



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 34 OF 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF CS ASIA OPPORTUNITIES MASTER FUND

Appearances: **Mr Christopher Levers and Mr Jordan Constable of Ogier on behalf of Altair Asia Investments Limited (In Official Liquidation)**

Mr Neil McLarnon of Travers Thorp Alberga on behalf of CS Asia Opportunities Master Fund

Before: **The Hon. Justice David Doyle**

Heard: **31 March 2022 and 26 April 2022**

**Ex Tempore Judgment
Delivered:** **26 April 2022**

**Draft Transcript of
Ex Tempore Judgment
Circulated:** **27 April 2022**

**Transcript of Ex Tempore
Judgment Approved:** **29 April 2022**



HEADNOTE

Winding up petition pursuant to section 92(d) of the Companies Act (2022 Revision) dismissed – Order 3 rule 3 (3) (b) of the Companies Winding Up Rules, 2018 considered – inadequacy of evidence in support – bona fide dispute on substantial grounds – exclusive jurisdiction clauses

JUDGMENT

Introduction

1. I have considered the material in the hearing bundles and the written and oral submissions of the attorneys in this case. Mr Christopher Levers and Mr Jordan Constable appear for Altair Asia Investments Limited (in Official Liquidation) (the “Petitioner”) and Mr Neil McLarnon appears for CS Asia Opportunities Master Fund (the “Company”). I am grateful to the attorneys for their assistance to the court.
2. The Petitioner (which is the subject of a winding up order made on 7 December 2020) seeks a winding up order against the Company pursuant to section 92 (d) of the Companies Act (2022 Revision) “on the grounds that the Company is insolvent and unable to pay its debts” (paragraph 1 (a) of the petition). The Petitioner refers to a prime brokerage agreement (“PBA”) entered into by the Company and Global Prime Partners Limited (“GPP”) on 2 March 2018 pursuant to which the Petitioner contends the Company become liable to GPP in the sum of HK\$73,004,750.21 (the “CS Asia Liability”). At paragraph 5 of the petition it is stated that the Petitioner is “unaware of the nature of the CS Asia Liability or when it arose”. The Petitioner adds that it is aware “that it went unpaid by the Company”. At paragraph 6 of the petition it is stated that GPP called upon a guarantee dated 4 July 2018 entered into by the Petitioner, the Company and GPP (the “Guarantee”) by which the Petitioner guaranteed the Company’s liability to GPP under the PBA including the CS Asia Liability. The Petitioner adds that “in exercise of its rights under



the Guarantee, GPP discharged the CS Asia Liability through the use of the Petitioner's assets and that the Petitioner is entitled to be reimbursed by the Company in the amount of the liability so satisfied". The Petitioner served a statutory demand on the Company on 26 October 2021 demanding reimbursement but the Company has failed to satisfy the demand.

3. Even with just a brief consideration of the bare facts it can be seen that this is not a straightforward winding up petition.
4. It was first before the court on 31 March 2022 (with a maximum of 2 hours allocated) and I adjourned to today, 26 April 2022, to enable the parties to put further evidence and submissions before the court.
5. By email dated 25 April 2022 4:21pm Ogier for the Petitioner referred to its desire to adduce yet further evidence in the form of the second affidavit of Jordan David Nicholas Constable sworn on 25 April 2022 and exhibit JDNC-2. I heard an application made on foot this morning to adduce that additional evidence and having considered submissions in respect of it I granted such application and considered the additional evidence.
6. I have considered all the evidence and submissions put before the court. I now turn to my determination of the issues presently before the court.

Determination

7. I am not satisfied in the circumstances of this case that it would be appropriate to make a winding up order and in the exercise of the court's discretion I dismiss the petition.
8. I do this for the following main reasons:
 - (1) Firstly, I am unsatisfied as to the evidence in respect of the alleged debt. Mr Conway in his third affidavit sworn on 22 April 2022 at paragraph 63 says in effect



that based on the documents provided to the court “the Petitioner considers that the existence of the underlying predicate liability, namely the CS Asia Liability, has been adequately demonstrated”. I have to say that based on my reading of the documentation presented to the court that I do not agree that such has been “adequately demonstrated”. I note all that is said and written on behalf of the Petitioner in respect of the statutory demand and deemed insolvency and the documentary evidence now before the court but I am not persuaded that the evidence establishes a debt within the relevant statutory provisions and caselaw, even leaving aside the somewhat convoluted arguments the parties have put before me in respect of debts at “law or in equity” and “debts in equity”, whether the Guarantee liability in this case is a liability in debt or a debt in equity or a claim for an indemnity and not a debt, whether there is an implied contractual term for repayment of the debt claim as a liquidated sum and not a claim for an unliquidated sum (*McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286 and other authorities were referenced);

- (2) Secondly, I am not satisfied that the Petitioner has complied with Order 3 rule 3 (3), of the Companies Winding Up Rules, 2018 which provides that the:

“...verifying affidavit shall be sworn by:- (a) the petitioner; or (b) a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.”

The verifying affidavit in this case is provided by Simon Richard Conway, (“Mr Conway”) in his capacity as one of the Joint Official Liquidators (“JOLs”) of the Petitioner. Mr Conway at paragraph 4 (a) states in standard form that:

“I have been concerned in and have personal knowledge of the matters giving rise to the Petition.”



If one gives the relevant rule a narrow construction, as Mr McLarnon encourages the court to do, it is difficult to understand how Mr Conway can have “personal knowledge” of the PBA or the Guarantee or to “have been concerned in” them. On his own evidence Mr Conway was not appointed one of the JOLs until Segal J’s order of 7 December 2020, over two years after the PBA was entered into. There is no evidence from an officer of GPP.

It may be that the petition, which presents a far from clear case and is somewhat unusual in its nature, should have been, if possible, verified by someone on the Petitioner’s side who had personal knowledge of the PBA, the Guarantee and the relevant circumstances of the matters giving rise to the petition.

Mr McLarnon in effect suggests that the court should not be troubled by the consequences of a narrow construction of the relevant rule, including a dismissal of the petition, as there is no significant prejudice to the Petitioner as it will be left to the remedy of commencing a substantive claim in the appropriate jurisdiction and can provide proper evidence in support of such claim, if such exists.

Mr McLarnon referred to the English Court of Appeal authority of *Lagos v Grunwaldt* [1910] 1 KB 41 and submitted that the court must ensure that a minimum evidential standard is met especially when it is asked to grant relief as draconian as a winding up order on a summary basis. Closer to home and 100 years later the Court of Appeal of the Cayman Islands in *HSH Cayman v ABN Amro* 2010 (1) CILR 114 stressed the need for strict compliance with the Companies Winding Up Rules especially in respect of the verifying affidavit.

At paragraph 33 Chadwick P, delivering the judgment of the court, stated that the court felt there was force in a complaint that the verifying affidavit did not meet the requirement in O.3, r. 3 (3) (b) as “although it may be said that Mr Fillmore is an



agent of the petitioner, it cannot be said that he has “personal knowledge” of those matters, as required by O.3 r. 3 (3) (b)”.

I canvassed in exchanges with counsel that in cases where a winding up petition is presented by a liquidator of another company it will often be the case that such liquidator will not have “personal knowledge of the matters giving rise to the petition”. In such circumstances the liquidator may have to obtain evidence by way of verification from someone who does have personal knowledge if Order 3, rule 3 (3) (b) is to be strictly complied with or maybe on a broad construction of the rule, which Mr Levers argues is the most appropriate construction, a liquidator who has personally investigated the circumstances has “personal knowledge” for the purpose of the rule.

Moreover, it appears that in this case the Petitioner would have been in difficulties in obtaining supportive evidence from someone with personal knowledge of the matters giving rise to the petition (see for example paragraph 53 of the verifying affidavit). The Petitioner seems to rely heavily on points made in letters from Hogan Lovells the lawyers acting for GPP. No evidence is provided by an officer of GPP.

I would have been reluctant to dismiss the winding up petition solely on this somewhat technical ground but the failure to comply with the basic evidential requirement of Order 3, rule 3 (3) (b) reminded me of the need to be cautious before exercising the court’s discretion in making a winding up order.

I do not decide this case on the Order 3, rule 3 (3) (b) point and leave it open for determination after full argument in another case, if need be;

- (3) Thirdly, and connected with my concerns in respect of the inadequate evidence of the alleged debt, I do not believe that I have enough pieces of the evidential jigsaw



provided by those with direct knowledge to enable me safely to take the serious step of making a winding up order.

Mr Levers, with his customary thoroughness, has taken me carefully through the evidence in support of the petition but I confess that after 4 hours of eloquent submissions from him I still feel a sense of unease in respect of the evidence presently before the court;

- (4) Fourthly, although I accept that the Company appears to have taken inconsistent stances ranging from the debt was settled from its own funds (12 November 2021 letter from its attorneys Travers Thorp Alberga to the Petitioner’s attorneys) to the Company had no outstanding liabilities to GPP at the time of the exercise of the alleged right to set-off (paragraph 12 of the Company’s skeleton argument dated 25 April 2022), and the Company has raised points late in the day in respect of the matters giving rise to the petition and I have other concerns in respect of the way in which the Company has gone about defending the petition (for example the failure to promptly waive confidentiality and to produce the GPP evidence to the court in a timely way), I have concluded that the Company has persuaded me that there is a bona fide dispute on substantial grounds (Lord Hoffmann in *Parmalat Capital Financial Ltd v Food Holdings Ltd* 2008 CILR 202 delivering the judgment of the Judicial Committee of the Privy Council on 9 April 2008 at paragraph 9; Kawaley J in *Harlequin Hotels and Resorts Limited* (FSD unreported judgment 21 September 2018) and Kawaley J in *Re Sky Solar Holdings Ltd* (FSD unreported judgment 12 October 2020 at paragraphs 23 – 26). I accept that the court must take care not to have the wool pulled over its eyes by unwilling debtors who raise “a cloud of objections” (see paragraph 53 of Parker J’s judgment in *Re Primus Investments Fund, LP* FSD unreported judgment 16 June 2020).



Courts must be astute to guard against debtors adopting disingenuous delaying tactics or attempting to create smokescreens to avoid winding up orders. However, in the case presently before this court, even before I had considered the evidence and arguments of the Company, I had concerns. After an initial perusal of the petition and the verifying affidavit it appeared that the case presented was far from straightforward with little, if any, direct evidence in respect of the alleged debt; and

- (5) Fifthly, in the Guarantee between GPP and the Company and one other, clause 18 provided that each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction over any dispute or claim arising out of or in connection with the Guarantee or its subject matter or formation (including non-contractual disputes or claims) but nothing in that clause shall limit the right of GPP to take proceedings against a guarantor in any other court of competent jurisdiction. Clause 18 was not referred to in the petition, although Clause 17 (proper law) was. Clause 31 of the PBA provides that the agreement shall be construed in accordance with English law and each party irrevocably submits to the exclusive jurisdiction of the English courts. Again Clause 31 was not referred to in the petition, although paragraph 16 of the petition purported to set out the “key provisions of the PBA”.

The Company recently (28 March 2022), and after the winding up petition was presented, commenced proceedings against GPP in the High Court of England and Wales in respect of the PBA and the Guarantee. That dispute, which I am persuaded, in the context presently before this court, is a genuine dispute on substantial grounds, should be determined in England and Wales. Moreover, in light of it I have concluded that this court should not exercise its discretion in favour of making a winding up order.

9. For all these reasons I dismiss the winding up petition.

10. Having heard submissions an order was made that the Petitioner pay 25% of the Company's costs, such costs to be taxed on the standard basis in default of agreement.

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT