

UPDATE

Standing to challenge the decisions of BVI office holders

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The BVI Court of Appeal has, in a recent judgment,¹ considered the standing of an applicant to challenge the decisions of BVI office holders in liquidation proceedings. The judgment also looks at what test will be applied in challenging those decisions once standing has been established, and the jurisdiction to expunge or amend an admitted claim in liquidation under section 210 of the BVI Insolvency Act, 2003.

Background

Steven Goran Stevanovich (**Stevanovich**) was the sole director of the BVI company, Barrington Capital Group Limited (the **Company**). The Company operated as an investment fund that loaned money to various businesses, including a US group of companies known as the Petters Group Inc (the **Petters Group**), which was controlled by Tom Petters. In 2009, Stevanovich placed the Company into solvent liquidation. He resigned as the Company's sole director and was replaced by an independent corporate director to oversee the dissolution of the Company. Between August 2010 and January 2011, the Company's affairs were wound up and the Company was dissolved.

In June 2009, it transpired that the Petters Group was being operated as a Ponzi scheme and Tom Petters was charged in the US with mail fraud, money laundering and conspiracy. A trustee in bankruptcy (the **Trustee**) was appointed to the Petters Group under US Chapter 11 Proceedings. The Trustee subsequently issued a complaint in the US Bankruptcy Court seeking to avoid payments which had been made by the Petters Group, including those made to the Company. The Company did not defend the US complaint and, in April 2015, default judgment was entered against the Company.

While the US proceedings were ongoing, in April 2013, the Trustee applied to the BVI High Court to restore the Company into liquidation. The application was approved, the Company was restored to the register, and joint liquidators were appointed over the Company (the **JLs**). The Trustee submitted a claim in the liquidation of the Company for payment of the sum claimed in the US proceedings. The JLs admitted the Trustee's claim and in October 2016 commenced proceedings against Stevanovich in the BVI for misfeasance and fraudulent trading (the **BVI proceedings**).² The JLs sought a contribution from Stevanovich personally as a former director of the Company, to satisfy the debt following the admission of the Trustee's claim. Stevanovich defended the proceedings by challenging the enforceability of the US default judgment in the BVI and the decision of the JLs to admit the Trustee's claim. In separate proceedings, Stevanovich applied to the court pursuant to section 273 of the Insolvency Act, 2003 (the **Insolvency Act**), to set aside the JLs' decision to admit the claim, or alternatively that the JLs be directed to apply to the court under section 210(2) of the Insolvency Act to expunge the claim. The JLs argued that Stevanovich was not a 'person aggrieved' under section 273, and therefore lacked standing to seek the relief.

¹ *Steven Goran Stevanovich v Marcus Wide and Mark McDonald* BVIHCMAP2019/0004 (7 March 2022, unreported).

² Claims of misfeasance and fraudulent trading were brought pursuant to sections 254 and 255 of the Insolvency Act, 2003.

In the High Court

By decision dated 5 December 2018, Wallbank J dismissed the section 273 application, finding that Stevanovich had no standing to seek to set aside the JL's decision as he was not an 'aggrieved person' under the provision. Wallbank J concluded that even if Stevanovich had standing, a review of the decision of the JLs would not be subject to the perversity test established in *Re Edennote Ltd*;³ the question was simply whether or not the proof of debt should have been admitted by the JLs. Wallbank J also concluded that there was no real need to resolve the issues arising from the section 273 application in these proceedings, as the BVI proceedings provided a convenient avenue for their resolution; and, it would not be appropriate to grant alternative relief under section 210(2) as the provision was not engaged.

Stevanovich appealed the decision.

In the Court of Appeal

On appeal, the Court of Appeal was tasked with considering two central issues:

- (i) whether Wallbank J erred in concluding that Stevanovich did not have standing to apply to set aside or reverse the decision of the JLs pursuant to section 273 of the Insolvency Act; and
- (ii) if Stevanovich did have standing, whether Wallbank J ought to have set aside or reversed the decision of the JLs to admit the Trustee's claim in the Company's liquidation, or direct that the JLs make a section 210 application.

The standing issue

Stevanovich argued that Wallbank J ought to have found that he had standing as either a debtor or as a person who had been directly affected by the liquidators' exercise of power, who would not otherwise have any right to challenge the exercise of that power.

In reply, the JLs submitted that Wallbank J had applied the law correctly, as applied by the Court of Appeal in *ABN AMRO*.⁴ The JLs held that Stevanovich, as an alleged debtor, was not directly affected by the JLs' decision; he had no legitimate interest in the section 273 relief; he had another forum in which to seek relief; and therefore he did not have the requisite standing to seek section 273 relief.

Section 273 of the Insolvency Act

Section 273 provides: '*[a] person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.*'

The meaning of 'person aggrieved' is not defined by the Insolvency Act, however this was considered in previous decisions.⁵ Upon considering the relevant authorities, the Court of Appeal held that –

- (i) An applicant for relief under section 273 must demonstrate the capacity in which they seek relief, and importantly that they are not a complete outsider to the liquidation.
- (ii) The class of potential applicants is not limited to persons in specific capacities ordinarily accepted by the courts, such as creditors, debtors or contributories. The courts have recognised a general class of potential applicants who are persons '*directly affected by an act, omission or decision of an office holder, and who would not otherwise have any right of challenge*'.
- (iii) Proof that an applicant possesses a capacity or qualification which would ordinarily entitle them to seek section 273 relief is not decisive of the applicant's standing. The applicant must go beyond demonstrating that they possess the capacity and show that the relief is being sought in the capacity claimed.
- (iv) Apart from showing that the relief is in fact sought in the capacity set out, an applicant must demonstrate that they possess a legitimate interest in the section 273 relief. Merely being affected by the outcome of the application is insufficient.

³ *Re Edennote Ltd, Tottenham Hotspur plc v Ryman* [1996] 2 BCLC 389.

⁴ *ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v The Kenneth Kryz et al* BVIHCCMAP:11-16,23-28 of 2016 (20 November 2017, unreported) (**ABN AMRO**).

⁵ *ABN AMRO; Kevin Gerald Stanford v Stephen John Akers et al* BVIHCCMAP2017/0019 (12 July 2018, unreported).

Stevanovich, in support of the section 273 application, identified himself as a former sole director of the Company. However, he did not assert that he sought the relief in that capacity. Rather, Stevanovich sought the relief as a defendant to the proceedings brought against him for contribution to the claims which were admitted in the US Court. As a defendant to the claim for contribution, Stevanovich was not a creditor, contributory, or a debtor. Stevanovich's standing to seek relief would therefore only fall to be considered under the rubric of a person who was directly affected by the JLs decision and who would not otherwise have any right to challenge the decision.

Standing as an alleged debtor

Stevanovich, as a defendant to the JL's claim for contribution was merely alleged to be a debtor. The Court of Appeal noted that in *ABN AMRO*, Pereira CJ rejected the argument that an alleged debtor could have standing to bring proceedings under section 273 of the Insolvency Act, concluding as follows: '*It is quite difficult to see the basis on which an "alleged debtor" as distinct from "a debtor" of an insolvent estate would be concerned or affected by the ultimate distribution of an estate in liquidation. Such a person would be a complete outsider to the liquidation*'.

The Court of Appeal was bound by its decision in *ABN AMRO*. The Court of Appeal held that, in any event, it was in agreement with the reasoning in *ABN AMRO*. While English Law has recognised that a person who is ordered to make a payment to the liquidator of money repayable to an insolvent company may qualify as a 'person aggrieved', there is no indication that a person who has not yet ordered to do so can qualify as a person aggrieved.

The Court of Appeal found that Stevanovich, as an alleged debtor to the Company, did not have standing to seek section 273 relief against the Company as a person who is directly affected by the exercise of a power given specifically to the JLs. This was concluded on the basis that:

1. There were other avenues available to Stevanovich to challenge the JLs' decision to admit the Trustee's claim.
2. Stevanovich had no legitimate interest in the relief sought. Stevanovich was an outsider to the Company, its affairs and the central purposes of the liquidation proceedings. The fact that Stevanovich would be impacted by the outcome of the proceedings was a personal interest and was far removed from the central purposes of the liquidation proceedings. This personal interest did not sanction the Court's reversal of a decision that had nothing to do with him directly. That would, in effect, be allowing an unconnected person to the liquidation to dictate how the liquidation was to proceed, which is clearly not contemplated by the Insolvency Act.

The Court of Appeal concluded that Wallbank J correctly found that Stevanovich did not have standing under section 273. That being the case, the Court of Appeal was not required to substantively consider the second issue. However, it chose to do so in the interests of completeness.

Review of the JLs' decision

The Court of Appeal turned to consider whether, in the event Stevanovich did have standing, Wallbank J should have set aside the JLs' decision or directed that a section 210 application be made.

The perversity test

The perversity test was developed in *Edenote*, and is most often associated with applications under section 273 of the Insolvency Act and the equivalent provisions under English law. The test is that, except in cases involving fraud and bad faith, the court will not interfere with the decision of a liquidator or office holder unless the decision is so perverse that no reasonable liquidator, properly advised, could have taken it.

The Court of Appeal, upon examining the relevant authorities, concluded that:

- '(i) *A court exercising the power to interfere with the decision of a liquidator is required to examine the nature of the decision in order to determine the manner in which it ought to treat with the decision.*
- (ii) *Where the decision of a liquidator is eminently one which involves the exercise of the unique discretion afforded to the liquidators to make commercial and administrative decisions in the realisation of assets in the liquidation, a review by the court ought to be conducted through the lens of the perversity test; and*

- (iii) *where the decision of an office holder raises purely legal issues, a review of the decision is a matter for the court upon review of the legal principles attendant on that decision and the perversity test does not apply.'*

In making commercial and administrative decisions, a liquidator is required to exercise their own judgment and to utilise specialised knowledge and experience rather than to rely on the approval or endorsement of the court for their proposed courses of action. It is not for the court to interfere with such commercial or administrative decisions. However, if a liquidator proposes to take a course which is based on a wrong appreciation of the law or is conspicuously unfair to a particular creditor or contractor of the company, then the court can interfere, if appropriate.

The Court of Appeal was in agreement with Wallbank J that the perversity test did not apply in this case. The discrete question raised by the section 273 application was whether, as a matter of law, the JLs were correct to admit the Trustee's claim under the circumstances. It was not a review of the JLs commercial and administrative decisions.

Were the JLs correct to admit the Trustee's claims?

The issue of the enforceability of the US default judgment was raised by Stevanovich in his defence to the BVI proceedings. The determination of this issue revolved around the resolution of the various factual contentions raised by both Stevanovich and the JLs in the large body of evidence filed in the BVI proceedings. In circumstances where the determination of the issue involved the resolution of substantial disputes of fact, and there were no findings by the first instance judge on this point, it was more appropriate for the issue of presence and therefore the enforceability of the default judgment to be dealt with in the BVI proceedings. The Court of Appeal declined to make any findings on this point and left the question of presence in the US and enforceability of the default judgment, for determination in the BVI proceedings.

The section 210 application

Section 210(2) gives the court specific powers upon the application of a liquidator or where the liquidator declines to make an application, a creditor, to expunge or amend an admitted claim in liquidation if it is satisfied that the claim should not have been admitted or should be reduced.

The Court of Appeal held that the provision is a tool for a liquidator, or creditor, to seek judicial intervention in liquidation proceedings. It was not for the Court to direct for such an application to be made. Stevanovich was neither a liquidator nor creditor. The Court of Appeal also held that it was clear from the JLs consistent defence of their decision to admit the Trustee's claim that they did not desire to make a section 210 application. The Court of Appeal found that section 210 was not engaged.

The Court of Appeal dismissed the Appeal and awarded costs to the JLs.

Conclusion

The decision emphasises the importance of adequately establishing standing in bringing an application to challenge the decisions of BVI office holders under section 273 of the Insolvency Act. The applicant will need to demonstrate their capacity to seek the relief and that they are in fact bringing the application in the capacity set out. Creditors, debtors and contributories are recognised capacities with standing to seek the relief. These recognised categories are not exclusive and it is possible to establish capacity to seek the relief under the general class of persons directly affected by the exercise of power by officeholders. It is crucial that the applicant establishes a legitimate interest in the liquidation proceedings, and not that they are merely being affected by the outcome. An alleged debtor will not qualify for such standing.

Mourant acted for the JLs in these proceedings.

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