

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHCV2010/010

**IN THE MATTER OF WELLGATE INTERNATIONAL LTD
AND
IN THE MATTER OF SECTION 162 OF THE INSOLVENCY ACT, 2003
BETWEEN:**

CRASTVELL TRADING LTD

Applicant

and

WELLGATE INTERNATIONAL LTD

Respondent

Appearances: Mr Anthony Lynton for the Applicant Crastvell Trading Limited
Mr Mark Forte and Ms Tameka Davis for the Respondent Wellgate International Limited
Mr Kissock Laing for Trafalgar Capital SARL
Ms Aisling Dwyer for ten other opposing creditors

[2010: 4, 9 March 2010]

JUDGMENT

(Application for appointment of liquidator – judgment creditor's application – opposed by company on grounds that it had prospect of realisations which could pay off applicant's debt – opposing creditors with debts totaling more than the debt due to the applicant by the respondent company – whether application should be adjourned to await outcome of prospective realisations in respondent's wholly owned subsidiary – what weight to give to wishes of opposing creditors where no

alternative insolvency regime proposed – weight to be given to views of connected party creditors)

- [1] **Bannister J [ag]:** This is an application by Crastvell Trading Limited ('Crastvell') for the appointment of Mr Andrew Bickerton as Liquidator of WellGate International Limited ('WellGate'). The application is based upon a judgment debt of some US\$8.57 million. That debt was the foundation of a statutory demand served by Crastvell on WellGate on 3 September 2009. On 16 December 2009 I dismissed WellGate's application to set it aside and on 28 January 2010 Crastvell issued the application which is now before me.
- [2] That being all, WellGate would have no answer to the application, but a number of creditors have put in notices of intention to oppose or, in one case, to support the application. The only supporting creditor, Ridgelane Limited ('Ridgelane') has a debt of GBP 3.25 million (which converts to very roughly US\$ 5 million¹) so that together with Crastvell's debt, support for the application amounts in value to some US\$13.57 million. Ridgelane did not appear at the hearing of the application. Those opposing amount in value to around US\$19 million. By far the most significant by value of the opposing creditors is Trafalgar Capital SARL ('Trafalgar'), which has a judgment of the English High Court of Justice in the sum of some USD14.25 million, apparently entered on admissions on 29 January 2010, the day after the present application was issued. Trafalgar was represented at the hearing by Mr Kissock Laing but he was unable, when I asked him, to tell me what was the consideration for this judgment. The other nine opposing creditors were represented by Maples & Calder ('the Maples & Calder creditors'). Their debts together amount to some US\$4.9 million and range in amount from US\$45.5K to US\$1.3 million.
- [3] At the hearing WellGate asked, not for the application to be dismissed, but for it to be adjourned to a date early in April 2010, in order to enable a proposed agreement between Bozel SA ('Bozel') (which is a wholly owned subsidiary of WellGate), and a company called Globe Metals Enterprises Inc ('Globe'), a Delaware corporation, to be concluded and (as I understand it) performed before the return date. The agreement is for the sale by Bozel to Globe of the whole of the issued share capital of one of Bozel's subsidiaries, Bozel Mineracao SA ('Mineracao'). What is said is that if this agreement is (a) concluded and (b) performed there will be sufficient proceeds for Bozel to put WellGate in funds to pay Crastvell's debt in full and (provided that no other creditor applies to be substituted), for WellGate in this way to apply to have the application dismissed.
- [4] There is in evidence a draft of the sale and purchase agreement ('the SPA'). So far as appears from the draft, the agreement is conditional upon the sale of a further Bozel subsidiary simultaneously with the conclusion of the SPA. The terms of that proposed sale are not in evidence. Performance of the SPA is subject to further conditions, including the release of all liens

¹ In an affidavit of Mr Craig Marshak sworn on 3 March 2010 Ridgelane's debt is put at US\$7 million, but nothing turns on the difference

(including liens in favour of Crastvell) and the intervening settlement of unidentified and undefined 'Disputes'. Clause 3.4 of the draft provides (inter alia) that either party may terminate the SPA on written notice given at any time after 31 March 2010 if by that date any of the conditions to that party's obligations to close has been neither satisfied nor waived. The purchase price under the draft SPA is US\$20 million in cash together with shares in a company called Globe Specialty Metals, Inc ('GSM ') having a fair market value of US\$8 million. There is a provision that the GSM shares are not to be freely tradeable until after six months following completion. The purchase price is to be increased, or as the case may be reduced, to the extent that Mineracao's net working capital either exceeds or is less than US\$12 million. There is a provision for holdback from the purchase price to allow for set off for any reduction. It follows, therefore, that the price actually paid is dependent on the final determination of Mineracao's net working capital. In the absence of any evidence that the holdback/retention will be less than the full US\$12 million referable to Mineracao's net working capital, the cash payable on completion of the SPA could be as little as US\$8 million, plus the GSM shares. There is provision for an additional earn-out consideration of US\$5 million depending upon Mineracao's performance during the 12 months following completion.

- [5] There is an affidavit sworn by Michel Marengere in opposition to Crastvell's application. In that affidavit Mr Marengere deposes that completion of the SPA will make available sufficient assets to enable Crastvell to be paid in full. He says that (contrary to the figures contained in the draft SPA) on completion Bozel will receive US\$25 million in cash together with US\$10 million worth of GSM shares. Where these figures come from is not explained. He says that Globe has made it clear to him personally that if the agreement is not 'performed' by 31 March 2010, it would have no choice but to walk away. He also says, without giving any reason for the assertion, that Bozel would not be able to complete the transaction if WellGate goes into liquidation. This assertion was not adopted in terms by Mr Mark Forte who, together with Ms Tameka Davis, appeared for WellGate at the hearing. He submitted merely that such an appointment would delay things while the liquidator conducted the necessary due diligence.
- [6] Mr Marengere goes on to explain that upon receipt of the consideration money, Bozel would first discharge liabilities of Bozel to Crastvell (US\$14.4 million) and Trafalgar (US\$1.5 million). How this would be achieved in the face of a US\$12 million retention (assuming that that is the correct figure) and given that the GSM shares cannot be traded for six months is not explained. Mr Marengere then says that after discharging the aggregate US\$15.9 million due from Bozel to Crastvell and Trafalgar there would remain a surplus of US\$19 million. Of this supposed surplus, WellGate 'would be able to realise' (presumably by way of dividend) some US\$14.25 million. Having made this realization, WellGate would bring into the BVI enough to satisfy Crastvell's judgment debt of US\$8.57 against WellGate, with instructions to Mr Marengere's solicitors to pay Crastvell off and thus get rid of this application.
- [7] There are also in evidence two affidavits made by Craig Marshak on behalf of Trafalgar. Mr Marshak makes clear that through its corporate finance arm in London Trafalgar has been active in seeking mechanisms by which WellGate's indebtedness to Crastvell, Trafalgar and others, could

be paid off. He says that following earlier failures (which he blames on the activities of Crastvell) Trafalgar assisted WellGate in getting to the draft SPA with Globe for the sale of the Bozel subsidiaries. He repeats the same consideration figures as are contained in the affidavit of Mr Marengere and says that they will generate sufficient to pay off Crastvell 'and all the debts outstanding to the other creditors.' There must, to say the least, be a considerable question about that. Bozel's own indebtedness to Crastvell and Trafalgar alone is, as has been seen, US\$15.9 million. Even if it is assumed that the cash consideration to be provided under the Globe SPA is US\$25 million (rather than the figure of US\$20 million given in the draft which is in evidence) and even if it is assumed that there will be no holdback/retention in respect of the Mineracao net working capital figure and that US\$10 million worth (rather than the US\$8 million provided for in the draft agreement) of immediately realisable (in contradiction to what appears from the terms of the draft SPA) GSM shares are to be handed over at completion, that only leaves a surplus of US\$19 million in cash and shares available to pay WellGate's creditors, of which US\$10 million will be represented by GSM shares. Ridgelane is owed at least US\$5 million and the Maples & Calder creditors claim debts of just under US\$5 million. It appears from paragraph 19 of Mr Marengere's affidavit that Bozel has other creditors whose debts are unquantified and are not taken into account in the above figures and a proposed scheme for distribution of the proceeds of the SPA mentions professional fees outstanding of at least US\$3.95 million. WellGate would thus have *at best* US\$9 million in cash to pay off creditors with debts whose total amount is unknown but appears to amount to at least US\$22 million – or US\$19 million in cash and shares, provided that the shares could be immediately sold for US\$10 million or (as to which there is no evidence) creditors were prepared to accept payment in cash and GSM shares. These figures take no account of the US\$14.25 million due to Trafalgar under its judgment, and it appears from a draft of a proposed distribution of proceeds agreement which Trafalgar has been attempting to persuade Crastvell and Ridgelane to accept, that Trafalgar would be prepared to take paper from another subsidiary of WellGate, PowerBras Energia Holding Ltda ('PowerBras') in satisfaction. Whether that would remain Trafalgar's position if the Globe transaction went off is unclear. If it did not, then the US\$9 million of cash and whatever could be got for the GSM shares whenever they were allowed to be traded would have to be spread round some US\$37 million of debt. In fact, it is plain from the terms of a proposed distribution agreement prepared by Trafalgar that in reality creditors would have to accept a mixture of cash, shares and paper.

- [8] On the basis of this material, Mr Forte asks me to adjourn this application until early in April to permit the SPA to close. At that point, he says, it will be possible to pay Crastvell its debt with the consequent dismissal of the application.
- [9] Trafalgar's position, as stated by Mr Marshak, is that the application should be dismissed to allow the Globe transaction to go through or at any rate any appointment should be deferred until it can be seen whether it has in fact successfully completed.
- [10] There are also in evidence affidavits in opposition from M Luc Bousquet, Mr Don Eastveld and Mr Norman Myers. The burden of that evidence may be summarized by saying that these witnesses

oppose a winding up of Wellgate because they believe that they or the entities for whom they speak have a better chance of being paid if WellGate is permitted to continue to trade and to realise its assets in the ordinary course, whether by a sale to Globe or otherwise. Mr Bousquet, who speaks for 3113019 Canada Inc (US\$1.3 million) and for Beauinvest Inc (US\$778K) and who holds general proxies for UEB (US\$250K), John V Goepfort (US\$250K) and 373 Florida Corp (US\$250K), says that he and other creditors believe they will obtain a better return if WellGate is allowed to continue as a going concern and to conclude negotiations with Globe rather than have its assets sold in a fire sale by a liquidator, who he suspects may be far less able to preserve critical business relationships at subsidiary level, leading to a loss of customer base. He also expresses concerns about the comparative cost of liquidation. Mr Don Eastveld, speaking on behalf of his brother, who is the sole owner of a creditor company claiming US\$1.1 million, expresses broadly similar concerns. Mr Myers is a loan note creditor in the aggregate sum of SU\$190K and he adopts what is said by Mr Bousquet and Mr Eastveld. There is nothing in this evidence to indicate what, if anything, these deponents know about WellGate's balance sheet, so that it is quite impossible to judge whether their opposition to this application is fully informed or not.

- [11] It will be seen that the evidence from the opposing creditors adopts a more open ended position than that contended for by Mr Forte. Ms Dwyer, who appeared for the Maples & Calder creditors, did not suggest to me that their position was any different from that taken by Mr Forte, but I have to take into consideration their views as expressed in their evidence and it seems to me that what they are asking for is that the application be dismissed so that WellGate may continue its business as a holding company and make steady realizations over time.
- [12] The position, therefore, is that the application is supported by creditors with debts to a value of roughly US\$12.57 million and opposed by creditors with debts of a little over US\$19 million.
- [13] There is no doubt that as *between Crastvell and WellGate* and leaving aside the views of other creditors, Crastvell is entitled to the appointment of a liquidator as of right unless the circumstances are extraordinary: see **In re P&J Macrae Ltd**². In my judgment, there are here no extraordinary circumstances to displace Crastvell's right as against WellGate to have a liquidator appointed.
- [14] The usual approach where creditors oppose the making of an order on an application by a creditor otherwise entitled as of right is that if the opposing creditors oppose any winding up at all (in other words they seek to have the application dismissed) then the opposing creditors will have to point to reasons why the order should not be made: **Re JD Swain Ltd**³; or, as it was put in **Macrae**, they must at least show some good reason for their attitude. WellGate accepts that if, come April, the SPA has not been concluded and Crastvell has not been paid off, then a liquidator must be appointed, but at any rate for the time being both WellGate and the opposing creditors oppose the appointment without suggesting any alternative form of insolvency process in its place. Where the

² [1961] 1 WLR 229 at 238

³ [1965] 2 All ER 761 at 765E

choice is between winding up by the Court and voluntary liquidation or some other insolvency process, then the Court will pay keen regard to the wishes of the majority, although even in that type of case the Court has an overriding discretion. That is not the position here.

- [15] Mr Forte referred me to **Re Demaglass Holdings Ltd**⁴, a decision of Neuberger J, as he then was. In that case, the company was already in receivership. The receivers took the view that the making of a winding up order would effect the dismissal of the company's employees who were working with the receivership. There was evidence that the company's stock could be more advantageously realized by the continuing of the receivership with the benefit of the company's employees than if a winding up order was made and the staff left, leaving a liquidator to dispose of the stock in a fire sale. On the basis of this material, the learned judge adjourned the petition for some ten weeks. That case, it seems to me, is a very long way from the present one and I derive no assistance from it.
- [16] In the present case WellGate is plainly unable to pay its debts yet asks that it be permitted to make unsupervised disposals of its assets (more accurately, of one if its wholly owned subsidiary's assets) in the hope that before the month end it will have realised sufficient to pay off Crastvell. On the basis of the material with which the Court has been presented and which I have attempted to summarise above, it seems to me that even if the Globe transaction closed tomorrow there is more than a considerable doubt whether even that limited object would be capable of achievement. Even if it were, the consequence would be that all other creditors of WellGate would be required to accept GSM shares or loan notes from WellGate or PowerBras in satisfaction of their debts or to wait until the GSM shares could be realized and then accept whatever they could be got for them. The ultimate totality of WellGate's debts would, as I have said, depend upon Trafalgar's continuing willingness to accept paper in satisfaction of its judgment.
- [17] Quite apart from that, I have no evidence (beyond the evidence that previous deals have fallen through) that the Globe transaction is the best that could be achieved. Beyond the unparticularised statements in Mr Marshak's first affidavit, I have no evidence that the Bozel subsidiaries have been professionally marketed, that Globe is the only potential purchaser or that the price to be paid by Globe (as to which, for the reasons set out above, there is in itself complete uncertainty) is the best that can be achieved. I have been shown no valuations, professional or otherwise, against which it might be possible to make some sort of judgment about the commercial wisdom of the Globe transaction. Apart from a document distinguished only by its exiguous detail and which purports to be a consolidated balance sheet of Bozel as at 31 December 2008, I have been shown no financial statements, let alone audited financial statements, for the WellGate group. I do not overlook the fact that WellGate has another wholly owned subsidiary, PowerBras, but while there is plenty of evidence purporting to show that PowerBras is the indirect owner of valuable assets, I have no financial statements in respect of that company, so that it is impossible to make any finding of fact

⁴ [2001] 2 BCLC 633

as to whether its inclusion in the WellGate group consolidated balance sheet would have a positive or negative effect.

- [18] In these circumstances Mr Lynton, for Crastvell, argues that payment of Crastvell's debt in cash and in full in order to permit WellGate to apply to have the liquidator application dismissed would amount to an unfair preference in contravention of section 245 of the Insolvency Act, 2003 ('the 2003 Act'). I would prefer to put the point which Mr Lynton makes rather differently. It is not lawful for an insolvent company to sell off what (in the absence of any evidence to the contrary) would appear to be its only presently realisable assets and then distribute the proceeds otherwise than pursuant to a recognized statutory insolvency regime or a court sanctioned scheme of arrangement. This case is quite the contrary to **In re A.B.C Coupler and Engineering Co Ltd**⁵, where it was proved that the company in question had a very substantial surplus of assets and prospects of continuing its business, which was of fifty years standing. In the present case there is no evidence that WellGate has surplus assets and its intention is to sell, rather than continue, the Bozel side of its business.
- [19] What the Court is really being asked to do is to shut out a creditor with an otherwise unanswerable claim to have a liquidator appointed on the basis that the debtor company may be about to enter into a transaction which may (although I confess I find it a little difficult to see how) result in the creditor's debt being paid in full against a background where all the evidence is that any such payment would be to the immediate prejudice of the company's other unsecured creditors.
- [20] I do not think that any of this amounts to good reason why Crastvell's application should be dismissed (which is what the Maples & Calder creditors seem to desire) or adjourned to abide the outcome of the Globe negotiations (which is what WellGate and Trafalgar appear to desire). The desire of an insolvent company to carry out its own realisations and distributions free from the restrictions and safeguards of any sort of insolvency regime is not an adequate reason to deny an undisputed creditor its rightful remedy. The fact that a majority of its creditors may support it in that position can make no difference. Creditors' support, even if it is majority support, cannot cure the inherent vice in WellGate's proposal.
- [21] There is another consideration. It appears to me from Mr Marshak's evidence, as well as from the fact that it has chosen to be separately represented on this application, that Trafalgar stands in a different position from the Maples & Calder creditors. It is clear that it has for some time been closely involved with WellGate's attempts to dispose of the Bozel assets. On its own account, it has been actively attempting to persuade major creditors of WellGate to agree to a scheme for the disposal of the proceeds. Additionally, the readiness of Trafalgar, on its own evidence, to accept PowerBras paper in almost entire satisfaction of its debt seems to me to show, when taken with the other evidence to which I have referred, including the unusual (I do not say irregular) circumstances under which its judgment was obtained, that its interests are in some way aligned

⁵ [1961] 1 WLR 243

with those of WellGate. In those circumstances, it does not seem to me that Trafalgar, although undoubtedly a judgment creditor of WellGate, can be regarded as a wholly independent party. It is well established that in considering what weight to attach to the wishes of creditors the court is entitled to discount (wholly or to such extent as the facts require) the views of connected party creditors. In my judgment, Trafalgar is to be treated as a connected party creditor and taking account of the matters to which I have referred above I do not feel inclined to accord much, if any, weight to its opposition. If one takes out the Trafalgar debt, then the amount of the unconnected opposing debts falls far short of what is owing to Crastvell on its own. In my judgment, that is another reason for coming to the conclusion that the opposition to this application fails.

[21] I shall therefore appoint Mr Bickerton as liquidator of WellGate International Limited.

Commercial Court Judge

9 March 2010