

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



CAUSE NO. FSD 47 of 2020 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF GLOBAL-IP CAYMAN

APPEARANCES: Mr Daniel Lightman QC, Mr Guy Dilliway-Parry, Mr David Lewis-Hall of Priestleys

Mr Tom Lowe QC, Mr Peter Sherwood of Carey Olsen

Mr Mark Goodman, Mr Guy Cowan of Campbells

BEFORE: THE HON. RAJ PARKER

HEARD: 3 April 2020 and 24 June 2020

**Draft Ruling
Circulated:** 15 July 2020

**Ruling
Delivered:** 21 July 2020

Headnote

Petition - payment of debt - validity of debt-standing – nonappearance of company - shareholders dispute - purpose of petition - conducting correspondence through the court - Overriding Objective - costs applications - s 24 (1) and (3) Judicature Law 2017 - CWR Order 3 r 8 (2008) - principles.



Introduction

1. Campbells (Attorneys) (the Petitioner) presented a petition for the winding up of Global-IP Cayman (the Company) on 12 March 2020 based upon an unpaid debt due from the Company to the Petitioner in the sum of just US\$175.84.
2. This judgment deals with the Petitioner's application to have the Petition dismissed with costs to be paid by the Company in circumstances where it asserts that the Petition debt has been paid in full.
3. Bronzelink Holdings Ltd (Bronzelink), a British Virgin Islands company and the majority shareholder in the Company, resists the applications and asks for its costs related to the Petition to be paid by the Petitioner.
4. The Company was founded in 2013 as a vehicle to own and operate a project to develop launch and operate a communications satellite to provide high-speed internet access to Africa. The founder was Mr Emil Youssefzadeh (Emil), who together with his business associate Mr Umar Javed (Umar) set up the company.
5. In 2016 they raised US\$200 million to fund the project by issuing Series A preferred shares to Bronzelink. Bronzelink's shares represent 75% of the ownership of the Company and are preferential, ranking ahead of the common shares of the Company. STM Group, Inc is the parent of STM Atlantic N.V. (STM Atlantic) which holds 53% of the common shares in the company. Emil is a director of both STM Group, Inc and STM Atlantic.
6. The Company's Articles of Association provide for the business of the Company to be managed by a board of nine directors, six of whom must be appointed by Bronzelink (the Series A directors) and three by the common shareholders (the common directors). It appears that for a number of years there has been a breakdown in the relationship between Emil, Umar and the common directors on the one hand, and Bronzelink and the Series A directors on the other, resulting in a number of litigation and arbitration proceedings.
7. The Petition was presented by Campbells, the Company's erstwhile lawyers, as a 'friendly' creditor to allow an application for the appointment of provisional liquidators to be made by STM Atlantic, in order to determine whether the Company's business and finances should be restructured. The common directors did not have authority to cause the Company to petition for its own winding up¹.
8. The facts of this case are somewhat unusual and a large body of affidavit evidence has been filed², some of it very late. Objection has been taken to the filing of this

¹ Emil Youssefzadeh 3, dated 26 May 2020, §23

² Emil Youssefzadeh 1, 2 and 3 (27 February 2020, 17 April 2020, and 26 May 2020), Shafiqh Youssefzadeh 1 and 2 (4 March 2020 and 30 March 2020), Damien Magee 1 and 2 (3 March and 26 May 2020) Yu Hoi Ying 1, 2

evidence. Notwithstanding this, the court gave leave for the evidence to be adduced and relied on. There has also been a lot of correspondence between the parties involving the court, or at least copied to the court both before and after the hearing. I would remind the attorneys to all parties that this is not appropriate. The court does not sit as a running arbiter between parties preparing for hearings, or indeed after hearings have been concluded. I would remind the attorneys to also follow the principles behind the Overriding Objective to conduct litigation efficiently and economically and on a reasonable basis. At times in this litigation this has manifestly not been evident.

9. The court had determined at a hearing on 3 April 2020 that Campbells did not have standing to proceed further with the Petition because the Petition debt had admittedly been paid. It made no order to strike out or dismiss the Petition, but gave leave for a substitution application to be made by STM Atlantic. Campbells accepted at the hearing that they were no longer a creditor and instead sought to extricate themselves by withdrawing the Petition.
10. STM Atlantic had applied on 13 March 2020 for joint provisional liquidators to be appointed to the Company. There were then applications to adjourn the matter and to strike out the Petition by Bronzelink. On 3 April the court did adjourn the matter and said that the substitution application, if made, would be heard before determining STM Atlantic's application for the appointment of provisional liquidators.
11. Costs relating to the April hearing, the application to strike out, the adjournment, and the Petition itself were reserved.
12. Subsequently STM Group Inc (STM), the parent company of STM Atlantic, has applied to be substituted as petitioning creditor in place of Campbells. That application will be heard at a later date.
13. Bronzelink now also seeks its costs in relation to the winding up petition, the application to strike out the same, the adjournment and of the April hearing.
14. Bronzelink applies as an alternative for costs to be paid by STM, which is an argument for another day, if necessary. This judgment only deals with the controversy as to costs between Bronzelink and Campbells.
15. The Company is not represented in these proceedings.
16. The Petitioner is represented by Mr Goodman of Campbells. Bronzelink is represented by Mr Lightman QC and STM by Mr Lowe QC.

and 3 (1 April 2020, 2 April 2020 and 23 May 2020), Calvin Tang 1 (12 June 2020) and David Lewis Hall 1 and 2 (16 June 2020 and 23 June 2020)





The Petitioner's case

17. Campbells had been the Cayman Islands attorneys to the Company since 2012. Campbells Corporate Services (CCSL) have acted as the Company's registered office provider since it was founded in 2013.
18. It appears that the Company stopped paying Campbells' and CCSL's invoices in 2019.
19. As at 10 February 2020 the sum of US\$32,175.84 was outstanding (in respect of 7 invoices). Partial payment was made from STM in the sum of US\$32,000 on 11 February 2020 which left only US\$175.84 outstanding in order to ensure that Campbells had standing to petition. This had been agreed between STM and Campbells in order to progress STM Atlantic's application for appointment of provisional liquidators. Campbells were happy to go along with this arrangement on the basis that it was itself of the view that a restructuring of the Company was, as it had advised for some time, the best way of preserving the business as a going concern.
20. Campbells asserts that the Company is plainly insolvent on a cash flow basis and its directors have confirmed as much on numerous occasions. The Company has been unable to pay Campbell's invoices for some time (including the Petition debt) which had been effectively discharged by the Company from monies borrowed from its shareholders or their affiliates.
21. Campbells points out the Company's CEO Mr Pourmand admitted that Campbells' invoices '*would be paid as soon as we have sorted out finances*' as long ago as October 2019³.
22. Following presentation of the Petition, Bronzelink took immediate steps to pay what it believed to be the Company's liability in respect of Campbells' outstanding invoices and wired a payment of US\$27,957.97 to Campbells on 9 March 2020.
23. However it was only received by Campbells on 13 March 2020, one day after the Petition was sealed⁴. The payment was said to have been made on the Company's behalf. The payment was received without condition or qualification and so the Petitioner argues that it fully extinguished the Company's remaining debt (which was only US\$175.84 as a result of STM's payment on 11 February 2020).
24. The Petitioner argues that this is a straightforward case for the court to determine that as a result of the payment by Bronzelink the Petition should be dismissed. The Petition has never been disputed or challenged by the Company. It was settled in this way on an unconditional basis by Bronzelink on the Company's behalf. In circumstances where the debt has been paid in full prior to the hearing of the

³ They were all due and payable within 30 days

⁴ Magee 2 at pp 17-19

Petition the Petitioner's costs of and occasioned by Petition should be paid by the Company on the indemnity basis in the usual way.

25. In addition the Petitioner argues that Bronzelink's challenge to the validity of the Petition debt is misplaced as it has no standing as a shareholder to dispute the debt. Only the Company can challenge the validity of the debt.
26. The Petitioner further argues that Bronzelink's attempts to intervene in the winding up proceedings are inappropriate, unreasonable, and unsustainable in law. It rejects the numerous allegations made about Campbells' conduct and motives.

Bronzelink's case

27. Mr Lightman QC submits that since the April hearing Bronzelink has discovered more about the background to the presentation of the Petition and most significantly on 7 May 2020 obtained from one of the common directors an invoice from Campbells dated 10 February 2020 (172813) which forms the basis of the Petition debt in the sum of US \$175.84.
28. The 10 February invoice was in the amount of US\$3,761.12 and is stated to concern the provision of professional services to the Company between 14 January and 10 February 2020. Three entries on 6 February relate to what Mr Lightman QC submits are improper charges relating to discussions between STM and Campbells about the Petition.
29. He argues that these matters have been raised in correspondence with Campbells to which Campbells has failed to respond and the court should find that Campbells did not have a good arguable case that a debt is due and owing from the Company when it issued the Petition. Rather, either no debt is due and owing or else there is a *bona fide* dispute on substantial grounds as to the existence of the debt upon which the Petition is based.
30. Moreover, he says that it appears that Campbells took a deliberate decision not to send the 10th February invoice to Bronzelink or to the Series A directors, or for that matter to engage in any pre action correspondence with the Company with respect to the alleged Petition debt precisely so as to ensure that the Petition debt was not fully paid, thereby enabling them to file the Petition as agreed with STM Atlantic.
31. He argues that this was a contrived creditor's petition and that Campbells should not be awarded any of its costs and rather the court should order Campbells to pay Bronzelink's costs. Even if the court were to consider that Campbells has been 'successful' in having the debt paid, in view of the extraordinary facts of the present case there were exceptional and special circumstances which justified the court not making the usual order for the petitioner's costs and in making an order in favour of Bronzelink. He points to the size of the likely costs that Campbells are seeking (some



US\$65,000) as against the small amount of the alleged Petition debt which was much less than even the fee payable to the court.

32. As to the April hearing and the costs of the strike out and adjournment summonses, he argues that the key issue was whether STM's summons to appoint provisional liquidators should be heard notwithstanding that Campbells accepted that they were no longer a creditor of the company. To that extent Bronzelink was successful as it had asserted correctly that Campbells no longer had standing. This was in the face of objection from STM Atlantic, who had at that stage taken the position that as long as Campbells had standing to petition when the Petition was filed, it did not matter that they had in the meantime ceased to be a creditor (which had been supported by Campbells because they did not agree to withdraw the Petition pending the outcome of the hearing of STM Atlantic's summons). It was on that basis that Bronzelink was compelled to issue the strike out and adjournment summonses and was successful.

The law

33. The court has a wide discretion as to costs: s 24(1) and (3) of the Judicature Law (2017 Revision). The overall purpose is to achieve justice between the parties. The general rule is that the successful party should be awarded its reasonable costs incurred in conducting proceedings as long as they are conducted in an economical, expeditious and proper manner. The court can of course in the exercise of its discretion make a different costs order to 'costs following the event'.
34. The usual practice where a winding up petition is dismissed on late payment of the debt by the company is to make an order of costs in favour of the petitioner. The petitioner is seen as having succeeded and the normal rule applies that the costs 'follow the event'- see Lindsay J in *Re Nowmost Ltd* [1996] 2 BCLC 492 at p 496.

"It follows, as it seems to me, from the modern practice that, where the court is truthfully told that the debt has recently been paid in full and that the company does not appear, the petitioner ordinarily can, in the absence other considerations properly put before the court, expect an order for costs in his favour. He is regarded as having succeeded and has the benefit of that inclination, when costs are discussed, towards costs following the event. The event is seen as his success and so there is a disposition to reward that success with an order for costs in his favour. If the company is silent then an order for costs in the petitioner's favour as against the company will usually be made.

When there has been a late payment of the petition debt so that the petitioner is content with a dismissal, then, although the discretion as to costs which the court has is unfettered, that inclination towards costs following the event coupled with the modern practice of, in effect, regarding a petition which has led to a payment in full as being successful, leads to a position in



which such onus as exists is nowadays upon the company to lay before the court the material upon which it intends to rely to displace what will otherwise be ordered, namely, an order for costs in the petitioner's favour."

See also Reliance Wholesale Ltd v AM2PM Feltham Ltd [2019] EWHC 1079 Ch at §31 per Morgan J

"Accordingly, if the company had not paid £6,000 on the 3 December 2018 the petitioner would have been entitled to continue with its petition and seek the winding up of the company. On that basis, it seems to me that the petition was justified, and I can find that to be the case on the material before me. The petition was dismissed but that was because the full amount of the petition debt was paid before the hearing. But the ordinary order should be made, which is that the company should pay the petitioner's costs of the petition."

35. The petitioner is ordinarily entitled not just to the costs of and occasioned by the petition but also to the costs of related applications see *Re Ryan Developments Ltd* [2002] 2 BCLC 972, per Neuberger J.

36. The Companies Winding Up Rules (2008) O.3, r.8 provides in material part:

1) *The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II.... should have his costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.*

.....

4) *The court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs".*

Analysis and decision

37. I am satisfied that the Petition debt has been extinguished by the Bronzalink payment on 13 March 2020⁵. I am also satisfied that there was a debt when the Petition was sent to the court for assignment to a Judge and listing on 4 March, and presented by Campbells on 12 March 2012 and that they were then creditors with standing within s .94 of the Companies Law⁶.

⁵ Received by Campbells at 3:26 pm on 13 March 2020 (see letter from Campbells dated 2 April 2020 setting out chronology)

⁶ See Magee 2 §12(c)



38. I do not accept that the arguments made by Bronzelink (as to part of the 10 February invoice) in relation to activities carried out on 6 February 2020 (amounting to 3.75 hours of time cost) calls into question the debt on which the Petition was based. The affidavits of Mr Magee satisfactorily deal with the allegations made.

The Company has not taken part in these proceedings and has not disputed the debt. The debt has now been discharged.

The Petition is dismissed.

Costs

39. As to costs, this is an unusual case and as I have said it has not been conducted in a manner which is in accordance with the Overriding Objective. Campbells petitioned on the basis of an outstanding sum of US\$175.84 (which is a small and clearly cost ineffective sum upon which to present a winding up petition) but, as they have freely admitted, as a 'friendly' creditor in order to allow a formal restructuring of the Company. There is nothing improper in that. It may well be the case that before the approach by Emil of STM Campbells were already considering petitioning to wind up the company, but they chose to do it as a commercial matter as a creditor, having received a payment by STM for their outstanding invoice, as part of the wider plan to achieve a restructuring.
40. However Campbells did not apply to withdraw the Petition until shortly before the hearing⁷ even though they had been aware on 9 March⁸ (before it was filed) that sums substantially in excess of the small sum relied upon had been wired to them by Bronzelink. This was admittedly a joint application with STM Atlantic to achieve an outcome which would result in the appointment of provisional liquidators, which persisted at least until the 3 April hearing.
41. In my view, given the purpose for which the Petition was brought by Campbells, they cannot be said to have been 'successful', as it was not in reality brought to pay such a small debt. It was to facilitate the application by STM Atlantic to appoint provisional liquidators. That has not occurred as yet.
42. For these reasons and in the exceptional circumstances of this case the usual rule will not be applied and their costs (of the Petition and the related applications) will not be paid out of the assets of the Company on an indemnity basis.
43. Neither have Bronzelink any substantial grounds to call into question the propriety upon which Campbells brought the Petition. I am satisfied by the evidence of Mr Magee and Emil⁹ in this regard.

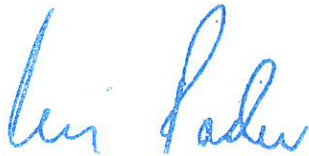
⁷ By way of a letter dated 31 March 2020

⁸ By way of e mail from Calvin Tang at 23:56pm noting a value date of 10 March 2020 (reflecting local time Hong Kong)

⁹ §§9-34 of Emil Youssefzadeh 3



44. There will therefore be no order as to costs in relation to the winding up petition.
45. In relation to the costs of the strike out, adjournment and April hearing, it was the application STM Atlantic had made and the stance which it took to the April hearing (supported to an extent by Campbells) which led Bronzelink to issue the applications. It would not be fair or just to order Campbells to pay any part of those costs as the main protagonists were STM Atlantic and Bronzelink.
46. Neither would it be fair to apportion any costs liability to Campbells in respect of the 24 June hearing. Campbells already bear their own costs of the Petition.
47. At the April hearing the court, faced with an admittedly paid debt, and no appearance by the Company, adjourned the summons to appoint provisional liquidators by STM Atlantic to allow time for a substitution application to be made by STM, before any application by Campbells to withdraw the Petition was dealt with.
48. Bronzelink could not be said to have been successful in their application to strike out the petition . The matter was adjourned on the basis that a substitution application was to be filed by STM Atlantic as the Petitioner no longer had standing. To that limited extent Bronzelink can be fairly said to have been successful.
49. However, in view of the pending substitution application and the, as yet, unknown outcome of the summons to appoint provisional liquidators, the court will reserve judgment with respect to the costs of the strike out summons, the adjournment and the April hearing, and the 24 June hearing, to be determined in due course as between STM Atlantic and Bronzelink.



THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT