



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 8 OF 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (AS REVISED)

AND IN THE MATTER OF MV CAYMAN LTD. (IN OFFICIAL LIQUIDATION)

Appearances: Ben Tonner KC and Sally Bowler of McGrath Tonner for the Petitioner
Rupert Wheeler of KSG for the Company
David Lewis-Hall of Appleby (Cayman) Ltd for BXR1 Holdings Inc
Stuart Diamond of Diamond Law for Sygnus Capital Ltd

Before: The Hon. Justice David Doyle

Heard: 16 September 2022

Judgment delivered: 16 September 2022

**Reasons for Judgment
circulated:** 23 September 2022

**Reasons for Judgment
delivered:** 28 September 2022

HEADNOTE

Adjournment of winding up petition

REASONS FOR JUDGMENT

Introduction

1. On 16 September 2022, in face of vigorous opposition from the Petitioner, I granted a short adjournment of the winding up petition, made orders for costs against the Company in favour of the Petitioner and BXR1 Holdings Inc and gave consequential directions at the sensible suggestion of counsel. I gave brief reasons on the day and now give my detailed reasons, as requested by Mr Tonner KC.
2. By winding up petition dated 17 January 2022 (as amended on 19 April 2022) Jeremy Beck (“Mr Beck”) seeks an order for the winding up of MV Cayman Ltd (the “Company”) and the appointment of Russell Homer and Karen Scott as joint official liquidators. The petition is based on the inability to pay debts ground (s92 (d)) and the just and equitable ground (s92 (e)).
3. By order made on 15 March 2022 the hearing of the petition was adjourned until after the delivery of the determination by the Court of Appeal of the Company’s appeal to stay execution of an order dated 19 November 2021 upon which in part the petition was based.
4. By order made on 12 April 2022 leave to amend was granted and the petition was set down for hearing at 10am on 24 May 2022 with half a day allocated. By consent order made on 24 May 2022 the petition was further adjourned. Under paragraph 2 of that Order it was provided that the parties shall file a draft consent Order seeking an Order that either:
 - (a) the Amended Petition is withdrawn with the Petitioner’s costs of the Petition to be paid by the Company on the standard basis to be taxed if not agreed; or

(b) the Petitioner be at liberty to apply for the Amended Petition to be relisted for a hearing on the first available date.

Under paragraph 4 it was provided that in the event that “the Petitioner applies for the Amended Petition to be relisted for hearing in accordance with paragraph 2 (b) above the Company shall not oppose the Amended Petition.”

5. At the request of Mr Beck the petition was subsequently listed for hearing today, 16 September 2022.
6. Mr Beck sought a winding up order and opposed the requested adjournment. BXR1 Holdings Inc, stated to be a creditor in the sum of “\$3,681,612” plus interest, supported the making of a winding up order and also opposed the requested adjournment. By email dated 12 September 2022 Stuart Diamond stated that “our client Sygnus – an unsecured creditor of MV Cayman in the principal amount of US\$6 million – supports the Petition presented by Mr Beck and now listed before His Lordship for hearing on Friday 16 September 2022.” By email dated 16 September 2022 11:14 AM Mr Diamond indicated in effect that he had forwarded the material in respect of the Company’s application for the adjournment to “our instructing officers and their IRM Committee to review and consider.” Mr Diamond importantly added:

“In all the present circumstances, our client now considers it to be in its best interest to support the 30 day adjournment that your client seeks (subject to any order the court may make as to costs)”.

7. Ben Tonner KC appeared for Mr Beck. Rupert Wheeler appeared for the Company. David Lewis-Hall appeared for BXR1 Holdings Inc. Stuart Diamond appeared for Sygnus Capital Ltd. I am grateful to the attorneys for their assistance to the court.

The Settlement Agreement

8. Pursuant to clause 3.7 of an agreement made on 20 May 2022 between Mr Beck and the Company, described as the Settlement Agreement and signed on behalf of the Company by Jonathan Murphy (“Mr Murphy”) as director of the Company, the Company agreed to pay Mr Beck into the client account of McGrath Tonner in cleared funds by midnight on 20 May 2022 (1) KY \$78,966.10 and (2) KY \$77,342.72. Clause 3.8 also referred to a payment of US\$2,005,000. Clause 3.9 referred to a daily payment of CI\$151.06 from 17 May 2022 and the date of closing. It appears that there has not been full compliance with these provisions. Clause 3.14 of the Settlement Agreement provides that should the Company not comply with the requirements set out at clauses 3.7 – 3.9 Mr Beck shall be at liberty to pursue all means of enforcement of the Grand Court’s Order in cause 45 of 2021 including continuance of the claims and remedies in FSD 8 of 2022 and “MV Cayman shall not oppose the winding up order sought by Mr Beck in FSD of 2022.”

The late application for an adjournment

9. At the 59th minute of the eleventh hour (15 September 2022 4:32pm to be precise) by email from Rupert Wheeler on behalf of the Company, the Company sought yet another adjournment, this time for 30 days. In support of such application an affidavit of Mr Murphy sworn on 15 September 2022 was filed, without leave of the court. The email also attached an undated note from Thistle Construction Ltd signed by Michael Laurensen stated to be “Owner & Director” and minutes of a meeting of the shareholders of the Company held on 15 September 2022. I note that one of the shareholders listed as present was “Michael Laurensen (as controlling shareholder of Howard Investments Ltd)”. Although the note and minutes had not been formally adduced into evidence I had regard to them.

10. Mr Murphy refers to a loan offer from Silver Arch Capital Partners which the Company accepted on 19 May 2022 but it was not apparently until 8 August 2022 that he signed and submitted a loan application. No explanation for the delay is provided in Mr Murphy's affidavit. Mr Murphy does, however, provide evidence of the current status in respect of the refinancing and its significant progress over recent weeks.
11. Mr Murphy refers to Sygnus Capital Limited and Sygnus Credit Investments and BXR1 Holdings Inc as unsecured creditors. At page 238 of the bulky exhibited documents KSG Attorneys at Law refer to US\$53,920,000 in refinancing with a target date of "now the 9th September 2022." By that letter, which appears to have been sent to other creditors, the Company states in effect that if no agreement in respect of payment of principal only to unsecured creditors is reached "then the refinancing will not be forthcoming."
12. By email dated 6 September 2022 from Stuart Diamond (on behalf of Sygnus) to Rupert Wheeler it was indicated that if the Company shall "fail to pay the USD\$6mm principal on or before 9 September 2022 our client will support Mr Beck's Petition on the Hearing listed for 16 September 2022." The US\$6 million has not been paid. The Company has not treated its creditors well and continues to breach promises to make payment. I have also referred above to receipt of an email from Mr Diamond at 11:14 AM on 16 September 2022 indicating that his client "now considers it to be in its best interest to support the 30 day adjournment."
13. Mr Murphy devotes only one three line paragraph in his 47 paragraph affidavit to Mr Beck. At paragraph 42 he says:

"The Company will also be in a position to buy back the Petitioner's units at \$2,005,000 as per the 23rd May 2022 settlement agreement between the Petitioner and the Company, referred to in the Fifth Affidavit of Jeremy Beck."

14. Mr Murphy in his third affidavit makes no reference to the Company's agreement not to oppose the making of a winding up order. Instead he sought a further adjournment of the petition. It is not an attractive or satisfactory position for the Company to adopt. The stance adopted by the Company appeared to be in breach of the terms of the Settlement Agreement and the provisions of the consent order made as long ago as 24 May 2022.
15. The Company initially produced no law in support of its belated adjournment application. However at 12:09PM on the day of the hearing (which was set to commence at 3pm) it belatedly filed, again without leave, a skeleton argument and *Evergreen International Holdings Ltd* (FSD unreported judgment of Ramsay-Hale J 11 January 2022). I have full regard to that judgment and the contents of the skeleton argument.
16. In the skeleton argument of the Company the following points, amongst others, are made:
- (1) there is credible evidence that there is a reasonable prospect that the petition debt (and the debts owed to other creditors) will be paid within a reasonable time;
 - (2) the Company has taken steps to secure refinancing. It has accepted a loan offer of US\$68,492,950 and on 14 September 2022 the lender's New York attorneys provided their comments on the loan agreement;
 - (3) the majority of unsecured creditors support an adjournment to allow the refinancing to conclude and an adjournment is in the best interests of the creditors; and
 - (4) there is limited, if any, real prejudice to Mr Beck or BXR1 in adjourning the petition. Mr Beck continues to own the units which he seeks to be

repurchased by the Company. He retains assets of value and interest continues to accrue in his favour.

The relevant law

17. Under section 95(1) of the Companies Act (2022 Revision) the court has the power to adjourn the hearing of a winding up petition.
18. In *Evergreen* at paragraph 55 Ramsay-Hale J stated: “It is well-settled that if a creditor with standing to make an application wants to have the company wound up, and if the court is satisfied that the company is unable to pay its debts, a winding up order will follow, unless there are some special reasons why it should not.” At paragraph 58 Ramsay-Hale J refers to authority to the effect that in practice the court will only adjourn “if there is credible evidence that there is a reasonable prospect that the petition debt will be paid within a reasonable time.” Ramsay-Hale J at paragraph 61, adopting the words of Kawaley J in *ASL Asean Tower* (FSD unreported judgment 8 March 2019) stated that the court should be “leery” in respect of last minute applications. It is right that a court should be cautious and wary in respect of last minute adjournment applications. I should, for present purposes, set Kawaley J’s “leery” comment in context. The full sentence at paragraph 39 of his judgment was as follows:

“In my judgment winding-up courts should generally be leery about last minute adjournment applications made by insolvent companies and/or related parties and which are framed as requests to investigate for the first time matters which ought to have been investigated long ago.”

On the facts of *Evergreen* Ramsay-Hale J refused to adjourn as the debt was indisputably due and no good reason had been shown as to why a winding up order should not be made.

Ramsay-Hale J at paragraph 57 quoted further from Kawaley J in his *ASL Asean Tower* judgment:

“Although the Court may in general terms be willing to grant a shorter adjournment than a longer one, a rational basis for the adjournment must nonetheless be advanced.”

19. As indicated at the hearing, I also had regard to the well-known English authority of *Demaglass Holdings Ltd* [2001] 2 BCLC 633 where Neuberger J indicated that a creditor who has not been paid is entitled to a winding-up order virtually as of right in the absence of a good reason as to why the order should not be made. The court should consider the views of creditors but the court would have greater regard to the views of independent creditors as opposed to creditors connected with the company. Ordinarily it was the duty of the court to direct a winding up.
20. I also considered the judgment of McMillan J in *Green Dragon Gas Limited* (FSD unreported 22 September 2021) where an adjournment of a winding up petition was refused in the particular circumstances of that case. McMillan J at paragraph 67 stated:

“... ultimately the decision whether or not to grant an adjournment is a discretionary case management decision. It is one that arises at a very late stage of proceedings and in arriving at a fair, realistic and practical decision the Court has to bear in mind a variety of conflicting interests.”

The Submissions

21. I considered the submissions put before the court.

22. Mr Wheeler for the Company made the following submissions:

- (1) it is accepted that the adjournment application was made very late in the day. The Company was hopeful that the refinancing would have been finalised before the hearing;
- (2) there is credible evidence sufficient to found an adjournment for a relatively short adjournment (approximately 30 days) to allow the refinancing to take place and there would be no prejudice to the creditors;
- (3) progress of the refinancing has been made recently with real engagement with the Company and the lender and their respective attorneys;
- (4) there has been delay but the evidence reveals considerable activity in the last two weeks with the lender engaging in a serious way. The lender has instructed attorneys to take matters forward and there is confidence amongst both parties that the refinancing will be finalised in the next 30 days;
- (5) at the time of the Settlement Agreement it was not appreciated that refinancing would be so close at the date of any winding up hearing;
- (6) Mr Beck and the other supporting creditors will be repaid once the refinancing comes through;
- (7) This late adjournment application is supported by credible evidence of proactive restructuring by the Company and refinancing is close to being finalised and Mr Beck will be paid within the next 30 days. There is no evidence to suggest that the refinancing will not come to fruition.

23. Mr Tonner for Mr Beck made the following submissions:

- (1) Mr Beck has an entitlement to the order absent a special reason and the burden is on the Company to satisfy the court that Mr Beck and others will be paid and the Company has been unable to do that;
- (2) pursuant to the Settlement Agreement the Company agreed to a date when the monies would be paid and the monies have not been paid and the Company agreed not to oppose the winding up petition;
- (3) the Company has had plenty of time to get its house in order. The loan is the same loan mentioned to the court on the last occasion and precipitated the Settlement Agreement;
- (4) the court has heard nothing in evidence as to what happened between May and August 2022;
- (5) the evidence is woefully inadequate. There is no evidence from the lender that the lender is aware of these proceedings or that 30 days is enough;
- (6) the loan is subject to creditor approval and Mr Beck does not approve it and neither does BXR1. The loan is also subject to the agreement of the current senior secured creditor and there is no evidence in respect of its position;
- (7) the documents are heavily redacted and we do not know anything about the collateral and we do not know who the pledger or guarantor is, if the Company has one. It appears that the Company is going to struggle with complying with the conditions;

- (8) there is little in respect of how the financing will work and how the debts will be discharged;
 - (9) lack of prejudice to Mr Beck is not a consideration but in any event Mr Beck has been waiting for his money long enough already. Mr Murphy in his 2 May 2022 affidavit said that financing would be complete in 4 – 6 weeks but still Mr Beck waits without access to his assets. The Company's debts mount and increasingly there will be less assets available to be distributed amongst its creditors and enough is enough; and
 - (10) the evidence does not show that refinancing is close. It simply shows that a potential solution has not yet fallen through.
24. Mr Lewis-Hall for BXR1 Holdings Inc supported Mr Tonner's opposition to the adjournment and put on record that his client accepted a settlement figure if paid by 9 September 2022. It has not been paid.
25. Mr Diamond for Sygnus Capital Ltd made the following submissions:
- (1) we agreed to accept principal if paid by 9 September 2022;
 - (2) last night the Investment Management and Risk Committee of his client met and took into account all of the information and evidence that was before them and decided to support the adjournment; and
 - (3) his client does hold out hope that it will be paid as promised within the next 30 days and that is why they support the adjournment application.

Conclusions

26. In the circumstances of this case I was satisfied that there was a good reason to adjourn. The adjournment will only be for a relatively short period of time to 10am on 25 October 2022. It may be that within that further time period the Company will be able to finalise the re-financing, which does seem to be progressing, and pay off its creditors. If it can do so, this will obviously be in the best interests of its creditors. If it fails to do so then it is highly likely that a winding up order will inevitably follow on 25 October 2022.
27. Although I accept that there were gaps in the evidence I felt that there was sufficient credible evidence, albeit filed very late in the day, to the effect that there was a reasonable prospect that the petition debt would be paid before the petition is next before the court. A rational basis for a relatively short adjournment had been eloquently and persistently advanced by Mr Wheeler on behalf of the Company, in face of initial push-back from the court.
28. There was a tangible ground for an adjournment, namely the prospect of the re-financing, which was at an advanced stage, being finalised and the creditors being paid within 30 days.
29. I considered the views of Mr Beck and the other creditors in respect of the adjournment application, although I did not attach much weight to the views of those creditors connected with the Company. The creditors may benefit from the adjournment.
30. The position was unsatisfactory but, on balance, I was persuaded, albeit with some considerable reluctance, to grant one further relatively short adjournment. The further delay is regrettable but it may be in the best interests of the creditors, only time will tell. This adjournment will give the Company one final opportunity to finalise the re-financing

and pay off its creditors within a relatively short further period of time. If the Company has not fully discharged the debts due to Mr Beck and the other supporting creditors before that day I would be minded to make a winding up order on 25 October 2022, although I do not fetter my discretion in that respect.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT