In The Supreme Court of Bermuda

COMMERCIAL COURT
COMPANIES (WINDING UP)
2017: Nos. 302, 303, 304

IN THE MATTER OF SEADRILL LIMITED-IN PROVISIONAL LIQUIDATION
AND IN THE MATTER OF NORTH ATLANTIC DRILLING LTD-IN PROVISIONAL LIQUIDATION
AND IN THE MATTER OF SEVAN DRILLING LIMITED-IN PROVISIONAL LIQUIDATION
AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

(in Court)

Parallel restructuring proceedings for Bermuda companies-Bermuda provisional liquidation and Chapter 11 proceedings in US -US COMI-application by provisional liquidator for prospective recognition order in relation to US Plan-opposition to recognition order by minority shareholders who had previously submitted to the jurisdiction of the US Bankruptcy Court-standing of minority shareholders to oppose grant of recognition order and/or the grant of a stay in support of the recognition order

Date of Decision: March 29, 2018
Date of Judgment: April 3, 2018

Ms Kehinde George, ASW Law Limited, for the Joint Provisional Liquidators ("the JPLs")
Ms Robin Mayor and Mr Rhys Williams, Conyers Dill & Pearman Limited, for the Companies
Mr John Wasty, Appleby (Bermuda) Limited, for [the Coordinating Committee (CoCom) on behalf of the lenders of 13 senior secured facilities of the Seadrill group] (Creditors)
Ms Simone Smith-Bean and Mrs Keiva Durham, Smith Bean & Co, for certain Minority Shareholders of Sevan Drilling Limited ("Sevan")

Background

1. On September 13, 2017 the Companies presented winding-up petitions to this Court. The previous day, they had entered into a Restructuring Support Agreement ("RSA") and (together with other affiliates) filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code (the "Chapter 11 Proceedings") with the United States Bankruptcy Court for the Southern District of Texas, Victoria Division (the "US Court"). The Petitions averred that the Chapter 11 Proceedings had been commenced to serve as a platform for restructuring the Group (which was engaged in offshore drilling), as a response to liquidity challenges resulting from the downturn in the oil and gas industry.

2. On September 13, 2017, Hellman J heard and granted the Companies' Ex Parte Summonses issued on the same date seeking to appoint the JPLS (Simon Edel and Alan Bloom of Ernst & Young LLP, London, and Roy Bailey of Ernst & Young Ltd, Bermuda Bahamas, BVI and Cayman Islands). Paragraph 1 of that Order empowered the JPLs, *inter alia*:

   "

   (a) to review the financial position of the Company;

   (b) to oversee the continuation of the business of the Company under the control, of the Company's Board of Directors ("the Board') and under the supervision of this Court and the US Court;

   (c) *to oversee, in conjunction with the Board, the Chapter 11 Case and such other proceedings as deemed appropriate by the Company after consultation with the JPLs*…"

3. On October 27, 2017, the duly advertised Petitions were adjourned until April 27, 2018 with the consent of all those who appeared. On January 26, 2018, I gave directions sought by the JPLs for the issuing and service of an *inter partes* Summons seeking recognition of a Chapter 11 Plan and permanently staying all claims of creditors and shareholders against the Companies. The Directions Order also provided that:

   - the hearing of the Summons should be fixed having regard to the timetable in the Chapter 11 proceedings; and

- that any creditor or shareholder wishing to object to the Summons should file an affidavit setting out the grounds of their objection not less than four days before the hearing.

4. The Summons was issued on February 20, 2018 returnable for March 23, 2018. The First Affidavit of Neil Joynson dated March 21, 2018 deposed that the *inter partes* Summons was served with the Solicitation Package sent to voting and non-voting groups in the Chapter 11 Proceedings. Service was confirmed in those Proceedings by an Affidavit of Service filed on March 13, 2018. At the hearing on March 23, 2018, Mrs Smith-Bean applied for and was granted an adjournment (until March 29, 2018) as she had only recently been instructed by certain Minority Shareholders of Sevan to oppose the Summons.

