In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: No. 437

BETWEEN:

SAN ANTONIO INTERNATIONAL LIMITED

Applicant

-and-

SAN ANTONIO OIL & GAS SERVICES LIMITED

Respondent

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr. John Hindess, Marshall Diel & Myers Limited, for the Plaintiffs**
	Mr. David Kessaram, Cox Hallett Wilkinson Limited, for the Defendant
Dates of Hearing:	**5 October 2020**
Date of Ruling:	**15 October 2020**

RULING

Application for the provision of audited accounts and permission to inspect the books and papers of a company in liquidation under the supervision of Court by an applicant who is neither a creditor nor a contributory; scope of section 176(5) of the Companies Act 1981; whether the applicant is a proper person to invoke the jurisdiction

Introduction

1. This is an application by San Antonio International Limited, the Applicant, for an order under section 176 (5) of the Companies Act 1981 (the "**Act**") for an order that the Joint Liquidators of San Antonio Oil & Gas Services Limited (the "**Company**") provide to the Applicant audited accounts and permit the Applicant to inspect the books and papers of the Joint Liquidators in this matter.

2. The application is supported by the First affidavit of Saul Dismont sworn on 1 November 2019. The Joint Liquidators have also filed evidence in the form of the First Affidavit of Matthew Clingerman sworn on 18 December 2019.

Background

3. The Applicant owns 100% of the shares of Oil Services Holdco Ltd "**Oil Services**") which owns 100% of the shares of Armadillo Holdings Inc. ("**Armadillo**") which in turn owns hundred percent of the shares of the Company. The Applicant claims that it is entitled to a copy of the audited accounts and inspection of the books and papers of the Joint Liquidators on the basis that it has sufficient interest on two grounds.

4. First, as the Applicant is the indirect holder of 100% of the shares of the Company, the Applicant has an economic interest in any surplus dividend declared by the Joint Liquidators to the shareholders of the Company.

5. Secondly, it is said that the Applicant has an economic interest in the shares of the company owned by Armadillo. The shares of the company owned by Armadillo were pledged as collateral for the indebtedness of the Company, pursuant to a Credit Facility Agreement dated 23 July 2008 between the Company, as the borrower, Armadillo, as the owner of the shares of the Company to be pledged, and the lenders who are parties to that agreement. In 2014, the lenders foreclosed on the debt and the collateral agent, Mayflower Management Services (Bermuda) Limited ("Mayflower"), took possession of the shares pursuant to the

terms of the Credit Facility Agreement. In the written submissions, filed on behalf of the Applicant, it is said that the Applicant is entitled to any surplus after the sale of the shares of the Company "*held by the [Applicant]".* In the written submissions it is contended that this entitlement arises pursuant to the terms of the Credit Facility Agreement. At the hearing of this application Mr Hindess, who appeared on behalf of the Applicant, was unable to point to any particular provision in the Credit Facility Agreement which provided that entitlement to the Applicant. Mr Hindess contended that the Applicant had an economic interest in any surplus from the sale of the shares of the Company given that the Applicant was the indirect holder of 100% of the shares of the Company.

Statutory framework

6. As noted, this application is made under section 176 (5) of the Act which provides that:

> *"If any person is dissatisfied by any act, omission or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and may give such directions and make such order in the premises as it thinks just."*

7. It should be noted that the Act expressly provides for inspection of books and papers of a company in liquidation. Section 193(1) of the Act provides:

> *"The Court may, at any time after making a winding-up order, make such order for inspection of the books and papers of the company by creditors and contributories as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise."*

8. Furthermore, Rule 129 of the Companies (Winding Up) Rules 1982 provides that:

> *"When the liquidator's accounts have been audited, the Registrar of Companies shall certify the fact upon the account and thereupon the duplicate copy bearing a*

like certificate, shall be filed with the Registrar and that copy together with a copy of the said account delivered to the Court for filing in accordance with section 180 of the Act, shall be open to the inspection of any person on payment of the same fee as is payable with respect to the inspection of the file of proceedings under rule 12."

9. Rule 12, referred to in Rule 129, provides that:

"Every person who has been an officer of a company which is being wound up and the Registrar of Companies shall be entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, shall be entitled on payment of the prescribed fee, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or be furnished with such copies or extracts on payment of the prescribed fee."

Discussion

10. In correspondence with the Applicants attorneys, the Joint Liquidators have taken the position that the Applicant has no entitlement to the books and papers of the Company as the Applicant is neither a creditor nor a contributory. The Joint Liquidators have taken the position that the Applicant is an outsider and has no legal standing to pursue this application.

11. Mr Hindess, on behalf of the Applicant, argues that the law is clear that a party does not need to be either a creditor or a contributory to take advantage of the redress available in section 176 (5) of the Act. He relies upon the decision of the Bermuda Supreme Court in *Re Mentor Insurance Ltd* [1987] Bda LR 52 which in turn relied upon the decision of the Privy Council in *Attorney General of the Gambia v N'jie* [1961] AC 617.

12. *Re Mentor Insurance Limited* concerned winding up proceedings pursuant to an order of the Supreme Court made on 25 June 1985. Mentor was, at the date of a winding up, a

wholly owned subsidiary of Mentor Holding Corporation ("**MHC**"), a Delaware corporation which in turn was wholly owned subsidiary of another Delaware corporation, Ocean Drilling and Exploration Company ("**ODECO**"). The particular application also concerned Pinnacle Reinsurance Company Limited ("**Pinnacle**"), another Bermuda incorporated exempted company, which at all material times carried on reinsurance business in Bermuda and was a wholly owned subsidiary of CE Heath Underwriting Agencies Pty Ltd.

13. In March 1986, the joint liquidators of Mentor, having obtained the sanction of the committee of inspection, commenced proceedings in the US District Court for the Eastern District of Louisiana against a number of defendants including Pinnacle, ODECO, MHC and a number of corporate officers individually, claiming damages for alleged fraud. Some of the causes of action comprised in the Complaint were founded upon alleged violation of the US Racketeer Influenced and Corrupt Organizations Act (RICO).

14. In response, Pinnacle issued an Originating Summons in the Supreme Court claiming, pursuant to section 176 (5) of the Act, a declaration that in instituting and maintaining the Louisiana proceedings against Pinnacle the joint liquidators had acted in excess of and in abuse of their powers as liquidators. The liquidators challenged the *locus standi* of Pinnacle to make such an application under section 176 (5) of the Act, contending that the statutory scheme contemplates that only creditors or contributories can make applications under this subsection. Counsel for Pinnacle, relying upon the Privy Council decision in *N'jie,* argued that the phrase "person aggrieved" is of wide import and is not limited to creditors and contributories.[1]In that case, Lord Denning referred to the earlier decision in *Ex parte Sidebottom* (1887) 19 QBD, 174 in which James LJ said that a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, wrongfully refused him something or wrongfully affected his title to something. That definition, said Lord

[1] In 1987, when the judgment in Mentor was delivered, section 176 (5) of the Act referred to a "person aggrieved" by any act or decision of the liquidator and that phrase was replaced by a person "dissatisfied" by any act or omission or decision of the liquidator, by section 146 of the Bankruptcy Act 1989.

Denning, was not to be regarded as exhaustive and he went on to cite with approval words of Lord Esher MR in *Re Reed Bowen Co*. (1867) 19 QBD 174, that the phrase "*person aggrieved*" is of wide import and should not be subject to a restrictive interpretation. Lord Denning further stated that while excluding a mere busybody interfering with things which do not concern him, they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.

15. Having regard to the statements made in *N'jie,* Collett J held that the court must have regard to the purpose for which the person alleging himself to be aggrieved seeks to invoke the protection of the court. Collett J held that Pinnacle was properly to be regarded as a person aggrieved within the subsection because "*Pinnacle is seeking to challenge acts or decisions which have caused them to be sued in a foreign court under foreign laws in a way, which the evidence before me, is likely to have occasioned them and to continue to occasion them severe financial damage".*

16. Mr Kessaram, appearing for the Joint Liquidators, points to the decision of the Privy Council in *Deloitte & Touche AG v Christopher D Johnson and Another* [1995] UKPC 25 as setting out the proper approach and required judicial restraint to the question of *locus standi* at [18-19]:

> *"18. In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court*

affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.

19. Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellants submit, that he "has an interest in making the application or may be affected by its outcome". It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor…"

17. The requirement that the applicant must have a legitimate interest in the relief sought it is also referred to in the judgment of Gibson LJ in *Mahomed & Anr. V Morris & Ors*.[2000] EWCA Civ 46 at [26]:

"*It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of s. 168 (5)*[2]*. However, I would accept that someone, like the landlord in Hans Place Ltd., who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power, can utilise s. 168 (5). It may be that other persons can properly bring themselves within the subsection. But the mere fact that the act or decision is that of a liquidator in respect of an asset of the company the proceeds of which would be available for unsecured creditors is not enough, as can be seen from the example of the persons*

[2] Section 168(5) of the Insolvency Act 1986 is the UK counterpart to section 176 (5) of the Bermuda Companies act 1981.

denied an opportunity to buy an asset of the company from the liquidators in Edennote. Nor in my view is it enough that the person claiming to be aggrieved by the act or decision of the liquidator in respect of assets of the company is a surety when his subrogation rights do not in any way depend on the company being in liquidation."

18. Having regard to these authorities, it seems to me that the Applicant is not a person who is directly affected by the exercise of the powers given to the joint Liquidators and does not have a legitimate interest in the relief sought.

19. First, as set out at paragraph 7 above, the issue of inspection of books of a company in liquidation is expressly provided for by section 193 of the Act. That right is expressly limited to creditors and contributories and the section expressly provides "*not further or otherwise*". Following the advice of the Privy Council in *Deloitte & Touche*, the Court must look at the categories of persons identified in section 193 to see if the Applicant is a person who comes within the scope of the section. As the Applicant is neither a creditor nor a contributory, it is not entitled to inspect books and papers of the Company.

20. Second, to the extent that this application is grounded upon the premise that the Applicant has an economic interest in the surplus assets of the Company and any surplus from the sale of the shares of the Company, the application, in my view, is misconceived. As a matter of law, only a shareholder of a company in liquidation has a legally recognisable interest in the surplus assets of the company. The relevant shareholder in this case is Armadillo and not the Applicant. Likewise, the legal entitlement to any surplus from the sale of the pledged shares belongs to the owner of the shares, Armadillo, and not the Applicant.

21. Accordingly, the applicant has no legal entitlement to any dividend the Joint Liquidators may declare to its 100% shareholder, Armadillo, or to any surplus monies following the sale of the shares held by the collateral agent, Mayflower. It is legally

irrelevant that the Applicant is the 100% indirect owner of the shareholder, Armadillo, who is the proper recipient of any surplus dividend declared by the Joint Liquidators or any surplus monies following the sale of the shares by the collateral agent, Armadillo. The fact that the Applicant has an indirect economic interest is irrelevant for the purposes of the present application. As explained by Goff LJ in *Bank of Tokyo Limited v Karoon* [1986] 3 WLR 414:

> *"[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."*

22. Third, as pointed out by the Joint Liquidators, even the economic interest asserted by the Applicant in any surplus dividend declared by the Joint Liquidators and any surplus monies arising from the sale of the shares, can only materialise if the Company's parent, Armadillo, was a solvent company and, its parent , Oil Services, was also solvent. Otherwise, the Applicant could have no expectation of receiving either a dividend representing all or part of the distribution paid to Armadillo; or any monies paid to Armadillo representing the surplus on the sale of the shares. There is no evidence to prove that Armadillo and/or Oil Services are solvent and that the Applicant would ultimately receive any monies in respect of which it claims to have an economic interest.

23. On the contrary, it is clear from the uncontradicted evidence of the Joint Liquidators that shortly before the commencement of the liquidation, virtually all of the Company's assets were realised by the Company for the benefit of the secured lenders. Mr Clingerman states in his affidavit that it is public knowledge that shortly before the commencement of the liquidation the Company's primary operating subsidiaries were sold to a private equity company, LSF10 Alamo Investments Ltd, during December 2018 for an undisclosed amount (the "Alamo Sale"). Mr Clingerman states that despite the Alamo Sale there still remains a deficit of several hundred million US dollars owing

to the secured lenders. In the circumstances, Mr Clingerman states, that it is abundantly clear, there will be no distribution to the shareholders of the Company. It follows that the Applicant has no economic interest in the liquidation of the Company.

24. Fourth, no clear rationale was presented to the Court as to why information requests in relation to the sale of the Company's shares are being directed to the Joint Liquidators. In the correspondence sent on behalf of the Applicant, it appears to be assumed that the shares of the Company are an asset of the Company. Thus, in the letter dated 28 May 2019, it is said by Marshall Diel & Myers, attorneys for the Applicant, that *"it is our view that any sums recovered from the sale of the shares over and above the amount of the [Company's] debt should be kept separate from other company assets and should be paid to the [Applicant] as a beneficiary under a constructive trust… Please confirm whether the shares have been sold or are in your possession. If the former, please provide an accounting of the proceeds of sale and if the latter, please indicate your position in relation to their sale and the distribution of the proceeds."*

25. However, it is beyond argument that, as a matter of law, the shares of the Company are not an asset of the Company. The shares are the property of the shareholder, Armadillo, and any claims in respect of those shares can only properly be made by Armadillo against the collateral agent, Mayflower, who apparently sold the shares in December 2018.

26. In the circumstances, I have come to the clear view that the Applicant does not have the legal standing to pursue the relief sought, namely, that the Joint Liquidators provide to the Applicant audited accounts of their receipts and payments as Joint Liquidators and that the Applicant be permitted to inspect the books and papers of the Joint Liquidators. The Applicant has no proper legal interest in the relief sought under section 175 (6) of the Act. The Applicant is not an "*aggrieved person*" or a person who is "*dissatisfied"* by an act or omission of the Joint Liquidators, within the meaning of section 175 (6) of the Act.

27. I should add that even if the Applicant had the requisite legal standing to make this application, the Court would have refused to set aside the decision of the Joint Liquidators. In order to set aside the decision of the Joint Liquidators under section 175 (6), the Applicant has the burden to demonstrate that the decision of the Joint Liquidators not to provide the requested documents is one which is so utterly unreasonable and absurd that no reasonable liquidator properly advised would have made it (see: *Re Edenote Ltd* [1996] 2 BCLC 389, per Nourse LJ at 394 b-c, j). Here, in my view, it is impossible to contend that the decision of the Joint Liquidators is so utterly unreasonable and absurd that no reasonable liquidator properly advised would have made it. The Joint Liquidators have refused to provide the requested books and papers to the Applicant because the Applicant is neither a creditor nor a contributory, a standing required by section 193 (1) of the Act. The decision of the Joint Liquidators was dictated by the express terms of section 193 (1) of the Act.

28. In conclusion, I am bound to dismiss the Applicant's application seeking an order that the Joint Liquidators be required to provide to the Applicant audited accounts of their receipts and payments and that the Applicant be permitted to inspect the books and papers of the Company.

29. In relation to the issue of costs, my provisional view is that the Applicant should pay the costs of this application to the Joint liquidators and should do so on a standard basis. However, if either party wishes to argue that the Court should make a different order, such an application should be made within the next 21 days.

Dated this 15th day of October 2020

NARINDER K HARGUN

CHIEF JUSTICE