

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/389

BETWEEN:

GRAND PACIFIC HOLDINGS LIMITED

Applicant

and

PACIFIC CHINA HOLDINGS LIMITED

Respondent

Appearances: Mr Mark Forte and Ms Tameka Davies for the Respondent
Mr Jack Husbands and Ms Julie Engwirda for the Applicant

JUDGMENT

[2010: 11 January]

(Appointment of liquidators over Respondent company – application for stay pending appeal – practice)

- [1] **Bannister J [ag]:** I gave judgment today on an application by Grand Pacific Holdings Limited ('the Applicant') for the appointment of liquidators over Pacific China Holdings Limited ('the Company'). For the reasons set out in that judgment, I have decided that liquidators should be appointed. Mr Mark Forte who appears, together with Ms Tameka Davis, for the Company, now asks for a stay of my order. The reasons he gives are (1) that the Company intends to appeal my order (2) that that appeal has at the very lowest a realistic prospect of success and (3) that unless a stay is granted, the appeal will become nugatory, because (as stated in Mr Allen's second affidavit) if liquidators are appointed, the life of an asset rich company which is carrying on a thriving business will be effectively ended.
- [2] Mr Forte referred me to a decision of Rawlins JA (as he then was) in **Smith and ors v Wheatley and anor**¹. The question was whether a stay should be granted on a costs order made at first instance when the court struck out a statement of case. So that it is a little far on its facts from the present case. The learned Justice of Appeal referred to the general rule that a successful party is entitled to the fruits of its judgment and added that where the application of the general rule was in doubt the Court might consider the perceived strength of the appeal. Mr Forte also referred to **Hammond Suddards v Agrichem**

¹ British Virgin Islands Civil Appeal No 4 of 2005

International Holdings Ltd². That case arose out of a first instance judgment for a money sum together with orders for interim payments on account of costs and the main issue (which the Court of Appeal decided against the appellants) was whether the appellant should be ordered to bring the amount for which judgment had been given into court or otherwise secure it. On the stay point, the Court of Appeal simply refused to accept that the appellant had produced sufficient evidence to show that the appeal would be stifled unless a stay was granted.

- [3] I think that it follows from these authorities that I must start from the position that unless the consequence would be to cause an injustice (either because the Company could not, without the benefit of a stay, even prosecute its appeal or because unless a stay is granted the appeal would be rendered nugatory), I should not grant a stay.
- [4] In the course of argument I drew the attention of Counsel to the decision of Plowman J in **re A&BC Chewing Gum Ltd**³. The learned Judge had made an order for winding up on just and equitable grounds at the instance of disaffected contributories. He refused to stay his order, on the grounds of settled English insolvency practice. The reasons he gave for the English practice were that it was essential for the Official Receiver (who, in an English liquidation at that time was the immediate first liquidator of any company wound up by the Court) should be able to carry out his duty of ascertaining the assets of the company as at the date of the order and its liabilities at the same date, in order to be able to settle the preferential creditors. If the Official Receiver (or in this case appointed liquidators) were unable to set about this task until after the appeal had been determined, it might prove much harder. In the context of a liquidation of the Company, which carries on no trade within the jurisdiction, I do not think that these reasons weigh very heavily.
- [5] So far as prejudice is concerned, the authority is of more help. Plowman J took the view that where a company's business is being carried on at a profit (as Mr Allen says and I accept is the case here) it can continue to do so under the overall supervision of the liquidators, if necessary and, subject to suitable safeguards, with the present management carrying on its day to day running as managers on behalf of the liquidators. Day to day expenses would be part of the expenses of the winding up. If the appeal succeeds, the business can be handed back as a going concern. If the business (contrary to the evidence before me) can only be run at a loss, then it should not be being carried on at all and nothing will be lost if, on succeeding to office, the liquidators shut it down. If the appeal fails, nothing will have been lost.
- [6] Although this practice is not set in stone in England, I was told by Mr Husbands who appeared, as he did below, for the Applicant, that it is followed in many, although not all, Commonwealth jurisdictions, where a stay is asked of an order winding up a company. So that this practice is consistent with what Rawlins JA described as the general rule.
- [7] The present case differs from the case before Plowman J because there the proposed appellants were members of the company, with the company itself playing no more than a nominal part in any appeal. In the present case, the Company itself will be the substantive appellant. I do not think that that makes any difference in fact. The directors of a company, notwithstanding the appointment of liquidators or receivers,

² [2001] EWCA 2065

³ [1975] 1 WLR 579

have a residual power to prosecute an appeal against the order appointing them and it seems to me that it would be possible for me expressly to provide that that power was available to them.

- [8] On the other hand, the practice in England and Wales is that directors prosecuting an appeal on behalf of a company against which a winding up order has been made may not resort to the assets of the company in order to fund the appeal. Further, in order to avoid the risk that, if the appeal is unsuccessful, the company (and its creditors) may be exposed to an order for costs made against it, it is also the practice to provide that the directors (or others maintaining the appeal) provide security to the company against the risk that such an order may be made. I appreciate that in the present case the Company has an appeal as of right and does not need my permission, but it seems to me that it is nevertheless within my power, as part of my order regulating the conduct of the liquidation during the pendency of the appeal, to order the provision of such security.
- [9] In my judgment the practice which I have described is one which ought to be followed, unless there are reasons in any particular case why it should not be, where appeals against orders appointing liquidators are made in this jurisdiction. In other words, the presumption should be against a stay of an order appointing liquidators unless there are particular circumstances making the imposition of a stay expedient. I do not consider that there are any such circumstances in the instant case. This conclusion means that I accept the submission made by Mr Forte that the merits of the appeal, although they were canvassed during the hearing, do not need to enter into the calculation.
- [10] On the other hand, it seems to me that where a company, as here, is continuing to trade, the Court should take appropriate steps to minimise, so far as possible, any prejudice which might turn out to have been suffered by the Company as a result of its having been placed in liquidation should its appeal succeed.
- [11] I should mention that on its stay application the Company has put in evidence a letter from Far Eastern International Bank ('the Bank'), expressing a willingness to provide a guarantee. A draft has been put in evidence. The terms of the draft provide for the guarantee to expire one year after it is given unless renewed. Any such renewal is said to be conditional upon the Bank's 'internal compliance requirements then prevailing' and the requirements of Taiwan law. It seems to me that a guarantee in this form is too uncertain a security to justify a stay of my order. The Applicant would be buying a law suit.
- [12] I shall therefore refuse a stay of my order, but in order to mitigate against any prejudice against the Company resulting from that decision I shall make orders, pursuant to the wide discretion given to me by section 167(1)(d) of the Insolvency Act ,2003 ('the Act'.)
- (a) that the liquidators have permission at their absolute discretion to carry on the business of the Company for so long as they may think fit;
 - (b) that the costs and expenses of continuing the business of the Company after 11 January 2010 be costs and expenses in the liquidation of the Company;
 - (c) that subject to their paying the sum of US\$50,000 into a joint account to be maintained within this jurisdiction by the Solicitors to the parties, such sum to stand as security for any order for costs that may be made against the Company in the course of or on determination of any such appeal,

the Directors of the Company are to be at liberty to pursue in the name of and on behalf of the Company an appeal against my order of 11 January 2010 ('the appeal');

(d) that for the purposes of paragraph (c) above the Directors of the Company may convene and hold meetings of the board of Directors of the Company notwithstanding the appointment of liquidators to the Company and at such meetings may consider and, if thought fit, pass such resolutions (only) as may be necessary to clothe them with authority to conduct the appeal, such resolutions to bind the Company as they would have done if no liquidators had been appointed;

(e) that notwithstanding the passage of resolutions pursuant to paragraph (d) above, the Directors may not resort to the assets of the Company to fund the appeal unless and until such appeal is finally determined in the Company's favour;

(f) that time under section 178 of the Act for the advertisement of the appointment of the liquidators be extended until 14 days after determination of the appeal ('the determination date');

(g) that time under section 179 of the Act for the convening of the first meeting of creditors of the Company be extended until 21 days after the determination date;

(h) that until the determination date the duties of the liquidators pursuant to section 185(1) of the Act be restricted to the duties to take possession of and protect the assets of the Company;

(i) that until the determination date neither the Applicant nor the liquidators shall publish the fact that liquidators have been appointed to the Company unless they are obliged to do so in compliance with some statutory or regulatory provision binding upon them or (in the case of the liquidators only) unless it is necessary for them to do so for the proper performance of their duties or the due execution of any of their powers, but in that case the liquidators shall take all reasonable steps to ensure that the information is restricted to those persons to whom it has been necessary to disclose it;

(j) until the determination date the liquidators will not without the permission of this Court seek recognition in any jurisdiction other than this one; notice of any application for permission to be given to those prosecuting the appeal, who will be entitled to appear by Counsel on any such application.

Commercial Court Judge

11 January 2010