

BRITISH VIRGIN ISLANDS COURT OF APPEAL

KMG International NV -v- DP Holding SA BVIHCMAP2017/0013 (3 May 2018)

INSOLVENCY ACT SECTION 168 – TIME PERIOD FOR APPOINTING LIQUIDATORS AND APPLICATIONS TO EXTEND TIME

KMG International, the appellant, issued an application for the appointment of liquidators (the “Original Originating Application”) over DP Holdings SA, the respondent. By Section 168 of the *Insolvency Act* an application to appoint a liquidator must be determined within six months after filing, or within any extension of that period granted by the Court. If the application is not determined within either of those periods it is deemed dismissed.

Here, as a result of an order by the Court below setting aside service out of the jurisdiction, a further extension of time was not sought, although one had been sought and granted previously. Before the expiry of the date for the hearing of the Original Originating Application the appellant launched its appeal against the decision of the learned judge below to set aside service out of the jurisdiction.

The Original Originating Application was valid at the time the appeal was filed but technically expired before the appeal was heard many months later. After the appeal was heard, but before judgment had been handed down, the respondent sought to argue in correspondence that the Originating Application was no longer valid. In response to such, the appellant issued a new Originating Application in identical terms to the Original Originating Application. The respondent then issued its application to strike out the appeal and its own cross-appeal, on the basis that the Original Originating Application had been deemed dismissed. In dismissing the respondent’s applications, the Court held that the fact that the Court below had made an order extending the appointment of Provisional Liquidators over DP Holding was not enough to extend the period under Section 168 by implication.

After the Court of Appeal hearing, but before judgment in the Service Appeal was handed down, KMG issued a new Originating Application which raised identical issues to the Original Originating Application.

In deciding whether to hand down the judgment in the Service Appeal, the Court of Appeal ruled that it maintained the jurisdiction to deal with the hearing and determination of the Service Appeal. The Court of Appeal having had jurisdiction when the appeals were commenced does not thereby lose jurisdiction merely because the operation of Section 168 caused the Originating Application to be deemed to be dismissed.

That left the Court of Appeal with the discretion whether to deliver judgment. In this case, it exercised its discretion in favour of delivering judgment, taking into consideration, among other things, that the appeal was not a formality and *lis* remained between the parties, particularly now that KMG had filed a fresh application between the same parties on the same subject matter and there having been no disposal of the Originating Application on its merits.

The Court also confirmed that the language of Section 168 was very clear: any applications to extend time must be made before the expiry of the relevant period. Further, it was not possible for the required extension to be implied by reason of the extension of the appointment of joint provisional liquidators over the company.

The application to strike out the Service Appeal was dismissed with costs to KMG.

The case stands as a cautionary tale to always check the expiry of Section 168 periods: both as the petitioner (in which case you must make an extension application in good time) and as a respondent (in which case you may suffer costs or other consequences if the point is not raised promptly).

Mark Forte and Tameka Davis of Conyers were instructed by the appellant led by Alain Choo Choy QC.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.