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Re A company A v B

[2021] EWHC 2289 (Ch), [2021] All ER (D) 37 (Aug)

Company – Compulsory winding up. The applicant petitioning creditor's application for a winding up petition regarding the respondent debtor company failed. The Chancery Division held that the debtor company had demonstrated a prima facie case that there had been a financial effect on the debtor company. The financial effect of the coronavirus pandemic on the debtor company was inextricably linked to its inability to pay the judgment debt. Having made that finding, it followed that the petition had to be dismissed.

Catchwords

Company – Compulsory winding up – Coronavirus

Background

The respondent debtor company was the main contractor in respect of a development for which it engaged the applicant petitioning creditor as sub-contractor in respect of labour only. The debtor company paid the initial instalments due under the contract but failed to pay the final instalment.

The debt was disputed and the parties engaged in adjudication. The debt was found to be owing by the adjudicator. As the debt remained unpaid, the petitioning creditor applied to enforce the adjudication decision. In April 2021, judgment was entered against the debtor company for the total amount of £146,899.06. Payment was due in May 2021. A number of without prejudice offers to pay in instalments were made by the debtor company. Those were not accepted by the petitioning creditor.

The petitioning creditor applied for a winding up petition. The petition relied upon s 122(1)(f) of the Insolvency Act 1986 (IA 1986), that the company was unable to pay its debts.

As a consequence of the coronavirus pandemic, the Corporate Insolvency and Governance Act 2020 (CIGA 2020) and the associated Insolvency Practice Direction were enacted. A preliminary hearing was ordered so that the court could determine whether it was likely that it would be able to make an order under IA 1986 s 122(1)(f) or 221(5)(b), having regard to the coronavirus test. The test, as set out in *Re A company (application to restrain advertisement)*[2020] All ER (D) 88 (Jun), had two stages (see [24] of the judgment).

Issues and decisions

(1) Whether there had been a financial effect caused by coronavirus.

On the evidence, the debtor company had demonstrated a prima facie case that there had been a financial effect on the company. The financial effect on the debtor company was not only the increased level of debtors, which had inevitably affected cash flow, but also difficulties with workers self-isolating, whether as a result of having coronavirus or as a result of being a close contact of someone who had tested positive for the disease, leading to delays in completion of projects which had had a knock-on impact on completion and therefore cash flow. That aspect alone sufficed to show that coronavirus had had a financial effect on the debtor company (see [47], [48] of the judgment).

Further, the debtor company had won fewer contracts and the turnover had decreased by 26% as a result of coronavirus. Whilst the company which owed money on the invoices had not been specifically identified, in asserting that the debt was from an intergroup company, and that the director of the petitioning creditor had believed that the client had had difficulties caused by coronavirus, that sufficed to pass the low bar and assist in establishing that the company had been subject to a financial effect as a result of coronavirus (see [49], [50] of the judgment).

In the circumstances, it was not appropriate to draw any adverse inferences against the debtor company because the information given was not more detailed. Nor was the information so inherently unlikely that the accounts had to be fundamentally inaccurate (see [52], [53] of the judgment).

Re A company (application to restrain advertisement) [2020] All ER (D) 88 (Jun), [2020] EWHC 1551 (Ch) applied

Mumtaz Properties Ltd, Re; Wetton (as liq of Mumtaz Properties Ltd) v Ahmed [2011] All ER (D) 237 (May), [2011] EWCA Civ 610 considered

Re PGH Investments Ltd PGH Investments Ltd v Ewing [2021] EWHC 533 (Ch) considered

(2) Whether the debtor company would have been unable to pay its debts even if coronavirus had not had a financial effect on it.

The fact that the judgment debt was in respect of a contract entered into after the start of the coronavirus pandemic, with payment due in December 2020, did not assist the court in finding that the debtor company would have been unable to pay its debts in any event (see [57] of the judgment).

The financial effect of the coronavirus pandemic on the debtor company was inextricably linked to its inability to pay the judgment debt. More evidence would be needed than was before the court to enable it to find that it was likely that the debtor company would have been insolvent within the meaning of IA 1986 s 123 in any event and, therefore, a court could make a winding up order if the petition was heard. Having made that finding, it followed that the petition had to be dismissed (see [63], [64] of the judgment).

Judgment Date

11 August 2021

Judge

Judge Kelly (sitting as a High Court judge)

Representation

Ian Tucker (instructed by Gunnercooke LLP) for the petitioning creditor.

Nick Taylor (instructed by Clarion Solicitors) for the debtor company.

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