In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2015: No. 441

IN THE MATTER OF ROYAL CHEMIE INTERNATIONAL LIMITED

AND IN THE MATTER

BETWEEN:

ROYAL CHEMIE INTERNATIONAL LIMITED

Applicant

-v-

(1) BARCLAYS BANK PLC

(2) ERSTE ABWICKLUNGSANSTALT

Respondent

RULING ON APPLICATION TO DISCHARGE AN INJUNCTION

(in Chambers)

Date of hearing: November 17, 2015
Date of Ruling: December 11, 2015

Mr Narinder Hargun and Ms Robin Mayor, Conyers Dill and Pearman Limited, for the Applicant ("the Company")
Mr. Rod Attride-Stirling and Ms Kehinde George, ASW Law Limited, for the Respondents

Introductory

1. By A Specially Endorsed Writ of Summons filed on October 29, 2015, the Applicant sought a permanent injunction restraining the Respondents from presenting a petition to wind up the Applicant on the basis of statutory demands served on September 28, 2015, or otherwise. By an Ex Parte Summons issued on the same date, the Company sought an interim injunction in similar terms. On October 30, 2015, I granted the interim injunction sought ("the Injunction").

2. The Company's case was that the threatened petition would be an abuse of process on the following grounds. The Respondents were one of several syndicated lenders under a Facility Agreement entered into with the Company on February 27, 2012 (as subsequently amended) ("the Facility Agreement"). The Facility Agreement contained a mechanism whereby the Majority Lenders in respect of Facility A and Facility B could modify the terms of the Facility Agreement.

3. In 2013 certain investors commenced negotiations on a proposed purchase of the Syndicated Lenders' rights. An 'Exit Offer' was made by Avalon Hills Pte Ltd ("Avalon") in the amount of $US 50 million (the original contractual amount was $90 million) which lapsed. On September 22, 2015, Avalon made a 'Renewed Exit Offer' to purchase Syndicated Lenders' rights under the Facility Agreement for a mere $18.75 million. This offer was approved by the Majority Lenders as of October 19, 2015, a decision which is said to be binding on the Respondents. Upon completion of the Sale and Purchase Agreement ("SAPA") all amounts otherwise due under the Facility Agreement will be extinguished. It was a condition of the SAPA that no enforcement action be outstanding on the part of Syndicated Lenders prior to completion. The Respondents were contractually bound by the vote of the Majority Lenders and were seeking to take enforcement action to assert improper pressure on the Company with a view to obtaining preferential settlement terms. Any petition presented by the Respondents in these circumstances would be an abuse of process, the Company contended.

4. By Summons dated November 5, 2015, the Respondents applied to set aside service of the Writ on technical grounds. I refused that application on November 9, 2015 and awarded costs to the Applicant. On November 13, 2015, the Respondents issued a Summons seeking to set aside the Injunction. In short, the Respondents contend that they are fully entitled to take enforcement action under the Facility Agreement, properly construed. They also assert that they believe they would obtain a better

recovery if the Company was liquidated than if the Renewed Exit Offer (which offers a return of only 15 cents on the dollar) were to be completed. The Company's interest in supporting that offer is said to be to reduce its debt with a view to a future IPO which will benefit its shareholders at the expense of its Syndicated Lenders.

5. By the time this Summons was heard, it was clear that the Security Agent was taking no steps to complete the SAPA because of the dispute between the present parties as to the proper construction of the Facility Agreement.

Findings: legal principles governing restraining the presentation of a winding up petition

6. Mr Hargun submitted un-controversially that it was an abuse of process to present a petition for an improper purpose: *Roberts –v-Wayne Roberts Concrete Construction Pty Ltd.* [2004] NSWSC 734. Here, the impropriety lay in the Respondents' service of statutory demands in breach of its contractual relations and the threatened abuse of process lay in seeking to petition for their own benefit rather than that of the class they notionally represented. Reliance was placed on Lord Wilson's following observations in *Ebbvale Limited-v- Andrew Lawrence Hosking* [2013] UKPC 1 where he approved earlier *dicta* of Harman J in *In re a Company* [1983] BCLC 492 at 495:

> "*28… 'In my judgment the true question is 'for what purpose does the petitioner wish to wind up this company'. A judge has to decide whether the petition is for the benefit of the class of which the petitioner forms part or is of some purpose of his own. It the latter, then it is not properly brought'...*"

7. Mr Attride-Stirling reminded me of my own observations in *Agrenco Limited-v-Credit Suisse Brazil (Bahamas) Limited* [2014] Bda LR 38:

> "*6. It was essentially common ground between the parties that the Company bore the burden of establishing a prima facie case that presentation of a Petition based on the Statutory Demand would be an abuse of process …*
>
> *8. In my judgment, where a would be petitioner is admittedly owed an undisputed sum and the company seeks to restrain the presentation of a petition… the company's evidence may fairly be scrutinised more carefully because the creditor's constitutional rights of access to the Court under section 6(8) of the Bermuda Constitution are engaged.*
>
> *9. Another feature which ought in my judgment result in this Court being cautious about restraining the presentation of a petition based on an undisputed debt against an insolvent company did not appear to be explicitly addressed in the authorities cited by counsel. It is well recognised that an unpaid creditor who petitions is asserting a representative right on behalf of*

unsecured creditors as a class. It is one thing to dismiss such a petition after it has been advertised and other creditors have been afforded an opportunity to apply for substitution if necessary. It is another to prevent such a petition from being filed, and potentially prejudicing the rights of other unsecured creditors of an insolvent company…"

8. On the facts of the present case, I find that the Company bears the burden of demonstrating a *prima facie* case that the Respondents are not contractually entitled as Syndicated Lenders to pursue unilateral enforcement action because they are contractually bound by the choice of the Majority Lenders to accept the Renewed Offer and permit it to be completed.

The Facility Agreement: Overview

9. The Facility Agreement was entered into between the Company, Credit Suisse AG Singapore Branch (as Security Agent and as Account Bank) and the Original Lenders listed in Schedule 1. The key clauses relied upon by the Company were the following:

- 35.1.1, which provides:

  "*Subject to Clause 35.2 (Exceptions) and Clause 27.3 (Releases) any term of the finance documents may be amended or waived only with the consent of the Majority Lenders and the Obligors…and any such amendment or waiver will be binding on all Parties.*"

- 35.2 ("*Exceptions*") has no relevant exceptions.

10. The key clauses relied upon by the Respondents were the following:

- 2.3.1, which provides:

  "*The obligations of each Finance Party under the Finance Documents are several…*"

- 2.3.2, which provides:

  "*The rights of each Finance Party under or in connection with the Finance Documents are separate and independent rights and any debt arising under the*

Finance Documents to a Finance Party from an Obligor shall be a separate and independent debt."

- 2.3.3, which provides:

  "*A Finance Party may, except as otherwise stated in the Finance Documents, separately enforce its rights under the Finance Documents.*"

- 4.8 ("*Early Exit Option*"), which only expressly contemplates the Majority Lenders shortening the notice period for offers received prior to June 30, 2012.

- 16 ("*Events of Default*"), which contemplates, inter alia, winding-up proceedings being commenced against the Company.

- 25 generally, which regulates the treatment of payments received by individual lenders otherwise than from the Security Agent under 29.

- 25.5.2, which provides:

  "*A Recovering Finance Party is not obliged to share with any other Finance Party any amount which the Recovering Finance Party has received or recovered as a result of taking legal or arbitration proceedings, if:*

  (i) *it notified the other Finance Party of the legal or arbitration proceedings ; and*

  (ii) *the other Finance Party had an opportunity to participate in those legal or arbitration proceedings but did not do so as soon as reasonably practicable having received notice and did not take separate legal or arbitration proceedings.*"

11. Without taking into account the contentious evidence adduced by the Company in relation to the drafting history of the Agreement, it seemed clear to me that the Majority Lenders were empowered to amend any provision of the Facility Agreement not expressly excepted. The Early Exit Option clause was not excluded. However, it seemed equally clear that the Respondents were given individual enforcement rights

by the Facility Agreement which the Majority Lenders had not expressly voted to abrogate.

12. How these separate rights, the collective amendment rights of the Majority Lenders and the individual enforcement rights asserted by the Respondents, were exercisable in the event of conflict was a more difficult question. This Court has, to my knowledge, never previously considered this sort of question in the syndicated loan context. In light of this, I invited supplementary submissions.

Findings: key issues and chronology of key events

13. The key dates relied upon by the Respondents were as follows:

- July 9, 2015: the 1st Respondent gave notice under clause 25.5 of enforcement action under the Facilities Agreement;

- July 16, 2015: the Agent advises all Lenders of receipt of notice of 1st Respondent's intention to serve a Statutory Demand and of their right to take similar action if they wish to participate any recoveries made;

- September 22, 2015, Avalon made a Renewed Exit Offer;

- September 28, 2015, the Respondents served Statutory Demands on the Company;

- October 19, 2015, the period of three weeks after service of the Statutory Demands expires. The Security Agent gives notice that the Majority Lenders have accepted the Renewed Offer.

14. In light of this chronology of events, the key issue in controversy, as framed by the Respondents, was whether the Facility Agreement contemplated that the Majority Lenders had the right to accept an Exit Offer after an individual lender had given notice of independent enforcement action and, as a result, implement amendments to the Facility Agreement which would nullify the independent enforcement action already put in train. There was, after all, no suggestion that the Majority Lenders had voted to amend those provisions of the Facility agreement, principally clauses 2.3.3 and 25, which permitted independent enforcement action.

15. The Applicant framed the question as simply being whether or not the Respondents were entitled to frustrate the vote of the Majority Lenders to accept the Renewed Exit Offer and, in the process, to breach their contractual bargain to be bound by such vote. The logical extension of this argument, applied to the present facts, was that the Majority Lenders had the right, without expressly amending the Facility Agreement to

abrogate independent enforcement rights, to nullify those independent rights. This result flowed from the fact that all key commercial decisions under the Agreement were governed by the umbrella principle of 'majority rule'.

Findings: construing the Facility Agreement

Approach to construction generally

16. The general principles of interpretation were agreed. Both counsel referred the Court to the decision of Eder J in *Bank of New York Mellon-v-Truvo NV* [2013] EWHC 136 (Comm). Mr Hargun cited paragraph 43 while Mr Attride-Stirling cited paragraph 77. It was also common ground that the principles articulated by Lord Mance in *Re Sigma Finance* [2009] UKSC 2 applied:

> "*12. In my opinion, the conclusion reached below attaches too much weight to what the courts perceived as the natural meaning of the words of the third sentence of clause 7.6, and too little weight to the context in which that sentence appears and to the scheme of the Security Trust Deed as a whole. Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving "checking each of the rival meanings against other provisions of the document and investigating its commercial consequences" (para. 98, and also 115 and 131). Like him, I also think that caution is appropriate about the weight capable of being placed on the consideration that this was a long and carefully drafted document, containing sentences or phrases which it can, with hindsight, be seen could have been made clearer, had the meaning now sought to be attached to them been specifically in mind (paras. 100-1). Even the most skilled drafters sometimes fail to see the wood for the trees, and the present document on any view contains certain infelicities, as those in the majority below acknowledged (Sales J, paras. 37-40, Lloyd LJ, paras. 44, 49-52 and 53, and Rimer LJ para. 90). Of much greater importance in my view, in the ascertainment of the meaning that the Deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme. Ultimately, that is where I differ from the conclusion reached by the courts below. In my opinion, their conclusion elevates a subsidiary provision for the interim discharge of debts "so far as possible" to a level of pre-dominance which it was not designed to have in a context where, if given that pre-dominance, it conflicts with the basic scheme of the Deed.*"

17. Mr Hargun relied upon Geoffrey Fuller, '*Corporate Borrowing, Law and Practice*', 4th edition (2009) for the learned author's explanation (at paragraph 16.2) of the purpose of majority approval clauses. However as regards the question of how to interpret such clauses, I find the following subsequent passages from the same text to be instructive:

"***16.4*** *There is no doubt that, if properly drafted, the contractual power of a majority to pass resolutions that bind the majority is valid. However, the majority can only bind the minority in respect of matters that are specifically envisaged by the power…*

16.5 *Where powers have been inserted, they will be construed as only permitting changes that can be reasonably considered to have been within the contemplation of the parties at the time of issue, and ambiguities are therefore construed in favour of the minority...*

16.6 *Because of these limitations, it is standard…in particular to make specific references to 'abrogations' of the holders' rights…*"

The function of majority clauses

18. In *Fuller*, the purpose of majority clauses is defined as follows:

> "*16.2 The purpose behind majority approval provisions is to protect the majority against unreasonable conduct on the part of the minority and to prevent deadlock and the defeat of an attractive proposal because unanimity cannot be reached…*"

19. I accept Mr Hargun's submission that where majority powers exist, the Courts will only exceptionally scrutinise their exercise. In *Redwood Master Fund , Ltd-v-TD Bank of Europe* [2002] EWHC 2703 (Ch), where minority lenders challenged the validity of majority lenders' decision to approve a modified waiver letter, Rimer J held:

    (a) "*the burden of proof is on the claimants to show that the majority lenders' exercise of the… power was bad*" (paragraph 106);

    (b) proof that a proposal approved by majority lenders discriminated against some lenders was insufficient unless it was possible to infer "*that the exercise of the power had been motivated by improper considerations which ought to vitiate it*" (paragraph 107).

20. These findings appear to be based on the broader principle that class rights must be exercised in good faith for the benefit of the relevant class as a whole: *Fuller*, paragraph 16.7; *Goodfellow-v-Nelson Line (Liverpool) Limited* [1912] 2 Ch 324.

Relationship between syndicated lenders inter se

21. The relationship between lenders as regards collective and individual rights is ultimately governed by the terms of the relevant contract. Mr Attride-Stirling relied upon a helpful extract from Ravi Tennekoon, '*The Law and Regulation of International Finance*' (Butterworths: London, 1991) at 100-102. I extract the following general guidance from this text:

(a) a several liability clause appears to be a usual one;

(b) such is clause is typically "*buttressed by another clause which provides that each bank may separately enforce its rights under the syndicated loan agreement…this clause must be read in the context of the clauses in respect of the agent bank whereby the agent bank is given the power to call default on behalf of the syndicate*…[or] *on the request of the majority lenders*… ";

(c) "*These clauses, however, do not affect the right of each bank in the syndicate to enforce its rights to interest and principal where this right is expressly preserved by a clause in the syndicated loan agreement*";

(d) 'sharing clauses' generally require the agent to distribute monies collected with lenders on a pro rata basis and individual lenders to do likewise if they make an independent recovery.

22. The Respondents' counsel also referred the Court to the July 28, 2015 decision of Harris J in *Charmway Hong Kong Investment Ltd-v-Fortunesea (Cayman) Ltd* [2015] HKCFI 1308. It was suggested with reference to an October 28, 2015 Loan Market Association ("LMA")[1] that this decision, to the effect that minority lenders had no right to pursue independent enforcement action which majority lenders had disapproved of, did not reflect the English law position where the parties used LMA forms. However the primary submission was that this case was distinguishable in that no equivalent to clause 25.5 in the Facility Agreement in the present case existed in the facility agreement considered in that case. It accordingly provides indirect support for the proposition that where such a clause does exist, minority lenders can take independent enforcement action including winding-up proceedings, even if the majority disapprove.

23. I accept this submission with one main *caveat*. That is that the dispute in *Charmway* was whether independent enforcement action could be pursued at all after majority lenders had voted to discontinue proceedings. That appears to me to be a far broader question than the narrower point in controversy here, namely in what circumstances can independent enforcement powers which admittedly exist legitimately be exercised by the minority against the wishes of the majority. Nevertheless Jonathan Harris J concluded his judgment in *Charmway* as follows:

> "*50. It seems to me that the Facility Agreement created an aggregated loan rather than aliquot shares and that, this being so, in the absence of an express provision giving individual Lenders a right to take independent enforcement proceedings it is for the Majority Lenders, acting in good faith, to decide what enforcement proceedings to take…*
>
> *53…if I had reached a different conclusion I would have found that the 1st Defendants could commence winding-up proceedings. If I had found that there was a debt due to the 1st to 4th Defendants that they were entitled to enforce immediately and without the agreement of the Majority Lenders it*

[1] '*LMA FACILITY DOCUMENTATION-SUPPLEMENT TO FINANCE PARTIES' RIGHTS CLAUSE*'.

would follow that they were creditors of Rightway and other debtors pursuant to the Finance Documents. I can see nothing in the terms of either the Facility Agreement or the Intercreditor Agreement which in those circumstances would restrain them from taking action to wind up Rightway and its subsidiaries, which would also be debtors…"

Construing the Facility Agreement

24. The term "*Finance Party*" is defined in clause 1.1 as meaning "*each of the Agent, the Security Agent, the Account Bank and each Lender*". Under clause 2.3.3, a Finance Party "*may, except as otherwise stated in the Finance Documents, separately enforce its rights under the Finance Documents*". There is no express provision in the Facility Agreement restricting the right to take enforcement action in circumstances where the Majority Lenders have voted to accept an Early Exit Offer. Nor is there any more general express power conferred on the Majority Lenders to override these independent enforcement rights. "*Enforcement Action*" is explicitly defined under clause 1.1.1 as including "*the taking of any steps…in relation to the winding up….of an Obligor…or any analogous procedure or step in any jurisdiction*". So the starting assumption must be that the Respondents are in general terms entitled to take independent enforcement action as they have an express right to do so which is only expressly qualified in sharing recoveries terms.

25. Clause 25.1, read with clause 29, imposes an obligation to share the proceeds of any recoveries achieved by independent enforcement. However, this obligation does not apply, according to clause 25.5.2, if the Recovering Finance Party:

> "*(i)…notified the other Finance Party of the legal or arbitration proceedings; and*
>
> *(ii)The other Finance Party had an opportunity to participate in those legal or arbitration proceedings but did not do so as soon as reasonably practicable having received notice and did not take separate legal or arbitration proceedings.*"

26. So the Facility Agreement expressly contemplates that if independent enforcement action is taken:

    (a) the individual Lender will have to share any recoveries unless notice is given of the independent enforcement process;

    (b) where such notice is given (as occurred here on July 9, 2015 as regards the 1st Respondent and September 8, 2015 as regards the 2nd Respondent), other Lenders must elect as soon as reasonably practicable to either participate in the relevant proceedings or commence proceedings of their own.

27. Independent enforcement action is not just provided for in abstract terms. There is an explicit contractual machinery for ensuring that either independent recoveries are shared or other Lenders are afforded an opportunity to either join the individual proceedings or commence proceedings of their own if the individual which

commences recovery proceedings wishes to 'go it alone'. Credit Suisse as Security Agent notified Lenders on July 16, 2015:

> "*3. We have received a request from Barclays Bank PLC that they wish to serve a statutory demand in Bermuda on the Borrower in respect of the Unpaid Sums due to it and we hereby seek the instructions of the Lenders if any of the Lenders wish to join in such legal action.*
>
> *4. Please note that each individual Lender may act individually and proceed with the service of a statutory demand on the Borrower for its respective share of the Unpaid Sums. Any amounts so recovered by such Lender directly from the Borrower would not be required to be shared with the other Finance Parties unless the other Finance Parties also delivered statutory demands…*"

28. In light of these provisions one must return to the central question of construction. Does clause 35.1.1, in providing that amendments agreed between the Majority Lenders and the Obligors "*will be binding on all Parties*" have the following effect? If the Majority Lenders vote to accept an Early Exit Offer and to pursue amendments to the Facility Agreement which will result, when consummated, in a reduction in the lump sum payable, does this vote (by necessary implication) nullify the right of individual lenders to pursue enforcement action which they have already commenced? This question can only be correctly answered keeping the test for implying terms in the forefront of one's mind. Mr Attride-Stirling referred the Court to the following passage in '*Chitty on Contracts*' which Mr Hargun had placed before the Court:

> "*A term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract.*"[2]

29. One way of assessing whether a term ought to be implied to give business efficacy to a commercial agreement is to consider whether a construction contended for makes the agreement unworkable or leads to obviously uncommercial results. To my mind, it is helpful to consider two contrasting scenarios:

    (a) **individual enforcement action commenced after the Majority Lenders have voted to amend the Facility Agreement**: it is strongly arguable that, for the reasons persuasively argued by Mr Hargun, minority lenders are subject to an implied obligation not to pursue independent enforcement action which would have the effect of frustrating their express contractual obligation to be bound by any amendments approved by the Majority Lenders: *Chitty*, paragraph 13-013. Once the Majority Lenders have evinced an intention to amend the Facility Agreement, their power under 35.1.1, which is quite fundamental to the Facility Agreement and the bargain struck between syndicated lenders, would be rendered nugatory if independent enforcement action could be initiated in circumstances which would impede the due exercise of the Majority Lenders' amendment power;

[2] 31st edition, paragraph 13-008.

(b) **individual enforcement action commenced before the Majority Lenders have voted to amend the Facility Agreement**: it is at least arguable that where independent enforcement action is commenced before a vote is taken by Majority Lenders to amend the Facility Agreement and the individual Lender has given notice of such action under clause 25.5.2, the position should be governed by the express terms of that clause. The Majority Lenders have the right to either join the independent enforcement action or to take action of their own. It is difficult to fairly conclude that the parties envisaged that independent enforcement rights could be nullified by the Majority Lenders, by way of example, in the following circumstances:

(i) a Lender, having given notice under clause 25.5.2, has been pursuing costly litigation to recover its indebtedness from the Obligor for 3 years and hopes to obtain a judgment for 100% of its claim together with a significant award in respect of costs. Majority Lenders vote to accept an Early Exit Offer which requires an amendment to the Facility Agreement which will reduce the amount due to each Lender by 80%. The Obligor on behalf of the Majority Lenders obtains a stay the proceedings on the eve of the trial on abuse of process grounds. The individual Lender is required to accept a net recovery that is less than the costs it has incurred in the stayed proceedings;

(ii) a Lender, having given notice under clause 25.5.2, has obtained judgment against the Obligor together with costs. Before the Lender can commence enforcement proceedings, the Security Agent gives notice that the Majority Lenders have voted to accept an Early Exit Offer. The Obligor obtains of stay of execution on the grounds that execution would involve a breach of the judgment creditor's bargain to be bound by any amendments to the Facility Agreement.

30. These illustrative scenarios are far removed from the facts of the present case but serve to illustrate how unreasonable the practical results could be if one adopted the construction of the Agreement the Company appeared to contend for in its purest form. It is impossible to imply a term to the effect that the Majority Lenders are entitled at any juncture whatsoever to require minority lenders to cease pursuing enforcement action they have already commenced. That would dilute the independent enforcement power almost to vanishing point. It would also permit the majority to oppress the minority in a way that goes far beyond the reasonable parameters of commercial efficacy of a syndicated loan agreement which does not confer such majority powers in express terms.

31. The present facts fall within a range of scenarios which are perhaps at first blush less clear but which nevertheless engage the same basic concerns. It is admittedly a more nuanced endeavour to assess the commercial fairness of minority lenders, for

instance, stealing a march on the majority by commencing enforcement proceedings in anticipation of a majority vote in favour of a course of action with which they disagree. But that is not what the evidence suggests happened here. The 1st Respondent on July 9, 2015 gave notice of independent enforcement action well before the Renewed Exit Offer was even made. The Security Agent notified all Lenders of this proposed enforcement action and advised them of their right to join in. The 2nd Respondent elected to do so.

32. If anything, the Renewed Exit Offer of September 22, 2015 may be broadly viewed as a response to the threatened enforcement action. The Statutory Demands were served before the Majority Lenders voted to accept the Renewed Exit Offer. On any sensible view of the facts, the Respondents can only be viewed as having commenced independent enforcement action before the Majority Lenders voted to pursue a different course. Where ought the demarcating line to be drawn between independent enforcement action which undermines the majority approval mechanisms of the Facility Agreement and enforcement action which does not?

33. In my judgment there is a clear dividing line between commencing independent enforcement action after the Majority Lenders have voted on an inconsistent course of action (e.g. a claim based on a level of indebtedness which will be or has been reduced by the Majority), which is *prima facie* impermissible, and commencing enforcement action prior to the Majority Lenders' decision which it is contended that enforcement action will frustrate. In the latter instance, certainly on the facts of the present case, the relevant independent action ought generally to be viewed as *prima facie* permissible. Obviously, individual cases with distinctive fact patterns may demand a different result. The contrary view imports by implication into the bargain a power conferred on the Majority Lenders to abrogate at their whim vested minority contractual rights.

34. It is interesting to note that the Security Agent's July 16, 2015 communication to all Lenders described their independent enforcement rights in unqualified terms. It did not advise Lenders that any independent enforcement action they might pursue would have to be discontinued if, for any reason, the Majority Lenders subsequently voted to approve some alternative conflicting or inconsistent course. This omission is obviously not dispositive in circumstances where what the Facility Agreement means is in dispute. But it provides this Court with some comfort that the interpretation the Respondents contend is not wholly inconsistent with the parties' expectations. On the contrary, their position is entirely consistent with the prima facie view of the Security Agent as to what the Facility Agreement contemplates.

35. I am bound to find that the Company failed to make out a *prima facie* that it would be an abuse of process for the Respondents to petition to wind it up based on the Statutory Demands. It is not strictly necessary for me to decide the point of construction having regard to the interlocutory nature of the present application. However, if I was required to decide the point, I would find that the Facility Agreement cannot be construed as incorporating an implied power for the Majority Lenders to nullify the taking of independent enforcement steps which have already been initiated before a conflicting majority decision is taken and notified to Lenders generally. The position might well be otherwise if the enforcement action was initiated after the Majority Lenders had voted to take conflicting action.

36. This conclusion is, of course, entirely without prejudice to (and takes cognizance of) the right of the Majority Lenders to contend at the hearing of the threatened winding-up petition, that the interests of the class which the Respondents as petitioners were representing would be best served by relief alternative to a winding up. The Majority Lenders, after all, have not formally participated in the present application. In my judgment, that is the appropriate legal context in which many of the concerns canvassed by the Company about the entitlement of the Respondents to override the judgment of the majority ought properly to be taken into account.

37. I should add that to the extent that the position was to be ambiguous, I would resolve any ambiguity in favour of the minority lenders. This is not simply because majority approval clauses should be construed in this manner. The right of access to the Court is a fundamental right protected by section 6(8) of the Constitution. This Court should not lightly conclude that the parties have agreed to contract out of such rights. Clause 34 of the Facility Agreement itself in any event provides:

> "*34…The rights and remedies provided in this agreement are cumulative and not exclusive of any rights or remedies provided by law.*"

Conclusion

38. For the above reasons I find that the Company has failed to make out a *prima facie* case that the presentation of a winding up petition by the Respondents based on the Statutory Demands would be an abuse of process. The Ex Parte Injunction I granted on October 30, 2015 should be set aside. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to the Respondents to be taxed if not agreed.

Dated this 11th day of December, 2015 _____
IAN RC KAWALEY CJ