International Corporate Rescue

Published by

Chase Cambria Company (Publishing) Ltd

ChaseCambria

www.chasecambria.com

SOUTH SQUARE

Centre for Commercial Law

UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2024 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 560.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

A Little More Time: The BVI Court Clarifies When and How It Will Exercise Its Discretion to Adjourn an Application to Appoint Liquidators

Luke Petith, Partner, and **Cate Barbour**, Senior Counsel, Dubai, UAE, and **Murray Laing**, Partner, British Virgin Islands, Walkers LLP

Synopsis

Emerging from the COVID-19 pandemic, inflationary pressures and increasing interest rates have continued to have a negative impact on the global economy. This has caused a significant increase in the number of creditor applications seeking to appoint liquidators over BVI companies on the basis that they are unable to pay their debts as they fall due.

It is well-settled that if a creditor wants to have a company wound up, and the court is satisfied that the company is unable to pay its debts, an order for the appointment of liquidators will follow unless there is some special reason why it should not. The case law principally addresses whether companies should be put into liquidation or not (and in most cases, the focus is one whether or not there is a genuine dispute as to whether the debt is due and payable), but there is little authority as to the intermediate question of adjournment where a debtor is working to pay an undisputed debt and requires a further period of time in which to do so.

The Court has a discretion to adjourn the hearing of an application for an order appointing liquidators.[1] That discretion is an unfettered one [2] but the burden to show why the order appointing liquidators should not be made[3] rests on the company.

A recent (unreported) BVI decision has given a welcome insight into the factors that the Court will consider in exercising its discretion to adjourn the hearing of an application to appoint liquidators, including the impact on other creditors.

The application to appoint liquidators

The BVI company in question (the 'Company') holds a significant interest, through subsidiaries, in the development of a maritime port and storage facility on Egypt's Red Sea coast, a substantial infrastructure project of significant strategic economic importance in Egypt. The creditor is an investor in one of the subsidiaries of the Company which indirectly holds the majority shareholding in the port project. The parties agreed some years ago that the creditor would exit its investment, but there were disagreements about the interpretation of the exit provisions which led to the dispute being resolved by arbitration. In May 2022 the arbitral tribunal made an award in favour of the creditor.

Whilst the Company was able to make interim payments in part satisfaction of the debt, it was not able to meet the debt in the timeframe required by the creditor. The creditor served a statutory demand and, when that was not set aside, issued the application to appoint liquidators.

In parallel, the Company was making significant progress in respect of the sale of a significant asset in order to settle the debt. The Company sought an adjournment of the hearing of the application in order to allow it to complete that transaction and make payment in full of the outstanding debt.

The Court's discretion

Beyond the fact that the discretion to adjourn exists, there is no statutory guidance in relation to its exercise. However, there is established English precedent that the Court has a discretion to adjourn if there is a reasonable prospect of the creditor being paid within

Notes

1 S167(c) of the BVI Insolvency Act.

2 This is well established in England and Wales (*Re Minrealm* [2008] 2 BCLC 141 at 154 ([52])) and has implicitly recognized by the BVI Courts (*Daselina Investments Ltd v Kirkland Intertrade Corp* (BVIHCOM 2019/0149 [43]).

3 In circumstances where there is no dispute as to whether the debt is due and payable, and where the creditor has served the company and advertised in accordance with the provisions of the Insolvency Act and the Insolvency Rules.

a reasonable time.[4] The BVI Court has recognized that there must be credible evidence to support such a prospect. The BVI Court in *Bank of America v Pacific Andes* BVIHC (COM) 132 of 2016, at [38] formulated the test to be applied as there having to be 'reasonable prospects of payment of the application debt in full within a reasonable period'.[5]

In the light of these authorities, the Court must consider the following principles when considering whether to exercise its discretion to adjourn the hearing of an application to appoint liquidators:

1. If a creditor wants to seek the appointment of liquidators and the Court is satisfied that the company is unable to pay its debts, liquidators will be appointed unless there are some special reasons why it should not.
2. 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.
3. The Court will be more inclined to give a short adjournment than a long one.
4. The Court will consider the views of creditors as a whole and give greater regard to those who are independent of the company.
5. However, the decision whether to grant an adjournment is discretionary and the Court will bear in mind a variety of conflicting interests in arriving at a fair, realistic and practical decision.

Credible evidence

The Court considered the evidence as to the prospects of the Company being able to raise the funds and complete the transaction.

The Court considered that the evidence presented by the Company was credible and persuasive and noted in particular that the Company had engaged a top investment bank to assist and advise on the transaction and significant steps had been taken to advance the transaction. The Court noted that, even though there may be uncertainties as to whether the deal would go through, this was not a bar to the Court contemplating whether to grant an adjournment.

Views of creditors

The BVI Insolvency Act does not expressly require the Court to have regard to the wishes of other creditors.[6] However, in practice, the BVI Court may and does consider the views of creditors and contributories when exercising discretion under s167(1) of the Insolvency Act.[7] Established practice, following the position taken by the English Courts, is that the Court will have particular regard to the views of independent creditors, but will give little weight to the views of shareholders or connected creditors.

Whilst the creditor was the main known creditor of the Company, there was also a known contingent creditor[8] independent from the Company, who sought to be heard on the application. This contingent creditor appeared at the hearing of the application, confirmed that it would be severely prejudiced if liquidators were appointed and requested that the hearing of the application be adjourned in order to allow the Company time to complete the transaction.

Ultimately the Court in this case acknowledged that it had to balance the petitioning creditor's desire to appoint liquidators with the consequences that will flow from that appointment, and the impact that appointment would have on other creditors and other parties that are associated with – what the Court acknowledged was – a particularly complex business.

A reasonable time for payment

A critical focus for the Court in this case was the prospect of payment of the debt within a reasonable time.

The Judge in his ex tempore decision considered in detail what constitutes a 'reasonable time' to adjourn an application in order to allow for a company to come up with the money to satisfy a debt.

The Court considered that a 'reasonable time' will always be fact sensitive – in some cases a week may be considered reasonable. However, in a case like that presented, where the transaction is complex and has a number of moving parts such as are involved in a large infrastructure project, with jobs on the line, banks and government officials, a week would be – in the Judge's words – 'a mere blink of the eye'. The Court therefore ordered an adjournment of several weeks to allow the transaction to complete and the debt to be repaid.

Notes

4 *In re Gilmartin* [1989] 1 WLR 513 [516F].

5 See also *Daselina Investments v Kirkland Intertrade Corp* BHIHCM2019/0149 at [38]. In both of these cases, the Court determined that such evidence had not been provided and consequently there was no ground to adjourn the hearing of the application.

6 By s195(1) UK IA 1986 the Court may ('as to all matters relating to the winding up of a company') have regard to the wishes of that company's creditors or contributories. In the UK context, there is relevant case law concerning the weight to be given to the views of creditors on the question of whether a winding order should be made or not. See e.g. *In re P&J Macrae* [1961] 1 WLR 229 (regarding s346(1) UK Companies Act 1948, a predecessor of s195(1)).

7 It is expressly envisaged by rr162-163 of the Insolvency Rules that creditors have standing to appear on applications to appoint liquidators.

8 Contingent creditors are included within the meaning of 'creditor' under the BVI Insolvency Act: see ss9-11 of the Insolvency Act.

The decision confirms that a debtor seeking an adjournment of an application to appoint liquidators must present credible evidence demonstrating to the Court that genuine steps are being taken to settle the debt The Court will also take into consideration the impact appointing liquidators will have on other creditors and, in ascertaining how long to adjourn the application for, the Court will consider the nature of the business and what, in the particular circumstances of each case, will be a reasonable time in order to allow the debtor to settle the debt.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com