



Press Summary

19 June 2024

Sian Participation Corp (In Liquidation) (Appellant) v Halimeda International Ltd (Respondent)

[2024] UKPC 16

*On appeal from the Court of Appeal of the Eastern Caribbean
Supreme Court (British Virgin Islands)*

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Briggs, Lord Hamblen, Lord Burrows

Background to the Appeal

This appeal concerns the test to be applied by courts in the British Virgin Islands (the “**BVI**”) when exercising their discretion to dismiss or stay insolvency proceedings in circumstances where the parties have agreed to resolve their disputes by arbitration.

In December 2012, the respondent advanced a loan of USD 140m to the appellant (the “**Loan**”). The agreement governing the Loan (the “**Facility Agreement**”) included a clause providing that “any claim, dispute or difference of whatever nature arising under, out of or in connection with” the Facility Agreement would be referred to arbitration (the “**Arbitration Agreement**”).

The Loan has not been repaid. In February 2020, the respondent sent a letter to the appellant demanding payment of the debt under the Facility Agreement (the “**Debt**”). As at 15 December 2020, the total sum claimed was approximately USD 226m. The appellant disputes that the Debt is due and payable on the basis of a cross-claim and/or set-off.

In September 2020, the respondent applied to have liquidators appointed in respect of the appellant pursuant to sections 159(1)(a) and 162(1)(a) of the BVI Insolvency Act 2003. Following a hearing of the application, Mr Justice Wallbank (the “**Judge**”) delivered an oral judgment in May 2021 holding, among other things, that the appellant had failed to show that the Debt was disputed on genuine and substantial grounds. The Judge ordered the appellant to be put into liquidation.

In November 2022, the Court of Appeal of the Eastern Caribbean Supreme Court (the “**Eastern Caribbean CA**”) dismissed the appellant’s appeal against the Judge’s decision. In

December 2022, the Eastern Caribbean CA dismissed the appellant’s application for leave to appeal to the Judicial Committee of the Privy Council (the “**JCPC**”) as of right under section 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (the “**1967 Order**”).

In November 2023, the JCPC granted the appellant permission to appeal in respect of the following issues:

- (1) What test should the court apply when exercising its discretion to make a liquidation order where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed (notwithstanding that dispute is not on genuine and substantial grounds) (the “**Test Issue**”)?
- (2) Did the Judge conclude that the court should refuse to consider the impact of the Arbitration Agreement because it had been raised too late and, if he did so find, was he wrong to do so (the “**Timing Issue**”)?
- (3) Does "the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards" so as to entitle the appellant to an appeal as of right under section 3(1)(a) of the 1967 Order (the “**Appeal Issue**”)?

Judgment

The Board unanimously dismisses the appellant’s appeal. Lord Briggs and Lord Hamblen give the judgment of the Board.

Reasons for the Judgment

The Test Issue

The Board explains that some jurisdictions, including England and Wales as a result of the Court of Appeal’s decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 (“*Salford Estates*”), have adopted a wide definition of what amounts to a dispute about a debt. On this view, if the debt is merely not admitted by the company, without that non-admission being on genuine and substantial grounds, the creditor will likely have its winding up petition dismissed or stayed on the basis that there is a dispute covered by the parties’ agreement to arbitrate. Other jurisdictions, including the BVI, favour a test which requires the debt to be genuinely disputed on substantial grounds before a creditor’s application can be dismissed or stayed because of an arbitration agreement [3]-[5].

The Board considers that the Court of Appeal in *Salford Estates* was wrong to introduce a discretionary stay of creditors’ petitions where an insubstantial dispute about the creditor’s debt was covered by an arbitration agreement. The starting point is the position, as adopted in *Salford Estates* itself, that a creditor’s winding up petition (or, in the BVI, liquidation application) does not trigger a mandatory stay under applicable arbitration legislation. This is because such a petition does not seek to, and does not, resolve or determine anything about the petitioner’s claim to be owed money by the company. Nor is the existence or amount of the debt a matter or issue for resolution in those proceedings [88]. If the mandatory stay provisions do not apply, then the policy underlying them equally does not apply. That policy is to enforce the positive and negative aspects of arbitration agreements. Those are only engaged, however, in respect of a “matter” which is subject to the arbitration agreement [61].

The same reasoning applies to the court's exercise of its discretion to dismiss or stay insolvency proceedings. A winding up or liquidation order based on a debt not disputed on substantial grounds does not offend the general objectives of arbitration legislation because it does not seek to resolve anything about the underlying debt or interfere with the resolution of any dispute about the debt. Nor does it offend the parties' arbitration agreement because it is not a "matter" subject to that agreement; seeking a liquidation is simply not something the creditor has promised not to do. To require the creditor to go through an arbitration where there is an insubstantial dispute simply adds delay, trouble and expense for no good purpose [89]-[94].

The Board therefore concludes that, as a matter of BVI law, the correct test for the court to apply in exercising its discretion to make a liquidation order in circumstances where there is an arbitration agreement between the parties is whether the debt is disputed on genuine and substantial grounds. This test was correctly applied by the Judge and the Eastern Caribbean CA in the present case. The Board's conclusion not only applies to generally worded arbitration agreements, but also exclusive jurisdiction clauses. Different considerations would arise if the agreement or clause was framed in terms which applied specifically to a creditor's winding up petition [99], [100], [122].

The Board notes that its conclusion in respect of *Salford Estates* is not only one about BVI law, but also English law. The Board therefore gives a direction pursuant to *Willers v Joyce (No 2)* [2016] UKSC 44 that *Salford Estates* should no longer be followed in England and Wales and that the Board's decision in the present case, so far as it holds that *Salford Estates* was wrongly decided, now represents the law of England and Wales [124]-[126].

The Timing Issue

The Board concludes that the Judge did not refuse to consider the impact of the Arbitration Agreement because it had been raised too late. Among other things, the Board notes that the Judge gave other reasons for dismissing the appellant's reliance on the Arbitration Agreement, and he expressly considered in his judgment whether the Arbitration Agreement should affect the exercise of the court's discretion [107]-[108], [122].

The Appeal Issue

The Board concludes that the appellant's appeal does not fall within section 3(1)(a) of the 1967 Order, because the Eastern Caribbean CA's judgment does not affect the appellant's interests to the extent of at least £300. The Board notes that the process for seeking and obtaining an order for the appointment of a liquidator does not require or involve the pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum: in the present case the appellant's underlying debt will remain whatever the outcome of an appeal. The Eastern Caribbean CA was therefore correct to hold that the appellant was not entitled to an appeal as of right to the JCPC [114]-[117], [121]-[122].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: [Decided cases - Judicial Committee of the Privy Council \(JCPC\)](#)