

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

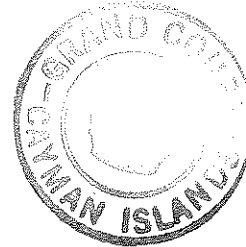
Cause No.63 of 2014 (AJJ)

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

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

8 AND

9 IN THE MATTER OF VC COMPUTER HOLDINGS LIMITED



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

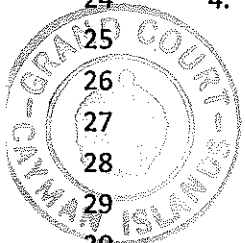
26 2. Further evidence

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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 3<sup>rd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 16<sup>th</sup> day of October 2014

32  
33  
34  
35  
36  
37   
38 **The Hon. Mr. Justice Andrew J. Jones, QC**  
**JUDGE OF THE GRAND COURT**

