

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

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4

CAUSE NO: FSD 168 OF 2012

5 The Honourable Mr Justice Andrew J. Jones QC

6 In Open Court, 21st December 2012

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9 IN THE MATTER OF THE COMPANIES LAW

10 AND IN THE MATTER OF ORCHID DEVELOPMENTS GROUP LIMITED

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12 **Appearances:** Mr Nicholas Fox of Mourant Ozannes for the Petitioner

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RULING

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Introduction

17 1. A creditor's winding up petition was presented against Orchid Developments Group
18 Limited (the "Company") on 13th December 2012 by Bellport Corporation (the
19 "Petitioner"). The evidence before the Court is that the Company is insolvent in that it is
20 unable to pay its current operating expenses as they fall due, but solvent in that the value
21 of its assets exceeds the amount of its liabilities by about €70 million. The trial of the
22 petition will take place on 25th January 2013. By its summons dated 17th December the
23 Petitioner now applies for the appointment of provisional liquidators pending the hearing
24 of the petition.

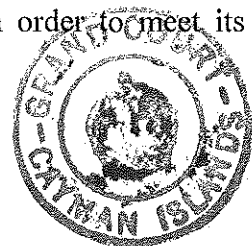
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Factual Background

27 2. The Company was incorporated on 2nd June 2004 and its shares are listed on the
28 Alternative Investment Market of the London Stock Exchange, although trading has been
29 suspended since 24th September 2012. Together with its subsidiaries, the Company carries
30 on business, mainly in Bulgaria, as the owner-manager and developer of various
31 commercial and residential property developments. The group's three main projects are

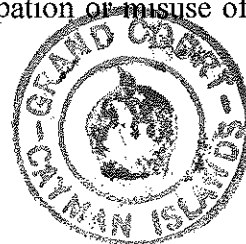
1 the Grand Mall retail centre, the Orchid Gardens multi-use commercial and residential
2 complex and the Orchid Hills residential complex, all of which are in Varna. The
3 Company and its subsidiaries are managed by the Petitioner pursuant to a management
4 services agreement executed in 2005. The Petitioner is wholly owned by Messrs Guy
5 Meyohas and Ofer Miretzky who are the Company's joint Chief Executive Officers. I
6 shall adopt the language and definitions used in the Circular filed with the stock exchange
7 and delivered to shareholders on 20th November (the "November Circular") and refer to
8 Messrs Meyohas and Miretzky and the Petitioner collectively as the "Concert Party". The
9 Concert Party owns 29.97% of the Company's issued share capital. The evidence in
10 support of the petition and this application comprises two affidavits sworn by Mr Meyohas
11 in his capacity as the authorized representative of the Petitioner.
12

- 13 3. A detailed analysis of the Company's consolidated financial position, as at 30th June 2012,
14 is contained in Part III of the November Circular. I shall use the expression the "Group" to
15 mean the Company, its twenty-four wholly owned direct and indirect subsidiaries and an
16 associated company in which it holds a 30% interest, details of which are set out in Part V
17 of the November Circular. In brief summary, the Company's net asset value is €71.4
18 million (2011: €75.3m) which equates to an NAV per share of €0.74 (£0.61). The Group's
19 non-current assets (at fair value) are €167.2 million (2011: €166.9m) and current assets (at
20 net realizable value) are €36 million (2011: €38.7m). Long term liabilities are €103.4
21 million (2011: €102.6m). Short term borrowing liabilities of €15.3 million consist mainly
22 of credit facilities which should be repaid during the period to 30 June 2013. The Group's
23 net loss for the six months ended 30th June 2012 was €3,029,000 (2011: half year profit of
24 €2,060,000 and full year loss of €182,000). The Group's revenue of €5.9 million for the
25 half year ended 30th June 2012 (2011: €5.0m) consists mainly of rent generated from the
26 Grand Mall and the proceeds of the sale of completed apartments in the Orchid Hills
27 project. In spite of the fact that the Company is clearly solvent on a balance sheet test, Mr
28 Meyohas's evidence is that it is insolvent on a cash flow test in that it is presently unable
29 to pay its operating expenses as they fall due. He says that the Company is unable to pay
30 €216,664 owing to the Petitioner in respect of management fees due for the months of
31 August, September, October and November 2012. In addition to the fees owed to the
32 Petitioner, which are accruing at the rate of €54,166 per month, Mr Meyohas' evidence is
33 that the Company will be unable to pay additional operating expenses of about €132,000
34 which will fall due by the end of this month. His affidavit does not explain why the
35 Company is apparently unable to draw down on its short term credit facilities in order to
36 meet these immediate expenses.
37
- 38 4. Trading in the Company's shares was suspended in September because its directors
39 determined that they could not issue its interim financial statements for the half year ended
40 30th June 2012 without a going concern qualification. In order to meet its short term



1 financing requirements (and avoid the need for a going concern qualification) the
2 Company's directors announced a rights issue by which they proposed to raise up to
3 £2,114,240 (about €2.65m) of new share capital. They also proposed to capitalize
4 £671,621 (€839,526) of unpaid management fees for the period up to 31st December 2012
5 by the issue of 29,849,813 new shares to the Petitioner. Messrs Meyohas and Miretzky
6 committed to invest a minimum £1.36 million (€1.7m) as part of these proposals. The
7 directors expressed the view that this minimum subscription of £1.36 million, coupled
8 with the capitalization of fees, would be sufficient to meet the Group's working capital
9 requirements for the period from 1st December 2012 until 30th November 2013, but not
10 beyond. The November Circular emphasized to shareholders that if the proposed
11 resolutions were not passed at the EGM, this minimum subscription and capitalization of
12 fees would not occur, with the result that "the Company would not have sufficient
13 working capital to continue to trade, would cease to trade, and would most likely be
14 placed into liquidation." In spite of this warning, the proposal was rejected by the
15 shareholders at the EGM held on 14th December 2012. Mr Meyohas has not sought to
16 explain why this proposal was rejected, but I note that it would have resulted in a
17 significant dilution of the equity interest of the independent shareholders (by which I mean
18 all those other than the Concert Party). If the proposals had been passed, the Concert
19 Party's *minimum* interest in the Company's share capital would have risen from 29.97% to
20 39.34% and it was theoretically possible for its interest to be increased to 63.84%. In the
21 event, the winding up petition was presented on the day *before* the EGM was due to be
22 held, presumably in the knowledge that the resolutions were bound to fail. The result of
23 the EGM and the fact that a winding up petition had been presented the previous day was
24 duly announced to the London Stock Exchange on 14th December 2012 at 5.44pm London
25 time. It is against this factual background that the Petitioner (or in reality, the Concert
26 Party) seeks an order for the appointment of provisional liquidators without having given
27 notice of the application to the Group's independent creditors (who appear to be owed
28 approximately €115 million) and the Company's independent shareholders (who still own
29 70.03% of its issued share capital).

- 30
- 31 5. Prior to the enactment of the Companies (Amendment) Law 2007, the Court had a very
32 broad discretion to make orders for the appointment of provisional liquidators which
33 tended to be abused by petitioners, who would make *ex parte* applications for the
34 appointment of their own nominees as provisional liquidators in the knowledge that it
35 would be difficult, thereafter, for the main body of stakeholders to secure the appointment
36 of an official liquidator of their own choice. This mischief was cured by the provisions of
37 what is now section 104(2) of the Companies Law (2012 Revision) which sets out limited
38 and very specific grounds upon which provisional winding up orders can be made on the
39 application of a petitioning creditor. I have jurisdiction to appoint provisional liquidators
40 only if it is necessary in order to prevent (i) the dissipation or misuse of the Company's



1 assets or (ii) the oppression of minority shareholders or (iii) mismanagement or
2 misconduct on the part of the Company's directors, that is to say mismanagement or
3 misconduct on the part of Messrs Meyohas and Miretzky themselves. Obviously, they are
4 not suggesting that they will act in breach of duty between now and the trial of the petition
5 on 25th January 2013 unless provisional liquidators are appointed. In his second affidavit,
6 Mr Meyohas seeks to put the Petitioner's case as follows –
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8 *"21. First, and as I said above, the Company has no money to fund its day to day*
9 *activities. In particular, the Company will not be able to pay the salaries of the*
10 *Company's employees, nor will it be able to pay its other professional advisers and*
11 *regulatory fees. Bellport is presently owed, or will shortly be owed, approximately Euro 2*
12 *million by the Company. That debt will increase monthly because the Management*
13 *Services Agreement between Bellport and the Company continues to operate. Bellport is*
14 *under no obligation, contractual or otherwise, to fund the Company's operations.*
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16 *22. In the circumstances, Bellport is not prepared to provide further gratuitous funding*
17 *to the Company without the appointment of Provisional Liquidators. It will be Bellport's*
18 *intention to negotiate an immediate agreement with the Provisional Liquidators to allow*
19 *Bellport to provide additional funding to assist the Company in continuing to trade, but on*
20 *the basis that such funding is not considered as an unsecured debt in the Liquidation."*
21

22 Bearing in mind that the amount owed to the Petitioner is less than 2% of the Group's total
23 liabilities and that the Company has an NAV of about €71.4 million, of which the Concert
24 Party owns 29.97%, I do not find Mr Meyohas' analysis at all convincing. I can see no
25 justification for making a provisional winding up order so that the Concert Party can
26 nominate the liquidators and safely enter into a funding arrangement, "on the basis that
27 such funding is not considered as an unsecured debt in the liquidation" without reference
28 to the Group's independent creditors and the Company's independent shareholders. I
29 accept Counsel's representation that no agreement has been concluded with the nominated
30 provisional liquidators in anticipation of an appointment being made, but I would not
31 authorize any such agreement in the circumstances of this case unless the independent
32 shareholders had been given notice of the proposals.
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- 34 6. The second argument is set out in paragraphs 23 -26 of Mr Meyohas's second affidavit.
35 He says that he and Mr Miretzky are (or will be if the non executive directors resign) in a
36 position in which their own personal interests (as part of the Concert Party) conflict with
37 their duties as directors of the Company. This may be so, but section 104(2) does not
38 permit the Court to appoint provisional liquidators, effectively upon the application of
39 these directors, as a means of relieving them of their duties for the next month.



1 7. In my judgment the requirements of section 104(2) of the Companies Law have not been
2 met with the result that this application must be dismissed.
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5 DATED this 21st day of December 2012
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12 **The Honourable Mr. Justice Andrew J. Jones QC**
13 **JUDGE OF THE GRAND COURT**

