimants' wrongful admission of Mr Kelley's claim does not give rise to a recoverable loss against the Defendant where none would exist, but for the Claimants' wrongful admission of Mr Kelley's claim;

(ii) alternatively, the Defendant should not be held liable to make a contribution towards the assets of the Company in respect of a loss to the Company which does not exist, and/or was caused by the supervening act of the Claimants in wrongfully admitting Mr Kelley's claim;

(iii) the Defendant will invite the Court to set aside the admission of Mr Kelley's claim in the liquidation of the Company, and as necessary to terminate the liquidation."

[8] Stevanovich was also dissatisfied with the decision of the Joint Liquidators to admit the Trustee's claim in the liquidation of the company. He applied to the court pursuant to section 273 of the Insolvency Act to set aside or reverse the order of the Joint Liquidators. Section 273 provides as follows: '[a] person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.' The section 273 claim sought the following orders, that: (i) the decision of the Joint Liquidators on 15th May 2015 to admit the claim lodged on behalf of Douglas A. Kelley (as Chapter 11 Trustee for Petters Group et al) in the sum of USD\$398,503,855.66 ("the Trustee's Claim") be set aside and/or reversed; or (ii) alternatively, that the Joint Liquidators be directed to apply to the court under section 210(2) of the Insolvency Act to expunge the claim.

[9] The Joint Liquidators argued that Stevanovich was not a 'person aggrieved' under section 273. By decision dated 5th December 2018, Wallbank J [Ag.] dismissed the section 273 application with costs to the Joint Liquidators. The learned judge accepted the Joint Liquidators' submission that Stevanovich was not a 'person aggrieved' and found that he was not entitled to seek section 273 relief in relation to

the Joint Liquidators' decision. The judge went further to conclude that even if Stevanovich had standing, a review of the decision of the Joint Liquidators would not be subject to the perversity test established in **Re Edennote Ltd.**,³ the question arising from the section 273 application was simply one of the correctness of the joint liquidator's decision to admit the Trustee's claims; there is no real need to resolve the issues arising from the section 273 application in these proceedings, as the BVI proceedings against Stevanovich provide a convenient avenue for their resolution; and, it would not be appropriate to grant alternative relief under section 210(2) as no application had been made thereunder by the Joint Liquidators or a creditor.

The Appeal

- [10] Stevanovich now appeals the judge's decision arguing six grounds upon which the learned judge is said to have erred in his refusal of the section 273 application. By a counter notice of appeal dated 27th March 2019, the respondents submit five grounds upon which the decision of the judge should be upheld. The notice and counter notice of appeal disclose two central and dispositive issues for determination by this Court: (i) whether the judge erred in concluding that Stevanovich did not have standing to apply to set aside or reverse the decision of the Joint Liquidators pursuant to section 273 of the **Insolvency Act**; and (ii) if the appellant did have standing, whether the judge ought to have set aside or reverse the decision of the Joint Liquidators to admit the Trustee's claim in the Company's liquidation, or direct that the Joint Liquidators make a section 210 application.

Issue 1 – Whether Stevanovich had standing to seek section 273 relief

- [11] Stevanovich challenges the following reasons advanced by the judge for arriving at the conclusion that he had no legitimate interest in the section 273 relief sought, that: (i) he had no interest in the assets of the Company or the manner in which they are to be distributed and had interests adverse to the liquidation; (ii) he did not fall within any of the established categories of persons who have locus standi to bring

³ [1996] 2 BCLC 389.

a claim under section 273 of the **Insolvency Act**; (iii) he had an alternative right to challenge the decision in the proceedings that had been brought against him by the Joint Liquidators; and (iv) he was not directly affected by the decision of the Joint Liquidators to admit the claims by the US Companies.

[12] Stevanovich argues that the judge ought to have found that he had standing as either a debtor or a person who was directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. He contends that those persons have no interest in the assets of the Company or the manner in which they are to be distributed or have interests adverse to the liquidation but have been regarded by this Court as capable of possessing *locus standi* to seek section 273 relief. He further argues that the judge erred in adopting too narrow a test as to who might be directly affected by the decision and ought to have applied the ‘but for’ test in determining whether he was directly affected by the decision.

[13] In reply, the Joint Liquidators argue that the judge applied the law correctly as stated by this Court in **ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v The Kenneth Kryses et al**⁴ and in **Kevin Gerald Stanford v Stephen John Akers et al**.⁵ They say that the case was one which required a direct application of this Court’s decision in **ABN AMRO** and that the judge correctly arrived at the conclusions that Stevanovich was not a person qualified to seek section 273 relief as an alleged debtor, he was not directly affected by the Joint Liquidators’ decision, he had no legitimate interest in the section 273 relief, he had another forum in which to seek relief, and therefore that he was not seized of the requisite *locus standi* to seek section 273 relief.

⁴ BVIHCP:11-16,23-28 of 2016 (delivered 20th November 2017, unreported).

⁵ BVIHCP:2017/0019 (delivered 12th July 2018, unreported).

Section 273 of the Insolvency Act

- [14] As stated earlier, section 273 provides that a person aggrieved by an act, omission or decision of an office holder may apply to the court and the court may confirm, reverse or modify the act, omission or decision of the office holder. On the one hand, section 273 permits an aggrieved person to seek by application the confirmation, reversal or modification of an act, omission or decision of an officer holder. On the other hand, section 273 empowers the Court to confirm, reverse or modify an act, omission or decision. For the purposes of section 273, 'office holder' is defined by section 272 as a company's administrator, liquidator, provisional liquidator or administrative receiver. It is not disputed that the Joint Liquidators in this case are office holders for the purposes of sections 272 and 273. It is further not disputed that an applicant, like Stevanovich, is required to demonstrate *locus standi* as a 'person aggrieved' in the terms of section 273, prior to obtaining section 273 relief. In the absence of such *locus standi*, the court would have no jurisdiction to grant the relief sought, for the court has no jurisdiction to exercise its statutory powers under section 273 except on the application of a person qualified by the statute to make it: **Deloitte & Touche AG v Christopher D Johnson and another**.⁶
- [15] The expression 'person aggrieved' is not defined by the Insolvency Act. This Court however considered the meaning of the expression in **ABN AMRO** and in **Stanford**. **ABN AMRO** concerned, in the main, a section 273 application by a number of parties to restrain the liquidators from pursuing US proceedings seeking the recovery of monies on behalf of the certain parties. Similarly, **Stanford** was concerned with an application under section 273 to reverse or vary the decision of Joint Liquidators to enter into a settlement arrangement and to agree to admit a creditor's claim. Central to the Court's disposition in both **ABN AMRO** and **Stanford** was the question whether the applicants were 'persons aggrieved' within the terms of section 273, and therefore entitled to obtain the relief sought. In construing the phrase 'person aggrieved', the Court considered the meaning of the phrase against

⁶ [1999] UKPC 25 at para. 18.

the broader context of the statute and adopted, as apposite, the guidance set out in **Deloitte**.

- [16] **Deloitte** was concerned with the statutory jurisdiction of the court under the Cayman Companies Law (1998) to remove a liquidator appointed over a company. At paragraph 16, Lord Millett delivering the judgment of the Privy Council identified the categories of persons who have ordinarily been regarded as the proper persons to make an application for removal of liquidators under English law, and stated as follows:

“The court has consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application, being the only persons interested in the liquidation.”

- [17] Beyond this statement, which is specific to the context of an application for the removal of a liquidator under English Company law, the Privy Council made critical pronouncements in relation to the powers of the court when asked to exercise a power conferred upon it by statute. At paragraph 19, Lord Millett stated:

“Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellants submit, that he ‘has an interest in making the application or may be affected by its outcome’. It means that he has a legitimate interest in the relief sought.”

Lord Millett’s pronouncements in this regard are authoritative for the proposition that a party seeking to invoke a statutory power of the court must show that they have sufficient interest to make the application in the sense that they are: (i) a person qualified to make the application; and (ii) a proper person to make the application in the sense that they have a legitimate interest in the relief sought.

- [18] This Court, in both **ABN AMRO** and **Stanford**, expressed views on who would ordinarily be qualified to seek relief under section 273. In **ABN AMRO**, the Court considered that an applicant for relief under section 237 may be brought by a

creditor, contributor, debtor (but not ‘alleged debtors’) or a ‘person who is directly affected by the exercise of a power given specifically to that officeholder, and who would not otherwise have any right to challenge the exercise of that power’. The categories of persons contemplated in **Stanford** are virtually identical to those stated in **ABN AMRO**, except that in **Stanford** the Court did not consider debtors to be among its list of persons qualified to seek section 273 relief. Stevanovich, at first instance, did not claim to be a debtor of the Company and there was no evidence before the learned judge to suggest that he was. It is therefore unnecessary for the purposes of the present proceedings to reconcile the approaches taken in **ABN AMRO** and **Stanford** in as much as *locus standi* of debtors, as ‘persons aggrieved’ is concerned. It suffices in the circumstances to summarise the general principles which uncontroversially arise from both judgments and the **Deloitte** decision, and which have found wide acceptance on the question of qualification to seek relief in the nature of section 273 relief.

- [19] Firstly, who may be entitled to seek relief under section 273 is not at large. An applicant must demonstrate the capacity in which they seek relief, and importantly that they are not ‘a complete outsider to the liquidation’.⁷
- [20] Secondly, the class of potential applicants for the purposes of section 273 is not limited to persons who occupy specific capacities (e.g. creditors, debtors or contributories). As Nourse LJ stated in **Edenote**: ‘it is neither necessary nor desirable to attempt a classification of those who may be persons aggrieved by an act or decision of a liquidator in a compulsory winding up’.
- [21] The courts have recognised a general class of potential applicants, outside those which have been ordinarily accepted, namely persons who are ‘directly affected by an act, omission or decision of an office holder, and who would not otherwise have

⁷ See paragraph 33 of *ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others*; paragraph 77 of *Kevin Gerald Stanford v Stephen John Akers et al* BVIHCMAP2017/0019 (delivered 12th July 2018, unreported) and page 555 paragraph b of *Mohamed and another v Morris and others* [2000] 2 BCLC 536.

any right of challenge'. This general class of persons was unequivocally accepted by the English Court of Appeal in **Mahomed and another v Morris and others**⁸ where Peter Gibson LJ, while commenting on the issue of standing to seek relief under section 168(5) of the UK Insolvency Act 1986 (which is equivalent to section 273 of the Insolvency Act) made the following remarks:

"It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of s 168(5). However, I would accept that someone, like the landlord in *Re Hans Place Ltd* who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power, can utilise s 168(5)."

- [22] Thirdly, proof that an applicant possesses some qualification or capacity which would ordinarily entitle a person to seek relief under section 273 is not decisive of the applicant's standing to seek section 273 relief. As Pereira CJ noted at paragraph 32 of **ABN AMRO**, the mere fact that an applicant under section 273 possesses some formal or technical capacity – 'would not suffice if the circumstances demonstrate that the relief is sought not in that capacity but in some other'.⁹ In the context of a section 273 application, a person must go beyond demonstrating that they possess some characteristic or act in some capacity which would usually be attributed to a person capable of being aggrieved by the decision of an office holder in liquidation proceedings, and show that the relief is sought in the capacity claimed.
- [23] Fourthly, and critically, apart from showing that the relief is in fact sought in the capacity prayed, an applicant must demonstrate that they possess a legitimate interest in the section 273 relief sought. A mere interest in making a section 273 application or merely being affected by the outcome of the application, is not enough.¹⁰ The applicant must show what has been described in recent cases as a 'legitimate economic interest in the liquidation'.¹¹ All the above-mentioned matters

⁸ [2000] 2 BCLC 536.

⁹ See Nourse LJ in *Re Eden* note at page 393.

¹⁰ See paragraph 19 in *Deloitte & Touche AG v Christopher D Johnson and another* [2000] 1 BCLC 485.

¹¹ See *Re Sturgeon Central Asia Balanced Fund Ltd (In liquidation) No. 2*, *Carter v Bailey and another* [2020] 1 BCLC 600 at paragraph 4.

are at the heart of the court's consideration of a section 273 application. The judge very clearly cognised and applied these principles and was correct in so doing.

Discussion

- [24] In his affidavit in support of the section 273 application, Stevanovich avers that he is the former sole director of the Company. He avers that he resigned from the directorship of the company prior to the institution of the BVI proceedings against him. He sets out in detail the background to the Joint Liquidators' claim against him including the genesis and substance of the US Proceedings. He avers in essence that he had no knowledge or involvement in the circumstances which gave rise to the fraud claim against Mr. Petters and the Petters Group, and that the Trustee's claims in the liquidation were wrongfully admitted by the joint liquidators on the basis that the default judgment obtained by the Trustee in the US proceedings: (i) is not capable of being recognised or enforced in the BVI; (ii) is not capable of constituting proof or evidence of the matter alleged in the US proceedings; (iii) is not binding as between the Trustee and the Company outside of the State of Minnesota; (iv) is not binding upon him; and (v) does not give rise to an admissible claim in the liquidation of the Company. Stevanovich therefore states that he should not be liable to give the contribution claimed by the Joint Liquidators to the company's debt. He concludes his affidavit in the following terms:

"58. For these reasons I am advised that I have sufficient interest to bring this application as I have been directly affected by the exercise of a power specifically given to the Respondents. As such I am an aggrieved person for the purposes of section 273 of the Insolvency Act, 2003.

59. Had the Respondents not wrongfully admitted the Trustee's claim, the Stevanovich BVI Proceedings would never have been issued."

- [25] Though Stevanovich in his affidavit identifies himself as a former sole director of the Company, he does not anywhere in the affidavit assert that he seeks section 273 relief in that capacity of former sole director. Furthermore, and in any event, when read as a whole, the affidavit does not seek to establish any connection between his previous directorship of the Company and the section 273 relief sought before the judge. A close reading of the affidavit, in its entirety, leads to the unavoidable

conclusion that Stevanovich seeks section 273 relief not as a former sole director of the company, but as a defendant to proceedings brought against him for contribution to the claims which were admitted in the US Court, the decision to admit the claims having, in the first place, occasioned the litigation against him. As a defendant to the claim for contribution, Stevanovich is neither a creditor, contributory, nor a debtor to the company in liquidation. Stevanovich's qualification to seek relief would therefore only fall to be considered under the rubric of a person who is 'directly affected by the Joint Liquidators decision and who would not otherwise have any right to challenge of the liquidators' decision'.

- [26] The Joint Liquidators' claim for contribution is an allegation against Stevanovich subject to proof that he is liable to the Company for contribution in relation to the claim admitted by it in the US proceedings. The learned judge found, at paragraph 38 of his judgment, that Stevanovich in those circumstances, is an alleged debtor and this finding by the judge has not been challenged by Stevanovich on appeal. Indeed, at this stage, Stevanovich, as a defendant to Joint Liquidators' claim is merely alleged to be a debtor. I note that in **ABN AMRO**, Pereira CJ rejected the argument that an alleged debtor could have standing to bring proceedings under section 273. At paragraph 33, the Chief Justice concluded as follows:

"It is quite difficult to see the basis on which an "alleged debtor" as distinct from "a debtor" of an insolvent estate would be concerned or affected by the ultimate distribution of an estate in liquidation. Such a person would be a complete outsider to the liquidation."

This Court is bound by its decision in **ABN AMRO** and the appellant has not engaged the settled principles of law on the circumstances which would permit this Court to depart from its previous decision. I, in any event, do not doubt the correctness of Pereira CJ's reasoning in **ABN AMRO** and note, in similar stead to the conclusion of the Chief Justice, that while English Law has recognised that a person who is ordered to make a payment to the liquidator of money repayable to

an insolvent or bankrupt company may qualify as a 'person aggrieved',¹² there is no indication that a person who has not yet been so ordered can qualify as a person aggrieved and is thereby entitled to seek judicial interference with the action of an office holder.

[27] The upshot of the above is that, at the very outset, Stevanovich falls squarely within a category of persons which is not recognised as have standing to pursue section 273 relief. I would go further to say that, in any event, in the circumstances of this case, I conclude that there is no basis to find that Stevanovich, as an alleged debtor to the Company, has standing to seek section 273 relief against the company as a person who is directly affected by the exercise of a power given specifically to that office holder. I so conclude for the following reasons, which, in my view, are dispositive of the matter:

- (i) Stevanovich's section 273 application is not the only avenue of challenge by Stevanovich to the Joint Liquidators' decision. As already mentioned, Stevanovich's defence to the BVI proceedings frontally challenges the Joint Liquidators' decision to admit the Trustee's claim, with a view to avoiding liability for contribution to the Company. Stevanovich has not sought to suggest that the BVI proceedings would not provide an adequate forum for the vindication of his position on the correctness in law of the decision of the Joint Liquidators. Indeed, the cornerstone of Stevanovich's defence is to assert that he is not liable to the Company for contribution because the basis of the Joint Liquidators' claim (the admission of the Trustee's claim) was wrong in law. He is seeking to say that the Trustee's claim is not enforceable and therefore that he cannot be made liable to pay a contribution. In my view, the BVI proceedings provide an appropriate forum for the resolution of this issue and it cannot be said that Stevanovich would not have any other avenue of challenge to the Joint Liquidators' decision.

¹² See Bailey & Groves: Corporate Insolvency Practice at Chapter 4, Paragraph D 'Applications in the nature of appeal from an office-holder', citing *Re Duckett, ex p Minister of Education v Trustee* [1964] Ch 398, See also *Re Burn, ex p Dawson, McClellan and Trustee* [1932] 1 Ch 247; *Re Baron, ex p Debtor v Official Receiver* [1943] Ch 177, and *Attorney General of Gambia v Pierre Sarr N'Jie* [1961] AC 617.

(ii) Stevanovich has no legitimate interest in the relief sought. Stevanovich is an outsider to the company, its affairs and the central purposes of the liquidation proceedings. He is no longer a director of the company and has not demonstrated any legal interest in the management and assets of the Company, and how the assets are distributed to satisfy the Company's debts which is the central concern of the liquidation. Stevanovich has no connection to or interest in the central purposes and intendment of the liquidation and is a stranger to the liquidation itself. Whilst Stevanovich has shown an interest in making the application and that he will be affected by its outcome, he has not shown that he has an interest which the court can regard in the context of liquidation proceedings – his interest is far removed from the central purposes of the liquidation proceedings and is a personal interest by which he seeks to absolve himself from the liability sought to be placed upon him by the act of the Joint Liquidators in admitting the claim from the US proceedings and thereafter seeking a contribution from him as a former director. This personal interest to my mind does not sanction the court permitting his intervention into the liquidation proceedings and the court's reversal of a decision which has nothing to do with him directly. This would be in effect permission for a stranger, an unconnected person to the liquidation, to dictate how the liquidation was to proceed – this is clearly not contemplated by the Insolvency Act.

[28] In all the circumstances, I am of the view that the judge quite correctly concluded that Stevanovich did not have standing to pursue section 273 relief against the Joint Liquidators. He did not err in his application of the law, and in concluding as he did. My findings on this point are such that the Court is not required to substantively consider the second issue. However, the second issue was discussed by the judge and the parties before this Court. I will therefore, for completeness, address it.

Issue 2 – Should the judge have set aside the Joint Liquidators’ decision or directed that a section 210 application be made?

- [29] Following the learned judge’s conclusion (with which I have agreed) that Stevanovich did not have standing to seek section 273 relief, the learned judge went on to consider what test would apply to the court’s review of the joint liquidators’ issue, in the event that Stevanovich had standing. Particularly, the judge considered whether the perversity test crystallised in **Edennote** was applicable in the circumstances. The judge considered that central to the court’s assessment of the Stevanovich’s section 273 application was whether the debt claimed by the Trustees from the Company was provable in a liquidation. Further, that the court would be required to look at how, in practice, a liquidator is to react when faced with a claim where it is debatable that it is provable. The judge concluded that these matters respectively fell outside the scope of the **Edennote** perversity test and was incompatible with reliance by liquidators on the **Edennote** test to protect their decision to admit a claim. He, in essence, concluded that the test was simply whether or not the proof of debt should have been admitted by the liquidators. The judge did not go on to make any findings on the merits of the section 273 application but did conclude that it was not an appropriate case to grant the alternative relief Stevanovich sought by way of section 210 as the section was not engaged in the circumstances.
- [30] Stevanovich argues that the learned judge, having correctly concluded that the **Edennote** perversity test did not apply to a challenge to the Joint Liquidators’ decision, failed to set aside or reverse the decision or direct the Joint Liquidators to make a section 210 application. Alternatively, if the perversity test did apply, the learned judge failed to conclude that that test was satisfied in relation to the decision and thereafter failed to set aside or reverse the decision or direct the Joint Liquidators to make a section 210 application.
- [31] The Joint Liquidators in their counter notice of appeal argued that were the judge to have found that Stevanovich had standing, the perversity test was applicable in the

circumstances. In this respect, the Joint Liquidators argue that the judge erred in concluding that the test to be applied was whether or not the proof of debt should have been admitted by the respondents. The judge should have concluded that the test was whether the decision to admit the proof of debt was so absurd that no reasonable liquidator could have made it. The Joint Liquidators argue that the decision of the respondents to admit the Trustee's claim was not absurd and was in any event correct. Accordingly, whichever legal test for reviewing the decision of the Joint Liquidators to admit the proof was not, and is not, liable to be set aside.

[32] The perversity test is most often associated with applications under section 273 of the Insolvency Act and the equivalent provisions under English law. The test finds authoritative articulation in **Edenote**. In simple terms, the test is that absent cases involving fraud and bad faith, the court will not interfere with the decision of a liquidator/office holder unless the decision is so perverse that no reasonable liquidator, properly advised, could have taken it. On its face, the perversity test is undoubtedly a high bar, and can only be satisfied by a qualitative comparison of the impugned conduct against the conduct of the notional 'reasonable liquidator' who is presumed to have been properly advised of circumstances bearing on the decision made.

[33] In **Mitchell v Buckingham International plc**¹³ the English Court of Appeal discussed the circumstances in which it is appropriate to apply the perversity test. At page 391f, Robert Walker LJ stated as follows:

"When liquidators are exercising their administrative powers to realise assets, the court will be very slow to substitute its judgment for the liquidators' on what is essentially a businessman's decision (see *Re Edenote Ltd, Tottenham Hotspur plc v Ryman* [1996] 2 BCLC 389 at 394). All the cases referred to by Nourse LJ on the point... are concerned with decisions as to the disposal of assets. In this case, by contrast, when the provisional liquidators launched their s 304 petition, they did so for the same purpose as they might (in times when there was a lower level of comity in cross-border insolvency) have sought an anti-suit (or anti-execution) injunction from the English court: see *Vocalian (Foreign) Ltd* [1932] 2 Ch

¹³ [1998] 2 BCLC 369.

196 and the earlier cases there cited. That is eminently a matter for the Companies Court, or for the liquidators acting under the control of the Companies Court. It is not a matter for the liquidators to decide at their own discretion in the way in which they might take decision as to the disposal of their company's assets."

- [34] Robert Walker LJ's reasoning in this regard was later endorsed by the Court of Appeal in **Mahomed**. At paragraph 31 of **Mahomed**, Peter Gibson LJ noted that the decision in **Mitchell** was that the perversity test was applicable to decisions taken by liquidators as to the realisation of assets of the company for the benefit of the general body of unsecured creditors but was not applicable to the liquidators' decision to seek a restraining order from an American court. Applying **Mitchell**, Peter Gibson LJ concluded as follows:

"The circumstances of the present case seem to me far removed from those *Mitchell v Buckingham International plc* [1998] 2 BCLC 369. They have nothing to do with competing unsecured creditors. What was involved was a decision by the liquidators on the realisation of assets of the company in the form of the notes in circumstances where a rival claim to those notes had been made. Compromise in such circumstances calls for a commercial decision to be taken. That decision did not involve purely legal issues.... In my judgment this is a case where it is for the liquidators to decide at their own discretion what compromise (if any) is acceptable."

- [35] The position evidenced in **Edenote**, **Mitchell** and **Mahomed** is, as follows:

- (i) A court exercising the power to interfere with the decision of a liquidator is required to examine the nature of the decision in order to determine the manner in which it ought to treat with the decision.
- (ii) where the decision of a liquidator is eminently one which involves the exercise of the unique discretion afforded to the liquidators to make commercial and administrative decisions in the realisation of assets in the liquidation, a review by the court of ought to be conducted through the lens of the perversity test; and
- (iii) where the decision of an office holder raises purely legal issues, a review of the decision is a matter for the court upon review of the

legal principles attendant on that decision and the perversity test does not apply.

[36] The reasoning underpinning the difference in approach by the court to matters of a commercial and administrative nature, on the one hand, and matters involving pure legal questions, as discussed above, is clear. It is a recognition that a liquidator is required by law to make commercial and administrative decisions which do not involve legal questions which are within the province of the court. A liquidator is generally required and expected to exercise their own judgment and to utilise specialised knowledge and experience rather than to rely on the approval or endorsement of the court for their proposed courses of action. It is not for the court to interfere with such commercial or administrative decisions. However, if a liquidator proposes to take a course which is based on a wrong appreciation of the law or is conspicuously unfair to a particular creditor or contractor of the company, then the court can and, in an appropriate case, should be prepared to interfere.¹⁴

[37] I agree with the learned judge that the perversity test does not apply in this case. The discrete question raised by the section 273 application was whether, as a matter of law, the Joint Liquidators were correct to admit the Trustee's claim on the basis that the Trustee's claim, made on the footing of the US default judgment, was enforceable against the Company. It does not matter that the Joint Liquidators' decision was dependent on their and their advisors' view and evaluation of the facts of the case. Such an evaluation did not involve an exercise of a discretion as to the realisation of assets in satisfaction of the debts of the company's creditors or any similar commercial or administrative function which is contemplated by **Edennote**, **Mitchell** or **Mahomed** as generally within the unique province of the liquidator. The reluctance with which a reviewing court ought to treat a liquidators' commercial and administrative decisions is therefore not engaged. Accordingly, and as the learned

¹⁴ See *Re T & D Industries plc* (in administration; *Re T & D Automotive Ltd* (in administration) [2000] 1 All ER 333 at 345; *Re MF Global UK Ltd* (in special administration) [2014] EWHC 2222 (Ch); *Re CE King Ltd* (in administration) [2000] 2 BCLC 297 at 303 per Neuberger J.

judge concluded, the **Edenote** test would not apply to a review of the joint liquidators' decision to admit the Trustee's claims. The question would simply therefore be whether, as a matter of law, the Joint Liquidators were correct to admit the claims on the basis that the Company was present in the US when the complaint was issued.

- [38] On this point, Stevanovich argues that the default judgment entered in the US proceedings is not enforceable in the BVI, and therefore that the Trustees' claim (which was entered on the presumption that the default judgment is enforceable) ought not to have been admitted by the joint liquidators. In this regard, the parties are agreed that the question of presence in the BVI is resolved with reference to the common law rules of private international rules on the enforcement of foreign judgments set out in **Adams and others v Cape Industries plc and another**,¹⁵ and that the critical factor in this case which bears on the enforceability of the default judgment, and therefore the correctness of the Joint Liquidators' decision to admit the Trustee's claim, is whether the Company was present (in law) in the US.
- [39] Stevanovich's essential position is that the Company was never present in the US and, in any event, the Company had ceased to carry on business by the time the complaint was issued in October 2010. The Joint Liquidators contend that their decision to admit the claims was in accordance with the established legal principles for determining presence in a foreign jurisdiction for the purposes of enforcement of a judgment set out in **Adams**. They contend that so far as the facts are concerned, they were satisfied on the evidence that the company was present in the US through its investment manager, Westford Global Asset Management Ltd, as well as Stevanovich who was an officer of Westford.
- [40] As already stated, the issue of the enforceability in the BVI of the US default judgment has been raised by Stevanovich in the BVI proceedings in his defence to the BVI proceedings. The determination of this issue very clearly revolves around

¹⁵ [1990] 1 Ch 433.

the resolution of the various factual contentions raised by both Stevanovich and the Joint Liquidators in their numerous detailed affidavits and voluminous exhibits filed in this matter, and potentially documents and evidence which are not before this Court which may have been exchanged or disclosed as part of the case management process. I agree with the Joint Liquidators' position that, in circumstances where the determination of this issue involves the resolution of substantial disputes of fact, and there are no findings by the judge on this point, it is more appropriate for the issue of presence and therefore the enforceability of the default judgment to be dealt with in the BVI proceedings as raised by Stevanovich in his defence. This is a matter which, ought not to be determined on the basis alone of apparently cogent and conflicting written evidence presented by both sides. Like the learned judge therefore, I decline to make any findings on this point and leave open the question of presence in the US and therefore enforceability of the default judgment, for determination in the BVI proceedings where the parties' rival contentions may be fulsomely tested at trial.

The section 210 application

- [41] Stevanovich has sought, as an alternative to section 273 relief, that the court direct the joint liquidators to file an application pursuant to section 210(2) to expunge the claim.
- [42] Section 210(2) gives the court specific powers upon the application of a liquidator or where the liquidator declines to make an application, a creditor, to expunge or amend an admitted claim in liquidation if it is satisfied that the claim should not have been admitted or should be reduced. Section 210 is a tool which a liquidator or exceptionally, a creditor may seek judicial intervention in the context of a liquidation. The making of an application under section 210(2) is within the province of the liquidator or a creditor where the liquidator is not minded to make the application. In my view, it is not for the court to direct that such an application be made, but for those so empowered by the statute to make that application to address their own concerns and protect their own interests. Stevanovich is neither a liquidator nor

creditor and the joint liquidators consistent defence of their decision to admit the Trustee's claims is clear evidence that they do not, at this stage, desire to make a section 210 application. In my view, section 210 is not engaged.

Order

[43] For all the above reasons, I would order that:

- (i) The appeal is dismissed.
- (ii) Costs in the appeal to the respondents, to be assessed if not agreed within 21 days.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Vicki-Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar