THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP 2014/0017

BETWEEN:

C- MOBILE SERVICES LIMITED

Appellant

and

HUAWEI TECHNOLOGIES CO. LIMITED

Respondent

Before:

The Hon.Dame Janice M. Pereira — Chief Justice
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mde. Joyce Kentish Egan, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Jason Nickless of Pump Court Chambers for the Appellant.
Mr. Mungo Lowe of Harney Westwood & Riegels for the Respondent.

2015: May 22;
September 15.

Civil appeal- Arbitration - Stay pursuant to section 6(2) of the Arbitration Ordinance – Application for appointment of liquidators – Whether arbitration clause in contract brought the liquidation proceedings within the ambit of section 6(2) of the Arbitration Ordinance.

The appellant unsuccessfully applied for the setting aside of a statutory demand served on them by the respondent which was upheld in a previous appeal. The learned trial judge further authorized the respondent to apply for the appointment of liquidators over the appellant. On the 18th March 2014, the respondent made the application for the appointment of liquidators over the appellant. The appellant applied to stay the respondent's application on the basis that the agreement ("the Supply Contract") under which the underlying debt arose contained an arbitration clause, and thus, the application should be

stayed pursuant to section 6(2) of the Arbitration Ordinance, in favour of arbitration. In finding that the commencement of the winding up proceedings did not engage the arbitration clause in the Supply Contract, the learned trial judge dismissed the appellant's application for a stay.

With the leave of the court, the appellant appealed the dismissal of its application for a stay. A stay of the proceedings in the court below was granted pending the hearing and determination of the appeal.

Held: dismissing the appeal and awarding costs to the respondent to be assessed unless agreed within twenty-eight days, that, inter alia:

1. Having regard to the wording of the arbitration clause and the wording of the Mandatory Stay Provision (section 6(2) of the **Arbitration Ordinance**), the issue as to the insolvency of the appellant, or the issue as to whether the appellant is to be wound up, does not fall within the category of the disputes under the arbitration clause of the Supply Contract which may be referred to arbitration. The wind up proceedings is not a dispute '**arising out of or in connection with the formation, construction, or performance of the supply contract**', as is required by the arbitration clause in the Supply Contract, and is thus, not legal proceedings commenced '**in respect of any matter agreed to be referred**', in order to be debarred by section 6(2) of the Arbitration Ordinance. Further, a wind up application, although it may be premised on the underlying debt, is not an action or proceeding on the debt or under the contract. Winding up proceedings are not intended to be caught within the ambit of the mandatory stay provisions contained in the **Arbitration Ordinance** unless the arbitration agreement itself is so drawn as to encompass such a proceeding.

   Re Sanpete Builders (S) Pte. Ltd [1989] 1 MLJ 393 applied.
   Community Development Proprietary Ltd v Engwirda Construction Co. (1969) 120 CLR 455 applied.

Salford Estates (No. 2) Ltd. v Altomart Ltd. [2014] EWCA 1575 Civ explained and distinguished.

JUDGMENT

[1] **PEREIRA, CJ:** This appeal follows on from C-Mobile's appeal in No. 6 of 2014. The references to the parties, the debt and the various statutes shall remain the same as given in that appeal. This appeal arises from the learned judge's refusal to grant a stay, pursuant to section 6(2) of the **Arbitration Ordinance**[1], in respect of the application made by HTC to appoint liquidators over C-Mobile.

Chronologic summary

[2]
(a) On 11th February 2014, the learned judge made an order refusing to set aside the statutory demand in respect of the Liberian Debt, (and which was the subject of Appeal No. 6 of 2014 just delivered). He further authorized HTC to apply for the appointment of Liquidators over C-Mobile.

(b) On 18th March 2014, HTC applied for the appointment of liquidators over C-Mobile. ("the Wind Up Application").

(c) On 9th April 2014, C-Mobile applied to stay the Wind Up Application on the basis that the agreement under which the underlying debt arose contained an arbitration clause, and thus, the Wind Up Application should be stayed pursuant to section 6(2) of the Arbitration Ordinance, in favour of arbitration.

(d) On 9th May 2014, the learned judge (Bannister, J) dismissed C-Mobile's application for a stay.

(e) C-Mobile with the leave of the Court has appealed the dismissal of its application for a stay. A stay of the proceedings in the court below was granted pending the hearing and determination of this appeal.

[1] Arbitration Ordinance 1976 – Laws of the Virgin Islands.

The decision of the trial judge

[3] The learned judge, in an ex-tempore judgment delivered on 9th May, 2014, after setting out a brief history of the matter and after reciting the arbitration clause contained in the Supply Contract and section 6(2) of the **Arbitration Ordinance** pursuant to which the application for a stay was brought, had this to say[2]:

> " It seems to me that the first question is whether the winding up proceedings have been commenced in respect of a matter agreed to be referred to arbitration pursuant to the clause in the contract, which I have earlier read. In my judgment, the winding up proceedings do not seek the resolution of dispute arising out of or in connection with the formation, construction, or performance of the supply contract. Those proceedings seek a class remedy available under statute to an Applicant with locus standi to seek it, if certain of the conditions set out in the statute are satisfied, and if the court in its discretion considers it just and equitable to appoint liquidators. It is true that dispute may arise in the course of winding up proceedings as to all or any of these matters but the proceedings themselves are not brought for the resolution of any disputes let alone any disputes arising out of or in connection with the formation, construction, or performance of the supply contract. In my judgment therefore, the commencement of the winding up proceedings did not engage the Arbitration Clause in the contract. Section 6(2) of the Arbitration Ordinance accordingly has no application."

He felt fortified in this view by reference to two cases: **Re Sanpete Builders (S) Pte. Ltd**[3]**,** a decision of the High Court of Singapore, and **Community Development Proprietary Ltd-v-Engwirda Construction Co.**[4]**,** a decision of the High Court of Australia to which I will refer later.

The Appeal

[4] C-Mobile has raised three grounds of appeal all alleging error on the part of the learned judge in:

(i) finding that section 6(2) of the **Arbitration Ordinance** was not applicable. C-Mobile contends that he ought to have had regard for the fact that the

[2] See Transcript of judgment pg. 74-75; ROA Bundle 2 pg. 324-325.
[3] [1989] 1 MLJ 393.
[4] (1969) 120 CLR 455.

Wind Up Application was based upon a disputed debt arising pursuant to the Supply Contract which contained an arbitration clause;

(ii) failing to give effect to the mandatory wording of section 6(2) of the **Arbitration Ordinance**;

(iii) deciding that C-Mobile was attempting to bring liquidation proceedings within the ambit of the arbitration clause in the Supply Contract.

[5] These complaints in reality boil down to the determination of a singular issue which may be framed this way: Whether the winding up proceedings which have been commenced on the basis of the underlying Liberian Debt are caught by the arbitration clause in the Supply Contract so as to bring the liquidation proceedings within the ambit of section 6 (2) of the **Arbitration Ordinance.**

[6] At this juncture, two observations must be made. Firstly, in the earlier appeal No. 6 of 2014, the court agreed with the learned trial judge that the Liberian Debt was not disputed on substantial grounds and affirmed his decision refusing to set aside the statutory demand. For the purposes of this appeal therefore, the court proceeds on the basis that there is no dispute as to the Liberian Debt on substantial grounds. Secondly, on fresh evidence adduced and accepted by the court at the hearing of this appeal it has been shown that there are currently no arbitration proceedings afoot before the International Court of Arbitration in Paris, those proceedings (started by C-Mobile) having been withdrawn as at 24th March 2015. There is no evidence of any further referral to arbitration in Paris or anywhere else in relation to the Supply Contract.

Discussion

[7] It is necessary to recite the arbitration clause in the Supply Contract. Clause 25 states:

> "All disputes **arising out of or in connection with the formation, construction and performance of this contract**[5]**,** which cannot be settled

[5] Emphasis added.

amicably between the parties shall be finally settled under the rules of arbitration and consultation of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules, unless the parties agree on the name and identity of a single arbitrator. The arbitration shall be held in Paris; the law to be applied shall be the French substantive laws, and the language of the arbitration proceedings shall be English.

Section 6(2) of the Arbitration Ordinance[6], (the "Mandatory Stay Provision") states:

> "If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, **commences any legal proceedings** in any court against any other party to the agreement… **in respect of any matter agreed to be referred,** any party to the proceedings may at any time after appearance, and before delivering pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that **there is not in fact a dispute between the parties with regard to the matter agreed to be referred, <u>shall</u>** make an order staying the proceedings.[7]

[8] A conjoint reading of the arbitration clause in the Supply Contract and the Mandatory Stay Provision makes clear that the dispute must **arise out of or be *in connection with the formation, construction and performance of the contract*.** Only disputes falling within this category are agreed to be referred to arbitration. The Mandatory Stay Provision, in turn, relates to legal proceedings commenced ***'in respect of any matter agreed to be referred.'*** The question then is whether the wind up proceedings is a dispute '***arising out of or in connection with the formation, construction and performance of the contract'*** and is thus legal proceedings commenced ***'in respect of any matter <u>agreed</u> to be referred.'***

[9] In **Sanpete**[8], the High Court of Singapore, citing with approval the Australian decision in **Community Development**[9], held the petition to wind up was not a proceeding which came within the scope of the arbitration clause in the sub-contract which was there under consideration. In **Community Development,** Owen J at pg. 460 of his judgment had this to say:

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[6] Arbitration Ordinance 1976 – Laws of the Virgin Islands.
[7] Emphasis added.
[8] Ibid 2.
[9] Ibid 3.

> "It may well be that the presentation of a winding up petition is, in some circumstances, to be regarded as the commencement of an "action" …; but the presentation of this petition was not the commencement of proceedings based upon the building contract or upon a dispute or difference arising under it. The "cause of action", if it may be so described, was that the appellant was unable to pay its debts and that it was just and equitable that it should be wound up."

It is important to bear in mind that in winding up proceedings one is considering always a class remedy and not a private is between the petitioner and the company.

[10] Counsel for C-Mobile places heavy reliance on the case of **Salford Estates (No. 2) Ltd. v Altomart Ltd.**[10] **Salford Estates** concerned an application under section 9 of the English Arbitration Act 1996 to stay the winding up of a company on the ground of its inability to pay its debts as they fell due. A stay of the application was granted at first instance. The first instance judge felt bound to follow the decisions in **Rusant Ltd v Traxys Far East Limited**[11] and **Halki Shipping v Sopex Oils.**[12] Otherwise, he said he would have come to a different conclusion; that had he not been bound by those decisions (which he said were to the effect that the mere raising of a defence or of a dispute is sufficient to bring into play the arbitration provision) he would have dismissed the stay application on the ground that there was not a bona fide and substantial dispute. On appeal it was held that proceedings commenced by a winding up petition are "legal proceedings" within the definition in section 82 of the 1986 Act, but that section 9(1) of the 1996 Act did not apply to a wind up petition where the ground of the petition is that the company is unable to pay its debts and what is in issue is the issue generally, or more specifically, whether there is outstanding and due a particular debt mentioned in the petition.

[10] [2014] EWCA 1575 Civ.
[11] [2013] EWHC 4083. (Comm).
[12] [1997] EWCA Civ. 3062.

[11] The following excerpts appearing at paragraphs 31 to 35 from the judgment of the Chancellor (Sir Terrence Etherton) in **Salford Estates**[13] are very instructive and warrant setting out:

> "31 In the present case Salford Estates relies on non-payment of the specific debt mentioned in the Petition as *evidence* that Altomart is unable to pay its debts as they fall due within IA 1986 s. 123(1)(e) and so the ground for invoking the exercise of the court's jurisdiction to wind up a company unable to pay its debts in IA s.122(1)(f) is satisfied. By contrast with the wording of section 9(1) - "(whether by way of claim or counterclaim)" - **the Petition is not a claim for payment of the debt.**
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> "32 The making of a winding up order might or might not result in the right to payment of an amount equal to the debt specified in the Petition in the present case. It would depend upon the value of the assets available for distribution in the liquidation to Altomart's body of creditors and the respective priority ranking of the creditors, including Salford Estates, under the statutory framework.
>
> "33 Further, by contrast with a "claim" for a debt, it is an abuse to present a winding up petition in order to put pressure on the company **to pay a genuinely disputed debt:** Palmers Company Law para. 15.217. It was common ground between the parties before us that the court will dismiss a petition based on an alleged debt where **the debt is bona fide disputed on substantial grounds**: Palmers Company Law para. 15.215.
>
> "34 If several alleged debts are stated in the winding up petition as evidence of the company's inability to pay its debts within IA 1986 s. 122(1)(f) and only some arise out of a transaction containing an arbitration agreement, the concept of a non-discretionary "stay" of the winding up petition pursuant to section 9(1) and (4) of the 1996 Act makes no sense. Plainly, there is no basis for staying the Petition itself; and, if the Petition proceeds, there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proof of debts which supersedes any arbitration agreement.
>
> "35 Furthermore, **it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.**[14]**"**

[13] Ibid 9.

[14] Emphasis added.

[12] Having concluded that the mandatory stay provisions in section 9 of the 1996 **Arbitration Act** did not apply, the Chancellor went on the opine, not in respect of a stay in relation to **the Arbitration Act**, but in relation to the court's discretionary power conferred by section 122(1) of the UK **Insolvency Act 1986** ("IA") to wind up a company. In this regard he had this to say:

> "39. … . It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in paragraph 19 of Rusant.
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> "40. Henry and Swinton Thomas LJJ considered in *Halki Shipping* that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the companies' court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic - to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.
>
> "41. There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in *Halki Shipping*, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under IA 1986 s 122(1)(f), it was right for the court either to dismiss or to stay the Petition so as to compel the parties **to resolve their dispute over the debt by their chosen**

method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.[15]**"**

[13] Three observations must be made. Firstly, the arbitration clause considered in **Salford Estates**[16] was, in my view, wider than the arbitration clause under consideration here. In **Salford**, the arbitration clause encompassed 'Any dispute or difference arising between the Lessor and the Lessee as to their respective rights duties or obligations or as to any other matter arising out of or in connection with this Underlease …', whereas here the arbitration clause under the Supply Contract is confined to 'disputes **arising out of or in connection with the formation, construction and performance of this contract."**

[14] Secondly, the court has already been called upon to adjudicate and has in fact adjudicated on the question as to whether the debt is disputed on substantial grounds on C- Mobile's application to set aside the statutory demand on this basis and on this basis only. The court has accordingly already investigated the question as to whether the debt is bona fide disputed on substantial grounds. The learned Judge found that it is not. I agree with that finding. It has been stated and restated in numerous authorities and thus is well established that a winding up petition should not be used as a means of oppression by way of enforcing payment of a debt which is bona fide disputed on substantial grounds. Indeed such a course would be viewed as an abuse of process.

[15] I also fully support the view that the court must have due regard for the policy underlying the Mandatory Stay Provision and discourage parties from seeking to bypass the parties' chosen method of dispute resolution by presenting a wind up application. However, it is important to note that under the IA there is a two-step process as it relates to the non-payment of a debt which is alleged to be due and owing. The alleged creditor must first serve a statutory demand on the company.

[15] Emphasis added.
[16] Ibid 9.

The company may dispute the debt and at the same time it is quite open to the company to engage the arbitration agreement where one governs their relations. As I have indicated in the earlier judgment, the company may seek to set aside the statutory demand either by showing that the debt is bona fide disputed on substantial grounds [157(1) IA], or ask the court to exercise its discretion [section 157(2) IA] and set aside the statutory demand by showing that to maintain it would cause substantial injustice. In my view, evidence of a referral to arbitration would be a factor to be considered in the exercise of such discretion.

[16] In the present case, as I alluded to earlier, the learned judge was not asked to exercise a discretion under section 157(2) of the IA. It would in my view be a rather odd approach to now seek to retrofit the proceedings, having regard to the manner in which they came on and was fought before the court below. In my view it is not open to the appellant to now ask this court to proceed on the discretionary ground and apply the test as set out in **Halki Shipping v Sopex Oils**[17] and **Applied Enterprises Ltd v Interisle Holdings Ltd et al**[18] and ask, for the purposes of the Mandatory Stay Provision, whether the debt is within the scope of the arbitration clause and, if it is, whether C- Mobile disputes it; that is, whether ***in fact*** the debt is disputed (irrespective of how unlikely would be its success in defending it, were it a claim on the debt). This test, to my mind, is a separate and distinctly different test to that required for the purposes of section 157(1) of the IA and thus the **Sparkasse**[19] test, - that is, whether there is a bona fide dispute as to the debt on substantial grounds.

[17] Thirdly, the arbitration proceedings which were started by C- Mobile are no longer a foot, having been withdrawn in March 2015.

[18] As to the exercise of the discretionary power under the IA in respect of the question whether to grant or dismiss the petition, I am in full agreement with the sentiments

[17] Ibid 11.
[18] BVIHCV (COM) 2012/0135.
[19] Referring to the case of Sparkasse Bregenz Bang AG v Associated Capital Corporation -BVI Civ. App. 10/2002.

expressed by the Chancellor in paragraphs 39 to 41 of his judgment in **Salford Estates**.[20] The court must always be astute to ensure that it is giving effect to the terms of the parties' bargain as it relates to their agreed forum for settling their disputes. This is no doubt a sentiment which may be weighed in the scale before the trial judge when he comes to exercise his discretion under section 162 of the IA in deciding whether or not liquidators should be appointed.

[19] I do, however, approve and adopt the reasoning of the Chancellor at paragraphs 31 to 35 of his judgment as to why the Mandatory Stay Provision does not apply to a wind up proceeding. A wind up application, although it may be premised on the underlying debt, is not an action or proceeding on the debt or under the contract. Winding up is a class remedy. It is a collective remedy being undertaken for the benefit of all creditors who will no doubt rank according to any priority to be accorded to their proofs of debt in the scheme of the liquidation. I am in full agreement and would endorse the statements made by the Singaporean and Australian courts as expressed in the cases above mentioned as, to my mind, they capture the true essence of the distinction to be made in respect of wind up proceedings and the correlation between such proceedings and the mandatory stay provisions contained in similarly worded arbitration statutes.

[20] Accordingly, I am of the view, having regard to the wording of the arbitration clause and the wording of the Mandatory Stay Provision that the issue as to the insolvency of C-Mobile, or the issue as to whether C-Mobile is to be wound up (which is the issue in the Wind Up Application), does not fall within the category of the disputes under the arbitration clause of the Supply Contract which may be referred to arbitration. The issue of C- Mobile's insolvency does not, strictly speaking, arise 'out of **or in connection with the formation, construction and performance of this contract**' so as to be in respect of a legal proceeding commenced '**in respect of any matter agreed to be referred.'** I am accordingly in agreement with Bannister J

[20] Ibid 9.

in holding that section 6(2) of **Arbitration Ordinance** does not apply to the Wind Up Application.

[21] On a consideration of all the authorities to which the court's attention was drawn, one principle is clear: For the reasons explained above and as expressed by the Chancellor in **Salford**[21], winding up proceedings are not intended to be caught within the ambit of the mandatory stay provisions contained in the **Arbitration Ordinance** unless the arbitration agreement itself is so drawn as to encompass such a proceeding. The Legislature did not intend that winding up proceedings be so caught for obvious reasons which have been well explained by the Chancellor in **Salford,** as set out in the paragraphs above quoted and with which I agree and adopt.

[22] Before concluding, I would make this further observation, as much was made during the hearing, as to the applicable test on an assertion that a debt is disputed. It has been, in my view, amply demonstrated on the authorities, that the test for the purposes of the Mandatory Stay Provision and that for the purposes of the IA as to a dispute on the debt, is decidedly different, albeit that it may be considered one of degree. For the purposes of a claim on the debt, the question for the purposes of a stay under the Mandatory Stay Provision is whether the debt is disputed irrespective of how weak may be the defence. (See: **Halki** and **Applied Enterprises**) whereas, for the purposes of the IA the question is whether the debt is **bona fide** disputed on **substantial grounds**. (see: s. 157(1) IA and **Sparkasse**[22]). Once it is clearly kept in mind, the difference in nature and the purpose of the respective proceedings there is in reality no conflict between the two.

Conclusion

[23] For the reasons which I have set out above, I would therefore dismiss this appeal. I would award costs to the respondent, HTC, to be assessed unless agreed within 28

[21] Ibid 9.
[22] Ibid 18.

days. For completeness I add that the appeal having been determined, the stay earlier granted ceases to have effect.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Joyce Kentish Egan, QC
Justice of Appeal (Ag.)