SHANG PENG GAO KE, INC SEZC V OFFICIAL LIQUIDATOR OF HEC INTERNATIONAL LTD[1]

THRESHOLD FOR GRANTING LEAVE TO BRING PROCEEDINGS AGAINST COMPANY IN LIQUIDATION

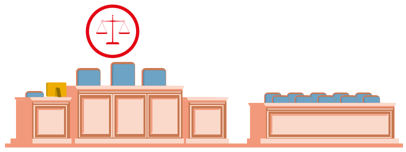
Authored by: Andrew Ayres KC (Barrister) & Thomas Wong (Barrister) - Twenty Essex

Introduction: Factual Summary and Issues

Ascentra Holdings, Inc ("Ascentra"), and its subsidiary HEC International Ltd ("HEC"), were each a Cayman exempted company in voluntary liquidation.[2] This case concerned Shang Peng Gao Ke Inc SEZC ("SPGK")'s assertion of a proprietary claim against HEC for US$25,800,000, known as the "HEC Funds": SPGK said that they had been paid on its behalf for a "specific purpose" to pay loyalty bonuses for Ascentra, but Ascentra's payment of those bonuses had ultimately been satisfied elsewhere, so in law SPGK had retained the beneficial interest in the HEC Funds.[3]

HEC's official liquidator ("OL")'s position was that SPGK was not even a creditor of HEC, but, for the purposes of these proceedings, agreed to isolate the proprietary claim.[4] The OL required SPGK to file a fresh summons seeking leave under section 97 of the Companies Act (2023 Revision) ("CA").[5]

At first instance, Doyle J ruled that SPGK was required to proceed under section 97 and that it had no genuinely arguable case.[6] The Cayman Islands Court of Appeal ("CICA") therefore had to resolve two issues: whether SPGK: (1) needed leave to appeal; and (2) should have sought (a) to establish its proprietary claim in its appeal against the Notice of Rejection, or (b) leave under section 97, and, if (b), whether leave should have been given.



No Leave to Appeal was Required

The CICA held that, pursuant to section 6(f)(v) of the Court of Appeal Act (2023 Revision), even if Doyle J's judgment refusing leave for SPGK to pursue its proprietary claim had been interlocutory (which it was not), no leave was required.[7] And, here, Doyle J's order had been a final decision, since it had disposed of SPGK's proprietary claim, and finally determined its free standing application for permission to pursue its claim against HEC outside the liquidation.[8]

1 CICA (Civil) Appeal 17 of 2023, 19 June 2024. Unless otherwise stated, all paragraph references in these footnotes are to this Judgment.
2 §1.
3 §3.
4 §4.
5 §9.
6 §11.
7 §19, 24.
8 §20.

Leave was Required under CA Section 97

The CICA concluded that SPGK's proprietary claim had to be brought in separate proceedings, leave for which was required under CA section 97, because it was incapable of proof in HEC's liquidation. A creditor relying on a security or claiming as a beneficiary were both claiming that the property in issue was outside the liquidation estate and hence unavailable as a dividend to the creditors generally. Thus a claim to that property was adverse to the liquidation and had to be brought in separate proceedings.[9] Indeed, the only means for determining a proprietary claim where the OL contended that it was unarguable and did not agree to any alternative procedure, was by proceedings under section 97(1).[10]

Should Leave be Granted?: A "Genuinely Arguable Case"

The CICA recalled that the threshold test for granting leave under section 97(1) was whether SPGK had demonstrated a "genuinely arguable case": "[t]he adverb is of importance since it is the regular experience of all courts that anything may be argued, however fallacious."[11] But precisely because the threshold was that, the Court stressed the exercise "does not and should not involve findings of fact. It is a matter of assessment…. Contested evidence should not be resolved before full discovery, and before an opportunity has been afforded to give oral evidence and to be cross-examined."[12] By the same token, "if resolution of the issue of whether the case is genuinely arguable depends, at least in part, on credibility, then it is wrong to deprive a party of an opportunity of establishing to the satisfaction of the court that it is telling the truth."[13]

Applying these principles here, the CICA held that Doyle J's "repeated references to the credibility of Mr Yoshida [SPGK's director and principal witness] tends to show that the Judge himself took the view that the case turned on Mr Yoshida's credibility", in which case "it was wrong as a matter of law for the Judge to make a determination without giving Mr Yoshida the opportunity to be heard."[14] In particular, "the Judge's conclusion that the claim was incredible and invented was wrong in law."[15] Neither was Doyle J's criticism "that the 'generalised' statements of Mr Yoshida were self-serving and were unsupported" justified: "[o]f course they were"; "[t]here was no legal requirement for documentary proof, and it is not impossible to conceive of an arrangement in which funds loaned by SPGK were not at the free disposal of HEC even absent any supporting document or confirmatory exchange of emails, in the circumstance that Mr Yoshida was director of both SPGK and HEC and a co-director of Ascentra."[16] Further, the CICA regarded as material that "[the] circumstance [that HEC was dormant] might arguably establish that the loans were made for that one exclusive purpose",[17] and that "shortly before this appeal was heard, Ascentra issued an amended writ making proprietary and fiduciary claims in relation to other funds claimed by SPGK against Mr Yoshida and SPGK as defendants", which "is or may be relevant to… whether SPGK was a creditor of HEC, and… the proprietary claim".[18] For these reasons, the CICA allowed the appeal and granted SPGK section 97(1) leave to pursue its proprietary claim.

Conclusion: Key Takeaways

The CICA's decision makes clear that an applicant for leave to bring proceedings against a company in liquidation must show a "genuinely arguable case", no more, no less. But unless it is "clear beyond question that the [applicant's] statement of facts is contradicted by all the documents or other material on which it is based",[19] both the respondent company and the Court would do well to remember that (not unlike getting leave to defend at a summary judgment application, or surviving a strike-out application) "questions of credibility and implausibility are beside the point",[20] and "[i]t is… important not to equate what may be very powerful cross-examination ammunition, with… [a] 'knock-out blow'".[21] To indulge in an extensive attack on credibility, implausibility, and/or even the apparent lack of supporting documentary evidence in circumstances where the claim could genuinely be established without it, would run the risk (as HEC's OL did in this case) of "merely add[ing] to costs and [delay in the] resolution of the substantial issue". [22]

9 §35.
10 §43.
11 50.
12 §60.
13 §62.
14 §75.
15 §77.
16 §§75, 81.
17 §92.
18 §95.
19 Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 (HL), §95, cited in §60.
20 §87.
21 Mentmore International Ltd v Abbey Healthcare (Festival) Ltd [2010] EWCA Civ 761, §23, cited in §60.
22 §97.