



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

CAUSE NO: FSD 248 OF 2023 (MRHCJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF BPGIC HOLDINGS LIMITED

IN OPEN COURT

Appearances

**Mr. Anthony Beswetherick KC, and with him, Mr. Barnaby
Gowrie of Walkers for the Petitioner
Mr. Ben Valentin KC, and with him, Mr. Liam Faulkner of
Campbells for the Respondent**

Before:

The Chief Justice, the Hon. Justice Margaret Ramsay-Hale

Date heard:

20 November 2023

Draft Judgment circulated: 19 January 2024

Judgment Delivered:

26 January 2024

HEADNOTE

***Companies - compulsory winding up - application to dismiss petition on ground that debt
disputed on bona fide and substantial grounds - principles to be applied.***

JUDGMENT

Introduction

1. By petition dated 24 August 2023, the Petitioner, MENA Energy Services Holdings Limited (“MENA”) applied to wind up BPGIC Holdings Limited (the “Company”) on the basis that the Company was unable to pay its debts as they fell due.
2. The Company filed a summons to strike out the petition on the grounds, *inter alia*, that the debt was substantially disputed. The Company’s summons was heard in two stages. The first hearing was limited to an *in limine* submission that the Court was not entitled to determine the question of whether the debt was *bona fide* disputed on substantial grounds given that the agreement between the Company and the Petitioner included an agreement to submit all disputes to arbitration which included any dispute as to whether the debt was due and payable. The *in limine* point of law was resolved in favour of the Petitioner in an unreported judgment dated 30 November 2023.
3. The balance of the Company’s summons to strike out the petition on the ground that the debt was substantially disputed was heard on 20 November 2023. The application was dismissed and an order for the winding up of the Company made. I gave brief *ex tempore* reasons for finding that the debt was not genuinely or substantially disputed and now set out my reasons for that decision in full.

The Background

4. In the application, MENA relied on the evidence of one of its directors, Mr. Stephen John Vineburg, and the Company on the evidence of Mr. Nicolaas Paardenkooper, the Company’s Chief Executive Officer.
5. The agreed facts are that MENA advanced sums, the repayment of which was governed, primarily, by a Deed Poll agreement originally made with Brooge Petroleum and Gas

Investment Company (BPGIC) Plc (“BPGIC Plc”) in 2019. The Company was incorporated on 9 October 2019. Subsequently, the obligations of its parent (BPGIC Plc) were novated such that the Company became directly indebted to MENA in respect of the sums that it had advanced. An amended Deed Poll was executed on 19 November 2019, and subsequently amended and restated on 10 November 2021.

6. The Deed Poll required that the Company pay interest to MENA annually on 31 March of each year. It is common ground that the Company has never paid any of the interest due.
7. On 11 April 2021, the Company and MENA entered into a formal agreement in which MENA agreed to forbear from enforcing its rights under the Deed Poll (the “2021 Forbearance Letter”).
8. The 2021 Forbearance Letter was countersigned by Mr. Paardenkooper on behalf of the Company, by Mr Vineburg on behalf of MENA and by a Mr Al-Ameri on behalf of the Guarantor of the Company’s liabilities.
9. In what might be thought the clearest admission of an inability to pay, the 2021 Forbearance Letter records in Clause 1 that the Company had failed to pay the interest that had fallen due on 31 March 2020 and was unable to pay the interest that fell due on 31 March 2021.
10. Clause 3 provided that MENA “*agreed to forbear, on the terms of this letter, for the Forbearance Period*” from enforcing its rights in respect of the non-payment of the 2020 and 2021 interest amounts. The “*Forbearance Period*” was defined in clause 2 as being the earliest of a number of events, including the “*Long Stop Date*”, which was defined as 30 September 2021.
11. Clause 4 stipulated that the agreement would be binding upon MENA “*only from the Effective Date*”, which was expressly confirmed in clause 10. Clause 4 further stipulated that if the “*Effectiveness Conditions Precedent are not completed to the satisfaction of [MENA] by the Effectiveness Deadline, this*

letter shall not come into force". The Effective Date was defined in clause 2 as the time "at which the Effectiveness Conditions Precedent are completed to the satisfaction of [MENA]", provided this was before 11:59 pm (London time) on the 7th day after the date of the letter (the "Effectiveness Deadline"). The Effectiveness Conditions Precedent were identified in Annex 1 as including: (a) the countersignature of the letter by the Company and by the Guarantor and delivery of those countersigned versions to MENA; and (b) the provision of a board resolution by the Company approving its entry into the letter.

12. The Company undertook to use all reasonable steps to satisfy certain "Milestone Steps" - which included payment of the overdue interest liabilities - as soon as reasonably practicable and in any event before the "Milestone Step Deadline," which, like the Long Stop Date, was defined as 30 September 2021.
13. The Company also agreed to provide MENA with security over 1,666,666 shares in the Company's subsidiary, Brooge Energy Limited ("BEL").
14. MENA expressly reserved its rights, save as expressly set out in the 2021 Forbearance Letter, which records at clause 8 that,

"Nothing in this letter shall (other than expressly set out herein) constitute a waiver, or prejudice, diminish or otherwise adversely affect, any present or future rights or remedies of [MENA] arising in respect of or pursuant to the Deed Poll ..."

15. The 2021 Forbearance Letter was amended to vary the definition of the "Effectiveness Deadline." These amendments were documented in a formal agreement executed by the Company, MENA and the Guarantor.
16. On 10 November 2021, the parties agreed to a further formal amendment to the 2021 Forbearance Letter. This variation changed the definition of the Long Stop Date from 30 September 2021 to 31 March 2022, thereby granting the Company a further period of forbearance on the terms set out in the amended agreement. Under the amended agreement,

the Company promised to provide MENA with a first equitable mortgage over 12,500,000 shares in BEL by 31 March 2022 as security.

17. The Company failed to pay the overdue interest for 2020 and 2021 that it had promised to pay by 31 March 2022 and the mortgage over the shares was never provided.
18. There were further discussions between the MENA and the Company with respect to a further period of forbearance and a draft forbearance agreement was circulated which envisaged a Long Stop Date of 31 December 2022 (the “Draft Forbearance Agreement”).
19. The overdue interest payments were not paid on the Long Stop Date proposed in this Draft Forbearance Agreement nor when interest next fell due under the Deed Poll on 31 March 2023, or at all.
20. On 31 May 2023, MENA served an Event of Default Notice on the Company. No payment was made and no response sent by the Company.
21. On 9 June 2023 MENA served a statutory demand upon the Company pursuant to s.93 of the **Companies Act** demanding payment in respect of the overdue interest. No payment was made and no response was sent by the Company whatsoever.
22. On 14 June 2023 MENA served a Redemption Notice, as a result of which the full debt fell due. No payment was made or response received from the Company.
23. The petition was filed on 24 August 2023.

MENA’s position

24. MENA’s position was that the petition was properly presented as the debt was indisputably due in the circumstances where there had been no further agreement to forbear, the interest

reserved under the agreement had not been paid, the statutory demand remained unsatisfied.

The Company's Position

25. The Company's position was that the petition was an abuse of process in the circumstances where the parties had agreed at a meeting held on 15 August 2022 that there would be a further forbearance of the interest payments. The Company contended that the contemporaneous documents and MENA's conduct up to May 2023, when it made demand for the interest due, were consistent with and supported the Company's assertion that that a further forbearance agreement had been reached. The Company also contended that there was no requirement, as part of the agreement reached between the parties, that the forbearance agreement was subject to formal execution in order to be valid and binding. As the resolution of the issue required the resolution of disputed facts, the proper course was to dismiss the petition and leave the issues of fact to be determined in the arbitration proceedings which had already been commenced by the Company.
26. The Company's evidence in support of its contention that there had been a further forbearance agreement was given on affidavit by its Chief Executive Officer, Mr. Paardenkooper. It was his evidence that after the March 2022 Long Stop date had passed, MENA did not take any action in relation to the interest which was then due, which did not surprise him as he understood the parties were proceeding on the understanding that MENA would not seek to recover the interest at that time.
27. He stated that in August of that year, the Company and MENA discussed the possibility of the Company taking BEL private as a means of restructuring its debt and it was agreed that there would be a further period of forbearance.
28. There were further exchanges between the Company and MENA's representatives which resulted in the Draft Forbearance Agreement being circulated on 17 August 2022, setting

