THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

Claim No. **CV2017-02536**

IN THE MATTER OF CL FINANCIAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CHAPTER 81:01

Before the Honourable Mr. Justice Kevin Ramcharan

Date of Delivery: November 20, 2018

APPEARANCES:

Mr. Bronock Reid instructed by Ms. Sanika Tyson, Attorneys at Law for the Company

Mr. Felix Celestine and Mr. Joseph Sookoo, Attorneys at law for the Applicant

REASONS

1. This is an application by Mr. David Hannays, one of the shareholders of the company, dated the 31st July, 2018, for an order that the joint liquidators do transfer the shares of the applicant in the company to NEVICOTT limited and that a new share certificate in the name of NEVICOTT be issued. It is supported by the affidavit of the Applicant dated the 31st July and a supplemental affidavit filed on the 8th October, 2018.

2. The essence of the application is that the proposed transferee is willing, once the shares are transferred to it, to invest some $2,000,000,000.00 USD in the company to repay the Government of Trinidad and Tobago the debt which is owed to it by the company. They have annexed a "proof of funds" to buttress this assertion. The "proof of funds" is in the form of a letter, addressed to the Minister of Finance, and indicates that a private equity company BMB Group Ltd can assist NEVICOTT in securing the sum of 2 billion USD subject to due diligence checks, and seeks to obtain certain financial information with respect to the company.

3. The Joint Liquidators object to the application on the basis that no strong reason for the transfer has been proffered, and that the proof of funds is not certain enough to show that NEVIOTT would with a sufficient degree of certainty be able to raise the requisite level of funding.

4. The Applicant submits that the modern test to be applied in determining whether the transfer would cause any detriment to the company and that in the instant case, there is no danger of that happening, and therefore the transfer ought to be allowed.

5. The relevant provision of the companies act which applies is section 360 which provides that **"In a winding up by the Court, any disposition of the property of the company including things in action, of and any transfer of shares, or alteration in the status of the members of the company made after the commencement of the winding up, is, unless**

the court otherwise orders, void." While it is clear therefore that the court must approve the transfer, the section is silent as to what it must consider in doing so.

6. The leading case on the factors to be considered in determining whether to approve such a transaction is ***In Re Onward Building Society***[1], in which the Court of Appeal stated **"It would be inexpedient that the Court should lightly allow, after the list has once been settled, changes which could only operate for the purpose of enabling people to speculate on what the result of the winding up might prove to be. It is not to be taken, therefore that it would be an easy matter to obtain the leave of the Court for such an alteration of the list."**[2] Further on the judgement reads: **"I conceive however, that before the Court gives leave to register such a transfer, it ought to see that to do so would be of some benefit to the company or those interested in its assets, and that it would not exercise its discretion except for very strong reasons."**[3]

7. Since that time, the test which has been applied by Courts is whether there is strong reasons for granting approval for allowing a transfer.

8. The Applicant contends that the test was restated in ***In re Bayou Offshore Master Fund Ltd and Three Other Funds***[4] to considering whether there was potential detriment to the

[1] [1891] 2 QB 465
[2] Bowen, L.J at p. 480
[3] Kay, L.J at p 483
[4] 2007 CILR 434

contributories or creditors. With respect I do not agree. What the court was saying was that unlike a previous matter which had suggested that both a benefit to contributories or creditors had to be shown, as well as strong reasons, the real test was whether there was no detriment to creditors or contributories as well as strong reasons. In other words, the Applicant must show that there will be no detriment to creditors or contributories as well as that there are strong reasons for allowing the transfer. That is what the court clearly stated at paragraph 8: **"Rather the more appropriate proposition, restated in the positive terms used in *In re Onward Building Society*** itself, would be that where no potential detriment to contributories or creditors could arise, a transfer of shares may be allowed after a winding-up order if there are strong grounds for doing so.

9. In other words, the lack of potential detriment does not obviate the need for strong ground. Both criteria must be satisfied.

10. Turning therefore to the facts of the instant application, there is nothing before the court which suggests that the transfer would cause any detriment to any contributor or creditor, and therefore that aspect of the test has been satisfied.

11. With respect to strong grounds, the purpose of the transfer is not to allow the NEVICOTT to speculate on the outcome of the winding-up, but rather to allow it to inject funds into the company in order to allow it to repay the debt owed to the Government of Trinidad and Tobago, which is its biggest creditor. There is no doubt that this is a desirable

outcome, rather than leaving the matter to a speculative sale of the assets of the company which may or may not be sufficient to cover the company's debts.

12. With respect to the Joint Liquidators' concerns surrounding the "proof of funds", while I agree that it is not as definitive as a declaration that NEVICOTT has the funds sitting in a bank account, it certainly does illustrate that there is a good possibility that the funds can be raised, beyond mere speculation.

13. In the circumstances, I am satisfied that strong grounds exist to approve the transfer of the shares from the Applicant to NEVICOTT and as such an order will be made in terms of the draft order annexed to the application dated the 31st July, 2018 with no order as to costs.

Kevin Ramcharan
Judge