In The Supreme Court of Bermuda

COMMERCIAL COURT

COMPANIES (WINDING UP)

2022: No. 337

IN THE MATTER OF ISLAND OPHTHALMOLOGY LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

Before: **The Hon. Chief Justice Hargun**

Representation: **Mr Rhys Williams of Conyers Dill & Pearman Limited for the Petitioner**
Mr John Hindess of Wakefield Quin for the Company

Date of Hearing: **20 February 2023**

Date of Judgment: **3 March 2023**

JUDGMENT

Application to wind up the company based upon a failure to comply with a statutory demand; whether the debt is bona fide disputed on substantial grounds; whether the company has bona fides cross claims against the petitioner which exceed the statutory demand; whether the petition is filed for an improper purpose

Introduction

1. By Petition dated 2 November 2022 Dr Jacob Smith ("**the Petitioner**") seeks an order that Island Ophthalmology Ltd ("**the Company**") be wound up by the Court under the provisions of the Companies Act 1981("**the Act**") and that Mr Edward Willmott and Mr John Johnston be appointed as the joint provisional liquidators of the Company.

2. The factual ground upon which the Petition is presented is that on 7 October 2022, the Petitioner caused a Statutory Demand to be served on the Company at its registered office pursuant to section 162 (a) of the Act, seeking payment of the outstanding sum of $130,000 said to be owed by the Company to the Petitioner and that the Company has failed to pay all or part of the Statutory Demand within the 21 day period set out therein or at all. It is said by the Petitioner that the Company remains indebted to the Petitioner in the sum of $130,000. In the premises, it is said by the Petitioner, that the Company is deemed unable to pay its debts pursuant to section 162 (a) of the Act and should therefore be wound up.

3. The Company opposes the making of the winding up order on three grounds. Firstly, that the debt which forms the basis of the Statutory Demand is in fact disputed by the Company bona fides and on substantial grounds. Secondly, that the Company has bona fide cross claims against the Petitioner which exceed the debt claimed in the Statutory Demand. Thirdly, the Petition should be dismissed on the basis that it was filed for an improper purpose.

4. It is to be noted at the outset that at times the case on behalf of the Company was presented as though it was a shareholders' dispute between Dr Smith and Ms Faries, who both each own 40% of the shares in the Company. However, it is to be borne in mind that the Petition is against the Company based upon the fact that it is the Company which owes the debt to the Petitioner. Indeed, Ms Faries has not commenced any shareholder action against Dr Smith and

has not entered an appearance in these winding up proceedings seeking to oppose the making of the winding up order.

The Background

5. The background to this matter is uncontroversial, save for one issue. The Petitioner is an ophthalmologist, having earned a degree in medicine from Cambridge University and trained in ophthalmology at Moorfields Eye Hospital in London. Ms Jennifer Faries is a certified orthoptist. In or about September 2019, the Petitioner and Ms Faries agreed to establish a new ophthalmology business together. They decided to establish and carry on that business by incorporating a limited liability company under the Act. The Company was incorporated on 9 July 2020 and the shares in the Company were allotted as to 40% to the Petitioner; as to 40% to Ms Faries and the remaining 20% to Dr Gordon Campbell. A resolution of the Provisional Directors passed on 20 July 2020 records that the shares allotted to the Petitioner, Ms Faries and Dr Campbell were issued "*as fully paid*". It appears that the Petitioner, Ms Faries and Dr Campbell became the directors of the Company and Ms Faries also assumed the office of the Chief Executive Officer of the Company.

6. On 4 March 2021, after the issuance of the shares, the Petitioner and Ms Faries signed a one-page agreement to which the Company is not a party and it provided as follows:

> "***The shareholders agreement for Island Ophthalmology 4 March 2021, as agreed between Jennifer Faries (Jenny) and Jacob Smith (Jacob)***
>
> ***Financial arrangements***
>
> ***Payments to Jenny and Jake***
>
> *Jake will earn a salary, in compensation for the role of chief ophthalmologist and surgical doctor, of 33% of Jake's billings.*

Jenny will earn a salary, in compensation for the role of orthoptist and practice manager, of 11% of Jake's billings.

Profit following payment of the above disbursements to Jenny and Jake and operating expenses (including staff payroll and rent) will be split 50:50 between Jenny and Jake.

Capital

Jenny and Jake will each contribute $300,000 to start-up costs of business.

It is agreed that, following the first six months of operation, $15,000 per month will be set aside for further capital expenditure. This may be disbursed by mutual agreement.

As practice expands, further capital disbursements and expenditure will be 50:50 between the two parties.

...

Final profit share

On sale of the company or departure from the business, Jenny and Jake will each be owed 50% of the book value of all assets less liabilities."

7. It is not in dispute that in furtherance of this agreement the Petitioner made a payment to the Company on 24 August 2021 in the sum of $140,000. The issue for the Court to determine is the proper characterisation of that payment. The Petitioner contends that the payment constituted "*loan capital*" and as such the Petitioner retained the right to demand repayment of that "*loan capital*" upon giving reasonable notice to the Company. The Company contends that the payment was in the nature of "*equity capital*" and as such the Petitioner has no right to demand repayment of that sum from the Company.

Bona fide dispute on substantial grounds

8. There is no material difference between the parties in relation to the relevant law on what constitutes a bona fides dispute on substantial grounds in this context. Mr Williams, for the

Petitioner, referred the court to the judgment of Hildyard J in *Colicolor Limited v Camtrex Limited* [2015] EWHC 3202 where the learned judge summarises the current legal position:

"32. The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact.

33. The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. Re Pan Interiors [2005] EWHC 3241 (Ch) at [34] – [37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set-off, a genuine and substantial crossclaim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter). That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.

34. Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.

35. However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the

matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do.

36. As stated by Chadwick J (as he then was) in Re a Company (No 6685 of 1996) [1997] BCC 830 at 838:

> *"I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible."*

9. Mr Hindess, for the Company, referred the Court to its judgment in *Titan Petrochemicals Limited* [2021] (Hargun CJ) at [27]-[30] as setting out the appropriate approach in cases such as this:

27. In the ordinary case the Court accepts that the general rule is that if it is satisfied that the debt is bona fide disputed on substantial grounds then, in the absence of exceptional circumstances, the Court would ordinarily dismiss the petition. In Stonegate Securities v Gregory [1980] Ch. 576. Buckley LJ so held at 579C to 580C:

> *"Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in paragraph (c) of section 224 (1). If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances*

be restrained that is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide dispute.

> *Mr. Justice Ungoed-Thomas put the matter thus in the case of Mann v. Goldstein in (1968) 1 Weekly Law Reports, 1091 at page 1098 below H: "For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court". I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings."*

28. The Court also accepts that in the ordinary case the threshold as to what constitutes a disputed debt is not a high one, as was held by Etherton LJ in the English Court of Appeal in Tallington Lakes Limited v South Keveten District Council [2012] EWCA Civ 443 at [22]

29. It is also emphasised in the authorities that whether a debt is disputed on substantial grounds is a question of judgment based on the facts of each case (McPherson & Keary: The Law of Company Liquidation, Fourth Edition, at 3.080; Re Alloy Aircraft Company Ltd [2005] Bda LR 79 at [8]).

30. In considering whether there is a dispute on substantial grounds the court is not bound to accept every assertion set out in the affidavit evidence filed on behalf of the company.

The exercise upon which the court is engaged is not equivalent to the determination of an application to strike out a pleading where the court is bound to assume that all the pleaded allegations are true. The court is entitled to take a real-world view of the factual allegations made in the affidavit evidence filed on behalf of the company and is entitled to consider the credibility of those allegations in light of (i) whether the company is in fact insolvent which may colour the question of whether the dispute is bona fide; (ii) whether any of the allegations contained in the affidavit evidence were made by the company prior to filing of the winding up petition; (iii) whether any proceedings commenced by the company against the petitioner, in relation to the validity of the debt upon which the petition is based, are merely retaliatory to the winding up proceedings; and (iv) whether the assertions made by the company are consistent with other factual evidence which is objectively verifiable. This approach of the court to consideration of the issue whether the debt is bona fide disputed on substantial grounds is supported by several English and Bermuda authorities"[1]

The evidence relied upon in relation to the loan

10. The Court accepts that, in considering whether the payment of $140,000 by the Petitioner to the Company is a loan to the Company, it is relevant to consider how the Company itself treated that payment in its own books and records. Indeed, it is a primary consideration given that section 83 of the Act requires that every company shall cause to be kept proper records of account with respect to its assets and liabilities. The obligation upon a company to maintain proper records of account is reinforced by section 277 (1) of the Act which provides that if any person makes a statement false in any material particular, knowing it to be false, in any document, required by for the purposes of any provision of the Act, he shall be guilty of an offence. In *Secretary of State for Business Enterprise and Regulatory Reform v Art IT plc* [2009] 1 BCLC 262 HHJ Toulmin QC held at [21] that a failure to comply with section 221 of the UK Companies Act 1985 (the equivalent to section 83 of the Act) is a "*serious matter*".

[1] in the Court of Appeal [2022] CA (Bda) 13 Clarke P emphasised at [33] that the considerations referred to in paragraph 30 above are derived from widely different factual circumstances and each case must necessarily depend upon its particular circumstances.

11. Accordingly, the starting point of considering this issue is to consider how the Company treated the payments made by the shareholders on account of "*capital*" and in particular to consider how the Company treated the cash contributions made by Ms Faries in March 2021, and by the Petitioner, some five months later. In March 2021, Ms Faries paid $200,000 to the Company as her "*contribution*" to the start-up costs. In addition, Ms Faries purchased equipment and other items to a value of approximately $80,000. Ms Faries' "*contribution*" was therefore approximately $280,000 ("**Ms Faries Payment**").

12. At all relevant times the Company engaged professional accountants to prepare, *inter-alia*, its monthly management accounts. The monthly management accounts included, *inter-alia*, the balance sheet and the profit and loss account. Up to February 2022 the Company engaged the services of ABS Limited ("**ABS**") and commencing February 2022 ABS were replaced with accountants appointed by Ms Faries, Acumen Group Ltd ("**Acumen**').

13. Upon receipt of the Ms Faries Payment in March 2021, the Company's accounts, prepared by ABS, recorded that sum as a *non-current liability* with reference to "*due to JF (start-up capital)*". The Company did not consider the Ms Faries Payment as an *asset* of the Company but considered it as a *liability* of the Company to be paid in due course. The balance sheet in the management accounts, as at 31 May 2021, records the Ms Faries Payment as a *liability* to Ms Faries. By this stage the Petitioner had not made any payment on account of his contribution to the "*capital*" and therefore was not considered in the 31 May 2021 management accounts.

14. Upon receipt of the payment of $140,000 from the Petitioner in August 2021 ("**the Petitioner Payment**"), the Company accounts again recorded that sum as a *non-current liability* with reference "*due to JS (start-up capital)*".

15. In February 2022, as noted earlier, ABS was replaced with Acumen. Acumen has to date continued to record the Ms Faries Payment and the Petitioner Payment as a liability of the Company. As Mr Williams points out that whilst Acumen noted in the management accounts, as at 30 April 2022, that there is a dispute as regards the "*equipment*" originally owned by the Petitioner; no such dispute is recorded as regards the allocation of either the Ms Faries Payment or the Petitioner payment as *liabilities* of the Company.

16. As far as the Company's own books and records are concerned (its monthly management accounts prepared by professional accountants) the Ms Faries Payment and the Petitioner Payment have consistently during the period 31 May 2021 to 31 January 2023 (a period of 21 months) been recorded as *liability* of the Company to Ms Faries and the Petitioner. Throughout this period these payments to the Company have been recorded in the Company's management accounts as "*non-current liabilities*" and "*Due to JF (start-up capital)*" and "*Due to JS (start-up capital)*". It should further be noted that as from at least 28 February 2022 the long-term liabilities owed to Ms Faries and the Petitioner have been referred to in the as "*Due to JF(start-up loan)*" and "*Due to JS(start-up loan)*". Whatever the description the contributions made by Ms Faries and the Petitioner on account of "*capital*" have always been recorded as a *liability* of the Company in its balance sheet.

17. Secondly, in March and April 2022 the Company caused the "*repayment*" of $10,000 to each of Ms Faries and the Petitioner in part payment of the liability recorded to Ms Faries and the Petitioner in the books of the Company. In relation to this part repayment of the loan, in an email to Ms Faries and Ms Reasmus of Acumen dated 25 April 2022, the Petitioner stated that: "*there are funds in the business account, so the **$5000 loan repayment** should be in addition to our pay.*" In response Ms Faries stated in an email of the same date: "*my only hesitation is that I understood that the $5000 was meant to be "subtracted" from our pay - **5000 out of our pay would be allocated as a loan repayment**. Rather than paying us out an additional 5000.*" Ms Erasmus advised both Ms Faries in an email of 22 April 2022 that "*We have added a Reimbursement line for both you and Jake of $5000 each. **This is part of the loan repayment**.*" In accordance with the email from Ms Erasmus, the Company made the $5000 payment to

both Ms Faries and the Petitioner as part repayment of the loans which were recorded as a liability of the Company in its balance sheet.

18. These loan repayments are reflected in the management accounts of the Company. Thus, the balance sheet as at 30 of April 2022 shows that the amount "*Due to JF (start-up loan)*" reduced from $154,603 as at 31 March 2022 to $149,603 as at 30 April 2022. Likewise, the amount "*Due to JS (start-up loan)*" reduced from $144,511 as at 31 March 2022 to $139,511 as at 30 April 2022.

19. Ms Faries has been unable to provide any cogent explanation as to why it is that the Ms Faries Payment and the Petitioner Payment were consistently recorded as a *liability* of the Company to Ms Faries and the Petitioner. Furthermore, commencing February 2022 the liability has been recorded as "*Due to JF (start-up loan).*" In her first affidavit Ms Faries says that "*the only reason we changed the "capital" to a "loan" in the account was to start paying ourselves a portion of salary tax free as a "loan repayment" on the advice of Dr Smith's friend, Trevor Boyce. We did this only two months, paying portion of a salary, dollar 5000 to each of us each time, which is shown on our payslips as a loan repayment.*" This explanation by Ms Faries is not supported by the contemporaneous emails referred to above and is strenuously denied by Mr Boyce. Furthermore, this assertion by Ms Faries provides no explanation as to why, at all relevant times, the Ms Faries Payment and the Petitioner Payment were recorded as a *liability* of the Company to Ms Faries and the Petitioner.

20. Thirdly, on 21 March 2022 Ms Faries caused the Company to "*repay*" her $140,000.00, which again was recorded in the Company accounts as reducing the amount "*due to*" her by that amount in the management accounts of the Company. In relation to this payment the Petitioner sent an email to Ms Faries on 3 August 2021 proposing leasing of the equipment and stated, *inter-alia*: "*The goal of this proposal is to facilitate substantial (50%)* ***immediate repayment of the loan made to Island Ophthalmology by Jenny (and the father)...*** *Immediate cash*

injection to repay Jenny Faries will be ***half of what has been loaned so far*** *- based on $280,000 will be $140,000."*

21. On 21 March 2022 Ms Faries sent an email to the Petitioner advising him that: "***I have just paid myself back the $140,000, which is about half of my initial setup capital (loan).*** *This brings us close to even in start-up contributions.*"

22. In her first affidavit Ms Faries states that leading up to the February 2022 meeting the Petitioner was consistently suggesting to her that they could no longer work together. Thus, she says that she felt that she had put in $280,000 and he had put in less cash and was arguing that the equipment belonged to him and not the Company, which left her vulnerable. Ms Faries states that she then removed $140,000 from the Company's bank account and told the Petitioner that she had done so. Ms Faries makes no attempt to explain how she could have removed $140,000 from the Company's bank account if in reality and in substance it represented equity in the Company and why its removal resulted in the reduction of the Company's liability to her from $280,000 to $140,000.

23. The Court accepts Mr Williams' submission that the evidence clearly establishes that the Company has always acknowledged the existence and validity of the debt in its own statutory books and records, prepared by professional accountants; and that the Company has treated the Petitioner Payment as a loan. The Company's conduct in making the part payment of $10,000 is further evidence of the Company's acceptance that it was liable to repay the debt.

24. The Court accepts Mr Williams' further submission that there is not a single Company document showing that the Petitioner Payment (or the Ms Faries Payment) was treated by the Company as *equity*.

25. The Company's case, as articulated by Mr Hindess, is that there was an agreement by the Petitioner to "*contribute*" towards the "*capital*". In the present context, it is argued, the reference to "*capital*" can only mean "*equity*" and therefore, the Petitioner Payment was consideration for his shares in the Company. This submission faces a number of difficulties in the circumstances of this case.

26. First, it is not correct that conceptually a contribution to "*capital*" necessarily means contribution by way of *equity* in the company. Thus, in *Clark v Energia Global International Ltd* [2002] Bda LR 39, Meerabux J recognised that in the context of a "*start-up company*" the reference to "*capital*" includes both "*equity capital*" and "*debt capital*":

> *"The company was a start-up company i.e., in order to achieve its aims, it had to raise capital in order to fund the projects. It did raise capital* ***through loans and complex share offerings*** *and had a variety of classes of shares, with different rights and powers attached to them."*

27. Second, having regard to the company law provisions relating to equity capital, the Company never considered that the Ms Faries Payment and the Petitioner Payment constituted equity capital of the Company. In her first affidavit Ms Faries states that she deposited $200,000 in March 2021 and purchased equipment at a value of approximately $80,000 between September 2019 and August 2021 which made up her contribution to that date. She contends that "*In return, I received shares in a new business*." She further states that it was always the intention of the Petitioner and herself that their contribution would be to start-up the business and "*in exchange, we would get the shares in the new business once it was incorporated which did in fact happen*."

28. As a matter of chronology, it is not correct that the shares in the Company were issued to Ms Faries and the Petitioner "*in exchange*" or "*in return*" for the Ms Faries Payment and the

Petitioner Payment. As noted earlier, on 20 July 2020 the Provisional Directors passed a resolution confirming that the common shares of the Company had been issued *fully paid* to Ms Faries (40%), the Petitioner (40%) and Dr Campbell (20%). Ms Faries did not make her contribution in terms of the payment of $200,000 and the purchase of the equipment until March 2021, some eight months later. The Petitioner did not make his contribution until August 2021, 13 months after the shares had been issued to him as *fully paid*.

29. Conceptually, it was open to the Company to treat the Ms Faries Payment and the Petitioner Payment as constituting either share premium or contributed surplus to the capital of the Company. However, if the Company was minded to consider these contributions as "*share premium*" the Company had to comply with section 40 of the Act which requires a company in receipt of share premium to establish share premium account, and to transfer to that account the aggregate amount of value of the premiums. The Company did not do so and instead entered these contributions from the shareholders in its books as *liability* of the Company. Furthermore, if the contributions from Ms Faries and the Petitioner are to be treated as share premium, no part of those contributions could have been returned to the shareholders without complying with the strict requirements of section 46 of the Act dealing with reduction of share capital. Thus, the Company could not have made the payments of $10,000 to each of Ms Faries or the Petitioner or the payment of $140,000 to Ms Faries without the reduction of share capital in accordance with section 46 of the Act. It is common ground that the Company took no such steps. Instead, upon the making of these payments to Ms Faries and the Petitioner, the Company reduced its indebtedness to Ms Faries and the Petitioner as recorded in the balance sheet prepared by the professional accountants engaged by the Company.

30. If the Company was minded to consider the contributions from Ms Faries and the Petitioner as *contributed surplus* then the Company was obliged to record these contributions as contributed surplus in its books of account. The Company did not do so and instead recorded these contributions as *liability* of the Company to Ms Faries and the Petitioner. Furthermore, if the Company had treated these contributions from Ms Faries and the Petitioner as contributed surplus then it could only be returned to shareholders by way of dividend in accordance with

section 54 of the Act. Thus, it would not have been possible for the Company to make payments of $10,000 to each of Ms Faries or the Petitioner or the payment of $140,000 to Ms Faries without complying with section 54 of the Act. Any distribution made by the Company pursuant to section 54 requires the company to pay all the shareholders in proportion to their shareholding in the company. There is no suggestion that the Company attempted to comply with the provisions of section 54 of the Act. Instead, the Company made the payments to Ms Faries and the Petitioner on the clear understanding that it was making loan repayments to them in relation to the Company's liability as reflected in its balance sheet.

31. Faced with these difficulties Mr Hindess submitted that the Company's management accounts did not reflect the true position and given the size of the Company it is understandable that it did not fully understand its obligations under the Act. The Court is unable to accept this submission. The Company's treatment of Ms Faries Payment and the Petitioner Payment in its books is clear and is of long standing. The Court is unable to accept that it does not reflect the true position. Likewise, as a matter of principle, the Court is unable to accept the proposition that it is understandable "*small*" companies may fail to comply with sections 40 and 54 of the Act, two sections reflecting fundamental provisions designed for the protection of creditors of companies.

32. Having regard to the totality of the evidence, the Court is satisfied that there is in fact no bona fide dispute on substantial grounds that the Petitioner is a creditor of the Company for at least $130,000. Accordingly, the Court is satisfied that the Petitioner has the requisite legal standing to present the Petition.

Cross claims

33. The Company contends that it has cross claims of substance which exceed the debt claimed in the Petition and as a result the Court should exercise its discretion against making a winding up order in this case.

34. One such cross claim relates to the ownership of the equipment which was made available to the Company by the Petitioner. There are presently proceedings pending in relation to that claim. The proceedings were commenced by Dr Smith (2022 No 240) by Specially Endorsed Writ of Summons dated 15 August 2022. In those proceedings the Petitioner seeks a declaration that the equipment is the property of the Petitioner and, to the extent it is detained by the Company, it is in the Company's wrongful possession. The Petitioner claimed an order for delivery of the equipment or payment of its value at an amount to be assessed, and damages for conversion.

35. The Company has counterclaimed in those proceedings and the seeks a declaration that pursuant to the Shareholders Agreement the equipment with an approximate value of $114,500 is owned by the Company, and an order for delivery of all the equipment and for payment of any consequential damages. In these winding up proceedings the Company, in its written submissions, contends that the "*equipment in dispute totals approximately BD$374,000.*"

36. In relation to this counterclaim, it is to be noted that the contribution of both Ms Faries and the Petitioner was agreed to be in equal amounts and was originally intended to be $300,000 each. However, as a result of Ms Faries' decision to repay the loan in an amount of $140,000, Ms Faries' contribution is reduced to $140,000, the same amount as the Petitioner. In these circumstances, Mr Williams contends it is not at all clear on what basis Ms Faries or the Company can validly contend that it has a claim to the equipment originally owned by the Petitioner. The Court notes that these proceedings are presently pending and will be determined by the Supreme Court in due course.

37. In its written submissions, the Company complains that after the Petitioner resigned in May 2022, he began his campaign to discredit, defame and intimidate the Company and Ms Faries. Thus, the Company complains that after the Petitioner handed in his resignation and he was removed as a director of the Company, he asserted he was entitled to vacation which was

refuted by the Company. As a result, the Company asserts, the Petitioner called in sick for 15 days while also attempting to continue to work at night at the hospital.

38. The Company further complains that during this time period, the Petitioner did everything he could to interact and damage the business operations of the Company and damage the reputation of Ms. Faries. It is said by the Company that the Petitioner gave conflicting instructions to Company employees and most notably, with a view to opening a competing business while he was still an employee of the Company.

39. The Company also complains that prior to filing the Petition, the Petitioner filed a complaint with the Department of Labour alleging he was wrongfully dismissed. The Company asserts that the Petitioner included in its complaint, the complaints of two other employees with whom he intended to open a new, competing practice. The Company claims that this has caused financial loss to the Company.

40. It is to be noted that other than the counterclaim in the proceedings commenced by the Petitioner for the recovery of the equipment, the Company has not commenced any proceedings in relation to any other claims which it asserts it has against the Petitioner. However, the Company submits to the Court that the cross claims outlined above are of sufficient substance such that this Court should exercise its discretion against making a winding up order in respect of the Company.

Improper Purpose

41. It is said on behalf of the Company that it is clear from the history of the disputes between the parties that the Petitioner has filed this Petition as a retaliatory act against the Company and Ms Faries in particular. In its written submissions, the Company complains that when Ms Faries refused to be complicit in his deceit to defraud Bermuda Customs, the Petitioner began a campaign to end the relationship by any means necessary and open in new business to

compete against the Company. However, when he was unsuccessful in taking the major assets of the Company with him, he filed his claim in relation to the recovery of the equipment.

42. When the equipment claim did not move as quickly as he hoped, the Company contends he broke into the Company offices late at night and stole the equipment which gave him the ability to use it in its new practice and at the same time, hobbled his competition by stopping the Company from being able to operate.

43. The Company submits that when this again did not produce the desired results fast enough, the Petition was filed so that the Petitioner could terminate his competition by winding up the Company while at the same time enabling him to save face in the community by claiming that the Company was dissolved due to a debt he was owed but the Company refused to pay. In the circumstances the Company submits that the Petition has clearly been filed for an improper purpose and ought to be dismissed.

44. In considering the issue of improper purpose, it is important, as Mr Williams submits, to differentiate between the *purpose* of the Petition and the *motive* of the Petitioner. It appears to be well established that if the petitioner has sufficient ground for petitioning, the fact that his motive for presenting the petition may be antagonism to some person or persons cannot render that ground less efficient or "*improper*". Thus, in *Coulon Sanderson & Ward Ltd v John Francis Ward* [1965] WL 310877, Slade LJ held:

> *"Another point which emerges from Bryanston Finance Ltd v De Vries (No 2) [1976] Ch 63, decision is that bad motives cannot render an otherwise good winding-up petition groundless. As Lord Justice Buckley said (at [1976] Ch 63 page 75):*
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> > *"If a petitioner has a sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person or*

persons cannot, it seems to me, render that ground less sufficient. If, on the other hand, he has no sufficient ground, his petition will be an abuse, whether he be actuated by malice or not."

I stress this point because Mr Coulon and his legal advisers are clearly deeply suspicious of the motives of the defendant, who has now established himself as a trade competitor of the Company, in insisting on seeking relief by way of a winding up order, as opposed to a petition under what used to be section 75(1) of the Companies Act 1980 and is now section 459(1) of the Companies Act 1985."

45. French: *Applications to Wind Up Companies, 4th edition*, clearly sets out the proposition that the petitioner's motive in presenting the petition is irrelevant. The court is solely concerned whether the petitioner has established the legal ground for presenting the petition and the purpose of the petition is to provide for all of the company's creditors the benefit which the liquidation brings. At 2.125 the learned author states:

"Motive (in the sense of the psychological process which induces a person to act in a certain way by influencing that person's volition) is irrelevant if the petitioner has standing to petition and has established the existence of circumstance in which the court has jurisdiction to order winding up.[2] As Gibbs J said in IOC Australia Pty Ltd v Mobil oil Australia Ltd,[3] "it is not the law that only a creditor who feels goodwill towards its debtor is entitled to a winding up order". The fact that the petitioner is a commercial rival whose business will benefit from eliminating the company sought to be wound up is not in itself a reason for not making a winding up order.[4]

In Mann V Goldstein,[5] Ungoed-Thomas J said:

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[2] *Re Amalgamated Properties of Rhodesia (1913) Ltd [1917] 2 Ch 115; Re A I levy (Holding) Limited (No 2) (1965) 109 SJ 209; Braynston Finance Ltd v De Fries (No 2) [1976] Ch 63; Tele-Art Inc v Nam Tai Electronics Inc (1999) 57 WIR 76; Ebbvale Ltd v Hosking [2013] UKPC 1, [2013] 2 BCLC 204 at [28]*

[3] *[1975] 2 ACLR 122 at p 131.*

[4] *Fuji Photo Film Co Ltd v Jazz Photo (Hong Kong) Ltd 1 HKLRD 530.*

[5] *[1968] 1 WLR 1091 at p 1095.*

"It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, even though with personal hostility or even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide acting bone fide in accordance with the process. And certainly no authority suggesting otherwise has been brought to my attention."

46. In the circumstances the Court is satisfied that it is well established that the motive of the Petitioner in presenting the petition is not a relevant consideration. Accordingly, the alleged facts that (i) the Petitioner has filed this Petition as a retaliatory act against the Company and Ms Faries; (ii) the Petition is part of the campaign to end the existing relationship with Ms Faries and open in new business to compete against the Company; and (iii) the Petition is filed in order to hobble the competition by stopping the Company from being able to operate, are not relevant considerations in determining whether the Petitioner is entitled to the relief sought in the Petition. The relevant issues for the court to consider are: (i) whether the Petitioner has established ground for presenting the Petition as required by the Act; (ii) whether the Petitioner seeks the winding up relief for the benefit of the creditor class (*Ebbvale Ltd v Hosking* [2013] UKPC 1 at [28]); and (iii) whether there is "*a reasonable possibility of some advantage*" from the winding up procedure in accordance with the test laid down by Neuberger J in *Re Demaglass Holdings Limited* [2001] 2 BCLC 633 (*In the Matter of US Holdings Limited* [2023] SC (Bda) 13 Civ (17 February 2023)).

47. At paragraph 32 above the Court has held that the Petitioner does indeed enjoy the legal standing to present this Petition. The Court is also satisfied that the Petitioner genuinely wishes to obtain the winding up order and if a winding up order is made there is "*a reasonable possibility of some advantage*" to the Petitioner in that there is a reasonable possibility of a distribution of available assets to the creditors of the Company. It appears to the Court that the Petitioner has clearly established the very low threshold of "*a reasonable possibility of some advantage*" in the present case.

Exercise of Discretion

48. Even where a petitioner establishes his standing to present the petition, the Court retains a discretion whether or not to make a winding up order in the particular circumstances of the case. It is also established that in the ordinary case where a creditor proves that the company is unable to pay its debts, it is settled practice that the court will ordinarily exercise the discretion only one way, namely by granting the winding up order. Thus, in *Re Demaglass Holdings Ltd* [2001] BCLC 633, Neuberger J held at 638:

> *"at least in the absence of a good reason a creditor of a company who has not been paid is entitled to a winding-up order virtually as of right. Thus in a classic statement made in Bowes v Directors of Hope Life Insurance and Guarantee Co (1865) 11 HL Cas 389 at 402 Lord Cranworth said:*
>
> > *'... it is not a discretionary matter with the Court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding up.'*

49. The only issue which concerns the Court, in the exercise of its discretion whether to make a winding up order, is the Company's contention that it has cross claims which exceed the debt claimed by the Petitioner in the Petition.

50. The existence of cross claims by a company may be a relevant consideration in the exercise of the court's discretion whether or not to make a winding up order. In the ordinary case where a company's cross claims exceed the debt claimed by the petitioner the court would exercise its discretion against the making of a winding up order (*Re Bayoil SA* [199] 1 ALL ER 374). There may be exceptional circumstances where it would be appropriate to allow the petition to go

forward even if there was a disputed cross claim exceeding the disputed debt (*Re A Company* [2018] EWHC 1143 (Ch) at [28], Morgan J).

51. In *Bayoil SA* Nourse LJ made it clear that the cross claim must be genuine and serious and one of substance. The Court accepts that the ability or inability to litigate the counterclaim is not a critical consideration in the exercise of the court's discretion (*Re A Company* [2018] EWHC 1143 (Ch) at [27], Morgan J).

52. Mr Williams for the Petitioner submits that the Court should discard any suggestion of counterclaims on the basis that they are without any substance. Mr Williams asks the Court to note that Ms Faries justifies the repayment to her of $140,000 on the basis that the Petitioner had not contributed his equipment. By repaying herself $140, 000, the respective contribution by Ms Faries and the Petitioner would be "*close to even*". Having regard to these facts, Mr Williams submits that there is simply no valid basis upon which the Company can maintain any right to refuse to return the Petitioner's equipment to him. Accordingly, the Company's various allegations of theft and misconduct are therefore entirely misconceived. There is force in Mr Williams submission, but it seems to the Court that these issues must be determined in separate proceedings.

53. The Company also appears to assert cross claims against the Petitioner based upon breach of fiduciary duty as a director of the Company. No particulars are given in respect of the loss suffered or claimed by the Company. Again, the Court is not in any position to determine whether there is any realistic prospect of success in relation to these cross claims asserted by the Company.

54. In the circumstances, in the exercise of the Court's discretion, it would not be appropriate to dismiss the Petition based upon the asserted cross claims. However, the Company should be given the opportunity to establish its cross claims in separate proceedings. If the Company wishes to pursue those proceedings, they must be pursued expeditiously. In the meantime, the Court orders that the Petition be adjourned to a date so that the court could consider whether additional cross claims are to be pursued by the Company; and if so, the outcome of those proceedings.

55. Mr Williams submits that if the Court is minded to adjourn the Petition pending the determination of the cross claims, then it must do so on condition that the Company pays into court the amount claimed in the Petition. He says that the limited resources of the Company are being dissipated by Ms Faries including unnecessary litigation expense in which the Company is involved and is likely in the pursuit of cross claims. In those circumstances Mr Williams submits that it is just and appropriate that the Company be required to pay into court the Petition debt of $130,000. Mr Williams relies upon *Coilcolor Limited v Camtrex Limited* [2015] EWHC 3202 (Ch) where at [65] Hildyard J justified the making of such an order on the grounds that:

> *"My only uncertainty has been prompted by my acceptance that, though not suitable for the Companies Court, there are some signs that the Company has been (if I may put it that way) scratching around for a defence and exacerbated by the doubts raised towards the end of the hearing as to the financial position of the Company in what may be difficult trading conditions. It is whether (by analogy with CPR Part 24 and leave to defend on a conditional basis), I should require some payment in by the Company pending resolution of all the issues. I shall hear the parties further on that point..."*

56. A similar order was made in *Re A Company* [2016] EWHC 3811 (Ch), Foxton QC, based upon "*thinness of some of the evidence*":

"39. I note that in Coilcolor, Hildyard J observed that while he had concluded that the dispute before him, he nonetheless had the impression that the company had been scratching around for a defence. He identified one possible response available to him; that of making it a condition of injunctive relief that there be some payment into court. Both counsel confirm that they were not aware of any reason, in principle, why such a course could not be followed.

40. I have indicated the relative thinness of some of the evidence on causation and loss in the way in which that evidence has developed. In those circumstances, I believe a payment into court of £30,000 as a condition of injunctive relief pending resolution of the issues is appropriate. This order I have in mind with liberty to either party to apply in relation to it and, in particular, with Alumnia being at liberty to withdraw the payment if no proceedings had been commenced by Smart Systems to recover the debt within three months."

57. It is to be noted that *Coilcolor* concerned an application by the company to restrain the presentation of a winding up petition against it by the petitioner. Likewise, *Re A Company* concerned an application by the company for an injunction to restrain the petitioner from advertising a winding up petition presented to the court. Both cases concerned an application for an injunction from the court and as a condition of grant of the injunction the court imposed a condition that the sum claimed be paid into court. Here, there is of course no application for an injunction as such. However, it appears to the Court that there is no reason in principle why the Court should not be able to impose the same condition in this case.

58. Here, in accordance with the settled practice of the court, the Petitioner, having established its standing as an unpaid creditor, is entitled to a winding up order. In response, the Company prays in aid the existence of cross claims which it asserts exceed the debt claimed in the Petition. The Court has doubts about the strength of these cross claims and the potential unnecessary dissipation of the Company's assets in terms of legal fees. In the circumstances the Court considers that it is just and appropriate that rather than making an immediate winding up order the Court should adjourn the Petition to allow the Company to pursue these cross claims but only on the condition that the Company pays into court the sum of $130,000 within 14 days of this judgment. In the event the Company fails to pursue its counterclaims with expedition and/or fails to obtain a judgment in excess of the amount paid in by the Company,

the Petitioner would be entitled to make an application that the amount paid in by the Company should be paid out to him. There shall be general liberty to apply in relation to the payment in by the Company.

Conclusion

59. Having regard to the totality of the evidence, the Court is satisfied that there is in fact no bona fide dispute on substantial grounds that the Petitioner is a creditor of the Company for at least $130,000. Accordingly, the Court is satisfied that the Petitioner has the requisite legal standing to present the Petition. However, the Court is willing to allow the Company to pursue its counterclaim in the pending proceedings in the Supreme Court 2022 No 240, and the other cross claims referred to in the written submissions filed on behalf of the Company, by adjourning the Petition to a fixed date on condition that the Company pays into court the sum of $130,000 within 14 days of this judgment.

60. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 3rd day of March 2023

THE SEAL OF THE SUPREME COURT OF BERMUDA

NARINDER K HARGUN

CHIEF JUSTICE