

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0013

BETWEEN:

VIDATEL LIMITED

Appellant/Applicant

and

PT VENTURES, SGPS, S.A

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mde. Esco L. Henry

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Hermann Boeddinghaus, KC with him Ms. Colleen Farrington for the Applicant

Mr. Christopher Harris, KC with him Ms. Georgina Peters and Mr. Stuart Rau for the Respondent

2024: July 24.

Application for a stay of execution of order appointing liquidators – Winding-up proceedings - Whether the appeal would be stifled or rendered nugatory if a stay is not granted – Court's reluctance to grant stays in winding-up proceedings pending appeal – Whether without a stay, the liquidation will progress thus damaging the applicant's prospects of having the order appointing liquidators set aside - Whether the appeal has strong prospects of success – Balance of harm test

REASONS FOR DECISION

Introduction

[1] **ELLIS JA:** Before the Court was an application by Vidatel Limited (“Vidatel”) (made pursuant to the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** (“CPR”), Parts 62.23, 62.24(1) and 26.1(2)(q)) seeking a stay of execution of the order appointing Mr. Matthew Richardson and Mr. Nicholas Stuart Wood as liquidators (“the Liquidators”) in respect of Vidatel (“the Appointment Order”) granted by the judge in the court below on 17th April 2024 pending the determination of Vidatel’s appeal against the Appointment Order (the “Stay Application”).

[2] This application for the stay of execution filed on 10th May 2024 was heard on 24th July 2024. Following that hearing the Court made the following orders:

- “1. The application by notice filed the 29th April 2024 is dismissed.
2. Costs of the application are awarded to the respondent to be assessed by a judge of the Commercial Division of the High Court of the Territory of the Virgin Islands if not agreed by the parties within 21 days of the date of this order.
3. The Court will provide written reasons for its decision.”

The following sets out the reasoning of this Court.

Background

[3] The applicant, Vidatel is a British Virgin Island (BVI) company owned by Ms. Isabel dos Santos, the daughter of the late president of Angola. The respondent, PT Ventures, SGPS, SA (“PT Ventures”) is a company incorporated in Portugal and is now ultimately owned by the Angolan State. Vidatel and PT Ventures each owned a valuable 25% shareholding in Unitel S.A. (“Unitel”), the leading Angolan telecoms company, until Vidatel’s shares in Unitel were nationalized by the Angolan state by Presidential Decree 256/22 dated 28th October 2022.

- [4] PT Ventures commenced Paris-seated ICC arbitration proceedings against Vidatel and the two other shareholders in Unitel, Mercury Sericos de Telecomunicacoes S.A. (“Mercury”) and Geni S.A. (“Geni”) in October 2015, and obtained an award on 20th February 2019 ordering Vidatel, Mercury and Geni to pay damages of approximately US\$650 million to PT Ventures. PT Ventures obtained a worldwide freezing order against Vidatel in the BVI in October 2015 in support of the arbitration.
- [5] Vidatel sought to annul the arbitration award through the French judicial system. These efforts were ultimately unsuccessful. While proceedings to annul the arbitration award in France were ongoing, PT Ventures sought to enforce the arbitration award against Vidatel in the BVI (it has never attempted to enforce the award against Mercury or Geni). By the order of Justice Jack (Ag.) dated 29th October 2020, PT Ventures was given leave to enforce the award pursuant to sections 81(1) and 84(1) of the **Arbitration Act 2013**.¹ Justice Jack (Ag.) appointed receivers over Vidatel’s principal assets, namely its shares in Unitel and its rights to dividends.
- [6] On 5th March 2021, PT Ventures issued an originating application to compulsorily wind up Vidatel, under the provisions of the **BVI Insolvency Act 2003**² (“the Act”) pursuant to section 162(1)(a) on the ground that it was insolvent. That application was based on (i) the amounts due under the arbitration award, and (ii) an outstanding costs order. Its position was that Vidatel was insolvent on a ‘cash flow’ basis. Vidatel opposed the winding up order. Its position was that the test for cash flow insolvency was not satisfied, in circumstances where it was being prevented from paying PT Ventures, not by a lack of means, but by various external restrictions (including the worldwide freezing order obtained by PT Ventures itself).
- [7] PT Ventures, however, failed to ensure that its originating application to wind up Vidatel was determined within the statutory six-month time limit under section 168

¹ Act No. 13 of 2013 of the Laws of the Virgin Islands.

² Act No. 5 of 2003 of the Laws of the Virgin Islands.

of the Act, which once expired cannot be extended retrospectively. Vidatel therefore contended that the application had been deemed dismissed on 5th September 2021, before the appointment order was made on 30th September 2021. The appointment order was ultimately set aside by consent by order of this Court dated 4th January 2023.

- [8] In anticipation that the appointment order would be aside, PT Ventures filed a second originating application on 12th October 2021. This second originating application was part heard on 6th - 7th December 2023, then 15th - 16th April 2024. For its part, Vidatel argued that inter alia:

“a. PT Venture’s Second Originating Application was void ab initio pursuant to section 175 of the Insolvency Act 2003, having been issued against Vidatel during a period in which it was in liquidation (i.e. after the appointment order had been entered and before it had been set aside).

b. The sole basis on which PTV relied to demonstrate Vidatel’s insolvency was section 8(1)(c)(ii) of the Act. The court must look at the circumstances of the (sic) Vidatel, including its future prospects, in order to establish why it is that the debt in question has not been paid. If it is not established that the non-payment of the petition debt is due to a general want of means, but is in fact due to some other reason, then the company should not be held to be insolvent within section 8(1)(c)(ii) of the Act. Vidatel provided evidence that its inability to pay the petition debt was brought about by circumstances within the control of PTV and its associates.”

- [9] By order dated 17th April 2024, the learned judge in the court below appointed Mr. Matthew Richardson and Mr. Nicholas Stuart Wood as liquidators in respect of Vidatel. The reasons of the learned judge in the court below were set out in an oral judgment delivered on 17th April 2024. The judge held that the effect of the order of the Court of Appeal setting aside the first appointment order was to render the first appointment order itself void ab initio and therefore of no effect for the purposes of section 175 of the Act. The judge also held that temporary or other difficulties unrelated to its balance sheet (even those caused by the petitioning creditor) were merely discretionary factors in the court’s decision whether or not to wind up the company.

- [10] Vidatel has appealed against the Appointment Order dated 17th April 2024. The notice of appeal was filed on 10th May 2024. After handing down judgment on 17th April 2024, the judge indicated that he was unable to accommodate a hearing of an urgent application for a stay that day (but gave Vidatel permission to apply to him). On 29th April 2024, Vidatel issued its application for a stay of the Appointment Order in BVIHCOM2021/0174 requesting an urgent hearing on the papers. A delay would occasion precisely the prejudice that the Stay Application seeks to avoid. Vidatel has therefore issued the Stay Application directly to this Court.
- [11] By the Stay Application, Vidatel seeks to avoid (1) the progress of the liquidation pursuant to the Appointment Order jeopardizing the appeal or rendering the appeal nugatory; and (2) prejudice to the claims and other activities brought or carried out in Angola on Vidatel's behalf by the receivers appointed by order of Jack J (Ag.) dated 29th October 2020.
- [12] By email to the court on 1st May 2024, PT Ventures, inter alia, requested to be heard on Vidatel's Stay Application.

Submissions of the Parties

- [13] In support of the Stay Application the applicant, Vidatel, sets out the following grounds:
- (1) That a stay of the Appointment Order is urgent and necessary to avoid Vidatel's intended appeal against the Appointment Order being rendered nugatory. If Vidatel's intended appeal is successful and the Court of Appeal sets the Appointment Order aside, then time and resources expended by the Liquidators will have been incurred and steps will have been taken by the Liquidators, and there is a real risk that this Court might in the exercise of its discretion decline to set aside the Appointment Order so as to avoid wasting costs and expenses

already incurred and/or reversing steps already taken. As to these steps, the applicant noted that:

- (a) In and around December 2021, the receivers commenced the process for recognition of the Receivership Order in Angola. In their report dated 10th December 2021, the receivers realized that if a liquidation order was made in respect of Vidatel, they would likely have to restart the recognition proceedings in the name of the Liquidators. This will severely and adversely impact Vidatel's ability to vindicate its rights in Angola - including recovery of dividends payable by Unitel to Vidatel calculated by the receivers to be worth US\$254 million.
- (b) The same argument can be applied to the Nationalization Applications filed by the receivers on 22nd December 2022 in which they seek the reversal of the nationalization of Vidatel's shareholding in Unitel. To the extent that a change in the receivers' legal status will require the Nationalization Applications to be recommenced, significant prejudice would be caused to Vidatel's assets.
- (c) There is, further, a risk that the Liquidators will not be put in funds to continue to take steps (as they had taken in their capacity as joint receivers of Vidatel prior to the Appointment Order) to preserve and/or secure and/or get in assets belonging to Vidatel (including notably its unpaid dividends from Unitel and its claim for annulment and/or compensation against the Republic of Angola following the purported nationalization of its shares in Unitel) by the withdrawal of funding for that purpose that had previously been made available to them in their capacity as joint receivers.

- (2) That it is just and appropriate that PT Ventures should not gain advantage through exercise of the Liquidators' powers in respect of Vidatel's affairs pending the intended appeal. In the absence of a stay, even if Vidatel's intended appeal is successful, it may not be possible to undo or "reverse" the progress of the liquidation pursuant to the Appointment Order. Progress of the liquidation could also adversely affect efforts by the receivers to vindicate Vidatel's assets in Angola which are of significant value and in excess of the petition debt.³
- (3) That, conversely, PT Ventures will not suffer any real prejudice through the granting of a stay of the Appointment Order. PT Ventures already enjoys the benefit of a receivership order granted in respect of Vidatel's assets, and a worldwide freezing order. Vidatel's assets are, in other words, already in safe hands. Any concerns about securing or disposing of Vidatel's assets do not apply. The only practical advantage to PT Ventures would be the commencement by the Liquidators into the affairs of Vidatel. However, clearly time and resources should not be expended by Liquidators on investigations if the liquidation will not proceed because the Appointment Order will be set aside.
- (4) That there are therefore no circumstances of urgency requiring the progress of the liquidation pursuant to the Appointment Order. On the other hand, there is a real risk of injustice to Vidatel if the Stay Application is refused. It follows that the balance of harm weighs in favour of granting an urgent stay in the unusual circumstances of this case.
- (5) That despite the potentially wide-ranging public policy ramifications of the judge's decision that the second originating application was void ab

³ See Fourth Affidavit of John Patrick Rogerson dated 22nd March 2024: taken at its highest value, the petition debt amounts to approximately US\$ 400 million.

initio, neither the Virgin Islands Recovery and Insolvency Specialist Association nor the Attorney-General of the Virgin Islands were given the opportunity to be heard on this issue. According to the applicant, it is probable that these public bodies will seek to make submissions on the appeal. The need to ensure the appeal is not rendered nugatory is therefore enhanced.

- (6) That Vidatel has good prospects of success on the Appeal in relation to each of the grounds of appeal.

[14] In opposition to the Stay Application, the respondent submitted that the Stay Application discloses no basis for the Appointment Order to be stayed. The respondent contends:

- (1) That judicial authorities all speak with one voice that there should be a high bar for (and general presumption against) granting a stay, even higher in circumstances where the stay sought is of a winding up order. It follows that Vidatel bears the burden of satisfying this Court that the general presumption should be rebutted, by way of exception to the general rule. It further follows that cogent and persuasive evidence is required that the appeal will be rendered nugatory unless the stay is granted. It cannot be enough for an applicant to rely upon the bald assertion that being placed in liquidation prior to the appeal is, in itself, evidence of the appeal being rendered nugatory.
- (2) That Vidatel's submission that if a stay is not granted it will be exposed to the risk of progress in the liquidation damaging its prospects of having the Appointment Order set aside on the substantive hearing of the appeal is self-evidently circular as the same could be said of every case where a liquidation order is made. Since the grant of a stay pending appeal is an exceptional order, and there is a general presumption against staying a winding up order, Vidatel's argument is

manifestly insufficient as a basis for seeking a stay. Vidatel's core submission therefore falls squarely into the category of complaints that the authorities reject: namely, there exist no exceptional circumstances which should deprive PT Ventures of the fruits of the Appointment Order. Vidatel has failed to identify any sustainable reasons (or cogent evidence) 'that the appeal will be stifled or rendered nugatory unless a stay is granted'.

(3) That there are also a number of inaccuracies in Vidatel's position, which militate against the granting of a stay:

(a) First, Vidatel's own actions demonstrate that the supposed urgency does not exist. The BVI Court Stay Application was filed nearly two weeks after Vidatel first intimated that it would seek a stay. When required by the BVI Court to submit a revised certificate of urgency justifying the need for urgency, Vidatel elected not to do so and instead filed the Stay Application before this Court after a further delay of another two weeks. Furthermore, Vidatel's delay in seeking the stay indicates that Vidatel itself recognizes that it is unlikely to suffer prejudice in the absence of a stay.

(b) Second, Vidatel's suggestion as to 'the potentially wide-ranging public policy ramifications' of the Appointment Order and the 'probable' intervention of the Virgin Islands Recovery and Insolvency Specialist Association ("RISA") and the Attorney-General of the Virgin Islands is unsupported, self-serving and speculative. In fact, leading counsel for Vidatel expressly confirmed to the learned judge shortly before the BVI Court made the Appointment Order that "RISA told [Vidatel] they don't intend to intervene, so I don't want you to be left with the impression that they might be thinking about intervening".

Similarly, leading counsel for Vidatel explained to the BVI Court that the Attorney General 'hasn't indicated one way or another whether she would intervene or not'. Even if both RISA and the Attorney General of the Virgin Islands did wish to make submissions on this appeal, Vidatel has not even attempted to explain why these supposed interventions would justify a stay pending that appeal. If relevant at all, such intervention would be a matter for this Court when it hears the appeal. Since the Appointment Order was made on 17th April 2024, PT Ventures has not been informed that the Attorney-General has indicated that she is contemplating intervening.

- (c) Third, Vidatel's contention that "[p]rogress of the liquidation could also adversely affect efforts by the receivers to vindicate Vidatel's assets in Angola which are of significant value and in excess of the petition debt", ignores the fact that the receivers are the same individuals as the Liquidators. Further, the contention that in circumstances where the receivers were appointed, PT Ventures might now elect to withdraw funding from the receivers is baseless because the pending actions were brought by the joint receivers in Angola in order to preserve Vidatel's assets, which would ultimately enure to the benefit of PT Ventures as Vidatel's significant majority creditor, to pay the undisputed judgment debts which Vidatel accepts must be paid to PT Ventures. In addition, since Vidatel has no liquid assets, the Angolan proceedings have in fact been funded by PT Ventures at its own election for an extended period – notwithstanding that it has had unsatisfied judgment debts exceeding US\$400 million outstanding since 2019. Further, Vidatel's reliance on the receivers' claims in Angola as a means of recovering the petition debt is in any event far from certain. The receivers' reports suggest that there has been no

progress in those proceedings since late August 2023 and the BVI Court was unpersuaded by the likelihood of those actions resulting in any compensation being paid to Vidatel (which would ultimately enure to the benefit of PT Ventures).

- (d) That the presumption is that having obtained the Appointment Order, PT Ventures is entitled to that order being maintained. The Court should place great weight on the presumption in this case, where PT Ventures is an unsatisfied judgment creditor whose significant debts have been unpaid since 2019, and it has been forced to expend considerable time and costs over years of protracted litigation prior to the Appointment Order.
- (e) Vidatel's primary asset (being its 25% shareholding in Unitel, has been subject to the nationalization by the Angolan Government since 26th October 2022. Accordingly, the receivership order and worldwide freezing order are no longer the only restrictions preventing Vidatel from taking any actions in relation to its assets. Moreover, both those orders were intended as temporary measures to preserve Vidatel's assets pending PT Ventures' enforcement of its judgment debts, and (since Vidatel has no assets in the BVI, its place of incorporation), liquidation is now the only means by which PT Ventures can recover its judgment debts.
- (f) Vidatel's prior non-compliance with orders of the BVI Court (namely, the worldwide freezing order and ancillary disclosure orders), including Vidatel's diversion of money away from Vidatel to entities controlled by Ms. dos Santos is a further reason why the Liquidators should be permitted to commence their statutory investigations into Vidatel's affairs.

- (g) That Vidatel is a holding company whose main asset has been its shareholding in Unitel. It does not trade (in the sense of operating a business), has no ongoing operations or employees and appears to have no unconnected creditors (its sole creditors, apart from PT Ventures, are likely to be companies associated with Ms. dos Santos which have funded these proceedings). As such, no prejudice would be suffered by Vidatel (or third parties) if the Appointment Order is maintained, and the liquidation will serve to realize and distribute its assets to the benefit of its creditors (of which PT Ventures is likely the significant majority creditor). Notably, no other creditors have opposed the winding-up or appeared to support Vidatel's opposition to its winding-up. The sole opposition has been that of Vidatel itself, directed by Ms. dos Santos, Vidatel's sole director and ultimate beneficial owner. Consequently, the Stay Application is a self-serving application which would prevent the joint liquidators from carrying out their investigations and realizing Vidatel's assets to satisfy its debts.
- (h) It follows that granting a stay would cause PT Ventures significant prejudice, and no prejudice to Vidatel sufficient to rebut the presumption that the Appointment Order should be maintained (or at all).
- (i) That the appeal is entirely without merit, because Vidatel has not identified any issue which falls into the category envisaged by **Henderson v Foxworth Investments Ltd**.⁴ This is not a case where the lower court has made any material error of law in its comprehensive reasoning.

⁴ [2014] UKSC 41.

Analysis and Conclusion

The Law

- [15] The general position is that a successful party is entitled to enjoy the fruits of his judgment notwithstanding that the unsuccessful litigant has appealed such judgment. CPR 62.23 fortifies that position. It provides that an appeal does not operate as a stay of execution or proceedings under the decision of the court below. It further provides that any intermediate act or proceeding is not invalidated by an appeal.
- [16] CPR 62.19, however, gives the Court a discretion to grant a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal. In exercising that discretion, the judge must not act arbitrarily. The exercise of judicial discretion should be performed having regard to all the circumstances of the case and applying the settled legal principles which have been prescribed in the case law.
- [17] The test to be applied by the Court when deciding whether to grant a stay of execution is well established. Blenman JA encapsulated the five principles that govern a stay application in her judgment in **C-Mobile Services Ltd v Huawei Technologies Co. Limited**⁵ at paragraphs [30] and [44], citing and adopting the dicta in the English case of **NB v London Borough of Haringey**⁶ in which Mr. Justice Mostyn cited and approved the dicta of the Chief Judge of the High Court of Hong Kong, Ma J, in **Wenden Engineering Services Co Ltd. v Lee Shing UEY Construction Co Ltd**⁷ where five principles were identified as relevant to applications for stays pending appeal:

(1) The court must take into account all the circumstances of the case.

(2) A stay is the exception rather than the general rule.

⁵ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

⁶ [2011] EWHC 3544 (Fam).

⁷ HCCT No. 90 of 1999.

- (3) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (4) 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.
- (5) 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).

[18] In **Novel Blaze Limited (in liquidation) v Chance Talent Management Limited**,⁸ this Court confirmed that these principles are self-explanatory and apply in virtually all applications in varying degrees. In that case, Webster JA (Ag.) at paragraph [10] observed:

“...The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case. In this application, the Company asserts that it has a strong likelihood of success on the appeal and that if it is successful, the victory will be nugatory because the damage caused by the appointment of the Liquidators in the meantime will be substantial and irreversible.”

[19] The guiding principles encapsulated in **C-Mobile Services Ltd** were recently reconfirmed by this Court in the context of a winding up order, in **Haimen Zhongnan Investment Development (International) Co. Ltd. v Cithara Global Multi-Strategy SPC**.⁹ At paragraphs [18] – [20] of that judgment, the Court observed:

“[18] We are also satisfied that within the specific context of a stay of a winding up order, there is a general presumption against the grant of a stay of a winding up order. In that regard, we are guided by the dicta in the English decision of **In re A&BC Chewing Gum Ltd [1975] 1 WLR 579** which concerned an application for a stay of a winding up order pending

⁸ BVIHCVAP2020/0006 (delivered 9th July 2020, unreported).

⁹ BVIHCMAP2023/0012 (delivered 4th August 2023).

appeal. Although the court in that case accepted that there was jurisdiction under the English legislation to grant a stay of winding-up proceedings the court explained the practical reasons for refusing a stay of the winding-up order pending appeal noting that under insolvency law, as soon as a winding-up order is made, the Official Receiver has to ascertain the assets and the liabilities of the company at the date of the order so as to find out the preferential creditors and the unsecured creditors. It follows that in the event that a stay of the winding-up order pending appeal is granted and the winding up order is ultimately affirmed, the Official Receiver's ability to conduct the said investigation into the liability and assets at the date of winding-up order will be seriously hampered given the time-lapse. Furthermore, even if a stay is not granted, the company may continue running its business and will not suffer any additional harm, irrespective of whether it is making any profit or not.

[19] The reasons in **In re A. & B.C. Chewing Gum Ltd.** were expressed in terms which are generally applicable to all windings up, to wit that a stay would probably make it very difficult for a liquidator to investigate the affairs so as to be able in a timely and efficient manner to ascertain the company's liabilities and assets and so take steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well. This dictum has been applied in numerous other cases including **In Re BVL Realty II Limited** [2010] EWHC 1791; **Grand Pacific Holdings Ltd v Pacific China Holdings** BVIHCV2009/389 (delivered 11th January 2010, unreported) **Re Parmalat Capital Finance Limited** [2007] CILR 1, [3] (Smellie CJ); and **Safe Castle Limited v China Silver Asset Management (Hong Kong) Limited** [2020] HKCFI 1028, Harris J.

[20] It is therefore clear that a court would not lightly exercise its discretion to stay of (sic) a winding-up order pending appeal."

[20] This Court has reiterated this approach in **Nam Tai Property Inc et al v West Ridge Investment Company Limited**.¹⁰ At paragraph 19 of the judgment, Webster JA [Ag.] applied the dictum in **Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd**. pointing out that:

"The trial judge in that case made an order appointing liquidators of the applicant company on the ground of insolvency. The company appealed and applied for a stay of the trial judge's order on the grounds that it had good grounds of appeal and the company would be ruined if a stay was not granted. The Court of Appeal found that the applicant did not have strong

¹⁰ BVIHCMAP2021/0010 (delivered 8th November 2021, unreported).

grounds of appeal or a strong likelihood of success but nonetheless went on to consider the other principles in **C-Mobile** and continued –

‘These elements are self-explanatory and apply in virtually all applications in varying degrees. The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case.’

The Court of Appeal noted that if a stay was not ordered the liquidators appointed by the trial judge would take over the company and this would have had a devastating effect on the company. However, this had to be balanced against the facts that the company was deemed to be insolvent, had not made any proposals for paying the outstanding debt, and did not have good prospects of success on appeal. The Court carried out the balancing exercise and refused the stay.”

- [21] It is therefore clear that a court would not lightly exercise its discretion to stay a winding-up order pending appeal.
- [22] In this Court’s judgment, the applicant has not presented a strong enough case to rebut the presumption against the grant of a stay of the judge’s liquidation order.

Appeal Will Be Rendered Nugatory

- [23] In traversing the relevant threshold, an applicant would ordinarily be obliged to advance a case which is cogent and which persuasively asserts that the appeal will be stifled or rendered nugatory unless a stay is granted. However, it is clear to this Court that in advancing an application to stay a liquidation order, an applicant would have to contend with the court’s demonstrated reluctance to grant the stay in winding-up proceedings. This position was made plain in the English case of **Re A&BC Chewing Gum Ltd**,¹¹ where Plowman J explained the practical reasons for refusing a stay of the winding-up order pending appeal.
- [24] It follows that whereas in general litigation, the likelihood of success and the danger that that success may in the interim be rendered nugatory are matters of

¹¹ [1975] 1 WLR 579, 592-593.

considerable concern, in winding-up proceedings the position is somewhat different. The court's jurisdiction in winding-up proceedings is to some extent a supervisory one which obliges a court to take into account the interest of others, in particular, the creditors of the company. A court must consider whether or not creditors' interests will be harmed by a stay of the winding-up order and in that regard it is clear that in the event that a stay of the winding-up order pending appeal is granted and the winding-up order is ultimately affirmed, the liquidators' ability to conduct the said investigation into the liability and assets at the date of winding-up order will be seriously hampered given the time lapse. Moreover, if a stay is not granted, the company may continue running its business and will not suffer any additional harm, irrespective of whether it is making any profit or not.

- [25] It is therefore wholly unpersuasive for an applicant to simply assert that refusing the stay in this appeal will mean that the liquidation will progress thus damaging its prospect of having the Appointment Order set aside. The Court agrees that this is a circular argument which is a manifestly insufficient basis for seeking a stay.
- [26] Vidatel has, however, contended that there are special circumstances in this case that would make it appropriate to grant a stay. However, the company's contention that the progress of the liquidation could adversely affect the efforts by the receivers to vindicate its significant and valuable assets in Angola is equally unpersuasive. The Court accepts the submissions advanced by the respondent that this argument is implausible given that the receivers are in fact the same individuals as the liquidators and, in the circumstances which obtain, it is unlikely that they may elect to withdraw funding to preserve Vidatel's assets. This Court further agrees that Vidatel's reliance on the receivers' claims in Angola as a means of recovering the petition debt is in any event far from certain. From all accounts there has been no progress in those proceedings since late August 2023, and it is wholly speculative as to the likelihood of those actions resulting in any compensation being paid to Vidatel (which would ultimately enure to the benefit of PT Ventures).

[27] The Court also finds no merit in the applicant's argument as it relates to the potential intervention of RISA and the Attorney General in this appeal. Such intervention (even if it were likely) could not without more justify a stay of the Appointment Order.

Strong Likelihood of Success of the Appeal

[28] The Court has also considered the parties' somewhat limited submissions on the strength of the appeal. The applicant maintains that it has strong grounds of appeal and has identified what it contends are egregious errors of law and principle made by the learned judge, the effect of which is that the appeal will be upheld. Ground 1 of the proposed appeal is directed at the legal effect of section 175(3) of the Act given that the originating application upon which the Appointment Order was made was issued at a time when Vidatel was in liquidation (by order dated 30th September 2021) and therefore void *ab initio*. Vidatel contends that the Court had no jurisdiction on 17th April 2024 to make the Appointment Order because the originating application was a nullity and remained a nullity at all times thereafter notwithstanding the subsequent setting aside of the first appointment order by the order of this Court dated 4th January 2023.

[29] Counsel for the applicant submitted that it is a respectable argument that the Court of Appeal did not declare that the first appointment order was void *ab initio* for **all** purposes. Counsel for the applicant submitted that as a matter of public policy it would be contrary to high authority (citing **Isaacs v Robertson**¹² and **Price Waterhouse Coopers v Saad Investments Co Ltd. (In Liquidation)**¹³) but it was readily conceded that there is no legal or judicial authority which directly addresses this issue in this context.

[30] Having considered the background to this appeal and having reviewed the learned reasoning, this Court is not satisfied that this is a clear-cut issue or indeed a particularly strong one. Neither of the authorities cited deal with the effect of an order

¹² [1985] AC 97.

¹³ [2014] 1 WLR 4482.

of an appellate court which overturns an order of a lower court. They certainly do not address circumstances where it is contended that the lower court would have lacked jurisdiction to make the first appointment order (30th September 2021). It is therefore not at all clear that any error of law or principle could be made out here.

[31] Grounds 2 and 3 are concerned with the test for cash flow insolvency and the judge's assessment of facts relevant to cash flow insolvency, in particular the learned judge's decision as to the scope of the jurisdiction under section 8(1)(c)(ii) of the Act to determine a company's insolvency and his evaluation of the evidence presented. Under Ground 2, Vidatel contends that the test for insolvency under section 8(1)(c)(ii) of the Act does not operate as a deeming provision. The applicant contends that the judge's finding that Vidatel was insolvent within the meaning of section 8(1)(c)(ii) of the Act was vitiated by an error of law to wit that the test of insolvency under that section did not require PT Ventures to prove that Vidatel was unable to pay its debts because of lack of means. Under Ground 3, Vidatel argues that the judge's finding that Vidatel was insolvent under section 8(1)(c)(ii) of the Act, was vitiated by error of law because where the company's inability to discharge debts as they fall due is caused by temporary or other difficulties unrelated to its balance sheet, this is not only relevant to discretion but also to jurisdiction in that it goes to whether cash flow insolvency under section 8(1)(c)(ii) of the Act is proved.

[32] Vidatel further contends that the judge did not adequately address all of the evidence before the court of the temporary or other difficulties unrelated to its balance sheet alleged to have caused its inability to discharge debts as they fall due. Vidatel submits that the judge erred in fact in his evaluation of the evidence in that he gave no or insufficient weight to the fact that Vidatel's inability to pay the petition debt was brought about by circumstances within the control of PT Ventures and its associates, including (without limitation) the nationalization by the Republic of Angola (PT Ventures' parent entity) of Vidatel's principal asset without compensation and the withholding by Unitel (a company partially owned by PT Ventures) of substantial dividend payments owed to Vidatel.

[33] According to counsel for the applicant, insolvency must be proved by demonstrating some want of means. It is not enough to simply prove a failure to pay. The court must take into account the reasons why payment has not been made. As in this appeal, there may well be a temporary glitch which prevents a company from satisfying its debts. Again, the applicant was unable to advance any directly relevant authority on this issue. Instead, counsel cited in support the case of **Byblos Bank SAL v Al-Khudhairy**¹⁴ in which the English appellate court determined that in deciding whether a company was unable to pay its debts within the meaning of section 223 of the 1948 Companies Act, it was not correct to take into account any hope or expectation that the company would obtain assets in the future where there was no right to these assets. The court concluded that on this basis there was evidence indicating that the company was unable to pay its debts within the meaning of section 223 of the 1948 Act and therefore the plaintiff was entitled to appoint a receiver under both its charges.

[34] Counsel for the applicant submitted that these grounds are at least arguable. It cannot however be said that success on appeal is very likely or inevitable. At the core of this appeal is the learned judge's refusal to dismiss the winding-up application. It is conceded that the principal tests of insolvency – the 'cash flow' test (where a company is deemed to be insolvent on account of its inability to pay its debts as they fall due) and the 'balance sheet' test (where a company is deemed to be insolvent in the event that its liabilities exceed its assets) are not at issue here. At the centre of this appeal is Vidatel's failure to satisfy indisputable judgment debts for some significant time. PT Ventures is the undisputed creditor of those judgment debts, and it is not disputed that Vidatel has no known assets located in the BVI.

[35] Ultimately, in carrying out the balancing exercise, this Court has considered that there are insufficient reasons for denying the respondent the fruits of its victory in the lower court. The liquidators are aware of the pending appeal and would then be

¹⁴ (1986) 2 BCC 99 549; UKCA [1987] BCLC 232 (CA).

on notice that the appeal might succeed. It then becomes a matter of commercial judgment how they will treat with the liquidation in the interim.

[36] The liquidation proceedings are a consequence of Vidatel's failure to pay its debts. In order for a stay to be exceptionally granted, in addition to the considerations in general litigation, such as the prospect of success of the appeal, the applicant for a stay should adduce evidence which shows that it is able to pay its debts as they fall due. The applicant's evidence before the Court does not assist in this regard. Vidatel has no liquid assets. Any reliance on the joint receivers' claims in Angola as a means of recovering the petition debt are speculative. The receivers' reports, in any event, suggest that there has been little progress in these proceedings. It is not lost on this Court that these Angola proceedings have in fact been funded by PT Ventures for some time and despite its outstanding judgment debt exceeding \$400 million.

[37] In exercising its discretion, the Court has applied the balance of harm test in which the likely prejudice to the successful party must be carefully considered. The Court has considered the applicant's evidence and the written and oral submissions filed in support of the stay. This has to be weighed against the established practice to refuse a stay of winding-up orders pending appeal, the fact that the applicant is clearly not able to pay its debts and that further delays in the liquidation have the potential to adversely impact creditors who have a right to recover the debts they are owed.

[38] Accordingly, this Court considers that a stay should not be granted. It is therefore ordered as follows:

- (1) The application by notice filed the 10th May 2024¹⁵ is dismissed.
- (2) Costs of the application are awarded to the respondent to be assessed by a judge of the Commercial Division of the High Court of the Territory

¹⁵ The Certificate of Result issued by the Court's office incorrectly reflects the application date in paragraph 1 of the order and accordingly should be (or has been) corrected and re-issued pursuant to CPR Part 42:10.

of the Virgin Islands if not agreed by the parties within 21 days of the date of this order.

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar