Lexis®Nexis Case Summaries

Re A Company

[2022] EWHC 1690 (Ch), [2022] All ER (D) 120 (Jun)

The Chancery Division dismissed the applicant petitioner's application for permission to appeal, in proceedings concerning a winding-up petition. The decision of the judge had concerned the Covid-19 provisions of Sch 10 to the Corporate Insolvency and Governance Act 2020 (the Schedule). The court held that there was no warrant in the wording of para 5(3) of the Schedule to conclude that it was to be applied or tested narrowly as at the date when the debt being claimed in the petition had fallen due. The appeal lacked real prospects of success and permission to appeal would be refused.

Catchwords

COMPANY – WINDING UP – CORONAVIRUS RULES

Background

The appellant petitioner and the respondent company were connected parties. The proceedings concerned a winding-up petition, brought on the grounds specified in s 123(1)(e) of the Insolvency Act 1986 (IA 1986), namely that the company was unable to pay debts as they fell due.

At the time of the presentation of the petition, Mrs G, a director of the company, and her husband, Mr G, owned 35.5% of the shares of the petitioner's ultimate parent company. Mr G was also the founder of the petitioner. He was a director of the petitioner and of its ultimate parent company until 26 November 2019. In 2020, Mr G commenced proceedings for unfair dismissal and related matters against the petitioner's parent and various of its directors. The company maintained that that had prompted the presentation of a petition, which the petitioner denied.

The decision of the judge concerned the Covid-19 provisions of Sch 10 to the Corporate Insolvency and Governance Act 2020 (the Schedule). Those had ceased to have effect from 30 September 2021, when they had been replaced by a different regime which had itself been repealed.

Issues and decisions

Whether the judge had erred in applying the test in para 5(3) of the Schedule by reference to the position as at the date of the letter of demand sent in June 2020. The petitioner contended that the judge ought to have assessed the position as at 31 March 2020 when the petition debt had fallen due.

There was no warrant in the wording of para 5(3) of the Schedule to conclude that it was to be applied or tested narrowly as at the date when the debt being claimed in the petition had fallen due (see [46] of the judgment).

Applying the words of the Schedule to the actual winding up petition issued by the petitioner in November 2020, on the judge's findings of fact the position was clear: the petitioner would not have been able to establish a ground under IA 1986 s 123 as the company would have been able to pay - and indeed would actually have paid (see [55] of the judgment)

That interpretation of para 5 did not provide unduly broad protection to companies in the position of the company. The paragraph itself contained the relevant conditions. The company had first to establish that its financial position had been adversely affected by coronavirus. That having been shown, the company was only protected by the provisions if the adverse effect of the coronavirus would have made a difference in the winding up proceedings. If a company would have been unable to pay its debts in any case, the court would proceed with the winding up proceedings, notwithstanding any adverse impact of the coronavirus (see [56] of the judgment).

The appeal lacked real prospects of success and permission to appeal would be refused (see [61] of the judgment).

Re Flagstaff Silver Mining Company of Utah (1875) 20 Equity Cases 268 considered.
Cornhill Insurance plc v Improvement Services Ltd [1986] BCLC 26 considered.
Byblos Bank SAL v Al-Khudhairy [1987] BCLC 232, 2 BCC 99, 549 considered.
Company, a (No 006798 of 1995), Re [1996] 2 All ER 417, [1996] 2 BCLC 48 considered.
Easy Letting and Leasing, Re [2008] All ER (D) 112 (Apr), [2008] EWHC 3175 (Ch) considered.

Judgment date
10 June 2022

Judge
Judge Miles (Chancery Division Court)

Representation
Mr A. Barden (instructed by Field Seymour Parkes LLP) appeared on behalf of the Petitioner.
Mr J. Gunaratna (instructed by Boyes Turner LLP) appeared on behalf of the Company.