The Fatal Application Test – BVI Court of Appeal strikes out derivative appeal as a nullity

Insights - 26/11/2020

"Final" decisions of the BVI Court come with an automatic right of appeal to the ECSC Court of Appeal (CoA), whereas "interlocutory" decisions (other than in respect of injunctions and receivers) require permission. Getting this wrong is fatal to an appeal: if leave was required, then an appeal brought without permission is a nullity and will be struck out. That is precisely what happened to the appellants – appealing the grant of derivative permission - in the recently handed down decision in Harvest Network Ltd v CHC Investment Holdings Ltd.

Application Test

Whether a decision is "final" or "interlocutory" is determined by the Application Test. Known throughout the common law world (and to be distinguished from the Order Test), a decision is final according to the Application Test if, whatever the outcome, the decision would have brought an end to the proceedings. So a strike out decision is interlocutory, as only if the application is successful do the proceedings come to an end.

Derivative Permission

This was the first time that the CoA had considered the issue of whether the grant of derivative permission under s. 184C of the BVI Business Companies Act 2004 (BCA) is final or interlocutory. The issue had arisen before at first instance, but only in an unreported decision of Justice Bannister QC in Microsoft v Vadem, where Brian Lacy, appearing for Microsoft, successfully argued that the grant of derivative permission was interlocutory.

In both Microsoft and in CHC the perhaps understandable, but mistaken, view that the decision had been a final one rested on the fact that derivative permission is sought by a Fixed Date Claim Form (similar to a Part 8 claim form in E&W), which once determined – for or against - seems to be at an end.

However, on a closer analysis, the grant of derivative permission does not bring those proceedings to an end. The Court retains a statutory supervisory role not only over the proceedings that are to be brought derivatively, but also in respect of the permission itself. Having granted permission, the Court can – within those same proceedings and without an appeal – alter or remove that permission. It can, for example, under s. 184E BCA, hand the conduct of the underlying proceedings back to the company or direct that the proceedings are discontinued.

Accordingly, the grant of derivative permission is merely interlocutory.

For that reason, the appeal by Harvest Network, which was brought without permission, was a nullity and was struck out.

A copy of the Reasons for Decision can be found here. (The decision was given on the same day as the hearing, with written reasons to follow.)

Brian Lacy, Head of BVI Dispute Resolution at Ogier, appeared for the successful Respondent.

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Meet the Author

Brian Lacy

Partner

British Virgin Islands

Jersey

E: brian.lacy@ogier.com

T: +44 1534 514493

Key Contacts

Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: +852 3656 6044

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