MAPLES GROUP

UPDATE

Appointment of Liquidators: BVI Court Rejects 'Put-Up Job' Defences

Following contested hearings on each of 20 and 21 February 2023, the Commercial Court has handed down its decision in *Happy Lion Ventures Limited and Anor v RZ3262019 Limited*. By its judgment, the Court appointed joint liquidators over the respondent BVI HoldCo and, in so doing, confirmed its proactive and forensic approach to the analysis of alleged defences to debts upon which liquidation applications are founded.

Aisling Dwyer, Adrian Francis, Matthew Freeman and Scott Tolliss acted for the successful applicants, across the Maples Group's Dispute Resolution & Insolvency practices in the British Virgin Islands ("BVI") and Hong Kong.

Background

The applicants, Happy Lion Ventures Limited and Chinex Limited, issued an application to appoint Joint Liquidators over RZ3262019 Limited (the "Company") on the grounds that it was unable to pay its debts as they fell due, and was therefore insolvent (the "JL Application"). The applicants had issued a demand in respect of a *bona fide* debt arising from a Vendor Loan Agreement (the "VLA" and the "Debt", respectively). As at the date of the JL Application, the Debt remained unpaid.

By an *ex parte* application filed on 8 July 2022, the applicants obtained an order appointing Joint Provisional Liquidators (the "JPLs") over the Company, on the following bases:

(a) the unpaid Debt;
(b) a conspiracy perpetrated by the Company and its affiliates to deprive creditors of its assets had to be investigated;
(c) the value of assets owned and managed by the Company had to be maintained; and
(d) the interests of the Company's creditors had to be protected, including by the JPLs causing the Company to seek to intervene in extant proceedings in the People's Republic of China.

At the hearing of the JL Application, the applicants sought the appointment of the JPLs as Joint Liquidators over the Company.

In opposition, the Company and its affiliates sought the dismissal of the JL Application on the grounds that:

(a) the Debt and the VLA (and related transactional documents) were disputed on genuine and substantial grounds;
(b) the Company intended to challenge the validity of the VLA by way of proceedings intimated in Hong Kong, on the basis of mistake and / or frustration;
(c) the Company was solvent or, alternatively, its solvency should have been viewed in the

context of the wider group of companies to which it belongs;

(d) the conspiracy alleged by the applicants was denied;

(e) one of the Company's affiliates was proposing to restructure, which restructuring would be derailed in the event the JL Application was granted; and

(f) the view of a majority creditors of the Company, whom the applicants alleged were party to the conspiracy, was that the appointment of Joint Liquidators would not be in the interests of the creditors as a whole.

The Law

Genuine and Substantial Dispute

The parties were agreed as to the applicable legal test, namely that a creditor is entitled to wind up a company as of right, where the order is sought on the basis of a debt which is due and undisputed.

The seminal decision of Sir Denis Byron, CJ in *Sparkasse Bregenz* articulated the test as follows:

> *"…the dispute must be genuine in both a subjective and an objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore."*

What constitutes a substantial dispute was confronted by Lord Denning MR in *Re Claybridge Shipping SA*, where he said:

> *"…If it is obviously a 'put-up-job' or if it is so insubstantial that a Queen's Bench master would only give conditional leave to defend – then I should think the petition to wind up should stand."*

Adjournment for Restructuring

The Court accepted that there are cases where it must seriously consider submissions that an application to appoint liquidators should be adjourned to allow a restructuring to be pursued. So too that such a proposal will invariably require the support and buy-in of the Company. Where the company has not indicated its support or desire for a restructuring proposal to be explored, the Court confirmed that it *"is not going to allow the proposal to be pursued".*

The Court drew upon the experience of Doyle J, sitting in the Grand Court of the Cayman Islands, in *In the Matter of Shinshun Holdings (Group) Co. Ltd* where an application by a company seeking a three month adjournment of a winding up petition was dismissed. It was dismissed on a number of bases, including that the company had had a restructuring plan in the pipeline for nearly a year, and thus had had ample time to finalise any proposed restructuring, but had not done so.

The legal threshold for an adjournment on the basis of a restructuring is therefore, necessarily, a high one.

Treatment of the View of Majority Creditors

The majority creditors must show their reasons for the stance that they take in opposing a winding up petition, or in seeking an adjournment.

It was common ground between the parties that, even in an unexceptional case, it is *"not simply a matter of numbers or percentages or a head-counting process".*

The Court applied the reasoning of Willmer LJ, in *In Re P & J Macrae, Ltd*, where he held *"…before a majority of creditors can claim to override the*

wishes of the minority, they must at least show some good reason for their attitude."

Decision

The Court, accepting the applicants' submissions and granting the JL Application, held that *"the late stage at which the Company has raised the alleged dispute… demonstrates a lack of sincerity or of conviction"* and that *"the delay and tardiness in raising the allegations make no commercial sense".* The applicants characterised the Company's (and its affiliates') approach as entirely on all-fours with Lord Denning's portrayal of a *"put-up job"*. In reaching its decision, the Court made clear that on applications of this nature, it is important to *"zero in on precisely what is involved in the examination as to whether there is a genuine and substantial dispute".* In doing so, the judge undertook a careful forensic review of the evidence and contemporaneous papers to determine that the alleged dispute was not in fact advanced by the Company and its affiliates *bona fide*.

As is often the case in contested liquidation applications of this type, those opposing will file voluminous evidence with the court. In the present case, the hearing bundles totalled in excess of 5,000 pages. Addressing this approach, the court adopted the reasoning of Oliver LJ in *Re Claybridge* where he remarked that *"the credibility of evidence does not depend upon the number of kilograms achieved on either side"*. This is a stark warning to those opposing such applications that the substance of a party's opposition will always triumph over its form.

Conclusion

The Maples Group continues to represent the successful applicants in these proceedings and welcomes the Commercial Court's reasoned judgment.

Further Assistance

If you need assistance with a recent claim, our Dispute Resolution & Insolvency team have unparalleled experience providing in-depth, pragmatic and commercial advice with cross-office cooperation and support on all litigation matters.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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