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ARTICLE

This Is Not a Wind Up: Viewing a Stay to Restrain Presentation of an Application to Appoint Liquidators through the Prism of an Injunction

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Synopsis

Creditors of companies in the BVI will often begin the process of recovering their debt by serving a statutory demand. In many such cases, companies so served will invoke the statutory mechanism to have the demand set aside[1] afforded to them by the BVI Insolvency Act, 2003 (the 'Act'). If the application to set aside is dismissed, and the BVI Court makes the order which the Act requires,[2] authorising the creditor to proceed with an application to appoint liquidators to a company (an 'Authorisation Order'), the debtor may then seek to stave off winding up proceedings further by seeking a stay of the Authorisation Order pending appeal (a 'Stay Application').

A recent decision of the BVI Commercial Court (the 'Court') (the Hon. Justice Ingrid Mangatal (Ag.)) in *Rich Region Holdings Limited v Industrial and Commercial Bank of China (Macau) Limited* BVIHC (COM) 0134 of 2022[3] ('*Rich Region*') has provided welcome clarity on the approach that the Court will adopt in determining whether to grant a stay to restrain the presentation of an application to appoint liquidators in such circumstances.

Overview

Under BVI law, the filing of an appeal against a decision of a first instance judge does not automatically operate as a stay of proceedings. To obtain a stay, a party must apply to the BVI Court for an order to stay the proceedings pending an appeal.

In Rich Region, the application of *Rich Region Holdings Limited* (the 'Company') to set aside the statutory demand served on it by the Industrial and Commercial Bank of China (Macau) Limited (the 'Bank') was dismissed and the order of court also directed that the Bank be permitted to proceed with an application to appoint liquidators to the Company (the 'Order').

Following the dismissal of the application to set aside the statutory demand, the Company filed an appeal together with an application seeking a stay of execution of the Order pending the determination of the Company's appeal (the 'Company's Stay Application').

The applicable legal principles – whether a statutory demand is capable of being stayed

In *BEC Limited v A1 and another* ('*BEC*'),[4] a decision of the Eastern Caribbean Court of Appeal ('ECCA') handed down in September 2022, the ECCA considered whether and under what circumstances an order dismissing an application to set aside a statutory demand could be stayed. It held that, because an order refusing the application to set aside the statutory demand is declaratory in nature, it did not create any enforceable rights, and so was not capable of being stayed.[5]

In *BEC,* just as in *Rich Region*, the order of the Court below had also authorised the creditor to proceed with an application for the appointment of liquidators. On this, Paul Webster JA [Ag.] made the following *obiter* observation:

> '... there is one additional factor in this case. The Judge's order authorised the Respondents to apply for the appointment of liquidators over the Company. This is a right that the Respondents may exercise, though they are not obliged to do so. It would have

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1 Section 156 of the BVI Insolvency Act, 2003.
2 Section 157(5) of the Act states that: 'If the Court dismisses an application to set aside a statutory demand, it shall make an order authorising the creditor to make application for the appointment of a liquidator or for a bankruptcy order, as the case may be.'
3 The decision was handed down orally.
4 BVIHCMAP 2022/0044.
5 In the words of Paul Webster JA [Ag.] at [41] of BEC: 'I am satisfied that the Judge's order refusing to set aside a statutory demand is in the nature of a declaratory judgment. It did not create any enforceable rights. It confirmed the validity of the statutory demand.'

> been better if the Company had applied for an injunction to restrain the Respondents from exercising their right to apply for the appointment of liquidators. However, the Court, in the exercise of its wide discretion and considering the overriding objective and the need to do justice between the parties, will consider the application for a stay of that part of the Judge's order authorising the Respondents' right to apply for the appointment of liquidators, and grant the stay if it is justified on the facts and all the circumstances of the case.'

In Rich Region, the Bank relied on Paul Webster JA's observation in BEC, and took a preliminary objection that the Order was not amenable to a stay of execution. Rather, the Bank submitted, the appropriate procedure was for the Company to apply for an injunction to restrain the presentation of an application to appoint liquidators. The primary distinction between an application for a stay and an injunction where the act sought to be restrained or stayed is the filing of a winding up application, is the threshold which the applicant company must meet for such an application to succeed.

Where a debtor company applies for an injunction to restrain presentation of a petition or an application for the appointment of liquidators, to succeed, the company must satisfy the Court that the petition would be an abuse of process or would be bound to fail.[6] In Rich Region, the Court agreed with the Bank's submission that this was the applicable test and with its further submission that, where the application took the form of an application for a stay, no lesser test should be applied in determining whether or not such an order should be made.

The threshold point

In *BEC*, the ECCA made it clear in unequivocal terms that an order dismissing the application to set aside a statutory demand was not capable of being stayed.

The Court in Rich Region agreed with this proposition and further reasoned that this position is supported by section 157(5)[7] of the Act which makes it compulsory for the judge, in dismissing an application to set aside a statutory demand, to make an order authorising the creditor to make an application for the appointment of liquidators. The Court observed that the mandatory language of the subsection contradicts the existence of any general power allowing the Court to make an order staying the Authorisation Order, which the statute requires be made.

Echoing the words of Justice Webster in *BEC,* the Court agreed that the effect of the Authorisation Order was simply to give the creditor a choice as to whether or not to proceed with the application to appoint liquidators. The Court therefore concluded that the true essence of the Company's Stay Application was not for an order to suspend the Authorisation Order but was in fact seeking an order preventing the Bank from proceeding with an application for the appointment of liquidators.

Nonetheless, given that the application before it was an application for a stay, as in *BEC,* the Court in Rich Region held that taking account of the overriding objective, rather than dismiss the Stay Application outright, it should consider and decide the Stay Application before it but, in so doing, it should bear in mind the principles which would apply had the application been an application for an injunction to restrain the Bank from proceeding to file a winding up application.

The principles applicable to a stay pending an appeal through the prism of the threshold point

The general principles applicable to a stay pending appeal are well known and are set out in *C-Mobile Services Ltd v Huawei Technologies Co. Limited* BVIHCMAP 2014/0017 ('*C-Mobile'*) and as refined in *Nam Tai Property Inc v ISZO Capital LP* BVIHCMAP 2021/0010:

1) The Court must take into account all of the circumstances of the case.
2) A stay is the exception rather than the general rule.
3) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
4) In exercising its discretion the Court applies what is in effect a 'balance of harm' test in which the likely prejudice to the successful party must be carefully considered.
5) The Court should, in a preliminary way, take into account the prospects of an appeal succeeding. Where there are strong grounds of appeal or a strong likelihood that the appeal will succeed a stay should be considered. In a case where the justice of letting the general rule take effect is in doubt, the answer may well depend on the perceived strength of the appeal.

The Court in Rich Region held that the Company had failed to provide cogent evidence to demonstrate that its appeal would be stifled or rendered nugatory without a stay. On the first ground on which the Company

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6 *Bryanston Finance Ltd v De Vries (No 2)* [1976] Ch 63 per Buckley LJ at [76] and per Stephenson LJ at [80] ('*Bryanston Finance*')
7 See footnote 2.

relied, that the advertisement of a winding-up application would be likely to cause serious harm to the Company, the Court accepted the Bank's submission that this was simply a bare assertion and, if accepted, would amount to an endorsement that the advertisement of a winding-up petition or an application to appoint liquidators is harmful to any company facing a winding up petition as a matter of principle.

The Court disagreed with the Company's second ground: that, if the appeal were successful and the statutory demand set aside on appeal, that would contradict an application to appoint liquidators given that such an application would be based on the statutory demand which would subsequently have been set aside. If correct, such a submission would mean that in every case where an appeal was filed against an order refusing to set aside a statutory demand, the Order permitting a creditor to proceed with an application to appoint liquidators would invariably be stayed without more. Such a position was untenable, and the Court further took heed of the caution by the ECCA in *C-Mobile* against the risk of such an approach becoming a debtor's charter to frustrate liquidation applications.

As to the strength of the appeal, after examining the evidence filed by the Company in the Stay Application and its Notice of Appeal, the Court agreed with the Bank's submissions that the Company could not be said to have such strong grounds of appeal or so strong a likelihood of success that it would tip the balance in favour of granting a stay, a stay being the exception rather than the rule.

Apart from considering the Company's prospects of an appeal on a preliminary basis, in applying the 'balance of harm' test (which the Court determined to be the essence of its judicial discretion in this context), the Court determined that the Bank was more likely to suffer irremediable harm than the Company. In particular, and taking into account all the circumstances of the case in accordance with the first principle in *C-Mobile*, the Court was particularly persuaded by the fact that the Bank had been awaiting payment of a substantial sum by the Company for over a year. It also observed that, even if the Bank was allowed to proceed with the application to appoint liquidators, the Court hearing that application could consider whether to stay a winding-up order pending an appeal pursuant to section 167(1)(c)[8] of the Act.

In any event, the Court held that the Company had not satisfied the Court that it should exercise its discretion to grant a stay even on ordinary stay principles.

However, most importantly, as part of its obligation to take into account all of the circumstances of the case, the Court held that it had to consider the Company's Stay Application against the higher threshold which applies and an applicant has to satisfy when it seeks to restrain an application to appoint liquidators by injunction. The Court held that had the Company applied for an injunction to restrain the presentation of an application to appoint liquidators, it would have had to satisfy the Court that such an application would be an abuse of process or bound to fail (applying the test in *Bryanston Finance*). The Company in Rich Region had failed to meet this threshold and so its application must fail.

Case significance

Rich Region represents a decision in which the obiter statements of Paul Webster JA (Ag.) in *BEC* have been considered by the BVI Court and the natural consequences of those statements brought to bear on a debtor company's application to stay presentation of a winding up application.

It appears clear in light of *BEC* and *Rich Region*, that, rather than applying for a stay (as the debtor company did in both *BEC* and *Rich Region*), the debtor company must instead apply for an injunction to restrain creditors from exercising their right to appoint liquidators. However, in any event, should the debtor company nevertheless apply for a stay, that application will be determined by reference to the principles which would apply had an injunction to restrain the filing of a petition been made; that is to say, that it must show that the application or petition which it seeks to restrain would be an abuse of process or bound to fail. Given the difficulty in satisfying this higher threshold, it may be much less straightforward in future for debtors to succeed in frustrating or delaying liquidation applications.

Walkers (Rosalind Nicholson, Partner, Walkers, British Virgin Islands and Tom Pugh, Partner and Jolin Lin, Counsel, Walkers, Hong Kong, Renell Benjamin, Senior Associate, Walkers, British Virgin Islands) acted on behalf of *Industrial and Commercial Bank of China (Macau) Limited* in the proceedings.

Notes

8 Section 167(1)(c) states that: 'On the hearing of an application for the appointment of a liquidator, the Court may – … adjourn the hearing conditionally or unconditionally…'

International Corporate Rescue

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