In The Supreme Court of Bermuda

COMMERCIAL COURT
COMPANIES (WINDING UP)
2013: No. 333

IN THE MATTER OF LAEP INVESTMENTS LTD ("the Company")

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

(In Court)

Date of hearing: 26th March 2014
Date of ruling: 1st April 2014

Mr John Wasty and Mr Henry Tucker, Appleby (Bermuda) Limited, for the Petitioner

Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan, for the Company

Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Joint Provisional Liquidators

Introduction

1. There are three applications before the Court:

(1) An amended petition dated 23rd September 2013 to wind up the Company ("the Petition"). The Petitioning Creditor is Emerging Markets Special Situations 3 Limited ("the Petitioner").

(2) The Company's summons dated 23rd October 2013 to dismiss the Petition and set aside the appointment of Joint Provisional Liquidators ("JPLs").

(3) The Company's summons dated 24th March 2014 to stay execution of an Order of this Court made on 22nd March 2013 ("the Enforcement Order"). The Enforcement Order gave leave to the Petitioner to enforce against the Company an arbitral award ("the Award") made in ICC arbitration 17446/JRF/CA seated in Sao Paulo, Brazil ("the Arbitration") and entered judgment for the Petitioner in the amount of the Award.

Arbitration

2. The Company submitted a Request for Arbitration on 4th October 2010. The Arbitration concerned the Company's ostensible obligations to the Petitioner under a number of agreements in relation to the restructuring of a debt issued by the Company's indirectly wholly owned subsidiary, Parmalat Brasil SA Industria de Alimentos. In particular, pursuant to these agreements, the Petitioner discharged a very substantial debt due on some debentures that was owed by the Company and its subsidiaries. The Company has yet to pay the Petitioner in consideration of that discharge. The Company maintained that the agreements were null and void and that consequently the Petitioner had no enforceable claim against it of any kind. It also asserted monetary claims against the Petitioner.

3. The Tribunal made its final Award on 18th March 2013. The Company was ordered to pay the Petitioner approximately R$ 145 million, including interest and costs. At present exchange rates, this is equivalent to well in excess of US$ 73 million.

4. On 29th April 2013 the Tribunal rendered an addendum to the Award providing that payment of the amounts awarded became due immediately as of the date of notification of the Award.

Enforcement proceedings in Bermuda

5. The Award was made in Brazil, a country which is party to the New York Convention on the Reciprocal Enforcement of Arbitration Awards 1958 ("the Convention"). Section 40(1) of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act") provides for the enforcement of a Convention award in Bermuda. The award may be enforced by action or alternatively, with leave of the Court, may be enforced in the same manner as a judgment or order to the same effect. Where leave is given, judgment may be entered in terms of the award.

6. As noted above, on 22nd March 2013 the Court made the Enforcement Order. This was pursuant to Order 73 rule 10 of the Rules of the Supreme Court 1985 ("RSC").

7. On 26th March 2013 the Court made a worldwide Mareva injunction against the Company prohibiting it from dealing with its assets up to the value of the Award.

8. The Company issued a summons pursuant to RSC Order 73 rule 10(6) to set aside the Enforcement Order. On 21st June 2013 that summons was dismissed.

9. On 27th June 2013 the Petitioner issued a statutory demand to the Company seeking payment of the Award. That demand has not been met.

10. It is against this background that on 20th September 2013 the Petitioner issued the Petition, which was amended on 23rd September 2013.

Challenge to the Award in Brazil

11. The Company, as is its right, has sought to challenge the Award in the Brazilian courts. After initial setbacks it has currently gained the upper hand. There are two sets of proceedings: (i) an action to annul the Award ("the Annulment Application") and (ii) an action to suspend the Award pending the determination of the Annulment Application ("the Suspension Application").

12. The Annulment Application was filed by the Company on 18th June 2013 in the 43rd State Lower Civil Court of the City of Sao Paulo. It seeks to annul the Award under Article 32 of the Brazilian Arbitration Law on the basis that the decision is inconsistent with and was rendered in violation of Brazilian public policy.

13. On 20th June 2013 the Annulment Application was dismissed. But on 23rd August 2013 this decision was reversed by the 37th Civil Chamber of the Court of Appeals of the State of Sao Paulo. The Court remitted the request for annulment to the 43rd State Lower Civil Court. Subsequent attempts by the Petitioner to appeal this decision have been dismissed, most recently by the 37th Private Law Chamber on 11th March 2014.

14. The Suspension Application was filed *ex parte* by the Company and its parent company LAEP Holdings Ltd ("Holdings") on 1st October 2013 in the 43rd State Lower Civil Court. On 2nd October 2013 the Application was denied.

15. The Company and Holdings appealed. On 19th December 2013 the 13th Private Law Chamber of the Sao Paulo State Court of Appeals made an interim order staying the effects of the Award pending the hearing of the appeal. On 28th January 2014 the Sao Paolo Court of Appeals rejected the Petitioner's appeal against the interim stay.

Application for stay of execution

16. The Company applies for a stay of execution of the Enforcement Order, pursuant to RSC Order 45 rule 11. This provides that a party against whom an order has been made may apply to the Court for a stay of execution on the ground of "*matters which have occurred since the date of the judgment or order*". The Court may grant such relief, and on such terms, as it thinks just.

17. What that means is that the facts must be such as would or might have prevented the judgment or order being made, or would or might have led to a stay of execution if they had already occurred at the date of the judgment or order. See EI Du Pont de Nemours & Co v Enka BV (No 2) [1988] RPC 497, Patents Court, *per* Falconer J at 509 line 11 – 510 line 14.

18. The principles applicable to the grant of a stay are helpfully set out in the commentary to the 2014 Edition of the White Book:

> **General approach**
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> 52.7.1 Neither the commencement of an appeal nor the grant of permission to appeal affects the enforceability of the judgment below. If the appellant desires a stay, they must apply for it and put forward solid grounds why such a stay should be granted. … R. (Pharis) v SSHD [2004] EWCA Civ 654 ; [2004] 1 W.L.R. 2590 .
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> Under RSC Ord.59 (which governed appeals prior to May 2000) the courts had established the principle that a successful litigant should not generally be deprived of the fruits of their litigation pending appeal, unless there was some good reason for this course. This general principle still applies. The normal rule is for no stay per Potter L.J. in Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474 at [13]. In DEFRA v Downs [2009] EWCA Civ 257 at [8]-[9] Sullivan L.J., having noted that a stay is the exception rather than the rule, stated that the solid grounds which an applicant must put forward are normally some form of irremediable harm if no stay in (sic) granted.

The balancing exercise

52.7.2 If an appellant puts forward solid grounds for seeking a stay, the court must then consider all the circumstances of the case. It must weigh up the risks inherent in granting a stay and the risks inherent in refusing a stay. See, e.g. R. (Van Hoogstraten) v Governor of Belmarsh Prison [2002] EWHC 2015 (Admin) ; Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWCA Civ 51 . In Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 , December 18, 2001, unrep., CA, Clarke L.J. described the correct approach as follows at [22]:

"*Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of an appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?*" (The last sentence might be more felicitous if the word able is changed to unable).

19. The Company does not seek to appeal or set aside the Enforcement Order. However, it invites me, when considering the merits of its application for a stay, to consider the circumstances in which the Court may refuse to enforce a Convention award.

20. Section 42(2)(f) of the 1993 Act provides that enforcement of a Convention award *may* be refused if the person against whom it is invoked proves that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

21. The principles applicable to the enforcement of a Convention award were summarised by Kawaley J (as he then was) in LV Finance Group Ltd v IPOC International Growth Fund Ltd [2006] Bda LR 67, SC, at para 26, summarising and applying the judgment of Gross J in the English

Commercial Court in IPCO (Nigeria) Ltd v Nigerian Petroleum Corporation [2005 2 Lloyd's Rep 326:

> The following key principles on the adjournment issue may be extracted from this decision: (a) legislation implementing the New York Convention has a bias towards enforcement, even where grounds for refusal exist, (b) the discretion to adjourn is unfettered, (c) general considerations relevant to the exercise of the discretion are likely to include whether the appeal has reasonable prospects of success, the length of the delay an adjournment will occasion and the extent of any resultant prejudice, and (d) pro-enforcement considerations will sometimes be outweighed by the need to defer to the courts of the jurisdiction chosen by the parties as the place for the arbitration to take place.

22. One of the considerations mentioned by Gross J at para 15 of his judgment which was not expressly mentioned by Kawaley J in his summary was whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics.

23. The Company submits that there has been a material change of circumstances since the Enforcement Order was made, namely the orders of the Brazilian courts remitting the request for annulment to the 43rd State Lower Civil Court and suspending on an interim basis the effects of the Award. Had these orders of the Brazilian courts been in place at the date of the enforcement hearing, the Company submits, then, pursuant to section 42(2)(f) of the 1993 Act, the Court might well have refused leave to enforce the Award.

24. I am therefore urged to stay enforcement of the Award on principles of comity and because, it is submitted, there is a real risk that the Company will suffer irreparable prejudice if it is wound up in that it will be unable to pursue the Annulment Application or alternatively, if the Company is able to pursue that Application and succeeds, it will nonetheless be irreparably damaged by the winding up process.

25. Turning first to enforcement, I am not in a position to assess whether the Annulment Application has any real prospect of success. So far as I can tell

from the limited material before me, the Company wishes to reargue the case that it put before the arbitral Tribunal in the hope that the court might reach a different conclusion on the merits. I have not been supplied with any independent (or other) legal opinion as to the merits of the Annulment Application. Even if I had been, I strongly suspect that the other party could produce one to opposite effect. However I accept that the Annulment Application is not clearly without merit, as otherwise the Suspension Application, albeit on an interim basis, would not have been allowed.

26. The Petitioner has adduced evidence that the judicial process in Brazil could take anything from two to 10 years. The Company has not adduced any evidence to the contrary, although its counsel, Mr Duncan, submits that the expedition with which the Brazilian proceedings have progressed thus far gives grounds for optimism that 10 years is something of an overestimate. I have no information as to when the 43rd State Lower Civil Court is likely to hear the annulment application. I have no doubt that the unsuccessful party will wish to pursue an appeal.

27. In short, there is no material before me to outweigh the bias towards enforcement inherent in the 1993 Act. As to the Brazilian courts, the Enforcement Order does not purport to interfere with their jurisdiction to annul the Award or suspend its enforcement in Brazil, where any assets which the Company or its subsidiaries have are likely to be located, pending the determination of the annulment proceedings.

28. Turning to the question of a stay, it follows that I am not satisfied that there is any real prospect that the developments in the Brazilian courts, had they taken place prior to 22nd March 2013, would have led this Court to refuse to make the Enforcement Order. The Company has pointed to nothing which would or might have led the arbitral Tribunal to make a different award.

29. Moreover, the Company appeared to accept at the Arbitration that it owed substantial sums of money to someone. Its counsel stated at para 34 of its written submissions dated 23rd January 2012:

> We have made clear that LAEP/Parmalat seek no unjust enrichment. Because they received the loan proceeds, they will repay whatever they lawfully owe to their counterparty under the debentures, the Brazilian FIDC, Fundo Alemanha.

30. Mr Wasty, counsel for the Petitioner, submitted that if the Award were set aside the Company would owe its counterparty under the debentures $4 million more than the amount of the Award, and would face an additional cost of putting itself in this position of US$ 2.5 million. These submissions were not challenged. In those circumstances it is difficult to understand the commercial benefit to the Company of challenging the Award. The Company's suggestion, unsupported by any evidence, that maybe it could negotiate better terms for repayment with the counterparty than it could with the Petitioner is not convincing. There is force in the Petitioner's submissions that the Company is engaging in delaying tactics.

31. In the circumstances, I am not satisfied that the Company has put forward solid grounds for a stay.

32. If I am wrong on that point, the considerations outlined by Clark LJ, which are in effect a "balance of convenience" test, come into play. On the one hand, a winding up order, which is the enforcement mechanism contemplated by the Petitioner, will not necessarily stifle the appeal as this could still be pursued by the liquidators. But they will at least be able to take an independent view as to its merits.

33. On the other hand, a winding up order will facilitate the realisation of the value, such as it is, of the Company's interest in its subsidiaries. The subsidiaries, rather than the Company, hold the assets within the group. As noted above, it will also prevent the Company from increasing its indebtedness to the detriment of its existing creditors. To avoid the risk of irreparable harm to the Company in the event that the Annulment Application was ultimately successful, any winding up order might include an appropriate undertaking in damages from the Petitioner.

34. I also take into account that as matters stand the Company and its subsidiaries have the benefit of the discharge of the debt by the Petitioner

whereas the Petitioner is out of pocket to the sum of many millions of dollars.

35. In all the circumstances, and assuming for the sake of argument that the Company has put forward solid grounds for a stay, the "balance of convenience" does not favour interfering with the Petitioner's right to enforce the Award. The Company's application for a stay is therefore dismissed.

Winding up petition

Guiding principles

36. In this section of my judgment I draw heavily on the helpful statement of the relevant principles set out in the skeleton argument of the Petitioner.

37. The Petitioner seeks an order for the winding up of the Company pursuant to section 161 of the Companies Act 1981 ("the 1981 Act") on the ground that the Company is unable to pay its debts.

38. Section 162(a) of the 1981 Act provides that a company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding $500 then due has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due, and the company has for three weeks thereafter failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

39. Section 163(1) of the 1981 Act provides that an application to wind up the company may be made by any creditor. The Court has a discretion whether to grant a winding up order, but that discretion is not unfettered. In Re Gerova Financial Group Ltd [2012] Bda LR 43 at para 27, Kawaley CJ cited with approval the following proposition from Andrew Keay's McPherson's Law of Company Liquidation, 1st English Edition at paragraph 3.67:

> the rule that a petitioner who can prove that a debt is unpaid and that the company is insolvent is entitled to a winding-up order *ex debito justitiae*, which has been taken to mean that, in accordance with settled practice, the court can exercise its discretion in only one way, namely by granting the order …

40. However, as Mr Duncan points out, the *ex debito justitiae* principle is subject to an important qualification. The winding up petition must be brought for the benefit of the class to which the petitioner belongs – here, the class of creditors – as a whole, and not for some purpose of his own. See the judgment of Harman J in Re a company [1983] BCLC 492 at 495:

> Firstly it is trite law that the Companies Court is not, and should not be used as (despite the methods in fact often adopted) a debt-collecting court. The proper remedy for debt collecting is an execution upon a judgment, a distress, a garnishee order, or some such procedure. On a petition in the Companies Court in contrast with an ordinary action there is not a true *lis* between the petitioner and the company which they can deal with as they will. The true position is that a creditor petitioning the Companies Court is invoking a class right (see Crigglestone Coal Co. [1906] 2 Ch. 327), and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view. It has long been the law that a petition presented for the purpose of putting pressure on the company is not properly presented: see In re a Company [1894] 2 Ch. 349 and in a slightly different context Re Bellador Silk Ltd. [1965] 1 All E.R. 667.
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> The question for me, therefore, is whether I am satisfied that the petitioner seeks this winding-up for the benefit of his class. I am not concerned with his motives … The decision in Bryanston Finance never sought to overrule the basic law that the only proper purpose for which a petition can be presented is for the proper administration of the company's assets for the benefit of all in the relevant class. To hold otherwise would be to confuse motive, which is past, with purpose, which is future.
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> . . . . .
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> If the petitioner can show that he and his class stand together and will benefit or suffer rateably, then his ill motive is nothing to the point.

41. As a matter of practical reality, a petitioner will usually bring a petition because he wants to wind up the company in order to obtain payment of the money that the company owes him. He is not motivated by an altruistic concern for the other creditors. None of this matters so long as the petition is brought with the genuine intention of winding up the company and the petitioner can show that he and his class stand together and will benefit or suffer rateably.

42. The *prima facie* right of a creditor to obtain a winding up order is not displaced merely by showing that the company has a disputed claim against him which is the subject of litigation in other proceedings. See Re Douglas (Griggs) Engineering Ltd [1962] 1 All ER, Ch D, *per* Pennycuick J at 23. As Mr Duncan submits, whether to make an order for the compulsory winding up of the company where there is a cross claim against the petitioner is a matter for the discretion of the judge. See In re LHF Wools Ltd [1970] 1 Ch 27, EWCA, at 37D *per* Harman LJ and 41F *per* Danckwerts LJ.

Petitioner's case

43. In the present case the Petitioner submits that it is entitled to a winding up order as of right. It is a judgment creditor with a debt in excess of $500. The debt is undisputed in that the judgment has not been challenged in court proceedings in Bermuda. The Petitioner has issued a statutory demand for the debt which has remained unpaid for more than 3 weeks after the date of the demand. The Company is therefore deemed to be insolvent.

44. Moreover, the Petitioner submits, the Company is both cash flow insolvent and balance sheet insolvent. A winding up order is therefore in the interests of the creditors as a whole in that it will prevent the continued accumulation of debts by the Company.

45. The Company is cash flow insolvent because, as its indirect controlling shareholder, Marcus Elias, states in his third affidavit, it has no bank accounts and no cash. This is because, as Roy Bailey states in his second

affidavit filed on behalf of the Joint Provisional Liquidators, it is a holding company and has no operations of its own. It is wholly reliant on funds from its subsidiaries to meet its debts as and when they fall due.

46. Based on their investigations, the Joint Provisional Liquidators understand that the Company has liabilities in excess of US$ 74 million. In addition to the debt owed to the Petitioner these liabilities include monies payable to US and Bermudian law firms in connection with the Arbitration and various regulatory fees and penalties. In addition, the Company submits there are other unsecured creditors in the sum of approximately US$ 30.7 million, although the Petitioner has expressed scepticism as to the veracity of their claims. There appears to be no realistic prospect of the Company being in a position to satisfy these debts in the foreseeable future.

47. In the circumstances, I am satisfied that the Company is unable to pay its debts as and when they fall due.

48. I am also satisfied that the Company is balance sheet insolvent. Antonio da Silva, an officer of the Company, has sworn an affidavit in response to the disclosure provisions of the Mareva injunction obtained by the Petitioner. He exhibits the consolidated accounts for the Company and its subsidiaries for the first quarter of 2013. These show a net asset value of approximately minus US$ 225 million.

49. I am therefore satisfied that *prima facie*, and subject to what the Company has to say, which I consider below, it would be in the interests of the creditors as a whole to wind up the Company.

Company's case

50. The Company submits that there are four grounds on which the Petition should be dismissed.

    (1) That the Award has been suspended in Brazil.

(2) That the winding up proceedings are being used to subvert the judicial process in Brazil.

(3) That the debt is fully secured and the Petitioner has commenced proceedings in Brazil to enforce its collateral.

(4) That the debt is fully secured and there are no supporting creditors.

I shall consider each ground in turn.

That the Award has been suspended in Brazil

51. I have already decided that the Suspension Application is not a sufficient reason for me to stay the Enforcement Order. It is therefore not a sufficient reason for me to decline to wind up the Company.

That the winding up proceedings are being used to subvert the judicial process in Brazil

52. The Court will decline to make a winding up order if it is sought for an improper purpose. In In re LHF Wools Ltd, on which the Company places great reliance, a bank obtained judgment against a company in England and the company sued the bank in Belgium. Both actions arose out of the same underlying set of facts, which involved a third party rogue who had deceived both parties. The bank as judgment creditor then obtained a winding up order against the company which the company successfully appealed. The company had no assets. Danckwerts LJ commented *obiter* at 40H that in those circumstances:

> It is difficult to see what the bank really has to gain, except that it may, as has been said, hamstring the proceedings against the bank itself which are being conducted in Belgium, and that does not seem to me to be a motive which is very creditable in circumstances where the petitioning creditor is also the debtor on a very large claim.

53. The circumstances in which a winding up petition should be considered an abuse of process were considered recently by the Privy Council in Ebbvale Limited v Hosking [2013] UKPC 1. The respondent obtained a winding up order against the company in Brazil. He had also brought a claim against the company in England. Lord Wilson, giving the judgment of the Board, stated at para 33 that its conclusions included:

> (b) There is no doubt that Mr Hosking's [ie the respondent's] purposes in presenting the petition for the company to be wound up were intimately related to the English action.
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> (c) It is indeed probably the case that Mr Hosking regarded a winding-up order as likely to be of advantage to him in his capacity as the claimant in the English action as well as in his capacity as the petitioning creditor. For the company's continued defence of the action was leading him to incur very substantial costs in its continued prosecution and was thus generating a potential increase in its total liability to him and a corresponding increase in the risk that such could not be met. In his capacity as claimant in the action Mr Hosking therefore probably considered it advantageous to secure a winding-up order which might lead to his saving of some such costs.
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> (d) But a winding-up order was also, objectively, likely to be of substantial advantage to him in his capacity as the petitioning creditor; and to secure such an advantage was the other of his purposes. It is not necessary that it should have been his principal purpose: see In re Millennium Advanced Technology Ltd [2004] EWHC 711 (Ch), [2004] 1 WLR 2177 at para 42 (Michael Briggs QC sitting as a deputy High Court judge).

54. In the present case a winding up order will benefit the Petitioner by facilitating the realisation of the value, such as it may be, of the Company's interest in its subsidiaries and by preventing the Company from continuing to increase its indebtedness. If the liquidators conclude that the Annulment Application is not worth pursuing, then the Petitioner will be saved the expense of contesting it: an expense which the Company, if unsuccessful, is unlikely to be in a position to repay. The fact that the Petitioner may well

hope that the liquidators take that view does not mean that it has brought the Petition for an improper purpose.

55. The Company alleges that the winding up petition is a tactic to forestall the Annulment Application because, or so the Company submits, it is unrealistic to expect the liquidators to pursue those proceedings unless put in funds to do so. However it is not clear to me how the litigation funding position would be any different if liquidators were appointed than it is at present. The decision whether to proceed with the Annulment Application, assuming that funds were made available, would be for the liquidators not the Petitioner. The Court has every confidence in their objectivity. More so than in the objectivity of the parties to the Brazilian proceedings.

56. I am therefore satisfied that the winding up proceedings have not been brought improperly with respect to the judicial process in Brazil.

That the debt is fully secured and the Petitioner has commenced proceedings in Brazil to enforce its collateral

57. There a number of difficulties with this ground. First, the fact that a company is a secured creditor does not prevent it from bringing a winding up petition. As Jessel MR stated in Moor v Anglo-Italian Bank [1879] 10 Ch 681 at 689: "*the winding up is equally good whether it is obtained by a secured creditor or an unsecured creditor*".

58. In a passage approved by the Privy Council in Cleaver v Delta American Reinsurance Co [2001] 2 AC 328 at 341 A – B, Jessel MR went on to explain at 689 – 690 that if a secured creditor wants to prove in the liquidation he may give up his security altogether and prove for the full amount; or get it valued and prove for the difference; or sell and realise his security and prove for the difference.

59. However, as Jessel MR stated in In re Carmarthenshire Anthracite Coal and Iron Co (1875) 45 LJ Ch 200 at 200 – 201, secured creditors are not bound

to elect between resting on and giving up their securities until the time arrives for them to prove their debts.

60. Second, I am not satisfied that the debt is fully secured. There is a factual dispute between the parties, which I am not in a position to resolve, as to the value of the underlying security and whether it would be sufficient to satisfy the Award.

61. Moreover, for a security to count as such in the context of a liquidation, it must be marketable by the creditor. See the judgment of the Lord President in the Scottish case of Commercial Bank of Scotland, Limited v Lanark Oil Co Ltd (1886) 14 R 147. That cannot be said of the security in the instant case as the Petitioner's attempts to enforce it in the Brazilian courts are being resisted by the subsidiary companies. The Petitioner's right to realise those securities is contingent upon the outcome of that litigation. It is therefore unlikely that the Petitioner would be able to assign its claim to the securities at anything like their market value.

62. As to that, the judgment of the Supreme Court of Western Australia in Forsayth NL v Juno Securities Ltd [1991] 4 ACSR 281, which was given by Malcolm CJ, is authority for the proposition at 307 lines 25 – 30 that:

> ... where the debt is established because the creditor's claim is not genuinely disputed upon any substantial ground it would not be a proper exercise of the residual discretion to dismiss, stand over or stay the petition upon the company tendering a bank guarantee of payment conditioned upon liability for the debt being established by judgment in an action.

63. To the extent that the Petitioner's debt is secured, it is not secured against the assets of the Company but against the assets of third parties, namely the subsidiaries. Without deciding the point, upon which I did not hear full argument, I would not have thought that in those circumstances the Petitioner would rank as a secured creditor in the liquidation.

64. Be that as it may, for the reasons given above I am satisfied that there is no merit in this ground.

That the debt is fully secured and there are no supporting creditors

65. As stated above, I am not satisfied that the debt is fully secured. But it does not have to be for the Company to make out this ground. Mr Duncan referred me to In re Crigglestone Coal Company, Limited [1906] 2 Ch 327, EWCA. Buckley J stated at 331 – 332 that as the order which the petitioner seeks is not an order for his benefit, but for the benefit of a class of which he is a member, if the majority of the class are opposed to the winding up then their view will prevail.

66. Four purported creditors have filed notices opposing the Petition. The Petitioner is sceptical as to their bona fides and their claims were not identified by the Joint Provisional Liquidators. Assuming that the claims might be valid, their combined value is in the region of US$ 30.7 million. That is substantially less than the value of the Petitioner's debt. As these purported creditors do not represent a majority in value of the Company's creditors, their objections are nothing to the point.

67. The absence of any supporting creditors is neither here nor there. I am satisfied that there is no merit in this ground.

Conclusion

68. I am in principle prepared to make a winding up order. However I should like to hear from the parties as to its terms. Eg whether the Joint Provisional Liquidators should be required to provide security and/or the Petitioner to provide an undertaking in damages, given that the Company may succeed on the Annulment Application.

69. In view of the funding difficulties which the Joint Provisional Liquidators have faced to date, I should like to hear from them as to what provisions regarding their costs they suggest the order should include.

70. The Company's summonses to dismiss the Petition, set aside the appointment of the Joint Provisional Liquidators, and for a stay of execution, are dismissed.

71. I shall hear the parties as to costs.

Dated the 1st day of April, 2014

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Hellman J