IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA Application No. 3 of 2015
C.I.C.A. (Civil) Appeal 25/2014

BEFORE

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
(FSD63/2014)

BETWEEN

VC COMPUTER HOLDINGS LIMITED
MERTAL OVERSEAS S.A.

Applicants

and

ZUKIAPA MANAGEMENT LIMITED

SAKARAS HOLDINGS LIMITED

Respondents

Mr Paul Murphy of Stuarts Walker Hersant Humphries instructed by the Applicants, VC Computer Holdings Limited and Mertal Overseas S.A.
Mr Alan Turner of Turners, instructed by the Respondents, Zukiapa Management Limited and Sakaras Holdings.

Hearing : 21 April 2015
Judgment: 21 April 2015

JUDGMENT
Revised from transcript and Approved released 27 May 2015

Sir John Chadwick, President:

1 VC Computer Holdings Limited ("the Company") was incorporated in the Cayman Islands as an exempt company on 2 August 1995. On 20 June 2014, a creditor's petition for the winding up of the Company was presented by Zukiapa Management

Limited ("Zukiapa"), a company incorporated in Cyprus, on the grounds that the Company was unable to pay its debts.

2 By an *ex parte* summons issued on the same day, 20 June 2014, Zukiapa sought the appointment of Joint Provisional Liquidators. That summons came before Justice Andrew Jones QC for hearing in July 2014. On 17 July 2014 the judge made the order sought. He did so for reasons which he put in writing and handed down on the 4 August 2014. At paragraph 2 of those written reasons - after explaining why he had reached the conclusion that it was necessary to appoint provisional liquidators in order to prevent the continued mismanagement and misconduct of the kind of which had occurred in the past - he observed that:

> ". . . it is difficult to see how the appointment can prejudice the Company, bearing in mind that it ceased to carry on business at least a year ago and is said to have no assets other than a nominal bank balance of about $5000."

3 The Joint Provisional Liquidators made a preliminary confidential report to the Grand Court on 1 August 2014. Shortly thereafter Zukiapa sought directions as to the further proceedings in the winding up petition; including leave to amend the petition. Leave to amend was granted on 13 August 2014. Amongst the amendments made were, first, the addition as a co-petitioner of Sakaras Holdings Limited ("Sakaras"), a company in liquidation in Malta which was – and had been, at all material times - the holding company of Zukiapa and other companies in the Verysell Group of Companies; and, second, to add an allegation in these terms:

> "4B. During the hearing of Zukiapa's summons dated 20 June 2014 (heard, after adjournments, on 16 and 17 July 2014), the Company represented and admitted that it was no longer trading and its total assets were then approximately US$5,000 held in one or more bank accounts."

4 On 19 August 2014, the Joint Provisional Liquidators made a further interim report to the court in which they said:

> "The JPLs have been unable to receive assistance from any of the current or previous directors or management of the Company in order to gain access to the Company's … accounts."

On 2 September 2014, the Joint Provisional Liquidators made a further interim report to the court. In that report, they stated they had not received a state of affairs of the Company as of 17 July 2014 from any of those (naming them) to whom they had submitted a request.

5 On 2 October 2014, Conyers Dill & Pearman (Cayman) Limited ("Conyers"), a firm of attorneys who had formerly been retained by the Company, gave notice of intention to appear at the hearing of the petition to support the making of a winding up order and the appointment of those nominated therein (the Joint Provisional Liquidators) as Joint Official Liquidators. It was stated in the notice that Conyers was a creditor to whom the Company owed $43,765.63 in respect of unpaid professional fees.

6 On 30 October 2014, the Joint Provisional Liquidators made a further interim report to the court in which they stated that they had still not received a state of affairs in respect of the Company; that due to lack of cooperation of the key counter-parties, the current directors and the previous management of the Company, they had been unable to obtain the necessary relevant financial information to ascertain the current financial position of the Company; and that, as a result of such a lack of cooperation, they had been unable to investigate the affairs of the Company.

7 The winding up petition came before the judge for hearing in November 2014. On 5 December 2014, the judge made the order for winding up that had been sought by Zukiapa and Sakaras ("the Petitioners"). He did so for the reasons which he set out in the written judgment which he handed down on that day.

8 At paragraph 5 of his judgment, the judge referred to the statutory demand which had been served on the Company by Zukiapa on 24 February 2014. The demand was for payment of the principal sum of US $36,425,370 and interest of US $6,683,654; that is to say, for an aggregate amount which exceeded the petition debt stated in the petition. The response to that demand – as the judge observed) was to deny that any indebtedness was due from the Company to Zukiapa.

9 The judge identified two issues for determination: first, on what basis was US$32.4 million paid to the Company pursuant to certain loan agreements and/or supply agent agreements made between March 2007 and December 2010; and, second, was a debt of US$12.8 million, which had been assigned to Zukiapa by Sakaras under an assignment and settlement agreement made on 15 December 2010, conditional. He determined each of those issues against the Company. His conclusion, expressed at paragraphs 38 and 39 of his judgment, was in these terms:

> "38. Mr. Krasnov and Mr. Azevedo [who were officers of the Company or its associates] would have the Court believe that the Loans Agreements are

> backdated and were executed in June 2009 solely for the purpose of misleading the Maltese tax and regulatory authorities and that they were never intended to be performed and enforced in accordance with their terms. This assertion is not corroborated by contemporary documentary evidence. To the extent that there is any contemporary evidence from an independent source, namely the UBS bank advice notes, it points unequivocally to the opposite conclusion. I do not doubt that Mr. Krasnov and Ms. Terekhova are ready to backdate documents and engage in false accounting when the need arises, but the evidence leads me to the conclusion that it is the Supply Agents Agreements and Framework Agreement which have been backdated and executed for the purpose of misleading the Court.
>
> I am satisfied on the balance of probabilities that [the Company] is indebted to Zukiapa in the sums of US$32.4 million plus interest due under the Loan Agreements and US$12,851,770 plus interest due under the Debt Restructuring Agreement. Of these amounts, the sum of US$31,840,000 plus interest is presently due and owing."

And he went onto say this, at paragraph 40 of his judgment:

> "I am also satisfied that [the Company] is insolvent. It ceased to carry on business about two years ago. There is no evidence that [the Company] has any other liabilities apart from the sums payable under the costs orders made in this proceeding and a sum of $43,700 owing to its former lawyers who now support the making of a winding up order. Counsel for [the Company] asserted at an earlier stage of the proceedings that [the Company's] only realizable asset is a sum of approximately $5,000 credited to its bank account. The provisional liquidators have not [yet] identified any other realizable assets. Mr. Azevedo's evidence is that he incorporated Mertal [Mertal Overseas SA, the sole shareholder shown on the register of members of the company] for the purpose of buying the Company. The price paid was $1,287.50 being the amount of it's issued … capital. His evidence is that he attributed some potential value to a judgment debt in the sum of $462,000 which is still outstanding, but when asked about it in cross-examination he said that he now assumed that the debtor ha[d] no assets. On the basis of this evidence there can be no doubt that [the Company] is in fact insolvent."

So he held that Zukiapa was entitled to a winding up order; he appointed two insolvency partners of KPMG as the Joint Official Liquidators and he made an order for costs.

10 The Company- or, perhaps more accurately, its holding company, Mertal Overseas SA ("Mertal") - decided to appeal against the winding up order. The notice of appeal, which names the Company and Mertal as co-appellants, seeks an order that the winding up order be set aside and that the costs be paid by the petitioners. That notice of appeal was filed in court on 19 December 2014, 14 days after the date on which the winding up order had been made. Also on 19 December 2014, the Company and

Mertal filed a memorandum of grounds of appeal. The grounds upon which they relied were in these terms:

> "The Learned Judge failed to dismiss the petition on the basis that there was a disputed debt bona fide on substantial grounds.
>
> 1. The Learned Judge erred in Fact in finding that the Supply Agent (Credit) Agreements and Framework Agreement on Netting had been backdated and executed for the purpose of misleading the court.
> 2. The Learned Judge erred in Law and in Fact in determining that there was sufficient evidence to make a finding that the Supply Agent (Credit) Agreements and Framework Agreement on Netting had been backdated and executed for the purpose of misleading the court.
> 3. The Learned Judge erred in Law in allowing serious questions of fact and [law] to be resolved as part of the court's winding with up jurisdiction."

Curiously, perhaps, the grounds do not include an assertion that the judge had reached the wrong conclusion in relation either to the US$ 32.4 million debt or the US$12 million debt; merely that he had erred in some of the findings which led him to that conclusion.

11 More curiously - and significantly - the grounds of appeal do not include any challenge to the judge's conclusion, in paragraph 40 of his judgment, that there could be no doubt that the Company was in fact insolvent. The basis upon which the judge reached that conclusion was set out in paragraph 40: it included the debt of $43,700 owing to Conyers, who, as I have said, were supporting creditors. There was no challenge at the trial to a finding in those terms; and no challenge in the grounds of appeal. Absent a challenge to that finding, it is difficult to see how Mertal, as a supporting contributory, has any standing to appeal. If the Company is insolvent Mertal has no interest in its assets and is not a competent appellant.

12 The advocates retained by the Company and Mertal (Stuarts) filed the notice of appeal and the grounds of appeal within the time limited by the Court of Appeal Rules and the Court of Appeal Law. But they did not serve those documents, or either of them, on the petitioners, or either of them; and they did not think it necessary or appropriate to inform the Joint Official Liquidators that there was a challenge to their appointment. No steps were taken to inform either the petitioners or the Joint Official Liquidators that the Company and Mertal were appealing until the end of January 2015.

13 In an affidavit sworn on 29 January 2015 a paralegal employed by Stuarts, in whose hands had been left the formalities of pursuing this appeal, explained that, from her understanding of the Court of Appeal Law, the appellants had 14 days from 5 December 2014 to file and serve the notice and 21 days to file and serve the grounds, and that that was done within the prescribed period by filing on 19 December 2014. She went onto say this:

> "Unfortunately, I was unaware that I was also required to serve the Notice and Grounds on the Respondent's Attorneys. As previously stated, I work primarily [sic] in the corporate services department and therefore had only limited experience in dealing with litigation matters. The error went unnoticed until 27 January 2015."

On 30 January 2015, the appellants issued a summons, dated 29 January 2015, seeking an extension of time for the service of a notice of appeal and a memorandum with grounds of appeal upon the other parties within two days from the date of the order granting such extension. I emphasise that, at that stage, the other parties were not aware that there was to be an appeal. The appellants sought that leave ex parte from a single judge of the Court of Appeal. The application came before me. I took the view that an application for an extension of time had to be made *inter partes* and at a hearing before the full court. Accordingly, that application came before the Court for hearing today. .

14 It is common ground that the principles which the Court should apply when deciding whether or not to grant an extension of time for failure to comply with the Rules are set out by the Chief Justice in the case of *Streeter and K Coast Development v Immigration Board and The Governor-in-Council* 1999 CILR 24. In that case, the Chief Justice dismissed the application for an extension of time on the grounds that the Grand Court did not, itself, have jurisdiction to extend time. But he went onto say that he would not have extended time in any event. He approved four considerations for granting of extension of time: first, the length of the delay; second, the reasons for the delay; third, the likelihood of prejudice on appeal; and, fourth, the prejudice to the Respondents in the proposed appeal. Those factors were derived from paragraph 59/4/17 in the former Supreme Court Practice 1999 and observations in *CM Van Stillevoldt v EL Carriers Inc.*

15 The length the delay in serving the notice and grounds of appeal in this case was some five or six weeks. That is a serious delay in the context of an appeal against a winding

up order. It is particularly important in such cases that finality be achieved as soon as possible. If finality is not achieved, then those who have been appointed as Joint Official Liquidators – and those with whom they have to deal - do not know whether their authority to proceed is unchallenged. That, in turn, affects their ability to obtain recognition as the authorised representatives of the Company in foreign jurisdictions. So in this sort of case it is particularly important that the liquidators are notified promptly and that the Rules are complied with.

16 The reason advanced to explain or excuse the delay in this case is not a reason which was outside the control of those seeking to appeal. It was their decision to instruct and retain the lawyers that they did; and it was the decision of those whom they instructed and retained to entrust the task of pursuing this appeal to an employee who, it seems, was neither sufficiently experienced nor sufficiently supervised to perform that task in accordance with the Rules. The fact that the appellants are out of time is wholly attributable to their decision to employ the firm of advocates that they did; and to that firm's decision as to the manner in which they carried out their retainer. In my view there was no good reason, outside the control of the appellants, for their failure to comply with the Rules.

17 But I would not, myself, refuse the application for an extension of time if persuaded that there was a real likelihood of success on appeal; such that refusal of the extension of time lead to a real likelihood of potential injustice.

18 In the present case I am not persuaded that there is any realistic chance that an appeal based on the grounds which have been advanced in the grounds of appeal filed on 19 December 2014 would have any prospect of success. The reason I take that view is that, even if the applicants were to succeed in persuading the Court of Appeal that the judge erred in finding that the supply agent credit agreements and the framework agreement had been backdated and executed for the purpose of misleading the court, and were able to persuade the court that the judge erred in determining that there was sufficient evidence to make a finding that the supply agent credit agreements and framework agreement netting had been backdated for the purposes of misleading the court, and had erred in allowing questions of fact and fraud to be resolved as part of the court's winding up jurisdiction, it would still be necessary to consider whether the judge was wrong to make the winding up order that he did. And it would be necessary

to consider that question on the basis that this was a case in which the judge had found the Company to be insolvent; that there was an unchallenged debt owed to Conyers for US$43,700 which had not been paid; and that the judge's findings on those matters are not challenged on the appeal.

19 In those circumstances, the fact that - in seeking to resolve serious questions of fact and fraud on a winding up petition - the judge may be said to have erred does not lead to the conclusion that the order which he made on that petition should be set aside: it leads only to the conclusion that, if he had approached his task on the proper basis, he would have made the same order without the need to resolve those questions. If he had approached his task on the proper basis, he would have been left with the position that there was an undisputed debt owed to the supporting creditor by a company which was admitted to be unable to pay its debts as they fell due; and which he had found to be insolvent for the reasons that he had set out (reasons which did not depend upon a finding that the US$32 million claim and the US$12 million claim had been made out).

20 So the Court of Appeal, if seized of an appeal in this case, would need to ask itself why it was wrong for the judge to wind up a company which he had found to be insolvent and in relation to which there was a supporting creditor with an undisputed debt. All that he needed to do was to substitute the supporting creditor as petitioner. The supporting creditor would then be entitled to a winding up order *ex debito justitiae* . An appeal would be serve no purpose – other than to generate fees for the lawyers payable by a company which has no assets to pay them – in circumstances where the real dispute in this case is not whether there are assets to be distributed which can now be identified; but whether or not there should be an investigation into the affairs of this company by those insolvency practitioners who were first appointed as Provisional Liquidators and subsequently appointed as Official Liquidators.

21 As I have indicated when referring to the interim reports made by the Provisional Liquidators, there has been a complete lack of cooperation by those who ought to be providing the information which liquidators require. It is difficult to avoid the conclusion that Mertal, which stands behind the Company in opposing liquidation, has some interest in that situation continuing. I have no doubt that the sooner it is

brought to an end, the better. There is no reason to delay finality in this litigation, by allowing this appeal to proceed.

22 For those reasons, I would dismiss this application for an extension of time to serve the notice and grounds of appeal out of time. If invited by the petitioners to do so, I would strike out the appeal.

Elliott Mottley, Justice of Appeal:

23 I agree with the conclusion reached and the reasoning therefore.

Sir George Newman, Justice of Appeal:

24 I agree entirely and I have nothing useful to add.