



In The Supreme Court of Bermuda

COMPANIES (WINDING UP) JURISDICTION

COMMERICAL COURT

2024: No. 265

IN THE MATTER OF AFINITI LTD

**(PROVISIONAL LIQUIDATORS APPOINTED FOR RESTRUCTURING
PURPOSES)**

AND

**IN THE MATTER OF AN APPLICATION FOR AN INTERIM
INJUNCTION PENDING APPEAL BROUGHT IN THE LIQUIDATION
PROCEEDINGS**

RULING **(In Chambers)**

Date of Ruling: 26 November 2024

Appearances: *Sam Stevens* of Carey Olsen Bermuda Limited for Mr. Chishti

Ex parte on notice to the Joint Provisional Liquidators and the Company and the Secured Lenders

RULING of Martin J

***Ex tempore* ruling¹**

1. The Court has decided to refuse Mr. Chishti's application for injunctive relief. These are the Court's reasons.
2. This is an application made on behalf of Mr. Chishti by way of *ex parte* summons dated 25 November 2024 in the liquidation proceedings. In those proceedings the JPLs had sought the sanction of the court to enter into a transaction by and between the Company and the secured lenders whereby the assets of the Company are to be transferred and/or sold to a new company owned by the secured lenders in exchange for the restructuring of the Company's debt². This is called the Transaction in the substantive Ruling that the Court has already given in relation to the applications made by the JPLs for the Court's sanction to enter into the Transaction either as a compromise or as a sale or both. Time does not permit me to recount the background history which I summarized in my Ruling of 20 November 2024 which I incorporate by reference (so far as material) into this Ruling.
3. Mr. Chishti opposed the grant of the Court's sanction on the grounds that the Valuation Report relied upon by the JPLs was fundamentally flawed and therefore unreliable. Mr. Chishti sought an adjournment of the sanction hearing in order to have a full trial of the issue for valuation before the Court granted its sanction. The Court refused Mr. Chishti's application for an adjournment and granted its sanction by a ruling dated 20 November 2024.
4. The JPLs now intend to proceed to enter into the Transaction in accordance the Court's sanction Ruling, and to take steps to seek recognition of the effect of the Transaction in the United States Bankruptcy Court in Delaware under Chapter 15 of the US Bankruptcy Code. The JPLs intend to make the application to the US Court for recognition in Delaware tomorrow, on 27 November 2024.

Urgency

5. The application has been made on the grounds of urgency and has proceeded *ex parte* for that reason, and the Court did not see any advantage to adjourning the application to an *inter partes* hearing given the fact that the Transaction is due to close on 3 December 2024 and Mr. Chishti's application for leave will not be determined until next year.

¹ This note has been modified slightly from the version distributed to the parties on the giving of the *ex tempore* ruling to correct some small typographical and syntactical errors.

² The full terms of the Transaction are summarised in the Court's Ruling of 20 November 2024

Mr. Chishti's application

6. Mr. Chishti is dissatisfied with the court's ruling of 20 November 2024 and has evinced an intention to seek leave to appeal against the Court's Ruling in a separate application. At the same time, Mr. Chishti indicated that he would seek an urgent order for a stay of the Court's sanction Order pending his application for leave to appeal.
7. However, Mr. Chishti's attorneys have indicated that he has decided not to make an urgent application for leave to appeal but will do so in the ordinary course under the rules and further that he does not intend to seek a stay of the Court's Sanction Order pending his application for leave to appeal.
8. Independently of the appeal process, Mr. Chishti has instructed his attorneys to make this application for an injunction to restrain the Company and the JPLs from proceeding to consummate the Transaction.

The nature of the application

9. This change of tack on Mr. Chishti's part gives rise to some initial hurdles for Mr. Chishti's present application. In the first place, this application is made in the liquidation proceeding and arises out of the Court's determination of the sanction application. Therefore, the court's jurisdiction is being invoked in the context of the sanction application, which this court has already determined against Mr. Chishti. This raises the question whether the court is *functus officio*. I apprehend that the conventional and (in my view) the more appropriate course would have been for Mr. Chishti to seek relief under section 176 (5) of the Companies Act 1981 to regulate the proposed actions of the JPLs in the liquidation proceedings. I am of the view that that this would have engaged the Court's powers in a more appropriate way.
10. This observation is made because, as a matter of the Court's jurisdiction, there is no free-standing jurisdiction to grant injunctive relief independently from a cause of action (save in the case of the enforcement of foreign judgments³). Bermuda has not amended the Supreme Court Act 1905 in line with the English legislation which was amended to cure the lack of jurisdiction to grant a free-standing injunction identified in **Mercedes Benz v Leiduck** [1979] AC 210. The **Mercedes Benz** rule has been applied in the Bermuda courts as a binding English precedent and I cannot find any example of a Bermuda case which has distinguished it or departed from it. (See for example **Gold Seal Holding Ltd et al v Paladin Ltd et al** BM 2014 SC 65 per Kawaley CJ at paragraphs 19-25).

³ **Mubarak v Mubarak** [2002] Bda LR 63 per Hargun AJ

11. The first ground of refusal therefore is that the Court has no jurisdiction to grant an injunction in these circumstances.
12. However, in the interests of transparent justice, and to avoid the appearance that the Court is refusing the application on jurisdictional or “technical” grounds alone, and in case I should be held to be wrong in my approach by a higher court, I have considered the matter *as if* I had the relevant power to grant a free-standing injunction.
13. I would also have refused the grant of the injunction had I applied the conventional injunction principles to restrain a threatened breach of a right or the infraction of the rights of action open to litigants to preserve or protect their legal rights. My reasons for reaching this conclusion are briefly summarized below.

The evidence

14. Mr. Chishti did not file an affidavit in support of the application for the injunction, but he got one of his attorneys to do it for him. For reasons I have given on a different occasion⁴, substantive applications such as this should not be supported by the evidence of attorneys on behalf of their client. That evidence should be given by the party who is applying, or a competent witness who is able to set out the averments of fact from their own personal knowledge. The content of the affidavit sworn in support of the application by Mr. Masters is therefore not one which contains substantive allegations of fact but is based wholly on legal argument.
15. Mr. Masters attaches the draft documents on which the JPLs will proceed before the US Court, and some relevant correspondence. However, he does not describe the nature of the impact of the injunction on the other parties, and he does not refer to Mr. Chishti’s ability to meet any obligation that the Court may impose upon him to fortify his cross undertaking in damages, should the Court require him to do so. Mr. Stevens sought to meet the last point by saying it is for the JPLs and the Company to seek fortification, so Mr. Chishti is not required at this stage to provide details of his ability to meet the requirement if he is called upon to do so. He also advanced the submission that the effect of refusing the injunction will be to shut out Mr. Chishti from access to justice. The Court considers that such assertions should be addressed in the evidence given by the applicant. However, in the circumstances of this case nothing turns on that for reasons which I will set out below.
16. However, absolutely nothing is said about the Transaction or its effect on the interests of the other creditors, nor are any of the consequences of the failure to

⁴ **Alpine Partners LP v Sumitomo and Wasty** 14 November 2024

proceed with the Transaction addressed in the affidavit. This is a remarkable omission. The duty of frank and complete disclosure applies to this application as it does to any other *ex parte* application, albeit that this application has been made on notice to the JPLs who have submitted a letter setting out their comments. That is why the Court took pains to ask for further particulars of the impact on the Company and its creditors, employees, customers and the eligible holders (as defined in the Transaction documents) if the Transaction were not to proceed.

17. The effect upon the stakeholders will be catastrophic in financial terms and for employees, highly disruptive in human terms as well. The effect will not be just “materially adverse” as submitted: it will collapse the business and result in no recovery for anyone except the secured creditors, and likely a vastly reduced recovery at that.
18. This is of central importance because the Court must weigh the consequences that flow if the Transaction does not proceed against the consequences to Mr. Chishti if it does. For the reasons I explain below, it is obvious that the consequences that flow to all the creditors and stakeholders if the Transaction does not proceed far outweigh the consequences to Mr. Chishti if it does in terms of the balance of competing interests of justice as between the parties.
19. The Court observes that it is always necessary for the proper rules and protocols for *ex parte* applications to be followed. These are well known and so it is unnecessary for me to set them out here. I would re-iterate that the Court can refuse to grant injunctive relief on this ground alone. In this case, it is only (and with hesitation) because Mr. Stevens was prepared to concede the implications that would flow from the prevention of the Transaction that the Court has refrained from refusing relief on this ground. It is to be hoped that this will serve as a reminder that failure to observe these requirements in the future will likely be met with a robust attitude from the Court.

Mr. Chishti’s “rights”

20. The short point that is made by Mr. Stevens is that Mr. Chishti says that his rights under an Indemnity Agreement between himself and the Company dated 1st January 2020 will be rendered “nugatory” if the Transaction proceeds, and it is said that this would be unjust⁵.

No good arguable claim

21. In order to seek an injunction of this type, the applicant must show that he or she has a good arguable case that there is a legal right that will be infringed in the absence of an injunction that will lead to damage or a legally redressable injury or

⁵ I mean no discourtesy to his written and very able oral arguments by not setting them all out here, but time does not permit.

infringement of a legally enforceable right which is not capable of being redressed by an award of damages. In my view, there is no such “right” in these proceedings.

22. Mr. Chishti says that he has a right under the Indemnity Agreement which gives him (a) an absolute defence to claims between himself and the company and its affiliates (b) a right of indemnity in respect of the payment of all expenses that he incurs in litigation with the company and its affiliates in respect of claims arising from actions taken in his capacity as an officer of the company (c) a right of advancement of those expenses and (d) a right to compel the Company to transfer or assign the obligation of the indemnity to a solvent third party. These are the rights that Mr. Chishti will seek to establish if he is given leave to commence proceedings against the Company in a separate application that he intends to make in the liquidation proceeding, for which the Court has already given its directions.

23. Mr. Chishti may or may not have some of those rights under the Indemnity Agreement. That is to be determined on a separate application if leave is given to Mr. Chishti to pursue his claims. As things presently stand, the Company against whom Mr. Chishti intends to make that claim is hopelessly insolvent. Mr. Chishti does not have any claim against the new company that is to acquire the assets of the Company in the Transaction. The Court has already held that whatever Mr. Chishti’s rights may be, they are rights exclusively against the Company⁶. Section 9 of the Indemnity Agreement (if it is a valid and enforceable obligation) purports to enable Mr. Chishti to compel *the Company*⁷ to require a successor company to assume the Company’s obligations to indemnify Mr. Chishti. That right is self-evidently a right against the Company.

24. The Company is insolvent, and the secured lenders are entitled to exercise their rights under their security in circumstances when no value remains in the Company, because the value of the secured debt exceeds the total value of the Company’s assets. The Company is also cash flow insolvent. The Company is expected to last no more than a few weeks in the absence of the restructuring of the Company’s capital and debt structure into a new company as proposed in the Transaction documents.

25. An injunction preventing the Transaction proceeding would force the secured lenders to exercise their enforcement rights under their security which would in turn result in the Company being unable to proceed with any solvent restructuring. It would also have the result that Mr. Chishti would be unable to make any recovery as a contingent creditor in respect of the rights that he asserts that he has under the Indemnity Agreement. It is accepted that on the evidence there is no surplus

⁶ See para 172 of the Court’s Ruling of 20 November 2024.

⁷ My emphasis added

beyond the value of the assets which are exceeded by the liabilities to the secured lenders, and so no unsecured creditors will be entitled to share in any surplus recovery.

26. It seems to me therefore that the right that Mr. Chishti seeks to protect by the grant of the injunction is entirely illusory. There is, in reality, no good arguable case that he has a right that will be infringed by the Transaction. His rights, whatever they may be, remain exclusively against the Company. In this, Mr. Chishti is in no different position than any other unsecured creditor who seeks to recover against an insolvent company which has no distributable assets. It is not a case of “shutting [Mr. Chishti] out” of any rights of action or access to the Court in an unconstitutional or unfair way. The automatic stay prevents any creditor from issuing proceedings without the leave of the Court. The fact that the Company will not have any assets from which to make a distribution is not a basis for alleging that Mr. Chishti’s rights have been denied.

27. In the course of argument, I put the opposing situations to counsel for comparison on the assumption that if the Court were to accept (for the sake of argument) that Mr. Chishti’s claims were good ones, and if the injunction were granted, the uncontroverted evidence is that the secured lenders would proceed to an enforcement action, resulting in no recovery for anyone except the secured creditors. In that situation, Mr. Chishti’s “rights” would be rendered nugatory. In comparison, if the Transaction proceeds without any impediment, Mr. Chishti’s “rights” would also (on Mr. Chishti’s case) be rendered nugatory.

28. The only answer was that Mr. Chishti would have been deprived of his right to make his case to the Court. That is not in my view a sufficient answer.

Damages are an adequate remedy

29. Further, Mr. Chishti’s “rights” or claims are financial in nature. There is (in my view) no justification for the plea that damages would not be an adequate remedy. If this Company were solvent, there would (obviously) be no basis for an injunction of this type. The fact that the Company is insolvent does not mean that damages would not be an adequate remedy. It simply means that that right would not be capable of being enforced. That is the same for any unsecured creditor where the assets of the Company are insufficient to produce a dividend for creditors. The Company is the only party against whom Mr. Chishti can enforce his rights under the Indemnity Agreement. The fact that his alleged rights to reimbursement will not be paid by the Company in full (or at all) does not detract from the principle that damages are an adequate remedy for his claims. This includes his equitable claim for specific performance, which is to the effect that he can claim against someone else for a monetary reimbursement.

The balance of justice

30. In my judgment, the balance of justice⁸ is plainly against the grant of an injunction because of the impact upon the secured creditors, the Company and certain of its essential creditors, its employees, as well as any eligible holders or preferred shares and warrants (as defined in the transaction documents). They will all be irretrievably harmed.
31. Mr. Chishti's "right" under the Indemnity Agreement to assert his claim by way of indemnity as a defence to the claims made by the company is unaffected by the transaction, and his "right" to claim reinvestment and advancement of expenses against the company is also unaffected by the transaction. Mr. Chishti's claim for specific performance of the obligation to transfer the Company's obligation of indemnity to a solvent third party is of no relevance in the present circumstances because there is no obligation on the secured lenders to assume the Company's indemnity obligation as part of the restructuring of the Company's debt. As I have noted above, that right is exclusively against the Company. If the Company fails to perform that obligation, then Mr. Chishti can seek to recover damages measured by the amount of money he has spent which he has been unable to recover (if he is successful) against the other parties (where possible) or as an unsecured claim in the liquidation of the Company.
32. In weighing the competing interests of justice, and assessing the impact of the injunction sought against the nature of the right Mr. Chishti seeks to "preserve", the Court has concluded that it would be most unjust to all the other stakeholders and parties to the Transaction to prevent the JPLs from proceeding to enter the Transaction on the strength of Mr. Chishti's claims.
33. If the Transaction does not proceed the Company's business will collapse, its customers will find other contractors, its creditors, both secured and unsecured, will suffer very substantial losses, and its employees will lose their jobs. These are all avoidable losses if the Transaction proceeds.
34. For the reasons I have summarized above, Mr. Chishti is in reality in no different position one way or the other. If the Transaction does not proceed, and Mr. Chishti (theoretically) establishes that he is right in his claims against the Company, then his claims will still be unrecoverable because the Company will have no assets with which to pay him. If he is right that if the Transaction proceeds it will not be worth his while pursuing his claims because the Company is a "shell", he is in no different position.

⁸ For brevity I refer to the extract quoted in Mr. Stevens' submissions in **National Commercial Bank Jamaica Ltd v Olint Corp** [2009] 1 WLR 1405 at para 16 per Lord Hoffman.

35. In my judgment, the balance of justice is very heavily against granting an injunction. It would in my view amount to a travesty of justice to all the stakeholders to allow Mr. Chishti to use his potential claims against the Company to defeat the reorganization and reconstruction of the Company's debt.

36. For those reasons, the Court has refused the grant of the relief sought and the application made by Mr. Chishti for an injunction is hereby dismissed. Counsel will draw an Order in those terms for signature by the Court.

26 November 2024



THE HON. ANDREW MARTIN
PUISNE JUDGE