5. On March 29, 2018 I granted the Recognition Order and Permanent Stay sought by the JPLs and the Companies, including Sevan. These are the reasons for that decision.

The inter partes Summons

6. The JPLs primarily sought an Order that:

> "*1. Recognition of the Plan of Reorganization of the Companies (the 'Plan') filed by the Companies under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, in the United States Bankruptcy Court for the Southern District of Texas, Victoria Division (Case No. 17-60079) be granted, effective upon the confirmation of the Plan by the said US Bankruptcy Court, and the occurrence of the effective date of the Plan pursuant to its terms.*
>
> *2. To give effect to the Plan in Bermuda:*
>
> *2.1 All claims by creditors and shareholders that have been brought in this jurisdiction against the Company are hereby permanently stayed;*
>
> *2.2 Leave shall not be granted under section 167(4) of the Companies Act 1981 for the commencement of proceedings against the Company; and*
>
> *2.3 No debts may be proved by any creditors whose claims are affected by the Plan on its terms, and no claims may be brought by shareholders/contributories, within these proceedings*…."

Legal basis for the JPLs' application

7. Ms George submitted in the JPLs' '*Outline Submissions*' that the "*restructuring of Bermudian companies by way of parallel proceedings under Chapter 11 of the US Bankruptcy Code in the US, and light touch provisional liquidation proceedings in Bermuda, has been standard practice in the Bermuda Court since the case of ICO Global Communications Limited [1999] Bda LR 69.*" The Order sought was similar to Orders made by this Court in *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com; *Re C & J Energy Services Limited* [2017] SC (Bda) 20 Com.

Legal findings: jurisdiction to recognise the Confirmation Order

8. The legal basis for recognising the anticipated confirmation of the Chapter 11 Plan was not ultimately challenged in the present case as it was in *Re Energy XXI Ltd.* However the JPLs' counsel relied on the central findings on jurisdiction which I made in that case:

> "*27. The Recognition Order was not being used to cut through the recognised private international law rules on recognition of judgments deploying 'woolly' common law cooperation notions to fill gaping statutory chasms. The Equity Committee, unlike the shareholder in Cambridge Gas, was not able to complain that recognition entails permitting the enforcement of a foreign judgment (the anticipated Confirmation Order) in circumstances which traditional conflict of law rules do not permit. Rather, the Recognition Order was being sought on the basis of traditional recognition principles against a background of parallel insolvency proceedings in which there was no or no serious challenge to the proposition that the US proceedings should be regarded as the primary proceedings…*"

9. In short, the Minority Shareholders (along with Sevan itself) having submitted to the jurisdiction of the US Court would be bound by the Confirmation Order, assuming it was granted, under US Bankruptcy law. It would not be open to them to complain before this Court that the US Court's Confirmation Order was an *in rem* order which had no effect under Bermudian law on shares which were located here. The US Court had jurisdiction over Sevan because it commenced the Chapter 11 Proceedings. It also had jurisdiction over the Minority Shareholders' shares in Sevan, despite the fact that they were situated in Bermuda. This was because the Minority Shareholders submitted personally to the jurisdiction of the US Court in relation to the Chapter 11 Proceedings, the function of which was to determine (amongst other things) the extent of shareholders' rights.

10. The position here (as in *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com) was materially distinguishable from the position in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508. *Cambridge Gas* was disapproved by the UK Supreme Court majority in *Rubin–v-Eurofinance* [2013] 1 AC 36, and by the Privy Council majority in *Singularis Holdings Limited-v-PricewaterhouseCoopers* [2015] AC 1675. Lord Collins crucially disapproved of the approach to recognition adopted in *Cambridge Gas* in *Rubin* on the following grounds:

> "*45. At this point it is necessary to point out that the opinion in Cambridge Gas does not articulate any reason for holding that, in the eyes of the Manx court, the US Bankruptcy Court had international jurisdiction in either of two relevant senses.*
>
> *46. The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (Dicey, 15th ed, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation (Dicey, 15th ed, para 30R-100). Under United States law the US Bankruptcy Court has jurisdiction over a "debtor", and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.*
>
> *47. The second sense in which international jurisdiction is relevant is the jurisdiction over the third party, Cambridge Gas, and its shares in Navigator. Cambridge Gas was not incorporated in the United States, and it was held by the Isle of Man courts that it had not submitted to the jurisdiction of the US Bankruptcy Court (and this was, as I have said, accepted with evident reluctance by the Privy Council). The property which was the subject of the order of the US Bankruptcy Court was shares in an Isle of Man company. Consequently the property dealt with by the US Bankruptcy Court was situate, by Manx rules of the conflict of laws, in the Isle of Man, and the shareholder relationship was governed by Manx law.*"

11. A further important contextual distinction between the present case and the position in *Cambridge Gas* was that here ancillary liquidation proceedings were commenced, expressly to support and implement an anticipated Chapter 11 Plan. The Minority Shareholders of Sevan could have appeared at the advertised first hearing of the Companies' Petition and sought to argue that the provisional liquidation should take a different course from the outset. This they elected not to do. In these circumstances it was unsurprising that the Minority Shareholders did not seek to pursue the 'nuclear' option of opposing the recognition limb of the Order. However attractive this diluted challenge superficially appeared to be, in reality the same jurisdictional principles, subject to distinctions which are insignificant, applied to both aspects of the Order the JPLs sought. The stay limb was an integral part of the recognition limb of the proposed Order, for the reasons set out below.

12. For these reasons I found that this Court had sufficient jurisdictional competence to conditionally recognise the Chapter 11 Plan.

The Minority Shareholders of Sevaen's objections to the permanent stay of proceedings sought by the JPLs

13. The Minority Shareholders of Sevan who opposed the JPLs' application for a permanent stay placed various documents before the Court through the First Affidavit of Yolanda Furbert, an employee of Smith Bean & Co. The most significant document, in my judgment, was a February 6, 2018 letter to Judge Jones of the US Court which, *inter alia*:

    - Confirmed that they had filed a claim in the Chapter 11 Proceedings;

    - suggested that the Liquidation Analysis upon which the Companies relied was faulty;

    - invited the US Court to postpone the Chapter 11 process in relation to Sevan until the question of good faith was considered.

14. This request was not acceded to, because it was not disputed that on February 26, 2018, the US Court approved various procedures designed to facilitate confirmation of the Plan. Nevertheless, the Minority Shareholders, in their submissions to this Court:

    - argued that the remedy of minority shareholder oppression under section 111 of the Companies Act 1981 was a unique Bermuda remedy not available in the Chapter 11 Proceedings;

- contended that it would not be an abuse of process for the Minority Shareholders to be permitted to pursue claims in this Court which they could not pursue in the US Court and/or were based on facts which had yet to be disclosed;

- complained that they had yet to obtain full disclosure of information relevant to potential claims against Sevan because Sevan had insisted on an undertaking not to sue as a condition for entering into a non-disclosure agreement;

- asserted that submission to the jurisdiction of the US Court did not deprive the Minority Shareholders of the right to bring derivative proceedings in relation to Sevan in Bermuda;

- submitted that Bermuda was the most appropriate forum for the Minority Shareholders' rights in relation to a Bermuda company to be determined; and

- consequentially invited this Court to exempt them from the proposed permanent stay.

15. The Companies responded that:

    - the Minority Shareholders were bound by the US Court's automatic stay;

    - Sevan was hopelessly insolvent and the US Court had declined to create an Equity Committee. The Minority Shareholders had no prospect of any recovery from a liquidation and therefore no standing to pursue the litigation they wished the opportunity to pursue in Bermuda;

    - the Creditors' Committee had analysed pre-petition transactions and considered potential claims against directors, but had concluded that none were worth pursuing;

    - no derivative claim was viable as the JPLs were already providing independent oversight of Sevan's management.

16. The objections to the scope of the proposed permanent injunction, properly analysed, involved attacking the fundamental premises upon which this Court was being asked to recognise the US Court's Confirmation Order, on somewhat different terrain. The Minority Shareholders' case for affording them any remedies against Sevan at all required this Court to decline to fully give effect to the US Court's Order under Bermuda law. This ignored the inconvenient truth that it made little commercial

sense to recognise the US Court's Order confirming the Plan without restraining creditors and shareholders from collaterally attacking it in subsequent proceedings in Bermuda.

Legal findings: jurisdiction to restrain creditors and shareholders from pursuing existing or future claims against Sevan

17. That this Court possessed the jurisdiction to grant the stay sought was not ultimately challenged. In *Re Energy XX1 Ltd.,* I explained the jurisdiction in broad terms in the following way:

> "*34…It would be inherently inconsistent for a 'Recognition Order' to seek to achieve any more than that which the recognised order seeks to achieve, apart from the obvious intent to extend of the territorial scope of the original order's operation. Again, it must be remembered that the dominant purpose of the Recognition Order sought was not to bind strangers with no notice of either the present proceedings or the proceedings before the Texas Court. The main function of the Order is to restrain parties who have submitted to the jurisdiction of the Texas Court and/or who are otherwise bound by any confirmation order from seeking to pursue claims that they have either affirmatively waived or passively lost under US Bankruptcy law.*
>
> *35. The stay aspect of the Recognition Order was clearly intended to be supplemental to the primary aspect: by granting the Order this Court was signifying that any confirmation order made in Houston should not be subject to re-litigation in Hamilton. Having appointing the PL and approving in principle the pursuit of the US restructuring on the basis that the Texas Court would be the primary restructuring court, it would make no sense to leave open the possibility for parties involved in the US proceedings to re-litigate issues before this Court. Any such re-litigation would be a manifest abuse of process.*
>
> *36. Granting the stay can be justified by reference to the doctrine of modified universalism and may be seen as an aspect of common law cooperation with a foreign insolvency court in relation to a Bermuda company in provisional liquidation here. As Lord Sumption noted in Singularis with reference to the high level principles correctly identified in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2007] 1 A.C. 508:*
>
> > '[16] *Reviewing the English case law, Lord Hoffmann discerned in it a 'golden thread running through English cross-border insolvency law since the 18th century' which, adopting*

> *a label devised by Professor Jay Westbrook, he called the 'principle of (modified) universalism' (at [30]):*
>
> *'That principle requires that English courts should, so far as is consistent with justice and United Kingdom public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*
>
> *37. However, more prosaically, the granting of the stays sought may be viewed as an incident of this Court's general jurisdiction to restrain abuses of process and/or to manage the processes of the Court in relation to the cases before it. Regard must also be had to the Court's implied statutory power to stay proceedings brought against a company in liquidation, which is necessarily incidental to the express power to lift the statutory stay, as read with its power to sanction a liquidator's conduct of legal proceedings and entry into arrangements with creditors…*"[1]

Findings: merits of Minority Shareholders' objections to permanent stay sought by JPLs

18. There was no need to analyse the underlying merits of the objectors' complaints. It was impossible to avoid viewing their intervention at this late stage as little more than a final throw of the dice in the apocryphal 'Last Chance Saloon'. Having exhausted their remedies in the Chapter 11 Proceedings, the Minority Shareholders appeared to be seeking to place a roadblock in the path of the Chapter 11 convoy, in the hope that some last-ditch and otherwise unlikely bargain could be extracted against all the odds. As I observed in the course of argument, Mrs Smith-Bean had been instructed to seek an outcome, which could only be achieved by a magician.

19. When a Bermudian company is placed into provisional liquidation for the purposes of pursuing an insolvent restructuring, this Court makes three central interlocutory findings:

    (1) a *prima facie* case for winding-up has been made out on the grounds of insolvency;

    (2) the creditors have displaced the shareholders as the key stakeholders in the company; and

[1] Supreme Court Act 1905, section 18; Companies Act 1981, sections 167(4) (power to lift automatic stay of proceedings after the appointment of a provisional liquidator or winding-up order) and 175(1) (a), (e) (power of liquidators to bring proceedings in the name of the company and to enter into compromises or arrangements).

(3) an arguable case that a restructuring is where the best interests of the creditors lie have been made out.

20. These findings underpinned the Ex Parte Order made by Hellman J on September 13, 2017. The appropriate time and place for creditors or shareholders of Sevan (and indeed the Companies generally) to challenge those interlocutory findings was the hearing of the Petition, which the Rules require to be advertised for this purpose. The statutory basis for this Court deciding whether or not an insolvent company should be wound up or restructured or, indeed, is not insolvent at all is section 164 of the Companies Act 1981, which provides:

> "*(1) On hearing a winding-up petition, the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit*…"

21. The Petition in the present case was first heard on October 27, 2017. On that date all parties appearing assented to the JPLs pursuing the Chapter 11 Plan route. The adjournment Order made on that date implicitly confirmed the Ex Parte findings that the Companies were insolvent and that the creditors' best interests were what the Companies were required to seek to vindicate. Even if the Minority Shareholders are not strictly bound by these interlocutory decisions, they adduced no credible evidence in support of the improbable proposition that Sevan is <u>not</u> in fact insolvent and that they as shareholders <u>do</u> still possess a commercial interest in the Company. The suggestion that if Sevan was willing to give full disclosure without restricting their right to pursue claims against Sevan, the true position would be revealed beggared belief. Mr Wasty represented that CoCom has claims totalling some $5.7 billion against the Companies. It made no sense that sophisticated creditors would support a Plan which promised to deliver a partial recovery and release directors from pre-petition claims if the true position was that:

- Sevan was in fact solvent and able to pay its debts in full; and/or
- viable claims could be pursued against the directors which likely ensure a 100% return for creditors with a surplus in which the shareholders could participate.

22. The objections could only be rejected, not simply because the objectors did not advance even an arguable case capable of establishing their standing to seek any relief

as shareholders in an insolvent provisional liquidation proceeding[2]. As Ms George rightly submitted, the fact that the JPLs are in office undermines the essential basis for a derivative claim. In addition it would be an abuse of process for the Minority Shareholders to be able to derail an orderly and substantial cross-border restructuring process by intervening at the tail-end of the process rather than at the outset.

23. The US Court has made its own corresponding determinations, most pertinently finding that the Companies' equity interests are so intangible that no Committee of Equity Holders need even be established. The Sevan Minority Shareholders filed their claims in the Chapter 11 Proceedings and on February 6, 2018 requested the US Court to postpone the Chapter 11 process. On February 26, 2018 the US Court gave directions for voting to take place on the Plan. If the Plan is confirmed, the Minority Shareholders would clearly be bound both by the Plan and the related permanent stay of proceedings against Sevan under US Bankruptcy law. It would clearly also be an abuse of process to permit the Minority Shareholders to reserve the right to bring proceedings against Sevan in Bermuda in breach of their obligations to the US Court.

24. In short, recognition of the Confirmation Order necessarily included recognising and enforcing under Bermuda law the permanent stay imposed by the US Court. The two limbs of the Order sought by the JPLs were inextricably intertwined, and the beguiling invitation to view them as severable could only properly be rejected.

Summary

25. For the above reasons on March 29, 2018 I granted the Order sought by the JPLs supported by the Companies and a substantial creditor. This Order conditionally:

    (a) recognised the Confirmation Order which the US Court is expected to make later this month; and

    (b) permanently restrained creditors and shareholders from pursuing claims against the Companies in breach of their obligations under the proposed Chapter 11 Plan.

Dated this 3rd day of April, 2018 _____

IAN RC KAWALEY

[2] A minority shareholder oppression petition under section 111 is a remedy to be pursued against a solvent company.