

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2020/0006

BETWEEN:

NOVEL BLAZE LIMITED (IN LIQUIDATION)

Appellant

and

CHANCE TALENT MANAGEMENT LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Robert Nader and Ms. Sophie Christodoulou for the Appellant

Mr. Grant Carroll and Mr. Daniel Mitchell for the Respondent

2020: November 23;

2021: April 16.

Civil appeal — Insolvency law — Appeal against order appointing liquidators over company — Locus standi — Whether respondent had standing to apply for appointment of liquidators over appellant — Whether respondent was a secured creditor within meaning of section 9(2) of Insolvency Act, 2003 and was therefore disqualified from making an application to appoint liquidators over respondent — Section 162 of Insolvency Act, 2003 — Whether learned judge erred in exercising discretion to appoint liquidators over appellant — Costs — Whether circumstances of appeal warrant departure from general rule that unsuccessful party should pay costs — Whether costs award should be made against non-party

Novel Blaze Limited (in liquidation) (“Novel Blaze”) and Chance Talent Management Limited (“Chance Talent”) are companies incorporated in the Territory of the Virgin Islands (the “BVI”). Novel Blaze is a minority shareholder in Mobile Internet (China) Holdings Limited (“Mobile Internet”). Novel Blaze owed money to Chance Talent pursuant to a guarantee agreement. The debt was secured by charges over the entire issued share capital in two companies – Rich Kirin Holdings Limited (“Rich Kirin”) and Big Wealth Limited (“Big Wealth”). Rich Kirin is owned by Mobile Internet, and Big Wealth is wholly owned by Rich Kirin.

Chance Talent sent a letter of demand to Novel Blaze for repayment of a portion of the guaranteed sum. Novel Blaze did not repay the debt in accordance with the letter of demand. In November 2019, therefore, Chance Talent served a statutory demand on Novel Blaze for repayment of the sums inclusive of interest. Novel Blaze did not respond to the statutory demand and did not apply to have it set aside.

In March 2020, Chance Talent applied to the Commercial Court to have liquidators appointed over Novel Blaze on the basis that it had failed to comply with Chance Talent's statutory demand, which had not been set aside, and that Novel Blaze was insolvent and unable to pay its debts as they fell due. The liquidation application was issued on the instructions of Mr. Sun Shao Hua ("Mr. Sun"), who is a director of Novel Blaze. Novel Blaze resisted the application on the basis that Chance Talent was a secured creditor as defined by section 9(2) of the Insolvency Act, 2003 ("the Insolvency Act" or "the Act") and therefore had no standing to pursue its liquidation application. The application by Chance Talent was granted by a learned judge of the Commercial Court, who was satisfied that Novel Blaze was insolvent and that Chance Talent was not a secured creditor and therefore had standing to make the application.

Being dissatisfied with the learned judge's decision, Novel Blaze appealed. The issues considered by the Court of Appeal were: (1) whether Chance Talent was a secured creditor within the meaning of section 9(2) of the Insolvency Act, and therefore disqualified from pursuing an application to appoint liquidators over Novel Blaze; (2) whether the learned judge erred in exercising his discretion to appoint liquidators over Novel Blaze; and (3) whether a costs award should be made against Novel Blaze, or alternatively, Mr. Sun, upon whose directions the appeal was launched.

Held: dismissing the appeal; awarding Chance Talent its costs in the lower court to be paid by Novel Blaze and assessed by a judge of the Commercial Court, if not agreed within 21 days; and awarding costs on the appeal to Chance Talent against Novel Blaze to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days, that:

1. The general rule is that the words in a statute must be interpreted and given effect in keeping with their natural and ordinary meaning. This is so particularly where the words of the statute are clear and unambiguous. At the heart of this appeal is the interpretation of section 9(2) of the Insolvency Act which provides that a creditor is a secured creditor of a debtor if it has an enforceable security interest over an asset of the debtor in respect of its claim. The central question therefore is whether, in keeping with the settled principles of statutory interpretation, Chance Talent is a secured creditor within the meaning of section 9(2) of the Insolvency Act, and is therefore disqualified from pursuing an application to wind up Novel Blaze.

Smith v Selby [2017] CCJ 13 (AJ) applied; **Joseph Cadette v Saint Lucia Motor and General Insurance Co. Limited** [2021] ECSCJ No. 472 (delivered 22nd February 2021) followed.

2. The natural and ordinary meaning of the words 'security interest over the assets of the debtor' in section 9(2) of the Insolvency Act mean that a creditor will be a secured creditor if it holds a security interest over the assets of the

debtor, only. To argue that section 9(2) was intended to apply to security interests held over assets of a third party is an impermissible overextension of the clear words of the statute. A security interest held over the assets of a debtor's subsidiaries is simply not a security held over the assets of the debtor. When applied to this case, the effect of section 9(2) is that Chance Talent will only be a secured creditor if it holds an enforceable security interest over the assets of Novel Blaze. On the plain words of the section, there is no basis upon which to conclude that Chance Talent is a secured creditor of Novel Blaze, given that the security interest held by Chance Talent is not over assets of Novel Blaze, but is over the assets of its subsidiaries, Rich Kirin and Big Wealth. The learned judge's reasoning and conclusion on this point therefore cannot be impugned.

Section 9(2) of the **Insolvency Act, 2003** Act No. 5 of 2003 interpreted; **Re Swiber Holdings Ltd** [2018] SGHC 180 applied; **Re Plummer** (1841) 1 Phillips 56 41 E.R 552 applied; **White v Davenham Trust** [2011] EWCA Civ 747; **Ex parte West Riding Union Banking Co.** (1881) 19 Ch D 105 distinguished.

3. The court has a discretion under section 162 of the Insolvency Act to appoint liquidators over a company on the ground of insolvency. In order for this Court to interfere with the learned judge's decision to appoint liquidators over Novel Blaze, it must be demonstrated that the decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore blatantly wrong. It is clear that the judge exercised his discretion to wind up Novel Blaze having found that the company was insolvent within the meaning of the Act and having determined further that there would not be any straight-forward remedy which Chance Talent could pursue to realise its debt. In the totality of circumstances, there is no discernible error in principle that was committed by the learned judge. Therefore there is no basis upon which this Court can interfere with the judge's exercise of discretion to wind up Novel Blaze.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

4. It is the law in relation to a winding up application, as with any court proceedings, that the question of costs is always at the discretion of the court. The general position is that the costs of a company that is the subject of liquidation proceedings, for participating in a winding up application, are to be paid by the company as an expense in the liquidation. The court, however, has the power to depart from this general position and order that the company's costs are to be paid by some non-party who is connected to the liquidation where, in the circumstances, it is just to do so. Critically, the basic principles of natural justice require the party seeking such an order, against a non-party, to give notice of its application and the evidence in support of the application, to the person against whom the order is sought. While it is true that the opposition to Novel Blaze's winding up application and its appeal were commenced as a result of instructions given by Mr. Sun, in his capacity as director of Novel Blaze, his powers as a director to issue

those instructions have not been challenged by Chance Talent. Furthermore, there is no evidence that Mr. Sun was given notice by Novel Blaze of its intention to seek an order for costs against him, as a non-party. Therefore, in the circumstances, it would not be in the interests of justice to make an order for costs against Mr. Sun, and accordingly there is no proper basis to depart from the general rule that costs should be awarded to the winning party (Chance Talent) against the unsuccessful party (Novel Blaze).

Re Humber Ironworks Co (1866) LR 2 E Q 15 applied; **Re Bostels Ltd** [1967] 3 All ER 425 applied; **Re A Company (No.004055 of 1991)** [1991] 1 WLR 1003 applied; **Re Aurum Marketing Ltd (in liquidation)** [2000] 2 BCLC 645 applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an appeal by Novel Blaze Limited (in liquidation) (“Novel Blaze”) against the judgment and order of Jack J [Ag.] made on 8th June 2020, by which the learned judge appointed joint liquidators over Novel Blaze upon the application of Chance Talent Management Limited (“Chance Talent”). Novel Blaze is aggrieved by the decision of the learned judge and has appealed on several grounds. The appeal is strenuously resisted by Chance Talent.
- [2] It is necessary to briefly set out the relevant background to the appeal in order to provide the requisite context. The background is not in dispute. I therefore gratefully adopt the summary that was helpfully provided by learned counsel for the appellant, Mr. Robert Nader, in his skeleton arguments filed in support of the appeal.

Background

- [3] Novel Blaze and Chance Talent are companies incorporated in the Territory of the Virgin Islands (the “BVI”). On 10th June 2015, Novel Blaze entered into a subscription agreement with Mobile Internet (China) Holdings Limited (“Mobile Internet”), Rich Kirin Holdings Limited (“Rich Kirin”), Big Wealth Limited (“Big Wealth”) and the sole director of Novel Blaze, Mr. Sun Shao Hua (“Mr. Sun”), on the one hand, and Chance Talent on the other hand. Novel Blaze holds 29.62% of the issued shares in Mobile Internet. Mobile Internet owns 100% of the issued share capital in Rich Kirin, which in turn holds 100% of the share in Big Wealth. By the subscription agreement, Mobile Internet issued a ‘note

instrument' in the sum of HK \$80,000,000.00 to which Chance Talent agreed to subscribe for a term of 3 years commencing 19th June 2015.

- [4] Novel Blaze and Mr. Sun entered into a deed of guarantee, guaranteeing Mobile Internet's obligations under the subscription agreement. This was supplemented by a supplemental deed of guarantee entered into on 29th March 2016. The parties also executed, on that date, two 'deeds of share charge' which created security in favour of Chance Talent in respect of the current and future obligations of the parties under the subscription agreement. It is of significance that the effect of the deeds of share charge was to create security by way of a charge over 100% of the issued share capital in both Rich Kirin and Big Wealth and not Novel Blaze.
- [5] Mobile Internet paid HK \$40,000,000.00 to Chance Talent in redemption of half of the principal amount of the loan. Mobile Internet then sought to renew the term of the note instrument and it was agreed that between Mobile Internet and Chance Talent that HK \$40,000,000.00 of the principal would be repaid and the balance of HK \$40,000,000.00 would be renewed. Novel Blaze, Mobile Internet and Chance Talent therefore entered into a second supplemental deed to extend the note instrument until 19th May 2019.
- [6] On 19th September 2019, Chance Talent sought to redeem the outstanding sums under the note instrument by presenting a redemption notice to Mobile Internet, by which it demanded repayment of HK \$40,000,000.00 plus interest. Mobile Internet failed to repay the outstanding sums.
- [7] Chance Talent thereafter sent a letter of demand to Novel Blaze as guarantor. Novel Blaze failed to comply with the demand and, on or around 29th November 2019, Chance Talent served a statutory demand on Novel Blaze for repayment of the total sum of HK \$76,185,100.00, being the remainder of the principal owed plus interest. Novel Blaze did not respond to the statutory demand.

The Application Below

[8] On 3rd March 2020, Chance Talent issued an application in the Commercial Court to wind up Novel Blaze on the basis that the company failed to comply with Chance Talent's statutory demand which had not been set aside and that Novel Blaze was insolvent and unable to pay its debts as they fell due. Chance Talent's application was made pursuant to section 162(1)(a) of the **Insolvency Act, 2003** ("the Act" or "the Insolvency Act").¹

[9] Novel Blaze resisted the application on the basis that Chance Talent was a secured creditor as defined by section 9(2) of the Act and therefore had no standing to make an application to appoint liquidators over Novel Blaze. Chance Talent took issue with this contention as the security possessed by it was not provided by Novel Blaze. Chance Talent contended that security provided by a subsidiary of Novel Blaze ought to be equated with security provided by a third party as opposed to being provided by Novel Blaze itself. Chance Talent therefore argued that it was not a secured creditor over the assets of Novel Blaze and had standing to make the application.

Judgment in the Court Below

[10] The learned judge granted Chance Talent's application and ordered that liquidators be appointed over Novel Blaze, but that the appointment be stayed for a period of three weeks. In making this order, the learned judge emphasised that regard had to be paid to the fact that the Insolvency Act governed the application to wind up Novel Blaze. The judge considered section 9(2) of the Act, applied the principles elucidated in **Re Swiber Holdings Limited**² and reasoned that 'the assets of a subsidiary are not assets of the debtor and therefore a charge over the assets of the subsidiary are not such as to render the creditors secured by a security over an asset of the debtor'.³ He further determined, in the circumstances, that he had a discretion as to whether to appoint liquidators over Novel Blaze, and the fact of a third party security does not preclude the court from exercising its discretion to grant an order appointing a liquidator over the debtor. The learned judge was further satisfied that Novel

¹ Act No. 5 of 2003.

² [2018] SGHC 180.

³ Page 18, lines 15-19 of the transcript of proceedings.

Blaze was in fact insolvent and exercised his discretion to appoint liquidators over Novel Blaze.

The Appeal

[11] Novel Blaze has appealed the learned judge's decision on four grounds of appeal. Written submissions were filed by both parties. Based on the oral arguments and the written submissions the following three issues emerge to be resolved by this Court:

- (1) whether Chance Talent was a secure creditor within the meaning of section 9(2) of the Insolvency Act, and was therefore disqualified from pursuing an application to appoint liquidators over Novel Blaze.
- (2) whether the learned judge erred in exercising his discretion to appoint liquidators over Novel Blaze.
- (3) whether a costs award should be made against Novel Blaze, or alternatively, Mr. Sun, upon whose directions the appeal was launched.

Appellant's Submissions

[12] Learned Counsel, Mr. Robert Nader, repeated much of the arguments that were launched in the court below. He accepted that, generally, where security for a debt is provided by a third party, the creditor would have good standing to make an application to wind up the debtor company upon failure to meet the demand for the debt. He however argued that an applicant in liquidation proceedings, who has security over assets owned by the subsidiary of a debtor company, does not have standing to make an application to wind the debtor company up. He posited that the creditor, by exercising its rights, would impact the value of the insolvent estate of the debtor company. In those circumstances, Mr. Nader submitted that the applicant would be considered a secured creditor and therefore would not have standing to make an application for liquidation proceedings. It is noteworthy that Mr. Nader did not provide this Court with any authority in support of this particular proposition, but simply argued that Chance

Talent was so circumstanced and was therefore a secured creditor over the asset of Novel Blaze. He said that the judge was wrong to have favourably entertained Chance Talent's application.

[13] Mr. Nader argued that it is unfair to allow a secured creditor to invoke the class action remedy of liquidation while it continued to hold onto security which, if released, would augment the value of the debtor's insolvent estate as a whole. He submitted that the exercise of Chance Talent's security would involve the sale of the most profitable part of Mobile Internet in which Novel Blaze has a 29.62% stake, and giving up the security would augment the value of Novel Blaze's insolvent estate by enhancing the value of Mobile Internet. In respect of this submission, Mr. Nader sought to rely on the principle of augmentation as recognised in **Ex parte West Riding Union Banking Co.**⁴ He invited this Court to apply the principle of augmentation on the basis that the existence of a secured debt would serve to increase the value of the insolvent company's estate. He argued that a person who retains a security which, if given up, would augment the value of an insolvent estate does not have an admissible claim in the liquidation in respect of that insolvent estate.

[14] Mr. Nader argued that Chance Talent ought not to have been permitted to bring the liquidation proceedings pursuant to section 162(2)(b) of the Act. In those circumstances, Mr. Nader asserted that the only sensible and purposive interpretation of 'asset of a debtor' under section 9(2), consistent with the underlying nineteenth century rationale as to the treatment of secured creditors, is to include indirectly held assets. He maintained therefore that, based on **Ex parte West Riding Union Banking Company**, Chance Talent did not satisfy the criterion of having an admissible claim to liquidate Novel Blaze since it held security over assets indirectly held by Novel Blaze.

[15] Next, Mr. Nader said that the judge ought not to have exercised his discretion since the jurisdiction to wind up a company exists for the benefit of unsecured creditors. He submitted that, on any view of the facts, the learned judge

⁴ (1881) 19 Ch D 105.

improperly exercised his discretion to wind up Novel Blaze. He maintained that, in the circumstances of this case, the judge ought not to have exercised his discretion to wind up the company.

[16] Mr. Nader further submitted that, should this Court agree with him, costs of this appeal and the costs of the liquidation application should be borne by Chance Talent. He stated that Chance Talent seeks to have an order for costs made against Mr. Sun, were the appeal by Novel Blaze to fail. He submitted that should Novel Blaze's appeal be unsuccessful, an order for costs should not be made against Mr. Sun on the basis that such a claim for costs against Mr. Sun, as director of Novel Blaze, would require an application on Chance Talent's part for a third-party costs order pursuant to rule 64.10 of the **Civil Procedure Rules 2000**, which application had not been made. He argued therefore that, in the circumstances, if this Court does not agree with him on the appeal, a costs order ought to be made against Novel Blaze only or this Court ought to direct Chance Talent to make the proper application for costs to be awarded against Mr. Sun.

[17] In light of the above, Mr. Nader urged this Court to allow Novel Blaze's appeal and set aside the order of the learned judge with costs to Novel Blaze on the liquidation application and on appeal.

Respondent's Submissions

[18] In resisting Novel Blaze's appeal, learned counsel Mr. Grant Carroll's principal argument was that the Court should have regard to the definition of 'secured creditor' in section 9(2) of the Insolvency Act. A secured creditor is a creditor who 'has an enforceable security interest over an asset of the debtor in respect of his claim'. He relied on this definition in support of his submission that Chance Talent ought not to be construed as a secured creditor since the assets over which it has security in respect of the debt do not in fact belong to Novel Blaze, but to a separate entity altogether.

[19] Mr. Carroll reminded this Court that it is settled law that a company has its own separate legal personality and relied on the well-known principles set out in

Salomon v Salomon & Co Ltd⁵ for the proposition that ‘subsidiaries are not because of the nature of corporate entities, the debtor’. He also directed this Court’s attention to the fact that Rich Kirin and Big Wealth are subsidiaries of Mobile Internet, companies in which Novel Blaze holds only a minority interest in the amount of 29.62%. He argued therefore that Novel Blaze does not have direct control of the security that was given to Chance Talent since its share ownership percentage of Mobile Internet is insufficient for it to exercise any control over Rich Kirin and Big Wealth without the support of other shareholders.

[20] He insisted therefore that while Novel Blaze holds shares in its subsidiaries, Chance Talent does not hold any security over an asset of Novel Blaze. Mr. Carroll maintained that the definition of a secured creditor in section 9(2) of the Insolvency Act is clear and unambiguous. He reiterated that the Court should accord the relevant statutory provisions, its ordinary and natural meaning. Mr. Carroll stated further that the assets over which Chance Talent holds security are not assets which would prove in the liquidation of Novel Blaze. He insisted that in determining if a person or entity is a secured creditor, one must consider where the security lies. He was adamant that the authorities are clear that where the security is held over assets of a third party, that creditor would not be considered a secured creditor in respect of the debtor, as the security must be held over the assets of the debtor itself in order to fill the criteria of being a secured creditor. He argued further that an important principle of bankrupt law is that where the creditor holds security over the estate of a third party, he is still entitled to prove in the liquidation of the debtor company and also to realise the security since that security is not one which can augment the bankrupt estate of the debtor. He relied on **Re Plummer**,⁶ **White v Daveham Trust**⁷ and **Re Swiber** for this submission. He therefore submitted that the learned judge was correct, in the circumstances, to find that Chance Talent had the required standing to make the liquidation application.

⁵ [1897] A.C. 22.

⁶ (1841) 1 Phillips 56 41 E. R 552.

⁷ [2011] EWCA Civ 747.

- [21] Mr. Carroll asserted that if Chance Talent were not able to claim on the estate of a guarantor, then there would be dire consequences in the realm of finance law, certainly in the BVI, if such a judgment were to be countenanced and followed. He stated further that if Mr. Nader's position were to be taken as correct then it would render any guarantee from a parent company in the corporate structure virtually worthless. In the circumstances, Mr. Carroll urged this Court to find that the only natural and ordinary interpretation of the relevant statutory provision is that Chance Talent falls within the definition of an unsecured creditor and the learned judge did not therefore err in his interpretation or application of the law in finding that Chance Talent had the required standing to apply to wind up Novel Blaze.
- [22] Mr. Carroll criticised Novel Blaze's purported reliance on **Ex parte West Riding Union Banking Company** in seeking to buttress its case. He said that the main issue before the Court is the interpretation of the definition of the statute and therefore that **Ex parte West Riding** gives Novel Blaze no assistance.
- [23] Mr. Carroll also briefly addressed the exercise of the judge's discretion. He reminded this Court that the judge retains a discretion to wind up a company under section 162(1) of the Insolvency Act in circumstances where the company is insolvent. He stressed that, in this respect, the learned judge did not err in exercising his discretion to wind up Novel Blaze. He said that it was clearly open to the judge to exercise his discretion in the manner he did, and it cannot be said to be plainly wrong. This Court should therefore refrain from interfering with judge's decision in that regard.
- [24] On the matter of costs, Mr. Carroll submitted that, in the event this Court dismisses Novel Blaze's appeal, the costs of the appeal should be borne by Mr. Sun who provided instructions for bringing the appeal. He stated that costs ought not to be awarded against Novel Blaze itself since it is already deeply insolvent and a costs order against it would necessarily affect Chance Talent and the other creditors' ability to prove claims in the liquidation of Novel Blaze.

- [25] In all of the circumstances, Mr. Carroll urged this Court to dismiss the appeal, affirm the decision of the learned judge and award costs to Chance Talent against Mr. Sun as director and representative of Novel Blaze who was instrumental in bringing the appeal and providing instructions for the appeal.

Discussion and Conclusion

- [26] The starting point of the discussion in this appeal must, of necessity, be the relevant provisions of the Insolvency Act.

Insolvency Act, 2003

- [27] The Insolvency Act governs, among other things, applications to wind up/liquidate/appoint liquidators over a company on the basis of the company's insolvency. Section 159 (1) provides as follows: 'The court may appoint the official Receiver or an eligible insolvency practitioner as liquidator of a company on an application under section 162.'

- [28] Section 162 of the Act details the circumstances in which a court can liquidate a company/appoint liquidators over a company. It states:

"(1) The Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if

- (a) the company is insolvent;
- (b) the court is of the opinion that it is just and equitable that a liquidator be appointed
- (c) the court is of the opinion that it is in the public interest for a liquidator to be appointed." (Underlining supplied)

- [29] Section 8(1) of the Act expressly describes what it means for a company to be insolvent in the following way:

"8. (1) A company or a foreign company is insolvent if

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either
 - (i) the value of the company's liabilities exceed its assets,
 - or
 - (ii) the company is unable to pay its debts as they fall due."

[30] Critically, an application to liquidate a company under section 162(1) may only be made by a person specified in section 162(2). That section, so far as it is material, provides as follows:

“(2) Subject to subsections (3), (4) and (5), an application under subsection (1) may be made by one or more of the following:

- (a) ..
- (b) a creditor;
- ...” (Underlining supplied)

Subsections (3), (4) and (5) of section 162, speak to the statutory conditions relevant to liquidation applications made by a member of a company and therefore have no application to this appeal.

[31] The Act further defines who falls to be deemed a creditor for the purposes of insolvency proceedings. At section 2, the Act states that ‘creditor’ and ‘secured creditor’ have the meanings specified in section 9. Section 9 of the Act reads as follows:

“9. (1) A person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in

- (a) the liquidation of the debtor, in the case of a debtor that is a company or a foreign company; ...

(2) A creditor is a secured creditor of a debtor if he has an enforceable security interest over an asset of the debtor in respect of his claim.

(3) An unsecured creditor is a creditor who is not a secured creditor.”

[32] Section 9 makes reference to ‘an admissible claim in the liquidation of the debtor’. Section 11(2) of the Act sets out the liabilities which are admissible as claims in the liquidation of companies. Section 11(2) states:

“Subject to section 12, the following liabilities are admissible as claims in the liquidation of a company of a company...

- (a) liabilities of the company... at the relevant time;
- (b) liabilities of the company... incurred before the relevant time; and
- (c) any interest that may be claimed in accordance with this Act or the Rules.”

The ‘relevant time’ is defined by section 11(1) as the ‘time of commencement of liquidation’.

[33] I turn now to address the first issue.

Issue 1 – Whether Chance Talent was a secured creditor within the meaning of section 9(2) and was therefore disqualified from pursuing an application to appoint liquidators over Novel Blaze

[34] It is common ground that the threshold requirements of section 8(1) and section 8(2)(a) had been met in this case. Indeed, it is indisputable that Novel Blaze owes a debt to Chance and the latter demanded payment. This was followed by the statutory demand. Novel Blaze, being unable to liquidate that debt, was therefore deemed to be insolvent by virtue of section 8 of the Insolvency Act.

[35] The dispute central to the appeal lies elsewhere. Section 162 states, as alluded to earlier, that a creditor may apply for the appointment of a liquidator. The definition of ‘creditor’ contained in section 9(1) makes it clear that a creditor may only apply for the appointment of liquidators, if the creditor has an admissible claim in the liquidation. The uncontroverted evidence is that Chance Talent holds security over Rich Kirin Holdings and Big Wealth Limited. The very narrow question which arises in this appeal therefore is whether, in circumstances where Chance Talent holds security over Rich Kirin Holdings and Big Wealth Limited, it can be said that Chance Talent has an ‘enforceable security interest over an asset of [Novel Blaze]’ and is therefore a secured creditor of Novel Blaze. Stated differently, the case when properly construed, revolves around the matter of the security, that is, whether Chance Talent falls to be a secured creditor within the terms of section 9(2) of the Act.

[36] The resolution of the competing positions between Novel Blaze and Chance Talent brings into focus the interpretation of section 9(2) of the Act. This is so even though, in the oral submissions made before us, there has been much emphasis on the issue of standing, as distinct from the nature of the security possessed by Chance Talent in the context of section 9(2). For reasons which will become clearer shortly, in my view, to approach the matter primarily from that perspective served to confuse the real issue to an extent.

[37] Stripped of all its niceties, at the heart of this appeal is the interpretation of section 9(2) of the Act. For convenience, I will recite the provision again: ‘A creditor is a secured creditor of a debtor if he or she has an enforceable security interest over an asset of the debtor in respect of his or her claim.’ (Underlining supplied)

[38] As a general rule, the words in a statute must be interpreted and given effect in keeping with their natural and ordinary meaning. In **Smith v Selby**⁸ learned Byron PCCJ writing on behalf of the Caribbean Court of Justice gave judicial recognition to this principle. Recently, in **Joseph Cadette v Saint Lucia Motor and General Insurance Co. Limited**⁹ at paragraphs 43 to 45, this Court discussed the longstanding principles attendant on the interpretation of statutory words, and expressed itself thusly:

“It is settled law that this Court must give primacy to the natural ordinary meaning of words used in the context of the legislation, from which the court may only depart where the natural and ordinary meaning of the words give rise to an undesirable end result. The principle was given judicial recognition by this Court in **The Labour Tribunal v St. Lucia Electricity Services Limited**. This was recently affirmed in the Board in **Attorney General of the Turks and Caicos Islands v Misick and Others** where the Board stated that ‘...the first question is what is the natural or ordinary meaning of the particular words or phrases in their context...’. The Board in **Misick** further affirmed that:

‘It is only when that [natural or ordinary] meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase...’.

Along similar lines, the learned President of the Caribbean Court of Justice (‘the CCJ’) Sir Dennis Byron PCCJ (as he then was) enunciated as follows in **Selby**:

‘[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge’s view of what is just and expedient.’.

⁸ [2017] CCJ 13 (AJ).

⁹ [2021] ECSCJ No. 472 (delivered 22nd February 2021).

Critically, the learned Byron PCCJ stated as follows in relation to the use of the social and historical context when interpreting statutory words:

‘[10] The social and historical context can be decisive in ensuring that the words are interpreted to give effect to the meaning and purpose of the Act. But that does not extend to distorting the language used by Parliament. It must be remembered that the court’s responsibility is to give effect to the intention of Parliament not to correct legislation to ensure that it is just and expedient. If the court considers that there is a variance between the language used and its understanding of the special purpose of the Act it should be left to Parliament to amend the legislation. Where the words of the statute are not ambiguous are not ambiguous there could be no justification for interpreting them in a manner that would alter their meaning, unless it may be necessary to resolve an inconsistency within the statute itself. So, the conjecture that Parliament may have intended a meaning that is different to the words is not a sufficient reason for departing from their ordinary and natural meaning.

[11] In giving effect to these principles the court, when interpreting any part of a statute, should review other parts of the Act which throw light upon the intention of the legislature and may show how the provision ought to be construed. The underlying principles is that the court must use the available material to discover and give effect to the intention of Parliament. There can be no doubt that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation. (emphasis supplied).”

- [39] Applying these pronouncements to the appeal at bar, the words of section 9(2) must be given their natural and ordinary meaning. In my view, the natural and ordinary meaning of section 9(2) and in particular the words ‘security interest over the assets of the debtor’ (underlining supplied) mean that a creditor will be a secured creditor if a security interest is held by the creditor over the assets of the debtor, only. To say that the words of section 9(2) apply to security interests held by a creditor over assets of a third party is, in my view, an impermissible overextension of the clear words of the statute. A security interest held over the assets of a debtor’s subsidiaries is simply not a security held over the assets of the debtor. When applied to this case, therefore, the effect of section 9(2) is that Novel Blaze will only be a secured creditor if it holds an enforceable security interest over the assets of Novel Blaze. The words of the section are clear and unambiguous. They mean what they say. On the plain words of the section

alone, I am not persuaded that this Court should find that Chance Talent is a secured creditor of Novel Blaze, given that the security interest held by Chance Talent is not over assets of Novel Blaze.

