

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 83 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF NBRL GLOBAL, LTD.

IN OPEN COURT

Appearances: Mr Peter McMaster QC, and Mr Daniel Hayward-Hughes
on behalf of the Petitioner
Mr James Eldridge and Adam Huckle on behalf of the Respondent
Company
Mr Rupert Bell on behalf of Kosivana Holdings Limited, an
ordinary shareholder of the Company

Before: The Hon. Justice Raj Parker

Heard: 7th June 2017

Draft Judgment Circulated: 14th June 2017

Released for Publication: 20th June 2017



HEADNOTE

Companies-Winding up-Companies Law (2016 Revision)-debts as they fall due-section 92(d)-section 93(c)-creditors agreements to be paid over time-cash flow test-function of court where disputed evidence but no live testimony-discretion.

JUDGMENT

INTRODUCTION

1. By a Winding Up Petition dated and filed on the 21st day of April 2017 the Petitioner, Learn Capital Venture Partners III, L.P. (the Petitioner) seeks an order for the winding up of NBRL Global, Ltd. (the Company) and the appointment of joint official liquidators.
2. The Company is an exempted company registered pursuant to the Companies Law (2016 Revision) (the Companies law).

3. The Petitioner is a creditor of the Company. It is owed \$250,000¹ with interest by the Company under the terms of secured promissory notes dated 7 March 2017 (\$50,000) and 12 April 2017 (\$200,000) which are repayable on demand. The Petitioner also holds 10,000,000 preference shares in the Company with a par value of \$0.0001 each.
4. The Petitioner has standing both as a creditor and as a holder of shares in the Company. The Petitioner does not rely on its own advances to the Company to prove the Company's insolvency. There is evidence before the Court that the Company is prepared to pay back the money advanced by the Petitioner and has in fact tendered it to the Petitioner. The Petitioner has not accepted that money, because of the winding up order that it is asking the court to make which would result in the payment of these monies to be void (see section 99 of the Companies law).
5. The Company is the holding company for a group of entities that provides medical services to patients through the use of an exclusive licence to exploit intellectual property in brain and pain -related treatments.
6. The Petitioner claims that the Company is unable to pay its debts. It claims (by paragraph 7 of the Petition) that the Company owed (at least) the following debts as at 31 March 2017:
 - \$287,000 to PwC, the accounting firm
 - \$171,500 to MagVenture, a vendor/supplier
 - \$161,886.49 to Gunderson Dettmer (GD), a law firm
 - \$90,000 to IT-This, for IT services
 - \$51,300 to Saliwanchik, Lloyd & Eisenschenk, a law firm
 - \$50,000 to the Petitioner
 - \$12,000 to Herbert Smith Freehills, the law firm
 - TOTAL: \$824,000.
7. The Petitioner alleges that as at 31 March 2017 the Company had available a sum of \$75,000 to meet the above debts which was inadequate and there were additional liabilities in respect of payroll which also fell due on that date which amounted to almost \$75,000.
8. On 12 April 2017 the board of the Company resolved to accept an additional \$200,000 from the Petitioner. The Petitioner states that its

¹ All references to \$ in this judgment are references to United States Dollars.



motive in making further monies available to the Company was to preserve its own \$10,000,000 investment in the Company in preference shares and to preserve value in the Company. The Petitioner claims that the Company is unable to repay the amounts set out at paragraph 6 above as they fall due and accordingly it should be wound up in accordance with the Companies law.

THE LAW

9. Section 92 of the Companies law (2016 revision) provides that a company may be wound up by the court if-

....

(d) the company is unable to pay its debts.

10. Section 93 provides that a company shall be deemed to be unable to pay its debts if-

....

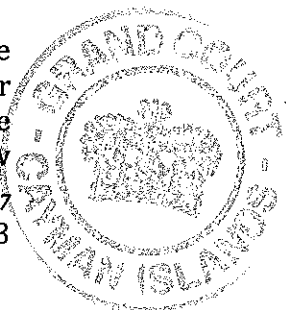
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

11. The test for solvency under the Companies law is cash flow insolvency, an inability to pay debts as they fall due-see *Weaving Macro Fixed Income Fund Limited (in liquidation) (CICA No.2 of 2016)*. It is settled law that the onus is on the Petitioner to prove that the Company is unable to pay its debts (to the civil standard of proof on the balance of probabilities), not on the Company to prove its solvency. The Court's power to make a winding up order is discretionary. That discretion exists even when it is proved to the Court's satisfaction that the company is unable to pay its debts-see *Re Minrealm Ltd (2007) EWHC 3078 (Ch.)*.

SUBMISSIONS and EVIDENCE

12. Mr McMaster QC for the Petitioner submits that the evidence shows that the monies set out in paragraph 6 above fell due, were not paid, are still unpaid and that all the Company has managed to do is to ask its creditors to be patient, and they have agreed (with the exception of the GD debt which is disputed by the Company). Mr McMaster QC submits that an agreement by each creditor to be paid over time does not mean that a debt is not due, and that the Company is unable to pay those debts.

Moreover he submits that the Company's evidence in relation to the disputed GD debt is unsatisfactory and not credible. He submits that Mr Won's evidence is defective and incomplete in various respects. He criticises the failure to provide the Court with any proper cash flow



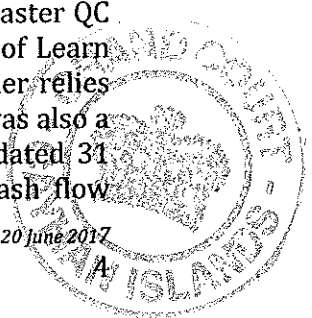
projections or management accounts. He submits that where the President and CEO of the Company (Mr Won) is in possession of a monopoly of such information I should draw adverse conclusions from Mr Won's failure to give necessary evidence-see *Prest v Petrodel* [2013] 2 AC 415 per Lord Sumption at paragraph 44.

I have as a result examined Mr Won's two affidavits, in the light of the extensive criticisms made by Mr McMaster QC, very carefully.

13. He also referred me to *Tay Bok Choon* [1987] 1 WLR 413 where Lord Templeman giving the judgement of the Privy Council said at PP 418-19:

"Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross examine the deponents of the opposition so as to prove a disputed fact, the petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts."

14. At the end of the day I do indeed have to decide the Petition on the evidence before me. The material evidence before me consisted of an affidavit of Gregory Mauro with exhibits dated 21 April 2017, and an affidavit of Paul Strange and exhibit dated 6 June 2017 for the Petitioner. For the Company it consisted of an affidavit of Erik Won dated 2 June 2017 with exhibits and affidavits from Rachel Baxendale dated 2 and 6 June 2017 together with exhibits. Mr Won also swore a further affidavit dated 6 June 2017 with exhibit. Mr McMaster QC dealt with Mr Won's second affidavit in his oral submissions. Mr Won is the President and CEO of the Company.
15. The Court has not heard any live evidence on this Petition and no cross examination of any of the deponents on their affidavits. I approach the exercise of attempting to resolve disputes on the facts that have been put forward by the parties on the basis of the passage set out above by Lord Templeman in *Tay Bok Choon*.
16. To demonstrate that Mr Won's evidence is not credible Mr McMaster QC took me to an email exchange between Mr Won and Mr Hutter of Learn Capital (the Petitioner) concerning the debts which the Petitioner relies on to argue that the Company is unable to pay them. Mr Hutter was also a director of the Company at the time. The exchange of emails dated 31 March 2017 starts with Mr Won setting out the Company's cash flow



position which is at a negative \$184k when revenue and existing commitments are taken into account for the month of April. Mr Hutter then asks about the total of legitimate AP (meaning accounts payable). Mr Won replies that legitimate AP is about \$716k and lists the debts at paragraph 6 above (save for the debt to the Petitioner). He also says that the current cash position is \$75k. Mr McMaster QC submits that that clearly shows that the Company was and is insolvent. He points to the fact that no point was taken as to the legitimacy of the debts including the GD debt, which the Company says is and always has been disputed. I am not prepared to find that in this brief email exchange Mr Won accepted the "legitimacy" of the GD debt when responding to Mr Hutter's questions which he did swiftly, openly and straightforwardly, albeit in an abbreviated way, as is commonplace in email exchanges.

17. Mr McMaster QC also criticises the evidence given by Mr Won in his first affidavit dealing with the GD debt. The relevant passages are at paragraphs 34 to 41. Mr Won says the GD debt is disputed for two reasons. The first relates work performed for Learn Capital in relation to the Seed Financing. (Learn Capital is the holder of Series Seed Preference Shares as defined in the Company's articles). That amount was capped at \$35,000 by clause 7.8 of the Series Seed Preference Shares Purchase Agreement 26 April 2016. I note in passing that clause 7.13 (b) of that same agreement under "Waiver of conflicts" provides that "...GD has represented the company in the transaction....and has not represented any individual investor". In any event Mr Won says that clause 7.8 limits the Company's exposure to the cap. He says that the Company has previously paid invoices from GD in relation to its role for Learn Capital in an amount well over \$35,000. The second reason he gives is that a substantial number of the entries in the outstanding GD invoices (which are summarised at page 22 of the exhibit to Mr Mauro's affidavit), relate to work done for Learn Capital, not the Company.
18. In his second affidavit Mr Won makes clear that the entirety of the GD debt is disputed. He expands upon the account given in his first affidavit with reference to a meeting at which he was present on or before 6 November 2015 with GD. At that meeting Mr Won says that although the Company disputed any liability to pay any of the sums in the November 2015 invoice over and above the agreed cap, the Company agreed to pay the invoice in full on condition that the difference paid over the agreed cap was applied by GD to any future invoices issued by the firm to the Company. GD was to take up any shortfall in the November invoice with Learn Capital. On that basis the Company paid the full amount of \$148,890.08 to GD. Whilst some of this explanation is somewhat confusing, the hearing of this Petition is not the appropriate forum for a resolution of the factual complexity of the relationship between the Company and GD, especially in the absence of GD.



I am persuaded by reference to Mr Won's affidavits and exhibits that the GD debt is genuinely disputed on sufficiently substantial grounds by the Company. It is not the function of this court to reject sworn evidence to this effect, save in exceptional circumstances (re Arena (2004) EWCA civ 371) and it is not the function of this Court on a winding up petition to determine the validity of disputed debts—see Parmalat (2008) UKPC 29.

19. Mr Eldridge on behalf of the Company pointed to the peculiarities of this winding up petition. He submitted that it was presented by a major creditor of the Company which does not accept repayment of its debt and that no other creditors of the Company supported the Petition. He submitted that the debts owed to the Petitioner on its own case were not due and payable. As to the other debts, they were not due and payable now as they had each been deferred on agreed terms with each of the creditors, save in one case (GD) which was disputed. I have already indicated that I am persuaded that the GD debt is genuinely disputed by the Company and as such does not afford a ground upon which to wind the Company up.
20. Mr Eldridge on behalf of the Company submits that winding up is a remedy of last resort and that the Court should be careful not to have its jurisdiction used for tactical purposes, nor to resolve disputes between stakeholders, as that would amount to an abuse of process.
21. I accept those submissions. However, I am not persuaded that Mr Eldridge is right when he submits that a deferral of a debt leads one to the conclusion that the debt is not due and payable. I have come to the view that the better interpretation of a deferral arrangement, such as in this case, where the existence of the debt and the amount is not disputed, is that it remains a debt which is due and payable, albeit at a later date (as factually set out in Mr Won's first affidavit paragraphs 25 to 33 and 42 to 51). The debts remain enforceable and payable, albeit subject to timing of payment by the individual terms of the deferral arrangements, which may amount to binding legal arrangements to pay later (principles of consideration and estoppel may apply) or simply goodwill extensions of time to pay. A goodwill extension would be no defence to a statutory demand presented by a creditor. I also bear in mind that is clear from the judgment of Martin JA in *Weaving Macro* at paragraph 40 that "... The cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future." The Petitioner has not satisfied the court that those debts that I have indicated are, as a matter of legal theory, due and payable, would in fact be due and payable today. This is because the particular circumstances of each arrangement with each creditor has not been explored in evidence, save that Mr Won has put in evidence that he believes they have been deferred and he has exhibited the relevant communications.

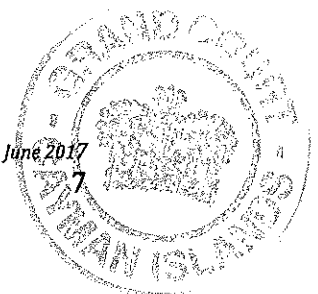


22. Nor however do I accept Mr McMaster QC's submission that the evidence shows on the balance of probabilities that the Company will at the end of the period of deferral have existing debt and further outgoings which it will be unable to pay. I accept that the Company would have to reach levels of revenue far greater than it had reached before now, perhaps even involving a triple fold increase in June, July and August. However, Mr Won at paragraphs 52 to 55 of his first affidavit bases his confidence on his experience as President and CEO of the Company that the Company's cash flow increases by approximately 50% to 70% in the summer months when compared against the previous months in the year. The reason for that is that unfortunately children comprise a significant percentage of attendees at the Company's medical clinics, and those summer months coincide with longer school and university summer holidays, which result in more children being able to attend the clinics during that period. He states that based on his past experience and projected revenues, the cash flow position will be adequate to pay the six service provider creditors in light of the agreed deferrals. I accept that these matters are very hard to predict. I do not regard Mr Won's evidence as fanciful or unrealistically optimistic. He gives credible evidence based on his position as CEO of the Company and experience.

DECISION

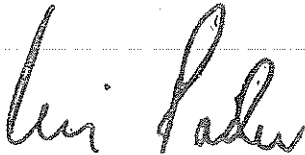
23. I have decided that the Petitioner has not satisfied the Court that the Company is unable to pay its debts. The question of discretion does not therefore arise.
24. However, had I been persuaded that the Company was unable to pay its debts, I would have, in my discretion, refused the application. That would be the case even if the evidence had shown that the Company had been unable to pay its debts today where for example the deferral arrangements had no legal basis and the creditors validly called in their money.

I was referred to a considerable amount of evidence, and submissions were made concerning the motive and conduct to date of the various stakeholders in the Company. Submissions were also made about whether the board was currently able to function properly, or not. Indeed Mr McMaster QC submitted that the state of affairs at the Company was such that the value in the Company should be realised for the benefit of shareholders by an orderly independent process of winding up under the supervision of a liquidator, in preference to a sale of rights (for example, intellectual property) or assets by an allegedly dysfunctional board. He relied on the dictum of Justice Jones in *In the matter of Wyser-Pratte Eurovalue Fund Limited* (2010) (2) CILR 194.



"If a company is going to be liquidated, I see no basis for denying the shareholders the right to have it done in accordance with the provisions of the Companies law".

25. In this regard, in the first affidavit of Mr Won (paragraphs 56 to 59), reference is made to a substantial offer in the form of a letter of intent from a third party for the purchase of the Company's business. The offer is to purchase all the assets of the Company (and three associated companies) for US\$25 million and also to provide the Company with US\$250,000 per month to fund operating costs through to closing.
26. But it is by no means clear to me that the Company will indeed sell its assets and be "liquidated". There are many commercial variables at play. For example, the Petitioner has a right of veto which enables it to prevent the Company from concluding any such transaction and there no doubt will be serious negotiations concerning the Petitioner's right (contained in the Memorandum and Articles of Association dated 26 April 2016) to receive first payment of the proceeds of disposals following any such sale. Would the Company be in a better position to realise value from such a transaction run by joint official liquidators, rather than the board as the Petitioner strongly contends on the question of discretion? Whilst I readily accept that might look preferable to the Petitioner with regard to its own interests and stake in the Company, having regard to the interests of the Company as a whole, I am not so sure.
27. The Petition is dismissed. The Company is entitled to be paid its reasonable costs by the Petitioner to be taxed if not agreed.



THE HON RAJ PARKER
JUDGE OF THE GRAND COURT

