CHP 14/0008

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CIVIL DIVISION

CHANCERY PROCEDURE

IN THE MATTER of the Companies Act 1931 (**"the 1931 Act"**)

and

IN THE MATTER of the Companies (Winding-Up) Rules 1934 (**"the 1934 Rules"**)

and

IN THE MATTER of Banners Broker International Limited (**"BBIL"**)

and

IN THE MATTER of the Claim of Targus Investments Limited (**"Targus"**) dated 10th January 2014 to wind up BBIL (**"the Winding-up Claim"**)

SKELETON ARGUMENT ON BEHALF OF IAN DRISCOLL

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1. This Skeleton is filed on behalf of Ian Driscoll, a creditor of BBIL. Mr Driscoll supports Targus' Winding-up Claim, but subject to amendments indicated in a notice filed, on his behalf, on 24th February 2014, pursuant to Rule 22 of the 1934 Rules.

2. A Witness Statement of Richard Christopher Curtin, dated 24th February 2014, has been filed in support of Mr Driscoll's position.

3. All underlining in quoted extracts below has been added.

THE LAW

(1) Statutory provisions

4. The following statutory provisions are highlighted:-

5. Sections 162(1), 165(5) and 163(1)(3) of the 1931 Act **[Tab 1]** provide:-

> ***"162 Circumstances in which company may be wound up by court***
>
> ***A company may be wound up by the court if —***
> ***(1) the company has by special resolution resolved that the company be wound up by the court...***
>
> ***(5) the company is unable to pay its debts...***
>
> ***163 Definition of inability to pay debts***
>
> ***(1) A company shall be deemed to be unable to pay its debts...***
>
> ***(3) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company...".***

6. Section 165 of the 1931 Act **[Tab 2]** provides:-

> ***"165 Powers of court on hearing petition***
>
> ***(1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or 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 assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."***

7. Section 270 of 1931 Act **[Tab 3]** provides:-

> ***"270 Meetings to ascertain wishes of creditors or contributories***
>
> ***(1) The court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence, and may, if it thinks fit, for the***

purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by this Act or the articles."

(2) Case-law

(i) Burden of proof of creditor status

8. In ***Petition of Colombo Investments*** (21st June 2005) (SoGD) **[Tab 4]**, the Staff of Government Division stated (at paragraph 76):-

"76. Firstly, Mr Benham submitted that he was under no obligation to produce evidence and that the court should simply accept an assertion by a party that he was a creditor. We unreservedly reject this submission. If any of the Applicants wish the court to act on the basis that they are creditors of the Manx companies, it is for them to establish that such is the case."

(ii) Regard to views of creditors

9. In ***Lehman Brothers Inc v Navigator Gas Management Limited*** (31st May 2005) (ChD) **[Tab 5]**, His Honour Deemster Kerruish stated (at paragraph [57]):-

"[57] It is well established that the courts will have greater regard to the views of independent creditors, as opposed to creditors, who are subsidiaries or otherwise connected to the subject company or companies."

(iii) View of creditors, when deciding between two liquidators

10. In ***Oracle (North West) Limited v Pinnacle Services (UK) Limited*** [2008] EWHC 1920 (Ch) (Patten J) **[Tab 6]**, it was held that:-

"The issue as to which of the two administrators ought to be appointed had to be determined by the court having regard to the wishes of the creditors. Although a joint appointment might be a way out of the disputed appointment, that might create more problems than it solved. There was no

joint strategy of the administration in place, and there was potentially the risk, if a joint appointment was made, of there being disagreement in relation to key issues and of there being further applications to the court for directions by the administrators. Therefore, it was not appropriate to make a joint appointment. In these circumstances the choice must essentially be dictated by the wishes of the creditors, who had a clear preference for C over Tenon. Where, as in this case, significant creditors had a clear preference for one administrator over another, and the secured and other creditors remained neutral, then the court should resolve that matter in favour of the wishes of those creditors, for whose benefit the administration was in the end" [Headnote]

"... The court's role on an administration application is to attempt to provide the best solution in terms of setting up an administrative framework for the benefit of the creditors. Disputes of the kind in this case have, in my judgment, to be resolved in whatever way is likely to produce the best outcome for the creditors as a whole, and it is on that basis that I approach the two applications which are before me" [paragraph 8]

11. In ***Med-Gourmet Restaurants Limited v Ostuni Investments Limited*** [2010] EWHC 2834 (Ch) (Lewison J) **[Tab 7]**, it was held:-

***"... where there was a contest about who should be appointed to administer an insolvent estate, the court will normally be guided by the wishes of the majority of creditors. (Oracle (Northwest) Ltd v Pinnacle Services (UK) Ltd* [2008] EWHC 1920 (Ch); [2009] B.C.C. 159 *applied.) However where there was a conflict between creditor and creditor, the majority of creditors did not have the absolute right to choose the identity of the administrators. Although there was a difference between liquidation and administration, the same broad principles applied to the choice of an administrator as to the choice of a liquidator, and in winding up the choice must be conducive to the proper operation of the process of liquidation and to justice as between all those interested in the liquidation. (Fielding v Seery** [2004] B.C.C. 315 *applied .)"* [paragraph H5]

12. In ***Stanley International Betting Limited v Stanleybet UK Investments Limited*** [2011] EWHC 1732 (Ch) (Stuart Isaacs QC, sitting as a deputy judge of the High Court) **[Tab 8]** - in an application for an administration order in respect of a company and for the appointment of particular administrators, such appointment being opposed by other respondents, who sought instead the appointment of different administrators - it was held:-

"H5. 1. The same broad principles applied in both liquidation and administration. In both cases, the appointment of the office-holder had to achieve justice between all the interested parties; and the office-holder needed both to act and be seen to act in the best interests of creditors and to investigate all claims properly. (Fielding v Seery* [2004] B.C.C. 315 *and Re Med-Gourmet Restaurants Ltd unreported, October 15, 2010 applied.)" [Headnote]

"...34 Before addressing those concerns, it is convenient to consider the guidance provided by the authorities with regard to the choice of administrators.

35 In Fielding v Seery [2004] B.C.C. 315 , H.H. Judge Maddocks, sitting as a deputy judge of the Chancery Division in the Manchester District Registry, summarised, at [33] of the judgment, the principles which emerged from the previous authorities with regard to the appointment of a liquidator. The judgment was given in the context of an application for the removal of a liquidator of a company under s.108 of the Insolvency Act 1986 and his replacement by an independent liquidator appointed by the court. The principles identified by the judge include:

(1) The test in relation to the appointment of a liquidator is whether it will be conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation.

(2) Although the majority vote of the creditors will in the normal course prevail, creditors holding the majority vote do not have an absolute right to the choice of liquidator.

(3) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. He should in particular not be the nominee of a person against whom the company has hostile or conflicting claims or whose conduct in relation to the affairs of the company is under investigation.

(4) By contrast, it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator.

36 In Re Med-Gourmet Restaurants Ltd, unreported, October 15, 2010, a judgment of Lewison J., of which I was provided by counsel with a note, the judge, after considering Fielding v Seery, stated that the same broad principles apply in both liquidation and administration. In both cases, the appointment of the office-holder has to achieve justice between all the interested parties; and the office-holder needs to both act and be seen to act in the best interests of creditors and to properly investigate all claims."

OUTLINE SUBMISSIONS

13. The following outline submissions are now made:-

(1) Mr Driscoll supports the winding-up of BBIL, but on the terms set out in the notice filed on 24th February 2014, under Rule 22 of the 1934 Rules;

(2) Targus has failed to identify that the Winding-up Claim falls properly to be considered under section 162(1) of the 1931 Act (there having been no special resolution filed by BBIL, as opposed to Targus, to wind up BBIL):

rather (and in any event) the Claim falls more properly to be considered under section 162(5) of the 1931 Act (the 'inability to pay debts' ground), not least given the overwhelming level of creditor claims;

(3) the contributory is not (as claimed) acting neutrally *"in the interests of all creditors"* but has, by its own admission, filed the Winding-Up Claim at the instigation of the beneficiary of BBIL, Christopher Smith;

(4) Mr Driscoll holds Mr Smith responsible for BBIL's present parlous position, and also considers that Mr Smith would be more likely to prefer his own interests to those of BBIL creditors (see Curtin WS, paragraph 15.2);

(5) Mr Driscoll has demonstrated that he is a creditor of BBIL;

(6) Mr Driscoll has, likewise, demonstrated that the parties included in the spreadsheet of creditors dated 24th February 2014 are creditors of BBIL;

(7) the Court should have regard to the value of Mr Driscoll's debt, and to the aggregate value of claims of all creditors supporting the joint or sole appointment of Mr Appleton on 26th February 2014;

(8) Mr Driscoll, and a clear majority of BBIL creditors identified to date, have expressed a clear view in favour of the joint or sole appointment of Mr Appleton on 26th February 2014, rather than for the joint appointment of Messrs Benham and Mann;

(9) the Court should have greater regard to the views of Mr Driscoll and the other creditors than to the views of Targus: in the event of a conflict, as here, the views of the creditors should prevail over the views of the contributory;

(10) for reasons identified by Mr Curtin in his Witness Statement of 24th February 2014 (see paragraphs 24-35, and supporting documents), there are numerous benefits to the immediate joint or sole appointment of Mr Appleton, over the joint appointment of two advocates, neither of whom has indicated prior experience as to having acted a liquidator;

(11) such reasons include (*inter alia*): (i) Mr Appleton's experience; (ii) Mr Appleton's specialist expertise, and that of his in-house specialist team; (iii) Mr Appleton's ability to conduct a forensic investigation, as is clearly required in this case; (iv) the multi-jurisdictional nature of the proposed liquidation; (v) the support amongst creditors for the immediate joint or sole appointment of Mr Appleton;

(12) Mr Appleton is a fit person to be jointly or solely appointed;

(13) the emerging risk of asset dissipation identified by Mr Curtin (see Curtin WS, paragraphs 41-48) reinforces the requirement to appoint Mr Appleton (jointly or, in default, solely), and to be appointed immediately, rather than await a creditors' meeting, in due course;

(14) the order sought by Mr Driscoll falls well within the scope of the Court's jurisdiction under section 165(1) (which includes a jurisdiction to make any interim order that the Court thinks fit) and should, in the exercise of the Court's discretion, be made;

(15) as indicated in the Rule 22 notice, an Order should also be made for Mr Driscoll's costs of and incidental to the Winding-up Claim.

CONCLUSION

14. For the above reasons, the relief sought by Mr Driscoll should be granted.

Old Court Chambers

Eight Finch Road

Douglas

Isle of Man

IM1 2PT

24th February 2014

INDEX TO AUTHORITIES

Tab 1 Sections 162(1), 165(5) and 163(1)(3) of the 1931 Act

Tab 2 Section 165 of the 1931 Act

Tab 3 Section 270 of 1931 Act

Tab 4 ***Petition of Colombo Investments*** (21st June 2005) (SoGD)

Tab 5 ***Lehman Brothers Inc v Navigator Gas Management Limited*** (31st May 2005) (ChD)

Tab 6 ***Oracle (North West) Limited v Pinnacle Services (UK) Limited*** [2008] EWHC 1920 (Ch)

Tab 7 ***Med-Gourmet Restaurants Limited v Ostuni Investments Limited*** [2010] EWHC 2834 (Ch)

Tab 8 ***Stanley International Betting Limited v Stanleybet UK Investments Limited*** [2011] EWHC 1732 (Ch)