

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 55 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF MATRIX INC.

Appearances:

Christopher Harlowe and Jonathon Milne of Mourant Ozannes, for the
Petitioner

Ian C Lambert of HSM Chambers on behalf of the Company

Before: The Hon. Justice Kawaley

Heard: 28 May 2018

Date of Decision: 28 May 2018

Reasons Circulated: 1 June 2018

Reasons Delivered: 21 June 2018



HEADNOTE

Winding-up petition-arbitration for award for liquidated sum in favour of petitioner-non-monetary cross-claim by company against petitioner arising out same arbitral award-whether debt disputed on substantial grounds-exercise of discretion to wind-up

**REASONS FOR WINDING UP ORDER
(in Court)**

Introductory

1. On April 4, 2018, Heathcliff Trading S.A., a Panamanian corporation, (the "Petitioner") presented a winding-up petition as a creditor against Matrix Inc. (the "Company") pursuant to section 94 (1)(b) of the Companies Law on the grounds that the Company was unable to pay its debts and was liable to be wound-up on that ground (section

- 92(d)). Although the Petition relied upon the failure to pay a demand dated January 18, 2018 and implied that demand was served under section 93(a) of the Law, evidence filed in support of the Petition made it clear that the relevant demand was not served on the Company's registered office. Reliance instead was placed on a failure to pay combined with a failure to honour past promises to pay and an absence of any post-petition offers to pay as evidence of commercial insolvency.
2. The Company opposed the Petition but at the end of a comparatively short hearing on May 28, 2018, I granted the winding-up Order sought by the Petitioner and appointed David Griffin and Andrew Morrison of FTI Consulting (Cayman) Limited as Joint Official Liquidators of the Company.
 3. These are the reasons for the decision which I promised to deliver.

The factual matrix

4. The most pertinent facts were essentially agreed. They may be distilled as follows:
 - the Company referred a dispute with the Petitioner about the sale of selenium-74 to arbitration before a Sole Arbitrator in Geneva, Switzerland. The Sole Arbitrator delivered a Final Award which ran to 116 pages on March 14, 2017;
 - the Final Award required the Petitioner to return or procure the return of the selenium to the Company within 30 days and ordered the Company to pay the Petitioner liquidated sums in excess of CHF 7.4 million (CHF 5.8 million plus some CHF 1.6 million in an escrow account);
 - the Company appealed this decision and obtained a stay of the Final Award pending appeal. The Swiss Federal Supreme Court dismissed the Company's appeal on January 8, 2018;
 - by letter dated January 18, 2018, the Petitioner's Swiss attorneys (Klein) wrote to the Company's Swiss attorneys (Python) demanding payment of the liquidated sums awarded to the Petitioner in the Final Award, together with default interest. The Python firm responded by letter dated January 19, 2018, advising that the Company would comply with the Award "*at the latest in the week of 5 February 2018*";
 - before the Petition was presented on April 4, 2018, the Company did not dispute its obligation to pay the sums due to the Petitioner under the Final Award;



- the only evidence filed by the Company in opposition to the Petition was an Affidavit sworn by a former director Peter Fischer on May 25, 2018. This Affidavit:

(a) reiterated the Company's case which was rejected in the Final Award and by the Swiss Supreme Court; and

(b) asserted: "*As the Petitioner is not the legal owner of the Goods it is not in a position to demand money from Matrix*".

The Petitioner's submissions

5. The Petitioner submitted that it was only if a petition debt was disputed *bona fide* on substantial grounds that its presentation or prosecution would be improper: *Mann-v-Goldstein* [1968] 1 WLR 1091. Other vintage cases were cited in support of the incontrovertible proposition that a failure to pay an undisputed debt was in and of itself evidence of insolvency: *Cornhill Insurance PLC-v- Improvement Services Ltd.* [1986] 1 WLR 114; *Taylor's Industrial Flooring Ltd.-v- Plant Hire (Manchester) Ltd.* [1990] BCLC 216. As far as the discretion to wind-up was concerned, reliance was placed on the following *dictum* of Jones J in *HSH Cayman I GP Limited and others-v-HSH Coinvest (Cayman) GP Limited* [2010] (1) CILR 157 (assuming an undisputed debt and insolvency were proven):

"...the petitioner has a prima facie right to expect the court to make winding-up orders. The court's power is a discretionary one, but the petitioner can expect the court to exercise its discretion in favour of making an immediate winding-up order unless it is satisfied that there is some exceptional circumstance or special reason which justifies the adoption of a different course."

The Company's submissions

6. The Company's opposition was not, in the final analysis, grounded on firm legal or factual foundations. Its evidence included the following averments:

(a) the Petitioner was in breach of its obligations and so could not enforce the Company's payment obligations;

(b) the Company had been a victim of fraud; and

(c) Mr Fischer was himself a creditor of the Company.

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7. Mr Lambert's main arguments were as follows:
- (a) the Petition debt was disputed in good faith upon substantial grounds because the liquidated sums ordered to be paid under the Final Award were *"inextricably linked with the requirement for the Petitioner to transfer to Matrix good title to 500.48 grams of selenium-74"*; and
 - (b) there was a dispute about implementation of the Final Award which this Court should refer back to the Sole Arbitrator to resolve.
8. The merits of the Company's opposition turned centrally on the proposition, belatedly raised at the 11th hour, that its payment obligations were *"inextricably linked"* to the Petitioner's obligation to transfer or procure the transfer of goods that the Company itself conceded it was not in the Petitioner's power to transfer. The Company's Swiss attorneys prompt response to the Petitioner's January 18, 2018 demand for payment of the sums awarded was to indicate without any qualifications their client's willingness to meet their obligations under the Final Award. No demand was made for the Petitioner to comply with its obligations.

Findings: was the debt disputed bona fide on substantial grounds?

9. Mr Lambert relied upon *MNC Media Investment Limited-v-ANG* [2016] (1) CILR Note 1:
- "A foreign arbitral award is to be interpreted according to the plain and obvious meaning of its terms, thereby giving it an autonomous interpretation without recourse to national law. The court is not to seek to improve the award or to apply Cayman rules of construction, e.g to strive to construe it having regard to commercial considerations."*
10. The operative part of the Final Award consists of ten paragraphs: the first paragraph dismisses the Company's claim; paragraph 2 orders the Company to pay the Petitioner CHF 1.8 million; paragraph 3 orders payment of CHF 4.0 million; paragraphs 4 and 5 oblige the parties to jointly instruct within 30 days the Escrow Agent to pay the Petitioner CHF 1, 666,865, and provide that the Award will serve as the instruction in default; paragraphs 6 and 7 make corresponding provisions for the instruction within 30 days of the Escrow Agent to pay interest to the Petitioner from the Escrow Account; paragraph 8 orders the Petitioner *"to transfer or procure the transfer of Se74*



(500.48gr)" to the Company "within 30 days"; paragraph 9 deals with costs; and paragraph 10 dismisses all remaining claims "with prejudice".

11. Mr Harlowe submitted that the terms of the Final Award were clear and that they did not state that the payment obligations in paragraphs 2 and 3 were in any way connected with the Petitioner's non-monetary obligations under paragraph 8, the language of which acknowledged that it might not be within the Petitioner's power to transfer the goods to the Company itself. I agreed. It was noteworthy that not only were the payment obligations in favour of the Petitioner expressed in unconditional terms; unlike the Escrow Account obligations and the Petitioner's transfer obligations, they were expressed in immediate terms. To my mind this clearly signified an intention to impose unconditional payment obligations on the Company, obligations which were wholly independent of any other provisions in the Final Award. Accordingly, I found that the Petition debt was not disputed on substantial grounds.

Were there discretionary grounds for declining to make a winding-up Order?

12. No evidence was filed which was capable of supporting a rational decision by the Court to decline to exercise its discretion to grant a winding-up order. The Court could in appropriate circumstances have adjourned or stayed the Petition pending the determination of a cross-claim advanced by the Company. It is well recognised that if a company has a genuine cross-claim for a sum equal to or greater than the debt upon which the petition is grounded, which has not yet been adjudicated, the Court will ordinarily adjourn or stay the winding-up proceedings to permit the cross-claim to be determined: *Re LFH Wools* [1970] Ch 27. The Company's cross-claim was not for a monetary sum.
13. However this Court's statutory jurisdiction when hearing a petition was sufficiently wide to enable an adjournment or stay on other grounds. Section 95 of the Law provides:

"(1) Upon hearing the winding up petition the Court may -

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit,



but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets."

14. The Company adduced no credible evidence of its solvency or indeed of its ability and/or willingness to pay the sums due if the Petitioner facilitated the return of the relevant goods. No current officer chose to place any evidence at all before the Court. Mr Fischer concluded his Affidavit by pointing out that he too was a creditor of the Company in an amount he was in the process of calculating, which strongly hinted that he had his own anxieties about the prospect of being paid.
15. Nor was any estimate provided of the value of the selenium-74 so the Court could assess the extent of the injustice of which the Company complained. What the evidence before the Court did strongly point to was that the selenium-74 had no great value at all. This appeared to explain the Company's dissatisfaction with the Final Award and its failure to vigorously press the Petitioner to comply with its obligation to facilitate the return of the goods before the Petition was filed and served.
16. There was, accordingly, no discretionary basis on which the Court could have refused to grant the winding-up Order the Petitioner was entitled to seek.

Summary

17. For the above reasons on May 28, 2018 the Company was wound-up.



**HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**

