

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2020/0006

BETWEEN:

NOVEL BLAZE LIMITED (IN LIQUIDATION)

Appellant/Applicant

and

CHANCE TALENT MANAGEMENT LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

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

Justice of Appeal [Ag.]

On written submissions:

Mr. Robert Nader for the Appellant/Applicant

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

2020: July 9.

Interlocutory proceedings — Application for stay of order appointing liquidators pending determination of appeal — Principles governing grant of stay pending appeal — Whether appeal has a strong likelihood of success — Whether failure to grant stay of order appointing liquidators would render appeal nugatory — Exercise of discretion by learned trial judge under section 162 of the Insolvency Act, 2003 to appoint liquidator

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an application by Novel Blaze Limited (in liquidation) (“the Company”) for an order staying the order of the Commercial Court made on

8th June 2020 appointing liquidators of the Company (“the Order”) pending the determination of its appeal to the Court of Appeal against the Order.

Background

- [2] The Company is a Virgin Islands company. The respondent, Chance Talent Management Limited, provided loan financing to Mobile Internet (China) Holdings Ltd., a traded company on the Hong Kong Stock Exchange that has substantial interests in the packaging and mobile gaming industries (“Mobile Internet”).

- [3] The Company holds 29.62% of the issued shares in Mobile Internet. Mobile Internet owns 100% of the shares of Rich Kirin Holdings Ltd. which in turn owns 100% of the shares of Big Wealth Limited (“the Subsidiaries”). The Subsidiaries own Mobile Internet’s packaging business.

- [4] The Company guaranteed the repayment of the loans to the respondent if Mobile Internet defaulted on its repayment obligations under the loan documents. As security for the loans, Mobile Internet charged its shares in the Subsidiaries to the respondent.

- [5] Mobile Internet defaulted on its repayment obligations and by letter dated 19th October 2019 the respondent demanded payment of the sum of HK \$76,185,100.00 (“the Debt”) from the Company under the terms of the guarantee. The Company did not comply with the demand and on 29th November 2019, the respondent served a statutory demand on the Company for payment of the Debt. The Company did not, as it was entitled to do, apply to the Commercial Court under section 156 of the **Insolvency Act, 2003**¹ (“the Act”) to set aside the statutory demand and the Company is therefore deemed to be insolvent under section 8(1) of the Act. It is clear from the evidence and the written submissions of counsel for the Company that it accepts that it is indebted to the respondent. Therefore, the respondent has an admissible claim in the liquidation of the

¹ Act No. 5 of 2003.

Company unless the respondent is a secured creditor for the Debt within the meaning of section 9(2) of the Act.²

- [6] Following failed negotiations between the parties to settle the Debt, the respondent applied under section 162 of the Act to appoint liquidators of the Company based on its failure to satisfy the statutory demand, and that it is insolvent and unable to pay its debts.
- [7] On Friday 24th April 2020, Mr. Robert Nader, filed evidence opposing the winding up application which was scheduled to be heard on Monday 27th April 2020. Jack J (“the judge”) adjourned the hearing to 8th June 2020 to allow the parties additional time for further settlement discussions. The contested hearing proceeded on 8th June 2020. The judge granted the application and appointed Messrs. Roy Bailey of Ernst & Young Ltd. and Matt Ng and So Kit Yee Anita, both of Ernst & Young Transactions Limited, as joint liquidators of the Company (“the Liquidators”). The judge suspended the order for three weeks ending on 29th June 2020 to allow further discussions towards settlement. The further discussions failed and the order became effective on 29th June 2020.
- [8] On 22nd June 2020, the Company filed a notice of appeal against the judge’s order containing three grounds of appeal which assert that the learned judge erred by: (i) treating the respondent as an ordinary creditor with an admissible claim in the liquidation of the Company and not as a secured creditor over assets indirectly owned by the Company which exceeded the value of the Debt; (ii) finding that the respondent was a creditor within the meaning of section 9 of the Act and had standing to apply for the winding up of the Company as a creditor under section 162; and (iii) not finding that the statutory demand was defective.
- [9] On 25th June 2020, the Company applied on an urgent basis for a stay of the judge’s order pending the determination of the appeal. The grounds of the

² Section 9 of the Act is set out in paragraph 12 below.

application are that the appointment of liquidators will severely and irreversibly damage the value of the Company and its assets, and in practical terms render the appeal nugatory. Further, a stay will not prejudice the respondent because it is fully secured for the value of the Debt. Although not stated as a ground of the application, the Company's evidence and written submissions assert that it has strong grounds of appeal against the judge's order appointing the Liquidators and a stay should be granted so that the appeal will not be rendered nugatory.

Stay pending appeal

[10] The Company relied on this Court's decision in **C-Mobile Services Limited v Huawei Technologies Co. Ltd**³ where Blenman JA, at paragraph 30, listed the five principles relevant to the grant of a stay pending appeal:

- (i) The court must take into account all of the circumstances of the case.
- (ii) A stay is the exception rather than the general rule.
- (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (iv) 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.
- (v) 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).

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. In this application, the

³ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

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. I will deal with these two elements, always bearing in mind elements (i), (ii) and (iv).

Prospects of success on appeal

- [11] The Company's chances of success on appeal rest heavily on whether the respondent is a secured creditor that has not surrendered its security and is therefore not a creditor entitled to apply under the Act for the appointment of liquidators. The resolution of this issue involves a consideration of the facts and the relevant provisions of the Act.
- [12] The relevant provisions of the Act are section 9 which defines a creditor and a secured creditor; section 162 which stipulates that a creditor can apply for an appointment and, by extension, that a secured creditor cannot apply; and sections 211 and 212 which provide that a secured creditor can surrender his security and prove in the liquidation as an unsecured creditor. The crucial section, and the one that will have to be resolved in the appeal, is section 9 which reads:
- “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; or
- (b) the bankruptcy of the debtor, in the case of a debtor who is an individual.
- (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.”
(Underlining added)
- [13] The Company submitted that the respondent is a secured creditor because it holds security for the repayment of the loans in the form of the charge over the shares that Mobile Internet owns in the Subsidiaries. The Company owns 29.62% of the shares in Mobile Internet and therefore owns, indirectly, an interest in the

underlying secured asset. If that asset is surrendered by the respondent, the value of the company's estate (the 29.62% shareholding in Mobile Internet) will be enhanced by an amount greater than the value of the Debt. Therefore, the respondent must surrender the security to become an ordinary creditor. The Company supported its position by reference to the judgment of Jessel MR in **Ex parte West Riding Union Banking Company; In Re Turner**⁴ where the Master of the Rolls stated:

“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?”

- [14] The **West Riding** case deals 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. There was no issue of indirect ownership of the secured asset. The case is important because it dealt with jointly owned property that enhanced the value of the debtor's estate when surrendered by the secured creditor. The Company in this matter is in a very different position. It does not own the secured asset and the principle in the **West Riding** case does not advance its position.
- [15] The Company continued by submitting that the trial judge should not have adopted the strict approach to section 9(2) of the Act and should have followed the more flexible approach in the **West Riding** case of deciding whether the surrender of the security interest held by the respondent would have enhanced the value of the Company's estate. Not having surrendered its security, the respondent continued to be a secured creditor and had no standing to apply under section 162 of the Act.

⁴ (1881) 19 Ch D 105.

- [16] The Company also challenged the judge's failure to question the validity of the statutory demand because the demand did not comply with the provisions of section 155(3) of the Act which sets out the procedure for a secured creditor to use when relying on a statutory demand.
- [17] The respondent countered by submitting that the meaning of section 9(2) is clear – the creditor's security interest must be in 'an asset of the debtor'. A security interest in an asset that the Company does not own but has a shareholding interest in the company that owns the secured asset (Mobile Internet) does not make the respondent a secured creditor within the meaning of section 9(2) of the Act. The respondent was not required to surrender its security interest because it was not an interest in 'an asset of the debtor'. Therefore, the respondent was an ordinary creditor with an admissible claim within the meaning of section 9(1) of the Act and had standing to apply under section 162 for the appointment of the Liquidators.
- [18] This debate raises an issue which I am not called upon to resolve on this application. Suffice it to say that I have reviewed the evidence, the notice of appeal and the submissions of both parties and I am not satisfied that the notice of appeal raises 'strong grounds of appeal or a strong likelihood that the appeal will succeed'. This finding weighs heavily against the grant of a stay pending appeal.
- [19] The trial judge did not rest his conclusion solely on the finding that the respondent had standing to apply for the appointment of the Liquidators. He went on to consider the Court's discretion under section 162(1) of the Act which provides that the Court may appoint liquidators on any of the listed grounds in sub-section (1). He considered whether the respondent had a simpler and more straightforward remedy by realising the secured asset and concluded:
- "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, and here there is no doubt that Novel Blaze do owe just under a hundred million US⁵ dollars to Chance Talent. 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."⁶

[20] The Company will have to show on appeal that the judge erred in the exercise of his discretion in coming to this conclusion. The test for setting aside the exercise of a trial judge's discretion is well known and has been repeated in many cases by this Court. The passage that is most often relied on is that of the former Chief Justice, Sir Vincent Floissac, in **Dufour and Others v Helenair Corporation Ltd and Others**⁷ where he said:

"We are thus here concerned with an appeal against a judgment by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

The test is in two stages – the trial judge must have erred in principle and as a result, his decision was outside the generous ambit of reasonable disagreement or was blatantly wrong. The judge exercised his discretion based on the evidence that was before him and considered, correctly, the relevant legal principles.

[21] I note also that there is no separate ground of appeal challenging the manner in which the judge exercised his discretion.

[22] In the circumstances, I am not satisfied that there is a realistic prospect of disturbing the exercise of the trial judge's discretion.

⁵ This is an obvious typographical error. This should be Hong Kong dollars.

⁶ Transcript in Chamber Proceedings, p. 19, lines 9 – 20.

⁷ (1996) 52 WIR 188.

Appeal nugatory

- [23] The Company's primary reason for applying for a stay of the judge's order pending appeal is that the appeal will be rendered nugatory if a stay is not granted. The Company argues that the appointment of the liquidators will; damage the value of its shares in Mobile Internet and the interests of other investors; adversely and irretrievably affect the relationship that the Company, Mobile Internet and the Subsidiaries have with trade creditors; result in the sale of its shares in Mobile Internet in a manner that is irreversible; and the Liquidators will appoint new boards of directors of Mobile Internet and the Subsidiaries which will have an adverse effect on those companies. The last point was scaled down in submissions to say that the Liquidators will appoint new directors of the Company. The scaling down is well advised because the Liquidators will have control of only a minority interest in Mobile Internet which will not give them the power to affect the composition of the board of Mobile Internet, far less the boards of the Subsidiaries.
- [24] Commenting on these matters very briefly, there is no doubt that the appointment of liquidators can have a devastating effect on a company. It is a draconian remedy that usually results in the 'death' of the company. This is why it is important to grant a stay of a winding up order when the Court is satisfied that a proper basis has been established, and if a stay is not granted the appeal will be rendered nugatory. With one exception, I am not satisfied that the matters listed in the preceding paragraph are so deleterious as to be irreversible if the Company is successful on the appeal. The exception is that the sale of the Company's shares will not be easily reversible or retrievable. The Company can purchase new shares in Mobile Internet, but that would be subject to availability and price at an uncertain time in the future. But this has to be weighed against the fact that the Company is insolvent and the finding that it does not have strong grounds of appeal or a strong likelihood that the appeal will succeed.

[25] In carrying out the balancing exercise, I have also considered that there are insufficient reasons for denying the respondent the fruits of its victory in the lower court. Further, the Company did not comply with the demands for payment of the Debt, including the statutory demand, and it is deemed to be insolvent. It has also admitted that the Debt is owed. It has had ample opportunity to pay the Debt or to agree a payment plan with the respondent. Finally, the Company has not produced any evidence of how it proposes to settle the Debt.

Conclusion

[26] For all of the reasons above I would refuse the Company's application for a stay of the order appointing the Liquidators pending the hearing of the appeal. The respondent will have its costs of the application to be paid out of the assets of the Company.

I concur.

Dame Janice M. Pereira, DBE.

Chief Justice

I concur.

Gerard St. Clair Farara, QC.

Justice of Appeal [Ag.]

By the Court

Chief Registrar