

Ogier's BVI and Hong Kong teams advise in liquidation matter involving secured creditors

Cases - 11/09/2020

Grant Carroll and Daniel Mitchell of Ogier in the BVI, together with Oliver Payne and Edwin Gomez of Ogier in Hong Kong represented Chance Talent Management Limited ("**Chance Talent**"/the "**Applicant**") in its recent application (the "**Application**") to appoint liquidators over Novel Blaze Limited ("**Novel Blaze**"). The matter came on for hearing on 8 June 2020 in the BVI Commercial Court before Justice Jack.

Novel Blaze opposed the application on a number of grounds. The most novel of which stemmed from an objection to the debt (upon which the liquidation application was grounded) (the "**Debt**") being used to wind up the company when the Applicant held security for its debt by way of secured charges in Novel Blaze's subsidiaries.

The objection had two prongs of attack:

1. the Applicant was not a "creditor" within the Insolvency Act, 2003 (the "**Act**"), rather it was a "Secured Creditor" and, as such, had no standing to bring the Application; and
2. because the Debt was secured by the Applicant in Novel Blaze's subsidiaries, it would 'augment' the estate of the company if the Applicant were to both wind Novel Blaze up and still be allowed to realise its security.

Justice Jack dismissed Novel Blaze's objections and wound the company up. In his oral judgment the Judge addressed the arguments raised and concluded as follows:

1. The definition of creditor in the Act is clear.
2. The Respondent in this case was a debtor to the Applicant. The security it held was in the Respondent's subsidiaries, which are separate corporate entities.
3. In support of this conclusion and, in dismissing Novel Blaze's second argument, the Judge referred to a High Court case in Singapore, Swiber Holding Ltd [2018] SGHC 180 (which was

cited by the Applicant in opposition to Novel Blaze's arguments) that arrived at the same conclusion. In his closing remarks the Judge added that the Court retained a discretion to wind the company up but that he was not minded to depart from the usual consequences in this case.

Shortly thereafter, Novel Blaze filed an appeal together with an urgent stay application. The Appeal will come on for hearing in November 2020. However, a full panel of the Court of Appeal dismissed the stay application and said the following about the substantive appeal:

"This debate raises an issue which I am not called upon to resolve on this application. Suffice it to say that I have reviewed the evidence, the notice of appeal and the submissions of both parties and I am not satisfied that the notice of appeal raises 'strong grounds of appeal or a strong likelihood that the appeal will succeed'. This finding weighs heavily against the grant of a stay pending appeal."

This case serves as a reminder that the BVI Commercial Court will continue to come to the aid of creditors in pursuing unpaid debts and that creditors should not necessarily be deterred from pursuing a debt in the BVI Commercial Court even if the security over the debt is in issue. The Court of Appeal will soon hear the matter, following which it is anticipated that further guidance will be provided.

Partners Grant Carroll and Oliver Payne, and Senior Associate and Edwin Gomez are part of Ogier's multi-jurisdictional Restructuring and Corporate Recovery group and advise on all matters pertaining to corporate recovery, rescue and insolvency.

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