

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
SPECIAL SITTING
VIDEOCONFERENCE

Thursday, 25th April 2024

JUDGMENT

Case Name: Floreat Real Estate Limited
v
[1] XYZ
[2] Chia Hsing Wang
[BVIHCMAP2023/0017]
(Territory of the Virgin Islands)

Date: Thursday, 25th April 2024

Coram for delivery: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Robert Nader holding papers for Mr. Alistair Abbott with him Mr. Christopher Bromilow and Mr. William Hare

Respondents: Mr. Andrew Willins

Issues: Interlocutory appeal – Appeal against order appointing joint provisional liquidators – Standing – Whether Mr. Wang had standing to apply for the appointment of joint provisional liquidators over RAGOF – Bare trusts – Whether XYZ held the XYZ shares on a bare trust for Mr. Wang – Derivative claims – Whether there were special circumstances entitling Mr. Wang to seek the appointment of joint provisional liquidators over

RAGOF on a derivative basis – Abuse of court – Subsequent interlocutory proceedings – Whether a subsequent interlocutory application involving the same parties and same issues runs afoul of the abuse of court principles – Whether the dismissal of Ladd v Marshall applications precludes an applicant from introducing that same evidence in the subsequent interlocutory application - The rule in Hollington v Hewthorn – Whether the rule in Hollington v Hewthorn applies to the reliance on decisions of another court in interlocutory applications

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. Costs are awarded to Mr. Wang to be assessed by a Judge of the Commercial Division if not agreed by the parties within 21 days from the date of delivery of this judgment.**
- 3. Ground 3A of the counterappeal is dismissed on the issue of whether he was a ‘member’ of RAGOF within the extended meaning of this term in section 2 of the Insolvency Act 2003. The learned judge’s finding on this issue is upheld.**
- 4. Mr. Wang shall pay FRE’s cost of the counterappeal limited to that ground 3(a) only, such costs to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days from the date of delivery of this judgment.**

Reason:

- 1. Section 184C of the BVI Business Companies Act 2004 applies only to applications by a shareholder/member to bring a derivative claim or to intervene in existing proceedings in which the company is a party in the name and on behalf of the company. There is no provision in the Insolvency Act 2003 or in any other applicable statute law which provides for an application for permission to bring a derivative claim based on the existence of a bare trust or, absent a bare trust, upon demonstrated ‘special circumstances’. These concepts were developed by the courts to facilitate actions brought by beneficiaries for reliefs to protect**

and preserve the assets of a trust or trust property, especially in circumstances where such assets or trust property are in real danger of being dissipated or misappropriated, and the trustee refuses or is unable to act to protect the assets or property of the trust. These species of derivative actions are not to be likened to the derivative actions of a 'member' of a company brought or undertaken in the name of the company under section 184C, as the beneficiary of the trust is not the registered owner of the shares in the company, and hence not a 'member' of the company.

Section 184C of the BVI Business Companies Act 2004 Act No. 16 of 2004 of the Laws of the Virgin Islands considered; Section 170 of the Insolvency Act 2003 Act No. 5 of 2003 of the Laws of the Virgin Islands considered.

2. Separate and apart from the provisions of section 184C of the BVI Business Companies Act 2004, BVI law recognizes and has adopted as part of its procedural and substantive law, the legal concept of derivative claims brought by beneficiaries of shares held in a company. Derivative claims based upon the existence of a bare trust or on the existence of special circumstances requiring the court to act to protect the property or assets of a trust, are available to beneficiaries and may be brought with respect to statutory remedies under the BVI's company law and insolvency regime, including in relation to applications to appoint provisional liquidators. Accordingly, section 184C has no application to 'derivative trust proceedings' brought by a beneficiary under a bare trust or in special circumstances. Section 184C was therefore not engaged in the Second JPL Application and no permission of the court below was required for Mr. Wang to bring the Second JPL Application on a derivative basis. In relation to that limb of the Second JPL Application, Mr. Wang was seeking relief not as a shareholder of RAGOF, but in his capacity,

purportedly, as the beneficiary under a bare trust of the XYZ shares in RAGOF.

Roberts v Gill & Co [2010] UKSC 22 applied; Joseph Hayim Hayim and another v Citibank N.A. and another [1987] AC 730 applied; Tipp Investments PCC v Chagala Group Limited et al BVIHC(COM) 2016/102 (delivered 9th November 2016, unreported) followed; Thelma Paraskevaides and another v Citco Trust Corporation Ltd and others BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed.

3. The concept of an economic interest to be protected, while permitted by virtue of the expanded meaning of the term 'member' in section 2 of the Insolvency Act 2003 must be subject to the specific and mandatory terms of the articles of the company in question. Pursuant to Article 17.5.1 of RAGOF's Articles, the prior approval of the Board of Directors of an intended transferee is a mandatory requirement. It is not in dispute that this provision was not complied with by Julius Baer prior to signing the instruments of transfer of the JB Shares in RAGOF to Mr. Wang. In fact, when an attempt was made to seek the approval of the directors, this was done by Mr. Wang's BVI lawyers, and not by the registered shareholder Julius Baer as Article 17.5.1 requires. The effect of these provisions in the Articles means that the instruments of transfer of the JB Shares to Mr. Wang were null and void pursuant to Article 18.2, as the learned judge correctly found. In those circumstances, it cannot be gainsaid that Mr. Wang had an economic or contractual interest to protect by virtue of or resting upon instruments of transfer in his favour that were null and void, such that the expanded meaning of the term 'member' in section 2 of the Insolvency Act 2003 applied to him rendering him a person who in his own right was entitled to bring the Second JPL Application. Ground 3(a) of his counter appeal therefore fails.

Section 2 of the Insolvency Act 2003 Act No. 5 of 2003 of the Laws of the Virgin Islands considered applied; McCarthy Surfacing Limited [2006] EWHC 832 (Ch) distinguished; Re A Company [1986] BCLC 391 distinguished; Harris v Jones [2011] EWHC 1518 (Ch) distinguished.

4. Although XYZ is not directly a party to the XY Nominee Agreement, it clearly holds the XYZ shares at the behest of its principal, XY, subject to and upon the terms and conditions of the said nominee agreement entered into by XY and Mr. Wang on 27th March 2015. It is well arguable, based on BVI trust law principles, that this gives rise prima facie to the existence of a bare trust between XYZ as a registered owner holding title to what is ultimately Mr. Wang's property, the XYZ shares in RAGOF. Further, it was not necessary for the purposes of the Second JPL Application, for Wallbank J to be satisfied conclusively that the XYZ shares are held by XYZ on a bare trust for Mr. Wang. He need only be satisfied that this point was well arguable in order to allow Mr. Wang to proceed on a derivative basis to appoint JPLs. Viewed in this way, and absent any expert evidence as to Swiss law or English law, Wallbank J was correct to conclude that it cannot be seriously disputed that XYZ holds the XYZ shares on bare trust for Mr. Wang and that that was sufficient to clear the way for him to bring a derivative claim.
5. The test as to whether there are special circumstances entitling a beneficiary of an estate to bring a derivative action is two-fold. First, the circumstances must be sufficiently special to warrant the beneficiary proceeding on a derivative basis; and second, it must be just, in the circumstances, for the beneficiary to proceed on a derivative basis. For this category of 'derivative claims' certain factors need to be present. They are: (1) the existence of a trust other than a bare trust; (2) some asset or property of the trust estate in need of protection; (3) the trustee is unable or unwilling to act to

protect the trust estate; and (4) the beneficiary claimant must be at least one of the beneficiaries capable of acting to protect the trust estate, but he/she need not be the only beneficiary capable of so acting. In this category of derivative actions, the court is called upon to assess whether the circumstances are sufficiently special to warrant the beneficiary bringing a derivative action and that 'justice' requires that the claimant beneficiary should be allowed to pursue the remedy in the court and have the question or questions in issue decided by the court.

Roberts v Gill & Co [2010] UKSC 22 applied; Joseph Hayim Hayim v Citibank N.A. [1987] AC 730 applied; Paraskevaides v Citco Trust Corporation Ltd BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed.

6. In this case, there is no basis, whether of law or fact, to disturb the finding by Wallbank J that there were 'special circumstances' shown on the evidence for Mr. Wang, the beneficial owner of the XYZ shares and the JB Shares, to have derivative standing to seek the appointment of JPLs, and to proceed with Claim No. 150/2021 derivatively. It is clear from the affidavit evidence and documents that Mr. Wang took steps to have both the XYZ shares, and JB Shares transferred to himself, in order to enable him to become a registered member of RAGOF entitled, in his own right, to bring an action to protect RAGOF, its assets, and his interests. Wallbank J was also correct to find on the evidence before him that FRE and or the Floreat individuals had sought to obstruct or block Mr. Wang's efforts to be registered as a member of RAGOF. While strictly speaking it may not be correct to say that XYZ has 'refused' to act to protect the assets of RAGOF, it is correct that it has declined to do so or to participate in the extant proceedings. This leads to the same result whereby the trustee is unable or unwilling to act, and is enough to justify Mr. Wang, as the beneficial owner of the shares, proceeding on a

derivative standing basis. Furthermore, Wallbank J, in assessing the risk, found that there was a real and present risk of harm to RAGOF if Mr. Wang, as the beneficial owner of 97% of RAGOF, is unable to proceed on a derivative basis to protect the assets of RAGOF and his interest therein. As a matter of principle, this Court ought to pay deference to the learned judge's conclusion on this issue. Accordingly, Wallbank J properly assessed and weighed the factors relied on by Mr. Wang as amounting to circumstances that were 'sufficiently special' and determined that it was 'just', in all the circumstances, for Mr. Wang, as the beneficiary of shares in RAGOF, to be able to proceed derivatively.

7. A subsequent interlocutory application involving the same parties and regarding the same or similar relief and/or issues and/or points (including points which could or ought to have been taken in the first proceedings) will run foul of the abuse of court principles, unless the applicant can satisfy the court that it does not on one of two bases. The first is where the applicant in the second application can show that there has been some 'significant and material' change of circumstances from when the first or earlier application was decided; and the second, is where the applicant can put before the court 'new' evidence, that is evidence which the applicant did not know and could not reasonably have discovered at the time of the first hearing. The threshold test is not, as FRE suggested 'very substantial and exceptional material change of circumstances such that justice requires reconsideration of the issue of regrant'.

Koza Limited v Koza Altin Isletmeleri [2020] EWCA Civ 1018 applied; Hunter v Chief Constable of the West Midlands Police [1982] AC 529 considered; Henderson v Henderson (1843) 3 Hare 100; Chanel v Woolworth [1981] 1 WLR 485 considered.

8. The dismissal of the three Ladd v Marshall applications in the First Appeal to adduce fresh or purportedly new evidence before the Court of Appeal in support of Mr. Wang's appeal, did not operate to exclude or to prevent such materials, if relevant, from being relied on before the first instance judge on the Second JPL Application, in support of the contention that there had been a 'significant and material' change of circumstances from when the First JPL Application was adjudicated, the ex parte order discharged by Wallbank J, and the appeal therefrom also dismissed. Different principles and considerations apply as between a Ladd v Marshall application before an appellate court, and those to be applied by a judge in the High Court charged in a second application with determining whether the said application amounts to an abuse of process in light of a first and unsuccessful application. The test in the latter is whether it has been demonstrated that a 'significant and material' change of circumstances has been demonstrated from that which pertained when the first application was decided. Accordingly, the applicant in a second application is not precluded from adducing material which was not admitted by the appellate court because, on an application of the Ladd v Marshall criteria, the application failed. Such material can be relied upon as part and parcel of the cache of 'new' evidence sufficiently material to satisfy the first instance court that the 'abuse of court' principles have been dispelled.

Ladd v Marshall [1954] 3 All ER 745 considered;
Flavio Maluf v Durant International Corp
BVIHCMAP2021/0025 (delivered 13th January
2022, unreported) considered.

9. 'New' evidence, which was not accepted by an appellate court on a Ladd v Marshall application requires close and careful scrutiny by a first instance court. For example, if that evidence or part or parts of it, had been rejected in the Ladd v Marshall application before the appellate

court, on the basis that it did not satisfy the first criterion of *Ladd v Marshall*, then such evidence would prima facie be caught by the abuse principles and could not be used by the applicant in the second application to show a 'significant and material' change of circumstances or 'new' evidence of the type described under the second limb of the threshold test in *Koza Ltd v Koza Altin Isletmeleri*. However, in this case, Wallbank J was correct in finding that simply because the same categories of evidence were in play, did not prevent the Second JPL Application from being made and heard on its merits. New or fuller evidence can, and here did, change the picture. Instead of some degree of speculation and supposition, there was now greater certainty with respect to the risk to RAGOF's assets.

10. It is a fallacy of principle, to categorize the Second JPL Application as a 'regrant'. It is not. As Wallbank J correctly found, it was a fresh application. The discharge of the First JPL order and the unsuccessful appeal therefrom, rested, in large measure, not so much on the quality of the evidence of serious wrongdoing, but on the breaches of the duty of full and frank disclosure, and failure to put alternative remedies, as found in the Discharge Decision and upheld by the First Appeal Judgment. The appeal having failed on these bases, it was certainly open to Mr. Wang to seek to become a registered shareholder of RAGOF, and where this process was delayed or encountered certain obstacles, to move the court in interlocutory proceedings on a derivative basis, as the beneficial owner of the XYZ shares and the person with an economic interest at risk to be protected. Mr. Wang was entitled to assert, as he did in the court below, that there was new or additional evidence of sufficient cogency showing a 'significant and material change' of circumstances, or new evidence not available on the First JPL Application, entitling him at the interlocutory stage, to the reliefs sought by the

Second JPL Application. In the same vein, FRE's argument that the Second JPL Application is essentially a re-hearing of the First JPL Application is also without merit. The fact that an issue was part of the claim in Claim No. 150/2021 or an allegation in the First JPL Application, is not dispositive of the question of whether additional or new evidence in relation to the same issue or allegation cannot properly be considered on the Second JPL Application, where the same or similar issues or points have been relied on. One of the criticisms at the discharge hearing was that several of the categories of allegations of wrongdoing remain just that, mere allegations, unsupported by any cogent evidence upon which a judge can grant the reliefs being sought. Accordingly, Mr. Wang cannot now be legitimately criticized for producing additional or new evidence aimed at buttressing the previously made allegations of serious wrongdoing, in circumstances where much has unfolded in relation to these matters.

11. The rule in *Hollington*, which prevents the admission of decisions of a court in an earlier trial being used as evidence in a subsequent civil action or trial, even one arising out of the same facts, no longer applies to the reliance on decisions of another court in interlocutory applications. This is so because, in interlocutory proceedings, the court is not called upon to make final decisions, but to determine whether there is a serious issue to be tried or whether there is a real risk of dissipation or, as in the instant matter, whether the appointment of provisional liquidators is 'necessary' for the purpose of maintaining the value of assets owned or managed by the company or it is in the public interest, pending the full trial and determination of the application to wind up the company by appointing liquidators. The latter type of interlocutory proceeding, albeit having serious consequences for a company before the trial of the winding up application, is in no way a final determination of the issues in the winding up application or of the wide discretionary

powers granted to the court under section 167 of the Insolvency Act 2003. The jurisdiction and discretion of the judge ultimately hearing the winding up petition, even if it is the same judge who heard the application to appoint provisional liquidators, is in no way fettered or constrained by any evidentiary assessments or findings made at the interlocutory stage. Accordingly, Wallbank J did not err when taking into account the findings of Justice Kawaley in the Cayman Proceedings.

Hollington v Hewthorn [1943] 1 KB 587 applied; Sabbagh v Khoury [2014] EWHC 3233 (Comm) considered; Rogers v Hoyle [2014] EWCA Civ 257 considered; Calyon (a company incorporated under the laws of the Republic of France) v Michailaidis and others [2009] UKPC 34 distinguished.

12. As FRE has failed on all of its grounds of appeal and has failed to satisfy this Court that the order appointing JPLs over RAGOF should be set aside, the issue of Wallbank J's dismissal of Mr. Wang's alternative application for certain reliefs did not arise for consideration.