Neutral Citation Number: [2025] CA (Bda) 11 Civ

Civil Appeal No. 5 of 2025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE ANDREW MARTIN
CASE NUMBER 2024: No. 265

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 05/05/2025

Before:

THE HON IAN KAWALEY JUSTICE OF APPEAL
(Sitting as a Single Judge of the Court of Appeal)

- -

Between:

MUHAMMAD ZIAULLAH KHAN CHISHTI

Intended Appellant

- and -

AFINITI, LTD.
(in Liquidation)

Intended Respondent

Appearances:
Ms Siobhan Boys, Carey Olsen, for the Applicant/Intended Appellant

Hearing date(s): On the papers
Date of Decision: 4 April 2025
Date of Reasons: 5 May 2025

REASONS FOR REFUSAL OF LEAVE TO APPEAL

Background

1. By a Judgment dated 20 November 2024, Martin J (the "Judge") granted the Plaintiff/Intended Respondent (in provisional liquidation for restructuring purposes) (the "Company") the Sanctions sought in relation to a proposed Restructuring agreement with the Plaintiff's Secured Lenders (the "Sanctions Ruling"). The application was heard over two days and the Sanctions Ruling ran to 41 pages.

.

2. The Applicant applied to the Judge for leave to appeal against that decision. On 21 March 2025, the Judge refused that application for the reasons set out in a reserved Ruling.

3. By a Notice of Motion dated 28 March 2025, the Applicant applied to this Court for leave to appeal against the 20 November 2024 Ruling and Order. The application was dealt with by me as a Single Judge of the Court of Appeal. I refused leave on 4 April 2025.

4. These are the reasons for my 4 April 2025 decision.

The Supreme Court decisions

5. The Sanctions Ruling explains that the Company was placed in provisional liquidation for restructuring purposes to restructure its debt (which was primarily secured) and shareholding by transferring its undertaking to a new company and reorganizing the existing debt and shareholding (the "Transaction").

6. The Company is the ultimate holding company of a group of 32 companies engaged in the artificial intelligence business and was founded by the Applicant. In November 2021 he was forced to resign as Chairman, and the Company's fortunes were further damaged by market conditions in 2022. In 2024 the resultant "liquidity and leverage crisis" caused the Company to negotiate the Transaction with the Secured Lenders. Teneo FA provided a Valuation Report and Michael Morrison and Charles Thresh were appointed as Joint Provisional Liquidators ("JPLs") on 19 September 2024. The JPLs applied for the Sanctions Order on 2 October 2024 and considered that the Transaction was in the best interests of the Company's creditors overall (including trade creditors and employees.

7. The Applicant opposed the application on the grounds that the Transaction prejudiced his rights (as a contingent creditor) under the Indemnity Agreement previously entered

into between himself and the Company. The Transaction was approved both as a "Type 1" compromise under section 175 (1) (e) of the Companies Act 1981 (where a sanction was required) and as a "Type 2" sale under section 175 (2) (a) (where a sanction was not required but was sought on the grounds of it being a "momentous" transaction).

8. The decisions made by the Judge most relevant to the four grounds of appeal which form the subject of the application for leave to appeal to this Court are the following:

   (a) the Valuation was not flawed so as to undermine the reasonableness of the JPLs' reliance upon it. It was not intended to serve as anything more than a "*yardstick*" for the general reasonableness of the terms negotiated with the Secured Lenders.;

   (b) the Transaction was sufficiently 'momentous' to justify a Type 2 sanction being granted (by of alternative to a Type 1 sanction);

   (c) the Court was not required to carry out its own valuation, so an adjournment of the application to enable the Applicant to mount a more extensive challenge to the Transaction was not required;

   (d) there was no reason not to include the "*normal comfort*" in the recitals to the Sanctions Order recording the Court's satisfaction that the JPLs had acted properly in supporting the Transaction.

9. The Judge refused leave to appeal applying the tests applicable to challenging case management decisions, the exercise of judicial discretion and the recording of factual findings.

Merits of application for leave to appeal

10. The Judge's decision is well reasoned and appears to be both legally and commercially sound. The Company was seemingly hopelessly insolvent with the Secured Lenders in the driving seat. Restructurings typically offer a better return to creditors than a winding-up. Their terms are shaped by an infinite variety of commercial considerations and judgments which are not amenable to precise judicial evaluation but which professional liquidators routinely assess. Insolvency judges ordinarily rely upon rather than second-guess the business judgment of professional liquidators. Transferring the Company's entire undertaking was, almost by definition, a "momentous" transaction.

11. No 'independent' creditors opposed the application. The Applicant's opposition appears to have been materially motivated by the understandable 'angst' of a company founder about losing control of a cherished corporate creation. He sought to undermine

the Company's evidence about its financial position through evidence the Judge found to be unreliable. Another point he advanced (in support of the assertion that, properly analysed, the Company was not balance sheet insolvent at all) the Judge considered "*stretches the boundaries of credulity to breaking point…is 'pie in the sky'*" (paragraphs 140-141).

12. The Applicant's opposition to the Sanctions Order appears quite transparently to have been advanced in pursuit of his own personal commercial interests. It is trite law that an insolvency court when asked to sanction transactions in a restructuring or liquidation is bound to have regard to the interests of creditors as a whole.

13. In my judgment none of the following grounds of appeal (distilled below), despite being carefully crafted so as to appear arguable on their face, have "realistic as opposed to merely fanciful" prospects of success (as a basis for setting aside the Sanctions Order or amending the recitals) viewed in the commercial and legal context of the present case:

    (1) the Valuation was flawed and the Judge erred in finding he had a sufficient evidential foundation to grant the Sanctions;

    (2) the Transaction was not momentous and Type 2 approval was not appropriate;

    (3) an adjournment should have been granted to enable a more extensive investigation of the Transaction to be pursued; and

    (4) the recitals ought not to have recorded the fact that the Judge was satisfied that "*in deciding to take the necessary steps to give effect to the Transaction the JPLs have acted properly and in accordance with their duties to do what is in their view in the best interests of the Company and its creditors as a whole*".

Conclusion

14. For these reasons on 4 April 2025, I refused the application for leave to appeal against Martin J's Costs Ruling of 12 February 2025.