

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM2021/0039

BETWEEN:

PT Ventures, SGPS, S.A.

Applicant

and

Vidatel Limited

Respondent

Appearances:

Mr. Roger Masefield, QC, with him Miss Akisha Adonis for the Applicant
Mr. Hermann Boeddinghaus, QC, with him Mr. Oliver Clifton and Ms. Yegâne Güley for the
Respondent

2021: June 16th;
July 7th;
September 30th.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** On 5th June 2021 the Applicant, PT Ventures, SGPS, S.A. ('PTV') applied to wind up the Respondent, Vidatel Limited ('Vidatel' or 'the Company'). This is the Court's judgment on that application. The result of the application was handed down on 30th September 2021, with a draft of this written judgment then circulated for review by the parties' legal representatives. After the hearing on 30th September 2021 and before finalization of this written judgment, the parties filed certain other applications, the outcome of which may radically affect the result. In short, the Respondent has raised that the Court's jurisdiction to make a winding up order had expired by 30th September 2021 as the Applicant had not obtained a time extension. The Respondent has thus applied for the order made on 30th September 2021 to be set aside. The Applicant has filed two applications in response. This written judgment does not address these applications filed subsequent to 30th September. This written judgment merely explains the Court's reasons for the decision handed down on 30th September 2021. The

Respondent has asked that this written judgment not be finalized nor sealed pending the outcome of its application as to jurisdiction. That is not a course that recommends itself to the Court, for two main reasons. First, the Court rendered a decision on 30th September 2021 and irrespective of whether the decision was correct or incorrect, there is a public interest in the reasons for the Court's decision to be recorded and published. That is all the more so where the subsequent applications have yet to be heard and determined. The parties, too, have a private interest in knowing why the Court reached the conclusion it did. Any prejudice the Respondent might suffer by reason of publication (albeit none has expressly been alleged) can, in my respectful judgment, be offset by having prominently signalled that a jurisdictional issue has been raised, such that the Respondent might for that reason ultimately not be wound up. Secondly, the legal submissions made by the parties on the correct interpretation of the Insolvency Act, 2003 ('the Act')¹ during the course of the hearings of the application raise matters of general public importance in relation to the 'cash flow' and 'balance sheet' tests for insolvency. Irrespective of whether the Respondent's more recent jurisdictional objections ultimately prevail, the Court's judgment on those interpretative matters are almost certainly going to be germane in other winding up applications. This written judgment should, in my respectful judgment, thus be sealed and published in the normal way.

[2] The Applicant made its application pursuant to section 162(1)(a) of the Act, for an order under section 159(1)(a) and/or (b) of the Act that:

- (1) Vidatel be liquidated pursuant to the terms of the Act;
- (2) Mr. Matthew Richardson of Grant Thornton and Mr. Nicholas Stewart Wood, an overseas insolvency practitioner, of Grant Thornton UK LLP, be appointed as joint liquidators of Vidatel;
- (3) The costs of this Application be costs in the liquidation of the Company; and
- (4) Such further or other relief be granted as the Court may deem appropriate.

[3] The proposed liquidators consented to act.

[4] The grounds on which the Applicant sought this Order are summarised below.

¹ No. 5 of 2003.

Summary of Grounds

- [5] The Applicant submitted that Vidatel owes it a debt ('the Debt') that arises and is due and payable pursuant to
- (1) a New York Convention arbitration award rendered in favour of the Applicant on 20th February 2019 (the 'Final Award'); further or alternatively,
 - (2) an order of this Court dated 29th October 2020 (the 'Order').
- [6] The Order provides (*inter alia*) that
- (1) the Applicant has leave to enforce the Final Award as if it were a judgment of this Court in the sum of US\$390,853,657.72 (that sum comprising the Operative Part of the Award relating to loss of value in the Applicant's shareholding (the 'Loss of Value Award'), plus interest thereon, and its legal costs (the 'Legal Costs Award')), and
 - (2) the Company should pay to the Applicant the sum of US\$800,000.00 (the 'Ordered Sum') within 28 days of the Order, i.e. by 26th November 2020.
- [7] PTV claims that the Company is insolvent within the meaning of section 8(1)(c)(ii) of the Act, because the Ordered Sum, further or alternatively, the Loss of Value Award, plus interest thereon, and the Legal Costs Award, each of which is due and payable, has not been paid.
- [8] PTV submits that in the circumstances of this case, the Company should be wound up under the provisions of the Act.

Procedural Background

- [9] The application was opened on 16th June 2021. It was part heard to 7th July 2021. Vidatel strongly resisted the application, raising a considerable number of arguments.
- [10] Nonetheless, Vidatel argued that there is only one significant issue in this case: for PTV's application to succeed: PTV must demonstrate, on the balance of probabilities, that Vidatel is **unable for want of means** to pay its debts as they fall due.

- [11] Vidatel argued that PTV appears to think it can do this merely by showing that Vidatel has failed to discharge a judgment debt of this Court. However, submits Vidatel, its non-payment of the Debt has nothing to do with its means, as it has the means to pay.
- [12] Vidatel says its assets easily exceed its liabilities (by US\$550 million on the best evidence available to the Court), and if it were allowed to do so it would be able to pay its debts as they fall due.
- [13] The reason it has been unable to pay the Debt, says Vidatel, is that it is being prevented from doing so, by reason of a Worldwide Freezing Order ('WFO') obtained by PTV in this jurisdiction, and by reason of an Angolan Freezing Order ('AFO') obtained by PTV's parent, 'Sonangol', and because a company called Unitel (controlled by PTV) is withholding very substantial dividend payments lawfully due to Vidatel.
- [14] At the hearing on 7th July 2021, Vidatel submitted also that the AFO has either been discharged or that it has expired, and thus should not be treated as an obstacle to discharge by Vidatel of its liabilities.
- [15] Vidatel stresses that the only point that matters is whether Vidatel's current inability to pay the Debt is for want of means, or for some other reason.
- [16] The factual and legal matrix is somewhat more complicated than this, although this point lies at the crux of the matter, including the manner in which the Court's discretion whether or not to appoint liquidators should be exercised.
- [17] Vidatel argues that it lies within the power of PTV (and Sonangol, a state-owned enterprise, which the Court was told is PTV's parent) to lift the restrictions; but PTV refuses. The obvious inference, submits Vidatel, is that PTV does not really want Vidatel to pay. Vidatel says that PTV wants Vidatel to fail, so that Vidatel is placed into liquidation. That would make it doubly unfair to make a finding of insolvency on the basis of non-payment.
- [18] The WFO was made in respect of Vidatel by this Court at PTV's application on 12th October 2015 and continued until further order by a Judgment of this Court delivered on 8th February 2016. The amount frozen by the WFO was a sum with a value of up to US\$2.449 billion.

- [19] PTV argues that it has been willing to allow the WFO to be varied to allow Vidatel to pay the sums due, but on terms with which Vidatel has been unwilling to comply with.
- [20] PTV submitted that it has always said it is willing to agree a variation to the WFO, and to allow Vidatel to use its shares in Unitel to raise security to pay off the Final Award, if Vidatel were to put forward a concrete proposal that did not entail a risk of dissipation. The latter condition was important, submitted PTV, as Vidatel had previously transferred liquid assets out of the Company, in deliberate breach of the WFO (as this Court has found). PTV said this as long ago as May 2019. But, submitted PTV, Vidatel has never put forward a concrete proposal, let alone one that did not entail a risk of dissipation.
- [21] Further and in any event, it was open to Vidatel at any time (as it said it might do) to issue an application in this jurisdiction to vary the WFO, to permit it to raise capital to pay the Final Award – but again it did not do so. Rather than taking steps towards paying the Final Award, Vidatel has resisted enforcement of the Final Award tooth and nail for the past two years; and since a challenge it filed was dismissed by this Court in August 2020, Vidatel has taken no further steps to ask PTV to agree to a variation of the WFO. Nor had Vidatel applied to this Court for such a variation. It has just continued to refuse to pay the Final Award, and the Ordered Sum.
- [22] The AFO was made on 23rd December 2019. The applicant for the AFO was the Angolan State, represented by the Public Prosecutor's Office together with the National Asset Recovery Service. The preamble recorded that the purpose of the AFO was to injunct and seize assets of one Ms Isabel Jose dos Santos and her husband, Mr. Sindika Dokolo, and one Mr. Mario Filipe Moreira Leite da Silva.
- [23] The purpose of the AFO appears to be to aid the Angolan State in recovering approximately US\$1.136 billion said to have been wrongfully appropriated by Ms. dos Santos.
- [24] A number of corporate entities are cited in the preamble to the AFO, including but not limited to Sonangol. Other companies are mentioned too. PTV is not mentioned. Vidatel's Counsel submitted that PTV was nonetheless in a position to 'do something' to have the AFO lifted or varied to enable Vidatel to make the payment.

- [25] PTV denies this. PTV says it has no standing in relation to the Angolan proceedings: it is neither a party to those proceedings (which have been brought by the Angolan Attorney General against Ms. dos Santos and others), nor is PTV affected by the AFO.
- [26] In contrast, says PTV, Vidatel, as an affected party, plainly does have standing and is entitled to apply to the Angolan Courts for clarification and variation of the AFO.
- [27] However, although the AFO was issued in December 2019, Vidatel has never applied to the Angolan Courts to have the AFO varied, to permit it to pay the Final Award, although it is clearly within its power to do so.
- [28] It follows, says PTV, that it is simply wrong for Vidatel to suggest that PTV is simultaneously preventing variations to the WFO and the AFO, while seeking to have Vidatel placed into liquidation. It is (and always has been) within Vidatel's power to seek variations of the WFO and AFO to allow it to pay the Final Award, but it has not done so. As a result, Vidatel has only itself to blame for the predicament it finds itself in now.
- [29] Ms. dos Santos is said to be the sole director and shareholder of Vidatel.
- [30] PTV denied also that the AFO has expired or has been discharged. PTV submits that Vidatel's assertion in that regard was based upon an unsupported hearsay statement deriving from an Angolan court search conducted by Ms. dos Santos, and a conclusion of Angolan law she and Vidatel have sought to derive therefrom. The reality, says PTV, is different. PTV says that the AFO remains in effect, and demonstrably so, in that at least two orders were made by the Angolan courts further to the AFO after it was said by Vidatel/Ms. dos Santos to have expired. Moreover, says PTV, the criminal proceedings in support of which the AFO had been made remain extant.
- [31] PTV moreover submits that the AFO has an *in rem* effect under Angolan law, thus encumbering Ms. dos Santos's assets, such that it is unrealistic to suppose that a commercial lender would lend Vidatel sufficient money on commercial terms to discharge the Debt in question.

[32] As to the law in this jurisdiction, Vidatel submitted as follows:

- (1) Section 159(1)(a) of the Act provides that the Court may appoint the Official Receiver or an eligible practitioner as liquidator of a company, on an application under section 162.
- (2) Section 162(1)(a) of the Act provides that the Court may, on an application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if the company is insolvent.
- (3) Section 162(2) of the Act provides that an application under subsection (1) may be made by, among others, a creditor.
- (4) It is trite law that the appointment of a liquidator under section 162(1)(a) is a discretionary remedy.
- (5) Pursuant to section 8(1) of the Act, a company is insolvent if:
 - “(a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
 - (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
 - (c) either
 - (i) the value of the company’s liabilities exceeds its assets, or
 - (ii) the company is unable to pay its debts as they fall due.”
- (6) In the present case, PTV relies only upon section 8(1)(c)(ii), the so-called cash flow test of insolvency.
- (7) The expression ‘debts’ is nowhere defined in the Act, in contrast with the expression ‘liabilities’ used in section 8(1)(c)(i), which is the so-called balance-sheet test of insolvency (the term ‘liabilities’ being defined in section 10 of the Act).
- (8) Nevertheless, it is settled law that an arbitration award gives rise to an enforceable debt for the purposes of section 8(1)(a) of the Act as soon as it is issued, even if not yet the subject of an order under sections 81(1) and 84(1) of the Arbitration Act, 2013, for its enforcement in the same manner as a judgment.

- (9) More recently, a decision of this Court has proceeded on the basis that such an award is also a debt for the purposes of section 8(1)(c) of the Act. - **Donna Union Foundation v Koshigi Limited et al.**²
- (10) As in the case of section 123(1)(e) of the UK Insolvency Act 1986 ('UK IA 1986'), section 8(1)(c)(ii) of the Act is not a deeming provision (in contrast with section 8(1)(a) and (b) of the Act and in contrast, likewise, with UK IA 1986 section 123(1)(a) and (b)).
- (11) Insolvency (whether on the balance sheet test or the cash flow test) must therefore be proven.
- (12) The burden of proving a company's insolvency under section 8(1)(c) is on the Applicant.
- (13) Section 8(1)(c)(ii) (cash flow insolvency) is most commonly relied upon where a debt presently payable is not paid because of a lack of means.
- (14) In **Byblos Bank SAL v Al-Khudhairy**, Nicholls LJ said this of section 223(d) of the UK Companies Act 1948 (the forerunner to section 123(1)(e) of UK IA 1986 and accordingly the English equivalent to section 8(1)(c)(ii) of the Act):
- “it seems to me plain that, in a case where none of the deeming paras (a), (b) or (c) is applicable, what is contemplated is evidence of (and if necessary, an investigation into) the present capacity of a company to pay all its debts. If a debt presently payable is not paid because of lack of means, that will normally suffice to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law.”³
- (15) This passage was cited with approval by the Supreme Court in **BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL plc**,⁴ ('Eurosail') a decision that has since been applied in this jurisdiction.
- (16) In **Eurosail**, Lord Walker also had this to say (at paragraph [25]):
- “Section 123(1)(e) . . . is not what would usually be described as a deeming provision. It does not treat proof of a single specific default by a company as conclusive of the general issue of its inability to pay its debts. Instead it goes to

² BVIHCM2018/0230 (unreported, delivered 14th May 2019), in particular see paragraph [28] (Adderley J (Ag.)).

³ *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232 at page 247 (Nicholls LJ).

⁴ [2013] UKSC 28.

that very issue. It may open up for inquiry a much wider range of factual matters, on which there may be conflicting evidence.”

(17) When applying the cash flow test, the Court should not merely look at events as they stand at a moment in time. It is inherent in the language of section 8(1)(c)(ii) that the debtor’s prospects are very relevant when the court is exercising its discretion – ‘as they fall due’ is a phrase that looks into the future: see **Byblos Bank** at p. 247f and **Eurosail** at paragraphs [25], [33], [34] and [37].

(18) In particular, Lord Walker said this (**Eurosail** at paragraph [37]):

“the ‘cash-flow’ test is concerned, not simply with the petitioner’s own presently-due debt, nor with the other presently-due debts of the company, but also with debts falling due from time to time in the reasonably near future.”

(19) The application of the cash flow test should thus not depend ‘on a slavish focus on debts due at the relevant time’, see **Re Cheyne Finance Plc**:⁵

“Such a blinkered review will, in some cases, fail to see that a momentary inability to pay is only the result of a temporary lack of liquidity soon to be remedied”

(20) Rather, the two tests (balance sheet and cash-flow insolvency) are properly to be seen as standing side-by-side as part of a single exercise to determine whether (looking at the commercial reality) a company is unable to pay its debts, see **Bucci v Carman**.⁶

(21) Ultimately, the statutory test under section 8(1) of the Act must not be mechanically applied but must be applied in a way that has regard to commercial reality: **Evans v Jones**,⁷ cited with approval in **Donna Union Foundation v Koshigi Limited**.⁸

(22) When considering whether insolvency has been proved, the Court should not mechanically apply the cash flow insolvency test but should, in addition, have regard to the commercial reality (**Evans v Jones**, *supra*, at paragraph [24]), and in particular should not ignore Vidatel’s balance sheet position when coming to a determination whether it is unable to pay its debts within the proper meaning of section 8(1)(c)(ii) (**Bucci v Carman**, *supra*, at paragraph [29]).

⁵ [2008] BCC 18236 at paragraph [51] (Briggs J).

⁶ [2014] BCC 26937 at paragraph [29] (Lewison LJ).

⁷ [2017] Ch 138 at paragraph [24] (Lewison LJ).

⁸ BVIHCM2018/0230 (unreported, delivered 14th May 2019) at paragraph [41] (Adderley J (Ag.)).

- [33] Vidatel submitted that in the circumstances PTV has failed to prove, on the balance of probabilities, that Vidatel is insolvent by reason of an inability to pay its debts as they fall due.
- [34] Moreover, Vidatel submitted, it has an extant challenge to the arbitration award pending before the Paris Cour de Cassation, which might yet see the award overturned.
- [35] Also, Unitel, a company controlled by PTV, is refusing to pay substantial dividends owing to Vidatel, which would go part way to paying off the Debt.
- [36] Accordingly, submitted Vidatel, the application should be dismissed with costs.
- [37] PTV submitted the following:
- (1) On the law, Vidatel wrongfully seeks to suggest that if Vidatel can demonstrate that it is balance sheet solvent, then it is irrelevant that it is cash-flow insolvent. That is incorrect.
 - (2) The two tests for insolvency are disjunctive, as the wording of section 8(1)(c) of the Act makes clear.
 - (3) Thus section 8(1)(c) of the Act provides that a company is insolvent if:
“either: (i) the value of the company’s liabilities exceeds its assets,
or (ii) the company is unable to pay its debts as they fall due.” (Emphasis added)
 - (4) The same is true in English law, under the Insolvency Act 1986. If a company is cash flow insolvent, it cannot try to avoid a winding-up order on the basis that – on a balance sheet test – it has a surplus of assets over liabilities.
 - (5) Indeed, in **Byblos Bank SAL v Al-Khudhairi**,⁹ the English Court of Appeal case to which Vidatel refers, Nicholls LJ made this perfectly clear. He said:

“If a debt presently payable is not paid because of lack of means, that will normally suffice to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law.”
 - (6) While Vidatel puts the emphasis on ‘lack of means’, Vidatel does not emphasise the subsequent sentences: which show that it ‘is trite law’ that, if a company is unable to pay

⁹ [1987] BCLC 232.

its debts, the mere fact that a company can show that 'there is a surplus of assets over liabilities' is irrelevant.

- (7) Those sentences also show that when Nicholls LJ is talking about 'lack of means', he is talking about liquidity issues/lack of working capital – rather than suggesting that, in addition to proving cash flow insolvency, a claimant has to establish the company is balance sheet insolvent.
- (8) Further and in any event, it would be wrong to read into section 8(1)(c)(ii) the words 'unable for want of means' and thereby try to import the balance sheet test set out in section 8(1)(c)(i) as Vidatel seeks to argue: when that wording does not appear in section 8(1)(c)(ii) and to do so would conflict with the express language of the statute, which makes it clear (by the words 'either...or') that the tests in (i) and (ii) are in the alternative.
- (9) It is long established that a creditor of even a substantial and prosperous company, whose debt is not disputed, is entitled to petition for its winding up: see the **Cornhill Insurance**¹⁰ case.
- (10) The other English decisions to which Vidatel refers – **Eurosail**¹¹ and **Bucci v Carman**¹² – also do not purport to say that (contrary to the wording of the United Kingdom Insolvency Act 1986) a petitioner must prove both cash flow insolvency and balance sheet insolvency.
- (11) Vidatel's contention that the two tests give rise to 'a single exercise ... looking at the commercial reality' is wrong and contradicted by authority:
 - (a) On the contrary, in his judgment in **Bucci v Carman**, Lewison LJ expressly endorsed at paragraphs [28] – [29] what Briggs J had said in the earlier case of **Re Cheyne Finance PLC**,¹³ and noted that the cash flow and balance sheet tests are 'alternative' tests for insolvency.

¹⁰ *Cornhill Insurance plc v Improvement Services Ltd. & Ors* [1986] WLR 114.

¹¹ [2013] 1 WLR 1408.

¹² [2014] BCC 269.

¹³ [2008] BCC 182.

- (b) Whilst Lewison LJ also said in that case (at paragraph [29]) that the two tests 'stand side-by-side', he simply meant that both were available to a petitioner. Lewison LJ plainly did not mean (as Vidatel tries to suggest) that the two tests had to be applied in conjunction: nor could he have done so, when the United Kingdom Insolvency Act 1986 makes it clear that they are 'alternative' tests, and Lewison LJ said that he expressly agreed with Briggs J's views that they were 'alternative' tests.
 - (c) Furthermore, the Supreme Court's reference in **Eurosail** to the two tests standing side-by-side (at paragraph [35]) was no more than a recognition of the fact that there are two different tests, with the legislation giving 'no indication of how they are to interact'.
 - (d) In any event, the real point of the discussion in **Bucci v Carman** was the question of whether (as the debtor tried to argue) the balance sheet test is excluded merely because a company is for the time being in fact paying its debts as they fall due: see paragraphs [26] and [29] – i.e. the obverse scenario to the present case. The Court of Appeal rejected that argument, precisely because the two tests are alternatives: holding that it was irrelevant that the company could show it was cash flow solvent, if it was balance sheet insolvent.
- (12) Moreover, applying the law to the facts of the present case, Vidatel clearly cannot pay its debts as they fall due at any point in the immediate future.
- (13) This is entirely a problem of Vidatel's own making, because Ms. dos Santos has stripped out all the liquid dividends from Vidatel (worth over US\$400 million) since 2015: in some cases in a breach of the WFO, which this Court has previously found to have been deliberate.
- (14) As a result, Ms. dos Santos has left Vidatel unable to discharge the debts which this Court has now found due and owing, both in relation to the Final Award, and with respect to the Ordered Sum.

- (15) Furthermore, as noted above, Vidatel has not applied – as it could have done – to vary the WFO or the AFO, in order to allow it to raise capital either by way of selling its shares in Unitel, or charging those shares.
- (16) Nor has Ms. dos Santos been prepared herself to put further working capital into Vidatel. This is so, despite the fact that when this Court (by Jack J.) made an order for the interim payment on account of costs (i.e. the Ordered Sum of US\$800,000) he referred to the English Supreme Court decision in **Goldtrail Travel Limited v Onur Air Tasimacilik AS**¹⁴ (which held that the Court was entitled to take account of the fact that a company might have wealthy backers who were able to meet costs orders imposed by the Court); noted that Ms. dos Santos in 2015 was worth some US\$3 billion; and noted that she had also been able to pay Vidatel's legal fees to the tune of 15.5 million Euro; and therefore should have no difficulty in putting Vidatel in funds, to make the US\$800,000 interim payment.
- (17) This is not a case of a temporary cash flow problem at Vidatel that is 'soon to be remedied' (in the words of Briggs J in **Re Cheyne Finance Plc**¹⁵). It is an endemic and long-term problem, to which Vidatel has proffered no concrete solution which would allow it to discharge its indebtedness in the immediate future.
- (18) A suggestion that Vidatel has made that it could (absent the WFO and the AFO) use its assets as collateral to raise finance is not a valid basis for asserting that it is not insolvent: see, e.g. **Bucci v Carman** at paragraph [31] – a company cannot 'stave off cash-flow insolvency by going deeper and deeper into long-term debt'.
- (19) It follows that Vidatel is insolvent on a cash flow basis.
- (20) It is irrelevant (even accepting as complete and accurate, Vidatel's unsubstantiated summary of its assets and liabilities set out in its skeleton argument) that Vidatel can try to argue that it is balance sheet solvent – because it is 'trite law' that this is an irrelevant consideration.

¹⁴ [2017] 1 WLR 3014.

¹⁵ [2008] 2 All ER 987 at paragraph 51 (Briggs J).

DISCUSSION

- [38] I accept PTV's submission that Vidatel clearly cannot pay its debts as they fall due at any point in the immediate future, thus that it is insolvent on a cash flow basis.
- [39] I also find PTV's evidence and submissions more credible than Vidatel's assertions that the AFO has expired or been discharged. There is no documentary evidence for Vidatel's assertions in this regard, and they are based on hearsay. It would, in my respectful judgment, be extraordinary for a court, such as the Angolan court, to make orders further to an order that has already either been discharged or expired.
- [40] I also accept PTV's submission that the effect of the AFO upon Ms. dos Santos's assets, including her interest in Vidatel, is that Vidatel cannot discharge the Debt, and that Vidatel could not plausibly borrow money on commercial terms to do so.
- [41] I also accept PTV's submissions that it is unable to arrange for the AFO to be varied, or relaxed, to enable Vidatel to pay the Debt. PTV is not a named party to those proceedings. Even if PTV is indirectly state owned, this does not mean that PTV is able to influence whether or not the Angolan State might consent to vary the AFO. The Angolan State appears to be concerned with a far bigger asset recovery issue, the terms of the AFO suggest, than PTV's relatively smaller concern to obtain payment of the Debt.
- [42] On the other hand, I accept that Vidatel does have standing to apply to the Angolan courts to vary or discharge the AFO, but that it has not done so.
- [43] I accept further that the Debt in issue is due and owing. Vidatel's appeal to the Paris Cour de Cassation – which appears to be an appeal of last resort, in circumstances where all Vidatel's other attempts to have the underlying award set aside have failed – does not change that.
- [44] In relation to the laws of this jurisdiction, there would appear to me to be nothing to warrant reading words such as 'unable for want of means' into section 8(1)(c)(ii) of the Act. If the legislature had intended such a restriction to apply, it would have provided for it. Such a restriction would unduly circumscribe the situations in which a creditor could apply to wind up a company.

- [45] I also accept PTV's submissions that the 'balance sheet' and 'cash flow' tests are disjunctive. It suffices for a creditor to show insolvency on one or the other.
- [46] Since a winding up order is a discretionary remedy, the Court can take into account, as a discretionary factor, whether a company's inability to discharge debts as they fall due is caused by temporary or other difficulties unrelated to its balance sheet, which might be healthy. But I do not apprehend that there is any statutory restriction in this regard, as learned Queen's Counsel for Vidatel has submitted there to be.
- [47] In the present case, in my respectful judgment, the AFO represents an existing and, certainly as far as can be anticipated, an enduring obstacle to payment and indeed to any plausible prospect for Vidatel to borrow money on a commercial basis to do so. Vidatel has standing to apply to the Angolan courts to have the AFO discharged or varied, but it has not done so.
- [48] PTV has submitted that Vidatel's efforts to get around this enduring obstacle are too little, too late. I agree.
- [49] I therefore need not decide whether or not the WFO also represents an obstacle. I find that question somewhat more difficult to decide, since it would appear to be within PTV's power to agree a variation. The AFO does, however, amount to a continuing obstacle, with, apparently, no end to it in sight. That suffices to establish that Vidatel cannot pay its debts as they fall due.
- [50] In such circumstances I am satisfied that PTV is entitled to the liquidation order that it now seeks.
- [51] At the hearing on 30th September 2021, I delivered the result of this application. Since that hearing was arranged on short notice to the parties, with their leading Counsel unable to attend, I pronounced the Court's judgment that the Company was to be put into liquidation forthwith, with the two proposed joint liquidators appointed immediately as prayed, but that consequential matters, pertaining to the precise terms of their powers and as to costs, should be reserved for further submissions.

- [52] Moreover, at the hearing on 30th September 2021, it had been my intention to explain the Court's reasoning in an oral judgment. A number of technological difficulties intervened for some of the participants in the video-conference hearing, such that I abandoned this idea and undertook to produce this written note of judgment. Where there are any differences between the partly delivered oral reasons and this note, the latter is to prevail.
- [53] I take this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar