EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM No. BVIHC (COM) 2015/0008

BETWEEN:

ANDRIY MALITSKIY and IGOR FILIPENKO

Applicants

and

STOCKMAN INTERHOLD S.A.

Respondent

Appearances on 13 April 2015:
Justin Fenwick QC and Dan Wise for the Applicants
Andrew Willins for the Respondent

Appearances on 4 December 2015:
Dan Wise and Shane Donovan for the Applicants
Andrew Willins for the Respondent

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2015: April 13
December 4
December 23
.....

JUDGMENT

Liquidation application – Reserved request by company to adjourn hearing after it commenced (The Insolvency Act, 2003 ("Act"), section 167(1)(c)) due to pending court proceedings between applicants and company in the Territory and elsewhere relevant to the application – Subsequent application by applicants for permission to adduce additional evidence of events occurring since commencement of hearing, namely regarding various pending proceedings in the Territory and elsewhere between applicants and Company that

may affect 'state of accounts' between applicants and company at relevant times and exercise of Court's discretion – Relevant times include date of application and date of judgment on application.

Words of a judge during oral argument cannot be taken as indication of likely outcome of proceeding (and ordinarily are not helpful in interpreting a court order) – Judges make comments and ask questions to 'test the waters', clarify submissions, and so forth – Unless expressly stated otherwise, they are not intending to convey or even foreshadow what their judgment will be – By reserving a court is providing itself with an opportunity to reflect further on its judgment and such reflection may lead to any earlier tentative views changing – Except in unusual circumstances, practice of referring to transcript of words any judge used during oral argument is discouraged.

Adjournment of liquidation application granted (with conditions) – Additional evidence from applicants and from company for liquidation application permitted if relevant to 'state of accounts' or to exercise of the Court's discretion under the Act, section 162(1).

Test for reconsideration of a judgment or additional evidence after a court's judgment rendered but before the order has been sealed is 'dealing with cases justly' (The Overriding Objective, CPR 1.1(1), following reasoning in 2013 UK Supreme Court in In the Matter of L and B (Children)) – Can be more liberal in admitting additional evidence before judgment has been rendered, where no question of the court changing its mind or a successful party being deprived of a judgment already rendered however test still is 'dealing with cases justly'.

Necessary for a court, when it is to make a determination and exercise its discretion on liquidator appointment, to have current information to assess relevant factors including 'state of accounts' between applicant and company – Court needs to be updated with current evidence if application adjourned after hearing commences, or judgment reserved for a period of time, particularly if situation respecting relevant circumstances is dynamic – appropriate for applicant and company to provide further evidence to update court (but not to 'backfill' their respective cases) without need to meet any test for additional evidence.

[1] LEON J [Ag.]: The Applicants applied by Originating Application dated 22 January 2015 ("Application") for an order appointing a liquidator[1] of the Respondent Stockman Interhold S.A. ("Company"), and other relief in the event the order is made, on the ground that the Company is insolvent. The Application was amended on 24 March 2015 and a hearing was commenced on 13 April 2015.

[1] Insolvency Act, 2003 ("Act").

[2] The Company filed a notice dated 7 April 2015 that it intended to invite the Court to adjourn the hearing of the Application until after hearing of an appeal to the Court of Appeal and then at the hearing of the Application on 13 April 2015 requested, as its primary submission, that the Application be adjourned [2] ("Adjournment Request") until after:

(a) the May 2015 hearing of an appeal to the Court of Appeal from a judgment of this Court, described below[3], and

(b) the determination of an application by the Company (and another person) to a Ukrainian appellate court to have a judgment in favour of the Company (and the other person) against the Applicants ("Ukrainian Judgment") denominated in American rather than Ukrainian currency (hryvna, referred to as "UAH") ("Ukrainian Redenomination Application")[4],

the results of which arguably would have a material effect on the Application (as it is said by the Company there would be a cross debt that exceeds the Applicants' debt).

[3] There is a history of legal proceedings between the parties in the Territory of the Virgin Islands and in the Ukraine, material parts of which are outlined below.

[4] On 13 April 2015 judgment on the Adjournment Request was reserved and if the Adjournment Request was not granted, judgment on the Application was reserved.

[5] As events transpired, and as described more fully below, the Court of Appeal heard the appeal (and related cross appeals) in May 2015 and reserved judgment. The Court of Appeal's judgment remains under reserve.

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[2] Act, section 167 (1) (c) provides that "[O]n the hearing of an application for the appointment of a liquidator, the Court may … adjourn the hearing conditionally or unconditionally".

[3] See description of the Anti-Enforcement Order under the subheading "Ukrainian Judgment and Anti-Enforcement Order".

[4] See description of the Ukrainian Judgment Appeal subheading "Ukrainian Judgment and Anti-Enforcement Order".

[6] In addition there have been other developments, leading to an application to this Court on 4 December 2015 by the Applicants to introduce additional evidence, described below ("Additional Evidence Application").

[7] This Judgment determines the Adjournment Request, which is granted on the basis set out below, and deals with the Additional Evidence Application and additional evidence more generally for the hearing of the Application when it resumes, which evidence is to be admitted if relevant to the issues on the Application.

Additional Evidence Application

[8] As noted above, on 4 December 2015 this Court heard the Additional Evidence Application brought by the Applicants for permission to rely upon evidence in relation to matters which have arisen since the commencement of the hearing on 13 April 2015.

[9] The nature of the additional evidence sought to be admitted and the responses of the Company are outlined below. In short, the Applicants seek at this stage to introduce evidence of the outcome of the Ukrainian Redenomination Application.

[10] The Company did not apply for permission to introduce other additional evidence but submitted it can do so by way of responding to the Applicants' additional evidence, if admitted.

[11] The Applicants submitted that without permission of this Court upon an application by the Company, the Company may not file additional evidence beyond proper responding evidence (that is, evidence that responds to the additional evidence of the Applicants, as opposed to 'updating evidence' more generally). Having heard the essence of the Company's proposed additional evidence, the Applicants disputed that it would be proper responding evidence.

[12] The Company wishes to introduce evidence that the Company and another person (Mr. Adamovsky) commenced new proceedings against the Applicants in the

Ukraine on 17 November 2015 ("2015 Ukrainian Claim") claiming interest on the Ukrainian Judgment amount and claiming damages under the Ukrainian Civil Code for "wrongful use of another's money" in the total amount of approximately $31.6 million[5], which the Company says it is entitled to claim at this stage and in this manner and which, if successful, will change the 'state of accounts' between the Company and the Applicants.

[13] The Company also wishes, in the event the reserved judgment of the Court of Appeal permits it to do so (by overturning the Anti-Enforcement Order described below), to introduce evidence of the 'state of accounts' between the Applicants and the Company as of the date the Application was commenced, as mentioned above and explained below.

Date Issue

[14] While in one sense de facto the adjournment has been in effect to date, the hearing of the Further Evidence Application and the submissions regarding the Company's proposed additional evidence leads to the consideration of the issue of the date or dates upon which, in the context of an application for the appointment of a liquidator, the Court (a) must conclude that the company in question is insolvent and (b) must have material information with respect to the exercise of its discretion[6] to appoint a liquidator ("Date Issue").

[15] First, on which date or dates must a company be insolvent, actually or deemed, in order for the Court to make a liquidator appointment order under section 161(1) of the Act:

- the date of the application,
- the date of the hearing of the application, and/or
- the date of judgment on the application?

[5] Second Affidavit of Kostiantyn Likarchuk sworn 27 November 2015 and filed 30 November 2015 ("Likarchuk 2"), and the exhibit thereto.
[6] Act, section 162(1) which provides "The Court may … appoint a liquidator of a company under section 159(1) …").

[16] Second, with respect to the second and third dates, as of when must the Court have material information with respect to the 'state of accounts' between the parties and with respect to the exercise of its discretion to appoint a liquidator?

[17] While the second and third questions may not be ones that arise separately often as a practical matter, given that often the hearing and judgment will occur on the same day or within close proximity, they can arise when there is an adjournment of the application for a period of time, as will be the case here, or when judgment is reserved for a time.

[18] It is necessary and appropriate to determine the second and third questions now, along with the first question, in the context of a determination of the Further Evidence Application, and the relevance and admissibility of the proposed additional evidence of the Company.

[19] In this case, because of the dynamic situation and particularly as it affects or may affect the 'state of accounts' between the parties and the exercise of the Court's discretion, as outlined below, the Date Issue looms large.

Factual Background and History of Proceedings between the Parties

Trial Judgment

[20] On 1 October 2014, judgment was entered for the Applicants against the Company and Mr. Andrey Adamovsky in Claim No. BVIHC (COM) 2012/51 ("Action") in this Court, after a full trial of an unfair prejudice claim, in the principal sum of $35,802,000 (against which Mr. Adamovsky is entitled to set off $1,056,558) together with pre-judgment interest accrued from 18 January 2010 to 1 October 2014 in the sum of $1,309,274.23, in the case of the Company being a total of $37,111,274.23 ("Trial Judgment").

[21] Interest accrues on the amount of the Trial Judgment at the rate of 5% per annum from 1 October 2014 to the date of payment pursuant to the Judgment Act (CAP. 35).

[22] The Company and Mr. Adamovsky were required to make an interim payment of $750,000 by 16 October 2014 on account of the Applicants' costs. (The Trial Judgment, accrued interest from time to time on the Trial Judgment, and the unpaid interim costs payment are collectively referred to as the "Judgment Debt"). No part of the Judgment Debt has been paid.

Statutory Demand

[23] On 13 October 2014, the Applicants served a statutory demand on the Company in the sum of $37,172,279.06 pursuant to section 155 of the Act based upon the Trial Judgment debt and accrued interest ("Statutory Demand"). The Company applied on 28 October 2014 pursuant to section 156 of the Act to set aside the Statutory Demand.

Appeal and Cross-Appeal of Trial Judgment and Stay

[24] Also on 13 October 2014, the Company and Mr. Adamovsky appealed from the Trial Judgment, and the Applicants cross appealed against the award of pre-judgment interest seeking additional interest ("Trial Judgment Appeal")[7]. The Applicants amended their cross appeal on 10 March 2015 to seek interest on a basis that the Company asserted on the hearing of the Application would increase the judgment debt to $67,307,760 (from $35,802,000).

[25] The Company and Mr. Adamovsky subsequently obtained a stay of execution of the Trial Judgment ("Stay") from a Justice of the Court of Appeal on an ex parte basis.

[7] High Court Civil Appeal No. BVIHCMAP 2014/0022.

Ukrainian Judgment and Anti-Enforcement Order

[26] On 19 November 2014, the Company and Mr. Adamovsky obtained the Ukrainian Judgment against the Applicants from a Ukrainian court, the Golosiyivsky District Court in Kiev, in the sum of UAH 748,205,985.02 (which at the time was worth approximately $49.5 million).

[27] The Applicants appealed against the Ukrainian Judgment to the Kyiv City Court of Appeal ("Ukrainian Appeal Court") on grounds that, among other things, no evidence was produced to the Ukrainian court in support of the counterclaim that resulted in the Ukrainian Judgment.

[28] The Company and Mr. Adamovsky applied to the Ukrainian Appeal Court to "clarify" the currency of the Ukrainian Judgment and to have it denominated in American rather than Ukrainian currency ("Ukrainian Redenomination Appeal") which would have had it in the sum of $48,788,785.70.[8]

[29] On 21 November 2014, an order of the Honourable Justice Bannister of this Court restrained the Company and Mr. Adamovsky in the Territory of the Virgin Islands and all other jurisdictions in the world other than the Ukraine from relying upon the Ukrainian Judgment ("Anti-Enforcement Order"):

a) to extinguish or diminish by way of set off or otherwise their liability under the Trial Judgment; or
b) to resist registration or enforcement of the Trial Judgment.

[30] The Applicants submitted that the Anti-Enforcement Order "effectively prevented the Company from relying upon the Ukrainian Judgment in answer to the Application".[9]

[31] On 12 December 2014, the Company and Mr. Adamovsky commenced an appeal of the Anti-Enforcement Order to the Court of Appeal and the Applicants cross

[8] Second Affidavit of Martin Steven Kenney sworn 23 October 2015 ("Kenny 2"), para. 12.
[9] Kenny 2, para. 7.

appealed to uphold the Anti-Enforcement Order for the reasons given by this Court and additional reasons ("Anti-Enforcement Order Appeal").[10]

Court of Appeal Order for Security; Dismissal of Trial Judgment Appeal

[32] On 14 January 2015, the Court of Appeal made the continuation of the Stay conditional upon the Company and Mr. Adamovsky paying into Court, or otherwise securing, the full amount of the Trial Judgment together with accrued interest and the interim costs award within 30 days. They were also ordered to pay into Court the sum of $300,000 as security for the costs of the Anti-Enforcement Order Appeal within the same period.

[33] The Company and Mr. Adamovsky failed to provide the security as ordered, and accordingly their appeal in the Trial Judgment Appeal was dismissed and the Stay discharged. The cross appeal remained to be heard.

Statutory Demand Not Set Aside

[34] On 21 January 2014 the Honourable Justice Bannister dismissed the Company's application to set aside the Statutory Demand and authorized the Application[11]. The Company was ordered to pay the Applicants' costs of the set aside application in the sum of $10, 224.25, which sum remains unpaid.

[35] Pursuant to section 8(1) of the Act, the Company was thereby deemed to be insolvent.

Application Commenced

[36] As set out above, the Application was commenced on 22 January 2015. The Applicant relied on the Statutory Demand (which was based upon the Trial Judgment debt and accrued interest), the dismissal of the application to set aside

[10] High Court Civil Appeal NO. BVIHCMAP 2014/0031.
[11] Act, section 157(5).

the Statutory Demand, and the above provision in the Act that accordingly the Company was insolvent.

[37] The Company was since 21 November 2014 – and remains – subject to the Anti-Enforcement Order which prohibits it, among other things, from relying on the Ukrainian Judgment in this jurisdiction to extinguish or diminish by way of set off or otherwise its liability under the Trial Judgment. As noted above, the Applicants accept that the Anti-Enforcement Order "effectively prevented the Company from relying upon the Ukrainian Judgment in answer to the Application."

[38] If the Anti-Enforcement Order was not in effect, the Company submits that there would be an issue raised by the Company on the Application of whether the amount due under the Ukrainian Judgment, which was then under appeal by the Applicants, exceeded the amount of the Statutory Demand due pursuant to the Trial Judgment, in respect of which the Applicants had a pending cross appeal in the Trial Judgment Appeal (the appeal by the Company and Mr. Adamovsky having been dismissed, as described above).

[39] The Company submits that the value of the Ukrainian Judgment as of 22 January 2015 was $47,301,582.37 which exceeded the value of the Trial Judgment, and hence the Statutory Demand, on that date "by a considerable margin"[12].

[40] The Applicants[13] submit that they were entitled to rely on the deemed insolvency in commencing their Application; that there was no need for them to adduce evidence of actual insolvency as of the date of the Application; and that it therefore had a "complete cause of action" when it commenced the Application.

[41] In the situation as it stands now – and has stood since 22 January 2015 – that submission must be the case.

[12] Likarchuk 2, para. 5.
[13] Applicants' Closing Written Submissions [in Support of their Application for Permission to Rely Upon Fresh Evidence] dated 8 December 2015, para. 1.

[42] The Company was insolvent on 22 January 2015 under the provisions of the Act. While the Act does not use the word "deem", the word is a means sometimes used to distinguish the consequences of a statutory demand that has not been set aside from the consequences of an insolvency under subsections 8(1)(b) and (c) of the Act (i.e. (b) an unsatisfied execution, and (c) balance sheet or cash flow insolvency).

[43] The current situation, however, becomes somewhat circular, and 'where the wheel stops' will depend, it seems, first on what the Court of Appeal decides about the Anti-Enforcement Order (see below under "Appeals"), and second, if the Court of Appeal sets aside the Anti-Enforcement Order, the consequences in relation to the Order of 21 January 2014 that dismissed the Company's application to set aside the Statutory Demand and authorized the Application, which Order appears to have been significantly affected by the existence of the Anti-Enforcement Order.

[44] In the event the Anti-Enforcement Order is set aside, even if the dismissal of the application to set aside the Statutory Demand ultimately stands for some reason (an issue which this Court may be asked to decide in those events), it seems that in the unusual circumstances this Court may be able to consider the actual solvency position of the Company as of 22 January 2015, even if not to say there was no "cause of action" (no insolvency as of the date of the Application), but in the exercise of its discretion respecting the Application.

[45] The Court would need to hear the parties on these issues if and when the Court of Appeal judgment makes them live issues. No views are being expressed and no decisions are being made now on the substance of those issues.

Application Amended

[46] As set out above, the Application was amended on 24 March 2015 to include references to the Trial Judgment Appeal and the dismissal of the appeal brought by the Company and Mr. Adamovsky, the Ukrainian Judgment and Anti-Enforcement Order, the Anti-Enforcement Order Appeal and its anticipated

hearing along with the Applicants' cross appeal in the Trial Judgment Appeal in May 2015, and the Ukrainian Appeal Court appeal and its anticipated hearing in April 2015; and to request an order under section 175(1)(c) of the Act, if a liquidator was appointed, for permission to proceed with the cross appeals in the Court of Appeal and their appeal in the Ukrainian Appeal Court.

Hearing in respect of the Application

[47] A hearing in respect of the Application was commenced on 13 April 2015 and at that time:

- no other creditors appeared;[14]
- interest accrued on the Trial Judgment to 13 April 2015 amounted at least to $986,244.82 so that the total sum payable under Trial Judgment was at least $38,847,519.05, and in addition the Company was liable for the balance of the Applicants' costs of the Action and the dismissed Trial Judgment Appeal; and
- the Company made the Adjournment Request, as its primary submission, pursuant to its prior notice that it would do so.

[48] The Applicants' position respecting the Adjournment Request was that even if the Ukrainian Judgment was upheld and the Company's appeal against the Anti-Enforcement Order was successful, the Applicants' debt arising from the Trial Judgment would exceed at that time the value of the Ukrainian Judgment by approximately $6.8 million.

[49] The Company's position was that there were bona fide disputes on substantial grounds and if it succeeds on the appeals and the Applicants do not succeed on the appeals, there would be an over-topping debt due from the Applicants to the Company. The Company submitted that an adjournment of the hearing of the Application was the appropriate and fair course so that the Application could be

[14] The Applicants were unaware of the existence of any other creditors of the Company save for one possible exception: see Affidavit of Shane Patrick Donovan sworn 24 March 2015.

determined with knowledge of the' state of accounts' between the Applicants and the Company.

[50] The Company could have argued, as it noted, that in light of the cross claims there should be an order striking out or dismissing the Application but instead the Company only sought an adjournment of the hearing of the Application to allow the other proceedings to be concluded.

[51] The Company further submitted as follows:

> *It is impossible to identify any reported instance, in any commonwealth [sic. Commonwealth] authority, where a company has been put into liquidation only because it has been denied the opportunity to advance an otherwise unimpeachable set-off – as a result of a separate order of the same Companies Court which is the subject of an appeal on strong grounds.*[15]

[52] As noted above, judgment on the Adjournment Request was reserved, and in the event the adjournment was not granted, judgment on the Application was reserved.

Appeals

[53] The Anti-Enforcement Order Appeal and the Applicants' cross appeal in the Trial Judgment Appeal were heard by the Court of Appeal during the week commencing 18 May 2015.

[54] Judgment was reserved by the Court of Appeal and remains under reserve.

[55] While certain submissions were made on the Additional Evidence Application based on words spoken by the Justices of Appeal who heard the appeals, which are set out the in the transcript, as this Court has said on several occasions, as have other courts, words spoken by a judge in the course of oral argument cannot be taken as an indication of the outcome of the proceeding (and ordinarily are not helpful in interpreting a court order).

[15] Skeleton Argument on behalf of the Respondent, 9 April 2015, para. 31.

[56] Judges make comments and ask questions to 'test the waters', clarify submissions, and so forth. In doing so, unless expressly stated otherwise, they are not intending to convey or even foreshadow what their judgment will be. Indeed by reserving a court is providing itself with an opportunity to reflect further on its judgment and such reflection may lead to any earlier tentative views changing. It can be misleading and sometimes dangerous for another judge in another proceeding to draw any conclusions from such comments and questions. Except in unusual circumstances, the practice of referring to a transcript of words any judge used during oral argument is discouraged.

[57] Having said this, it is appropriate for this Court to consider whether there is sufficient merit in the Company's appeal to grant an adjournment. An adjournment should not be granted if the Company's prospects on the appeal are merely speculative or not arguable. In my view, as of 13 April 2015 it could not be said that the appeal of the Anti-Enforcement Order was so lacking in merit as to require a denial of the Adjournment Request.

[58] To the extent subsequent events may be considered in relation to the reserved Adjournment Request, the fact that the Court of Appeal reserved judgment is some indication that it did not consider there was the requisite lack of merit. However, other circumstances may have resulted in the Court of Appeal reserving so there is only limited weight that can be put on that fact, if it is to be considered at all given its timing.

Additional Evidence Application: Ukrainian Redenomination Appeal and Other Additional Evidence

[59] The evidence sought in the Additional Evidence Application to be introduced by the Applicants on the Application[16] is that on 28 September 2015 the Ukrainian Appeal Court dismissed the Ukrainian Redenomination Appeal[17], with the result that even if the Company succeeds on the Anti-Enforcement Order Appeal, there

[16] Kenney 2, in particular paras. 13 – 16 and Exhibit MSK2.
[17] Confirmed in Likarchuk 2, para. 11.

is, according to the Applicants, "no prospect of the Company being able to establish a cross-claim in an amount exceeding the [amount of the Trial Judgment]"[18].

[60] The Ukrainian Judgment remains denominated in the Ukrainian currency at UAH 748,205,985.02, and it does not bear post-judgment interest.

[61] For illustrative purposes, as at 23 October 2015 (the date of the supporting affidavit but not a relevant date under the Act) the Ukrainian Judgment was valued at $33,581,956.24. The value of the Ukrainian currency against the American dollar had remained "stagnant" through 2015. Using that figure, even having regard to the Ukrainian Judgment, the cross claim would fall short of the Trial Judgment by approximately $3.83 million. But matters do not end there, even if that were the relevant 'state of accounts'.

[62] The "responding evidence" (and supporting submissions) sought to be introduced by the Company[19] was submitted to be evidence (and supporting submissions) that will show that the Application should be dismissed. It would deal with two matters, which the Company submits will show the following:

- as noted above, if the Anti-Enforcement Order is set aside by the Court of Appeal, on 22 January 2015 when the Application was commenced, the Ukrainian Judgment was worth just over $49 million so that it exceeded the amount of the Trial Judgment and thus the Applicants did not have a complete "cause of action" (i.e. the Company was not insolvent, leaving aside the dismissal of the application to set aside the Statutory Demand); and
- on 17 November 2015 the Company and Mr. Adamovsky commenced the 2015 Ukrainian Claim in the Obukhiv District Court of Kyiv Region in the Ukraine against the Applicants for $31,615,743.82 (consisting of a claim for interest (on the Ukrainian Judgment amount) of $27,803,837.03 and

[18] Kenny 2, supra, para. 16; Applicants' Written Submissions [In Support of their Application for Permission to Rely Upon Fresh Evidence] dated 3 December 2015, para. 6.
[19] Likarchuk 2, especially paras. 5 and 18 – 27 and Exhibit KL-2.

$3,811,906.79 "under the Ukrainian Civil Code for wrongful use of another's money"); and that:

i. such 'splitting' of the main claim and such claims are permissible under Ukrainian law and was justifiable as a practical matter in this case;

ii. the Ukrainian court must determine the claim "within a reasonable period of time but not more than two months after opening proceedings" (subject to a possible extension of "no more than for fifteen days");[20] and

iii. there is no injunction (such as the Anti-Enforcement Order) that restrains (the use of) this cross claim in this jurisdiction.

[63] With respect to the first point, as stated above, the statutory deeming of insolvency applies and it is not open to the Company to assert its solvency on 22 January 2015, at least so long as the Order dismissing its application to set aside the Statutory Demand stands. However, also as stated above, first, it is unclear what will happen to the Order dismissing the Statutory Demand set aside application if the Anti-Enforcement Order is overturned, and second, in the unusual circumstances, this Court may be able to consider its "actual solvency", or "actual insolvency" of the Company on the date of the Application, in the exercise of its discretion respecting the Application. To repeat what was said above, the Court would need to hear the parties' submissions in that regard and no views are being expressed and no decisions being made now on the substance of that question.

[64] Actual solvency on the date of the Application when there is a statutory demand that has not been set aside cannot itself lead a court to conclude there was no insolvency on that date or, in the words used on the Additional Evidence Application, that there was no "cause of action".

[20] Likarchuk 2, paras. 26 and 27.

Decision on Adjournment Request

[65] The Adjournment Request, which was reserved, is granted, with conditions.

[66] The Adjournment Request is determined on the situation as it stood on 13 April 2015 although if developments since then were to be considered, the circumstance of the reserved Court of Appeal judgment and the new Ukrainian proceedings make it even more clear the granting the Adjournment Request is appropriate and just.

[67] I agree with the Company's submission that an adjournment of the hearing of the Application was and is the appropriate and fair course so that the Application can be determined with knowledge of the 'state of accounts' between the Applicants and the Company, and the Court's discretion can be exercised in the context of all relevant facts. There were too many 'balls in the air' for the Application to be determined on 13 April 2015, and there are too many 'balls in the air' now for the Application to be determined now.

[68] In light of the dynamic and unusual situation on 13 April 2015, the 'state of accounts' between the Applicants and the Company was uncertain, and given the significance of the then pending court proceedings both on the 'state of accounts' and on factors that the Court may consider in the exercise of its discretion, it was and is appropriate and just to grant the Adjournment Request.

[69] Accordingly, the hearing of the Application is adjourned until after the judgment of the Court of Appeal in the Anti-Enforcement Order Appeal and the Applicants' cross appeal in the Trial Judgment Appeal that were heard during the week commencing 18 May 2015. Following the judgment of the Court of Appeal, this Court will reassess, after hearing submissions by the parties in a manner to be determined at the time, if the adjournment should continue. The state of the new Ukrainian proceedings, and any inappropriate delay by either party, may be relevant factors.

[70] Likely this reassessment of the adjournment can occur at a case management hearing to be convened expeditiously and the Court will give directions in that regard at the time.

[71] It is a condition of the adjournment that the parties prosecute all relevant outstanding proceedings expeditiously and diligently such that they are concluded as soon as reasonably practicable. By "prosecute" I do not mean to restrict the obligation to the party that initiated a proceeding: the obligation applies to the responding party as well.

[72] As a practical matter, at this point in time, this condition refers primarily to the new Ukrainian proceedings.

Additional Evidence in Light of Adjournment

[73] It may be that the granting of the Adjournment Request, which means that the hearing of the Application has not been concluded, makes moot the Additional Evidence Application and the Company's position that it can file responding evidence to introduce the matters it seeks to introduce.

[74] For reasons outlined below, before the Application is determined, the Court needs to be updated from the evidence that was before it when the hearing of the Application commenced. This would have been the case even if the Adjournment Request was not granted but judgment was reserved.

[75] In summary, it is necessary for a court, when it is to make a determination and exercise its discretion on a liquidator appointment, to have current information to assess relevant factors including the 'state of accounts' between the applicant and the company. The court needs to be updated with current evidence if a liquidation application is adjourned after the hearing commences, or judgment on the liquidation application is reserved for a period of time, particularly if the situation respecting the relevant circumstances is dynamic. It is appropriate for the applicant and the company to provide further evidence to update the court (but not

to 'backfill' their respective cases) without a need to meet any test for additional evidence.

[76] As the hearing of the Application is adjourned, not concluded, the introduction of additional updating evidence (as opposed to 'backfilling evidence') by either party for the continued hearing should be less controversial.

[77] Also before the hearing of the Application resumes the parties may wish to consider whether any amendment is required or desirable to the Amended Originating Application or any other document. By saying that, I am not suggesting any amendment is or is not necessary or desirable – simply that each side may wish to consider the matter.

[78] If I am wrong in having granted the Adjournment Request or that the introduction of additional evidence for the continued hearing should be less controversial, I will determine the Additional Evidence Application and outline why it is appropriate for the Applicants and the Company to provide further evidence to update the Court (but not to 'backfill' their respective cases) without a need to meet any test for additional evidence.

Test for Additional Evidence before Judgment is Rendered

[79] In this case of course judgment on the Application has not been rendered. The Additional Evidence Application was argued on the basis of the test for admitting additional evidence after a judgment is rendered (i.e. the court has made up its mind) but before the final order has been sealed (at which point the court is functus). That is not the circumstance here, and would not have been the circumstance here even if the Adjournment Request had not been granted and the hearing of the Application had concluded on 13 April 2015.

[80] The test for admitting additional evidence in the circumstances of a judgment having been rendered but no order sealed has been a 'relaxed version' of the test

to adduce new evidence before an appellate court. However the test has evolved in the UK and should evolve in this jurisdiction.

[81] The following sections of this Judgment (before the conclusion) will look at six topics:

(a) the established appellate court test for admitting additional evidence, which may, but it appears likely will not, continue in its long standing form in light of developments in the after judgment but before sealed order situation;

(b) the pre-2013 'relaxed test' for admitting additional evidence after judgment but before an order has been sealed;

(c) the new test in England and Wales for reconsideration of a judgment and likely for admitting additional evidence as part thereof;

(d) the appropriate test for admitting additional evidence in before judgment situations;

(e) the circumstances of additional evidence in liquidation applications and implications of the Date Issue in the scheme of the Act; and

(f) the reasons why additional evidence may be necessary and appropriate in liquidation applications at least when there is both a dynamic situation and either an adjournment or a gap between the date of the hearing of the liquidation application and the date of judgment on the application.

[82] The established three conditions which must be met for the admission of new evidence before an appellate court are the following:

- first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
- third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible.[21]

[21] Ladd v Marshall [1954] 1 WLR 1489, Denning LJ.

[83] The 'appellate test' was relaxed for applications to adduce additional evidence in non-appellate situations after judgment has been rendered but before a final order is perfected (sealed). Neuberger J. (as he then was) in Charlesworth v Relay Roads Ltd.,[22] held as follows:

> *While I think that these three factors [set out above from Ladd v Marshall] should be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down, but before the order has been drawn up, I incline to the view that the court is entitled to be somewhat more flexible, and not to proceed on the strict basis that each of these three conditions always has to be fully satisfied before fresh evidence can be admitted before judgment. Of course, in many ways, an applicant seeking to persuade the judge, to receive fresh evidence and/or argument on a new point is in a very similar position to an appellant seeking similar relief from the Court of Appeal. He has had a full opportunity to collect his evidence and to marshall his arguments, and there must be a strong presumption against letting him have a second chance particularly after he has seen in detail from the judgment why he has lost.*
>
> *In relation to an application to the judge after judgment but before the order is drawn up, just as much as in relation to an application to the Court of Appeal, it can be said that "When a litigant has obtained a judgment… he is by law entitled not to be deprived of that judgment without very solid grounds." Brown v Dean [1910] A.C. 373, 374. So, too, it is equally apposite to bear in mind that it is a duty of every litigant "to bring forward his whole case at once and not to bring it forward piecemeal as he found out the objections in his way" (see in re New York Exchange Ltd. (1888) 39 Ch. D. 415, 420), a view expressed more recently by Stuart-Smith, LJ. in Imperial Chemical Industries v Montedison (U.K.) Ltd. [1995] R.P.C. 449, 468:*
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> > *"It is incumbent upon a party to adduce such evidence as he considers relevant and persuasive relating to the findings of fact which the judge may make. He cannot wait for the findings and then say "Oh well, I could have called more evidence on that point."*

[84] However, the development of the tests for additional evidence in non-appellate situations after judgment but before an order has been sealed does not end there.

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[22] [2000] 1 WLR 230.

[85] The United Kingdom Supreme Court considered the issue of post-decision reconsideration by a court (not the admission of additional evidence) in 2013 in In the Matter of L and B (Children)[23].

[86] In 1972 the English Court of Appeal had decided in In re Barrell Enterprises[24] that:

> *When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought to save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one.*

[87] Later, In Stewart v Engel [25], the Court of Appeal held that the power to recall orders before perfection was subject to the "Barrell limitation", with Clarke LJ dissenting. Clarke LJ did not think that the court was bound by Barrell to look for exceptional circumstances. He took as a starting point the overriding objective in the Civil Procedure Rules of enabling the court to deal with cases justly.

[88] The Supreme Court noted in In the Matter of L and B (Children) that the Court of Appeal struggled to reconcile the "apparent statement of principle in Barrell … coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case."[26]

[89] In the result, the Supreme Court agreed with Clarke LJ in Stewart v Engel that the overriding objective must be to deal with the case justly and that every case is going to depend upon its particular circumstances.

[90] The unanimous judgment delivered by Lady Hale (Lord Neuberger (President), Lord Kerr, Lord Wilson and Lord Sumption) contains the following important conclusions, which in my view also are relevant to the admission of additional

[23] [2013] UKSC 8
[24] [1973] 1 WUR 19, at pp 23-24.
[25] [2000] EWCA Civ 362, [2000] 1WLR 2268.
[26] In the Matter of L and B (Children), para 27.

evidence at that stage of proceeding and to the admission of additional evidence in the present circumstances, before a court has come to its decision.

[91] The key parts of the judgment, as helpfully summarized in the Supreme Court Press Summary, are as follows:

> It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected. In the absence of express power to vary or discharge his own orders, any general power for a judge to review his order once perfected was abolished by the Judicature Acts 1873 and 1875 but the power to reconsider the matter before an order was perfected survived.[27]
>
> The overriding objective in the exercise of this power must be to deal with the case justly. Contrary to the practice previously adopted, it is not reserved for exceptional circumstances and would in every case depend on its particular facts. It would be relevant whether any party has acted upon the decision to his detriment especially in a case where it was expected that they may do so before the order is formally drawn up.[28]

[92] The case was a special one on its facts, as the Court discussed, given that it involved the welfare of children. Continuing from the Summary:

> Children cases may be different from other civil proceedings because the consequences were so momentous for the child and for the whole family. The court had to get it right for the child.[29] On the other hand, the purpose of the fact-finding hearing was to create a platform of established facts which would be undermined, throwing the later hearings into disarray, if a judge could be urged to change his mind and in effect hear an appeal against himself.[30] As the point did not arise in this case, the court declined to express a view.[31]

[93] However, the judgment on judicial reconsideration of a decision does not turn on that special situation. The test or standard for judicial reconsideration is not "special circumstances" but rather "dealing with the case justly".

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[27] Supra, paras 17 and 18.
[28] Supra, para 27.
[29] Supra, para 41.
[30] Supra, para 44.
[31] Supra, para 45.

[94] As noted, the case was dealing with reconsideration, not additional evidence, after judgment was rendered but before an order was sealed. However, it seems logical that the test for additional evidence after judgment should be the same: dealing with the case justly. That test is flexible enough to allow for some consideration to be given to the factors in the relaxed appellate court test that has been used for additional evidence applications before there is a sealed order. Those factors would be part of all that a court would consider in the particular circumstances to deal with the case justly.

[95] The English High Court did consider the question of additional evidence after judgment early this year in Vringo Infrastructure Inc. v. ZTE (UK) Limited [32], a patent case in which the unsuccessful party sought permission to reopen the trial to plead and lead evidence of new prior art (against the validity of the patent).

[96] Justice Birss applied In the Matter of L and B (Children) in that situation, accepting that the Supreme Court was "considering the legal principles from the point of view of civil and family law in general and not just children cases"[33] and concluding that even though the case before him was not a judicial reconsideration case:

> It seems to me that this difference does not mean that the general principle articulated by the Supreme Court is inapplicable. By that I mean that the overall guiding principle here is the overriding objective to deal with cases justly ... It must be applied in different factual circumstances and the fact that this application involves amended pleadings and new evidence is an element, no doubt an important one, in the relevant circumstances.[34]

[97] The test for additional evidence before judgment has been rendered must be taken to have advanced with the advancement of the test for a court to admit additional evidence and/or reconsider its judgment before its order has been sealed. The test before judgment also must be to deal with the case justly.

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[32] [2015] EWHC 214 (Pat) per Birss, J.
[33] Supra, para 16.
[34] Supra, para. 17.

[98] It must be borne in mind that before judgment has been rendered the question of reconsideration does not arise; it is a question only of whether further evidence is to go into the initial consideration. There is no question of the court changing its mind or a successful party being deprived of a judgment already rendered.

[99] In such circumstances logically the court may be more liberal in admitting additional evidence if it should be done to deal with the case justly. However in making that consideration, it may consider the factors that would have been considered under the Charlesworth v Relay Roads Ltd. relaxed appellate test but again with the bottom line focus being on dealing with the case justly.

[100] In the circumstances here, and indeed (as noted above, and for reasons explained below) generally in the circumstances of a liquidation application where the hearing is adjourned or judgment reserved for a period of time, assessments of solvency and the 'state of accounts' between the applicant and the company must be made at different points in time, including when the court is exercising its discretion and determining the application. If the situation is dynamic, updating evidence will be needed to deal with the case justly.

[101] Taking the alternative approach of considering the proposed additional evidence before judgment simply as additional evidence would be approached in any such case, if the test for additional evidence now is the overriding objective of "dealing with cases justly" ("to deal with cases justly"[35]), which in my view must be the case, the test has been met readily here.

[102] The Application should not be decided without the relevant facts before the Court at the time of the discretionary decision – a company should not be put into liquidation based only on circumstances months earlier if the circumstances have changed.

[103] Alternatively, even if the "old" post-decision tests for additional evidence are the applicable tests, the Applicants have met the tests as, apart from the adjournment

[35] CPR 1.1 (1).

of the hearing of the Application ordered herein which of course eliminates the question of the hearing of the Application being concluded. The Ukrainian Redenomination Appeal was not determined until after the 13 April 2015 hearing and so its result obviously could not have been known at the time of the hearing on 13 April 2015.

[104] While the Company has not brought an application for permission to introduce additional evidence, it appears to seek to introduce additional evidence of matters occurring after 13 April 2015 which could not have been known on that date.

[105] As noted above, the Company asserts that once the evidence of the Applicants is admitted, it can introduce responding evidence that deals not only with the matters in the Applicants' additional evidence but also deal with other matters that occurred after 13 April 2015 that are relevant to one or more issues on the Application. For the reasons discussed below, I agree, although not necessarily on the same reasoning, in the circumstances of a liquidation application such as this where updating of the Court is needed.

[106] In any event, the Company appears to accept that responding evidence cannot be mere "backfilling evidence" that was available but not submitted earlier. Such "backfilling evidence" would require the Court's permission if the Applicants will not consent.

Date Issue and Relevance of Additional Evidence

[107] The Date Issue needs to be determined in order to determine the relevance of proposed further evidence.

[108] It is necessary to have regard to the date or dates upon which, in the context of an application for the appointment of a liquidator, the Court must conclude that the company in question is insolvent, must assess the 'state of accounts' between the Applicants and the Company, and must exercise its discretion in respect of the appointment of a liquidator.

[109] To repeat, the question is on which date or dates must a company be insolvent in order for the Court to make a liquidator appointment order under section 161(1) of the Act:

- the date of the application,
- the date of the hearing of the application, and/or
- the date of judgment on the application.

Statutory Scheme for Appointing a Liquidator

[110] As stated above, the Act provides that a company is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the Act.[36]

[111] The Court may on application of a creditor appoint a liquidator of a company if the company is insolvent.[37]

[112] The Court has a discretion and may, among other things, dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved, or adjourn the hearing conditionally or unconditionally.[38]

[113] A creditor may claim in an insolvency proceeding only the balance of the account as between the creditor and the debtor where there are mutual credits, mutual debts or other mutual dealings as at the "relevant time" (a defined term), which in the case of a company is "the commencement of [the] liquidation".[39]

[114] The liquidation of a company commences at the time at which the liquidator is appointed.[40]

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[36] Section 8(1)(a) of the Act.
[37] Section 162(1) of the Act.
[38] Section 167(1) of the Act.
[39] Sections 149(1) and 150(1) of the Act.
[40] Section 160 of the Act.

[115] The "relevant time" is important where foreign currency is involved. The date at which a liability incurred or payable in a currency other than dollars shall be converted into dollars at the rate of exchange prevailing at the "relevant time".[41]

Insolvency on Date of Application

[116] A company must be insolvent (actually insolvent or deemed insolvent), when the application to appoint a liquidator is brought. In this case, the Company was deemed insolvent. Absent a statutory demand that was not set aside, actual insolvency on the date of the application would need to be established.[42]

[117] Additional evidence as to the 'state of accounts' cannot assist on the insolvency issue as at the date of the application where a statutory demand is not set aside, save that as observed above, in the unusual circumstances here it may be possible to consider it in the exercise of the Court's discretion.

Insolvency on Date of Hearing of, and/or Judgment on, the Application

[118] The circumstances which establish the grounds to order the liquidation of a company must exist at the time of the hearing of the application as well as at the time the application is commenced.[43]

[119] It appears necessary for the Court, at the time it exercises its discretion on whether to appoint a liquidator, to be able to assess the relevant factors including the 'state of accounts' between the applicant and the company.

[120] As noted earlier, ordinarily the date of hearing and the date of judgment will be the same or close in time such that material changes are unlikely, and ordinarily the situation will not be dynamic.

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[41] Section 154 of the Act.
[42] French, Applications to Wind-up Companies (3rd ed., 2015), para. 2.24.
[43] Supra.

[121] However, there are two situations at least that come to mind in which a court needs to be updated from the evidence before it when the hearing of the application commenced.

[122] First, if the court adjourns an application after the hearing has commenced, and second, if the court has reserved judgment on the application for a period, particularly when the situation respecting relevant circumstances is dynamic.

[123] Where the 'state of accounts' between the applicant and the company is significantly dependent on such things as (a) pending court proceedings in the jurisdiction or elsewhere that cannot be readily determined by the court hearing the liquidation application to be of dubious merit, and (b) in whole or in material part on potentially fluctuating currency exchange rates, it seems necessary for the court to be updated before it exercises its discretion and makes its determination on the liquidation application, which makes it appropriate for the applicant and the company to provide further evidence without the need to meet any additional evidence test.

[124] Where a court reserves judgment at the hearing of a liquidation application, at least in a situation where the state of solvency or the 'state of accounts' is in flux, the court needs to be updated on material developments affecting those matters so that it has current information when it renders judgment, and in seeking to update the court, a party to the application is not seeking to introduce additional evidence in the same sense as when the evidence and closing submissions at an ordinary trial have been concluded.

[125] Particularly in a case such as this where the Adjournment Request was not determined at the outset of the hearing of the Application, even though submissions at the hearing were made, the Application hearing remained open until the Adjournment Request was determined, and if the Adjournment Request was granted, the hearing of the Application was not concluded.

[126] If it were otherwise, a court could be putting a company into liquidation when it is no longer insolvent or when it has offsetting claims against the applicant, possibly being the only known creditor, which overwhelm its debt to the applicant.

[127] Accordingly additional evidence to update the Court on factors relevant to the issues on the Application, and to the exercise of the Court's discretion with respect to the appointment of a liquidator, including the evidence sought to be admitted on the Additional Evidence Application, will be admitted and considered in connection with the Application.

Orders

[128] There will be orders in the following terms:

1. The hearing of the Application is adjourned until after the judgment of the Court of Appeal in the Anti-Enforcement Order Appeal and the Applicants' cross appeal in the Trial Judgment Appeal that were heard during the week commencing 18 May 2015.

2. The parties shall have liberty to apply for an earlier resumption of the hearing of the Application in the event of any materially changed circumstances that make the outcome of the appeals irrelevant to the issues on the Application.

3. Following the judgment of the Court of Appeal, this Court will reassess, after hearing submissions by the parties in a manner to be determined at the time, if the adjournment should continue until after the 2015 Ukrainian Claims have been finally determined, if they have not been finally determined by that time.

4. For the resumption of the hearing of the Application the parties may file additional evidence and submissions to update the existing evidence and submissions filed with the Court with respect to the issues relevant to the determination of the Application, and to the exercise of the Court's discretion,

as of the time of the resumed hearing, including but not necessarily limited to the 'state of accounts' between the parties as at (a) 22 January 2015, the date of the commencement of the Application, and (b) the time of the resumed hearing of the Application.

5. Costs of the hearing on 13 April 2015, including the Adjournment Request, and the Additional Evidence Application shall be reserved to the resumed hearing of the Application.

Barry Leon
Commercial Court Judge (Ag.)