

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2003

BETWEEN:

NAM TAI ELECTRONICS, INC.

Appellant

and

[1] DAVID HAGUE

[2] TELE ART INC (IN LIQUIDATION)

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

The Hon. Mr. Ian D. Mitchell, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Michael Fay for the Applicant/Respondent

Mr. David Chivers, Q.C. with Mr. John Carrington for the Respondent/Appellant

Mr. Paul Dennis holding a watching brief for The Bank of China

2004: June 10;

2004: September 21.

JUDGMENT

[1] **GORDON, J.A. [AG.]:** By a Notice of Application dated and filed on the 17th May 2004 the Applicant, David Hague, the first-named Respondent, applied to the Court of Appeal for leave to appeal the decision of this Court given on 26th April 2004 to the Privy Council. The Notice of Application was not accompanied by any Affidavit, though at the hearing of the Application Mr. Michael Fay for the Applicant/Respondent was given permission to file such an affidavit which he did.

[2] The Application was made pursuant to Section 3 (1) (a) and 3 (2) (a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 which reads as follows:

"3. (1) Subject to the provisions of this Order, an appeal shall lie as of right from the decisions of the Court to Her Majesty in Council in the following cases-

(a) Where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards, final decisions in any civil proceedings;

(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases-

(a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;

[3] The Applicant, David Hague, was the liquidator of the second-named Respondent at the commencement of these proceedings in the High Court. He did, however, resign, with the permission of the Court and so, as a liquidator is functus officio. Notwithstanding that circumstance, the Appellant, Nam Tai Electronics Inc (hereafter Nam Tai) included him as a Respondent in their appeal against the first instance judgment of d'Auvergne J and he was represented by Counsel at the hearing of the Appeal.

[4] The application for leave was robustly opposed by learned Queens' Counsel for Nam Tai on several grounds. Firstly, he challenged the right of the applicant to seek to appeal in his status as an ex liquidator. Whilst it is quite clear that since the Applicant's resignation and the subsequent appointment of another liquidator the applicant has no interest in the liquidation process of the second Respondent, nevertheless, and this is conceded by learned counsel, he has an interest in the proceeds of the liquidation as far as his remuneration and expenses are concerned. Further, as counsel for the Applicant pointed out, there is extant a cross undertaking in damages given by the Applicant.

- [5] I am of the view that the applicant does have *locus standi*.
- [6] Secondly, the Respondent argued that the right of appeal existed in respect only of final judgments and that the judgment of the Court of Appeal was an interlocutory Order. A review of the Record of Appeal in the Appeal which generated the judgment from which it is sought to appeal shows that both parties, Nam Tai and the second Respondent both regarded the appeal to the Court of Appeal to be a procedural appeal, for which leave was required and obtained. At the hearing for leave, the parties were Nam Tai and the second Respondent only, presumably, though this is not stated, acting through its liquidator. Leave was granted by consent. Logic would dictate that what was procedural then could not suddenly become final.
- [7] If further confirmation were needed, a study of the genesis of these particular proceedings would provide it. On 21st January 1999 the Applicant, then the liquidator of Tele Art Inc, applied for and received an interim injunction restraining Nam Tai from redeeming its shares held by Tele Art Inc. The injunction was granted on condition that the Liquidator file proceedings “to determine the respective rights of Bank of China, Nam Tai and the Official Liquidator to hold and realize some or all of the Nam Tai shares and their respective rights and priorities in respect of the proceeds of sale of the said Nam Tai shares”
- [8] The then official liquidator, the present Applicant, filed a summons seeking a number of orders and declarations. The summons was by its nature interlocutory in that what it sought would not have finally disposed of the winding up which was the substantive action, of which the summons formed only part. Based on the authority of **Sylvester v Singh**¹ and **Pirate Cove Resorts Limited et al v Euphemia Stephens et al**² it is well established in this jurisdiction that in

¹ Civil Appeal No 10 of 1992 [1995] St. Vincent & The Grenadines

² Civil Appeal No. 11 of 2002 [2003] St. Vincent & The Grenadines

determining whether a matter is procedural (interlocutory) or final the Court will apply the application test rather than the order test, though I am not sure that in this case either test would not have yielded the same result, namely that the judgment sought to be appealed from is not a final order.

[9] Having found as I have it now falls to consider the effect of such a finding.

[9] Section 3 (1) (a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 (quoted at paragraph 2 above) has about it a certain inelegance in its language which I suspect has been caused by the printer's devil. If the final six words of paragraph (a) were to be put at the beginning of that paragraph then the section would read:

"3. (1) Subject to the provisions of this Order, an appeal shall lie as of right from the decisions of the Court to Her Majesty in Council in the following cases-

final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards;"

Indeed, this is how, for example, section 99 of the Constitution of St Christopher and Nevis reads . In other words appeals as of right lie only from final decisions of this Court. On that basis, therefore, in this case the Applicant may not appeal as of right.

[10] The Applicant offered as an alternative ground for leave that the question involved in the proposed appeal is one that by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council. In support of this ground the Applicant offered two arguments, and I can do little better than to quote from his skeleton submissions:-

"Public Importance

The intended appeal to Her Majesty in Council raises the novel and interesting question of whether a party to a pre-existing contractual

arrangement can alter the terms of the contract after the onset of the insolvency of a counter party so as to improve its position in respect of its obligations and benefits in the insolvency. It is irrelevant that the question rises in the context of the articles of association of Nam Tai- the articles are merely a contract. The question has implications not only to amendments to articles, but also is of general application to all forms of contracts.

In addition the question of whether a right to redeem remains exercisable in circumstances where the owner of the shares is in liquidation is a novel and interesting point that has implications for the financial services industry in the British Virgin Islands. It is particularly important given the reputation that the British Virgin Islands has as an attractive jurisdiction for lenders/creditors to take security interests."

[11] This Court in **Francois v The Attorney General**³ stated the following at paragraph 13 of the judgment :

"Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase "great general or public importance", the court usually looks for matters that involve a really serious issue of law or a constitutional provision that was not settled or an area of law in dispute or a legal question that poses dire consequences for the public. For example, in **Douglas v Pindling**⁴ leave was granted because the case raised important issues regarding the right test to be applied by a commission of inquiry in deciding whether to issue a summons under the Bankers' Books Evidence Act and the nature of the supervisory jurisdiction of the court over a decision to issue such a summons. In **Etoile Commerciale SA v Owens Bank (No. 2)**⁵, leave was granted in circumstances where there was conflicting judicial *dicta* from the highest courts on the law governing the circumstances under which the enforcement of a foreign judgment might be resisted on the ground that it had been obtained by fraud.

[12] Guided by that thinking, I am of the view that leave ought to be granted to the Applicant for the determination of the issues as set forth at paragraph 11 hereof. In the circumstances the Order of the Court is that conditional leave to appeal to Her Majesty in Council is granted unto the Applicant on the conditions that within 90 days from the date of this judgment the Applicant do pay into Court the sum of £500 sterling for the due prosecution of the appeal and that within the said ninety

³ Saint Lucia Civil Appeal No. 37 of 2003

⁴ (1996) 3 LRC 460

⁵ (1993) 45 WIR 136

days the Applicant shall cause to be prepared a record for transmission to the Registry of the Privy Council.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

[Sgd.]
Ian D. Mitchell, QC
Justice of Appeal [Ag.]