In The Supreme Court of Bermuda

COMPANIES (WINDING UP) JURISDICTION

COMMERICAL COURT

2024: No. 265

IN THE MATTER OF AFINITI LTD

(PROVISIONAL LIQUIDATORS APPOINTED FOR RESTRUCTURING PURPOSES)

AND

IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Leave to appeal against the court's refusal to grant an adjournment of the application of the Joint Provisional Liquidators for sanctions under section 175 of the Companies Act 1981

Dates of Hearing: **17 March 2025**

Date of Ruling: **21 March 2025**

Appearances: *Felicity Toube KC* of counsel and *Sam Steven* and *Kyle Masters* of Carey Olsen Bermuda Limited for Mr. Chishti

Adam Al-Attar KC of counsel and *Steven White* and *Devon Luca* of Walkers (Bermuda) Limited for the Joint Provisional Liquidators

Blair Leahy KC of counsel and *John Riihiluoma* and *Lalita Vaswani* of Appleby (Bermuda) Limited for the Secured Lenders

RULING of Martin J

Introduction

1. This is an application by Mr. Chishti for leave to appeal against this Court's Ruling of 20 November 2024. By that decision, the Court refused Mr. Chishti's application for a further adjournment of the hearing of an application by the Joint Provisional Liquidators (the "JPLs") for the Court's sanction to enter into a restructuring transaction (the "Transaction") whereby effectively the whole of the assets and undertaking of Afiniti Ltd (In Liquidation) (the "Company") were to be transferred and/or sold to a new company ultimately owned and controlled by the secured lenders. The Court proceeded to grant sanctions to the JPLs to enter into the Transaction both as a compromise and a sale under section 175 (1) (e) and 175 (2) (a) of the Companies Act 1981.

Background

2. The details of the history of the Company's indebtedness to the secured lenders are set out (so far as material) in the Ruling and do not need to be repeated for the purposes of this application. The debt owed under the Loan Facility and other unsecured debt exceeded USD500,000,000 and the Company's available cash was insufficient by a long margin to meet the repayment of USD125,000,000 that was about to fall due for payment when the extension granted by the secured lenders expired at the end of November 2024[1].

3. The evidence showed that (i) the Company was profoundly insolvent on a balance sheet basis[2] and on the brink of cash flow insolvency[3] (ii) the Company's business would collapse if a restructuring were not achieved before the Company's cash resources ran out[4] despite a last minute offer by Mr. Chishti to factor some of the Company's

[1] Thresh 2 para 19; Renehan 1 para 16: USD125M had fallen due on 24 October 2024. The secured lenders had indicated to the Court that further extension would not be granted beyond the point that the Company ran out of cash: Renehan 3 paragraph 13 and counsel's submissions at the hearing.
[2] Khaishgi 1 para 29
[3] Myshral 1 paras 10-11
[4] Myshral 1 para 12

receivables[5] (iii) the secured lenders had negotiated a transaction with the Company to acquire the assets and business undertaking on terms that would enable the business of the Company to continue[6] (iv) the Transaction was structured in several steps, the first two of which were the transfer of the assets of the Company to a new company established for the purpose by the secured lenders in exchange for a restructuring of the debt in terms of the existing repayment obligations and the grant of new terms of financing[7] (v) the Company had exhausted any realistic prospect of raising additional capital and an alternative sales transaction was not achievable before the failure of the Company's liquidity[8](vi) the secured lenders had refused to advance further credit or extend terms[9] and (vii) a liquidation would achieve a much worse financial result than the proposed Transaction[10].

4. The JPLs independently reviewed[11] the analysis and report of Teneo FA which had concluded that (i) the value of the Company's assets fell well below the amount of the Company's indebtedness (ii) the was no realistic alternative accelerated merger and acquisition process with another bidder but even if there had been, the result would also fall well below the amount needed to repay the Company's indebtedness (iii) a formal liquidation process would produce much less realisable value than the Transaction and (iv) that the Enterprise Value of the Company (and its affiliated entities) on a going concern basis (pre-Proposed Transaction basis) that formed the basis of the commercial terms of the Transaction provided the greatest recovery of value to the Company and its affiliates[12].

5. The JPLs (having conducted their own review and after discussions with the Company's management) considered that the terms of the Transaction were the best that were likely to be achievable in the circumstances, and applied for the Court's

[5] HB1792: This suggestion was considered but rejected by the JPLs as lacking any specific details and by the secured lenders because it would interfere with their security rights over the Company's assets: HB1975.
[6] Thresh 1 paras 32 and Khaishgi 1 para 32
[7] Thresh 1 paras 34-7
[8] Khaishgi 1 paras 23 -30
[9] Renehan 2 para 6
[10] Thresh 1 para 53
[11] Thresh 1 para 55
[12] Teneo FA Report at CT1/029.

sanction to enter into the Transaction on the basis of (i) a compromise by way of a transfer of the assets to the new entity and (ii) a sale[13].

Mr. Chishti's application

6. On 23 October 2024 Mr. Chishti applied for an adjournment of the JPLs' sanction applications on the grounds that (i) the Company and the JPLs should try to achieve a sale to a third party instead of entering into the Transaction (ii) the Court should conduct a trial on the issue as to whether the terms of the Transaction were based on a proper understanding of the Company's business and on a Valuation Report that was technically "wrong"[14]. Mr. Chishti also opposed the grant of the sanctions to the JPLs on the same grounds on which he sought the adjournment.

7. The initial application for an adjournment of the JPLs' sanction application was granted to enable the parties to file further evidence and to be able to present their arguments. In light of (i) the Company's liquidity crisis and (ii) the need to apply to the US Bankruptcy Court for relief under Chapter 15 by 25 November 2024[15], the Court adjourned the hearing to 6 and 7 November 2024.

8. At the hearing, the Court was not satisfied that it was appropriate to grant Mr. Chishti's application for a further adjournment in order to conduct a mini-trial on the question of valuation before hearing the JPLs' application for a sanction to enter into the Transaction. The Court proceeded to consider and upon the evidence was satisfied that it was appropriate to grant the JPLs' applications for sanction. The full reasons for that decision are set out in the Ruling and it is not necessary or appropriate to repeat them here.

9. Mr. Chishti is dissatisfied with the Court's decisions (i) to refuse the application for a further adjournment in order to conduct a mini-trial of his challenge to the Valuation Report and (ii) to grant the sanctions to the JPLs and (iii) to include comfort to the JPLs

[13] Thresh 1 paras 55, 81 and 82.
[14] Chishti 1 paragraphs 28 and 33-42.
[15] Thresh 1 para 43.

in the recitals to the Order in the terms the Court provided. He has applied to this Court for leave to appeal those decisions to the Court of Appeal.

Disposition

10. For the reasons briefly set out below, the Court has decided to refuse Mr. Chishti's application for leave to appeal. The decision appealed against is primarily a case management decision which must be shown to be plainly wrong. For the reasons explained briefly below, the Court is not satisfied that the challenge to the Court's decision not to grant a further adjournment to Mr. Chishti has a realistic prospect of success.

11. The secondary grounds of appeal relate to (i) the Court's assessment of the evidence that the Valuation Report was not flawed such that the JPLs were not entitled to rely upon it and (ii) the rejection of the evidence of Mr. Chishti's valuation expert.

12. There is no case law to support the submissions (i) that the Court was required to conduct a valuation exercise on a sanction application or (ii) that once a challenge was raised to the reliability of the Valuation Report, the Court had an obligation to conduct a full trial of the issues raised by Mr. Chishti. On the contrary, the Court was required to make an assessment of the evidence for the purpose of determining whether it was appropriate or proportionate to adjourn the hearing.

13. The ancillary matters raised in the draft grounds of appeal are either dependent on the success of the other points or are not of themselves susceptible to an appeal.

14. As a result, the Court is not satisfied that the proposed challenges to the Court's decision have a realistic prospect of success and leave to appeal must therefore be refused.

Leave to appeal against a case management decision test

15. The proposed appeal is first and foremost in respect of a case management decision to refuse a further adjournment in order to allow Mr. Chishti to conduct a mini-trial in

respect of the Valuation Report relied upon by the JPLs in support of their applications for the Court's sanction to enter into the Transaction.

16. It is well-established that the Court of Appeal will not interfere with a case management decision of the first instance judge unless the appellant can show that the decision was plainly wrong, in the sense that no judge could reasonably have arrived at that decision[16]. Therefore, an application for leave to appeal against this Court's refusal to grant a further adjournment to Mr. Chishti must show that the claim that no judge could reasonably have refused the further adjournment has a realistic (i.e. not fanciful) prospect of success.

Leave to appeal against a discretionary decision test

17. The decision to grant the sanction to the JPLs to enter into the Transaction was a discretionary decision of the Court under the terms of section 175 of the Companies Act 1981. It is also well-established that in order to succeed in an appeal against a discretionary decision the grounds for appeal against an interlocutory decision must demonstrate an arguable case that the judge (i) made an error of law or disregarded a relevant legal principle (ii) misunderstood the facts (iii) took into account irrelevant facts (or failed to take into account relevant facts) (iv) failed to exercise the discretion at all or (v) came to a conclusion that is outside the generous ambit with which reasonable disagreement is possible—i.e. it was plainly wrong[17].

18. These well-known principles were reviewed and applied by Mrs. Subair Williams J in **Apex Fund Services Ltd v Clingerman and Silk Roads Funds**[18] and her review was approved subsequently by the Bermuda Court of Appeal in **Templar Capital Ltd v Griffin Line Trading LLC**[19].

[16] **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd** [2014] UKSC 64 at paragraph 13 per Lord Neuberger (approving **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA 1743 para 51).
[17] This is a summary of the common formulation of the test based on the cases most commonly cited: 1999 Supreme Court Practice 59/1/142.
[18] [2020] Bda LR 12.
[19] BM 2023 CA 20.

The proposed grounds of appeal

19. There are 6 proposed grounds of appeal in the draft Notice of Appeal. They are:

(i) Teneo FA's Valuation Report on which the JPLs relied was "flawed".
(ii) The Transaction was not "momentous".
(iii) The "ex *parte James* principle" was breached.
(iv) There was an appearance of bias.
(v) The adjournment should have been granted.
(vi) The Order granted inappropriate "immunity" to the JPLs.

Brief analysis

20. In relation to draft ground (i), leave to appeal does not lie in relation to matters of fact decided by the Court unless there was no (or no sufficient) evidence upon which the first instance judge could have reached the decision which is the subject of challenge.

21. The JPLs sought the Court's sanction to enter into the Transaction under section 175 (1) (e) of the Companies Act 1981 as a compromise because the JPLs did not have the power to do so in the absence of a committee of inspection. The Court's role was to ensure that the JPLs were acting in good faith and that the Transaction was not flawed in some fundamental respect[20].

22. The Court examined the evidence relied upon by the JPLs which set out at length and in detail (a) the process by which Teneo FA determined the range of values which would likely be obtained in the alternatives to the Transaction (b) Teneo FA's conclusion that the Transaction would afford the best return for the creditors and the Company based on Teneo FA's assessment of the Company's Enterprise Value as a going concern (c) the JPLs' independent assessment of the Valuation Report and the conclusions reached by Teneo FA.

[20] **Greenhaven Motors Ltd (In liquidation)** [1999] BCLC 635, 643 a-e per Chadwick LJ.

23. Mr. Chishti adduced expert evidence from Mr. Stephen Taylor on several aspects of the Teneo FA Valuation Report which were aimed at undermining its reliability. The only matter which is relevant to the present application is the "new money" point which is central to this proposed ground of appeal.

24. The Court rejected Mr Taylor's evidence on the basis that it was not supported by independent facts or by principles of valuation. Briefly, it was said that the fact that TRGI[21] was prepared to lend "new money" (USD15M) on terms that this 'backstop' loan could be converted to junior equity in 7 years is a fact that "proved" that there was some present value to the shares in the Company. The Court did not accept that Mr Taylor's evidence was a 'fact' that there is any *present* value created or implied by the potential value that might exist post the restructuring Transaction in the *future*, namely after (a) the liquidity issues had been resolved (b) the defaults under the Loan Facility had been cured and (c) on the assumption that the future performance of the business would be successful.

25. Mr. Taylor's view was an expression of his opinion, and the Court was entitled to accept or reject it or put little or no weight on it. His argument was taken into account, but it was rejected because it did not (in the Court's view) reflect the reality of the (then) present circumstances of the Company's profound insolvency. This decision was well within the range of decisions the Court could reasonably have arrived at. It is not a conclusion that was plainly wrong in the sense that no judge could reasonably have arrived at that assessment of Mr. Taylor's opinion, when viewed against the totality of the evidence of overwhelming (then) present insolvency.

26. There is no case law that supports the submissions made on Mr. Chishti's behalf that (i) the Court is **required** to conduct a valuation trial on an application for sanction or (ii) that once a party challenges the Valuation Report the Court **must** conduct a trial, irrespective of the Court's assessment of the evidential weight to be attached to the material on which that challenge is based. On the contrary, the Overriding Objective requires the Court to make such an assessment.

[21] One of the minority shareholders in the Company in which Mr. Chishti also has a minority interest.

27. Moreover, it was not suggested that the JPLs were not acting in good faith and, having rejected Mr Taylor's evidence and accepted the evidence the JPLs adduced in support of the grant of the sanction, the Court concluded there was substantial evidence on which to come to the conclusion that Teneo FA's Valuation Report was not "flawed"[22]. In those circumstances, the proposition that the Court had no sufficient evidence on which to reach its conclusion is, in my view, unsustainable.

28. In relation to draft ground (ii) the JPLs sought the Court's sanction to enter into the Transaction under section 175 (2) of the Companies Act 1981 as a sale. Although the JPLs had power under the section to enter into a sale of the assets, the JPLs took the view that the sale of the whole of the Company's assets and undertaking was of sufficient importance and significance that they were justified in seeking the sanction of the Court before doing so, and although the term "momentous" was not expressly relied upon, it clearly was such a decision.

29. In addition, the Court took the view that the JPLs were appointed for the very purpose of achieving a restructuring, and that it was appropriate and routine for the JPLs in that situation to seek the Court's sanction.

30. It was accepted that the sanction power lies exclusively within the Court's discretion. There is no authority for the proposition that the Court of Appeal will revoke the grant of the sanction of the Court once granted. It also cannot be said that the exercise of the Court's discretion in this regard was "plainly wrong", and so this ground of appeal has no realistic prospect of success.

31. In relation to draft ground (iii) no allegation of bad faith was made against the JPLs in relying on the Teneo FA Valuation Report. There was no evidence to support the assertion that the JPLs had acted in an unconscionable way or had deliberately disadvantaged Mr. Chishti in a manner that was unfair. The terms of the Transaction were clearly not unconscionable. This ground of appeal therefore has no realistic prospect of success.

[22] i.e. the two requirements of **Greenhaven Motors**.

32. In relation to draft ground (iv) Ms Toube KC accepted[23] in the course of argument that the only matter relied upon in relation to this point was that the JPLs appeared to defend the Teneo FA report. No actual bias was alleged. It was said that once the apparent bias argument was raised, the JPLs had the burden of proving that there was no apparent bias and should have been required to give disclosure of their internal profit-sharing arrangements to prove that there was no apparent bias. This argument requires the Court to reverse the burden of proof, for which there is no authority in this context and is wrong in principle.

33. Further, the Court held that on the facts (i) the JPLs had undertaken an independent review of the materials and had reached an independent conclusion and (ii) that there was no appearance of bias in reaching that decision. This ground therefore has no realistic prospect of success.

34. In relation to draft ground (v) this is a case management decision. The Court rejected Mr. Taylor's evidence and decided that the Teneo FA Valuation Report was not "flawed". In light of that finding, no purpose would have been served by granting a further adjournment. The consequences of doing so would have destroyed the prospects of a successful restructuring in the light of the evidence that the Company would run out of cash within a few weeks. The refusal to grant a further adjournment in order to conduct a mini-trial in those circumstances was within the range of decisions that a judge could reasonably have arrived at--i.e. it was not plainly wrong. This ground of appeal has no realistic prospect of success.

35. In relation to draft ground (vi) the Court granted the sanctions in the terms sought for the reasons given. The Court was satisfied that in making the applications for sanction the JPLs were acting properly and in accordance with their duties to do what was in their view in the best interests of the Company. The Court decided that there was accordingly no reason to withhold the "comfort" in the recitals to the Order to that

[23] Transcript 7 November 2024 HB 765 Court: *"It seemed to be suggested that the joint provisional liquidators were favoring or defending the Teneo Report, as opposed to being partisan as between the company, the secured lenders and the company and Mr. Chishti. So, I don't need to worry about that. It's simply at the level..*
Ms Toube KC*: "It's the conflict of interest point."*
Court. *"Right. It's simply at that level."*
Miss Toube KC: *"It is."*

effect. There is no authority for the proposition that the Court of Appeal will revoke the terms on which a sanction has been granted under section 175 of the Companies Act 1981. It cannot be said that the terms of the recital were "plainly wrong". Therefore, this ground of appeal has no realistic prospect of success.

Conclusion

36. In light of the matters set out above it is my duty to refuse leave to appeal. Mr. Chishti is to pay the costs of the application.

Dated this 21st day of March 2025

THE HON. JUSTICE MR. ANDREW MARTIN
PUISNE JUDGE