COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2019/COM/com/00891

IN THE MATTER OF

THE INTERNATIONAL BUSINESS COMPANIES ACT, Ch. 309
(as amended by the International Business Companies (Winding Up Amendment) Act, 2011)

AND

OKYANOS OPERATING COMPANY LTD

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. John K. F. Delaney QC with him Ms. Lena M. Bonaby of Delaney & Partners for the Petitioner
No other Counsel appearing for any other interests

Hearing Date: 28 May 2020

Company - Insolvency – Inability to pay debts - Company unable to pay its debts as they fall due - Just and equitable – Section 185 and 186 of Companies Act, Chapter 308 (as amended) – Section 89 of International Business Companies Act, Chapter 309 – Order 3 of Companies Liquidation Rules, 2012

L.S. Enterprises Ltd ("the Petitioner") filed a Winding Up Petition on 21 November 2019 seeking an order that Okyanos Operating Company Ltd. ("the Company") be wound up on the ground that it is insolvent and unable to pay its debts when they fall due and for the appointment of an official liquidator.

The Petitioner petitions as a creditor of the Company. The Company is indebted to the Petitioner in an amount exceeding USD 12,000,000.00 which the Petitioner loaned to the Company by four Facility Agreements.

By a Director Resolution and Member Resolution both dated 19 November 2019, the Company admitted its inability to pay its debts and declared insolvency. The Company's insolvency was subsequently confirmed in a report from the provisional liquidator dated 25 May 2020.

HELD: granting the winding-up order and the ancilliary relief as prayed by the Petitioner as well as the costs associated with the WUP which shall be paid out of the assets of the Company.

1. The Court has jurisdiction to order the winding up of a company under sections 185 and 186 of the Companies Act, as amended ("CA").

2. A company is deemed insolvent and thus subject to winding up if it is unable to pay its debts as they fall due or if the value of the company's liabilities exceeds its assets or if proved to the satisfaction of the court that the company is unable to pay its debts: Sections 187 and 188 of Companies Act, Chapter 308 (as amended); **BNY Corporate Trustee Services Ltd v Eurosail** – UK 2007- 3BL Plc [2013] 1 WLR 1408.

3. The Court may also order the winding up of a company when it is just and equitable to do so under section 186(e) of the CA. **Ebrahimi v Westbourne Galleries** [1973] AC 360.

4. The Company is insolvent. It has ceased its operation and have failed to settle its indebtedness to the Petitioner. Its director, members and the provisional liquidator confirmed this position. There is no opposition to the Petition. It is therefore just and equitable that the Company be wound up.

JUDGMENT

Charles J:

Introduction

[1] These proceedings for the winding up of Okyanos Operating Company Ltd ("the Company") arose amidst two historic calamities. The Winding Up Petition ("WUP") commenced following the Category 5 Hurricane Dorian's devastation of the City of Freeport in the Island of Grand Bahama and was heard during the Coronavirus pandemic.

[2] The WUP, filed on 21 November 2019, was amended by Order of this Court (the "provisional order") dated 06 February 2020. Also, by the provisional order, Ms. Cheryl J. Simms of Kikivarakis & Co. ("the provisional liquidator") was appointed pending the hearing of the WUP.

[3] On 28 May 2020, the WUP was heard in Open Court though remotely in full compliance with the Judiciary of The Bahamas, Notice # 6, The Court Coronavirus Mitigation Protocols, 14 May 2020, which provides for remote judicial hearings.

[4] On the same day, I ordered the winding up of the Company in accordance with the Companies Act, as amended, and as applicable to the winding up of International Business Companies ("IBC's") under the International Business Companies (Winding up Amendment) Act, 2011 ("the WU Act"). The Company was wound up on the grounds that it is unable to pay its debts when they became due and also on the just and equitable grounds.

The facts

[5] The WUP, filed on 21 November 2019 and supported by the Verifying Affidavit of David Goodwin, Director of L.S. Enterprises Ltd ("The Petitioner"), shows that:

1. The Company was incorporated on 08 August 2011 pursuant to the International Business Companies Act, Ch. 309 of the Statute Laws of the Commonwealth of The Bahamas ("the IBC Act").

2. It carried on the business of regenerative medicine using stem cell therapy, highly-trained and licensed medical doctors, together with nurses and technicians deploying advanced technology and equipment.

3. The Company operated from leased premises situated at First Commercial Centre, The Mall Drive, Freeport, Grand Bahama, The Bahamas.

4. First Commercial Centre Ltd was its landlord.

5. The Petitioner is a company incorporated under the laws of the Virgin Islands (British) and petitions as a creditor of the Company.

[6] The evidence shows that the Petitioner is a related party and there is one or more directors in common on the Boards of the Petitioner and the Company. The evidence further shows that by four Facility Agreements ("Facility Agreements") entered between the Company and the Petitioner, the Petitioner agreed to make loan facilities ("Loans") available to the Company on terms as are more particularly set out therein, brief particulars of which are as follows –

1. Facility Agreement dated 02 August 2017 in an aggregate principal amount not exceeding USD 4,500,000.00 for the Company's working capital and general corporate purposes;

2. Facility Agreement dated 12 February 2018 in an aggregate principal amount not exceeding USD 1,900,000.00 for the Company's working capital and general corporate purposes;

3. Facility Agreement dated 11 July 2018 in an aggregate principal amount not exceeding USD 4,000,000.00 for the Company's working capital and general corporate purposes; and

4. Facility Agreement dated 06 May 2019 in an aggregate principal amount not exceeding USD 5,500,000.00 for the Company's working capital and general corporate purposes.

[7] By reason of borrowings under the Facility Agreements, the Company was shown to be indebted to the Petitioner in an amount exceeding USD 12,000,000.00. The Petitioner is the principal creditor of the Company.

[8] On or about 02 September 2019, Hurricane Dorian, an extremely powerful and devastating Category 5 hurricane struck the Island of Grand Bahama and then stalled over the island for another day. Dorian's impact was catastrophic. There was island-wide power outage for many days; homes and business structures were destroyed or severely damaged. Substantial amounts of water and wind had penetrated the Company's premises causing major property loss and damage which has been estimated at a cost of over USD 2 million. In the immediate aftermath of Hurricane Dorian, the Company's premises, operating facilities and equipment were not functioning nor functional.

[9] The Company attempted to mitigate loss and damage by moving equipment and supplies to a climate controlled storage and preparing the Company's operating facilities for mold remediation but that was allegedly hampered by the Landlord

whose servants and/or agents instructed the Company's personnel to cease and desist from such activities.

[10] Following Hurricane Dorian's devastations, the Company's business ceased, and never resumed.

[11] The Company issued a Notice of Lease Termination dated 25 October 2019. The Landlord disputes the termination and, on 30 October 2019, commenced Supreme Court proceedings in 2019/CLE/gen/FP/00212 (the "Landlord action") and threatened arbitral proceedings under the terms of the Lease: see WUP para. 12.6.

[12] The Company filed claims for damages with its insurance agents for losses arising out of the hurricane but had not received the majority of such insurance proceeds.

[13] The Company was in default of the Facility Agreements with the Petitioner under which it had secured substantial Loans and had insufficient funds to secure alternative leased premises, arbitrate for the recovery of the Company's equipment and supplies, or otherwise sustain operations. The Petitioner demanded payment under the Facility Agreements.

[14] The Company admitted its inability to pay its debts owed to the Petitioner and declared insolvency by a Directors Resolution and a Members Resolution, each dated 19 November 2019: para. 15 of the WUP. The Company is insolvent.

[15] The Petitioner seeks an order that the Company be wound up on the grounds of insolvency and that an official liquidator be appointed.

[16] The provisional order stayed the Landlord action.

[17] The provisional liquidator submitted a report to this Court dated 25 May 2020, annexed to her affidavit which was filed on 26 May 2020. In the conclusion of her report, the provisional liquidator stated, among other things, that:

> **"Based on my examination of the Company's financial records, in particular its unaudited Balance Sheet as of February 6, 2020, the**

Company appears to be insolvent as its total unaudited liabilities of $13,220,949.48 exceeds its total unaudited assets of $5,667,491.78 by $7,553,457.70 and its cash balance of $335,218 is inadequate to satisfy its unaudited liabilities of $13,220,949.48."

The law

Application of the Companies Act winding up regime to IBC's

[18] Section 89 of the International Business Companies (Winding Up Amendment) Act, 2011 ("the WU Act") provides for the winding up of IBC's. It states:

> **"A company incorporated under this Act may be wound up under any of the circumstances, insofar as they are applicable to a company incorporated under this Act, in which a company incorporated under the Companies Act, Ch. 308 may be wound up and subject to the provisions of this Part the provisions of the Companies Act relating to winding up and dissolution shall apply mutatis mutandis to the winding up and dissolution of the company."**

Jurisdiction

[19] The jurisdiction of the Court to make an order for the winding up of the Company is provided for in sections 185 and 186 of the Companies Act, as amended ("CA"). The insolvency ground is founded at 186(c), s. 187 and s. 188 and the just and equitable ground is founded at CA, s.186 (e).

[20] The relevant rules of procedure are at Companies Liquidation Rules, 2012 ("CLR"), specifically, O. 3 pertaining to winding up petitions.

[21] Pursuant to section 185 of the CA, the Court has the jurisdiction to make winding up orders in respect of…

> **"(a) an existing company;**
> **(b) a company incorporated and registered under this Act;**
> **(c) a body incorporated under any other law; and**
> **(d) a foreign company which-**
> **(i) has property in The Bahamas,**
> **(ii) is carrying on business in The Bahamas, or**
> **(iii) is registered under Part VI."**

[22] Section 186 of the CA lists the circumstances in which a company may be wound up by the court. Section 186 states:

> **"A company may be wound up by the court if -**

(a) …
(b) …
(c) the company is insolvent;
(d) …
(e) the court is of the opinion that it just and equitable that the company should be wound up; or
(f) …"

[23] Section 187 prescribes a meaning of the term "insolvent". It states:

> **"A company is insolvent if –**
> **(a) the company is unable to pay its debts as they fall due; or**
> **(b) the value of the company's liabilities exceeds its assets."**

[24] Section 188 states:

> **"A company shall be deemed to be unable to pay its debts if-**
>
> **(a) …**
> **(b) …**
> **(c) it is proved to the satisfaction of the court that the company is unable to pay its debts."**

Insolvency ground

[25] Pursuant to section 186(c) of the CA, a company may be wound up where it is insolvent and, by section 187, a company is deemed insolvent (i) if it is unable to pay its debts as they fall due (cash-flow insolvency) or (ii) if the value of the company's liabilities exceed its assets (balance sheet insolvency). Further, pursuant to section 188, a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts.

[26] With respect to cash-flow insolvency and balance sheet insolvency, in the leading English judgment of **BNY Corporate Trustee Services Ltd and others v Eurosail – UK 2007- 3BL plc** [2013] 1 WLR 1408, Lord Walker noted, at para 1:

> **"1 Subsections (1) and (2) of section 123 of the Insolvency Act 1986 ("the 1986 Act") provide as follows:**
>
> > **"(1) A company is deemed unable to pay its debts— (a) [non-compliance with a statutory demand for a debt exceeding £750 presently due] (b) to (d) [unsatisfied execution on judgment debt in terms appropriate to England and Wales,**

> **Scotland and Northern Ireland respectively] (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.**
>
> **(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.**
>
> **A company in the situation described in sub-s (1) (e) is often said to be 'cash-flow' insolvent. A company in the situation described in sub-s (2) is often said to be "balance-sheet" insolvent, but that expression is not to be taken literally…."**

[27] At paras 37 and 38, Lord Walker further enunciated:

> **"The changes in form served, in my view, to underline that the "cash-flow" test is concerned, not simply with the petitioner's own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business. That is consistent with the Bond Jewellers case (In re A Company (No 006794 of 1983)) [1986] BCLC 261, Byblos Bank SAL v Al-Khudhairy [1987] BCLC 232 and In re Cheyne Finance plc (No 2) [2008] Bus LR 1562. The express reference to assets and liabilities is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance-sheet insolvency… Whether or not the test of balance-sheet insolvency is satisfied must depend on the available evidence as to the circumstances of the particular case."**

[28] In addition, the learned authors of **Bailey & Groves: Corporate Insolvency Law & Practice** 5th Ed. noted, at para 14.48:

> **"Cash flow insolvency concentrates on whether the company can meet current debts from cash and other assets which can be readily realised; if it is unable to do this then it is insolvent. Often a creditor is unable to obtain current or management accounts to prove the real state of affairs; however, a number of factors may be used to prove**

> **insolvency. In the simplest case the fact that a creditor has not been paid after a request for payment of an undisputed debt is good evidence of the company's insolvency; there is no requirement to serve a statutory demand. If the company continues to refuse payment of an undisputed debt the court will regard it as insolvent notwithstanding that the court might instinctively regard the company as solvent. However, even where it can be shown that the company is meeting its current debts it may still be unable to pay its debts 'as they fall due' within s 123(1)(e) taking into account its contingent and prospective liabilities."**

[29] With respect to balance sheet insolvency, the learned authors in Bailey & Groves: [supra] at para 14.51 stated:

> **"Under IA 1986, s 123(2) the court may be satisfied of the company's insolvency if the company's assets are less than its liabilities, taking into account its contingent and prospective liabilities (but not contingent[1] and possibly prospective assets). The word 'liabilities' is obviously wider than 'debts'[2] and the reference to 'contingent and prospective' involves the court in some degree of guesswork aided by accountancy expertise. A 'contingent' liability does not describe all liabilities which may possibly be incurred by the company in the future, rather it is confined to liabilities which may arise in the future on the fulfilment of a contingency under obligations already binding on it, for example a surety. <u>The starting point in determining balance sheet insolvency is the company's accounts and if the balance sheet shows a net deficiency this is usually strong (but not conclusive) evidence of insolvency; the court will consider the whole of the company's financial circumstances in a commercial and comprehensive manner</u>."** [Emphasis added]

[30] Moreover, insolvency may also be shown where the directors of a company admit that the company is insolvent. On this point the learned authors of Bailey & Groves stated at para 14.49:

> **<u>"Insolvency is also shown if the directors admit that the company has no assets upon which the creditor can execute</u>, or if the company's business is under the control of debenture-holders and there will be nothing available after paying off the charges; or if there are outstanding judgments against the company and a number of creditors pressing for payment; the presumption of insolvency which arises in these situations may be rebutted if it can be shown that the company can in fact pay its debts."** [Emphasis added]

Just and Equitable Ground

[31] Pursuant to 186(e) of the CA, a company may be wound up where it is just and equitable so to do.

[32] Where the petitioner has a just due debt, a winding up order should be granted. In **Cave Development Corp.** [2003] BHS J 90 at para. 31, Lyons J granted a winding up order of a company in which he determined that the debt was just and due. The learned judge cited the case of Re: **A Company (No. 006273 of 1992)**, [1993] BCLC 131, [1992] BCC794, where Millett J (as he then was) stated:

> **"In my judgment, it is impossible to describe the presentation of a petition by the respondent based on an undisputed debt as an abuse of the process of the court. It is not threatened for an improper purpose, that is to say, in order to bring pressure on the company to pay a disputed debt. It is threatened for a purpose which is entirely proper, that is to say in order to bring pressure upon the company to pay a debt which is indisputably due. It is not threatened for the purpose of preventing or avoiding the bringing of proceedings against it, since it will not have that effect. It is not threatened for the purpose of avoiding any argument whether the company should have a stay upon any judgment for the sum claimed by the respondent pending the resolution of the company's own cross-claim. If the respondent brought proceedings in the Queen's Bench Division and sought summary judgment under RSC Ord 14 it would obtain judgment. If the company brought a counterclaim the company might ask for a stay on the judgment, but since the counterclaim would arise out of a separate and distinct transaction and there was no connection between the claim and the counterclaim the normal order would be for judgment for the respondent with costs and without a stay pending the trial of the counterclaim; although the court would undoubtedly have a discretion whether to order a stay or not. It would take account of the degree of connection between the claim and counterclaim, the strength of the counterclaim, and the ability of the company to satisfy any judgment on the counterclaim".**

[33] The definition of 'just and equitable' should be widely interpreted and as such Courts have resisted attempted arguments to restrict its meaning. In doing so, Courts have relied heavily on the opinion of Lord Wilberforce in the seminal English House of Lords decision in **Ebrahimi v Westbourne Galleries** [1973] AC 360. At page 379, Lord Wilberforce had this to say:

> **"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."**

[34] Lord Wilberforce further stated, at page 379, that the words [just and equitable]:

> **"…are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. ...just and equitable ...does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way."**

Compliance with the Company Liquidation Rules

[35] The Petitioner has complied with the applicable law and procedural rules.

[36] On 22 November 2019, the WUP and the Verifying Affidavit were served on the Company's registered office. An affidavit of service was filed on 13 December 2019 attesting to the same.

[37] Upon the fixing of a date by the Court for the hearing of the WUP, on 26 February 2020, the Company's registered office was effectively served with the WUP as amended with return date of Wednesday, 01 April 2020 at 10:30 a.m. and the 2nd Verifying Affidavit. An affidavit of service was filed on 26 March 2020 attesting to the same.

[38] The WUP was advertised twice. Pursuant to O. 3, r 6 of the CLR, notice of the WUP was advertised in the Nassau Guardian on 02 March 2020 and the Tribune on 05 March 2020 ("first advertisements") for the initial 01 April 2020 hearing date. However due to the closure of the Courts due to the COVID-19 Emergency Orders implemented by the Government of The Bahamas, the 01 April 2020 hearing date was rescheduled to 28 May 2020. The WUP was then advertised in the Tribune on 13 May 2020 and the Nassau Guardian on 14 May 2020 ("second advertisements") a second time stating the rescheduled hearing of 28 May 2020.

[39] Each of the first advertisement and the second advertisements called for notices of intention to appear by interested persons either to support or to oppose the WUP. Additional verbiage had been inserted to the form of advertisement at CLR Form No. 3 in terms as follows:

> **"NOTE:- Any person who intends to appear on the hearing of the Petition must serve on or send by post to the above-named attorneys, notice in writing of his intention to do so. The notice must state the name, address and other contact details of the person intending to appear, whether he intends to support or oppose the Petition, the amount and nature of his debt, and whether in the event of a winding up order he intends to support or oppose the appointment as official liquidator of the person nominated by the Petitioner and such notice be signed by him or his attorney (if any), and must be served, or if posted, must be sent by post in sufficient time to reach the above-named attorneys not later than 4:00 pm on Monday, 25 May 2020."**

[40] Additionally, the address for the Petitioner's attorneys included their email address.

[41] The first advertisements called for notices of intention to appear to be received by 4pm on 27 March 2020 and the second advertisements for such notices to be received by 4pm on 25 May 2020.

[42] No notice of any intention to appear has been received from any interested person. Moreover, the WUP is unopposed.

[43] The provisional liquidator, as evidenced by her Affidavit of Acceptance consents to be appointed the official liquidator. Her affidavit is supported by the Affidavit of Fitness provided by Mr. Anthony Kikivarakis of Kikivarakis & Co.

Company has ceased business

[44] As a result of the extensive damages sustained by the Company due to Hurricane Dorian, the Company's business has ceased as it has no means of generating revenue in the foreseeable future or to borrow funds for its operations or to pay debts as they become due.

Company's Insolvency

[45] The Company's insolvency has been established:

a) As of this date, the Company has failed to settle its indebtedness to the Petitioner or compound for it to the satisfaction of the Petitioner or at all;

b) The Company is unable to satisfy its debts now due and as others continue to fall due;

c) The Directors of the Company informed the Petitioner that it was insolvent; and

d) The provisional liquidator has confirmed that Company is unable to pay its debt to the Petitioner and that the value of the Company's liabilities exceed its assets.

Whether soft-touch liquidation an alternative

[46] The Court inquired of Learned Queen's Counsel Mr. Delaney appearing for the Petitioner whether "soft touch" provisional liquidation might be an alternative to a full blown liquidation leading to the ultimate dissolution of the Company. 'Soft touch' liquidation would leave provisional liquidation in place thereby offering protection against individual creditor actions, and enabling breathing space for a restructuring of debts. And, assuming no wrongdoing by directors, the Board of

Directors may remain in place with protocols between the provisional liquidator and the directors.

[47] Mr. Delaney QC pointed out that the Petitioner and the Company were related parties with one or more directors in common on their respective Boards. Moreover, that the principal evidence in support of the Company's winding up was sworn by a director common to the Boards of both companies and, it follows, both the Company's Board and that of the Petitioner supported a winding up of the Company.

Otherwise just and equitable

[48] In light of the Company's circumstances, including its insolvency, the fact that it has ceased to operate, and does not oppose the making of a winding-up order against it, it is just and equitable that the Company be wound up.

Conclusion

[49] Balancing the facts with the applicable legal principles and the overwhelming interests of justice underscore the grant of a winding-up order and the ancilliary relief as prayed by the Petitioner. The Costs related to the WUP shall be paid out of the assets of the Company.

Dated 31st day of August, A.D. 2020

Indra H. Charles
Justice