In The Supreme Court of Bermuda

COMPANIES (WINDING UP)

(COMMERCIAL COURT)

2011: No. 23

IN THE MATTER OF CELESTIAL NUTRIFOODS LIMITED (IN LIQUIDATION)

IN THE MATTER OF THE SUPREME COURT ACT 1905

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

(in Chambers)

Cross-border insolvency-common law recognition of Singapore insolvency proceedings in relation to Bermudian company supported by stay of proceedings against company in Bermuda-proceedings commenced by liquidators in Singapore against directors-application by directors to lift stay in order to determine Bermuda law issues in Bermuda-abuse of process-forum non conveniens

Date of Decision: January 23, 2017
Date of Reasons: February 1, 2017

Mr Jan Woloniecki and Ms Kehinde George, ASW Law Limited, for the Applicants
Mr Mark Diel, Marshall Diel & Myers Limited, for the Company

Background

1. The Company is a 2003 incorporated Bermudian company which traded as a Singapore listed company. It was placed into provisional liquidation by the Singapore High Court on December 24, 2010. By an Ex Parte Originating Summons issued on

January 27, 2011, the Company acting by its Singapore provisional liquidator Mr Yit Chee Wah sought an Order that:

> " *1. The appointment of Mr Yit Chee Wah…as provisional liquidator of the Company pursuant to the order dated 24th December 2010 of the Hon. Madam Justice Lai Siu Chiu of the High Court of the Republic of Singapore be recognised in Bermuda;*
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> *2. The automatic stay on prosecution or commencement of any proceedings in Bermuda provided by section 167(4) of the Companies Act 1981 shall be confirmed and imposed*;
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> *3. The Court shall make an order pursuant to section 195 of the Companies Act 1981 to require an authorised representative of Codan Limited to attend before the Court for examination and/or to produce the books and papers in the custody of Codan Limited relating to the Company…* "

2. I granted the relief sought six years ago on January 31, 2011 ("the Recognition Order"), accepting the submission that I was entitled to recognise the Singaporean liquidation at common law, grant all forms relief vested in the Court by section 18 of the Supreme Court Act 1905 and apply local insolvency law without commencing an ancillary liquidation following *Cambridge Gas Transportation Corpn-v- Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

3. The Company was wound up by the Singapore Court on December 21, 2011.

4. By Summons dated July 18, 2016, the Applicants (Lai Seng Kwoon and Loo Choon Chiaw, directors) sought an Order that:

> "*1. Notwithstanding the order of this Court dated 31 January 2011…the Applicants be at liberty to commence an action against the Company and the PL in order to enforce the indemnity under bye-law 164 of the Company's bye-laws.*"

5. Directions were ordered on August 12, 2016 for a half-day hearing. The Applicants' counsel requested dates in mid-October and early November which could not be accommodated by the Court. The application sought to obtain this Court's adjudication of a question of Bermuda law which would otherwise be determined in proceedings brought against the Applicants in Singapore.

6. Having eventually heard the application on January 23, 2017, I refused to grant the Applicants the relief they sought and awarded costs to the Company. These are the reasons for that decision.

The nature of the application

7. Distilled to its bare essentials, the present application was designed to invite this Court to decide an issue which had been joined in proceedings before the Singapore Court in circumstances where no contention had been made in those proceedings that the issue was not fit for determination by the Singapore Court. Mr Diel's submissions and the Company's evidence (the First and Second Affidavits of Drew and Napier LLC director Kirpalani Gopal) revealed the following timeline of significant events:

    - **21/12/2011**: Company wound up by Singapore Court;
    - **7/12/2015**: Company commences proceedings against directors (including the Applicants) for breach of duty;
    - **21/12/2015**: Deadline for directors to challenge jurisdiction of Singapore Court over the dispute;
    - **25/2/2016**: Directors file Defence and Counterclaim pleading the Bye-Law indemnity point;
    - **18/7/16**: Applicants file present Summons seeking to lift this Court's stay to pursue the Bye-Law indemnity point in Bermuda;
    - **31/8/2016**: Singapore Court at a pre-trial conference directs the parties to exchange a list of issues to be dealt with by Bermuda law experts;
    - **21/8/16**: Singapore Court at a further pre-trial conference directs the parties to exchange CVs of their proposed Bermuda law experts;
    - **14/10/16**: 2nd Applicant (Mr Loo) serves his proposed Bermuda law expert's CV (Mr Mark Chudleigh);
    - **18/10/16**: 1st Applicant (Mr Lai) serves his proposed Bermuda law expert's CV (Mr Jan Woloniecki);
    - **26/10/16**: Singapore Court fixes timetable for exchange of expert reports at a further pre-trial conference;
    - **3/2/17**: deadline for exchanging expert reports on Bermuda law;
    - **25/2/17**: next pre-trial conference;
    - **3/3/17**: deadline for filing responsive expert reports on Bermuda law.

8. It is not disputed that the Applicants have yet to assert before the Singapore Court that the Bye-Law indemnity point should not be determined in that Court. The First Affidavit of Mr Lai sworn on July 14, 2016 proffers no explanation as to why:

    (a) the Applicants waited more than seven months after the commencement of the Singapore Proceedings to commence the present application in Bermuda; and/or

    (b) the Applicants have fully participated in the Singapore Proceedings without seeking to contend that the Singapore Court ought not to determine the Bermuda law issues.

9. The Applicants filed no evidence in response to the First Gopal Affidavit or the updating Second Gopal Affidavit. These were Affidavits which explained the status of the Singapore Proceedings. The Company's evidence described some of the various options available to the Applicants to advance before the Singapore Court what amounted to a *forum non conveniens* argument and/or a Bermuda law pleading point which the Applicants have yet to pursue. The First Lai Affidavit merely:

    (a) recites Bye-Law 164(1) which indemnifies directors against all claims save for those relating to "*fraud or dishonesty*";

    (b) avers that the Applicants "*have been advised that there is no such properly pleaded claims of fraud or dishonesty in the statement of claim*";

    (c) seeks leave to commence an action against the Company in Bermuda to enforce the Bye-Law indemnity and to obtain:

        (i) a declaration that no action lies against the Applicants by reason of the indemnity, and

        (ii) an injunction restraining the pursuit of the Singapore Proceedings against the Applicants.

10. Putting aside the question of the adequacy of the pleadings of the Company in the Singaporean Proceedings, it was clear that allegations of fraudulent and/or dishonest conduct are made against the Applicants, *inter alia*, in paragraphs 37(g) and 41(c) of the Statement of Claim. The Applicants pleaded to these allegations rather than applying to strike them out on the grounds that they were improperly pleaded.

The legal basis of the application

11. Mr Woloniecki correctly submitted that the stay contained in the Recognition Order was in terms granted on a legal basis which had since been discredited: *Singularis Holdings Ltd.-v-PricewaterhouseCoopers* [2015] AC 1675. The Judicial Committee clearly decided in that case that statutory provisions could not be applied in circumstances in which they did not actually apply by way of common law assistance, even if the operation of the relevant statutory powers could potentially have been triggered by the commencement of an appropriate statutory proceeding in the local court. This is the necessary consequence of the disapproval of the approach taken in *Cambridge Gas* where, although a scheme of arrangement could have been implemented under Manx law in relation to the Manx company being restructured abroad, no scheme of arrangement had in fact been implemented in the company's place of incorporation. This emerges most clearly from Lord Collins' following remarks:

> "***[82]*** *The liquidators' argument is that the common law rule of assistance in insolvency matters extends to the application of local legislation even though as a matter of its legislative scope it does not apply to the case in hand. In the present case the argument is that, even if s 195 of the Companies Act 1981 does not apply to foreign companies, it should be applied by analogy or 'as if' the Cayman Islands company were a Bermuda company.*
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> ***[83]*** *In my judgment, that argument is not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that it depends on some part of the opinion in Cambridge Gas, that decision was not only wrong in its recognition of the New York order regulating the title to Manx shares, as decided in Rubin v Eurofinance SA, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or 'as if' they applied.*" [emphasis added]

12. However, the Applicants' counsel sensibly conceded that the Court clearly had, independently of the statutory insolvency stay powers recited in the Recognition Order, the inherent jurisdiction to stay proceedings. The Company's counsel did not demur. It is helpful to remember what the source of that inherent jurisdiction is. The following statement of principle was approved by the English Court of Appeal (Lord Bingham, LCJ) in *Reichold Norway Asa and Reichold Chemicals Inc-v-Goldman Sachs International (a Firm)*[1999] EWCA Civ 70628-4 (at page 7):

> "*On the issue of jurisdiction the judge expressed himself briefly in these terms:*

'The court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by section 49(3) of the Supreme Court Act 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be right to do so in a case such as the present, and if so under what circumstances."

13. This Court's inherent jurisdiction is preserved without express reference to the power to grant a stay by sections 12[1] and 18[2] of the Supreme Court Act 1905. Against this tacit background, Mr Woloniecki submitted that it was appropriate for this Court to approach the Applicants' case by reference to the same principles which would apply in relation to a statutory insolvency stay because this was the rationale behind granting the stay. Applying those principles, it was contended that the main rationale for granting the stay was to prevent creditors obtaining a preferential distribution by suing the debtor outside the primary liquidation forum. The reason for this Court's stay was not to prevent debtors from pursuing claims. Reliance was placed on various authorities including my own decision in *ACE Bermuda Insurance Ltd.-v-Pedersen and others* [2005] Bda LR 44. However, that was a case where a potential debtor was permitted to enforce an exclusive jurisdiction clause providing for arbitration in Bermuda rather than in an Arizona Bankruptcy Court. The Bermuda plaintiff in that case had not by its conduct submitted to the substantive jurisdiction of the Arizona Court in relation to the relevant dispute, effectively waiving its arbitration rights.

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[1] Section 12 (1) abolishes the old superior courts which largely corresponded to the England and Wales pre-Judicature Acts 1873-75 courts. Section 12 (2) provides:

"*(2)The jurisdiction transferred to the Supreme Court by virtue of this Act shall include the jurisdiction which, at the commencement of this Act* [6 June 1905]*, was vested in, or capable of being exercised by, all or any one or more of the Judges of the aforementioned courts, respectively, sitting in court or chambers, when acting as Judges or a Judge in pursuance of any Act, law or custom, and all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred.*"

[2] Section 18 provides:

"*18. In every civil cause or matter which is pending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail.*"

14. In an attempt to meet the Company's argument that the Singapore Court was the more appropriate forum, the Applicants also argued that a stay was not appropriate following the principles established by Lord Goff in *Spiliada Maritime Corporation-v-Cansulex* [1987] AC 460 at 476. As to the two crucial requirements for a stay, it was conceded that Singapore was a competent jurisdiction, but contended that it was not possible for the Company to establish (the stay applicant bearing the onus of proof) that Singapore was the more appropriate forum. This alternative argument, also unsupported by any relevant facts, was a hollow one.

15. The Company submitted firstly that the application was an abuse of process because the claim it sought to pursue amounted to an abuse of process because the Applicants ought to have challenged the Recognition Order of which they had notice as directors in 2011, almost 6 years ago. Reliance was placed on the judgment of Hellman J in *Corporation of Hamilton-v-Mexico Infrastructure Finance LLC* [2016] SC (Bda) 94 Com (18 November 2016) at paragraph 34. It was further argued that (1) the Bye-law indemnity point could be resolved in the Singapore proceedings based on expert evidence on Bermuda law, and (2) the pleading point it sought to pursue in Bermuda had not been taken in Singapore where it ought to have been. As to abuse of process, Mr Diel relied upon Hellman J's following observations in the *Mexico Infrastructure Finance LLC* case:

> "*34. The principle at issue here is the procedural rule that a party may be precluded on grounds of abuse of process from raising in subsequent proceedings points which could and should have been raised in previous proceedings which have been concluded, whether by a judgment or settlement. This principle is sometimes known as the rule in Henderson v Henderson (1843) 3 Hare 100 as that case contained an early statement of the rule by Wigram V-C at 114 – 115. However the fullest modern statement of the rule was given by Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1 HL at 31 A – F and 32 H – 33 A:*
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> > *'It may very well be, as has been convincingly argued (Watt, The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should*

have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice…"

16. As to *forum non conveniens*, Mr Diel submitted that it was self-evident that Singapore was the more appropriate forum, not least because the Applicants had by their conduct conceded this issue in the Singapore Proceedings. That apart, and applying the *Spiliada* principles, Singapore was clearly the most suitable forum since:

    (1) the joint liquidators were resident there;

    (2) the Applicants were resident in nearby Singapore; and

    (3) the lawyers were in Singapore conducting a case which was well advanced.

17. As far as the test for lifting the stay applying traditional insolvency principles was concerned, Mr Diel relied on the broad discretion articulated in *New Cap-v- HIH Casualty & General*[2002] 2 BCLC 228 at 233.

Findings

Principles governing the lifting of a stay against a company in liquidation

18. The Applicants conceded that the principles governing the lifting of a statutory liquidation stay should apply to a stay imposed under the Court's inherent jurisdiction by way of common law assistance to a foreign insolvency court. I accepted the submission that the usual approach to lifting the liquidation stay by reference to the character of the claim is indeed that an attempt by a debtor to establish non-liability will typically be allowed to be pursued, as the Applicants contended. This framing of the application was, however, inapposite for the factual matrix of the present case in which the debtors (the Applicants) were seeking to lift the stay to pursue a defence which they were already advancing in proceedings commenced against them by the Company's liquidators in another forum.

19. The purpose of the Recognition Order and the supporting stay was to assist the then provisional liquidator in Singapore to liquidate the Company in a commercially efficient manner for the benefit of its creditors by saving the expense of an ancillary liquidation in Bermuda. Permitting satellite litigation which was not required in the interests of the insolvent estate would equally undermine the objectives of the Recognition Order. I find that the governing principles for lifting the stay are, for present purposes, best stated by Jonathan Parker LJ in *New Cap-v- HIH Casualty & General*[2002] 2 BCLC 228 at 233 upon which Mr Diel on behalf of the Company relied:

> "[21] *There is no dispute between the parties as to the guiding principles in the authorities in relation to the nature and the purpose of the court's discretion under section 130(2). The main authorities are all referred to in the judge's judgment, where the relevant passages are quoted in full. For present purposes it suffices to say that in Re Aro Ltd [1980] Ch 186, Brightman LJ, giving the judgment of the Court of Appeal, said that section 231 of the Companies Act 1948*[3]*, which is the predecessor of section 130(2), gave the court 'freedom to do what is right and fair in all the circumstances'. It would, I think, be hard to formulate a greater freedom for any court than that.*"

[3] Bermuda's section 167(4) of the Companies Act 1981 is expressed in identical terms to section 231 of the 1948 Act. It provides:

"(4) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose."

Relevant meaning of abuse of process

20. The test for lifting the 'liquidation stay', most broadly yet pithily expressed, requires regard to be had to "*what is right and fair in all the circumstances*". That test is complementary to the correspondingly broad yet pithily expressed test for abuse of process which requires this Court "*to ask whether in all the circumstances a party's conduct is an abuse*": per Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 HL at 31 A – F (cited in *Corporation of Hamilton-v-Mexico Infrastructure Finance LLC* [2016] SC (Bda) 94 Com (18 November 2016) at paragraph 34 (Hellman J)).

Merits of application

21. On the facts of the present case, it was clear that it would in all the circumstances be wrong and unfair (rather than right and fair) to permit the Applicants to sue the Company in Bermuda having regard to the following pertinent considerations:

    (1) the legal proceedings they wished to bring would undermine the purpose of the Recognition Order by impeding the efforts of the Singapore Court to liquidate the Company rather than assisting the efforts of the foreign insolvency court;

    (2) the present application was an abuse of the process of this Court since the proper time for seeking to invoke this Court's jurisdiction in respect of the Bye-Law indemnity point had long passed;

    (3) the Applicants had by their conduct in the Singapore Proceedings waived the right to assert that it was an inappropriate forum for adjudicating the Bermuda law issues which have been joined therein; and/or

    (4) the Applicants had submitted to the jurisdiction of the Singapore Court on the merits and made no attempt to invite that court to decline jurisdiction in relation to the relevant Bermuda law issues.

Conclusion

22. For the above reasons, on January 23, 2017 I refused the Applicants' attempt to adjudicate their rights under the Company's Bye-Laws in Bermuda and dismissed their Summons with costs.

Dated this 1st day of February 2017 _____
IAN RC KAWALEY CJ