

UPDATE

In re NBRL Global Ltd

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In a recent decision, the Grand Court refused to make a winding up order after hearing a petition based on disputed allegations that the relevant company was unable to pay its debts. The decision is a timely reminder that where there is no live evidence of deponents, the court will disregard allegations which have been credibly denied and rely solely upon undisputed facts.

In a recent decision, the Grand Court of the Cayman Islands refused to make a winding up order after hearing a petition based on disputed allegations that the relevant company was unable to pay its debts. In his ruling, Parker J provided helpful guidance, not only with respect to the evidence which a petitioner is required to adduce in order to discharge its evidential burden, but also with respect to the operation of the solvency test in Cayman.

Facts

The Petitioner, Learn Capital Venture Partners III LP, brought a winding up petition against NBRL Global Ltd (NBRL) on the basis that it was unable to pay its debts. The Petitioner was a creditor and contributory of NBRL.

The Petitioner alleged that NBRL had a number of outstanding debts, each of which was due and payable, with the result that NBRL was unable to pay its debts due to its admittedly poor cash position. The Petitioner argued that the debts should be deemed 'due and payable' despite various deferral agreements in place with NBRL's creditors.

In opposition, NBRL contended that none of the debts were due and payable, either because (a) the creditors had agreed to defer payment or (b) in one instance, there was a bona fide dispute regarding the existence of the debt. NBRL further contended that, based upon its projected cash position, by the time the deferred debts became due, there would be sufficient cash to satisfy them.

Decision

In reaching his decision to dismiss the Petition, Parker J had to consider two issues which routinely confront the courts on petitions based upon a company's insolvency: (a) what does an inability to pay debts actually mean and (b) what evidence is required to demonstrate such an inability.

NBRL's solvency

At the outset, Parker J affirmed that the insolvency test in Cayman is cash flow insolvency, or the inability to pay debts as they fall due. He also confirmed the dicta of the Cayman Islands Court of Appeal in *SEB AB (Publ) v Conway and Walker* (as JOLs of Weaving Macro Fixed Income Fund Ltd¹) 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.'

Court's approach to the evidence

Parker J noted it was inappropriate to resolve difficult factual disputes at a petition hearing.² Accordingly, he adopted the approach espoused by Lord Templeman in *Tay Bok Choon*³ and confirmed that, in circumstances where there was no live evidence or cross-examination of the deponents, the Court would ignore any disputed allegations which had been 'credibly denied' and rely solely on undisputed facts.

Parker J found NBRL's evidence to be credible despite admitting that parts of it were confusing. The Petitioner, on the other hand, had not adduced evidence in relation to the disputed debt or the deferral agreements entered into by NBRL with its other creditors and, in absence of such evidence, Parker J accepted NBRL's evidence because 'it is not the function of this Court to reject sworn evidence ... save in exceptional circumstances.'

Accordingly, on the evidence before him, Parker J found the Petitioner failed to prove that NBRL was insolvent.⁴ He was persuaded that:

- part of the debt was genuinely disputed by NBRL
- it is not the function of the court to determine the validity of disputed debts, and
- the Petitioner failed to show that, on a balance of probabilities, NBRL would have been unable to pay its debts as they fell due.

Although Parker J agreed with the Petitioner that the debts were 'due and payable' as the deferral agreements did no more than postpone payment deadlines, Parker J ultimately held that the Petitioner had not demonstrated NBRL would be unable to pay the deferred debts at the end of the deferral period. NBRL had adduced evidence that its cash position would improve considerably in the coming months and this was not convincingly challenged by the Petitioner.

On that basis, Parker J dismissed the Petition.

Parker J went on to say that even if he had been persuaded of NBRL's insolvency, he would have exercised his discretion to refuse the petition on the following grounds:

- the petition was peculiar in that it was presented by a major creditor of NBRL, who refused to accept repayment of its debt
- no other creditors supported the petition
- winding up should only be used as a last resort and the court should take care not to have its jurisdiction used for tactical purposes or to resolve stakeholder disputes, and
- it was by no means clear that the broader stakeholder base of NBRL would benefit from the appointment of liquidators. Whilst that result may appear optimal from the Petitioner's stance, there were many commercial variables at play and, objectively viewed, it could be just as advantageous for NBRL to continue to be run by its board.

¹ unreported, CICA No. 2 of 2016, at paragraph 40.

² *Re Parmalat* [2008] UKPC 29.

³ [1987] 1 WLR 413, see paragraphs 418-419.

⁴ In so doing, he reminded the parties that it was the Petitioner who bore the burden of proving insolvency and that a company is not required to prove its own solvency.

Conclusion

The decision is a timely reminder of how the court will approach a winding up petition based on credibly disputed evidence of the company's insolvency. Unless there is undisputed evidence of a company's insolvency, the Cayman court will likely refuse a winding up order where there is no oral evidence on behalf of those opposing the petition, nor cross-examination of the petitioner's witnesses.

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