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

CLAIM NO. BVIHC (COM) 0083 OF 2010

BETWEEN:

DAVID FRIEDLAND

Applicant

and

(1) XENA INVESTMENTS LIMITED
(2) WILLIAM TACON
(3) DAVID GRIFFIN
(4) SPECTRUM GALAXY FUND LIMITED

Respondents

Appearances: Mr Richard Evans for the Applicant
Ms Keisha Durham for the first Respondent
Mr Robert Foote for the second and third Respondents
The fourth Respondent was not represented and did not appear

JUDGMENT

[2011: 26, 27 May; 6 June]

(Application by director of company for termination of liquidation – applicant contending that decision of Court of Appeal in **Westford Special Situations Fund Ltd v Barfield Nominees Ltd**[1] showing order appointing liquidators on 29 July 2010 should never have been made – section 233 Insolvency Act, 2003 considered)

[1] This is an application under section 233[2] of the Insolvency Act, 2003 ('section 233', 'the Act') for an order terminating the liquidation of the fourth Respondent, Spectrum Galaxy Fund Limited

[1] HCVAP 2010/014 22 September 2010
[2] the application notice refers to section 273, but it is clear that this was a typo

('Spectrum'). I appointed Joint Liquidators to Spectrum on 29 July 2010 on the application of the first Respondent, Xena Investments Limited ('Xena').

Background

[2] Spectrum is a BVI incorporated company and recognized as a private fund. It has been described as an umbrella fund, inasmuch as it has established sub-funds the separate interests in which are held by designated classes of shares in Spectrum. One such sub-fund was the MG Secured Debt Fund ('MG') and between 1 November 2006 and 1 June 2007 a company called Somers Dublin Ltd a/c KBCS ('Somers Dublin') subscribed, on behalf of a company called Pentagon Select Ltd ('Pentagon') for shares in Spectrum giving it an interest in MG. It appears that the parties treated MG as a trading style of Spectrum when it was convenient to do so. The total subscription price was some US$17m. On 30 April 2008 Somers Dublin submitted a redemption notice in respect of all its shares in Spectrum, effective on 30 June 2008. It is not disputed that as a result Somers Dublin/Pentagon became entitled as at that date to payment of redemption proceeds amounting to some US$21.4m (or to an equivalent distribution *in specie*).

[3] On 19 December 2008 Pentagon entered into a forbearance agreement with MG/Spectrum. Its principal terms may be summarized as follows. Spectrum acknowledged that Pentagon, as beneficial owner, was entitled to immediate payment of the redemption money (clause 7). Also by clause 7, Pentagon agreed not to bring any action against the fund or its directors in respect of its right to demand immediate payment for a period of two years from 30 June 2008, such forbearance to lapse if certain specified acts of default were committed within that period by Spectrum. Pentagon agreed not to charge interest on the outstanding amount (clause 5). As consideration for Pentagon's forbearance, Spectrum agreed that it would not attempt to satisfy the redemption by payment in kind. As further consideration Spectrum agreed irrevocably and unconditionally to consent to an anticipated transfer by Pentagon of its 'legal and beneficial interest in the redemption' (including its rights under the forbearance agreement), described in the forbearance agreement as 'the Proposed Transfers' (clause 9). Finally, by clause 10, it was declared that the forbearance agreement was governed by and to be construed in accordance with English law and that any dispute arising out of or in connection with the terms of the forbearance agreement should be subject to the exclusive jurisdiction of the English courts.

[4] On 1 May 2010, during the currency of the moratorium, Pentagon and Somers Dublin as assignors and Xena as assignee entered into a deed of assignment ('the assignment'). Under clause 3.1 of that document Pentagon and Somers Dublin assigned to Xena 'the Assigned Property.' Clause 1.1 of the assignment defined 'Assigned Property' as 'the Redeemed Shares, the Receivables and all Related Rights'. 'The Redeemed Shares' are defined (in summary) as shares having a value on June 30 2008 of US$21.4m and in respect of which a request for redemption had been duly accepted and processed by Spectrum but in respect of which Somers had not been removed from Spectrum's register of members and/or the redemption process had otherwise not been completed. 'Receivables' is given an extended definition but includes, as one would expect, the US$21.4m redemption proceeds. 'Related Rights' includes a number of rights which it is not necessary to mention, but which, importantly, included Pentagon's rights under the forbearance agreement.

[5] There is no evidence that the assignment is what was envisaged in the forbearance agreement as the 'Proposed Transfers', but it would seem to be a reasonable inference that it is.

[6] Notice of the assignment was given by Pentagon, Somers Dublin and Xena to Spectrum on the same day. The notice asked Spectrum to update the register of members (to the extent required) to reflect the transfer of the Redeemed Shares to Xena. It concluded by giving a contact reference for use by Spectrum 'if [it] had any questions concerning the transfer from Somers [Dublin] to Xena.'

[7] On 20 May 2009 an entity calling itself Sterling Group, which appears to have been acting for Spectrum in some administrative capacity, sent separate 'Confirmations of Transfer' to each of Somers Dublin and Xena. Each confirmation was in identical terms:

> 'In accordance with your instructions we confirm having transferred the following in Spectrum Galaxy Fund MG Secured Debt Fund Series 6/06'

There then followed particulars showing the trade date as 1 May 2009, the number of shares as 139,380.155, their value as US$21.4m, the NAV date as 30 June 2008, the transferor as Somers Dublin and the transferee as Xena. In context and against the previous dealings which I have summarized above, there can be no doubt that the words 'we confirm having transferred' meant

that the relevant register of members had been amended to substitute Xena for Somers Dublin as member in respect of the Redeemed Shares.

[8] On 6 July 2010, shortly after the expiry of the moratorium under the forbearance agreement, Xena issued an originating application for the appointment of liquidators to Spectrum, which came before me on 29 July 2010. The originating application sets out the facts leading up to the redemption of 30 June 2008 and paragraph 7 gave a very short summary of the forbearance agreement. Paragraph 8 said:

> 'By the Forbearance Agreement [Spectrum] acting through MG Secured Debt Fund has acknowledged that it considers Somers [Dublin] (on behalf of [Pentagon]) to be an unsecured creditor of [Spectrum] by virtue of its entitlement to the Redemption Proceeds, the beneficial interest in which vested in [Pentagon]'

Paragraph 9 pleads that by the assignment the Redemption Proceeds were assigned to Xena. Paragraphs 10 and 11 plead that Xena has not received any part of the US$21.4m Redemption Proceeds owed to it and that they remain due and payable. It is then said that the Spectrum has failed to pay its debts as they fall due and appears to be insolvent. On those grounds Xena asked for liquidators to be appointed. Xena's standing to make the application was not challenged at the hearing and I accept that the only reason for that was that it was considered at the time that by reason of my decision in **Western Union International v Reserve International Liquidity Fund Limited**[3] a redeemed shareholder had locus to apply as a creditor for the appointment of liquidators to the relevant company, although that did not preclude Spectrum from challenging that reasoning on the hearing of the application. Instead, the matter was argued on the basis that Xena ought to have accepted, alternatively that there should be an adjournment for further consideration of, compromise proposals offered by Spectrum but which Xena was then not prepared to entertain.

[9] I granted the application and appointed liquidators. That part, at any rate, of my decision in **Reserve International** which held that the applicant in that case was not applying in its character

[3] BVIHCV 2009/322 26 January 2010

as a member has subsequently been demonstrated by the Court of Appeal in **Westford Special Situations Fund Ltd v Barfield Nominees Limited and ors**[4] to have been misconceived.

The present application

[10] The present application, which was made on 27 April 2011 by Mr David Friedland ('Mr Friedland'), a director of Spectrum, is for an order under section 233 terminating its liquidation. The Court has been told that in tandem with and in addition to this application, an appeal to the Court of Appeal is being prepared against my appointment of liquidators on 29 July 2010. Section 233 is in the following terms:

> **'Order terminating liquidation**
>
> (1) The Court may at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is satisfied that it is just and equitable to do so.
>
> (2) An application under this section may be made by the liquidator, a creditor, a director or a member of the company or the Official Receiver.
>
> (3) Before making an order under subsection (1), the Court may require the liquidator to file a report with respect to any matter relevant to the application.
>
> (4) An order under subsection (1) may be made subject to such terms and conditions as the Court considers appropriate and, on making the order or at any time thereafter, the Court may give such supplemental directions or make such other order as it considers fit in connection with the termination of the liquidation.
>
> (5) Where the Court makes an order under subsection (1), the company ceases to be in liquidation and the liquidator ceases to hold office with effect from the date of the order or such later date as may be specified in the order.
>
> (6) Where the Court makes an order under subsection (1), the person who applied for the order shall, within ten days of the date of the order, file a sealed copy of the order with the Registrar.
>
> (7) A person who contravenes subsection (1) commits an offence.'

[11] The submissions of Mr Evans, who appeared for Mr Friedland on the application, are simple. He says that the **Westford** decision shows that Xena had no *locus standi* under the Act to apply for the appointment of liquidators and that for that reason I had no jurisdiction to entertain its

[4] HCVAP 2010/014, 22 September 2010, reasons given on 28 March 2011

originating application. It follows, he submits, that the appointment should not have been made and that the continuation of the liquidation is nothing more than a continuation of the wrong done to Spectrum by the appointment of the liquidators. He points out that no other creditor appeared to support Xena's originating application and says that four creditors (albeit connected to Spectrum) support Mr Friedland's application for termination. The liquidators have made no realisations to date and are presently without funds to progress the liquidation. In those circumstances it is plainly just and equitable, says Mr Evans, that the liquidation should be terminated.

[12] Ms Durham, who has appeared for Xena to oppose Mr Friedland's application, takes a number of points. First, she submits that the **Westford** decision has no application, because the inhibition imposed by section 197 of the Act applies only to prevent *members or past members* from claiming in a liquidation or applying for the appointment of liquidators in cases where they claim or apply in their character as members. Ms Durham submits that Xena is not claiming as a member, but as an assignee of the proceeds of the redemption requested by Somers Dublin and accepted by Spectrum. There was therefore no statutory block, submits Ms Durham, preventing Xena, in its capacity as assignee of the redemption proceeds, from applying in July 2010 for the appointment of liquidators.

[13] This submission was the subject of prolonged debate at the hearing of this application. For reasons which I hope will become clear later, I take the view that the less I say about it, the better, and I therefore propose to express no view on its merits.

[14] Ms Durham further submitted that for an application under section 233 to succeed the company must show that it is in a position to resume business unencumbered by debt or at any rate subject to satisfactory arrangements having been entered into with its creditors and to secure payment of the liquidators' remuneration. That, she says, is not this case.

[15] Ms Durham's third point was that this application was nothing more than an attempt to appeal my order by the back door.

[16] It seems to me that the real issue *on the present application* is not whether my order was rightly made, or whether it might be capable of being supported on other grounds. The real issue is

whether it is a proper application of section 233 to terminate the liquidation of Spectrum on the sole ground that I was wrong to appoint the liquidators. That requires an analysis of section 233.

Section 233

[17] The first and most obvious point to make is that section 233 is in the widest terms, the only condition requiring to be met being that it should be just and equitable to make the order. If the Court is of that opinion, it may 'terminate' the liquidation. The Act contains no similar provision in respect of personal bankruptcy. Instead, section 382(1) of the Act is in these terms:

> **'Annulment of bankruptcy order**
>
> (1) The Court may annul a bankruptcy order if at any time it appears to the Court
>
> > (a) that, on any grounds existing at the time the order was made, the order ought not to have been made; or
> > (b) that, to the extent required by this Act and the Rules, the claims made in the bankruptcy and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the Court.'

[18] Mr Evans submits that the restrictions placed upon the making of an annulment order by section 382(1) are to be contrasted with the wide language of section 233. The most striking distinction seems to me, however, to be that whereas section 382(1) provides for the annulment of the original order, section 233 provides only for the 'termination' of the liquidation. In this respect it is similar to section 147 of the UK Insolvency Act 1986 ('section 147'):

> **'Power to stay or sist winding up**
>
> (1) The Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory[5], and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed or sisted, make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.
> (2) The court may, before making an order, require the official receiver to furnish to it a report with respect to any facts or matters which are in his opinion relevant to the application.

[5] the terms are not identical, but for present purposes for 'contributory' may be read 'member'

(3) A copy of every order under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the company.'

Our Act sensibly uses the word 'terminate' instead of the archaic 'stay or sist', but the crucial point is that both section 233 and section 147 provide only for the liquidation to come to an end. They do not provide for the annulment of the original order putting the company into liquidation, nor do they affect anything done previously to the order for termination. Subsection 233(5) makes clear what is only implicit in section 147, that upon termination the company ceases to be in liquidation and the liquidator ceases to hold office.

[19] Ms Durham referred me to two English cases on section 147 or its predecessors[6]. Although not expressly deciding as much, they proceed upon the assumption, shared by all insolvency lawyers in England, that the power to stay a company liquidation is designed to be used where the interests of all those who would nowadays be referred to as stakeholders can be shown to have been secured to their satisfaction and where the company wishes to be taken out of liquidation so that it can continue with its business. In my judgment, section 233 is similarly designed to be applied where there are no good reasons for a liquidation to continue, either because all creditors and members are content that the liquidation should be ended so that the company can resume business or because there are otherwise no good reasons for continuing with the liquidation. It was on the latter ground that I made an order terminating the liquidation in **Emirates International Investment Company v Slim Malouche and anor**.[7] This approach to section 233 is reinforced, in my view, by subsection 233(3). Although not conclusive of itself, the provision for the production of a report by the liquidator chimes perfectly with the purpose of the section being to 'rehabilitate' companies which have managed to come to terms with all interested parties or where there are other reasons for coming to the conclusion that they can safely be let loose upon the public once more. Section 147, it will be observed, contains a similar provision.

[6] Re Calgary and Edmonton Land Co Ltd [1975] 1 All ER 1046; Re Lowston [1991] BCLC
[7] BVIHCOM 2010/231, 11 January 2011

[20] Mr Friedland has made no attempt to show that Spectrum is in a position to satisfy all parties otherwise interested in its affairs so as to be able to resume business out of liquidation, as was the case in **Re Lowston**[8], where Harman J said at page 572:

> 'I have to be satisfied that it is proper to allow this company with this history to re-emerge back as an unencumbered company able to trade and carry on business.'

In my judgment, exactly the same test is to be applied on an application under section 233. I am not satisfied, given the evidence put forward in an affidavit made by one of the Joint Liquidators, Mr David Griffin, that Spectrum is currently fit to be carrying on business out of liquidation. Mr Griffin deposes to the fact that Spectrum has no liquid assets and it is clearly insolvent in the sense that it is unable to discharge recurring liabilities, such as property taxes, without being put in funds by redeemers or others interested in outcomes. Completion of a construction project has had to be funded in a similar manner. Fees for vital accountancy work are having to be treated as an expense in the liquidation. Furthermore, Spectrum cannot pay off or secure the US$21.4m which is due to Xena[9] and which has to be taken into account when making an assessment for the purposes of section 233. This is because the question under section 233 is whether the company will be able, if taken out of liquidation, to resume business unencumbered, or at any rate with the concurrence of its creditors, not whether the creditor in question is in a position to apply for the appointment of liquidators or to claim *pari passu* with outside creditors in a liquidation. Spectrum cannot claim to be able to resume business unencumbered with an outstanding debt to Xena which it has been unable since June 2008 to pay or compound for. In my judgment, therefore, it does not make out a case for termination under section 233.

[21] I must, however, deal with the submissions of Mr Evans that Spectrum is entitled to a termination order on the grounds that my order of July 2010 has now been shown to have been wrongly made I do not think that that is a justification for making an order under section 233. In essence, that is because section 233 cannot, in my judgment, be used as an alternative to appealing an order appointing liquidators. There are several reasons for this.

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[8] [1991] BCLC 570

[9] a further US$1.5m appears to be due to another redeemer

[22] First, in contrast to section 382, section 233 does not give the Court the right to set aside its own order. I have no doubt that this distinction is deliberate. Bankruptcy Courts on both sides of the Atlantic have long possessed the power to annul their own orders, whereas corporate insolvency statutes have never conferred such a power. The reason is not far to seek. Personal bankruptcy, besides the social stigma which it bestows (or, in England, used to bestow) on those who are made bankrupt, imposes a number of severe personal disabilities upon the bankrupt. Legislatures have therefore seen fit to make provision for annulment at first instance in proper cases, so that not only does the former bankrupt escape, without the necessity of an appeal, from the disabilities imposed by bankruptcy law, he is free to tell the world that he has never been a bankrupt *at all*. That is the effect of annulment. No equivalent provisions have ever been part of corporate insolvency law.

[23] In the absence of an express power enabling the first instance Court to do so, the normal rule, that its orders may be set aside only by an appellate Court, must apply. I appreciate that Mr Evans is not in terms asking me to set aside my order, but in reality that is what he is attempting to bring about. His whole case on this application is predicated upon the submission that I should not have made the order when I made it. For his purposes, an order terminating the liquidation would have the same effect going forward as a successful appeal.

[24] If I were to accede to Mr Friedland's application, Spectrum would come out of liquidation and I would, in effect, have allowed an appeal which has yet to be brought. I have no right to do that. Whatever may be the merits of the submissions made by Ms Durham in opposition to the present application, Xena is entitled to have them heard and adjudicated upon by the Court of Appeal on appeal from my order – not dealt with summarily by me on an application for termination. I do not think that it would be at all just and equitable to take a step depriving it of that right and I do not think that section 233 permits me to do any such thing.

[25] It is true that Xena could appeal an order terminating the liquidation, but the injustice of putting it in that position becomes obvious when one reflects that as things stand it is entitled to the benefit of the order made and to make Spectrum shoulder the burden (which may or may not be a negligible one) of persuading the Court of Appeal that it should not have been made. In any case, if I were to terminate the liquidation the liquidators would leave office and Spectrum would be left to its own devices. If Xena succeeded on appeal and had the termination set aside, it is difficult to see how it

could be put back into its original position. The liquidators might well decline to resume office and the Court of Appeal could scarcely appoint new liquidators on an appeal against a section 233 order. Xena's position would be wholly uncertain.

[26] It cannot, in my judgment, be said at this stage to be inevitable that an appeal by Spectrum will succeed and even if it could it is not for me to say so. Ms Durham has arguments based upon the construction of section 197 of the Act which the Court of Appeal may or may not find compelling. There may, for all I know, be other arguments which, if Xena wished to make them and if the Court of Appeal permitted them to be advanced, might carry weight. Xena might wish to make a case that the forbearance agreement amounted to a fresh agreement outside the Memorandum and Articles of Association giving it a contractual right to recover independently of membership. There are certainly features of the forbearance agreement (for example, it is governed by a different law from that governing the Memorandum and Articles and has an English exclusive jurisdiction clause) which I can see might be deployed in support of such an argument. Further, because Xena is in the unusual position of being both a creditor in respect of the redemption proceeds and at the same time a present member of Spectrum, it is in a different situation from that of the applicant in each of **Westford** and **Reserve International** and with potentially different remedies as a result. I stress that I am not suggesting that these points should be run, still less that the Court of Appeal would necessarily permit them to be run and even less still that they would have any chance of success if run. The point that I am making is that it is the existence of particular case-specific facts like these and the potential for arguments to be built upon them which reinforces me in my view that it would be quite unjust to preempt the appellate process by terminating this liquidation summarily under section 233.

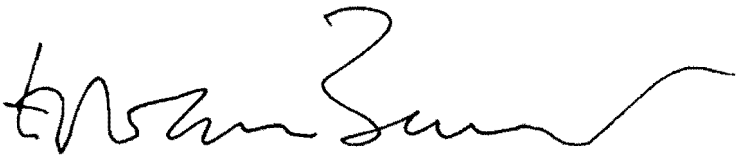
[27] It is for these reasons that I reject Mr Evans' submission that the decision of the Court of Appeal in **Westford** is determinative of this application under section 233.

[28] Where an appeal against an order appointing liquidators is on foot or contemplated, it is always open to the company in question to ask the Court to restrict the activities of liquidators pending appeal and I have made such orders in the past. In the present case I have not been invited to do that, but I am satisfied that no prejudice will be suffered by Spectrum if the liquidators remain in office until the appeal is determined. It is clear that no realizations are presently contemplated and.

as far as I can see from the evidence of Mr Griffin, the liquidators are currently doing no more than assisting in keeping the company ticking over.

Conclusion

[29] For these reasons this application is dismissed. I will hear the parties on the question of costs.



Commercial Court Judge

6 June 2011