BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 1999

BETWEEN:

CREDICOM N.V.

and

Appellant

COLONY CREDICOM LP.

and

COLORADO CREDICOM L.L.C.

Respondents

Before :

The Hon . C . M . Dennis Byron Chief Justice

The Hon . Satrohan Singh Justice of Appeal

The Hon. Albert Redhead Justice of Appeal

Appearances:

Mr. Gerard Farara, Q.C. for the Appellants

Miss T. Small with him

Mr. Joseph Archbi ald,Q.C. for the Respondent

Mr. Paul Webster with him

2000: January 11;

February 7.

JUDGMENT

[1] **REDHEAD J.A:** This is an applicationby motion by CredicomN.V. for conditionalleave to appeal to Her Majesty-in-Council against a judgment of this Court delivered on 6th December !) . The applicant also seeks a stay of the order from this Court pending the determination of the appeal to Her Majesty-in-Council.

[2] The application for leave to Her Majesty-in-Council is brought under Rule 3[1][a] of the VirginIslands[App9als to the Privy Council] Order 1967 which provides as follows:

where the matter in dispute on the appeal to Her Majesty-in-Council is of the value 0f £300 sterling or upwards or wht·e the appeal involves directly or indirectly a claim to or question respecting pro;,erty or a right of the value for £300 sterling or upward,sfinal decisions in any civil µrureedings."

[3] Learned Queen's Counse,l Mr. Archibald, argued that in order for the applicant to qualify for an appeal as of righ,t it must be established that:

[1] the appeal judgment is a final decision; and

[2] either

[a] the appeal directly or indirectly involvesa claim to or a question respecitng property or a right with £300 or more, and the matter in dispute on the a peal is worth £300 sterling or more

[4] Mr. Archibaldargued that the applicant nas no rigm of appeal to the Privy Council because it cannot meet a,,y of the conditions as laid down in Rule 3[1][a].

[5] Mr. Archibald argued that the matter is not a final judgmentbut an interlocutory matter.

What is an interlocutory matter as opposed to a final judgmen?t That question is

determined by applying either the application test or the order test. Underthe application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. Underthe order test an order is final if it finally determines the issue in litigation or disposed of the rights of the parties.

[6] In **Othniel R. Sylvester v Satrohan Sing h,** Civil Appeal No.10 of 1992, St. Vincent and the Grenadines Byron, J.A. [as he then was] in dealing with the issue of whether that matter was interlocutory or final preferre,din my view, the application test. At page 9 of the judgment he said:

"In conclusion the English Courts are not committed to the application test in determining whether an orderor judgment is interlocutory or final. Applying the test the order under appeal is final."

[7] Although Byron J.A. went on to say:

"I do not think that the order test would have rroduced a different result, because whereas the order effectively terminated the litigation, it did not determine ar y of the issues raised by the litigation it dealt only with the question of whether .:le proceedings can continue".

[8] What was the issue that was to be decided in the instant case? The respondents brought a compulsory winding up petition in the British VirginIslands [BVI] High Court against

Credicom Asia Limited [Credicom.] The respondents broughtthe petition on the basis that

Credicomwas indebted to them at the time in the sum of $190 million and was unable to pay this debt. Although Credicom did not contest the windingup petition, the applicant which is a contributor challenged therespondents application for the winding up petition on the ground that the British VirginIslands Court had no jurisdiction.

[9] The learned trial Judge heard the application and granted an order for the stay of winding up proceedings on the ground that he had no jurisdiction to entertain the petition. The respondentsappealed and this Court held that the British Virgin Islands Court has jurisdiction to entertain the petition. The Court of Appeal also directed that the matter be remitted to the trial Judge for the purpose of hearing the petition. It is this judgment the applicant seeks leave to appeal from and which it says is a final judgment.

[1O] Applyingthe applicaiton test, what was the matter in litigation? In my judgme,ntthe matter in litigation was the right of the respondent to institutewinding up proceedings in the British VirginIslands against Credicom Asia Limited. The matter in litigation, in my judgmen,t couldnever have been the jurisdiction of the Court of the British VirginIslands.

[11] Applying the order test what were rights of the parties to this litigation or the issues in litigation between the parties? Again the issue in the winding up litigation before the British VirginIslands Court was the respondents alleged right to bring thoso p 2ceedir,gs vvith a view to realizing the debt which the respondents say that Credicom Asia Limited owes to them. Whether or not the British VirginIslands Court has jurisdictionto hear the matter couldnever have determined the rights of the parties or the issuesin this litigation.

[12] In **Dermot Gregory Nottingham v Registered Securities Limited** [a judgment *nf* the Court of Appeal of New Zealand] at page 3 of the judgment Gault J. s1id:

"We do no: accept that there is an appeal as of right against the forr,1al dismissal of the appe':1l from the master's decision for lack of jurisdiction. The application to set aside the· udgment was an interlocutory application and decisions thereon including the decision to decline jurisdiction on appeal cannot meet the requirement of a "final judgment in R 2[a]. Further, the decision was not final in the sense that no issues remain for determination in the proceedni g. There is still to be resolvedwhether in light of the exercise by the Judges of the High Court jurisdiction. Mr. Nottingham has further avenues open to him [on his other applications] to secure review of the master's decision by this Court or the High Court."

[13] As I have said above the order of this Court is that the matter be remitted to the High Court for the hearing of the application for the compulsory winding up of Credicom Asia

Limited. Assuming that the winding up order is made by the High Court the appilcant may then have a right of appeal all the way up to the Privy Council. If that is the case then I cannot imagine anything which will debar the appilcant from raising the question of jurisdiction before the Privy Council.

[14] If I am correct then it would be wholly inappropriateto grant leave to the applicant at this stage as the Privy Council would not be able to deal finally with all that was at stake in these proceedings.

[15] In **Attorney General v Gre y** [1982] 2 NZLR 22. A lessor of office premises had successuflly brought an action against the lessee for payment of an increasedrental of approximately $210,000.00. The lessee appealed. On 2nd July 1982 the Court of Appeal found in favour of the lessor on the issue of liability, but a majority of the Court also held that the lessee was entitled to damages for fraudulent misrepresentaiotn which had induced the lessee to enter into the contract of lease. The quantification of damages res1..1lii,1g from me frauau1emmisrepresentation had not been fully canvassed in argument and the appeal was adjourned to enable consideration by the parties themselves. The parties were unable to reach agreement and the Court heard further argument from Counsel as to damages and related questions. A supplementary judgment was issuedon

19th October 1982 remitting the whole question of damages to the High Court for further evidence and as ssment.

[16] On 22nd JJly the lessor had applied for conditional ieaveto appeal to the Privy Council. That application was dismissed on 6th September 19c,2 on the ground that the judgment of 2nd July was not a final judgment. A second applic 1ion for conditional leave to appeal was made after the supplementary judgment was delivered. The lessor contended that the supplementary judgment was a final judgment and also that by reason of the large sum in dispute the lessor was able to demonstrate that the pecuniary condition in R 2[a] of the New Zealand [Appeals to Privy Council] Order 1910 had been satisfied.

[17] Held [1] The appeal as of right provided for by R 2[a] was designed to enable the Privy Council to deal finally with all that was at stake in the proceedings so that the inconveniencemight be avoided of dealing one day with an appeal limited to such aspect of liability with he possible need mar.,· ::: ! ::: ::::. r of hearing a further appeal in the area of relie.f As tre damages to be paid by the lessor had not been assessed there had been no final judgment disposing of the dispute raised by the lessee's defence based on misrepresentation. Accordingly the judgment of 19th October was not a final judgmentin termsof R 2[a].

[18] In **Ngali Kahu Trust Board v Southern Lights Floral Exports Ltd** [1995] 8 P.R.N.Z 320. The New Zealand Court of Appeal had to decide whethera right of appeal exists where the Court of Appeal had set aside an order winding up the Ngali Kahu Trust Board on the grounds that there was a defence to the alleged indebtedness. The applicant had sought conditional leave to appeal to the Privy Council on the ground, inter alia that the decision was a final one. Held [1] while the distinction between interlocutory and final judgmenht ad proved difficult to define, the present case turned on the true significanceof the word

"final". By setting aside the winding up order, the court had made no final determination nor denied the appellant a rer;;cciy. :t .ad simpiy dG11itCJ a1e ;e,;;edy until the rightto it had been establishe.dThe real issue between the parties was the alleged indebtedness and

this had not been finally dealt with.

[19] Similarly, in the instant case the real issue between the parties is the alleged indebtedness and this Court by making an order that the petition for the compulsory winding up of Credicom Asia Limited be remitte-:1 to Ine High Court for hearing had made no final determination of the issue between the par'.ie . In my judgmen,t therefore, having regard to these authorities, it is beyond peradventure that this judgment which dealt with t:1e jurisdiction of a British Virgin IslandsCourt could be regarded as anything but interlo(..1.1tory.

[20] Turning my attention to the application test as outlinedabove, it cannot be said by any stretchof the imagination that the order made would have determined the matter in litigation. Neither under the order test, the order made by this Court would have finally been disposed of by the parties. In that regard also I hold that the matter is interlocutroy.

[21] I now considerthe other limbs of 3 [1][a] of the 1967 order:

"Wherethe matter in dispute on appeal to Her Majesty-in-Council is of the value of

£300 sterling or upwards or where the appealinvolves directlyor indirectlv a claim to a question respecting property or a right of value of £300 sterilng or upwards

II

[22] Learned Queen's Counse,l Mr. Farara argued that the applicant need only show that this matter falls without one of those two limbs namely [1] a claim to a right of a value in excess of the statutory limit or [2] a question respecting such a right. I agree. However, Learned Queen's Counselsubmtited that the applicant had clearly established thatit had satisfied these two limbs.

[23] Mr. Farara argued that the interest of the applicant as majority shareholder of Credicom Asia Limited concerns directly or indirectly, the claim by the respondents to a right to bring the winding up petition in the British Virgin Islands to recover a debt of now $202 million. He contended what is at stake in this matter for the applicant is the devaluing of its sharehodl ingand investmentsin Credicom Asia Limitedby some $202 million.

[24] In construing Rule 3[a] and in determining its application to the instant matter, Learned Queen's Counsel urged this Court to pay particular attention to the use of the expression

"directyl " or "indirectly" in the subparagraphin light of the ;udicial interpretation and meanni ggiven to the term "indirectyl" by the Privy Council.

[25] In **Meghji Lakhan,shi and Brothers v Furniture Workshop** [1954] 1 A.E.P.. 'l.73. In that case the Privy Cot1r.i:il was calledupon to interpretan identicapl rovision as contained in 3 [1][a]of the Vir ;,, IslandsOrder1967. Leave to appeal had been grantedby the Court of Appealfor Eastern Africa on affidavits to the effect that the capital value of the plot in

question exceeded £500. The respondents contendedon a preliminary point that the true test was how much it was worth to the landlords to succeed in the appeal, and that this was to be measuredby deducntig from the value of the land with vacant possession its value to thelandlords subject to the statutory tenancy, and that as no evidenceof this had

been adduced, there was no jurisdictionto fix the conditionsin compliancewith which the final ordergiving leave to appeal would be an issue.

Held: it was sufficient for an appellant to show that the case came within any one limb of Arnc1e J[aJ, me casefell within the latter part of the article on the true consturctionof which it was the value of the property and not the value of the claim or question whicn was the determining factor, and, therefore, the preliminary objection failed.

[26] Mr. Farara also referredto **Arieh Zvi Lipshitz v Haim Aron Valero and others** 1948

A.C.1. At page 5 Lord Normand said:

"Therespondentsmaintain that the Board has no jurisdictionbecause all that is in dispute or in any way involved in the appeal is the appellant's right to occupy a small piece of land and that this right of occupation having granted under a lease for one month terminable on three day's notice and at a rent of only £13.50p a month is worth £.50p at most. They maintain also that the value of the building

erected by the appellant on the landleased by him does not enter into the value of "thematter in dispute" or of the right claimed, since there is no mention of the building in the Statement of Claim or pleadni gs and no decision has to be made respecitng it. Their Lordships are of the opinion that this is too narrow a constructionof Article 3 and that the true test under the Article is whether it is worth £500 to the appellant that the Rent RestrictionOrdinance should be held to

qive him protection against an orderto vacate the land leaving on it a building which costs £450 to erect."

[27] Mr. Archibal,dQueen's Counsel submitted that the value of the matter in dispute must be lookedat from the point of view of the party seeking to appeal. He argued that the proper couri:;e ts to look 8t the judgment as it affected the interests of the party who is prejudiced by it anj ,ho seeks to relieve itself from it by ai:,peal. Mr. Archibald also contended that thesubject matter of the dispute in this case is whr? er Credicom Asia Limited ought to be statutorily wound up because it is unable to pay :ts deots and because it would be justand

equitable to do so. Accordingly, the "matterin dispute" is not the value of £300 sterling or upwards, within the meaning of subparagraph 3[1][a] of the 1967 Order.

[28] Similarly, when interpretingthe second limb of subparagraph 3[1][a] of the 1967 Order [the appeal directly or indirectly involvesa claim to or a question respectni g the property or a right of the value of £300 sterling.]Mr. Archiblad argued that the Courts have consistently held that the "value" must be looked at from the point of view of the party seeking to appeal. In ..:ll pport of his argument Learned Queen's Counsel referred to **Allan v Pratt**

A.C. 780. **Meghji Lakhamshi and Brothers v Furniture Workshop** 1954 A.C. 80.

Fletcher v 111come Tax Commissioners 1974 A.C. 414.

[29] In **Allan v Pratt** [supra] it was decided that:

"The measure of value for determining a defendant's right of appeal is the amount which the plaintiff has recovered; where this falls short of the appealable amoun,t the Court below cannot give leave to appeal. Where such leave has been erroneously given, the appeal will be dismisse,dand no opportunity to apply for special leave will be granted unless the circumstances are such as to render it desirable."

[30] Learned Queen's Counsel, Mr. Archibald argued that the party seeking to appeal in this case is N.V. whose interest in the liquidation of Credicom Asia Limited is, at best, contingentremote interest of nominal or no value. This is because N.V. has no right to share in the proceeds of liquidation until after the claims for all other creditor's including Colony/Colorado have been paid - which claims exceed the value of Credicom Asia assets. I am persuaded by this argument.

[31] Moreover it cannot, at least, be said with certitude that the value of the matter in dispute on appeal was of the prescribed value for the purroses of 3[1][a] of the 1967 Order. [See **Zuliani and Others v Veira** [199] 4 W.I.R. 250.

[32] In **Zuliani and Others v Vernon S. Veira** [1994] 1 W.L.R. 1149. The Privy Cou1.:1I in affirming the Court of Appeal decision [referred to above] held inter alia that an a.,ipeal as of right under section 99[1][a] of the Constitution [of Saint Christopher & Nevis] lay only where the matter in dispute was of the prescribed value or more but did not lie against an award of unliquidateddamages,andsince the prescribedsums payable by the defendants to the plaintiff pursuant to the Judge's order remaindeto be quantified on taxation the defendantswere not entitled to appeal as of right from the dismissal by the Court of Appeal of their appeal from the Judge's decision, and that accordingly the Court of Appeal had correctly dismissed the defendant's application for leave.

[33] At page 1155 of the advice Lord Nolan said:

"In providing that the automactiright of appeal should arise only where the matter in dispute was of the value of [or in excess on a precise figure the legislature has chosen not to include an award for unliquidated damage.s In the view of their Lordships this provision should be strictly construed. No doubt there will be many cases of which the presentis one, where it can be said as a matter of utmost probability, or even of virtual certainty that the damages ultimatelyawarded will be in excess of EC$5,000.00 and in such cases the Court of Appeal may very well think it right, as a general rule, to grant leave in the exercise of its discretion. Equally, however, there may be cases and again the present case may serve as an example where the likely amount of damages is at or above the statutory threshold, but which are so lacking in merit that the Court of Appeal in its discretion would refuse leave."

[34] In my view the present case does not fall or fit into any of the examples or categories outlined by LordNolanas stated above. As I have said previously it cannot be said with certitudewhat is thevalue of the matter in dispute. In that regard, it is my view, that Vaturi who swore on behalf of the applicant in support of the applicatior1, i;0u:d not bring nimseii to put a value on the matter in dispute because he was unable to give a value.

[35] As a consequence of which Mr. Archibald submitted that the application was baseless not having a value, it is not only incompetent it is non existent.

[36] In light of Mr. /\rchibalds 'argument above [with which I agree] that NV's interest in the liquidationof Cr dicom Asia Limited, is at best, a contingentremote interest of nominal value. I have no cht,ice but to agree with this submission.

[37] I have disposed of the issue that the applicant has no appeal as of right, should this Court grant leave because in the opinion of this Court the question involved in this appeal is one that by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty-in-Council?

[38] LearnedQueen's Counse,l Mr. Farara argued strenuuosly in favour of such a proposition. He argued that there has never been such a case decided before this case in t:,e Eastern

Caribbean SupremeCourt. Mr. Farara submitted that the British virgni island is one of

the prefered jurisditcion for the incorporation of international business companies. He contended that it is in the interest of the entire British VirginIslands financial services sector to have clarity on this matter, which will affect the sanctity of conrtactsentered into by parties who wish to determine the governing law of their agreements.

[39] Mr. Archibald on the other hand argued that the appeal judgmentdoes not raise questions of public importance relating to the exten,t as is alleged, to which British Virgin Islands Courts should give effect to or interpret foreign jurisdictionclauses because it has been found that the jurisdictionclausesin question do not in fact apply at all to the matters before the British Virgin Islands Court.

[40] Mr. Archibaldsubmitted that this case does not raise issues of genuine public importance. Rather the simple issue raised by this case is whether proper grounds exist under section 116 of the Companies Ar:t to order a statutory winding up of Credicom Asia Limited. With this suomissio,nI am entirely in agreement.

[41] In **Geogas S.A. v Frammo Gas Ltd The Baleares** [1991] 2 All E.R. 110 at page 122 Leggatt L.J.sriid:

"........1t is useful to note how in **March Rich and Co Ltd v Tourlotti CIA Navira SA The Kalliopi** [1987] 2 Lloyds Ref 268 at 269. Bin0ham LJ dealt with an application under S1[7][a] of the 1979 Act in a case which the ,Jt dge had allowed an appeal against an arbitrator'saward given a certificate under S 1[:'][b] and refused leave to appeal. Bingham LJ said that he:

"would not be inclined to give leave even if the question of law was of general importance, if the law had been clearly laid down by the Judge of first instance in terms which there was no real probability of the Court of Appeal varying and if it appeared that no purpose was likely to be served by a further hearing."

[42] .....in my judgment the test should be whether the question of law is worthy of consideraticn by the Court of Appeal. That will include an assessment of whether there is sufficient dc.•ubt about the correctnses of the Judge's decision to warrantconsideration, whether the decision of the Court ot Appeal would add significantly to the clarity and certainty oi' English Commercial Law and whether for some other reason the Court of Appeal agrees to consider the question of law. If when the applicationis made to him the Judge is in doubt, he can, while giving a certificate himself refuse leave, so allowing the Court of Appeal to decide whether or not to entertain an appeal."

[43] In my view, having regard to the simple issue which had to be decided in this case ie. whether or not the British Virgin Islands Court had jurisdiction to hear a compulsory winding up of Credicom Asia, there is nothing to clarify or which a decision of the Privy Council could add significantly to that issue. Even if this case may involve a matter of great public interest and may raise important questions of law and in my view, it neither involves nor raises any of these things.

[44] However, even if it did there are other considerations to be taken into account before granting leave. For example the judyme,1t sought to be appealed from, may be plainly right or unattended with sufficient doubt to justify special leave being granted. **[See La** Cite de Montreal v Les Ecclesiastiques due Seminaire de St. Sulpice de Montreal

[1889] 14 App Cases 660].

[45] This applicatinoemanated from the fact that the respondents sought to bring a co.1pulsory winding up petition against Credicom Asia Limited, the petitioners alleging that C,·c Jicom was indebted to them at the time in the sum of US$190 million. Credicc:-;, did not challenge the petition nor, in my view, has Credicom disputed, the debt. However the appellant has challenged the application for winding up orderon the ground of jurisdictio.n This Court, in effecton page 15 paragar ph72 of the judgmentsaid that the appellantwas not acting in good faith in challenging the winding up petition on the ground of jurisdiction and having decdi ed that the simple issue raised in this case is whether proper grounds exist to order statutory windni g up of Credicom Asia Limited and that the British Virgin Islands Court has jurisdiction to do so.

[46] A serious considerationin determining whether leave should be granted to the applicant to go forward to challengethe jurisdiction of the British Virgin Islands Court and other related matters in my view is the lack of bonafides on the part of the applicant.

[47] While I appreciate that this is an application to this Court to appeal a judgmenot f this Court and this Court must, stand back, as it were and make an objective assessment of all the issues when considering the question of leave to appeal. Having done so, I cannot find anythingin this application which qualifies it to be of public importanceor "otherwise" to grant leave to the applicant. [See**Rich v Christ Church Girls High School Board of G overnors**[No.2] [1974] 1 N2LR21.]

[48] I now turn to address the question of a stay. The applicant initially was seeking a stay of the winding up proceedings until this matter is determined by the Privy Council. The applicantthen changed courseand finally sought an application for a stay for six months.

[49] First of all, I make the observation that Learned Queen's CoJnsel for the applicant could not have been in any doubt as to the way this Court was thinking so far as the e plication for

a stay was concerned. That is having regard to all the circum'1tan t::lS a stay would not be granted for the following reasons: Either position put forward by tho applicant - six

months or until·r. matter is determined - is untenable.

[50] To grant a stay for six months would be totally ineffectual as having regard to our own experience of the Privy Council disposing of civil matters in our jurisdiction we know of no civil matter which went to the Privy Council and was disposed of within that time frame. Our experience is that the average minimum for disposal of civil cases in Privy Council from our jurisdiction is 18 months to 2 years. As pointed out to Learned Queen's Counsel thatno one but the Privy Council controls the schedule for the hearing of cases. Secondly, to have a winding up petition stayed indefinitely would be most undesirbale and could result in an injusticeto the petitioner.s

[51] I am fortified in this view by the headnote in **Re Boston Timber Fabrication; Ltd** [1984] BELC p.328which reads as follows:

"it is improper to stand over a winding up petition presented by a creditor for a very long or indefinite period."

[52] Finally Mr. Archibald submitted that a delay in the hearing of the petition will cause significant deterioration in the value of Credicom Asia's assets which are already worth less than the debts to the respondents. He argued, therefore, there are no real financial risks to the applicant in the outcome of this proceeding and will suffer no injury if a stay is not granted. I am persuaded by this argument.

[53] Having regard to the foregonig the applications for conditional leave to appeal to Her Majesty-in-Cuoncil and for a stay of the order of this Court given on 6th December 1999 are refuseci

[54] Costs to the respondents fit for two Counsel to be taxed if not agreed.

Albert J. Redhead

Justice of Appeal

I concur

Dennis Byron

Chief Justice

I concur

Satrohan Singh

Justice of Appeal