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Creditor Claims against Liquidators: *Hague v Nam Tai Electronics* [2008] UKPC 13; [2008] BCC 295

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This recent Privy Council decision is the latest chapter in a long-running dispute arising out of the insolvency of Tele-Art Inc ('TAI'), which went into liquidation as long ago as 17 July 1998. In it the Privy Council struck down an attempt by Nam Tai Electronics, a creditor of TAI, to bring proceedings for its own benefit against a former liquidator (Mr Hague) for alleged failure to collect or take control of the assets of TAI. The Privy Council described the form of the proceedings as 'a matter of some surprise'.

The procedural background is complex, but is important to an understanding of the decision, which in form is the overturning of a grant of permission to serve proceedings out of the jurisdiction, but in substance is a decision as to the limited rights in law a disgruntled individual creditor has against a liquidator.

TAI was incorporated in the BVI, but carried on business in Hong Kong. It was wound up by the BVI court on the petition of Nam Tai, and Mr Hague (a partner in PricewaterhouseCoopers in Hong Kong ('PWC')) was appointed liquidator. Nam Tai soon fell out with Mr Hague, and by summons dated 25 February 1999 applied for Mr Hague's removal. That application failed, but before it had reached the point where no further appeal was possible, Nam Tai had in March 2001 issued a further summons to remove Mr Hague. Pursuit of that summons became unnecessary when on 24 July 2002 Mr Hague was given leave to resign as liquidator. His resignation was accepted by the BVI court on 17 December 2002.

However, prior to the acceptance of his resignation, Nam Tai had on 27 September 2002 commenced these proceedings in the BVI against Mr Hague and PWC. Nam Tai's statement of claim accused Mr Hague of various improprieties in the conduct of the liquidation: these were alleged to constitute breaches of statutory duty, breach of trust, and breach of duty of care in tort. The Privy Council noted that it was not clear from the pleading whether Nam Tai claimed damages for its own benefit or for the benefit of TAI.

Because Mr Hague and PWC were in Hong Kong, Nam Tai had to make an application under BVI procedural rules to serve them out of the jurisdiction. That application was granted (*ex parte*) by the BVI judge on 4 October 2002, whereupon Mr Hague and PWC were served with the proceedings. On 24 December 2002 Mr Hague and PWC applied for service to be set aside. They relied on various grounds, the one of relevance for current purposes being that the claim was misconceived in law. The application failed in the BVI's High Court and Court of Appeal. The Privy Council had no difficulty in allowing the appeal.

The Privy Council accepted that if there was a proper claim, it should be litigated in the BVI. However, permission should only be granted in respect of a claim which showed a serious issue to be tried. The Privy Council held there was no such serious issue. The key sentence in the decision (found in para. [13]) reads: 'A culpable failure by a liquidator to collect in or preserve or take control of the assets of a company in liquidation may diminish the value of the fund available for distribution pro rata among the creditors but is not, in their Lordships' opinion, a breach of a duty owed to each creditor as an individual'. The Privy Council made it clear (para. [16]) that if the application had been brought as a strike-out on the basis that the claim disclosed no reasonable cause of action, the application would clearly have succeeded.

Questions of insolvency law only rarely get to be addressed by judges of this seniority in the common law judicial hierarchy. The Privy Council's view will inevitably have substantial influence on in this area of the law. However, practitioners will note the decision is a very short one, and arises in an unusual procedural context. The question is, to what extent did the decision leave relevant points unaddressed?

It is suggested that the decision is a robust one of wide import, entirely in line with case law cited in it, as well as case law not referred to. At para. [14], the court made reference to three recent cases as establishing the proposition quoted above.

– *Kyrris v Oldham* [2004] 1 BCLC 305 (UK Court of Appeal): absent some special relationship, an administrator of an insolvent partnership appointed under the Insolvency Act 1986 owed no common law duty of care to unsecured creditors in relation to his conduct of the administration. The Privy Council commented expressly that no special

relationship had either been pleaded by Nam Tai or referred to in the evidence.

- *Peskin v Anderson* [2001] 1 BCLC 372 (UK Court of Appeal): this is simply named without further detail as supportive of the *ratio* of *Kyrris*. This was in fact a case about whether company directors owed fiduciary duties directly to individual shareholders, which held that absent special circumstances these could not arise. By implication, the Privy Council regarded the position as analogous to that in *Kyrris*.
- *Grand Gain Investment v Borrelli* [2006] HKCU 872 (Hong Kong Court of First Instance): liquidators were sued by a creditor for alleged failure to obtain a proper price for the sale of an asset of the company. Following *Kyrris*, the judge had struck out the claim as being 'plainly and obviously unsustainable', which the Privy Council said was correct.

The Privy Council went on to point out that the law does not leave the creditor without a remedy. The BVI's Companies Act contains a provision to the same effect as section 212 of the Insolvency Act 1986, enabling a creditor to bring proceedings against (amongst others) a past or present liquidator who is alleged to have been guilty of any misfeasance or breach of trust in relation to the company. The critical feature of such an application though is that if the claim is made out, the court's power is to order appropriate compensation to be paid to the company (rather than the applicant creditor). Note that there is no suggestion by the Privy Council that the proceedings before them could have been saved by an application to reconstitute them as misfeasance proceedings: the difference was clearly considered too fundamental. Moreover, the existence of a bright-line distinction between the misfeasance proceedings on behalf of a class and separate proceedings by an individual creditor is emphasised by the particular facts: as was pointed out in para. [13] of the decision, 'Nam Tai may be the most substantial creditor of TAI by some distance but it is nonetheless only one member of the class'. Nam Tai's relative importance as a creditor did not save its 'misconceived' proceedings.

No reference was made to another recent UK High Court case which might have invited comment, *Re HIH Casualty* [2005] EWHC 2125 (Ch); [2006] 2 All ER 671. However, there is no discernible difference of approach between the Privy Council and the judge in that case. At paras [115]-[126] of *HIH*, David Richards J commented on the distinction between claims by creditors against liquidators for breach of statutory duty owed to them personally (e.g. the possibility of a claim where a creditor has submitted his proof in time, it has not been rejected, yet nevertheless distribution is made without reference to the claim), and claims which can only be for a collective remedy for misfeasance. Although the focus is different, this is consistent with the Privy Council's statement that there must be some special relationship before a creditor may bring a direct claim against a liquidator. It is understood that the Court of Appeal has recently commended this analysis in an *ex tempore* judgment when dismissing an appeal in *Lomax Leisure v Miller* (the first instance decision in which is found at [2007] EWHC 2508 (Ch); [2008] 1 BCLC 262).

Standing back, the *Nam Tai* decision reinforces the collective nature of liquidation proceedings: the responsibility for collecting assets and implementing the statutory scheme is vested in the liquidator subject to the ultimate control of the court. That control is intended to be exercised on behalf of creditors as a class. While in theory it may be possible for an individual creditor to demonstrate that he is owed direct duties and is entitled to direct compensation for breach of those duties, his claim will only succeed on the basis that there is something which takes it out of the ordinary. In practice, that will be hard for an individual creditor to demonstrate to the court's satisfaction.

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