

JERSEY / JUDGMENT

AAA Holdings Limited

[2009] JRC 110 (04 June 2009)

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judgment

the commissioner: 1. On 18 th May, 2009, the Court heard an application by the liquidators of AAA Holdings Limited ("the Company") made ex parte under Article 170 of the Companies (Jersey) Law 1991 ("the Companies Law") to sanction the proposed compromise of a claim brought against the Company by the first and second respondents which claim was the subject of proceedings before the Court. 2. The liquidators were appointed by the Court on 15 th September, 2008, under Article 155 of the Companies Law (Winding Up on just and equitable grounds) and they were given the powers, amongst others, set out in chapter 4 of part 21 of the Companies Law (Creditors' Winding Up). 3. Article 170 of the Companies Law is in the following terms:- "170. Powers and duties of liquidator (1) The liquidator in a creditors' winding up may, with the sanction of the court or the liquidation committee (or, if there is no such committee, a meeting of the creditors) - (a) pay a class of creditors in full; (b) compromise any claim by or against the company." No liquidation committee had been appointed in this case and there had been no meeting of creditors. 4. This judgment is not concerned with the merits of the proposed compromise (which the Court subsequently approved) but with whether the other creditors of the Company should be notified of the proposed compromise and be given an opportunity to be heard. This was apparently the first time that the Court had been asked to sanction a compromise under Article 170 of the Companies Law. 5. In this case, there are three other creditors ("the other creditors") who have submitted claims totalling some £324,000, the only readily realisable asset of the Company being the sum of £195,447.19 (with interest accruing) held by the Court. None of the claims of the other creditors have yet been adjudicated by the liquidators. The liquidators represented the interests of the shareholders of the Company (as liquidators of the Company's parent). 6. The compromise had been agreed between the liquidators and the first and second respondents, subject to the sanction of the Court, on commercial grounds following legal advice given to the liquidators. 7. The liquidators did not invite the Court to convene the other creditors on the grounds that the merits of the compromise were such that there was very little that they would be able to say. There is no requirement under Article 170 of the Companies Law that creditors should be notified and given an opportunity to be heard. 8. Mr Cadin helpfully referred us to the English Court of Appeal decision of *In re Greenhaven Motors Limited*

- [1999] BCC 463 which was concerned, on very different facts, with the approach of the Court on an application by a liquidator for leave to compromise proceedings. The Court noted that the decision whether or not to sanction the compromise was a decision for the Court (or for the liquidation committee) and not for the liquidator. If the exercise of power is sanctioned, the liquidator, in the absence of a direction from the Court, can decide whether or not to actually exercise it. The judgment of Chadwick LJ said this in relation to the correct approach:- "In my view, the correct approach in cases under section 167(1)(a) of the Act [the equivalent to Article 170 of the Companies law] was identified by Lightman J in *In re Edenote Ltd* (No 2)
- (1997) 2 BCLC 92g-h. He said:- 'Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interest of the creditors, in any ordinary case where (as in this case) there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed.' In deciding whether or not to sanction a proposed compromise the court must consider whether the interests of those, whether creditors or contributories, who have a real interest in the assets of a company in liquidation, are likely to be best served (i) by permitting the company to enter into that compromise with all the terms that it contains; or (ii) by not permitting the company to enter into that compromise. It is not for the court to speculate whether the terms of the proposed compromise were the best that could have been obtained; or whether the proposed compromise would have been better if it did not contain all the terms that it does contain; or whether there could have been a better compromise unless it is satisfied that, if the company is not permitted to enter into the compromise on the terms which the liquidator has negotiated there will then be better terms or some other compromise on offer, the decision is between the proposed compromise and no compromise at all. In reaching that decision, the court may have to weigh the different interests of creditors and contributories and, perhaps, the different interests of preferential and non-preferential creditors. It will not give weight to the wishes of those who will be unaffected whichever way the decision goes; for example, the interests of contributories who have no realistic prospect of receiving a distribution in any foreseeable circumstances, or the wishes of preferential or secure creditors who will be paid in full in any event. Subject to that, the court will give weight to the wishes of creditors and contributories whose interests it has to consider, for the reason that creditors and contributories, if un-influenced by extraneous considerations, are likely to be good judges of where their own best interests lie. For the same reason the court will give weight to the views of the liquidator, who may, and normally will, be in the best position to take an informed and objective view. But, as I said, at the end of the day it is for the court to decide whether or not to sanction compromise."
9. In our view that reflects the correct approach to applications by liquidators for Court sanction to the compromise of claims under Article 170 of the Companies Law. The issue in this case was whether in considering the interests of the other creditors, the Court

ought to give them the opportunity of expressing their views on the basis that they are likely to be good judges of where their own best interests lie. 10. Under English law, a creditor has the right at his own cost to attend in court or in chambers at any stage of the proceedings, either in person or through his solicitor, and may request the Court in writing to give him notice of any step in the proceedings, subject to his paying the cost involved and keeping the court informed as to his address. We have no equivalent provision. Bearing in mind that difference, Chadwick LJ said this in relation to the views of creditors whose claims had not been admitted:- In my view it is plain that a creditor or contributory of a company is entitled to be heard on an application by the liquidator under section 167(1)(a). I do not understand that to be in dispute. But an application under section 167(1)(a) of the Act is not a suitable context in which to decide whether or not a person claiming to be a creditor is indeed a creditor. In my view, the Act does not require the court to attempt that task. At the end of the day it is a matter for the discretion of the court whether or not to authorise or sanction the compromise - see *Bank of Credit and Commerce International SA (No 2)* (

- 1992) *BCC 715* at page 735H. The court may, and usually will, take into account the views of someone claiming to be a creditor or contributory, but it is not bound by those views. If the claim appears thin, or the claimant can be seen to have no real interest in the assets having regard to prior claims, his views may carry little weight. I would think it inappropriate for the court to embark, in the context of application under section 167(1)(a) of the Act, on a detailed examination of the question whether a person wishing to be heard is indeed a creditor or a contributory. The circumstances in the present case demonstrate that such examination is likely to prove inconclusive. I think it is sufficient that the court should be satisfied that the claim is made bona fide and it is not plainly misconceived. If the claimant satisfies that test, then it seems to me that he should be heard. It remains a matter for the court what weight should be given to his wishes." 11. It was our view that in the absence of a liquidation committee or meeting of creditors, creditors should ordinarily be given an opportunity of being heard, so that the Court can take into account their views before a decision to sanction the compromise is made, bearing in mind that the decision is one which the Court will be making in their interests. Any creditor who seeks to be heard would do so at his own risk as to costs. 12. We say ordinarily as we accept that there may be circumstances in which it is not practicable for the views of the creditors to be heard, for example if the compromise would be jeopardised by the delay involved in such an exercise. In the instant case, there was no prejudice (other than the costs incurred) in the application of the liquidators for sanction being adjourned for a short period so that the other creditors could be notified by the liquidators in writing and given the opportunity to be heard. We therefore adjourned the application for this purpose. 13. A further issue arose as to what information should be given to the other creditors. Any legal advice given to the liquidators would be protected by litigation privilege and it would not be in the interests of the Company (or its creditors generally) for that advice to be disseminated amongst a wide body of persons. On the other hand, the other creditors will need sufficient information in

order to understand the terms of the compromise and why the liquidators recommend it should be sanctioned. 14. The Court directed that the other creditors should be given the pleadings and affidavits (without exhibits) filed in the proceedings but not the affidavit of the liquidators containing the legal advice received. Instead, the liquidators were directed to summarise the proposed compromise to the other creditors and the reasons why they recommended that sanction be given. 15. In this case, it transpired that none of the other creditors wished to be heard and the compromise was duly sanctioned. Authorities Companies (Jersey) Law 1991. In re Greenhaven Motors Limited

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