

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 43 of 2015

BETWEEN:

MOSTAFA SHARIFPOOR

Applicant

And

**FRAMJEE PROPERTIES LTD
(In liquidation)**

Respondent

Determined on paper:

Mr Jerry Samuel for the applicant

The respondent liquidator did not appear

2020: June 10

JUDGMENT

- [1] **JACK, J [Ag.]:** This is an application dated 3rd June 2020 seeking retrospective permission to prosecute proceedings issued in the High Court of England and Wales which by order of Master Cook of 11th May 2020 resulted in the making of an third party debt order against monies held by the respondent.
- [2] The respondent, ("Framjee") is a BVI company. On the application of Mr. Sharifpoor, the current applicant, on 17th June 2015 this Court placed it into liquidation. The only asset of Framjee was a house, 13 The Avenue in Willesden in North London. Mr. Sharifpoor and another man, Siamek Feridoni Balengani, had purchased the property jointly with a view to renovating it and selling it at a

profit. Because the property was held by Framjee, Mr. Sharifpoor and Mr. Balengani purchased the shares in Framjee rather than the house itself.

- [3] Mr. Sharifpoor and Mr. Balengani fell out in 2012. A major issue was that much of the renovation work had been done by Mr. Balengani's brother-in-law, Abholghassem Jamshid Jamshab, and there were issues about the amount charged. Mr. Balengani issued proceedings against Mr. Sharifpoor in the Chancery Division of the English High Court for breach of contract. Mr. Sharifpoor counterclaimed. On 30th June 2014 His Honour Judge Simpkins, sitting as a High Court judge, dismissed the claim and gave judgment on the counterclaim in the sum of £172,762.40 sterling, plus interest and costs.
- [4] Subsequently, as I have said, Framjee was put into liquidation. At the time, it had been unable to pay its debts as and when they fell due, but on a balance sheet basis the company was solvent, because the house was unencumbered. After his appointment the liquidator sought to realise the value of the house. This was not straightforward, because Mr. Jamshab and his family had taken up occupation of the property. Mr. Jamshab claimed an equitable interest in the property. In 2017 the liquidator issued proceedings against Mr. Jamshab in the Chancery Division. By a consent order in that year, Mr. Jamshab agreed to vacate the property on terms as to the holding of a retention from the sale price. In May 2019 the property was sold for about £2.3 million. On 10th February 2020 the proceedings against Mr. Jamshab were stayed on the terms of a Tomlin order, which resulted in Mr. Jamshab being paid £75,000. There are currently about £743,000 held by the liquidator and £778,000 held by Mackrell, a firm of English solicitors who acted for the liquidator throughout.
- [5] Mr. Balengani in the meantime had paid nothing towards the judgment debt awarded against him by Judge Simpkins. The total owed to Mr. Sharifpoor as at 14th April 2020 was £357,770.07. Judgment Act interest at 8 per cent per annum was still accumulating. On 7th February 2020 Mr. Sharifpoor issued an application for a third party debt order against both Framjee and Mackrell in order to ensure

payment of the outstanding judgment debt. The application against Mackrell was not proceeded with and need not concern me. Master Cook granted an interim third party debt order against Framjee on (as is usual) an *ex parte* basis.

[6] Mr. Balengani disputed Mr. Sharifpoor's entitlement to a third party debt order against Framjee. The liquidator had accepted service of the application for the order, but adopted a neutral position as regards the application. The return date was adjourned for detailed argument. Mr. Balengani, by his counsel, took five points before Master Cook:

- (a) There was no debt "due or accruing due" to Mr. Balengani from Framjee.
- (b) Any debt was situated in the BVI, not in England.
- (c) Framjee was not present within the jurisdiction.
- (d) There were technical defects in the application for the interim third party debt order.
- (e) The Court should decline to make the order final in its discretion.

[7] Master Cook in a written judgment of 11th May 2020 rejected ground (a) on the basis that half the surplus from the sale of the house was payable to Mr. Balengani and was therefore an existing debt (even if not yet completely quantified, because there was still money owing to Her Majesty's Commissioners of Revenue and Customs and others). He accepted under (b) that any debt due in respect of the surplus was a situate in this Territory, but held (correctly in my judgment as a matter of BVI law) that this Court would recognise an order of the English Court that payment by Framjee to Mr. Sharifpoor pursuant to a third party debt order was a good discharge of monies owed to Mr. Balengani by Framjee. Under (c) he held that Framjee had submitted to the jurisdiction. Any defects under (d) he waived.

[8] Under ground (e), the Master said:

"30. Mr. Turner [counsel for Mr. Balengani] argued that the Court should not exercise its discretion to make an order as to do so would run counter to well-established principles of public international law and judicial

comity... In particular he submitted that if this Court were to make a [third party debt order] it would interfere with the performance of the functions of an Officer of a foreign Court (i.e. the liquidator) who is required to comply with distributional priorities set out in legislation. He also pointed out that the permission of the Eastern Caribbean Supreme Court would be required to make an equivalent application in that Court due to the statutory moratorium that applies to the commencement of action against it by virtue of section 175(1)(c) of the BVI Insolvency Act of 2003. He submitted that the judgment creditor should not be permitted to circumvent that statutory regime by making the application in this Court and that in the circumstances it cannot be consistent with comity for this Court to make a TPDO against Framjee.”

- [9] The master proceeded to hold that this objection was answered by Mr. Sharifpoor’s undertaking to apply to this Court for retrospective permission to bring the application. It is Mr. Sharifpoor’s application pursuant to that undertaking which I am now considering.
- [10] In my judgment, it is appropriate to grant retrospective permission. Framjee is solvent. Making the payment from Mr Balengani’s share of the assets of the company will not interfere with the liquidation, which is now nearly complete. The policy of the BVI is that debtors should pay their debts.
- [11] It would have been open to Mr. Sharifpoor to have applied to register the English judgment in this jurisdiction and then, just as in England, to have sought a third party debt order against Mr. Balengani’s entitlement in the liquidation. This would have been much more expensive than the procedure actually adopted.
- [12] I note that Mr. Balengani’s approach to this litigation has been effectively a scorched earth policy. There appear to be *prima facie* grounds for making a third party costs order against Mr. Balengani under CPR 64.10. If the necessary evidence (including a schedule of costs) is provided, I would be willing to make an order permitting service on Mr. Balengani’s English solicitors of the notice: see **Starr Investments Cayman II Inc v Ou Wen Lin and another**¹ for the procedure.

¹ BVIHC(COM) 2018/0225 (decided 8th June 2020).

Consideration of whether to make a costs order, and if so in what sum, could then be determined on paper. If costs were awarded, the order could provide that the liquidator do pay that sum to Mr. Sharifpoor out of the monies otherwise payable to Mr. Balengani.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar