

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0006

(Interlocutory appeal pursuant to CPR 62.10)

BETWEEN:

[1] JACKSON IP
[2] JAMES WARDELL

Appellants

and

GRIFFIN INDUSTRIES LIMITED (IN LIQUIDATION)

Respondent

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

On written submissions:

Ms. Claire Robey, instructed by Harney Westwood & Riegels for the Appellants

Ms. Eleanor Morgan instructed by Forbes Hare for the Creditors' Committee

Ogier for the Joint Liquidators

2014: January 21.

Civil appeal – Interlocutory appeal filed with leave – Entitlement of voluntary liquidators to fees after they form view that company is insolvent – Insolvency Act, 2003, ss. 182, 430 – BVI Business Companies Act, 2004, ss. 209, 210 – Appeal against judge's findings of fact

JUDGMENT

[1] MITCHELL JA [AG.]: This is an interlocutory appeal by Mr. Jackson Ip and Mr. James Wardell, the former joint voluntary liquidators (“the appellants”) of Griffin Industries Limited (In Liquidation) (“the Company”), against parts of an order of

Bannister J made on 2nd May 2013 in the Commercial Division fixing the remuneration of the appellants. The appeal is brought with the leave of the learned trial judge which was granted on the same day. It has been passed to me as a single judge of the court in accordance with rule 62.10 of the **Civil Procedure Rules 2000**.

- [2] After they were replaced by court appointed liquidators, the appellants applied for their remuneration to be fixed pursuant to section 430¹ of the **Insolvency Act, 2003**² ("the IA 2003"). They submitted their fee notes and invoices, including disbursements for lawyers' and auditors' fees incurred in respect of the liquidation, to the current liquidators in the amount of HK\$6,481,920.79. At a meeting held on 11th June 2012, the creditors' committee fixed the appellants' remuneration at HK\$3,084,755, representing only 48% of the total sums invoiced by the appellants and only marginally more than the sum of the disbursements incurred by the appellants. The appellants considered this sum to be insufficient and applied to the court to fix their remuneration. They have retained HK\$5.8m of the Company's assets, and not paid this sum over to the new court appointed liquidators.
- [3] The learned trial judge found as a fact that in the first 12 months of their appointment on 23rd February 2007, the appellants realised the majority of the Company's assets. He also found that from 26th August 2007 onwards the

¹ Section 430 of the Insolvency Act, 2003:

- "(1) The remuneration of an administrator, liquidator or bankruptcy trustee is fixed
- (a) by the creditors' committee, if any; or
 - (b) by the Court on an application made under subsection (2).
- (2) An administrator, liquidator or bankruptcy trustee may apply to the Court to fix his remuneration, or to fix an interim payment under section 433, if
- (a) no creditors' committee is appointed;
 - (b) the creditors' committee fails, for whatever reason, to fix his remuneration, or an interim payment; or
 - (c) he considers that the remuneration, or an interim payment, fixed by the creditors' committee
 - (i) is insufficient,
 - (ii) is not in an appropriate currency, or
 - (iii) is on unacceptable terms."

² Act No. 5 of 2003, Laws of the Virgin Islands.

appellants' remuneration should be limited to work which fell only within the scope of section 182 of the IA 2003,³ i.e., the powers which are available to a liquidator in an insolvent liquidation. The appellants' position is that this was wrong. The restriction was imposed as a result of the judge's wrong finding of fact that the appellants were of the opinion that the Company was insolvent as at 26th July 2007; and that the appellants should have forthwith sent a notice pursuant to section 209(2)⁴ of the **BVI Business Companies Act, 2004**⁵ ("the BCA 2004") to the Official Receiver informing him of such. He found that such notice should have been sent by 26th August 2007. The appellants should thereafter have been limited to undertaking the scope of work set out in section 182 of the IA 2003. He accordingly limited their remuneration on this basis.

- [4] The learned trial judge determined that it would be quite wrong for the court to permit the appellants to take out of the Company remuneration for acts done other than acts falling within section 182 on assessing remuneration. The whole point of the scheme, as he put it, is to ensure that no further expenses will be incurred by the voluntary liquidators other than expenses in carrying out the functions prescribed by section 182. He determined that section 210⁶ of the BCA 2004, for

³ Section 182 of the Insolvency Act, 2003:

"Notwithstanding section 186, in the case of a liquidator appointed by the members of a company, during the period before the holding of the first creditors' meeting called under section 179, the powers of the liquidator are limited to

- (a) taking into his custody and control all the assets to which the company is or appears to be entitled;
- (b) disposing of perishable goods and other assets the value of which is likely to diminish if they are not immediately disposed of;
- (c) doing all such things as may be necessary to protect the company's assets; and
- (d) exercising such other of the powers conferred on a liquidator by section 186 as the Court may, on his application, sanction."

⁴ Section 209 – Company in voluntary liquidation unable to pay its debts

"(1) ...

- (2) If at any time the voluntary liquidator of a company in voluntary liquidation is of the opinion that the company is insolvent, he shall forthwith send a written notice to the Official Receiver in the approved form."

⁵ Act No. 16 of 2004, Laws of the Virgin Islands.

⁶ Section 210 – Liquidator to call meeting of creditors

the purpose of assessing remuneration, should proceed on the footing that the notice had been duly sent when it should have been. For that reason, he did not allow the appellants any remuneration or expenses after 26th August 2007. He appreciated that the decision was a harsh one, but he found that the failure to send a notice in the circumstances was serious, and that, if he were to award them remuneration for carrying out tasks other than those falling within section 182, he would be flouting the intention of the legislature that the voluntary liquidation should effectively be frozen once the opinion was reached that the Company was insolvent, and that such a decision would be quite wrong.

- [5] I have read the transcript of the learned trial judge's oral judgment, and the very helpful written submissions filed in this appeal by counsel for the appellants, the joint liquidators and the creditors' committee. It appears clear to me that the learned trial judge gave very careful consideration to the evidence that had been led before him, and to the submissions made to him by counsel for the appellants and counsel for the creditors' committee. The further complaint that the learned trial judge should have allowed the appellants to call live evidence instead of proceeding on the written evidence before him is misconceived. The appellants did not raise the question of live evidence until the hearing itself, which was too late. The learned trial judge came to the conclusion and found as a fact that there was the clearest evidence that the appellants were aware that the Company was insolvent by 23rd July 2007, the date of their statement of affairs which revealed the insolvency. Instead of sending a notice to the official receiver in the BVI forthwith as required by section 209 of the BCA 2004, years elapsed until that was done on 25th November 2011.

"(1) A voluntary liquidator who sends a notice to the Official Receiver under section 209(2) shall call a meeting of creditors of the company to be held within twenty one days of the date of the notice.

(2) ...

(3) Without affecting any acts carried out by the voluntary liquidator appointed under Division 1 prior to his sending a notice to the Official Receiver under section 209(2), section 182 of the Insolvency Act applies to a voluntary liquidator appointed under Division 1 as if he was a liquidator appointed by the members under the Insolvency Act."

[6] Following the decision of this court delivered by Baptiste JA in **Chiverton Construction Limited and Another v Scrub Island Development Group Ltd**,⁷ the appellants have an uphill task in challenging the learned trial judge's findings of fact. A Court of Appeal will be slow to interfere with them. In this case, the judge's findings of fact were rationally explained. He had adequate evidence to support his findings. He did not misapprehend the facts or misdirect himself in law. I would, therefore, affirm the order made by the learned trial judge on 2nd May 2013, and dismiss the appeal with costs to the creditors' committee to be assessed if not agreed within 30 days of this order.

Don Mitchell
Justice of Appeal [Ag.]

⁷ Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported).