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Neutral Citation Number: [2020] EWHC 1406 (Ch)

Case No: CR-2020-002640

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (Ch.D)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, WEC4A 1NL

Date: 02/06/2020

Before:

MR JUSTICE MORGAN

- -

RE: A COMPANY (INJUNCTION TO RESTRAIN PRESENTATION OF PETITION)

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- -

Felicity Toube QC and **Adam Al-Attar** (instructed by **Latham & Wilkins LLP**) for the **Applicant**
There was no appearance on behalf of the Respondent
Hearing date: 1 June 2020

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Judgment Approved by the court for handing down

MR JUSTICE MORGAN:

1. This is an application by a company to restrain the presentation of a winding up petition. The application has been made on an urgent basis in the vacation court. A creditor of the company has e-filed a winding up petition in relation to the company but has not yet paid the court fee so that the petition has not yet been presented. However, in the absence of an injunction, the creditor could present the petition at any time, hence this application.

2. The company has given notice to the creditor of this application and a solicitor for the creditor has attended the hearing which was conducted remotely by Skype. However, the solicitor attended the hearing for the purpose of hearing what transpired and did not wish to make submissions to the court. This judgment will therefore record that no one appeared on behalf of the creditor and I will approach the matter on the basis that the application was considered at an ex parte hearing. However, I have been shown the correspondence between the solicitors for the parties so that I am aware of the contentions put forward on behalf of the creditor when it declined to give an undertaking not to present the petition.

3. The company is a High Street retailer. The creditor is the lessor of one retail unit of which the company is the lessee. The company traded from those premises until it was required to close them in accordance with the instructions from the Government in response to the Covid-19 pandemic.

4. I will proceed on the basis that the company has failed to pay rent and service charge which recently fell due under the lease. The creditor is unable to seek forfeiture of the lease on those grounds by reason of section 82 of the Coronavirus Act 2020.

5. On or about 15 April 2020, the creditor served, or purported to serve, a statutory demand relating to the arrears of rent and service charge. There is an issue as to whether the statutory demand was properly served and also as to whether the statutory demand was invalid because it wrongly stated the amount of the arrears. For present purposes, I do not need to discuss those issues.

6. The creditor has e-filed a petition seeking the winding up of the company. I have not seen the petition as e-filed. However, I can proceed on the basis that the petition is based on the ground, within section 122(1)(f) of the Insolvency Act 1986 ("the 1986 Act"), that the company is unable to pay its debts. It seems likely that the creditor relies on section 123(1)(a) but it may be that it also relies on section 123(1)(e) or section 123(2) of the 1986 Act.

7. The company has applied for an injunction to restrain the presentation of the petition on various grounds. Those grounds are set out in detail in a witness statement from a director of the company and are further explained in a detailed skeleton argument from Ms Toube QC and Mr Al-Attar on behalf of the company. The grounds rely on the established law to the effect that a winding up order is a class remedy for the benefit not of the petitioner alone but for the benefit of creditors generally. It is submitted that a winding up order in this case would be harmful to the interests of the creditors generally and would confer no benefit on the proposed petitioning creditor. It is further submitted that the petition is bound to fail, is brought for a collateral purpose and is an abuse of the process of the court. These submissions referred to a

substantial body of evidence which had been filed and referred in detail to the history of the finances of the company. At the hearing of this application, I invited counsel for the company to concentrate on a further ground on which the application is based and, in the event, I did not hear full submissions on the other matters to which I have referred. The basis for the application on which counsel for the company then concentrated relates to the significance of the provisions as to winding up contained in the Corporate Insolvency and Governance Bill 2020 ("the CIG Bill").

8. At the end of the hearing, I indicated that I would make an order, until the hearing of the company's application for a final order to the like effect, restraining the presentation of the winding up petition on the ground that I was satisfied that that was the appropriate order to make in the light of the submissions based on the CIG Bill. I considered that I ought to give a short judgment dealing with those submissions. I also took the view that, even though the hearing was ex parte, that I ought to give the judgment in open court as the points which were argued in this case might arise in other cases in the near future. As the hearing had been in private to protect the interests of the company, this judgment has been anonymised.

9. The relevant provisions of the CIG Bill are contained in schedule 10. When I refer to what schedule 10 "provides", I am referring to the terms of the Bill in its current form, even before it has been enacted.

10. Paragraph 1 of schedule 10 provides that no petition for the winding up of a registered company may be presented under section 124 of the 1986 Act on or after 27 April 2020 on the ground specified in section 123(1)(a) (i.e. non-compliance with a statutory demand) where the demand is served during the relevant period which begins on 1 March 2020 and ends on 30 June 2020 (or one month after the coming into force of schedule 10, whichever is later). Paragraph 1 of schedule 10 states that it is to be regarded as having come into force on 27 April 2020.

11. Paragraph 2 provides for there to be restrictions on the presentation of winding up petitions. Paragraph 2(1) refers to petitions based on various grounds including the ground in section 123(1)(a) (non-compliance with a statutory demand) and paragraph 2(3) refers to a petition based on the ground in section 123(1)(e) (where it is proved that the company is cash flow insolvent) or section 123(2) (where it is provided that the company is balance sheet insolvent). Paragraph 2 is to be regarded as having come into force on 27 April 2020.

12. Both paragraph 2(1) and paragraph 2(3) require a creditor who seeks to present a petition pursuant to those provisions to satisfy a condition expressed in paragraph 2(2) or paragraph 2(4), as the case may be. The condition in paragraph 2(2) is expressed as follows:

> "(2) The condition referred to in sub-paragraph (1) is that the creditor has reasonable grounds for believing that— (a) coronavirus has not had a financial effect on the company, or (b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company."

13. The condition in paragraph 2(4) is in slightly different terms but appears to have a similar effect to the condition in paragraph 2(2).

14. Paragraph 4 of schedule 10 deals with winding up petitions presented on or after 27 April 2020 but before the day on which schedule 10 comes into force. If the court to which the petition is presented without the condition in paragraph 2(2) or 2(4) being met, the court may make such order as it thinks appropriate to restore the position to what it would have been if the petition had not been presented.

15. Paragraph 5 of schedule 10 provides:

> "5 (1) This paragraph applies where—
>
> (a) a creditor presents a petition for the winding up of a registered company under section 124 of the 1986 Act in the relevant period,
>
> (b) the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of that Act, and
>
> (c) it appears to the court that coronavirus had a financial effect on the company before the presentation of the petition.
>
> (2) The court may wind the company up under section 122(1)(f) of the 1986 Act on a ground specified in section 123(1)(a) to (d) of that Act only if the court is satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company.
>
> (3) The court may wind the company up under section 122(1)(f) of the 1986 Act on the ground specified in section 123(1)(e) or (2) of that Act only if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company.
>
> (4) This paragraph is to be regarded as having come into force on 27 April 2020."

16. If these provisions of the CIG Bill are enacted in their present form, then their effect will be clear. The policy of these provisions in the CIG Bill is self-evident.

17. At the hearing, I was given information as to the stage in the Parliamentary procedures which the CIG Bill has reached and also information as to when it is expected that the CIG Bill will receive the Royal Assent. Counsel for the company explained that the current expectation is that the CIG Bill will receive the Royal Assent by the end of June 2020. As to the likelihood that schedule 10 of the CIG Bill will be enacted in more or less its current form, I have been referred to a number of ministerial statements as to the Government's commitment to enact this legislation and I feel a high degree of confidence that schedule 10 will be enacted in more or less its current form and on the timetable referred to above.

18. It the petition were presented today or in the near future, it is most unlikely that it would be heard before the CIG Bill is enacted. As indicated earlier, once enacted, the relevant provisions are to be regarded as having come into force on 27 April 2020. This means that, on the hearing of the petition, a court must ask itself whether coronavirus has had a financial effect on the company before the presentation of the petition. If that is held to be the case, then the court can only wind up the company if it is satisfied that the facts on which the petition is based (under section 123(1) or (2)) would have arisen even if coronavirus had not had a financial effect on the company.

19. I have been provided with a substantial body of evidence as to the effect of coronavirus on the finances of the company and whether the facts on which the petition would be based would have arisen even if coronavirus had not had a financial effect on the company. On that evidence there is a strong case (at the lowest) that coronavirus has had a financial effect on the company before the presentation of the petition and, further, that the facts on which the petition would be based would not have arisen if coronavirus had not had a financial effect on the company. This means that it appears that a petition to wind up the company would not result in the court making a winding up order.

20. The evidence before me shows that the presentation of a petition which would ultimately fail would nonetheless have a seriously damaging effect on the company.

21. It is in these circumstances that the company asks the court to restrain the presentation of a winding up petition which, so far as one can tell, will ultimately fail but which will in the meantime seriously damage the company.

22. The response put forward in correspondence by the creditor is that even if the court reaches the conclusion which I have just expressed, in advance of the CIG Bill being enacted, there is absolutely nothing to stop the creditor presenting its petition and giving notice of it and continuing with it until a hearing. It will only be at the hearing that one will know the fate of the petition and that will depend on whether the CIG Bill has been enacted in its present form in the meantime.

23. Counsel for the company rely on a number of authorities for the proposition that in certain circumstances and for certain purposes the court can take into account, when reaching its decision, the possibility of a change in the law. The authorities cited were *Hill v C A Parsons* [1972] Ch 305, *Sparks v Holland* [1997] 1 WLR 143 and *Travelodge Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217 (Ch). The first two of those cases concerned facts and circumstances very different from the present case but the third case is a recent case where the facts were essentially the same as the case before me.

24. I derive from the first two of those cases, supported by the third case, the proposition that when the court is deciding whether to grant relief and, in particular, relief which involves the court controlling or managing its own processes, that it can take into account its assessment of the likelihood of a change in the law which would be relevant to its decision.

25. In the present case, the creditor wishes to invoke the procedures of the court to present a winding up petition. On my assessment of the relevant circumstances, the creditor wishes to do so where it is improbable that the court will make a winding up order but

where the existence of a presented petition will cause serious damage to the company. In those circumstances, I consider that, as a matter of law, I am able to take into account my assessment of the likelihood of the change in the law represented by schedule 10 to the CIG Bill. Having taken that assessment into account, I consider that the court should control its own processes by restraining the presentation of this petition in the present circumstances. I do not see that the court is powerless to act to prevent its procedures being used otherwise than for the purpose of obtaining a winding up order (because it is improbable that such an order will be made) but for the purpose of, or at any rate with the effect of, causing serious damage to the company. I also consider that the grant of an injunction to restrain the presentation of the petition is powerfully supported by the clear policy objectives of the CIG Bill.

26. Birss J reached essentially the same conclusion in *Travelodge Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217 (Ch) although that decision was before the publication of the CIG Bill and was based on what had been said in ministerial statements. The position at the present time is more clear now that the CIG Bill has been published and is being actively and speedily considered by Parliament and I can form a confident assessment as to when it will receive Royal Assent.

27. The decision in *Travelodge* does not appear to be available on the usual websites or on bailii.org. The judgment in the present case may help to notify practitioners of the attitude which Birss J took in the *Travelodge* case and which I have taken in this case.

28. There is one final matter with which I wish to deal. Counsel for the company submitted that the company should not be required to give a cross-undertaking in damages in relation to the injunction which I will grant. They submitted that there was authority that when the court granted an injunction to restrain presentation of a winding up petition, it was not appropriate to require the applicant for the injunction to give an undertaking in damages. They accepted that the authority they had in mind concerned a situation where the court granted a final injunction. In the present case, I am not granting a final injunction but am granting an interim injunction until the insolvency application for a final injunction is heard.

29. It was then pointed out that when Birrs J in *Travelodge* granted an interim injunction restraining the presentation of a petition, he had not required the applicant to give a cross-undertaking in damages. The judge based that decision on the ground that it was unlikely that the injunction would cause loss to the respondent for which the applicant would not already be liable. I confess I felt uneasy about this reasoning which seemed to me to be out of line with other authority. I indicated that I would look into the point further overnight and give my decision in the form of this judgment.

30. In that way, I turned up the line of authority which was in my mind at the hearing and which is referred to in *JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev* [2016] 1 WLR 160 where Lewison LJ said at [75]-[78]:

> "75. The first of these points raises the question whether it is necessary for a defendant to establish a likelihood of the freezing order causing loss in order to become entitled to a cross-undertaking unlimited in amount. In *Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch) at [25] Mann J said that a failure to establish a sufficient risk of loss was "no

reason for not extracting a cross-undertaking". The same point emerges from *Financial Services Authority v Sinaloa Gold plc [2013] 2 AC 28* which is a recent decision of the Supreme Court about when a law enforcement agency should be required to give a cross-undertaking in damages. At para 29, Lord Mance JSC said:

"The purpose of a cross-undertaking in favour of a defendant is to cover the possibility of loss in the event that the grant of an injunction proves to have been inappropriate. To refuse to require a cross-undertaking because it appears, however strongly, unlikely ever to be capable of being invoked misses the point. The remoteness of the possibility of loss might indeed be thought to be a reason why the public authority would be unlikely to be inhibited from seeking injunctive relief by fear that public funds may be exposed to claims for compensation."

76. At para 30, he continued:

"In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so. If it seeks interim relief which may, if unjustified, cause loss or expense to the defendant, it is usually fair to require the claimant to be ready to accept responsibility for the loss or expense. Particularly in the commercial context in which freezing orders commonly originate, a claimant should be prepared to back its own interests with its own assets against the event that it obtains unjustifiably an injunction which harms another's interests."

77. It is, then, fairness rather than likelihood of loss that leads to the requirement of a cross-undertaking. At the stage when a freezing order is granted nothing has been decided. The court cannot be seen to prefer the interests of one litigant over another. In addition, as mentioned, the cross-undertaking is regarded as the price that must be paid for the interim interference with the defendant's freedom. Moreover, cross-undertakings in damages are required to be given by applicants for freezing orders (and other injunctions) on without notice applications. Necessarily the cross-undertaking is required and given before the defendant has had the opportunity to give any evidence about loss (or indeed anything else). Nor in my experience is it usual for defendants to set out the prospective loss that they might suffer as a reason for requiring the cross-undertaking. Evidence of that kind is often deployed on the question of the balance of convenience, but that is a different point.

78. I do not, therefore, consider that the claimants are correct in their submission that the defendant must show that the

> freezing order is likely to cause him a loss before a cross-undertaking of unlimited amount is required."

31. That reasoning applies in this case. The injunction in this case will be on terms that the company provides the usual cross-undertaking in damages.