- [40] By way of emphasis, and in my view, the clear and unambiguous words ‘over the asset of the debtor’ must be accorded their natural and ordinary meaning. Accordingly, there is no need to have recourse to any sort of purposive interpretation as advocated by Novel Blaze. If any authority is needed to buttress the natural and ordinary meaning of section 9(2), and I am not of the respectful view that any is needed, the case of **Re Swiber Holdings Ltd** which was cited by the learned judge, suffices. In that case, it was held that a creditor whose claim against the debtor company is secured by a third-party is not a ‘secured creditor’ but is to be treated as an unsecured creditor with an admissible claim in the liquidation of the debtor company. Also highly supportive of my view is **Re Plummer**, where the court held:

“For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing and therefore if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt: but if he has a security on the estate of a third person that principle does not apply: he is in that case to prove for the whole amount of his debt, and also to realise the security...”.
(Underlining supplied)

- [41] Further support can be found in **White v Davenham Trust**¹⁰ where the English Court of Appeal held that:

“If however the security which the creditor holds is given not by the particular debtor but by a third party, whoever that third party may be, that security is not over an asset which can have any effect on the bankrupt estate of the particular debtor and it is accordingly irrelevant.... The case of third party security is similar to that of security given by the debtor in one respect since the existence of the security is no answer to a personal claim for payment. On the other hand it is different from the case of security given by the debtor because security by a third party is of no relevance to the debtor's estate as such since the asset over which the security exists can never form part of the assets of the particular debtor divisible between his creditors.

...

¹⁰ [2011] EWCA Civ 747.

Thus the authorities show that the existence of third party security does not affect the eventual realisation by insolvency procedures of the assets of the debtor.”

[42] From all that I have said, it is apparent that I am of the view that words ‘over the assets of the debtor’ contained in section 9(2) of the Insolvency Act are clear and unambiguous and should be construed so as to give them their natural and ordinary meaning.

[43] I am also far from persuaded that Novel Blaze is able to rely on the principle of augmentation as recognised in **Ex parte West Riding**. In **Ex parte West Riding**, Jessel MR stated that:

“The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves. That is the principle of the whole thing. The only question is whether, if the security were given up, it would augment the estate? Of course, if the security was given by a stranger and you were to cancel it, you would not augment the bankrupt's estate to the extent of one farthing, and consequently such a security need not be given up.”

[44] I am unable to see how that principle can be read into the clear and ordinary meaning of section 9(2) of the Act. **Ex parte West Riding** is vastly distinguishable from the appeal at Bar. In that case, there was no issue of ownership by subsidiaries or indirect ownership of the secured asset. That case dealt with a situation where the creditor's security interest was in leasehold property owned equally by the debtor and his partner and the secured creditor had to surrender one-half of the value of its security over the jointly owned property. The case dealt with jointly owned property that enhanced the value of the debtor's estate when surrendered by the secured creditor.

[45] Novel Blaze's position is vastly different. Novel Blaze does not own the secured asset and the principle in **Ex parte West Riding**. I am therefore of the considered view that it would not have been open to the judge to adopt the flexible approach in **Ex parte West Riding**. It would be strange, to say the least, to rely on the principle of augmentation which is based on an entirely different factual circumstances in order to construe the clear and unambiguous wording

of section 9(2) of the Act. In my opinion, it is wrong to seek to circumvent the proper and legitimate claim by Chance Talent by importing the **Ex parte West Riding** approach into the clear and unambiguous words of section 9(2) of the Act. A security interest in an asset that a company does not own, but has a shareholding interest in that company, the latter which owns the secured asset does not make Chance Talent a secured creditor within the meaning of section 9(2) of the Act. Chance Talent is simply not a secured creditor over Novel Blaze's assets.

[46] Consequently, the judge's decision cannot be impugned in so far as he held that the fact that Chance Talent held the security over the assets of a subsidiary of Novel Blaze does not suffice to establish that it held security over Novel Blaze. In no wise could Chance Talent be construed as a secured creditor under section 9(2) of the Insolvency Act since the assets it holds do not belong to the debtor Novel Blaze but rather to a third party. The learned judge therefore quite properly held that Chance Talent, as an unsecured creditor, had an admissible claim in the liquidation of Novel Blaze since it was not a secured creditor and therefore had standing to bring the application pursuant to section 162 of the Act.

[47] I turn now to the second issue.

Issue 2 – The Judge's Exercise of discretion

[48] This Court has to determine whether, in the totality of circumstances, the learned judge erred in exercising his discretion to wind up the insolvent Novel Blaze. In the court below, the learned judge held that in the circumstances he did have a discretion to appoint liquidators of Novel Blaze. He stated at pages 18 to 19 of the transcript as follows:

"In those circumstances, in my judgment, [Novel Blaze] has not shown that Chance Talent is a secured creditor and therefore the usual consequences flow. I accept that I have a discretion as to, whether to appoint a liquidator. There could be, for example, an extreme case where the security provided by the third party was a bank which provided on demand performance bond where nothing would be simpler for the creditor to claim against the performance bond from the bank. In those circumstances it may well be that the [c]ourt exercising

its discretion against a guarantor would decide not to appoint a liquidator on the basis that the creditor had a much simpler and more straight-forward remedy.

I don't accept on the facts of this case that there would be any straight-forward remedy against a third party quite apart from the issues about valuation going against the assets of these two subsidiaries is not necessarily straight-forward.

One starts with the proposition that a debtor should pay its debts... The fact that there's third party security, in my judgment, is not such as to mean the Court should exercise its discretion against the grant of an order appointing a liquidator."

[49] In order for this Court to interfere with the judge's decision in this regard, Novel Blaze must satisfy the high threshold of demonstrating that the judge has incorrectly exercised his discretion to appoint liquidators over Novel Blaze. In our court, **Dufour and Others v Helenair Corporation Ltd and Others**¹¹ is regarded as the leading authority on this principle. **Dufour** requires Novel Blaze to show that, (i) the judge erred in principle by failing to account for or give too little or too much weight to any relevant factors, or accounting for or being influenced by irrelevant factors; and (ii) as a result of this error, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and can therefore be said to be blatantly wrong.

[50] The learned judge very clearly had the power under section 162(1) of the Insolvency Act to appoint liquidators over Novel Blaze, upon the application of a creditor (Chance Talent) once satisfied that the company was insolvent within the meaning of the Act. From the excerpts of the transcript set out above, it is clear that the learned judge exercised his discretion to wind up Novel Blaze having found that the company was insolvent within the meaning of the Act and having determined further that there would not be any straight-forward remedy against a third party for realising the debt.

[51] Having reviewed the totality of circumstances, I am of the considered view that the learned judge committed no error in principle of the nature set out in **Dufour**.

¹¹ (1996) 52 WIR 188.

Chance Talent having proven that Novel Blaze was clearly insolvent within the meaning of section 162(1)(a) of the Act, it was open to the learned judge to exercise his discretion to appoint liquidators over Novel Blaze and to make an order to that effect. I find therefore, in the circumstances, that the learned judge was entitled to exercise his discretion as he did. His decision on this issue cannot be impugned. Consequently, the arguments on this issue fail and the learned judge's exercise of discretion to appoint liquidators over Novel Blaze is affirmed.

Issue 3 – Costs

[52] I turn now to the issue of costs. Chance Talent has enjoyed unqualified success both in prosecuting its application in the court below and in defending the appeal by Novel Blaze before this Court. It is the law in relation to a winding up application, as with any court proceedings, that the question of costs is always at the discretion of the court. The general rule is that costs are awarded to the winning party against the unsuccessful party. Chance Talent therefore having successfully resisted the appeal, is accordingly entitled to its costs in accordance with the general rule. As earlier stated, Mr. Carroll argued before us that costs should be awarded against Mr. Sun, the director under whose instructions Novel Blaze's appeal was brought. I agree with Mr. Nader however that such an order is not appropriate in the circumstances.

[53] The costs of a company, which is the subject of liquidation proceedings, for participating in a winding up application, are usually paid by the company as an expense in the liquidation. This general position is evidenced in cases such as **Re Humber Ironworks Co**¹² and **Re Bostels Ltd.**¹³ A court however has the power to depart from this general position and order that the company's costs are to be paid by some non-party who is connected to the liquidation. This was given judicial recognition in cases such as **Re A Company (No.004055 of 1991)**¹⁴ and **Re Aurum Marketing Ltd (in liquidation)**.¹⁵

¹² (1866) LR 2 E Q 15.

¹³ [1967] 3 All ER 425.

¹⁴ [1991] 1 WLR 1003.

¹⁵ [2000] 2 BCLC 645.

[54] As stated in **Re Aurum Marketing Ltd**, the court may order a non-party to pay costs if, 'in all the circumstances, it is just to do so'.¹⁶ Critically, the basic principles of natural justice would require the party seeking such an order to give notice of its application and the evidence in support, to the person against whom the order is being sought. In other words, before any such order can be properly made, fairness dictates that the non-party must be apprised of the basis upon which the applicant is seeking costs against them, and be given an opportunity to be heard.

[55] While I am of the view that Novel Blaze's resistance of Chance Talent's winding up application and by extension its prosecution of the appeal were unmeritorious, given the totality of the circumstances, I am unpersuaded that the usual costs order should not be made against Novel Blaze but should be made against Mr. Sun based on the fact that Novel Blaze's appeal was brought on his instructions. Mr. Sun's residual powers as a director of Novel Blaze to issue instructions for the commencement of this appeal have not been challenged by Chance Talent. Additionally, there is no evidence that Mr. Sun has been given notice by Novel Blaze of its intention to seek an order for costs against him, as a non-party. Mr. Sun therefore has had no opportunity to be heard on this point. In these circumstances, I am of the view that it is not in the interests of justice to make an order for costs against Mr. Sun, and accordingly there is no proper basis to depart from the general rule that costs should be awarded to the winning party (Chance Talent) against the unsuccessful party (Novel Blaze).

[56] I therefore award costs to Chance Talent to be paid by Novel Blaze in the appeal. These costs are to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days of the date of this judgment. Novel Blaze will also pay Chance Talent its costs in the court below to be assessed by a judge of the Commercial Court, if not agreed within 21 days of this judgment.

¹⁶ [2000] 2 BCLC 645 at p.654.

Conclusion

[57] Given the totality of the circumstances and for the reasons that I have given, I would dismiss the appeal by Novel Blaze and affirm the decision of the learned Jack J [Ag.]. Chance Talent shall have its costs in the lower court to be paid by Novel Blaze and assessed by a judge of the Commercial Court, if not agreed within 21 days. Costs on the appeal are awarded to Chance Talent against Novel Blaze. These costs are to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days of the date of this judgment.

[58] I gratefully acknowledge the assistance of all learned counsel in this appeal.

I concur.
Gertel Thom
Justice of Appeal

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

By the Court

Chief Registrar