IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 171 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF ACL ASEAN TOWER HOLDCO LIMITED

IN COURT

Appearances: Mr Tom Smith QC of counsel and Mr Mark Goodman and Mr Guy Cowan, Campbells, on behalf of the Petitioners

Mr Jan Golaszewski, Mr Tim Baildam and Ms Chandra Solomon, Carey Olsen, on behalf of the Company

Before: **The Hon. Justice Kawaley**

Heard: **11 December 2018**

Date of decision: **11 December 2018**

Draft Reasons Circulated: **24 December 2018**

Circulated

Reasons Delivered: **2 January 2019**

GRAND COURT CAYMAN ISLANDS

HEADNOTE

Application to strike out creditor petition-whether debt disputed bona fide on substantial grounds-test for insolvency-whether winding-up order should be made-appointment of joint provisional liquidators and adjournment of petition so viability of a restructuring can be investigated

The Decision

1. On September 13, 2018, the Petitioners, Alcazar Capital Limited ("Alcazar") and Forest Capital Holdings Limited ("Forest") presented the Petition to wind-up the Company on the grounds of its failure to pay debts totalling US$2,495,900. The Company tendered partial payment of US$367,000 on October 19, 2018 (which the Petitioners accepted) and applied on October 23, 2018 to strike-out the Petition on the grounds that the remaining sum of US$2,168,900 was disputed and the Petition was being presented improperly to pressurize the Company into paying disputed debts.

2. On October 23, 2018, the First Affidavit of Kai Uebach was filed on behalf of the Company and it accepted that further unquantifiable sums were due to the Petitioners and asserted rights of set off. The Second Affidavit of Mr Uebach was sworn on or about November 23, 2018. It exhibited an apparently independent forensic report prepared for the Company by a Dr. Frisanco which analysed the dealings between the parties which gave rise to the Petitioners' claims. The Company admitted that more than US$400,000 was still owed to Alcazar but asserted rights of set-off in an amount of US$750,000. The precise numbers were clarified in the Third Uebach Affidavit sworn on December 3, 2018.

3. The Company's strike-out Summons was listed on the first return date of the Petition. My provisional view was, based on the fact that the Petitioners had accepted post-petition payments and the Dr Frisanco Report supported the Company's case that it had set-off rights greater than what was properly due, that the Petitioners were improperly using the winding-up jurisdiction as a debt-collection mechanism. This changed having heard oral argument in the course of which the Company's evidence as to the existence of its set-off rights was seriously undermined and, more importantly still, Mr Smith QC confirmed that the Petitioners now positively sought a winding-up Order and would account to the liquidators for the post-petition payments received. I found that a case for winding-up had been made out.

4. I was concerned that the provisional views that I had expressed at the beginning of the hearing may have unfairly wrong-footed the Company and deprived Mr Golaszewski of the opportunity to take instructions as to what course the Company wished to adopt in the event that its strike-out Summons was dismissed. I declined the Company's invitation that I should make a finding that a specific sum was due so that the Company could tender that sum. However, to eliminate any risk that the value of underlying assets might be unintentionally impaired by the making of a winding–up Order which the Company did not appear to me to expect would be made on the date of the hearing, I decided to adjourn the Petition.

5. I also appointed David Griffin of FTI in of FTI Consulting (Cayman) Ltd and John Batchelor of FTI Consulting (Hong Kong) Ltd as joint provisional liquidators ("JPLs") with full powers, and specifically charged with reporting to the Court at the next hearing of the Petition on whether or not the best interests of creditors would be served by pursuing a restructuring in provisional liquidation rather than immediately winding-up the Company. I somewhat reluctantly declined to appoint the initial nominees from the local office of Ernst & Young. They were objected to by the Company because another office of Ernst & Young had previously certified (as

auditors) the validity Alcazar's claims against the Company. I found that this did not give rise to any formal conflicts, but could give rise to an appearance or at least complaints of an appearance of a lack of impartiality.

6. I now give reasons for my December 11, 2018 decision.

Legal principles

7. The Petition invoked the jurisdiction of the Court under section 92(d) of the Companies Law to wind-up a company on the grounds that it is unable to pay its debts. The Petitioners petitioned as creditors and assumed the further burden of establishing that they were creditors for a sum exceeding CI$100 and that the Company was unable to pay its debts (section 93(c)). In this regard, they relied upon *Angel-v-British Gas Trading Ltd* [2012] EWHC 2702 (Ch) where Norris J held:

> "*29... On this application the question is whether or not there is an indisputable debt owed by Angel to BG sufficient to support a winding up petition. There may be uncertainty about the precise sum: but the court at this stage is not concerned to determine what could be proved in a winding up. It is concerned to see that the petitioner is indisputably a creditor in a sum exceeding the statutory minimum and so entitled to present a winding-up petition.. In Re A Company No.2340 (2001) Mr Justice Blackburne held:-*
>
> *'At the end of the day the question is whether or not there is a debt owed by [the Debtor] to [the Creditor] over and above £750, sufficient therefore in amount to support a winding up petition, which is not bona fide disputed on substantial grounds. In my judgment, there clearly is. Even making allowance for the various points which [Counsel] has raised, on any view further substantial sums are owing. In my judgment therefore, it cannot be said that if [the Creditor] were now to present a petition to wind up [the Debtor] it would be an abuse of process. True it is that there is a dispute as to the precise amount of the sum to which [the Creditor] is entitled but, on the evidence I have seen, I am satisfied that there is no genuine dispute... as to the existence of an indebtedness on the part of [the Debtor] to [the Creditor] amply sufficient in amount to support a winding up petition. I propose therefore to dismiss this application.'"*

8. I readily accepted the proposition that the Petitioners did not have to establish that any specific sum was owed having regard to the fact that they were not relying on deemed insolvency based upon a statutory demand under section 93(a) of the Law. The governing legal principles on what constitutes a disputed debt were not themselves capable of serious dispute. The Company's counsel cited *Mann-v-Goldstein* [1968] 1 W.L.R. 1091 (Ungoed-Thomas J, at 1098H-1099B) as authority for:

> "*...the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is disputed on substantial grounds and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition...*"

9. The Company's counsel also accepted that subsequent case law establishes that that it is merely a rule of practice that a petition based on a disputed debt will ordinarily be dismissed: *Parmalat Capital Finance Limited-v-Food Holdings Limited* [2008] CILR 202 (Privy Council). According to Lord Hoffman:

> "9... *If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute: see, for example,* Brinds Ltd v Offshore Oil NL *(1986) 2 BCC 98,916. But the Board does not find it necessary to examine the limits of the discretion because they consider that there is no substantial dispute.*"

10. When a cross-claim or set-off is relied upon, question of whether the set-off is a serious one applies in the same way as when one is considering whether the existence of a debt is disputed: *Quarry Products Limited-v-Austin International Incorporated* [2000] CILR 265 (Sanderson J). Not only does the Court have the discretion to wind-up a company when the petitioner's debt is itself disputed on substantial grounds. A corresponding discretion exists where a cross-claim is said to be larger than the petition debt: the Court may either dismiss or adjourn the petition to allow the cross-claim to be determined or make a winding-up order nonetheless. The usual practice is not to wind-up if it appears the company is likely a net creditor of the petitioner. This case also demonstrates that it is for the Company to demonstrate that the dispute about the existence of the debt or the cross-claim is genuine and/or based on substantial grounds (page 267, lines 40-44).

11. I also accepted the Petitioners' submission that the Court "*is entitled and indeed bound to weigh the evidence to see whether there really is any substance in the dispute raised by the company or whether it is in reality contrived*": *Banco*

Economico SA-v- Allied Leasing & Finance Corporation [1998] CILR 292 (Graham J at 303).

The Petitioners' standing as creditors

The Petitioners' case

12. It was not disputed that the Company is the ultimate holding company of a Vietnamese operating company, Golden Tower BTS Corporation ("Golden Tower"), which builds and operates wireless towers in Vietnam. Alcazar, a Dubai International Financial Centre company, provided advisory services to the Company. Forest is a shareholder of Alcazar.

13. Forest alleged that it lent US$250,000 to the Company on the terms of a draft agreement which the Company's Board approved on July 31, 2016, including 12% interest ("Shareholder Loan"). Demand for payment of the loan and interest was made on August 1, 2018.

14. Alcazar was assigned a former director's fees claim in the amount of US$117,000 on August 1, 2018. The vast majority of its claim was for expenses paid to third parties and outsourced employees on the Company's behalf over a period of six years ending in 2017. Claims for payment were made through Debit Notes. On December 31, 2016, the Company's Chief Financial Officer signed a Balance Confirmation confirming that US$1,922,697 was owed to Alcazar. These sums due were formally demanded on August 1, 2018.

15. The legal test for insolvency was also not in dispute. Cash flow insolvency is established not only when it is shown that a company is unable to pay presently due debts. The relevant test "*permits consideration also of debts that will become due in the reasonably near future*": *In re Weavering Macro Fixed Income Fund Limited* [2016] 2 CILR 514 at paragraph 40 (Cayman Islands Court of Appeal, Martin JA).

The Company's case

16. As far as Forest and the Shareholder Loan are concerned, the Company admitted that the principal sum was due and owing on the date when the Petition was presented and that the US$250,000 sum was repaid post-Petition on October 19, 2018. It was accordingly not disputed that Forest had standing to present the Petition.

17. Forest's entitlement to receive interest at the rate of 12% was disputed. That rate was said to be unreasonable and excessive. The Company asserted that if the parties did adopt the terms of the draft loan agreement, that agreement included an arbitration clause and the dispute about the quantum of interest due to Forest should be referred to arbitration.

18. As far as the director's fees claim asserted by Alcazar is concerned, the Company paid the sum of US$117,000 post-Petition on October 19, 2018. It was accordingly not disputed that Alcazar was a creditor to this extent when the Petition was presented.

on September 13, 2018. Any liability in respect of the Alcazar Expenses was initially denied (First Kai Uebach Affidavit) on the grounds that:

(a) the CFO who signed the Balance Confirmation had a conflict of interest;

(b) the Expenses were not validly approved with the requisite super-majority by the Company's Board.

19. However, as far as the Secondment Expenses were concerned, Mr Uebach accepted that something might be due in respect of Mr Kumar's time (paragraph 54) and implied that had the Petition not been presented the amount due might have been agreed. The Third Party Expenses were disputed altogether on the grounds of inadequate documentary support.

20. The Company asserted a set-off claim in the amount of US$750,000 in respect of monies advanced to Alcazar on May 24, 2012 in respect of expenses and in respect of a US$103,152 expense Mr Uebach says Alcazar admitted it was not entitled to be reimbursed for and which remained "*outstanding*" (paragraph 59). The Company ultimately conceded that total "*readily verifiable*" expenses due to Alcazar amounted to US$193,134.80, although the net position was that the Company was owed nearly US$500,000 by Alcazar (Third Uebach Affidavit).

21. In summary, when the evidence was properly analysed, the Petitioners' standing to present the Petition as creditors was not in dispute. The real dispute was whether a winding-up order should be made in circumstances where there was a dispute about whether or not the Petitioners were creditors at the date of the hearing of the strike-out application and the Petition.

Findings: the Petitioners' standing to present the Petition

22. Mr Smith QC submitted orally that the post-Petition payments made by the Company demonstrated that the Petitioners were creditors with undisputed debts when the Petition was presented. The point was somewhat obscured as the evidence and arguments focussed on whether the balance of the Petition debt was due. Nonetheless, it was a compelling one to which there could be no answer.

23. I was bound to find that the Petition was not liable to be struck-out on the grounds that the Petitioners were not creditors of the Company when the Petition was presented.

Findings: the Petitioners' standing as creditors at the date of the hearing of the Petition

24. The Company's strike-out Summons only alleged that the "*unpaid portion of the Petition debt*" was disputed. In actuality, no challenge was made to the standing of

the Petitioners to present the Petition; rather the complaint was that further prosecution of the Petition was an abuse of process because the unpaid portion of the Petition debt was disputed. No authority was cited in support of the proposition that it is an abuse of process for a creditor at the Petition date to seek a winding-up order because part of the debt has since been paid and the balance was disputed. This was probably for two reasons:

(a) it would be an obvious abuse of process to use the winding-up process to pressurize a company to pay a disputed balance of a debt which has been partially admitted and paid;

(b) it would be legally inconsistent to accept part payment of a petition debt post-petition and to continue to prosecute the petition. Any payments received by the petitioner would be void if a winding-up order was subsequently made (sections 99-100 of the Law).

25. This is why at the beginning of the hearing I indicated my provisional view that the strike-out application appeared to be likely to succeed. The Petitioners only extricated themselves from this legal quagmire and displaced my provisional view that the proceedings were being prosecuted in an abusive manner by conceding that they could not retain anypost-Petition payments which would be invalidated by section 99 of the Law. My understanding of the factual position was that the post-Petition payments had been made by the Company and would be invalidated by the making of a winding-up order[1]. The practical result of this concession and the unambiguous election to seek a winding-up order rather than further payment was that the undisputed sums remained outstanding and had not in law been paid. On this basis, which was not fully appreciated by the Court at the hearing, the Petitioners were clearly creditors to an admitted extent at the date of the hearing of the Petition.

26. The question of the Petitioners' status as creditors at the date of the hearing was primarily argued by reference to the question of who was a net creditor, not whether or not the Petitioners were creditors at all, because the Company was forced to admit that even putting the post-Petition payments aside, further sums were actually due. There was no coherent basis for finding that the further prosecution of the Petition was an abuse of process because the existence of the debt was disputed. Whether the set-off claim was substantial went to the Court's discretion to make a winding-up Order, albeit that the usual practice is to dismiss or stay a winding-up petition where the company has a substantial cross-claim which if determined would make it a net creditor of the petitioner.

Findings on strike-out Summons

27. The Petitioners were admitted creditors both when the Petition was presented and heard, and accepted that they could not treat the post-Petition payments as having

[1] In comments on the draft of this judgment circulated to counsel, the Petitioner's counsel clarified that two post-Petition payments received were in fact made by a subsidiary of the Company. The judgment is obviously expressed in terms which reflect my understanding of the factual position at the time of the hearing.

been validly made. The fact that the quantum of their claim was disputed did not make it an abuse of process for them to seek to wind-up the Company.

28. For these reasons the strike-out Summons was dismissed.

Findings on merits of winding-up Petition

The Company's set-off claim was not seriously arguable one

29. In the background of the Company's case was the spectre of the September 11, 2017 removal of Mr Abou-Jaoude from the Board on the grounds of suspected misconduct. This seemingly explained the engagement in January 2018 of Dr Frisanco to internally audit matters such as the Alcazar expenses. Front and centre of the set-off claim were the assertions that:

(a) the sum of US$750,000 paid by a Mr Semaan on May 24, 2012 to be applied towards Company expenses by Alcazar had not been taken into account;

(b) the dispute over Forest's right to interest should be referred to arbitration.

30. It was neither possible nor necessary to assess whether or not all the claimed expenses were properly due. Some potentially valid objections were doubtless raised by Dr Frisanco, even if admissions made before his Report might make it legally difficult to validly raise such objections later. The central controversy was whether or not the Company's US$750,000 set-off claim was substantial as this would have exceeded or equalled the amounts admittedly due. Although the Alcazar set-off claim was supported as credible in Dr Frisanco's Report, it was ultimately clear that the Company's position was not plausibly supported by the underlying documents to which Mr Smith QC referred. For example, in a June 4, 2015 email sent by Alcazar to current director of the Company Mr Patrick Tangney and CFO Srivats Kumar (both linked to Alcazar), the following assertion was made without any apparent rebuttal at the time: "*The outstanding balance after netting off the $750k is in excess of $1 m.*" (Exhibit CAJ3, page 1279). It lacks credulity that the assertion that credit had been given for the US$750,000 would have been made in such a straightforward way, only a few months after the capitalization agreement relied upon by the Company, if this was not the case.

31. Alcazar's own internal year-end 2015 Intercompany Position record expressly gave the Company credit for US$750,000 in "*Shareholder payments*" (Exhibit CAJ3, page 1255). It is therefore unclear why it would <u>not</u> have been proper for Mr Kumar (in his capacity as CFO of the Company) to (a) sign the December 31 Balance Confirmation, and (b) to confirm to Ernst & Young (Alcazar's auditors) on April 13, 2017 that the December 31, 2016 Balance Confirmation he had signed on the Company's behalf was accurate. That balance confirmation, it must be remembered, confirmed that the Company owed Alcazar US$1,922,697.

32. It also was striking that the Company could produce not a jot of contemporaneous evidence indicating that the set-off claim was asserted at any time before Campbells threatened to present a winding-up petition on August 1, 2018. Dr Frisanco only completed his forensic report after this date and the set-off claim was apparently first formally asserted in a Walkers letter of September 3, 2018. (Precisely what transpired at an earlier meeting between Dr Frisanco and Alcazar representatives was unclear).

33. The set-off claim lacked substance and did not provide any or any material basis for declining to grant the winding-up Order sought as regards the Petition debt relied upon by Alcazar. Unlike Sanderson J in *Quarry Products Limited-v-Austin International Incorporated* [2000] CILR 265, rejecting the Company's case did not require me to "*disbelieve affidavits filed on behalf of the company*". The cross-claim in that case was a failure to provide ammonium nitrate of explosive grade. The merits of that claim clearly could not readily be assessed on the basis of documentary evidence. Further the need for caution identified by Sanderson J in that case (at 271-272) only properly applies where the company is solvent.

34. Be that as it may I concluded that the Company had failed to demonstrate that the set-off claim has any reasonable prospect of success. On the contrary, it had all the markings of a "*put-up job*": Denning MR, *Re Claybridge Shipping Co. S.A.* [1997] 1 BCLC 572 at 575, cited with approval by Graham J in *Banco Economico S.A.-v-Allied Leasing and Finance Corporation* [1998] CILR 292 at 303. In reaching this conclusion, I also took into account the evidence relating to the Company's financial position.

The fact that part of Forest's admitted Petition debt was disputed was irrelevant to the discretion to wind-up

35. The position of Forest was far more straightforward. Here the Company's position far more clearly lacked substance. No set-off was asserted. Instead, it was asserted that if contractual interest was due under the terms of the draft loan agreement the dispute should be referred to arbitration. As the interest claim was plainly less than the admitted principal claim, the fact that a small part of a partially admitted Petition debt was disputed provided no coherent basis for declining to immediately wind-up the Company in circumstances where the admitted loan itself had not (validly) been repaid.

36. Having admitted the principal element of Forest's Petition debt, no arguable basis for declining to wind-up on the basis of that debt was advanced by the Company.

The Company was clearly insolvent on a cash-flow basis

37. The Company had failed to pay Alcazar expenses dating back to at least 2015, covering a period when Alcazar was represented at Board and CFO levels. The only inference is that this is because the Company was insolvent on a cash flow basis. The Management accounts placed before the Court did provide some support for the

Company's assertion that its financial position was improving. The year end 2017 position was that it had only US$790 in "*cash at bank*". If "*current payables*" projected to be US$1.455 million at year-end 2018 means currently due payables as it is logical to assume, this line item alone shows that the Company is cash-flow insolvent. Nonetheless, the overall picture presented was one of creative accounting at play as far as dealings with Alcazar are concerned.

38. The year-end 2018 position was projected to be that the Company would have just over US$375,000 "*cash at bank*". On the other hand, the overall current assets position was projected to be down at year-end 2018 from US$2.181 million to US$2.001 million. And the overall current liabilities position was also projected to be worse, up from US$1.455 million at year-end 2017 to US$1.815 million at year-end 2018. The majority of current assets are current receivables, the collectability of which is unclear. Amongst the receivables (under the heading short-term prepayments) is US$750,000 said to be due from Alcazar, an asset which I considered had minimal value. On the other hand, despite the fact that the Company's CFO admitted to owing Alcazar US$1.9 million at year-end 2016, the management accounts leave the liability line for Alcazar blank for year-end 2013, 2014, 2015 2016, 2017 and 2018. The only provision made for Alcazar for year-end is under disputed claims, and the allowance made is for an optimistically low amount, US$327,000.

39. One line item under liabilities in particular gave the distinct impression that the management accounts had been prepared with the present proceedings in view. That was the "Alcazar" line. The Company's case was that Mr Kumar abused his position as CFO of the Company when signing the December 31, 2016 Balance Confirmation showing more than US$1.9 million as being due to Alcazar and confirming the accuracy of this document to Alcazar's auditors some months later. He was, it was implied, keen to help Alcazar get its expenses recognised as valid and due for payment. If he was simply performing his duty as CFO with sole regard for the Company's best interests, he ought to have been keen to ensure that the liability he had confirmed to Alcazar's auditors was reflected in the Company's financial records. It made no sense that Mr Kumar, in his capacity as CFO (presumably with authority to prepare or supervise the preparation of the Company's accounts) would have made no provision at all for a liability to Alcazar in the Company's accounts for year-end 2016 and 2017 if not before. The position ought logically to have changed only after Dr Frisanco's Report was received by the Company in August 2018.

40. The impression that historic liability figures had been altered to reflect the Company's position in the present proceedings made it difficult to place much credence on the asset line item showing US$750,000 as being due from Alcazar prior to the projected year-end 2018 position. Without, of course, making any definitive findings on these matters, the management accounts confirmed the general impression conveyed by other evidence, namely that the Company was engaged in advancing a defence to the present Petition which fundamentally lacked substance.

41. Perhaps the best indicator of a company's cash-flow solvency is whether or not it demonstrates an ability to meet its current obligations as they fall due. Mr Smith QC invited the Court to place considerable reliance on the fact that sums the Company admitted were properly due were only paid after winding-up proceedings were commenced. The failure to pay sums which were currently due such as the Alcazar

expenses during a period when there is no record of any dispute being raised, and the hasty formulation of unconvincing grounds for not meeting such obligations might be described as a 'badge of insolvency'. Dr Frisanco was apparently engaged after changing of the guard on the Board to confirm what sums were properly due to Alcazar. This may well have been justified by genuine conflict of interest concerns. But close scrutiny of the good doctor's November 23, 2018 Report revealed that he viewed his task as being primarily to minimize what the Company had to pay. Mr Smith QC was able to point to more than one example of objections which manifestly lacked substance; he also fairly described the Report's overly rigorous testing methodology as arbitrary and reflecting a "bootstraps" approach designed to achieve a desired result.

42. After I had dismissed the strike-out Summons and indicated that I had found that a *prima facie* case for winding-up had been made out, the Company's counsel invited the Court to indicate what sum was due so the Company could tender it. This seemed to me to be an odd request, just as it smacked of desperation for the Company to have paid anything at all to the Petitioners post-Petition without insisting on the withdrawal of the Petition. This request begged the question of how the Company could properly pay, otherwise than through borrowing, the most likely sum to be found as undisputedly due. It is not the business of a winding-up Court to resolve quantum disputes, even if the Court may be required to determine (in relation to petitions based on statutory demands) that a dispute about a particular liquidated debt is not a substantial one.

43. My finding that the Company was insolvent and liable to be wound-up was not based on any analysis of precisely what sums were due. If had been required to determine what minimum sum was presently owed to Alcazar, the most likely sum would have been the sum recorded in Alcazar's audited financial statements for year-end 2016, based on the Company's CFO's Balance Confirmation: US$1,922,697. This sum would have been not just far in excess of the US$375,000 "*cash at bank*" figure projected for year-end 2018 in the Company's own accounts. It was marginally more than the total current assets figure projected for the same date. If the Company had been able to liquidate all its current assets and paid Alcazar, it would have been unable to pay its other liabilities as they fell due.

44. The Petitioners established to my satisfaction that the Company was insolvent on a cash-flow basis.

Appointment of JPLs and adjournment of Petition

45. At the end of the day I was satisfied that a prima facie case for winding-up had been made out and that the JPLs should be appointed with full powers. I was concerned that neither the Petitioners nor the Company had fully considered the implications that a winding-up order might have on the value of the underlying assets. As far as Mr Golaszewski was concerned, I felt that he might been thrown off course by my intimation at the beginning of the hearing that the strike-out Summons was likely to succeed. I accordingly directed that the JPLs should report to the Court on where the best interests of the creditors lay, if possible before the adjourned hearing of the Petition.

Costs

46. I awarded the Petitioners their costs of the strike-out Summons and reserved costs of the Petition. However, I declined to order at this stage what the basis of the taxation of their costs should be. Having regard to the fact that I consider that it was very arguably an abuse of process for the Petitioners to accept part-payment of the Petition debts while continuing to prosecute the Petition, I wanted to afford the parties an opportunity to heard as to whether some costs penalty (such as depriving the Petitioner of the usual priority costs order) may be warranted. This issue is far from straightforward, however, because respondents to winding-up petitions (in my experience) ordinarily do not actually tender payment save on the condition that the petition is withdrawn or dismissed altogether.

Summary

47. For the above reasons on December 11, 2018 I dismissed the Company's strike-out application and found that a case for winding-up had been made out. The Petitioners had standing to petition as creditors and the Company's set-off claim lacked substance. Instead of making an immediate winding-up order, I appointed JPLs with full powers and adjourned the Petition. The Petitioners were awarded the costs of the strike-out application, but I reserved for future determination the question of the basis of that award as well as the costs of the Petition.

48. The primary purpose of the adjournment of the Petition was to obtain the recommendations of the JPLs as to whether a full liquidation or a restructuring provisional liquidation appeared to be in the best interests of creditors.

HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT