

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

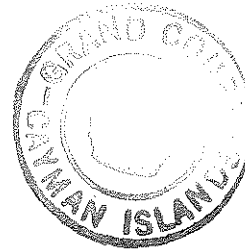
Cause No.63 of 2014 (AJJ)

4 Before The Hon Mr Justice Andrew J. Jones QC
5 In Chambers on 16th October 2014

7 IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

8 AND

9 IN THE MATTER OF VC COMPUTER HOLDINGS LIMITED



10

11 Appearances: For the Petitioner - Mr. Alan Turner and Ms Charlotte Hoffman of Turners
12 For the Company and Mertal Overseas Ltd - Mr. Paul Murphy of Stuarts
13

14

REASONS

15 1. Introduction

16

17 This is an application by the Company and its parent company, Mertal Overseas Ltd ("Mertal"),
18 by a summons dated 10 October 2014 for (a) leave to adduce further affidavit evidence, which
19 amounts to an application to vary the Order made on 3 September 2014, (b) orders requiring
20 the Petitioner, which is an insolvent company in liquidation, to disclose the identity of the
21 stakeholders who are funding this proceeding, the Maltese liquidation proceeding and an inter
22 partes action pending in the Maltese court and the identity of anyone who has provided the
23 Petitioner's official liquidator "with instructions and/or assistance to undertake these
24 proceedings" and (c) an order for security for costs in the sum of US\$290,000.

25

26 2. Further evidence

27

28 The Company and Mertal have consistently failed to comply with the Court's orders relating to
29 the service of affidavit evidence with the result that the trial of this petition has been delayed.
30 On 28 August 2014 Mr Azevedo swore his 2nd Affidavit on behalf of the Company in which he
31 asserted for the first time that the flow of funds between Sakaras, Zukiapa and VC can be
32 explained by reference to a series of supply agent agreements and supply credit agreements.
33 This represented a significant change in the way in which the Company's case was being put. By
34 an order made on 3 September, the day originally fixed for the trial of the petition, I allowed Mr
35 Azevedo's 2nd affidavit to be admitted in evidence notwithstanding the failure to comply with
36 the timetable, but I made an order that the Company be debarred from adducing and/or using
37 any further evidence. The agreements referred to in Mr Azevedo's 2nd affidavit purport to have

1 been signed by Mr Krasnov and Ms Terekhova but they were not mentioned in their affidavits
2 which are surprising having regard to the fact that they are now relied upon as a key part of the
3 Company's defence. Inevitably, the Petitioner is suspicious about the authenticity of these
4 agreements and for that reason I made an order that the originals be produced for inspection by
5 12 September. The Company failed to comply with this Order for reasons set out in Mr
6 Azevedo's 3rd Affidavit. The Company's witnesses will be cross-examined about the
7 circumstances in which these agreements were executed and it may well be that the Petitioner
8 will seek to draw an adverse inference from the fact that they were not mentioned in the
9 original affidavits of Mr Krasnov and Ms Terekhova.

10
11 3. Counsel for the Company/Mertal now seeks leave to adduce new evidence on the basis that his
12 clients are faced with a new allegation of fraud. I regard this as a contrived argument which is
13 wholly lacking in merit. The only explanation of the new evidence is contained in Stuart's letter
14 of 14 October 2014 (at pages 3 and 4). It seems to me that it is all evidence which could and
15 should have been produced and served at the same time as Mr Azevedo's 2nd Affidavit. It should
16 have been patently obvious to counsel that the failure to refer to the supply agent and credit
17 agreements in the Company's original evidence would lead to adverse comment, with the result
18 that it would be important to explain in detail the commercial rationale for these agreements
19 and the circumstances in which they were executed. Mr Azevedo's 2nd Affidavit does in fact
20 address this subject at length and I can see no justification for extending the timetable again
21 allowing the Company/Mertal another yet another opportunity to supplement its evidence. For
22 these reasons the application contained in paragraph 1 of the Summons is dismissed.

23
24 4. Security for costs – The Insolvency Rules Committee, of which I am chairman, has decided as a
25 matter of policy that creditors should not be required to put up security for costs as a pre-
26 condition of pursuing a winding up petition on grounds of insolvency. Arguably, different
27 considerations should apply to contributory's petitions, especially in circumstances where the
28 Court has directed that the petition proceed as an *inter partes* proceeding between one or more
29 shareholders as petitioners and other shareholders as respondents. In this type of case, it was
30 arguable that the parties should be subject to the same rules relating to security for costs as
31 those applicable in any other ordinary *inter partes* action, namely GCR Order 23, but CWR Order
32 24 is silent on this subject. *Re Freerider Limited* [2010(1)] CILR 285 was such a case. Foster J. held
33 that the Court has no inherent jurisdiction to make an order for security for costs. Creswell J
34 followed this decision in *Re Dyxnet Holdings Limited* (Unreported, 26 September 2013), which is
35 different from *Freerider* in that it concerned a contributory's petition in which the company
36 itself was treated as the respondent. I am told that the Court of Appeal has allowed an appeal
37 in *Dyxnet* (and that *Freerider* has been overruled) although its reasons for doing so have not
38 been published. Even if the Court of Appeal has held that there is jurisdiction to require that a
39 creditor to put up security for the costs of a winding up petition on grounds of insolvency, until
40 the judgment is published I cannot be sure about the scope of the jurisdiction or the criteria
41 upon which the Court's discretion should be exercised.

- 1 5. However, assuming for the sake of argument that I do have an inherent jurisdiction to order
2 security for costs against a petitioning creditor, I would dismiss this application for the following
3 reasons. Firstly, it is a fundamental policy of the Cayman Islands insolvency law that all creditors
4 are treated equally. There is no preference for local creditors. It would be wrong in principle to
5 require a petitioning creditor to put up security for costs merely because it is a foreign entity.
6 Secondly, I think that it would also be wrong in principle to require a petitioning creditor to put
7 up security for costs merely because it is itself an insolvent company in liquidation whose official
8 liquidator is being funded by the stakeholders and/or may be said to be acting in the interests of
9 its stakeholders. Thirdly, the Petitioner has already made out a prima facie case, on a fully
10 contested hearing, for being a creditor of the Company for about US\$32 million and it would not
11 be appropriate to require that it put up security at this very late stage – in effect, as security for
12 the costs of dealing with the Company’s new defence. Fourthly, the Petitioner has made out a
13 case for the appointment of provisional liquidators for reasons given on 4 August 2014. Fifthly,
14 the Company and whoever controls it have failed to comply with the requirements of the
15 Court’s order of 17 July 2014. They have failed to co-operate with the provisional liquidators. In
16 particular, they have failed to hand over all of the Company’s books and records and its director
17 and officers have failed to provide any statements of affairs. Finally, even if the petition is
18 dismissed, I anticipate that the Petitioner may have legitimate grounds for arguing that no order
19 for costs should be made having regard to the manner in which the Company’s defence has
20 been conducted. Even assuming that jurisdiction exists, for these reasons, I would dismiss the
21 application contained in paragraph 6 of the Summons.
22
- 23 6. It follows that the application in paragraph 5 of the Summons should also be dismissed. Mr
24 Murphy invited me to make no orders in respect of paragraphs 2, 3 and 4 of the Summons.
25
- 26 7. As for the costs of this Summons, I shall order that the Company and Mertal pay the Petitioners’
27 costs in any event and (as already provided for in paragraph 7 of the Order made on 3
28 September 2014) the Petitioners shall be at liberty to apply for an order that all or part of the
29 Petitioners’ costs of and occasioned by this Summons be met jointly and severally by identified
30 third parties controlling the litigation on behalf of the Company.

31 DATED this 16th day of October 2014

32
33
34
35
36



37 The Hon. Mr. Justice Andrew J. Jones, QC
38 JUDGE OF THE GRAND COURT

