

Is leave required to appeal a refusal to set aside a statutory demand?

October 2022

In the recent Eastern Caribbean Court of Appeal (CoA) decision in *BEC Limited v A2 and A1*^[1] the CoA clarified the position concerning whether a High Court judge's refusal to set aside a statutory demand was a final, or interim decision in respect of which leave to appeal to the CoA was required. The CoA held that a judge's decision on an application to set aside a statutory demand is a final order in respect of which leave to appeal is not required. Click [here](#) to read the full CoA judgment.

Background facts

The Appellant, a BVI company and the Respondents, which were incorporated under the laws of the Cayman Islands and the State of Delaware respectively, entered into (along with other related parties) a stock purchase agreement in February 2014 (the **Agreement**). Under the Agreement, the Appellant acquired the shares of a Bahamian company, BECB Limited (**BECB**).

The completion of the Agreement resulted in BECB having tax obligations to the tax authorities in the People's Republic of China (the **PRC**). This development led to an LCIA arbitration regarding which party was responsible for paying BECB's tax liability. The Respondents eventually settled BECB's tax liability to the PRC and sought to recover this from the Appellant and BECB.

This led to further arbitration before the LCIA, which found that the Appellant and BECB were jointly and severally liable to pay to the Respondents US\$6,185,886 in fees and disbursements, £618,249.91 in costs and US\$45,529.49 in interest (the **Debt**). The Appellant denied responsibility for the Debt.

On 2 March 2022, the Respondents caused a statutory demand to be served on the Appellant, seeking payment of the Debt.

On 17 March 2022, the Appellant applied under section 156 of the BVI Insolvency Act (the **Act**) to set aside the statutory demand (the **Set Aside Application**). Not long before the scheduled hearing of the Set Aside Application, the Appellant changed its solicitors and on the day prior to the hearing, applied for permission to amend the Set Aside Application by adding a new ground, and to adjourn the hearing. The Hon. Jack J (Ag) granted the application to amend, but refused the application for an adjournment and proceeded to hear the Set Aside Application.

By an order dated 2 June 2022 (the **Order**), the Hon. Jack J (Ag) dismissed the Set Aside Application and ordered that the Respondents were entitled to file an application for the appointment of liquidators over the Appellant. The Appellant was also ordered to pay the Respondents' reasonable costs of the Set Aside Application, the application for permission to amend the Set Aside Application, and the application for an adjournment.

The Appellant appealed to the CoA, without first seeking leave to do so, against the learned judge's decision refusing the adjournment and dismissing the Set Aside Application. The Appellant also sought a stay of execution of the Order (the **Stay Application**) and sought leave to rely on fresh evidence (the **Fresh Evidence Application**).

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The Respondents opposed both applications and applied for the Appellant's notice of appeal to be struck out on the basis that the Order was interlocutory (that is, interim as opposed to final) in nature and as such, the Appellant ought to have first applied for leave to appeal, either from the CoA or the court below.

The CoA considered the nature of an application to set aside a statutory demand and made the following observations:

1. An application to set aside a statutory demand is not a claim in the true sense, as it does not determine the rights or obligations of any of the parties to the claim and it does not contain an order that can be enforced. It is a mechanism by which a creditor can obtain an order from the court that the debtor company is insolvent, which is a ground under section 163 of the Act (when read in conjunction with section 8) for appointing liquidators over the company. If the application fails and the statutory demand is not set aside, the court's order will authorise the creditor to apply to appoint liquidators over the company.

However, such an order is not an enforceable order and the creditor is not required to apply for the appointment of liquidators.

Conversely, if the application succeeds and the statutory demand is set aside, the creditor may still apply to appoint liquidators over the debtor company, provided that it has the evidence to do so under any of the other grounds available to it under the Act.

2. The orders that can be made on an application to set aside a statutory demand should not be bifurcated into a result where the claim will continue if the application fails, but will come to an end if the application succeeds. In both situations, the issue of the insolvency of the company based on the alleged debt is resolved – the company is either deemed to be insolvent (if the set aside application fails) or not (if the application succeeds). The separate issues of the appointment of liquidators and the winding up of the company remain to be initiated and resolved.
3. An application to set aside a statutory demand is *sui generis*. Such an application has the effect of resolving the question of a company's deemed insolvency based on the unpaid debt in question, and nothing more. As such, it is a final order in respect of which leave to appeal is not required.

In light of these above observations, the CoA dismissed the Respondents' application for the Appellant's notice of appeal to be struck out.

The CoA also provided useful guidance concerning the Appellant's Stay Application, where it held as follows:

1. Generally, courts do not grant a stay of a declaratory order. In this case, the Order was in the nature of a declaratory judgment as it did not create any enforceable rights. The Order simply authorised the Respondents to apply for the appointment of liquidators over the Appellant.
2. This general rule notwithstanding, the CoA in the exercise of its wide discretion and considering the overriding objective and the need to do justice between the parties, could consider the application for a stay of that part of the Order

authorising the Respondents to apply for liquidators to be appointed over the Appellant and grant the stay if it is justified in all the circumstances of the case.

3. A party who applies for a stay pending appeal must satisfy the five principles in ***C-Mobile Services Ltd v Huawei Technologies Co. Limited***^[2], namely:

- i) The CoA must take into account all the circumstances of the case;
- ii) A stay is the exception rather than the general rule;
- iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
- iv) In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and
- v) The CoA should take into account the prospects of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood that the appeal will succeed is shown will usually enable a stay to be granted.

4. The Court will consider the fifth principle, the prospects of the appeal succeeding, even if the grounds of appeal are not strong and are only arguable. However, when the grounds of appeal are only arguable, the CoA will not likely grant a stay unless there are other compelling circumstances such as the appeal being rendered nugatory if a stay is not granted.^[3]

The CoA found that in this case, the grounds of appeal barely met the threshold of being arguable, and there were no compelling circumstances. In light of this, the Appellant's Stay Application was refused.

The CoA also refused the Appellant's Fresh Evidence Application as it failed to establish the test for admitting fresh evidence on an appeal.

Please do not hesitate to contact a member of our Dispute Resolution team, if you have any questions or if you require any assistance.

^[1] BVIHCMAP2022/0044

^[2] BVIHCMAP2014/0017

^[3] See ***Nam Tai Property Inc v ISZO Capital LP*** BVIHCMAP2021/0010

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