

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2008/0146

**In the Matter of the Insolvency Act 2003
And in the Matter of Y2K Finance Inc.**

BETWEEN:

(1) CITCO GLOBAL CUSTODY NV

Applicant

-and-

Y2K FINANCE INC

Respondent

Appearances:

Mr. Simon Browne-Wilkinson QC and Mr. Jeffrey Chapman of Fountain Court, London and
Ms. Arabella di Iorio of Maples & Calder for the Applicant
Ms. Barbara Dohmann QC and Mr. Robert Weekes of Blackstone Chambers, London and
Mr. Samuel Jackson Husbands of Walkers BVI for the Respondent

2009: January 16
2009: January 23, February 10

CATCHWORDS

Insolvency Act - Section 168 – Application to appoint a liquidator to be determined within 6 months-
Application to extend time within which evidence is to be filed granted within 6 months – New trial
date outside 6 month period – Whether application to extend time to file evidence amounted to
implicit application under Section 168 to extend time within which liquidator is to be appointed.

HEADNOTE

By Originating Application, the Applicant applied on 21 May 2008, pursuant to the Insolvency Act 2003 [“the Act”] for a liquidator to be appointed over the Respondent (“the Originating Application”). Section 168 (1) of Act requires such an application to be determined within six months after it is filed. Section 168 (2) provides that the Court may extend the six-month time limit if an application is made within the said time limit and the applicant can show special circumstances to justify the extension. Section 168 (3) further provides that if an application is not determined within the six-month time limit, or any duly granted extension of that time limit, it is deemed to be dismissed. Following the Originating Application, the Court made three Consent Orders. The first Consent Order gave directions for the hearing of the Originating Application to be fixed by the parties by

agreement with the Court but not before 1 September 2008. The second Consent Order varied some of the directions but not those in relation to the trial. The third Consent Order allowed for an extension of time for disclosure but not varying the directions in relation to the trial of the action.

On 23 October 2008, the Court ordered the trial of the action to take place commencing 12 January 2009 for 5 days which was outside the six-month time limit. Following a Judgment of the Court on 4 November 2008 in the Respondent's favour, on 11 November 2008, the Respondent brought an application to strike out the Originating Application.

On 28 November 2008, the Court ordered that the trial of the action due to take place commencing 12 January 2009 be vacated and that the two ancillary applications (Unless Order Application and Case Management Application) be fixed for 14 January 2009. The trial of the action was then vacated and a new trial date was fixed commencing 2 March 2009.

On 13 January 2009, the Respondent filed an application seeking a declaration that the Originating Application was deemed to have been dismissed on 22 November 2008. The Respondent contended that over 6 months have elapsed since the filing of the Originating Application and since the Applicant has failed to make an application for an extension of time within the 6 months time period or any extension thereof or at all, the Originating Application is deemed to have been dismissed on 22 November 2008.

The Applicant opposed this application on the grounds that the three Consent Orders made by both parties, impliedly had the effect of extending time and that the phrase "*deemed to have been dismissed*" should not be interpreted strictly.

HELD:

- (1) Six (6) months have elapsed since the Originating Application was filed and the Applicant had not applied for an extension of time to have the matter determined. Section 168(2) specifically requires that if an application to appoint a liquidator is not determined within the time limit, a formal application must be filed to have that limit extended.
- (2) The Applicant cannot "piggyback" on another application to get the effect of a specific and formal application for an extension of time. In fact, the three Consent Orders gave directions for trial of the action but did not extend the time, expressly or impliedly for appointing a liquidator. Further, an affidavit must be filed to show the special reasons why the time limit should be extended.
- (3) The Applicant was required to be vigilant in ensuring that the statutory time does not expire. The application to appoint liquidator over the Respondent was deemed to have been dismissed as of 22 November 2008.

The following cases were referred to in the judgment.

1. Safe Solutions Accounting Ltd v French Connections Ltd BVIHCV2005/0242 [Unreported] 24 May 2006.

2. Asiacorp Development Ltd. v Green Salt Group Ltd et al and Firstlink Investments Corporation Limited BVIHCV2005/0189 [Unreported] 21 September 2006.
3. Edwards v Waterproofing Manufacturers (Chedu) Pty. Ltd (2000) NSWSC 1227.

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** Pursuant to section 162 of the Insolvency Act 2003 (“the Act”), on 21 May 2008, the Applicant (“Citco”) issued an Originating Application to appoint a liquidator over the Respondent (“Y2K”) (the “Originating Application”). To date, this application has not yet been determined. On 13 January 2009, Y2K applied for an order that the Originating Application be declared to have been dismissed on 22 November 2008 pursuant to Section 168 of the Act which provides as follows:

- (1) “Subject to subsection (2), an application for the appointment of a liquidator shall be determined within six month after it is filed.
- (2) The Court may, upon such conditions as it considers fit, extend the period referred to in subsection (1) for one or more periods not exceeding three months each if:
 - a) it is satisfied that special circumstances justify the extension; and
 - b) the order extending the period is made before the expiry of that period or, if a previous order has been made under this subsection that period as extended.
- (3) If an application is not determined within the period referred to in subsection (1) or within that period as extended, it is deemed to have been dismissed.
- (4) Section 496 (1)(a) shall not apply to the time periods specified in this section.

[2] Y2K alleges that Citco has failed to police its own application and has failed to apply for an extension of time for determination of the Originating Application. Citco challenges the application and argues that the three Consent Orders which were approved by the Court have the effect of extending time to which the parties have impliedly agreed and there is no need for an application pursuant to section 168(2) being made.

Relevant chronology

- [3] Following the issuance of the Originating Application, the Court fixed 19 June 2008 for the hearing of the Application. Subsequently, the Court made three Consent Orders (“the Consent Orders”):
- a) The 1st Consent Order dated 19 June 2008, which gave directions for the filing of evidence, disclosure and a trial of the action to take place “on a date to be fixed by the parties by agreement with the court but not before 1 September 2008”.
 - b) The 2nd Consent Order dated 11 August 2008, which varied some of the directions but not those in relation to the trial of the action.
 - c) The 3rd Consent Order dated 29 September 2008, which allowed for an extension of time for disclosure until 6 October 2008 but not varying the directions in relation to the trial of the action.
- [4] On 23 October 2008, the Court ordered that the trial for the action will take place on 12 January 2009 for a period of 5 days.
- [5] On 11 November 2008, Y2K issued an application to strike out the Originating Application.
- [6] On 28 November 2008, the Court ordered that the trial of the action due to take place commencing 12 January 2009 be adjourned to 2 March 2009 and that two ancillary applications (Unless Order Application and Case Management Application) be fixed for 14 January 2009. On the said day, Walkers wrote to the Court recording that the trial of this action was originally fixed for hearing on 12 to 16 January 2009 and seeking confirmation that those dates have been vacated. On the same day, the Court confirmed that the trial of the action will now take place commencing 2 March 2009.

The submissions

- [7] Ms. Dohmann, Learned Queen’s Counsel for Y2K contends that over 6 months have elapsed since the filing of the Originating Application and Citco has failed to make an

application for an extension of time within the 6 months time period or any extension thereof or at all. The gravamen of her submission that the Court is bound to follow its earlier decisions in **Safe Solutions Accounting Ltd v French Connections Ltd**¹ and **Asiacorp Development Ltd. v Green Salt Group Ltd et al**² as to the meaning and effect of Section 168 of the Act.

[8] Ms. Dohmann QC submits that the argument which Citco advances that the Consent Orders made by both parties, impliedly had the effect of extending time lacks merit since no application or order was made to that effect. In any event, there had been no special circumstances to justify the extension as mandated by the Statute.

[9] Mr. Browne-Wilkinson QC, Counsel for Citco focused primarily on the interpretation of the phrase "*deemed to have been dismissed*" as opposed to the phrase "*is automatically struck out.*"³⁴ He contends that "*deemed to have been dismissed*" should not be interpreted strictly and that it is not as clear and precise as "*is automatically struck out.*"

Court analysis

[10] It is accepted that 6 months elapsed on 21 November 2008 since Citco issued the Originating Application. The key issue for determination is whether the Consent Orders have the effect of an Order being made for an extension of time and whether the parties impliedly agreed to that extension of time without an application being made pursuant to Section 168 (2).

[11] The case of **Safe Solutions** is instructive. In that case, the Applicants contended "that section 168 did not require a specific application to be made nor did it stipulate the manner in which such an application must be made"⁵. I said:

"It is my firm view that under section 168 (2) of the Act, an applicant must file a formal application with supporting affidavit to show what are the special circumstances justifying the extension. It does not lie in the mouth of the Applicants to say that the section does not require a specific application nor

¹ BVIHCV2005/0242–Judgment delivered on 24 May 2006 [unreported].

² BVIHCV2005/0189 –Judgment delivered on 21 September 2006 [unreported].

³ See *Rastin v British Steel Plc* (1994) W.L.R. 732.

⁴ (1994) W.L.R. 732.

⁵ Para. 5.

prescribe the manner in which such an application must be made. Indeed, section 168(2) does not spell out how and in what manner the application should be made because it is so straightforward. The Applicants cannot piggyback on another application for some other relief and submit that they have made an application and the Court, by extending the time for service of evidence was in fact, accepting that the application for the appointment of liquidators would be determined outside the 6 month period. It is my considered opinion that the insolvency rules are based on the adversarial system which precludes the Court from acting on its own motion in the absence of an application by one of the parties: the assumption being that each will be mindful of its own interest and take whatever procedural steps are necessary to advance its cause. So, it is incumbent on the Applicants to be vigilant.”⁶

[12] The same principle applies in this case. Citco cannot rely on the Consent Orders for the relief of the extension of time. This, to me, would be another example of an applicant trying to “piggyback” on another application to get the effect of a specific and formal application for an extension of time, and as I have said in before, an applicant cannot do so.

[13] It is not in dispute that no specific application was made for an extension of time before the 6 month period had expired and no order was granted for such an application. More importantly, the Act clearly states that the applicants must show that special circumstances exist to justify the extension of time (which confirms my judgment in this matter). In this case, there has been no application made by the applicant satisfying the court that those special circumstances exist for the extension of time and also, Y2K was not given an opportunity to oppose such an application.

[14] More guidance on the strict interpretation of section 168 can be gleaned from the Australian case of **Edwards v Waterproofing Manufacturers (Chedu) Pty. Ltd**⁷ which explores section 459R of the Corporations Law (similar to Section 168 of our Act). In that case, the plaintiff applied to wind up the defendant company. Pursuant to section 459R, an application for a company to be wound up must be determined within 6 months which meant that the proceedings would have been determined by 14 April 2000. On 7 December 2000, when the matter came up for pre-trial directions, it was discovered that section 459R had been overlooked. The plaintiff then applied to extend the period within which the proceedings should be determined. The New South Wales Supreme Court

⁶ Para 20.

⁷ (2000) NSWSC 1227. See also the Corporations Act 2001- sec 459R.

dismissed the proceedings and refused the order holding that *“there is a very clear policy indicated by section 459R and associated sections of the Corporations Law that applications to wind up companies in insolvency should be promptly dealt with”*.

- [15] Similarly, in **Asiacorp**, the court took into consideration the purpose and interpretation of the Act and stated as follows:

“It seems to me that our Insolvency Act is subject to the same strict limitations which bind the court and it means exactly what it says: “...an application for the appointment of a liquidator **shall** be determined within six months after it is filed.” If the application to appoint liquidators is not determined within that period and no application to extend time is made under section 168(2), then the application is deemed to have been dismissed. This approach appears unduly strict; in its defence, it has the merit of certainty. Moreover, it is consistent with the policy of the Act of creating certain time limits; some of which carry draconian penalties in the event of non-compliance, for example, section 156 which deals with statutory demands. If such extension were available to an applicant in winding up proceedings after the time limit has expired and no application to extend time is made, this would have an element of unfairness, when companies in respect of which statutory demands are issued have no possibility whatsoever of any extension of the time limited to them for challenging statutory demands.”⁸

- [16] In my judgment, the Act is clear and unambiguous. It must be interpreted strictly. Once the 6-month period has expired without an application for extension of time being made by the applicant (who must police its own application), the court has no jurisdiction to prevent the dismissal of the Originating Application and therefore can exercise no discretion as to whether the action has been finally dismissed.

Conclusion

- [17] I am satisfied that more than 6 months have elapsed since the issuance of the Originating Application and that no application was made to the Court for an extension of time within that 6 month period. In the circumstances, **IT IS HEREBY DECLARED** that the Originating Application is “deemed to have been dismissed” on 22 November 2008 pursuant to Section 168 of the Act. It logically follows that Citco’s application for an Unless Order against Y2K is also dismissed. Citco shall pay to Y2K its costs of and occasioned by the

⁸ Para. 20.

Originating Application (including this application). Such costs will be assessed pursuant to Rule 65.12 if not agreed.

Indra Hariprashad-Charles

High Court Judge