No: CR-2021-000200

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPOERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN RE A COMPANY
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC2A 1NL

Date: 16 August 2021

Before:

Deputy ICC Judge Baister

- -

Ms Catherine Doran (instructed by **Freeths LLP**) for the **Petitioner**
Mr Nicholas Wright (instructed by **direct access**) for the **Company**

Hearing date: 28 July 2021

- -

Approved Judgment

This judgment has been handed down remotely by circulation to the parties' representatives by email and. The date for hand-down is deemed to be 31 August 2021.

.....

Deputy ICC Judge Baister:

1. The petitioning creditor seeks the winding up of C Limited. The petition debt arises out of a contract of 4 September 2020 under the terms of which the petitioner paid the company £750,000 and by which it was agreed that within 60 days the company would pay the petitioner either €2 million if a standby letter of credit was monetised or £950,000 if the monetisation failed. The monetisation failed, but the company has paid the petitioner only £50,000 out of the £950,000 due. I need not go into more detail since most of the petition debt is undisputed.

2. This judgment follows a hearing to determine whether the coronavirus test has been met. I do not, I think, need to set out the relevant law in detail: it is to be found in the Corporate Insolvency and Governance Act 2020, the applicable parts of which are amply covered in the skeleton arguments prepared for the hearing and comprehensively explained in judgments in *Re A Company* [2020] BCC 773 and *PGH Investments Limited v Ewing* [2021] EWHC 553 (Ch) to both of which I have been taken; and the scope of the argument between counsel for the parties does not go to any fundamental points about the structure and working of the applicable law and procedure so much as to their application to the facts of the case. I should, however, note two provisions of the Insolvency Practice Direction relating to the Corporate Governance Act 2020. The first is paragraph 8.1, which provides that if the court is satisfied that a winding up order can be made, then the petition can be advertised and listed for hearing; but if the court is not satisfied, it must dismiss the petition. The second is the coronavirus test itself which is defined in paragraph 1.1(3):

> "the coronavirus test" means whether:
>
> (a) In the case of a petition to wind up a registered company on a ground specified in section 123(1)(a) to (d) of the 1986 Act that the condition in paragraph 5(2) of Schedule 10 to the 2020 Act is met;
>
> (b) In the case of a petition to wind up a registered company on a ground specified in section 123(1)(e) or (2) of the 1986 Act that the condition in paragraph 5(3) of Schedule 10 to the 2020 Act is met;
>
> (c) In the case of a petition to wind up an unregistered company on a ground specified in section 222, 223, or 224(1)(a) to (c) of the 1986 Act that the condition in paragraph 6(2) of Schedule 10 to the 2020 Act is met; or
>
> (d) In the case of a petition to wind up an unregistered company on a ground specified in section 224(1)(d) or (2) of the 1986 Act that the condition in paragraph 6(3) of Schedule 10 to the 2020 Act is met;

The effect of the statutory scheme is to allow the court to wind up a company only if it is satisfied that coronavirus has not had a financial effect on it. Paragraph 21 Sch 10 CIGA 2020 provides that coronavirus may be said to have a financial effect on the company "if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus."

3. In order to meet the coronavirus test the court must be satisfied:

> (a) that coronavirus had a financial effect on the company before presentation of the petition; (limb one), and
>
> (b) that the ground for winding up the company, namely that it is unable to pay its debts as they fall due (i.e. the ground under s.123(1)(e) Insolvency Act 1986), would apply even if coronavirus had not had a financial effect on the company (limb two) (see *Re A Company supra*).

4. In *PGH Investments Limited v Ewing* Deputy ICC Judge Passfield held that the evidential burden of showing that coronavirus had a "financial effect" on the company before presentation of the petition lay with the company. Following the judgment of ICC Judge Barber in *Re A Company* he noted that the company needed only to establish a *prima facie* case. If it did so, the evidential burden shifted to the petitioner to show that even if the financial effect of coronavirus were ignored, the company would still be unable to pay its debts as they fell due. *Re A Company* established that the burden on the company was "clearly intended to be a low threshold" in that "the requirement was simply that 'a' financial effect must be shown: it is not a requirement that the pandemic be shown to be the (or even a) cause of the company's insolvency." It is sufficient that it "appear" to the court that there has been such a financial effect, suggesting a lower threshold in relation to limb one than limb two.

5. The company submits that the coronavirus test is not met in this case because the evidence demonstrates that coronavirus has had a negative financial effect on its business, but for which it would have been able to pay its debts, including the undisputed part of the petition debt. It invites the court to dismiss the petition with costs. The evidence on which it relies takes the form of witness statements of DM and MJ. The petitioning creditor relies on witness statements of BS and DH. They cover a lot of ground, much of which is not relevant to the issue I have to decide.

6. The company relies essentially on two pieces of evidence in support of its contention that the coronavirus test is not met in this case.

7. The first goes to the reason why the deal underlying the contractual obligation (referred to as "the S transaction ") was not completed. Like many deals of this kind, a number of parties were involved behind the scenes. DM, a director of the company, adduces evidence that on 29 October 2020 he was contacted by a CT, a director of the company's ultimate counterparty in the transaction, SCPL, who told him that the S transaction could not proceed because SCPL's own bank, UBS:

> "is pressing pause on any new issued instruments to the SC account. This does I am afraid include your instrument and therefore trade. Covid is the reason they are giving as they have to restructure all current business to meet pandemic demands and funding requirements."

As Mr Wright puts it in his skeleton argument:

> "11. Consequently, as a result of Coronavirus:
>
> 11.1 The S transaction did not proceed;

> 11.2 [The company] did not receive the anticipated €10 million commission payment from it which it would otherwise have received; and
>
> 11.3 [The company's] liability to repay the Investment to [the petitioner] within 60 days pursuant to the Agreement, together purportedly with the £200,000 penalty (in respect of which [the company] reserves its right to argue that it is an unenforceable penalty clause), was triggered.
>
> 12. Due to the non-completion of the S transaction and its difficult financial position as a result of Coronavirus more generally, [the company] was unable to repay he petitioner by 14 November 2020 pursuant to the Agreement although it was able to make payment to [the petitioner] of £50,000 on or around 16 January 2021."

8. The second goes to the company's difficult financial position as a result of coronavirus more generally. In his witness statement DM says:

> "29. I and [the company] are also working a number of other matters where I would have normally expected to have received funds and but for the delays caused by the Covid-19 pandemic, I am sure [the company] would have received them. Notwithstanding these issues, [the company] is attempted to repay [the petitioner] where it can. Notably on 16 January 2021, [the company] was able to pay [the petitioner] £50,000 from a relatively small matter that it had been working on.
>
> 30. The Coronavirus pandemic has therefore severely impacted [the company]'s business and, but for the financial effect of the pandemic on [the company]'s business, it would have been able to repay the Investment together with any related valid liabilities."

9. DM gives a concrete example of disruption to the company's normal business in paragraphs 20-30 of his witness statement. A deal involving a company called MBPSL, which was seeking an instrument to finance a solar power project in Mauritius and which would have produced a fee of €2 million, fell through when the expected fee failed to reach the company. In fact the fee appears to have been sent to the company's bank account at HypoSwiss Bank in Geneva on 22 December 2020, but since the remitting bank was not a correspondent bank of HypoSwiss it had to be sent via Société Générale where it was delayed. Mauritius Commercial Bank wrote to MBPSL on 24 December 2020:

> "Société Générale, the current stand of the bank is that they have back logs of minimum 8 weeks due to COVID-19 pandemic and thus have skeleton staff for processing."

It is not clear whether the fee was eventually paid and whether late payment or non-payment is relied on.

10. There is another matter on which the company relies. It accepts that it is not something that concerns the narrow scope of this hearing, but the company does claim it goes to

its inability to pay the petition debt at present. The petition was served on 22 February 2021. Three days later BS, a director of the petitioner, contacted HypoSwiss to inform it of presentation of the petition. This astonishing conduct is said to be justified by the petitioner's claim that it was done to prevent the company from dissipating funds. DM claims that premature disclosure of the existence of the petition to HypoSwiss has had a serious effect as it has become known in Geneva with the result, as DM explains in his second witness statement, that "[a]s time has gone on, more and more people have come to find out about the petition by [the petitioner] and this has made dealing with existing clients very difficult and making new clients virtually impossible." DM gives examples and explains that, but for BS's behaviour, the company would have been in a position to pay the petitioner even with the disruption caused by the coronavirus pandemic.

11. Ms Doran contends that the evidence on which the company relies is insufficient. She says that aspects of it are so at odds with other facts or common sense that it should be rejected as incredible. She also makes a more general point about the reasons why the company claims the petition debt cannot be paid which, she submits, can have nothing to do with the pandemic.

12. She points first to a lack of straight dealing on the part of the company. She relies on her client's evidence of a meeting at the Holiday Inn Shepperton in November 2020 in which it is said that DM told BS and DH that the Staits transaction was still live at the time. This, she points out, is consistent with the company's own solicitors having stated on 19 November 2020 that if the petitioner presented a winding up petition it would "likely have an adverse effect on the transaction concluding." DM's evidence is now that he knew already on 29 October 2020 that the transaction had failed. Her point is plain and requires no elaboration.

13. Then she says that it was known from the beginning that there was always a risk that the S transaction might not complete, which is why the contract had provided for alternative obligations, one in the event of completion and one in the event of non-completion. She criticises the company for not providing evidence of having set aside or provided for the £950,000 it would have had to pay if the transaction did not complete: the company's inability to pay has nothing to do with coronavirus but is the result of a risk the company chose to take.

14. She points out too that the evidence relied on is redacted and that much of it is fourth-hand hearsay. UBS decided not to proceed for reasons said to relate to the effect of coronavirus on the economy, but,

> "If the email accurately reports a conversation between someone called Richard and unknown UBS officers, it shows that UBS could apparently withdraw on a whim and without incurring any contractual penalty or requirement to recompense [SC] or the Company. If this is the case, the Company cannot prove that, but for coronavirus, the S transaction would have completed. If UBS had decided not to proceed because of the effect of (say) Brexit on the economy, there is no evidence to suggest that the impact on the Company of the non-completion would have been any different."

The evidence for the link between the S transaction failing to proceed and coronavirus is therefore tenuous.

15. As to what I shall call the Mauritius transaction, Ms Doran points out that when the letter of 24 December 2020 from Mauritius Commercial Bank to MBPSL was emailed by DM to the petitioner's solicitors DM claimed that MCB had been told that although Société Générale had a backlog, they were going to fast track the transfer. Now, according to DM, the position is that the fee paid by MBPSL to the company was returned and was to be transmitted to the company by "some other yet to be determined route." She also relies on the inherent incredibility of a delay of the scale relied on, asking why the world would not have heard of such a catastrophic breakdown of normal banking arrangements. She points to the absence of evidence from Société Générale. As in the case of the evidence about the S transaction , she points out that the letter is remote hearsay evidence at best and should carry little weight.

16. Ms Doran complains generally that much of the evidence relied on by the company takes the form of unsupported or inadequately supported assertion, which, she submits, cannot be sufficient to discharge the burden of proof. This leads me to the next plank of her attack on the company's evidence: what is not adduced.

17. If the company's financial position had in fact worsened as a result of coronavirus, Ms Doran submits, it would have been easy for the company to prove that. It could have produced annual accounts, management accounts, or other records comparing the company's financial state pre- and post-pandemic. (The only accounts in evidence, I note in passing, show a modest balance sheet deficit.) Instead, Ms Doran points out that DM's evidence on the matter is limited to the company's inability to pay the petition debt.

18. I am not asked at this stage to adjudicate on the premature publicity given to the petition by BS. I think it was unwise and improper of him to act as he did, and I do not find the convoluted legal justification offered convincing, but I have not heard full argument and think that any effect is too remote for consideration in this context, so I say no more.

19. I reject Ms Doran's point about the company's inability to pay being attributable to its failure in some way to ring-fence or provide for its contractual obligation to pay the petition debt if the deal did not proceed. There was no contractual obligation to do so; there is no suggestion of a trust having arisen.

20. I have sympathy with Ms Doran's first evidential argument, namely the failure of the company to adduce evidence of the kind mentioned in paragraph 17 above, but as I said at the hearing, it was not obliged to; and if the company has not been as helpful in its evidence as the petitioner might have wished, that was a risk that the petitioner took when it decided to present its petition in the current legal and economic climate. It is for the company to decide what to put before the court, and whilst there may be circumstances in which adverse inferences should be drawn from a failure to adduce evidence of the kind Ms Doran would have wished to see, I do not think this is such a case. I decline the invitation implicit in Ms Doran's argument to pronounce on the detail or nature of the precise evidence that might be required to demonstrate a worsening comparative position in consequence of or for reasons relating to coronavirus. It will vary from case to case.

21. Although Ms Doran's criticisms of the two specific pieces of evidence on which the company relies, as well as many of her other and more general ones, are well made, they do not, in my view, detract from their plain effect, namely *prima facie* to substantiate the company's claim that coronavirus has adversely affected it. I say that for the following reasons:

> (a) The 29 October 2020 email expressly refers to Covid as the reason why UBS had put funding on hold;
>
> (b) The email plainly has context: see the first sentences, implying that DM had been putting on pressure to get the deal done. The reference to Covid as the root of the problem would appear then to be real and not something pulled out of a hat as an excuse rather than a cause.
>
> (c) I agree with Mr Wright's analysis of the consequences of the failure of the S transaction : the company lost a fee and incurred a liability. Covid was *prima facie* the reason for those consequences.
>
> (d) The problem with the transfer evidenced by the letter of 24 December 2020 also expressly refers to Covid, albeit in a very general way, but in context I think that is enough. I have no reason to doubt that the problem with the Mauritius deal was attributable to it in whole or in part, either directly or indirectly.
>
> (e) I accept DM's evidence as to the generality of the effect of the pandemic on the company's affairs: I have no basis on which to impugn it in general as there has been no cross-examination. Whilst Ms Doran has thrown doubt on aspects of its veracity (for example, her point about what was said at the meeting mentioned in paragraph 12 above, which may have been dishonourable or may have been based on a genuine if misplaced hope) it does not undermine its general thrust, which is supported by documentation.

In reaching my conclusion I bear in mind the low threshold applicable to the test and the requirement only to make out a *prima facie* case. The first limb of the test is therefore satisfied in favour of the company.

22. On the facts outlined above, it seems to me that the court cannot be satisfied that the company's inability to pay the undisputed part of the petition debt would apply even if coronavirus had not had the financial effects on the company I have found. Its present cash flow insolvency appears to be the result in whole or in part of problems arising from or connected with the pandemic. For the reasons I have already given, I do not think the company was obliged to make special provision for ability to pay the petitioner. Although there is evidence of balance sheet insolvency (net liabilities of £513 as at 31 January 2020), that evidence is now over a year old, the sum is small, and the limb under consideration is to do with liability to pay rather than balance sheet solvency. Accordingly, in my view, the second limb of the test is satisfied, again in the company's favour.

23. In the circumstances I would propose to dismiss the petition.

Approved Judgment