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CR-2020 002463

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

RE A COMPANY (APPLICATION TO RESTRAIN ADVERTISEMENT OF A WINDING UP PETITION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

16/06/2020

B e f o r e :

ICC JUDGE BARBER

Re a Company (Application to Restrain Advertisement)

Ian Rees Phillips (instructed by John Fowlers LLP) for the Company
Lauren Kreamer (instructed by TTMK solicitors) for the Respondents

Hearing dates: 8 and 9 June 2020

HTML VERSION OF JUDGMENT APPROVED

ICC Judge Barber

1. This is the adjourned hearing of an application by a company ('the Company')

   (1) to restrain the advertisement of a winding up petition presented by the First Respondent;

   (2) to restrain the presentation of winding up petitions by the Second and Third Respondents.

2. In order to protect the interests of the Company, this judgment has been anonymised in certain respects.

3. The Company's application was issued on 13 May 2020 following the presentation by the First Respondent ('the Petitioner') of a winding up petition against the Applicant ('the Company') on 1 May 2020 under case number CR 2020 002316. The petition is in the sum of £160,697 and relies upon a statutory demand dated 19 March 2020 served on 27 March 2020 concerning loan debts and interest thereon claimed to be due under a loan agreement dated 24 September 2018 ('the Agreement'). The petition is due for its first hearing on 17 June 2020. The Company seeks an injunction to restrain the Petitioner from advertising the petition and from proceeding with it generally.

4. The Company further seeks injunctions restraining the Second and Third Respondents from presenting their own petitions based on statutory demands (each dated 19 March 2020 and served on 27 March 2020) in the respective sums of £131,000 odd and £81,000 odd inclusive of interest. In the case of the Second Respondent, the £131,000 odd claimed is said to be due under two loan agreements dated 31 October 2018 made between (1) the Company as borrower and (2) the Second Respondent and her (now deceased) husband as lenders. In the case of the Third Respondent, the £81,000 odd claimed is said to be due under a loan agreement dated 8 September 2017 made between the Company and the Third Respondent.

5. The Company's application was originally founded on three grounds:

   (1) That the Respondents were acting with a collateral improper purpose in pursuing a winding up of the Applicant, in that they were seeking to support a related third party, the Company's former CFO

Mr Bains, in his campaign of litigation in various other courts and tribunals, rather than in the interests of the Company's unsecured creditors as a whole;

(2) That the debts the petition and statutory demands were founded upon were genuinely and substantially disputed; and

(3) That a winding up would be oppressive and unfair given the impending changes to insolvency legislation which are intended to have retrospective effect.

6. The application first came before the court on 14 May 2020 when directions were given.

7. The first substantive hearing of the application took place before Deputy ICC Judge Agnello QC on 1 June 2020. At that hearing the Company's first two grounds of opposition were dismissed. Consideration of the third ground of opposition was adjourned to today due to lack of court time.

8. On the direction of Deputy ICC Judge Agnello QC, the parties prepared a list of issues for the court to consider at the adjourned hearing of the application to restrain advertisement. The list prepared was as follows:

(1) Whether the provisions of Part One (paragraph 1) of Schedule 10 to the Corporate Insolvency and Governance Bill ('the CIG Bill') would, if enacted, permit the petition to proceed;

(2) whether the provisions of Part Two (paragraphs 2 to 21) of Schedule 10 to the CIG Bill would, if enacted, permit the petition to proceed;

(3) whether the court should factor the provisions of the CIG Bill into the exercise of its discretion in relation to the Company's application, in circumstances where the CIG bill has not yet been enacted; and

(4) whether, in light of the foregoing, in the exercise of the court's discretion to order an injunction, it would be oppressive and unfair to wind up the Company given the potential changes to the law and the retrospective nature of those changes.

9. By the time of the hearing before me, it was common ground that the court should factor the provisions of the CIG Bill into the exercise of its discretion in relation to the Company's application. Issue 3 was therefore agreed. The common ground reached on this issue reflected the recent decision of Mr Justice Morgan in the case of Re a Company (Injunction to Restrain Presentation of a Petition) [2020] EWHC 1406, which was handed down on 1 June 2020.

The CIG Bill

10. On 23 April 2020, BEIS announced that it would bring forward legislation to protect debtors affected by the coronavirus crisis. By a press release it said:

> " … The government will temporarily ban the use of statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions presented from Monday 27th April, through to 30th June, where a company cannot pay its bills due to coronavirus."

11. On 20 May 2020 the CIG Bill was presented to Parliament. It has now progressed through the House of Commons to the House of Lords and the current expectation is that the CIG Bill will receive the Royal Assent by the end of June 2020.

12. The key provisions of the Bill for the purposes of the application before me are contained in Schedule 10.

13. In the recent case of Re a Company (Injunction to Restrain Presentation of a Petition) [2020] EWHC 1406, which also concerned the impact of the CIG Bill, Mr Justice Morgan expressed (at [17]) 'a high degree of confidence that Schedule 10 will be enacted in more or less its current form'. I respectfully share that confidence.

Issue 1

14. Paragraph 1 of Schedule 10 is headed 'Prohibition of petitions on basis of statutory demands'. It provides that no petition for the winding up of a registered company may be presented under s.124 of the 1986 Act on or after 27 April 2020 on the ground specified in s.123(1)(a) (non-compliance with a statutory demand), where the statutory demand in question was served during the period 1 March 2020 and the later of 30 June 2020 and one month after the coming into force of Schedule 10. Paragraph 1 of Schedule 10 further provides that it is to be regarded as having come into force on 27 April 2020.

15. In the present case the petition was presented on 1 May 2020 and relies, at least in part (a point I shall come onto), on a statutory demand served on 27 March 2020.

16. On behalf of the Company, Mr Rees Phillips maintains that Paragraph 1 of Schedule 10 is fatal to the petition. His primary submission is that the

petition should be dismissed (or at the very least, advertisement restrained) on that ground alone.

17. On behalf of the Respondents, Ms Kreamer accepts that Paragraph 1 would be fatal to a petition based solely on s.123(1)(a) but submits that in this case the Petitioner relies upon both s.123(1)(a) and s123(1)(e).

18. The backdrop to this submission is that formal demand for payment of sums due under the Agreement was made by letter dated 24 January 2020, requiring payment by 31 January 2020. The letter of 24 January 2020 was the culmination of a run of correspondence in evidence spanning from December 2019 to January 2020 enquiring after (and latterly demanding) repayment of the sums due under the Agreement. The Company had failed to comply with the formal demand of 24 January 2020. That demand pre-dated the statutory demand and was not caught by paragraph 1 of Schedule 10. The Company's failure to comply with the formal demand of 24 January 2020, Ms Kreamer argued, gave the Petitioner an alternative ground to rely upon: s.123(1)(e). As confirmed in the case of Cornhill Insurance Plc v Improvement Services Ltd [1986] 1 WLR 114, failure to pay a debt which is due and is not disputed is of itself evidence of inability to pay debts as they fall due for the purposes of s.123(1)(e).

19. Ms Kreamer further argued that if, as a matter of construction, the petition does not expressly (or sufficiently clearly) embrace s.123(1)(e) as currently drafted, it would in any event be open to the Petitioner, at this early stage in the petition, ahead of its first hearing, to seek permission to amend the petition in order to insert express particulars of the Company's failure to comply with the formal demand of 24 January 2020; and that the court, when considering the argument that the petition is doomed to failure, should take that into account.

20. As a matter of construction, as currently drafted, the petition does not unequivocally rely upon s.123(1)(e). It can be read either way. Whilst it refers to the statutory demand *and* states that 'the Company is insolvent and unable to pay its debts', it does not refer expressly to the formal demand for payment made on 24 January 2020 and the Company's failure to comply with that demand. Moreover, as Mr Rees Phillips rightly noted, where a petition is based upon a statutory demand, rule 7.5(1)(l) IR 2016 requires the petition to state, inter alia, 'that the company is insolvent and is unable to pay its debts'. The inclusion of such words in the petition therefore does not point unequivocally to reliance upon s.123(1)(e).

21. That said, it was not (and could not be) disputed that formal demand was made on 24 January 2020 and was not complied with. On the face of it therefore, it is in principle open to the Petitioner to rely upon s.123(1)(e) in

place of s.123(1)(a) and to seek permission to amend the petition for that purpose. At this early stage, prior to the first hearing of the petition, the court would readily grant permission to amend, to delete reference to the statutory demand and to insert in its place an express reference to s.123(1)(e) and particulars of that ground. I reject Mr Rees Phillips' submission that paragraph 1 of Schedule 10 would preclude this. No good purpose would be served by refusing permission to amend in such circumstances. In principle (subject to the other issues addressed below) the Petitioner could simply present a fresh petition and, given the modifications to s.129(2) IA 1986 proposed by paragraph 9 of Schedule 10, even the change in date of presentation would be of little consequence. Ms Kreamer confirmed that the Petitioner will seek permission to amend if necessary.

22. Given Ms Kreamer's confirmation that the Petitioner will seek permission to amend, and given the likelihood that such permission would be granted at this early stage in the petition, in my judgment the court should not proceed, for the purposes of the current application, on the footing that paragraph 1 of Schedule 10, if enacted, would be fatal to the petition.

Issue 2

23. The next issue is whether the provisions of part two (paragraphs 2 to 21) of Schedule 10 to the CIG Bill would, if enacted, permit the petition to proceed.

Issue 2: Paragraph 2

24. Paragraph 2 of Schedule 10 is headed 'restriction on winding-up petitions: registered companies'. For the purpose of paragraph 2, the term 'relevant period' refers to the period commencing on 27 April 2020 and ending on the later of 30 June 2020 and the expiry of one month after the coming into force of Schedule 10: see para 21(1)(a) of Schedule 10.

25. Paragraph 2 provides as follows:

> "(1) a creditor may not during the relevant period present a petition under section 124 of the 1986 Act for the winding up of a registered company on a ground specified in section 123(a) to (d) of that Act ('the relevant ground') unless the condition in sub-paragraph (2) is met."
>
> (2) The condition referred to in sub-paragraph (1) is that the creditor has reasonable grounds for believing that –
>
> > (a) coronavirus has not had a financial effect on the company, or

(b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.

(3) A creditor may not during the relevant period present a petition under section 124 of the 1986 Act for the winding up of a registered company on the ground specified in section 123(1) (e) or (2) of that Act (' the relevant ground ') unless the condition in sub-paragraph (4) is met.

(4) The condition referred to in sub-paragraph (3) is that the creditor has reasonable grounds for believing that –

a) Coronavirus has not had a financial effect on the company, or

b) the relevant ground would apply even if coronavirus had not had a financial effect on the company.

(5) This paragraph is to be regarded as having come into force on 27 April 2020".

26. At first glance it would appear that there is a degree of overlap between paragraph 1 and paragraph 2 of Schedule 10 in relation to petitions presented in the period 27 April 2020 to 30 June (or one month after Schedule 10 comes into force) which are based on statutory demands. Read purposively, however, against the backdrop of paragraph 1, it is clear that paragraph 2 must apply to petitions presented after 27 April 2020 which are based on statutory demands served prior to 1 March 2020.

27. Given the Petitioner's intended reliance on s.123(1)(e), in the present case the relevant provisions are paragraphs 2(3) and (4) of Schedule 10.

28. For the purposes of satisfying this test, the Petitioner must show that, as at the date of presentation, it had reasonable grounds for believing (1) that coronavirus has not had a financial effect on the Company (para 2(4)(a)) or (2) that the relevant ground (in this case s.123(1)(e)) would apply even if coronavirus had not had a financial effect on the Company (para 2(4)(b)).

29. As accepted by Ms Kreamer, few petitioners would be able to satisfy paragraph 2(4)(a) and the Petitioner in this case cannot do so.

30. On the evidence before me however, the Petitioner does satisfy paragraph 2(4)(b). In my judgment, at the time of presentation, the Petitioner had reasonable grounds for believing that s.123(1)(e) would apply even if coronavirus had not had a financial effect on the Company. In this regard I take into account in particular the following:

(1) the repayment date provided under the terms of the Agreement was '120 days from the date of the loan agreement'. The loan was therefore due for repayment on 22 January 2019, long before Covid-19 hit;

(2) the Company did not repay any part of the debt on the repayment date of 22 January 2019. Instead, it reached an agreement with the Petitioner that the Petitioner would not call in the debt as long as it was serviced with interest payments twice a month on the 15th and last day of each month;

(3) the Company did not keep to its obligations to service the debt twice a month. In my judgment it is legitimate to infer that it could not do so. The agreed payments of interest started erratically and then stopped completely in May 2019. At that point, if not before, the debt became repayable on demand;

(4) no interest payments were offered or received thereafter, suggesting ongoing significant cashflow problems;

(5) by a series of letters commencing (at the latest) on 2 December 2019 and culminating in the formal demand letter of 24 January 2020, the Petitioner enquired after and latterly demanded repayment of the principal and interest due under the Agreement. These letters were met with either silence or holding responses. I was not taken in the evidence to any response by the Company to the Petitioner's formal demand letter of 24 January 2020. It appears to have been ignored;

(6) over the period December 2019 and January 2020, a similar pattern of correspondence is apparent in relation to the debts owed to the Second and Third Respondents. Demands for repayments of those debts were made and ignored;

(7) over the period January to March 2020 (the point at which, according to Mr Aldridge, the impact of Covid-19 was felt), the Company failed to respond to the Respondents' demands for payment or to give any concrete indication when or how the Respondents (including the Petitioner) could ever hope to be paid;

(8) it was not until 16 April 2020, almost three months after the sums due under the Agreement were formally demanded by letter of 24 January 2020, that the Company circulated a letter to all loan note holders, effectively blaming the pandemic for any delay in repayment of sums due and asking for patience ('the April letter').

31. Mr Rees Phillips argued that, in determining whether the Petitioner had 'reasonable grounds' for the purposes of paragraph 2(4)(b), account must be taken of events known to the Petitioner occurring between January and 1 May 2020 (the date of presentation). I accept this submission.

32. Mr Rees Phillips went on to submit that, by the time of presenting its petition, the Petitioner would have known of the steps being taken by the Company to raise finance at the beginning of the year and of the impact of Covid on those fund raising efforts. He argued that the Petitioner would have gained such knowledge (a) through Mr Bains, a former employee of the Company, who was repaid £405,000 by the Company in February 2020 in response to a statutory demand; and (b) from the April letter.

33. With regard to (a), there was no evidence before me to establish what Mr Bains knew of the Company's fund-raising efforts at the beginning of the year and no evidence from which to impute any knowledge that Mr Bains may have had to the Petitioner or the other Respondents. The mere fact that Mr Bains was a relative of the Second and Third Respondents was of itself insufficient. There was no evidence to establish or even to support the contention that the Respondents knew that Mr Bains had been repaid £405,000 by the Applicant in February 2020 either.

34. I accept that by an email dated 24 December 2019 the Company had informed the Respondents that the Company was 'working through arrangements with our investors to settle the amounts owed to you'. This email has to be seen in context, however. Two weeks prior, by email of 11 December 2019, the Respondents had been told by the Company that 'our finance team are reviewing this week and we will discuss with the board at the Board meeting and will revert to you shortly thereafter.' Ultimately, these communications were little more than holding responses, in each case prompted by chasing. I was taken to no evidence that they were followed up by any more concrete communications from the Company to the Respondents pre-Covid, setting out when or how the Respondents (including the Petitioner) could ever hope to be paid.

35. With regard to (b), the April letter was a one-page letter circulated to the Company's creditors after the onset of the pandemic. Given the Company's pattern of non-payment and broken promises in the past, summarised at paragraph 30 above, and absent any meaningful information from the Company in the run-up to the pandemic as to when or how it proposed paying the Petitioner, this letter could reasonably be seen as at 1 May 2020, in the words of Ms Kreamer, as something of an opportunistic attempt to jump on the Covid bandwagon. In my judgment, the April letter is of itself insufficient to render the Petitioner's reasonable grounds unreasonable.

36. For all of these reasons, I conclude that, at the time of presentation of the petition, the Petitioner met the condition set out in paragraph 2(4)(b).

Issue 2: Paragraph 5

37. That being so, the next question is whether paragraph 5 of Schedule 10 to the CIG Bill would, if enacted, permit the petition to proceed.

38. Paragraph 5 of Schedule 10 restricts the circumstances in which a winding up order may be made against a company. It provides as follows:

> '(1) This paragraph applies where-
>
> (a) a creditor presents a petition for the winding up of a registered company under section 124 of the 1986 Act in the relevant period,
>
> (b) the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of that Act, and
>
> (c) it appears to the court that coronavirus had a financial effect on the company before the presentation of the petition.
>
> (2) The court may wind the company up under section 122(1)(f) of the 1986 Act on a ground specified in section 123(1)(a) to (d) of that Act only if the court is satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company.
>
> (3) The court may wind the company up under section 122(1)(f) of the 1986 Act on the ground specified in section 123(1)(e) or (2) of that Act only if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company.
>
> (4) This paragraph is to be regarded as having come into force on 27 April 2020'.

39. In this case the conditions set out in paragraph 5(1)(a) and (b) are clearly satisfied. The petition was presented in the relevant period and the Company is deemed unable to pay its debts on a ground specified in section 123(1) of the 1986 Act. In such circumstances, at the hearing of the petition, the court would next ask itself whether 'it appeared to the court' that coronovirus had a financial effect on the Company before the presentation of the petition.

40. In my judgment, the evidential burden of showing that coronavirus had a 'financial effect' on the Company before the presentation of the petition is on the Company not on the Petitioner.

41. In the present case, the Company operates in the field of business and property management services in eastern, western and southern Africa. It is

a UK holding company for a variety of companies incorporated in the local jurisdictions in which it operates.

42. By paragraph 50 of his first witness statement on behalf of the Company, Mr Aldridge stated that the Company was 'solvent for its day to day operations, but relies on rolling over corporate debt and fund-raising by the issue of equity for its long-term financing'. He stated that 'the current Covid-19 situation has prevented both routes to acquiring new financing as international capital markets have frozen.' He explained that in early 2020, the Company was in the process of a funding drive which had been stopped in its tracks by the onset of Covid-19. As he put it: 'Immediately before the present crisis ensued, the Applicant had agreements in principle for significant new capital financing in the region of over US$10m, all of which fell away when the emergency conditions became full-blown worldwide in early March 2020.'

43. I have some reservations as to the quality of the evidence adduced by the Company on this issue. Only two draft finance agreements were adduced in evidence, one being a draft term-sheet with Aldridge Capital Limited (described as part of Mr Aldridge's 'family's investment operations') for a loan investment of US$1-4m with rights to convert the debt to equity, and the other relating to a proposed loan facility with Bank One Limited of Mauritius for the sum of US $1 million. The balance of the US$10m funding for which the Company claimed to have had agreements in principle was not documented at all, whether by emails, draft agreements or otherwise. No documentation as to the withdrawal of any of these agreements in principle was in evidence either. The Company adduced virtually no financial documentation to demonstrate its financial position before or after Covid hit. Its last filed accounts were not in evidence, and no management accounts or projections were adduced.

44. Notwithstanding these reservations, however, I have come to the conclusion that the Company has met the threshold requirements of paragraph 5(1)(c). This is clearly intended to be a low threshold; the requirement is simply that 'a' financial effect must be shown: it is not a requirement that the pandemic be shown to be the (or even a) cause of the company's insolvency. Moreover the language of this provision, which requires only that it should 'appear' to the court that coronavirus had 'a' financial effect on the company before presentation of the petition, is in marked contrast to that employed in paragraph 5(3), where the court is required to be 'satisfied' of given matters. The term 'appears' must be intended to denote a lower threshold than 'satisfied'. The evidential burden on the Company for these purposes must be to establish a prima facie case, rather than to prove the 'financial effect' relied upon on a balance of probabilities. Applying these principles, there is in my judgment adequate evidence before me that a funding drive was

underway by late December 2019/early January 2020 which was stopped in its tracks by the onset of the pandemic. The sudden halting of the funding drive is in my judgment a 'financial effect' of the pandemic for the purposes of paragraph 5(1)(c). The threshold test is met.

45. Given that the test in para 5(1)(c) is met, paragraph 5(3) must next be considered. Assuming that this is brought into force (which appears likely), the effect of this provision will be that the court can only wind up the Company if the court is satisfied that the ground (s.123(1)(e)) would apply even if coronavirus had not had a financial effect on the Company. At the hearing of the petition, the burden of showing that would be on the Petitioner. The Petitioner would have to show that even if the financial effect of coronavirus is ignored, the Company would still be insolvent within the meaning of s.123(1)(e).

46. Given that this is the approach to be taken when the petition is heard, in the context of this application, to restrain advertisement, the court must ask itself whether, at the hearing of the petition, there is a real chance of a winding up order being made (based on the material before it).

47. On the evidence as it stands, the court could not be 'satisfied' that section 123(1)(e) would apply even if coronavirus had not had a financial effect on the Company. As matters stand, therefore, unless further evidence on this issue is produced, there is no real chance of a winding up order being made on this petition (assuming that paragraph 5(3) is brought into force). Moreover, even if a winding up order was made on the evidence as it stands, paragraph 7 of the CIG Bill (if brought into force) would render the winding up order void.

Issue 4

48. The court must next ask itself whether, in the light of the foregoing, it would be oppressive and unfair to allow advertisement. In my judgment, on the evidence as it stands, it would be oppressive and unfair to allow advertisement. The Applicant is in the process of engaging in a restructuring exercise with its unsecured creditors by way of a scheme of arrangement under Part 26 of the Companies Act 2006 involving a debt for equity swap. The adverse publicity surrounding the presentation of a winding up petition at this commercially sensitive time would plainly be detrimental to the Company, and would serve no purpose if (as is currently the case on the evidence as it stands, assuming that the CIG Bill is made law) there is no real chance that a winding up order will be made.

Conclusions

49. For all of these reasons, I shall grant an injunction restraining advertisement, on terms that the Company provides the usual cross-undertaking in damages. Given that the CIG Bill is not yet law, however, and given also the indications during the course of the hearing before me that there may well be further material available which has not yet been adduced in evidence on the issue of whether section 123(1)(e) would apply even if coronavirus had not had a financial effect on the Company, the injunction restraining advertisement will not be permanent, but until further order. The Petitioner shall be at liberty to apply to lift the restraint on advertisement on production of further evidence demonstrating that section 123(1)(e) would apply even if coronavirus had not had a financial effect on the Company.

50. Unless suitable undertakings to like effect are offered, I shall also grant injunctions restraining the Second and Third Respondents from presenting winding up petitions based on the debts claimed by their statutory demands until further order, again with liberty to apply.

51. I shall hear from Counsel on the wording of the order and costs on the handing down of this judgment.

ICC Judge Barber

12 June 2020