out what Mr. Paardenkooper described as “*agreed terms.*” Notwithstanding he described the terms as agreed, Mr. Paardenkooper noted that, in its covering email, the Company raised additional items to which Mr. Vineburg responded on 18 August 2022.

29. Further discussions were had, but Mr. Paardenkooper relied on a 1 September 2022 email, written by Mr. Vineburg in which he stated, “*I refer to our recent meeting in Dubai where we agreed the terms of the forbearance...*” as well as a 13 September 2022 email to which Mr. Vineburg attached another version of an amended Forbearance Letter and stated “*the document is now in agreed form...*” as expressly confirming the agreement:
30. MENA did not take any action in relation to the interest which fell due on 31 March 2023, consistent with there being a forbearance agreement. In fact, Mr. Paardenkooper stated, there was no further correspondence from MENA after October 2022 until May 2023 when it proposed a restructuring of the parties’ arrangements as a way of dealing with the debt.
31. MENA’s proposal was rejected by the Company which perceived it to be a naked attempt to take control of BEL. The Company made its own counterproposals which were rejected by MENA in turn. It was at that point, Mr. Paardenkooper said, that MENA issued the statutory demand for the interest due, the suggestion being that the statutory demand was issued in bad faith to exert pressure on the Company. As Mr. Valentin KC put it, MENA’s position was “*if we can’t get BEL, we’ll wind up the Company*”.
32. Although the Draft Forbearance Agreement had a long stop date of December 2022, Mr. Valentin submitted that the forbearance was, in fact, on an open-ended basis. The evidence in support of this proposition appeared to be Mr. Paardenkooper’s assertion that,

“...although the specific terms of the continued forbearance were being discussed, it remained my understanding and belief that, so long as adequate security existed, it was always agreed that [MENA] would continue to extend the period of forbearance.” [emphasis mine].

33. The Company contended that at the time MENA served the statutory demand, adequate security existed in the form of the first equitable mortgage which was given to MENA over 12,500,000 shares in BEL, which was worth twice the accrued interest.
34. Indeed, the Company contended that it was “*robustly solvent*” as it held 85% of the shares in BEL which were worth an estimated sum of \$460 million at the date of hearing, a sum sufficient to secure the total amount of the debt at the date of hearing following the service of the Redemption Notice on the Company.
35. In the circumstances where MENA could be secured, an order winding up the Company should not be made.

MENA’S Response

36. My summary of MENA’s response does not do justice to the submissions made by Mr. Beswetherick KC, but the three that follow were, to my mind, the most significant.
37. The first was the submission that the Deed Poll provided that all amendments had to be in writing. The informal but binding agreement to forbear for which the Company contended was not only inconsistent with the terms of the Deed Poll, but also with the parties’ conduct with respect to the 2021 Forbearance Letter, and the later amendments to it, which had all been executed by the parties, including the Guarantor. It was also inconsistent with the provision in the Draft Forbearance Agreement which provided that the “Forbearance Period” would only come into effect on the date at which MENA, the Company and the Guarantor executed and released the letter.
38. There was no room to suggest that MENA had eschewed the formalities when Mr. Vineburg’s 13 September 2022 email was considered. In it he expressly stated - which the Company conveniently ignored - that,

“We look forward to receiving the executed version today,”

plainly indicating that the formalities were required to give rise to a binding agreement.

39. Second was the submission that, contrary to Mr. Paardenkooper's assertion that there had been no further correspondence from MENA after October 2022 until May 2023, there were numerous email exchanges with Mr. Vineburg who had written in terms that could leave no-one, including the Company, in any doubt that an agreement had not been reached.
40. In an email sent on 8 November 2022, Mr. Vineburg, while noting that the Company was making progress in relation to taking BEL private, stated that,

*"... we ... do not think it would be productive to expend further time and fees negotiating a forbearance in respect of the current outstanding amounts given the short time remaining until the **proposed** revised long stop date of 31 December 2022 and the likelihood of continuing and further defaults after that time.*

Due to the ongoing default by [the Company] ...including the failure to pay the outstanding interest amounts, we have the right to submit a Redemption Notice...

Therefore, we propose that you repay the outstanding interest amounts, at a minimum, in order to cure the continuing event of default...

We look forward to the default issue being resolved ...

MENA Energy reserves all of its rights and remedies under the terms of the Securities and applicable law that have arisen or may arise in connection with any breach of the terms of the Securities against [the Company] and its directors. MENA Energy may exercise any of these rights and remedies at any time without further notice. No delay in the exercise of such rights or remedies shall operate as a waiver of or impair any such right or remedy. For the avoidance of doubt, nothing in this letter is intended to be, nor shall it be construed as, a waiver of any of MENA Energy's rights and remedies, or any amendment to or waiver of the terms of the Securities". [emphasis mine]

41. In its 29 November 2022 response to Mr. Vineburg, the Company did not suggest that it was not in default nor protest that a forbearance had been agreed, but rather proposed a

“full and final settlement” of MENA’s claims, accepting that the interest was due and payable.

42. The third was that the Company did not provide MENA with an equitable mortgage over the shares - as Mr. Paardenkooper in his later evidence accepted - so the debt due to MENA was never secured as anticipated by the 2021 Forbearance Letter or as provided for in the Draft Forbearance Agreement.
43. There was no credible basis for Mr. Paardenkooper’s stated belief that MENA, being secured, would not pursue its rights to recover the sums due to it and no support for the submission that, when the statutory demand was made, MENA had security which exceeded the amount demanded.
44. On a plain construction of the Draft Forbearance Agreement, a failure to deliver the equitable mortgage within 10 days of the agreement was a “*Forbearance Termination Event*.” Even had an agreement been reached in August or September 2022, as the Company contended, it would have been breached long before the Long Stop Date of 31 December 2022 had arrived.

The Law

45. It is uncontroversial that where a debt is *bona fide* disputed on substantial grounds, the Court will stay the petition and leave the creditor to prove his claim in an action, or in arbitration.
46. The Privy Council in the Cayman case of *Parmalat Capital Finance Limited v. Food Holdings Limited and Dairy Holdings Limited* [2008 CILR 202] reaffirmed that rule of practice stating at [9] of the judgment:

“If a petitioner’s debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor, first, to

establish his claim in an action. The main reason for this practice is the danger of abuse of the winding-up procedure. A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt. “

47. Mr. Valentin correctly submitted that where the dispute is one which relies on the resolution of disputed facts, the question should be stood over for trial or arbitration as the case may be: see *Strategic Turnaround Master Partnership Ltd v Culross Global SPC Ltd* [2008 CILR 447].
48. The authorities are clear, however, that the Court should not shy away from examining the evidence to determine the threshold question of whether the dispute is genuine and substantial because *it is “only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings”* per Oliver LJ in *In re Claybridge Shipping Co SA* [1997] 1 BCLC 572, 579.
49. This principle was reaffirmed by this Court by Kawaley J in *Re Sky Solar* (Unrep., 12 October 2020) citing the decision of Parker J in *Re Primus Investments Fund, LP* (Unrep., 16 June 2020).

Decision

50. It was plain on the evidence that there was no agreement to forbear. Mr. Vineburg’s 8 November email, in which he highlighted the futility of further negotiations with the December 2022 long-stop date approaching and sought some payment on account, made that pellucidly clear.
51. The emails exhibited gave the lie to Mr. Paardenkooper’s evidence that MENA had not engaged in correspondence with the Company since October 2022. It was an assertion

made by Company in its *ex parte* application to restrain the advertisement of the petition which it relied on to support the Company's position that there had been an agreement to forbear. It was a breach of the Company's duty of full and frank disclosure and ultimately betrayed the insincerity of the dispute raised in respect of the debt.

52. Even if it had been understood and agreed, as Mr. Paardenkooper asserted, that there would be a forbearance so long as the debt were secured, the promised security - the equitable mortgage over 12,500,000 shares in BEL - never materialized.
53. Further, and in any event, the Draft Forbearance Agreement had a long-stop date for the payment of the accrued interest of December 2022 and did not speak to the Company's liability to pay interest on 31 March 2023 for which demand was made in May 2023.
54. I considered there was no credible evidence of an agreement to defer the payments as alleged and that the petition should not be dismissed as Company's liability for the interest was not otherwise disputed.
55. The **Companies Act** provides that a company may be wound up by the Court if it unable to pay its debts. It will be deemed to be unable to pay its debts pursuant to section 93(a) as it failed to pay the statutory demand and/or pursuant to section 93(c) if its inability to pay its debts is proved to the satisfaction of the Court. In *Taylor's Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216, 219 it was held, citing the judgment of Harman J in *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26, that if a debt is due from a company and it is not disputed, the failure of the debtor company to pay is evidence of an inability on the part of the company to pay its debts.
56. On any view, the evidence established that the Company was unable to pay its debts.
57. The Company sought to persuade me that it was balance sheet solvent with assets greater than the debt due to MENA, whether one considered the petition debt or the entire debt due to MENA following the issue of the Redemption Notice, and that it would be an appropriate

exercise of the Court's discretion to refuse to make the order sought. The authorities are clear, however, that balance sheet solvency is irrelevant and the applicable test is commercial or cash flow insolvency: see *In the Matter of Weaving Macro Fixed Income Fund Limited (in liquidation) SEB v Conway and Walker* [2016 (2) CILR 514] (CICA) at [18].

58. Although the Court has a discretion whether to make a winding -up order, it is well-settled that where the petition debt is not disputed, the company's failure to pay the sums claimed entitles the petitioner to a winding-up order *ex debito justitiae*: see *Ebbvale Ltd v Hosking* [2013] UKPC 1 at [25], cited with approval by Kawaley J in *Sky Solar* at [20].
59. I made the order accordingly.

Other Matters

60. I briefly deal with the two other matters urged on the Court by the Company in its efforts to persuade the Court not to make the order sought. The first was the argument that MENA had contracted out of pursuing a petition.
61. The clause on which the Company relied expressly refers to representations and warranties and appears in various transaction documents but not the Deed Poll which, Mr. Beswetherick submitted and I accepted, was the relevant document. The clause applied only to limit the scope of remedies for a claim based on "*any representation, warranty or undertaking made or given in connection with this Agreement,*"- that is to say, the agreements other than the Deed Poll in which the clause appears - in respect of a "*breach of the terms*".
62. The petition debt was not a claim for breach of any representation, warranty or undertaking in any of the agreements in which the clause appeared, but was in respect of a debt arising under the Deed Poll. No other remedy was sought but the payment of the interest due to MENA as provided for in the Deed Poll.

63. The second was the contention that the statutory demand was defective as it did not have a *wet ink* signature. It was not necessary for me to resolve this issue in the circumstances where I was satisfied on the evidence that the Company was unable to pay its debts, but I consider it to be conclusively answered by the provisions of the **Electronic Transactions Act (2003 Revision)**. In any event, the evidence on which the Company advanced the proposition that the statutory demand delivered to its registered agent did not have a wet ink signature was tenuous at best.

DATED THE 26TH OF JANUARY 2024

A handwritten signature in blue ink, appearing to read 'Adlees', is written over a horizontal line.

Hon. Chief Justice Margaret Ramsay-Hale
JUDGE OF THE GRAND COURT