

UPDATE

The Deemed Dismissal of Applications to Appoint Liquidators

Update prepared by Shane Donovan (Senior Associate, British Virgin Islands) and Eleanor Morgan (Partner, British Virgin Islands)

The Eastern Caribbean Court of Appeal has confirmed the strict operation of the statutory requirement in the British Virgin Islands that an application for the appointment of a liquidator be determined within 6 months, failing which it will be deemed to have been dismissed. Applicants will therefore need to ensure that they remain vigilant to avoid such applications being dismissed as a result of any delay in their determination, including during the period following hearing and before a reserved judgment is delivered.

Introduction

In *KMG International NV v DP Holding SA*¹, the Eastern Caribbean Court of Appeal considered the operation of section 168 of the British Virgin Island's Insolvency Act, 2003 (the **Act**) in relation to appeal proceedings.

The Statutory Requirement

Section 168 requires that an application for the appointment of a liquidator be determined within 6 months after it is filed. That period may be extended by the Court for one or more periods not exceeding 3 months each if:

- (a) it is satisfied that special circumstances justify the extension; and
- (b) the order extending the period is made before the expiry of that period or, if a previous order has previously been made extending time, the period as extended.

If an application is not determined within the 6 month period, or within the period as extended, it is deemed to have been dismissed.

Section 168 expressly disappplies another section of the Act that permits the Court to extend time within which an action shall or may be done, either before or after time has expired.

The Court of Appeal held that the wording of the section is clear and reflects Parliament's obvious intention that applications to appoint liquidators under the Act must be dealt with expeditiously.

The Procedural Background

On 11 October 2016, KMG International NV (**KMG**) filed an originating application to appoint liquidators to a Swiss incorporated company, DP Holding SA (**DPH**), under section 163 of the Act which permits the BVI Court to appoint liquidators to foreign companies in certain circumstances. Immediately following the filing of the originating application, KMG applied *ex parte* for permission to serve the originating application on

¹ Interlocutory Appeal No. BVIHCMAP2017/0013, 16 April 2018.

DPH outside the jurisdiction, and for the appointment of provisional liquidators to DPH. Both applications were granted.

In November 2016, DPH applied to set aside both *ex parte* orders and 28 February and 1 March 2017 were allocated as the hearing dates.

On 10 February 2017, KMG made an application under section 168 for a 3 month extension of time for the determination of its originating application on the basis that service on DPH in Switzerland under the Hague Service Convention was still to be effected, and the originating application was therefore unlikely to be determined within 6 months of filing. The Court granted a 3 month extension by Order dated 13 February 2017.

The hearing of DPH's applications took place on 28 February and 1 March 2017. On 10 May 2017, the BVI Court set aside its previous order granting permission to serve the originating application outside the jurisdiction, but continued the appointment of the provisional liquidators pending the determination of any appeal from that decision.

On 6 June 2017, KMG was granted permission to appeal the decision. Its appeal was subsequently filed on 8 June 2017. By notice filed on 28 June 2017, DPH sought to uphold the Court's decision setting aside permission to serve the originating application outside the jurisdiction for the reasons it had given and for additional reasons. It also cross-appealed against the Court's refusal to discharge the appointment of the provisional liquidators.

The appeal and cross-appeal were heard by the Court of Appeal on 22 and 23 November 2017, and a decision was reserved.

In early December 2017, DPH discovered that KMG had not sought or obtained any further order extending time for the determination of the originating application beyond 11 July 2017. Although KMG maintained in correspondence that its originating application had not been dismissed, it nevertheless issued a second originating application for the appointment of liquidators to DPH on 28 December 2017.

By application filed on 19 January 2018, DPH applied to strike out the appeal proceedings on the basis that the Court of Appeal had no jurisdiction to determine the appeal, the originating application having been dismissed on 11 July 2017.

The Grounds Upon Which it was Argued that the Application has not been Dismissed

KMG argued that its original originating application had not been dismissed on the basis that:

1. The Court's decision to set aside the order granting permission to serve the originating application outside the jurisdiction had effectively determined the application. Accordingly, the originating application had been determined within the period for determination as extended, and there was therefore no need for it to have obtained any further extension;
2. Alternatively, the effect of the order continuing the appointment of the provisional liquidators pending the determination of the appeal was to impliedly extend the period for the determination of the originating application.

Whether the Application had been Determined

The Court of Appeal had little hesitation in finding that the setting aside of the service out order did not have the effect of determining the originating application.

Implied Extensions of Time

The possibility of an extension of time under section 168 being implied as a result of other orders made by the Court was an argument that had twice previously been rejected in two decisions of the Honourable

Madam Justice Indra Hariprashad-Charles of the BVI High Court². KMG sought to argue that those cases had been wrongly decided. However, the Court of Appeal held:

... that Hariprashad-Charles J was correct in finding that the applicants in both cases could not benefit from an implied extension of time to determine the originating applications based on orders made during the six month period for taking steps outside the period. Adopting and applying the learned judge's phrase, KMG cannot 'piggyback' an application for extension of time under section 168 to the other order made ... extending the appointment of the joint provisional liquidators to the determination of an appeal against [the setting aside of the service out order].

In summing up, the Court of Appeal held that:

... section 168 does not allow implied extensions of the period for determining an originating application, and even if it did, there was no implied extension in this case. The originating application to appoint liquidators of DPH filed on 11th October 2016 was therefore deemed to be dismissed pursuant to section 168 of the Act on 11th July 2017.

The Exercise of the Jurisdiction to Determine Academic Appeals

The Court of Appeal held that it retained jurisdiction to determine the appeal proceedings notwithstanding that the originating application had been dismissed prior to the hearing of the appeal. It considered it significant that the appeal had been commenced before the originating application had been dismissed by operation of section 168.

The Court of Appeal then conducted a review of the authorities on the discretion to determine disputes that had become academic between the parties culminating in the English Court of Appeal's decision in *Hutcheson v Popdog Ltd*³, in which Lord Neuberger MR held that:

Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

In applying this test, the Court of Appeal held that both the first and third limbs were satisfied.

The Court of Appeal also took into consideration the fact that there remained a live issue between the parties on the basis that KMG had filed a fresh originating application for the appointment of liquidators to DPH.

The Court of Appeal therefore decided that it would exercise its discretion to deliver its judgment in the appeal proceedings.

Conclusion

Although most applications to appoint a liquidator will be determined within 6 months of filing, it is not uncommon for the Court to reserve its decision where the application has been opposed. In such circumstances, applicants will need to remain vigilant to ensure that they apply for an extension of time under section 168 to avoid their application being dismissed before it is determined including, if necessary, at the time that judgment is reserved.

Mourant act on behalf of DPH in these proceedings and instructed Stephen Moverley Smith QC of **XXIV Old Buildings**.

² In *Safe Solutions Accounting Limited (in administration) v French Connections Limited* (Claim No. BVIHCV2005/0242, 24 May 2006) and *Citco Global Custody NV v Y2K Finance Inc.* (Claim No. BVIHCV2008/0146, 10 February 2009).

³ [2012] 1 WLR 782.

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